EMPLOYMENT TRIBUNALS

Claimant: Mr Hussain

Respondent: Newday Cards Limited

Heard at: Leeds (by video) **On:** 25 October 2021

Before: Employment Judge Knowles

Representation
Claimant: Dr M Ahmad, Counsel
Respondent: Ms I Ferber, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the Claimant's claim is dismissed under Rule 52 of the Employment Tribunal Rules of Procedure.

RESERVED REASONS

Issues

1. This matter has been listed for an open preliminary hearing by video to determine the following issue:

"whether the Claimant, having entered into a COT3 via ACAS on 12 February 2021 and consideration having been provided for and performed, the Tribunal should not now proceed to issue notice of dismissal for the purposes of Rule 51 and 52 of the Employment Tribunal Rules."

2. The issue was set down at a previous closed preliminary hearing for case management which took place on 4 May 2021 before Employment Judge Morgan QC.

3. I should note that the setting down of that issue, which was described as a "narrow jurisdictional issue", proceeded following discussion and representations which appear incorrect based on the submissions I heard during the hearing.

4. There appears then to have been a perception that the validity of a COT3 agreement concluded through ACAS could not be challenged in this jurisdiction owing to ***Patel v City of Wolverhampton College [2020] UKEAT/0013/20/RN***.

5. However, before me the today the parties have volunteered and agreed that the

validity of a COT3 can be considered by an employment tribunal (***Cole v Elder's Voice UKEAT/0251/19/VP***).

6. It is also clear from the submissions made to me during the hearing that the Claimant is challenging both the validity of the COT3 agreement and the withdrawal of his claim for the purposes of Rules 51 and 52.

7. The Claimant seeks that the COT3 and his withdrawal are held void so that his case does not come to an end for the purposes of Rule 51 and so that no dismissal judgment is made following that withdrawal under Rule 52.

8. In effect he wants this case to proceed to a full hearing (as opposed to reserving his position on a new claim or bringing another claim in another jurisdiction) as if he had not entered a COT3 agreement or subsequently written to the Employment Tribunal office a letter withdrawing his claim.

9. The Respondent has submitted that this is not the application that has been made and that the only issue before me is the "narrow jurisdictional point".

10. I do accept that the narrow jurisdictional point set down as the issue for me today was under Rule 52, namely that I consider making a dismissal Judgment.

11. I do note also that the issue appears to have been narrowed by the reference to *Patel* in the previous hearing. But the parties appear to accept that that was erroneous.

12. The Respondent has given submissions on the validity of the COT3, both in writing and verbally to me during the hearing.

13. I note that the Claimant had always wanted the tribunal to consider letting him carry on with his case. His original email to the Employment Tribunal Office 16 February 2021 refers in plain language to him wanting to "continue with the claim" and "withdraw my withdrawal".

14. In plain language it appears to me that issue raised by the Claimant has always been revival rather than the right to reissue or continue to litigate in another forum.

15. It appears to me that the Respondent has read the Claimant's position in the light of a misplaced understanding of the issues at the previous case management hearing and I am grateful to the Respondent's representative for dealing with the Claimant's representations in full, regardless of whether or not they were envisaged when this hearing was listed, and regardless as to whether or not they could be considered to be within the ambit of the original application.

16. I do not propose to set out an amendment to the issues to be determined by me. I propose to deal with all the issues that have been brought before me by way of submissions. I appreciate that the issue listed sits within Rule 52 and concerns dismissal but that was based on incorrect assumptions as to the law. This case is unusual and in my conclusion requires consideration of all of the issues raised by the parties in relation to Rule 51 and 52. Clearly Rule 52 would not be engaged at all unless there has been a valid withdrawal under Rule 51.

Evidence

17. This hearing was a fully remote hearing undertaken using HMCT's Cloud Video Platform.

18. Dr Ahmed appeared on behalf of the Claimant by direct access and asked me to note that the Claimant is and remains a litigant in person.

19. For part of the hearing the Claimant was unable to hear everyone else and was advised to log out and try to reconnect. He was also given the helpline number for technical issues. Counsel for the Claimant advised that the hearing should not be delayed whilst the Claimant reconnected.

20. No oral evidence was given during the hearing. The hearing proceeded based upon submissions on the papers produced to me.

21. Each party produced a bundle of documents. In brackets in these reasons I have preceded each page number with "C" or "R" to denote the Claimant's or Respondent's bundle respectively. In referring to page numbers in the Claimant's bundle, I am referring to the PDF page number as there is no numbering on the documents themselves other than document numbers.

22. Each party produced, during the hearing, a written skeleton argument together with copies of their key authorities.

23. The bundle of documents contains without prejudice communications and confidential communications with ACAS. The parties have consented to me seeing those documents and referred me to Cole which supports a contention that I should see them. The consent provided by the parties for me to consider without prejudice communications is limited to being for the purposes of this preliminary hearing only.

24. On 28 October 2021, during my deliberations after the hearing, the following letter was sent by the Tribunal to both parties:

> *Employment Judge Knowles has requested that this letter be sent to each party following the video hearing 25 October 2021. This letter should be forwarded by you to your barrister who appeared at that hearing, i.e. to Dr Ahmad and Ms Ferber.*
>
> *"It appears to me that to reach a judgment on the Claimant's case (under Rule 52(b)) the question for me concerning capacity is whether or not there is good cause for concern that the Claimant may lack litigation capacity (see Royal Bank of Scotland PLC v AB UKEAT/0266/18/DA, which should be read as a whole, but particularly paragraph 26).*
>
> *If there is such concern, then the matter would require proper assessment followed by a further hearing.*
>
> *The parties have addressed me on the Claimant's capacity to enter the COT3 agreement. But I believe the question I should answer concerns litigation capacity as a whole (see Dunhill (a protected party by her litigation friend Tasker) (Respondent) v Burgin [2014] UKSC 18).*
>
> *Finally, I consider that it is not possible to determine the question concerning "good cause" without considering the information before me alongside the Mental Capacity Act 2005, particularly Sections 2 and 3, which is generally regarded to have codified the common law position.*
>
> *It would not be appropriate for me to determine the case using these two authorities and the 2005 Act without affording you the opportunity to make submissions upon them.*
>
> *Please note that I am not suggesting that these are the only matters that I should attend to; I will also consider the parties representations as a whole. The above are simply matters I consider I ought to attend to but received no submissions upon them.*
>
> *If you wish to make further submissions on the above matters please ensure that*

these are sent to the Tribunal on or before 11 November 2021."

25. I then directed that a second letter be sent 4 November 2021 as follows:

> *Employment Judge Knowles has asked me to write to the parties to notify them that the case of Royal Bank of Scotland v AB has been considered by the Court of Appeal this year (Royal Bank of Scotland Plc v AB [2021] EWCA Civ 345). The reasoning of the EAT appears to have been endorsed.*

26. The Tribunal received written representations from the Respondent 10 November 2021 and from the Claimant 11 November 2021.

27. The 11 November 2021 submissions from the Claimant referred to him obtaining and wishing to submit further medical evidence.

28. On 23 November 2021 the Tribunal received further medical evidence from the Claimant with a supporting email.

29. On 24 November 2021 I asked that the Tribunal write to the Respondent to request confirmation of whether or not they wished to add to their written representations in the light of the medical evidence served by the Claimant 23 November 2021.

30. On 1 December 2021 I received final submissions from the Respondent by way of email.

31. The completion of the above post-hearing processes and volume of evidence and submissions before me have delayed this determination and I apologise for the period that the parties have had to wait for this Judgment.

Chronology and documents

32. I have not been asked to resolve any dispute on the facts. There did not appear to be any factual dispute between the parties relevant to the issues.

33. I therefore set out the key background to the matter and the relevant documents that the parties have drawn my attention to as follows.

34. On 13 July 2021 the Claimant issued proceedings in the Employment Tribunal.

35. The Respondent filed an ET3 and denied the Claimant's claims.

36. There was a telephone preliminary hearing for case management 21 September 2020. It was identified that the Claimant was claiming disability discrimination, namely indirect disability discrimination, failure to make reasonable adjustments, disability related harassment and a claim for unauthorised deductions from wages. The matter was listed for a full hearing on 19 April 2021 with an estimated length of hearing of 5 days.

37. The Claimant claimed that he was a disabled person by reason of his anxiety and depression. I assume in pursuance of the orders made on 21 September 2020 (which are not within the bundle) that the Claimant produced a disability impact statement date 1 November 2020 (C26-29). This opens with a statement from the Claimant that:

> *I have had anxiety and depression for approximately 6 years now. I began suffering with anxiety and depression on 10th September 2013. I began working for my employer Newday on 15th April 2019. I informed my employer about my anxiety and depression on 22nd November 2019.*

38. On 10 November 2020 the Respondent wrote (C37) to the Employment Tribunal to confirm:

"*Having considered the Claimant's medical disclosure and impact statement, we are instructed to confirm that the Respondent will not contest that the Claimant was a disabled person within the meaning of the Equality Act 2010 at the material time by way of anxiety and depression for the purposes of these proceedings*."

39. I have been referred to an occupational health report dated 25 February 2020 where the writer concludes (C34):

> *"[The Claimant] has a history of anxiety and depression. His current absence is due his depression and anxiety perceived to be caused by lack of support in work. The provisions of the equality Act 2010 is likely to apply because without medication his day to day function may be affected and this condition has been present for more than 12 months. [The Claimant] is vulnerable to flare ups of his mental health condition therefore his attendance and performance is likely to be affected during flare periods. However with good response to therapy and management support a good attendance and performance is likely."*

40. The parties had expressed an interest in Judicial Mediation. A mediation was initially listed for 14 December 2020 which was then postponed to 19 January 2021. Prior to the hearing the Respondent had sent to the Claimant and copied to ACAS their standard terms for settlement in the form of a template COT3 agreement. The template includes reference to part of the terms of any settlement being that the Claimant will write to the Employment Tribunal withdrawing his claim, and encloses a template letter at Schedule 1 to the template agreement for that purpose.

41. The mediation took place but did not result in a settlement. It appears that the Respondent had made an offer of £15,000 to the Claimant which was rejected (R17). However the parties continued to negotiation through the ACAS conciliator. At times the parties would write to each other copying in ACAS.

42. An offer is put to the Claimant through ACAS on 4 February 2021 (R20).

43. The Claimant has informed me in his submissions which followed the hearing that he was suspended from work on 4 February 2021. It is clear from the terms of the draft agreement which followed that he was suspended for a matter of potential gross misconduct.

44. On 4 February 2021 the Claimant writes an email to the Respondent (R17) indicating that he is willing to accept the £15,000 offered at the mediation. In effect this is a counter offer to the Respondent's offer on 4 February 2021.

45. Having received no response he chases the Respondent up on 8 February 2021 (R17).

46. On 9 February 2021 the Claimant appears to abandon his request for £15,000 and states that he would like to accept the offer made on 4 February 2021, accepts the terms of the draft COT3 and asks that the COT3 be finalised.

47. On 10 February 2021, at 12:34, the Respondent refuses the Claimant's counter offer and confirms that the Respondent's offer made on 4 February 20201 is no longer on the table (R22). They make a further offer in the following terms:

> *"I am instructed to respond that:*
>
> *- the offer made to you via ACAS on 4 February 2021 in full and final settlement of your claim is no longer available for acceptance; and*
>
> *- the only offer NewDay is willing to make to you (and which is available for acceptance) in full and final settlement of your claim is as follows (subject to*

you entering into COT3 wording on terms acceptable to NewDay):

o You would resign from NewDay and your employment would terminate as at today's date (10 February

2021);

o The current disciplinary process to consider allegations of gross misconduct against you would not continue;

o NewDay would pay you in lieu of your notice period and any accrued but untaken holiday;

o NewDay would provide you with a factual reference in line with its usual policy; and

o NewDay would agree not to pursue you for the significant costs it has already incurred in defending your claim.

I am also instructed to state that:

- you have recently been invited to a disciplinary hearing to consider allegations of gross misconduct against you and that one possible outcome of that process is your dismissal for gross misconduct. Whilst no decision has yet been made, if you were dismissed for gross misconduct following the disciplinary hearing, then NewDay would not pay your notice pay;

- if NewDay dismissed you after the disciplinary hearing, because of the allegations against you, it may be required to inform the Financial Conduct Authority ("FCA") if you are found to have committed a breach of the Conduct Rules or any other regulatory obligation; and

- If NewDay dismissed you for misconduct or gross misconduct following the disciplinary hearing, it may also be necessary (in with its own regulatory obligations) for NewDay to disclose such breach to any new or prospective employer in the financial services sector (or any other sector regulated by the FCA) as part of any reference request. If, however, you choose to resign prior to the disciplinary hearing taking place, then it is likely to be the case that NewDay would not need to make any such disclosure to the FCA (although it gives no guarantee of this).

The offer set out in this email is available for acceptance until 1pm tomorrow, at which point it will lapse. If you choose not to accept the offer, or I do not hear from you by this date and time, then preparations for the final hearing in April 2021 will continue and the disciplinary hearing will go ahead as planned.

I have copied this email to ACAS, in case you wish to discuss the contents of this email with ACAS in more detail. I should be grateful if you would communicate your response to the offer set out in this email either to me or via ACAS.

48. The Claimant has emphasised the limited time given to the Claimant to consider the offer and the threat of a gross misconduct dismissal and of a disclosure to the FCA.

49. There is correspondence between the parties about that offer. The Claimant asks about the reference that he would be provided with, i.e. would it be the same as the previous draft circulated between them. The Respondent responds. Later the Claimant asks questions by email concerning roles he has seen advertised. The Respondent responds to that as well.

50. On 11 February 2021, at 12:30, the Claimant emails the respondent to accept the offer made on 10 February 2021 and copies in ACAS (R32). The ACAS conciliator confirms at 13:08 (R43) that they have discussed the offer and that the Claimant understands and accepts the terms of the draft COT3 from the Respondent.

51. The Respondent advises the ACAS conciliator that they are still in fact updating the COT3 but will forward it to them both shortly.

52. The Respondent sends a COT3 at 17:19 (R35). The correspondence is copied to ACAS "*so that they are aware of our correspondence and in case you wish to speak to them about the draft COT3 wording*".

53. At 18:45 the Claimant responds "*I have read the COT3 and I will need to discuss a couple of points with Acas tomorrow morning and come back to you*".

54. On 12 February 2021, at 10:08 the Claimant writes to the Respondent "*I have read the agreement and happy to accept the agreement*".

55. The Respondent acknowledges receipt at 10:11 and asks the ACAS conciliator if there is now a binding agreement in place. At 10:59 the ACAS conciliator replies "*You have both accepted the draft COT3 and now parties have reached a legally binding agreement. I have notified the Employment Tribunal of the settlement and you may also want to do so*".

56. Between those times, at 10:18, the Claimant had written to the Employment Tribunal office, and copied to the Respondent, a letter stating:

> *"I am the Claimant in the above matter. I write to unconditionally withdraw my claim against the Respondent in its entirety. I have no objection to the proceedings now being dismissed by an Employment Tribunal. I have copied this letter to the Respondent's representative in accordance with Rule 92 of the Rules of Procedure 2013."*

57. That letter is in the format that was agreed within the COT3 agreement. It is headed in bold font "Withdrawal Letter".

58. On 15 February 2021 at 14:52 the Claimant wrote to the ACAS conciliator, but did not copy to the Respondent, the following:

> *"I would like to find out if I can continue with the claim, I am sorry for any inconvenience, I suffer with mental health depression and anxiety and my recent circumstances have had a significant impact on my mental health.*
>
> *I feel the respondent has not given me a reasonable time to make a decision and I have felt under duress and pressured to make a decision I have also had further advise regarding my case and I have been advised I have a strong case.*
>
> *I can confirm I have not signed the agreement at this stage*
>
> *I am also going to speak to my GP for further support to help me with my disability"*.

59. At 15:59 that day the ACAS conciliator replies:

> *"Unfortunately both parties have agreed to the cot3 agreement which I have also confirmed legally binding.*
>
> *If you have changed your mind regarding the cot3 agreement then I would suggest you seek legal advice".*

60. At 19:35 the Claimant replies to the ACAS conciliator:

> "*I have been going through pre manic episode and my decision making was impaired as a result.*
>
> *I also thought until the agreement is signed it doesn't fully become binding.*
>
> *I believe under medical grounds some consideration should be given to my request.*
>
> *I would like to continue with my claim*".

61. On 16 February 2021 at 08:56, the Claimant writes to the Employment Tribunal office (C16), but does not copy to the Respondent:

> "*I want to sincerely apologise for the confusion that I have caused. My mental health has been quite bad over the last few weeks and I suffered a pre manic episode and I have spoken to my GP regarding my medication. I originally made a decision which was impaired by my mental health and I now wish to withdraw that decision and continue with the claim.*
>
> *I hope that my mental health can be considered when my request to withdraw my withdrawal is considered.*
>
> *Unfortunately this is one aspect of my mental health I have to deal with on a day to day basis.*
>
> *Thank you".*

62. On 21 February 2021 at 10:06 the Claimant writes to the Employment Tribunal office again (C15):

> *"I refer to my email send on Tuesday 16th February 2021.*
>
> *Due to the circumstances leading up to the COT3 agreement I was unable to make an informed decision due to the following reasons:*
>
> *Before agreeing to the COT3 I was going though a pre manic episode also I was put under pressure my the respondent and undue influence, The respondent sent me emails that I found black mailing. I was given less than 24 hours to accept the COT3 agreement, this in it self did not give me time to seek legal advice and due to my disability and at the time I was having a pre manic episode my decision making was impaired.*
>
> *I believe the respondent had put me at a disadvantage by not giving me reasonable time to get legal advice and used undue influence.*
>
> *leading up to the agreement, i was suffering mentally and struggling to sleep and fatigue and sought medical help. I was not in a position to make an informed decision.*
>
> *I would be grateful for the tribunal to consider my mitigation and allow the claim to continue."*

63. Again, the letter is not copied to the Respondent. They are unaware of this and are asking the ACAS conciliator to chase the Claimant concerning the signed COT3 agreement. They do so on 18 February 2021 (R46) and 1 March 2021.

64. The Respondent notes that on 24 February 2021 the Claimant is paid notice pay and accrued holiday pay as had been agreed under the COT3 agreement.

65. The Respondent also notes that the Claimant never attempted to return to work following the COT3 agreement which provided for the termination of his employment.

66. On 4 March the Employment Tribunal writes to the parties giving notice of a preliminary hearing for case management by telephone (R50). No specific reason is given for the hearing other than discuss the claim and response, make orders and fix the hearing.

67. The Respondent applies to vacate the hearing on the basis of the settlement and withdrawal. That application is refused by Employment Judge Wade which is communicated in a letter from the Employment Tribunal dated 20 March 2021. The Claimant is told in the letter of refusal that he must provide a copy of any medical evidence on which he relies in advance of the hearing.

68. A reference was requested by DWP on 16 April 2021 in relation to an application for employment made to them by the Claimant. The Respondent submits that it answered this in accordance with the reference template attached to the COT3 agreement in Schedule 2.

69. There is no reference to when this medical evidence is sent by the Claimant to the other parties but it is referred to in the case summary from the preliminary hearing for case management by telephone which took place on 4 May 2021.

70. The medical evidence is a letter (C24-25) from Dr Farakh Naeem of Affinity Care, North Street Surgery, 151 North Street, Keighley. It is dated 30 March 2021 and states as follows:

> *"I am writing this letter on behalf of [the Claimant] who I have been helping through his recent difficult period with regards to his mental health. He has a documented history on mental health issues, most notably depression and anxiety for which he has been prescribed medication on and off for several years. Recently we have needed to engage in increased contact due to mainly his stresses at work and the impact they have been having on him.*
>
> *Over the past few months we have been in contact with regards to his mental health having a negative impact on his work performance which led to a tribunal where he informs me he was let down by whom he had supporting him causing his depression to spiral and have suicidal thoughts. During this time it emerges he accepted a decision for which now on reflection he regrets. His mental health has shown signs of improvement with counselling and medications since engaging with ourselves and following our advice.*
>
> *At the time he felt pressured in making a decision which was not in his best interests and feels that this was impacted by his low self esteem at the time and his mental health issues which is quite plausible.*
>
> *It seems very reasonable to agree with him that due to the above, it had a negative impact on his decision making at the time of his tribunal and I would be very grateful if this letter can support this theory in any way.*
>
> *During the time [the Claimant] agreed to take the COT 3, he was in touch with the crisis team at the time during this period whilst taking propranolol, mirtazapine and promethazine with his anxiety and depression feelings.*
>
> *This is possible to have impacted his decision making capabilities at the time."*

71. As indicated under the heading Evidence above, following the hearing the Claimant made further written submissions and on 23 November 2021 produced additional medical evidence.

72. The first entry in the medical records is dated 22 January 2021 and records Mirtazapine 30mg tablet prescription for anxiety disorder. A later entry that say records Mepore dressing and Propranolol 40mg prescription.

73. An entry for 26 January 2021 reads as follows:

> *"History: Ongoing headaches. Mild through the day but every other night will get one episode where wakes up with headache. Woke up at 3am – pressure in head, thumping/pulsating, eyes were hurting. Had eye test last week – needs new px – lt eye change, Glasses will be available in 2/52. Also spoken to work and works with a laptop all day with small screen – has asked them for a larger monitor but no response. Had CT scan last week – reported as normal. No speech / swallowing / visual abn. Admits stress – ongoing grievance going on with work. Also covid restrictions and not being able to see family. Takes paracetamol daily. Examination: Alert. Speaking in full sentences. No speech/visual abn. No facial droop. Moving all 4 limbs symmetrically. Plan: Reassured ct scan was normal. Await new glasses and see if these help. Also push work for larger monitor or screen projector to reduce eye strain. Also suggested possibility of analgesia headache due to reg paracetamol use – consider stopping all analgesia. Wondering if anything else we could try – trial of triptan pm. Aware if FAST sx then 999. Rini after new glasses or sooner if sx worsening/new sx/concerns".*

74. On 15 February 2021 an entry reads:

> *"Problems with sleeping and anxiety taking more propranolol and mirtazapine having negative thoughts unable to switch off symptoms for 7 days."*

An assessment of needs was planned and first response number provided (mental health crisis support).

75. There are records of the surgery attempting unsuccessfully to contact the Claimant 22 and 23 February 2021.

76. There is a record for 23 February 2021 which reads as follows:

> *"Tel consultation due to covid 19 pandemic. NR, not sleeping and meds [telephone number]. Recently suspended from work. Difficulty sleeping since. Is still taking mirtazapine. Has been through tribunal. Has been in contact with FR. Works in a call centre when asked for flexible working request. Earlier had suicidal ideations but now better with help from FR. Still under rv from them. Had no rope at home hence did not action it. Better place now. Would not action it now. Appropriate tone, has capacity. No pressure of flight ideas. Short course Promethazine. Continue Mirtazapine. Rv in 2 weeks. Aware of FR. Red flags discussed. Rv as needed. Happy with plan."*

There is a prescription for Mirtazapine 30mg tablets and Promethazine hydrochloride 25mg tablets.

77. A further record appears for 3 March 2021 as follows:

> *"Covid pandemic – tel appmt. Pt requesting counselling as helpful last year. Advised that it is MWBC which he is familiar with and happy to call. Feels stable as when he spoke to Dr Naeem last week and feels that promethazine causes drowsiness and good sleep. Diagnosis re corona virus - no symptoms of concern. No known contact with corona virus. Plan: SMS sent with MWBC details".*

78. The final consultation record produced is for 9 March 2021 which reads as follows:

> *"Tel consultation due to covid 19 pandemic. Details confirmed. Got through.*

Tablets helping. Sleeping a lot better. Anxiety still an issue. Will be engaging with MWBC – is planning on doing it. Update tribunal – plans to hold a preliminary hearing in May – this is positive news for him. Getting support from union. B Blocker helping. Lengthy chat – finds helpful and comfortable speaking to me. Thanked me for calling. Happy things are improving. In a better place. Asked to pasue [sic] promethazine – he will try. Counselling. Continue SNRI. Rv as needed. Happy with plan".

79. The Claimant accompanied his medical notes with the following statement in his email:

"Please see attached medical records covering the time when I was at my most vulnerable stage.

I have suffered with anxiety and depression for a long time and on 4th February 2021 I was suspended from work and later found out I was betrayed by my witness who was giving evidence for the final hearing for this case. My mental health spiraled out of control. Whilst I did start to recover slowly with the help of the crisis team and my GP before and after agreeing with the COT3 I was in a vulnerable stage.

The respondent has said they had no way of knowing about my mental health however, the respondent was aware of my mental health and the actions they had taken in suspending me could have been avoided and it's reasonable for them to understand by suspending me how this may impact my mental health. I believe the respondent has taken advantage of the circumstances at the time and by giving me less than 24 hours to make a decision was unfair."

Submissions

80. Each party produced written submissions together with a copy of their authorities.

81. The Claimant has set out a key chronology in his written witness statement. There is nothing to note here that has not been set out above.

82. The Claimant's written submissions are brief so far as his substantive arguments are concerned. I copy them here in full:

4. In terms of the COT3, Rules 51 and 52 of the Employment Tribunal Rules 2013, the following cases will be argued, with the primary submission remaining that it remains a matter of judicial discretion, under Rule 52, if in the interests of justice the Tribunal would allow the Claimant to continue his claims:

a. L Campbell v OCS Group UK Ltd [2017] UKEAT/0118/16/DA, paras 15, 19-20, 23, 34-35;

b. G Cole v Elders' Voice [2020] UKEAT/0251/19/VP, header (2)-(4), 44-48 (which disapproved the case quoted in the last PHR of Patel v City of Wolverhampton College [2020] UKEAT/0013/20/RN), 59-61, and

c. Industrious Ltd v Horizon Recruitment Ltd (in liquidation) [2009] UKEAT/0478/09/JOJ, paras 1, 6, 8, 10, 15-17, 21, 27.

5. In terms of Rule 51 - the Tribunal must adopt the commonly understood and relied upon phrase in terms of 'the interests of justice' – as it has not been defined in the Rules - and weigh, for example, the respective positions of the parties (in terms of bargaining power, legal advice available to the parties), along with a consideration of all the circumstances of the case – which would include the respective prejudices caused or to be caused to the parties, the need for finality of proceedings and any estoppel arguments, judicial time allocated to the proceedings (so far) and the

intentions of the parties (especially around the unsigned and undated COT3 Agreement) in the context of a Claimant with evidence of mental health issues.

6. Being mindful of all the above, I submit that the balance of the interests of justice favours the Claimant's case to continue, especially as he feels he has a case with reasonable prospects and it would tantamount to a substantial and unjustified windfall for the Respondent, if he were not allowed to continue his claims due to his mental health condition during the relevant period in February and as confirmed by the GP letter, which contains persuasive and compelling evidence that the Tribunal can rely on.

7. I invite the Tribunal to find in favour of the Claimant so that a Trial date can be fixed.

83. The Claimant supplemented these submissions orally during the hearing. This is my summary of those submissions:

a. He invites me to consider the matter in the context of his claim, which are significant.

b. Also in the context of his conditions of anxiety and depression; the Respondent having conceded disability status.

c. Also in the context of the ultimatum that was given by the Respondent in the settlement offer 12 February 2021.

d. 3 days later, 15 February 2021, the Claimant emails ACAS to ask if he can carry on with his claim, noting his mental health conditions of anxiety and depression and that recent circumstances had a significant impact upon his mental health. The Claimant took action and explained to ACAS the circumstances of his decision.

e. The Claimant then emails the Employment Tribunal on 16 February 2021. He refers to his mental health being bad and a pre-manic episode. He states that he has now spoken to his GP.

f. The Claimant follows that email up with another to the Employment Tribunal, he sets out the 1-day deadline he faced and the references to gross misconduct in the letter. He states he was not given time to seek legal advice. He refers to a pre-manic-episode and his decision-making being impaired.

g. The Claimant's application is made under Rule 52(b), that the tribunal exercise its discretion in the interests of justice, taking into account the overriding objective, and all of the circumstances of the case.

h. The Claimant has a recognised disability, anxiety and depression. He has confirmed to ACAS and ET his pre-manic episode. His GP letter (C24) dated 30 March 2021 confirms his history, that he has been treated, that the GP is aware of the tribunal and COT3, the impact upon him, and that he felt pressured. There is clear independent evidence that the crisis team was also triggered. The GP paints a picture of a Claimant under pressure. There is anxiety, depression, and substantial medication. Given a 24 hour deadline, threat of gross misconduct, referral to the FCA. All of this would put pressure upon anyone, but more so for someone with a mental health condition.

i. There will be a massive windfall for the Respondent if the claim is dismissed; the heads of claim are serious complaints. There would be no

prejudice to the Respondent, whatever they paid under the COT3 would be set off against any damages. If there are no damages against which to set off, the Respondent can take separate action.

j. In relation to *Campbell*, see paragraphs 15, 16, 19 and particularly paragraphs 23 and 24. There is a good reason not to dismiss the Claimant's claim, that reason is mental health incapacity.

k. In relation to *Cole*, it is clear that the tribunal has jurisdiction to set aside the COT3. Note recital (4), the Claimant in this case is a litigant in person. Cole was a case involving a signed COT3 and there is no signature in this case. Paragraphs 44-48 make it clear a COT3 can be avoided at common law and that without prejudice correspondence should be considered.

l. In relation to *Industrious*, see paragraphs 6, 15-17, 21 and 27. This tribunal has jurisdiction to set aside the COT3 agreement.

m. The Claimant urged caution in relying on the Respondent's case authorities from before 2013 as these were not under the present Rules. *Arvunescu* is not in contention. The point is that the Claimant cannot bring his claims if the present claim is dismissed. The consideration of the validity of an agreement is done at a secondary stage. Rule 52(b) requires discretion to be exercised in the interest of justice, the net effect of which is that you would then be setting aside the COT3 for a good reason which is the Claimant's mental incapacity.

84. The Respondent's written submissions also contain a relevant chronology. Again, there is nothing to note that I have not already set out above.

85. The Respondent has set out the law. I will set out the relevant provisions below.

86. The Respondent's submissions are as follows:

35. The Claimant cannot bring himself within rule 52(a), which requires him to have reserved a right to bring a further claim at the time of withdrawal.

36. The only issue which arises is therefore the discretion in rule 52(b): is it in the interests of justice to issue a judgment dismissing the claim?

37. The Respondent submits that it is in the interests of justice to issue a judgment dismissing the claim, for the following reasons.

38. Firstly, in view of the limited effect of not issuing a judgment (as described above), the purpose of any refusal to issue a judgment could only be to allow the Claimant to bring a second claim, either in the Tribunal or in another forum, against the Respondent arising out of the same, or substantially the same, complaints.

39. The Claimant has intimated no intention to bring a second claim. On the contrary:

a. The time limit for bringing a fresh claim in the Tribunal has long passed: the Agreement (which included a term expressly terminating employment on 10 February 2021) became binding on 12 February 2021.

b. The civil courts have no jurisdiction to hear any claim for disability discrimination arising from employment.

40. Second, even if the Tribunal considers (on any basis) that it should review the validity of the Agreement, there are unarguable and overwhelming reasons why no claim to set aside the Agreement could possibly succeed:

a. The Claimant communicated with the Respondent's solicitors directly to accept the offer which had been made, having first taken time to consider the draft Agreement with the allocated ACAS Officer Mr Ramjohn; it is therefore not possible for him to argue that the claim was settled without his authority.

b. In the absence of an argument about lack of authority, the Claimant is left only with the argument that he elected to void the Agreement after it had become binding; but he never communicated that decision to the other party to the contract, the Respondent. The Respondent only found out about the Claimant's change of position when it received the notice of preliminary hearing from the Tribunal on 4 March 2021.

c. By then, the Claimant had clearly and unambiguously ratified and/or affirmed the terms of the Agreement, when he: (1) sent the email withdrawing the claim to the Tribunal; (2) accepted the payment of notice pay and accrued holiday pay; (3) failed to attend work at any time after the Agreement was made; and (4) sought a reference from the Respondent for a new job.

d. Further or alternatively, restitution of the Agreement has become impossible, not least by reason of the Claimant's acts of ratification and/or affirmation set out above (as well as the time which has passed since the Agreement became binding): if the Agreement were to be rescinded, the Claimant would have to repay the sums he has been paid; return to work for the Respondent; and face the disciplinary action for gross misconduct which he chose – understandably – to avoid by entering into the Agreement.

Conclusion

41. It is in the interests of justice for the Tribunal to issue a judgment dismissing the claim under Rule 51 of the Employment Tribunal Rules, and the Tribunal is asked to do so.

87. The Respondent supplemented these submissions orally during the hearing. This is my summary of those submissions:

a. *Campbell* – Rule 52 does nothing in relation to the withdrawal of the claim by the Claimant. All Rule 52 does is stop there being a judgment on the claim that was withdrawn if the Claimant wishes to bring a claim on the same facts. It provides for no automatic bar to further proceedings. That is the only effect.

b. The Claimant has not made an application concerning the validity of the COT3. The only application, made on last occasion, in May, is under rule 52 not to issue a judgment.

c. Discretion does not exist on Rule 51. We agree old cases are no longer good law. They are provided just as a background to the Campbell case, because that refers back. The discretion is extremely limited. See *Campbell* paragraph 15; there are no time limits. If there is no express reservation under Rule 52(a), Rule 52(b) provides a right to re-litigate. It is a residual power. Campbell at paragraph 19 considers ambiguous withdrawals but in this case the withdrawal was unambiguous. Rule 52 still applies, but this says nothing about revoking the withdrawal. There is still option of not giving judgment.

d. Under Campbell paragraph 23 and 24; there is no requirement to invite representations. There is no undue formality. There is no reference to a revocation of a withdrawal. There is only reference to dismissal not in the interests of justice. This concerns litigation in another forum, other

litigation, not resurrecting the withdrawn claim.

e. The ratio of the case, *Campbell*, paragraph 30, is that there is no jurisdiction to rescind or revoke a withdrawal. Withdrawal is a unilateral act of a party, it is not a judicial act. All the tribunal can do is decide whether or not to issues a dismissal. See paragraph 21 concerning that being a judicial determination,

f. An application under Rule 52 does not allow anything other than determining whether or not to issue a judgment.

g. The question of the validity of the COT3 is not in fact before the tribunal, but I will deal with this. Employment Judge Morgan QC drew attention to the *Poole* case, but there was then *Cole* 3 months later, i.e. 2 completing cases. They are both in the bundle 100, 128 in my authorities.

h. The Respondent accepts that Cole does allow the tribunal in principal to hear arguments about a COT3 agreement. The Respondent accepts that the tribunal can determine if a COT3 is valid.

i. But the difficulties for the Claimant in that are set out in paragraph 40 of the written skeleton argument.

j. See paragraph 40a concerning authority - Negotiations began with a judicial mediation. Settlement began with mediation listed for hearing in December eventually heard in January. In preparation for that mediation, the Respondent prepared a draft COT3. The Claimant had ACAS assistance. The parties were regularly communicated copying in conciliator. The Claimant received the offer 10 February 2021, in terms, for an FCA regulated job, where dismissal was a reporting requirement. See R34, 11 Feb 2021, the Claimant states “I confirm I am happy to accept the offer”. Mr Ramjohn from ACAS states “further to our conversation”; they had spoken in addition to the correspondence. R35 attaches the COT3, and asks can the Claimant agree the wording. Still there is a discussion between the parties, R41, the Claimant thanked the Respondent, and said he needed to discuss a couple of points with ACAS. The next day, R42, we see the 12 February 2021 acceptance. That is the context. A draft COT3 in December, judicial mediation, gross misconduct leading to new offer, negotiation, discussion with ACAS, following which the Claimant accepts. R42, the Respondent asks whether or not the terms are binding. It is the ACAS confirmation that makes the agreement binding. We have that email, R46. The tribunal were notified.

k. 40b – The Claimant is a litigant in person. The only basis he could make an application would be upon common law validity grounds. See Chitty R2and R3. I think capacity is argued. There is no proper medical evidence. The medical evidence is a GP letter, not an independent medical report. Look at the GP’s letter C24, it reports what the Claimant said to his doctor. It states that the Claimant “accepted a decision which now on reflection he regrets”. This contradicts a submission that he lacked capacity. If he regrets the decision, he must have had capacity. He has changed his mind. There is no knowledge of incapacity. Even where there is incapacity, then the contract is only voidable. The Claimant never contacted the Respondent. The Respondent only finds out on 4 March 2021 that the Claimant is trying to avoid the agreement, when the Respondent enquired why a preliminary hearing had been set up. Rescission means undoing the contract, putting parties in that position they would have been in had it not been made. The Claimant has never rescinded the contract. On 4 March 2021 the Claimant had stopped working, he was processed through payroll,

received a P45, and was paid accrued holiday and PILON. The Claimant sent in his withdrawal letter. The terms of the COT3 were performed.

l. 40c – the Claimant made a reference request under the terms of the COT3, in April 2021, applying for jobs elsewhere.

m. 40d – how can the agreement be rescinded? If the Claimant applies for the COT3 to be held invalid, he would need to return the money, return to work and face allegation of gross misconduct. The Claimant submits that he will hold on to the money, because there might or might not be a set off. They refer to other recourses. That is not how rescission works. The Claimant would have had to notify the Respondent, return the money, and provide a date to return to work to face the disciplinary. He has ratified or affirmed the contract and restitution has become impossible.

n. The Respondent was not expecting undue influence to be submitted. That operates where there is a relationship of trust and confidence, where one party persuades another to enter a contract where they do not want to (e.g. husband and wife, doctor and patient, solicitor and client). These are two parties in litigation, who have gone through judicial mediation, and the Claimant had been told to come back to work to face a disciplinary hearing. There was an ACAS officer, they spoke, before agreeing the initial offer, they then spoke about the terms.

o. In summary, we don't have an application about the validity of the COT3. The only application is under Rule 52. If there were an application, challenging COT3, the tribunal would have jurisdiction, but the Claimant has produced no proper evidence about capacity. He has not produced a witness statement. We don't have evidence from the Claimant. But if you had those things, there has been no recission of the COT3. That would be required. Even if we had recission, it is in this case too late for restitution.

88. The Claimant reiterated that he is a litigant in person, that *Campbell* requires the application of natural justice and the overriding objective and that mental health issues are a good reason.

89. The Respondent confirmed that they had nothing further to add.

90. Following the hearing, as explained under the heading evidence above, the Claimant sent further written representations on 11 November 2021. These are brief and are copied here in full:

> *3. The Claimant has instructed me to inform the Learned Judge that he remains of limited means and cannot afford to attend any further hearings or, for that matter, instruct any relevant expert medical professional for a detailed psychiatric assessment report under the said Mental Capacity Act.*
>
> *4. In order to assist the Tribunal, however, the Claimant is obtaining his medical records from his GP for the one-month period prior to and one-month period after the unsigned and undated COT3 Agreement [12/2/2021]. The Claimant will forward the relevant medical records to the Employment Tribunal (cc the Respondent) as soon as he receives them from his GP.*
>
> *5. As the Learned Judge is well aware, Section 4 of the Mental Capacity Act 2005 remains relevant to the judicial deliberations in this case, whether or not a medical expert opinion is available in any proceedings before the court/Tribunal.*
>
> *6. In that regard, the Supreme Court in Aintree University Hospital v NHS Foundation Trust v James [2013] UKSC 67, [2014] AC 591 helpfully considered*

and set out the proper approach to 'best interests' test under section 4, when Lady Hale said this:

> *'24. The advantage of a best interests test was that it focused upon the patient as an individual, rather than the conduct of the doctor, and took all the circumstances, both medical and non-medical, into account (paras 3.26, 3.27). But the best interests test should also contain "a strong element of 'substituted judgment'" (para 3.25), taking into account both the past and present wishes and feelings of patient as an individual, and also the factors which he would consider if able to do so (para 3.28). This might include "altruistic sentiments and concern for others" (para 3.31). The Act has helpfully added a reference to the beliefs and values which would be likely to influence his decision if he had capacity. Both provide for consultation with carers and others interested in the patient's welfare as to what would be in his best interests and in particular what his own views would have been. This is, as the Explanatory Notes to the Bill made clear, still a "best interests" rather than a "substituted judgment" test, but one which accepts that the preferences of the person concerned are an important component in deciding where his best interests lie. To take a simple example, it cannot be in the best interests to give the patient food which he does not like when other equally nutritious food is available.'*

7. Under the circumstances, due to the financial pressures instructed by the Claimant – especially as Counsel may not be able to act in the future for the Claimant - the Claimant respectfully requests the Learned Judge to conclude the Claimant's determination - under Rule 52 (b) and Section 4 of Mental Capacity Act 2005, in the best interests of the Claimant:

> *a. based on the medical records to be provided by the Claimant, in due course, and the existing GP letter of 30 March 2021 [from Dr Naeem, of affinity Care, North Street Surgery, Knightley - contained in the Claimant's Bundle for the last CVP hearing, at Item H],*
>
> *b. along with the consideration of the Claimant's various e-mails at the time by the Claimant expressing his incapacity, and*
>
> *c. my written and oral submissions on the Claimant's behalf made at the CVP hearing on 25 October 2021.*

8. The judicial determination remains necessary so that the Claimant can continue his substantive and substantial claims of Disability Discrimination, Indirect Discrimination, Reasonable Adjustments, Harassment related to disability and unauthorised deduction of wages. Otherwise, the Respondent will obtain a substantial and, it is submitted, an unjustified windfall, which would not be in the interests of justice under Rule 51 (or otherwise) in these proceedings.

9. If, however, the Learned Judge, in determining his judgement under section 4 Mental Capacity Act, in particular, re best interests of the Claimant considerations comes to the judgement that there is a 'good reason' for the Tribunal to have an expert medical opinion to assist it on the determination of the capacity of the Claimant - for the period on or around the 12 February 2021 – as per paragraphs 8, 12, 14 and 18 of Lady Justice Macur's judgement in RBS v AB, mentioned above, with such assessment being 'transient' and can change over time – then the Claimant makes it clear that he would have no objection to the same, so long as he does not have to pay for any such expert report , as he instructs me he is unable to pay or share the costs for the same.

91. The Respondent submitted further written representations 10 November 2021 as follows:

Royal Bank of Scotland v AB (EAT, affirmed by CA at [2021] EWCA Civ 345)

The "Good Cause for Concern" Test

3. The circumstances to which the principle in RBS v AB relates are those where it appears to the Tribunal (including, independently of any application by a party) that there is "good cause for concern" that a claimant may lack capacity to litigate.

4. If such circumstances do occur, the Tribunal is required to order that a capacity assessment be undertaken (presumably, paid for out of central funds if necessary).

5. It is quite common for Claimants in Tribunal claims to suffer from mental ill health, including serious mental ill health. That fact alone is plainly insufficient to give rise to a good cause for concern.

6. In RBS v AB itself, the claimant had attended a remedy hearing and had behaved so oddly that the Tribunal should have been concerned about her capacity (paragraph 12 of the Judgment: "her responses to the very simple questions he put to her were sounds and grunts, not words").

7. In those circumstances, the EAT concluded at paragraph 22 of the Judgment that the Tribunal had been "wrong to conclude that an assessment of AB's capacity to litigate was not necessary". It immediately went on in paragraph 22, however, to warn as follows:

…any Tribunal must take care before concluding that assessment of a litigant's capacity to litigate is necessary. Simler P's words of warning, at paragraph 38 of her judgment in Jhuti, are important. Tribunals must not permit arguments about litigation capacity to be used discriminately or unscrupulously. The risk of misuse must be carefully policed".

8. In this case, there is no good cause for concern, and therefore there is no basis for undertaking the step of ordering medical evidence about the Claimant's capacity. In particular:

a. Nothing in the Claimant's interactions with the Tribunal administration, the Tribunal Judge at the preliminary hearing in September 2020, the Tribunal Judge at the mediation in January 2021, the ACAS officer, or the Respondent's solicitors suggested to anyone that the Claimant might lack capacity.

b. The only possible basis for such a concern would be the emails sent by the Claimant to ACAS and the Tribunal on 15 and 16 February 2021, but in those emails the Claimant himself retrospectively alleged a lack of capacity, in order to avoid the effect of having agreed the COT3 and withdrawn the claim. The emails of 15 and 16 February (and earlier emails) are not in themselves at all irrational; they are not direct evidence of a lack of capacity (unlike the erratic and extreme behaviour described by the EAT in paragraph 12 of RBS v AB).

c. In those circumstances, the Tribunal is urged to follow the EAT guidance in paragraph 22 of RBS v AB, and carefully police the risk of the Claimant misusing arguments about litigation capacity, discriminately and/or unscrupulously.

d. That is particularly important here, because prior to the emails of 15 and 16 February, the Claimant had done nothing at all which could possibly give rise to any cause for concern. On the contrary – as the chronology set out in paragraph 12 of the Respondent's full skeleton argument, and the supporting documents in both parties' bundles, show – the Claimant behaved entirely rationally during the course of the litigation and its settlement.

e. Even in retrospective discussions with his own GP, in March 2021, the Claimant described his concerns about the COT3 as "a decision which now on reflection he regrets [by reason of his mental ill health at the time]" (Claimant bundle page 24). Regretting a decision made in the context of serious mental ill health is a very different thing from lacking capacity to conduct litigation.

f. Moreover neither the Claimant himself, nor his Counsel, have raised the allegation that he lacks capacity to litigate, or that he has ever lacked such capacity (only, conveniently, that he lacked capacity to enter into the COT3). Indeed, Counsel would not be able to take instructions from the Claimant, if the Claimant lacked litigation capacity.

9. For those reasons, there is no factual basis upon which the Tribunal could hold that there was a "good cause for concern" (as required by RBS v AB) in respect of the Claimant's capacity to litigate generally.

Practical Considerations

10. The Tribunal's attention is drawn to the outcome in RBS v AB: although it was held that the Tribunal erred in law in holding that it was not necessary to conduct a capacity assessment, the EAT nevertheless did not disturb the Tribunal's remedy judgment (because the absence of a capacity assessment did not make a sufficient difference to the outcome of the remedy hearing). The Court of Appeal described the appeal (in paragraph 1 of its judgment) as a "Pyrrhic victory".

11. Real practical difficulties arise in this case too: what would be the effect on the rule 52 application, if the Tribunal were to order a capacity assessment, and that assessment were to disclose a lack of capacity to conduct the litigation generally?

12. The Claimant left the Respondent's employment in February 2021 by reason of the COT3 and has not returned; his employment was terminated; his disciplinary process was abandoned; his P45 was processed; he was paid the termination sums owed to him under the COT3; he has applied for at least one new job; and he has received a job reference from the Respondent.

13. If the Tribunal were (by some principle other than the law of contract summarised in paragraph 20 below) to overturn the COT3 because of lack of capacity, the Claimant would have to return to work for the Respondent, and undergo the disciplinary process that he signed the COT3 in order to avoid (noting that his decision to avoid that disciplinary process was entirely rational, in the highly regulated industry in which he works).

14. Most fundamentally, the Claimant has not brought any new proceedings arising from the same events or claims as those relied on in these proceedings, and he is long out of time to do so. Such new proceedings would be the only practical reason why a rule 52 order might be of value – to preserve the right to bring another claim without a res judicata defence being raised by the Respondent.

15. In light of those matters, what difference would an assessment (positive or negative) of litigation capacity actually make? As in the RBS v AB case, it would not make any difference to the outcome of the application that is before the Tribunal, nor to any other possible application that the Claimant could make.

Dunhill v Burgin [2014] UKSC 18

16. The Burgin case does not take matters further than RBS v AB, for two reasons.

17. First, the same – insurmountable – practical problems arise, as set out in paragraphs 11 to 15 of these supplementary submissions.

18. Second, the ratio of Burgin is based, in every detail and particular, on the specific provisions of Part 21 of the Civil Procedure Rules 1998, in which (1) no step in the litigation can be taken where a party lacks capacity, until a Litigation Friend has been appointed for them; and (2) a consent order to settle a claim involving a claimant who lacks capacity must undergo a formal procedure of approval by the Court – something which did not happen in Burgin (see paragraphs 9, 15-20, and 34 of the Judgment).

19. No such rules apply in Tribunal claims: there is no rule that invalidates the steps taken in the litigation by a person lacking capacity, who has no Litigation Friend; and there is no rule of procedure requiring the Tribunal to approve a COT3 (or any other type of settlement) entered into by a party lacking capacity.

20. The correct legal position – and the only possible legal position – is the contractual position set out in paragraphs 33-34 and 40(b)-(d) of the Respondent's full skeleton argument: in summary, any lack of capacity could only have made the COT3 voidable (not void), but the Claimant chose to affirm it, by complying with its terms.

Conclusion

21. For the reasons set out above – both practical and legal – the question of litigation capacity does not make any difference to the rule 52 application which is before the Tribunal.

22. Moreover, as described in paragraphs 11 to 15 of these supplementary submissions, there is no application which the Claimant could make that would resolve the impossibility – in practical terms – of rescinding the COT3 which settled his claim in February 2021.

The Law

92. Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure. These provide:

WITHDRAWAL

End of claim

51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

Dismissal following withdrawal

52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

93. In basic terms, the rules allow someone to abandon their claim in this forum without

impacting on their right to further litigate upon the issues. A withdrawal alone does not impact on their right to bring another claim because there has been no determination of their original claim. But a dismissal would amount to a determination, which would ordinarily prevent other litigation based on the same or similar facts. It is important to note, therefore, the distinction between reviving an existing claim and bringing a new one or continuing another one.

94. The present rule on withdrawal, which states that the claim comes to an end, utilises a similar expression from previous incarnations of the rule. See ***Khan v Heywood and Middleton Primary Care Trust [2006] EWCA Civ 1087***; "*on a true construction, the words "brought to an end" in rule 25(3) meant that the withdrawn proceedings could not be revived, though that did not preclude a fresh claim on the same facts if there was no dismissal; and that, accordingly, there was no error of law in the decision of the employment tribunal chairman and the claimant was not entitled to have the withdrawal of his claim set aside*". This judgment meant that a Claimant, once he had withdrawn his claim, could not revive that claim. His only route would be to reissue a claim, either in the tribunal or in another court. But that particular claim was brought to an end. It cannot be revived.

95. There are earlier cases, such as ***Sajid v Sussex Muslim Society [2002] IRLR 113*** and ***Ako v Rothschild Asset Management [2002] ICR 899***, both Court of Appeal, which deal with the situation where a withdrawal under the 2001 rules automatically led to a judgment dismissing the claim. These cases are limited in effect to those 2001 rules, which was confirmed in ***Cokayne v British Association for Shooting and Conservation [2008] ICR 185***. Those authorities establish that revival is possible following withdrawal where the parties had not intended to end their right to bring a new claim or continue another claim. They fixed a conundrum caused by the automatic rule that withdrawal led to dismissal. They illustrate the need for a distinction between withdrawal and dismissal but we now have that distinction expressly set out in the 2013 Rules. Similarly, those principles are considered under the old rules in ***Srivatsa v Secretary of State for Health [2018] ICR 1660***, despite the date of that report.

96. The Respondent refers to ***Campbell v OCS Group UK Ltd (unreported, EAT 0188/16)*** submitting that in this case the then President of the EAT, Simler J, reviewed the position of withdrawn and dismissed claims under rules 51 and 52. She identified the distinction between withdrawal and dismissal, referring to *Khan* and confirming that there was no Tribunal power to revive a withdrawn claim, since that was an act of the claimant and not a judicial act. She further identified that the effect of a lack of dismissal of a claim following withdrawal was to allow the claimant to bring a fresh claim, based on the same facts.

97. That seems a fair summary of the case. As we are citing a case from Simler J on the current form of Rules, I copy some of the principles relating to the withdrawal and dismissal of claims that were set out in that Judgment:

> *16. In **Segor v Goodrich Actuation Systems Ltd [2012] UKEAT/0145/11/DM** the EAT made clear that tribunals should always take steps to ensure that litigants, particularly those who are self-represented or have lay representation, who seek to concede a point or abandon it do so on a clear, unambiguous and unequivocal basis before accepting the concession or abandonment indicated. At paragraph 11 Langstaff P held:*
>
> > *"11. What we should say, however, is this. A tribunal will always want to take care where a litigant, particularly one who is self-represented or who has a lay representative, seeks to concede a point or to abandon it. It may be a matter of great significance. Though it is always for the parties to shape their cases and for a tribunal to rule upon the cases as put before it, and not as the tribunal might think it would have been better expressed by either party, it must take the greatest of care to ensure that if a party during the course of a hearing*

seeks to abandon a central and important point that that is precisely what the individual wishes to do, that they understand the significance of what is being said, that there is clarity about it, and if they are unrepresented, that they understand some of the consequences that may flow.

As a matter of principle we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous."

…

19. It seems to me that the approach identified by both of those cases applies in the context of withdrawal and dismissal under Rules 51 and 52 of the 2013 Rules as follows. So far as withdrawal is concerned, as Langstaff P made clear in Segor, tribunals faced with an application to withdraw should consider whether the material available amounts to a clear, unambiguous and unequivocal withdrawal of the claim or part of it. Though there is no obligation on tribunals to intervene in such a situation, whether by reason of the overriding objective or any principle of natural justice, tribunals are entitled to make such enquiries as appear fit to check whether a party who is self or lay represented intends to withdraw. If the circumstances of withdrawal give rise to reasonable concern on the tribunal's part, it is entitled to make such enquiries as appear appropriate to ensure that the purported withdrawal is clear, unambiguous and unequivocal.

…

24. However, as Mr Matovu submits, tribunals are empowered to regulate their own procedure and to conduct hearings in a manner considered fair having regard to the overriding objective. They are empowered to avoid undue formality and to question parties so far as appropriate in order to clarify the issues or elicit evidence. It seems to me that it is a matter for the judgment of the tribunal to decide whether it is necessary to make further enquiries of the withdrawing party before making a dismissal decision. If there is material available that puts a tribunal on notice that the party seeking to withdraw his or her claim intends to resurrect the claim in fresh proceedings, even though no such notification is given, or puts the tribunal on notice that the decision to withdraw the claim was ill-considered or irrational for some reason, or that there are other good grounds for suspecting that dismissal may not be in the interests of justice in the particular circumstances of the case, those would all afford a proper basis for enquiries to be made by the tribunal of the withdrawing party before moving to a decision to dismiss. Whether to make enquiries at all and the extent of those enquiries will depend entirely on an assessment of the facts and the relevant context and is a matter of judgment falling squarely within the margin of discretion of the tribunal, which will in most if not all cases have a better understanding and feel for the case than the EAT can itself ever have.

98. I note that in ***Campbell*** the Claimant had withdrawn her claim expressly on the basis that she was too unwell to continue, and that she sought to retract her withdrawal. But it is clear reading the judgment that the focus of the appeal is on Rule 52; the question regarding the overturning the dismissal to allow a fresh claim to proceed.

99. See paragraph 26 concerning the disposal of the appeal on the facts:

Moreover, in this case the contents of the Claimant's email of 14 December 2015 contained on any view a clear, unequivocal and unambiguous withdrawal of her claim. Both the timing of the email and the fact that its contents sought to raise matters potentially relevant to the question of whether any adverse costs consequences might flow from her withdrawal suggested, as the Employment Judge expressly concluded, that the Claimant had given thought to the matter and to the consequences of her decision. Looked at objectively, there was nothing in the

circumstances or in the contents of the email or the medical advice to suggest that the Claimant's decision to withdraw was ill-considered or irrational. The Claimant did not express any wish to reserve her right to bring a further claim so that there could be no basis for consideration of her case under Rule 52(a).

100. And paragraph 30:

There is no jurisdiction for a notice of withdrawal to be rescinded or revoked and no scope at all under the Rules for the Claimant to revive those claims. Absent dismissal, however, a fresh claim on the same facts could have been commenced by the Claimant, and therefore an application to reconsider the dismissal decision could have had a potentially real and practical effect in enabling her to continue to pursue her claims. The question accordingly is whether it can be said that the Employment Judge erred in law in refusing reconsideration because of what Mr Matovu described as an overly narrow approach.

101. The appeal is then allowed on the basis of reconsideration of the dismissal of the proceedings, as opposed to withdrawal. See paragraph 35:

In the circumstances of this case and in the absence of any decision by the Employment Judge that there are no reasonable prospects of the application to reconsider being granted because it is inevitable that it is not in the interests of justice to allow the Claimant to present a fresh claim based on the same facts in this case, and, more particularly, in the absence of any consideration at all by the Employment Judge of anything that occurred after 15 December, I do not feel able to conclude that only one outcome is possible on these facts. In those circumstances, this appeal must be allowed, and the refusal to reconsider must be set aside.

102. This is a determination that the decision to refuse to reconsider a determination that it is not in the interests of justice to allow the Claimant to present a fresh claim should be set aside. It is a remittal back on Rule 52(b), not Rule 51.

103. Where it is unclear whether or not a Claimant has withdrawn their claim, clearly that uncertainty must be resolved and cannot be inferred; ***Arvunescu v Quick Release (Automotive) Ltd (unreported, EAT 0135/16)***.

104. In ***Cole v Elder's Voice (unreported, EAT 0251/19, 26 November 2020)*** it was held that:

(1) A litigant in person who had argued that a COT3 could not be relied upon because of misrepresentation and estoppel (and possibly also by way of interpretative construction) should have been allowed to refer to without prejudice material in support of those submissions. Oceanbulk Shipping and Trading SA v TMT Asia Ltd [2010] UKSC 44 [2011] 1 AC 662 and Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436 applied.

(2) A COT3 can be challenged on the same basis as any other agreement in common law or equity. Industrious Ltd v Horizon Recruitment Ltd [2010] IRLR 204 and Greenfield v Robinson [1996] EAT/811/95 applied. Patel v City of Wolverhampton College [2020] UKEAT/0013/20/RN held to be per incuriam and not followed.

(3) ET decisions on a Preliminary Issue that there was no jurisdiction to hear the Claimant's substantive claims were based on errors of law. It was wrong to find that the Claimant could not go behind the COT3 or rely on without prejudice or other evidence to show that it was not valid.

(4) As the Claimant was a litigant in person with no legal qualifications, particular

care had to be taken to make sure that what she was saying was heard and understood and acted upon. Mensah v East Herfordshire NHS Trust [1998] IRLR 531 and Drysdale v Department of Transport [2014] EWCA Civ 1083 [2014] IRLR 892 applied.

(5) The Claimant's submission that the COT3 should be set aside, or not enforced, by reason of misrepresentation, or that the Respondents were estopped from relying on it, or that it should be construed to exclude settlement of claims arising before the TUPE transfer, was not precluded by the involvement of a person holding himself out as a barrister (although disbarred) on her behalf. Redgrave v Hurd (1881) 20 Ch D 1 and Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd [2006] EWCA Civ 386 considered.

105. The parties agree in this case that the validity of a COT3 can be challenged in an employment tribunal.

106. I have been referred to by the Claimant to ***Industrious Ltd v Horizon Recruitment Ltd (In Liquidation), Mrs J Vincent UKEAT/0478/09/JOJ***, as authority for the proposition that the validity of a COT3 may be challenged. Plainly put in the conclusions to that case "*section 203(2) of the ERA permits the parties to make valid compromise agreements but the word "agreement" must mean a valid agreement and the Employment Tribunal has to ensure that any purported compromise agreement is valid*". I have been referred to several paragraphs in this Judgment which serve to underline that a COT3 agreement may be challenged on common law principles as may any other agreement. The Respondent has conceded that in this case so I do not quote from the Judgment.

107. I do however note that challenge to the validity of a COT3 would ordinarily reach the tribunal as a preliminary issue concerning jurisdiction and here it is instead positioned under Rule 51 and 52 by the Claimant.

108. The Respondent has in its bundle of authorities also included a section from Chitty on Contracts, 33rd Edn. This sets out the following:

Contract voidable

9-094 Where a mentally incapable person concludes a contract and the other party knows of this incapacity, the contract is voidable at his or her option rather than being void. It has been said that the mentally incapable person's right of rescission is subject to the usual bars (lapse of time, affirmation, third party rights and restitutio in integrum being impossible) familiar from the context of rescission for misrepresentation, though it should be added that an act of affirmation (as a declaration of intention) would itself require the person allegedly affirming to have possessed the requisite mental capacity to do so at the time. Where a person is entitled to and does rescind a contract on the ground of mental incapacity, then it would appear that any property or money transferred under it is recoverable without the need for any total failure of consideration, this marking a further distinction in the law's treatment of mental incapacity and minority.

Ratification

9-095 It would appear that a person who lacked mental capacity at the time of making a contract (so as to render it voidable in principle) may nevertheless be bound by it if he ratifies it subsequently after recovery or during an interval where he possesses the capacity to do so.

109. The Claimant has accepted that this statement of the law is correct.

110. The Mental Capacity Act 2005 contains provisions defining "persons who lack capacity". It contains a set of key principles and sets out a checklist to be used in

ascertaining a person's best interests.

111. The Act makes the following provisions concerning persons who lack capacity:

1 The principles

(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

2 People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.

4 Best interests

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) "Relevant circumstances" are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

112. In ***Royal Bank of Scotland PLC v AB UKEAT/0266/18/DA*** it was held at paragraph 26 that *"The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way. As Simler P pointed out in **Jhuti**, a litigant who lacks capacity is effectively unrepresented in proceedings since she is unable to take decisions on her own behalf and unable to give instructions to her lawyers. Thus, although any Tribunal should be alert to guard against attempts by litigants to use arguments about capacity improperly, if, considered objectively, there is good cause for concern that a litigant may lack litigation capacity, an assessment of capacity should be undertaken. What amounts to "good cause" will always require careful consideration, and it is not a conclusion to be reached lightly. For example, good cause will rarely exist simply because a Tribunal considers that a litigant is conducting litigation in a way with which it disagrees, or even considers unreasonable or vexatious. There is likely to be no correlation at all between a Tribunal's view of what is the "common-sense" conduct of a piece of litigation and whether a litigant has capacity to conduct that litigation. Something qualitatively different is required."*

113. Those principles were affirmed in the subsequent appeal to the Court of Appeal (***Royal Bank of Scotland plc v AB [2021] EWCA Civ 345***).

114. In ***Dunhill v Burgin [2014] UKSC 18***, noting that this case concerned the Civil Procedure Rules, it was noted that capacity to litigate may be transient and that "*the purpose of the assessment is to determine how the litigation should proceed; is a litigation friend required to ensure due process?"*.

115. In ***Jhuti v Royal Mail Group Ltd UKEAT/0061/17/RN*** the following guidance is given:

> *39. …The CPR do not apply in the Employment Tribunal or Employment Appeal Tribunal. Nevertheless the special provisions contained in CPR 21 provide guidance that is relevant by analogy to the approach to be adopted by employment tribunals where the question of appointment of a litigation friend arises. There are a number of important principles identified by and referred to in CPR 21 that are relevant and seem to me to be capable of being applied by analogy:*
>
> > *(a) First and foremost, a person is assumed to have capacity unless it is established that they lack capacity. The assumption of capacity can only be overridden if the person concerned is assessed as lacking the mental capacity to make a particular decision for themselves at the relevant time: see the Mental Capacity Act 2005, s.3, which provides a formula to be used in making that assessment. The burden of proof is on the person who asserts that capacity is lacking and if there is any doubt as to whether a person lacks capacity, that is to be decided on the balance of probabilities: see s.2(4) Mental Capacity Act 2005.*
> >
> > *(b) Secondly, a person should not be permitted to act as a litigation friend unless he or she can fairly and competently conduct proceedings on behalf of the protected party and has no personal interest in the litigation or an interest adverse to that protected party.*
> >
> > *(c) Thirdly, an application for an order appointing a litigation friend must be supported by evidence demonstrating that the person to be appointed is suitable and consents to act. Evidence must also be provided establishing the basis of the litigation friend's belief that the party lacks capacity to conduct the proceedings.*

116. Rule 2 of the Employment Tribunal Rules of Procedure deal with the overriding objective, enabling tribunals to deal with cases fairly and justly, and makes clear that dealing with a case fairly and justly includes, so far as practicable, "*ensuring that the parties are on an equal footing*".

117. In paragraph 22 of ***Jhuti*** it was observed that "*to continue with a hearing with an unrepresented litigant who lacks mental capacity to conduct litigation is tantamount to continuing with the hearing in that party's absence and flies in the face of a Rule designed to ensure so far as practicable that parties are on an equal footing*."

118. The Equal Treatment Benchbook contains the following overview on capacity:

> *"The legal system relies on the assumption that people are capable of making, and thus being responsible for, their own decisions and actions. It is therefore necessary to be able to recognise a lack of mental capacity when it exists, and to cope with the legal implications.*
>
> *False impressions of lack of capacity can be caused by communication difficulties or a person's physical appearance.*
>
> *There is no standard test of capacity for all purposes. Where doubt is raised as to mental capacity, the question to ask is not, 'Is he (or she) capable?', but rather, 'Is he (or she) incapable of this particular act or decision at the present time?'.*

When seeking opinions about capacity, bear in mind that different professions apply different criteria.

Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand.

There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity. When there is good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.

It may be necessary to determine the issue of capacity at a separate hearing.

The Mental Capacity Act 2005 (MCA) establishes a comprehensive statutory framework, setting out how decisions should be made by and on behalf of those whose capacity to make their own decisions is in doubt. There is also a Mental Capacity Act Code of Practice.

The Court of Protection has to deal with the entire range of decision-making on behalf of incapacitated adults.

A party who is incapable of conducting the particular proceedings must have a representative ('litigation friend') to do so, whether bringing the proceedings or defending them. Power to appoint litigation friends in tribunals is not generally set out in explicit terms as it is in the CPR. Nevertheless, recent cases have stated that immigration, employment and it would seem by extension, other tribunals, can do so as part of their general case management powers."

Conclusions

Is there good cause for concern that the Claimant was incapable of agreeing to the terms of the COT3 and executing the COT3's term to withdraw his employment tribunal claim?

119. I note that there has been no suggestion in the proceedings prior to the attempt to 'withdraw the withdrawal' that the Claimant either lacked or may lack capacity.

120. I note that the Claimant claimed to be a disabled person by reason of his anxiety and depression and that the Respondent, following directions for a disability impact statement and disclosure of medical records, conceded disability status for the purposes of Section 6 of the Equality Act 2010.

121. I note that in the occupational health report 25 February 2020 the condition was expressed to have subsisted for more than 12 months and that he is vulnerable to flare ups.

122. I note that the Claimant participated in the unsuccessful Judicial Mediation in January 2021.

123. I note that the Claimant was suspended from work 4 February 2021 and his response to that appears to have been to attempt to accept an offer of settlement made at the Judicial Mediation.

124. I note that the Claimant chases a response, which elicits a counter offer of contractual notice on 10 February 2021.

125. I note the threat of disciplinary action and threat of report to the FCA. I note that the Claimant is given limited time to consider the offer, some 24 hours only.

126. I accept that the Claimant was under pressure at this stage in the proceedings.

127. The Claimant engages in correspondence about the offer and accepts it within the time limitation.

128. The COT3 is agreed within a day or so within which the Claimant is engaged in the drafting process and the papers suggests that he spoke to ACAS before accepting the terms of the COT3.

129. Before the conciliator has confirmed to the parties that there is a binding COT3 agreement the Claimant has written on 12 February 2021 to the tribunal an unequivocal email withdrawing his claim and confirming that he had no objection to the proceedings being dismissed.

130. In his letter withdrawing his claim the Claimant did not seek to preserve any right to bring another claim or to continue another claim.

131. Three days later, 15 February 2021, the Claimant writes to the ACAS officer concerning continuing with his claim. He refers to his mental health, depression and anxiety. He refers to the Respondent not giving him reasonable time to make a decision and having had further advice suggesting he has a strong case. He states he is going to speak to his GP for further support.

132. I note that this first contact mentions nothing concerning capacity. I note that it appears to be a reconsideration of position after receiving advice. I note that the Claimant suggests he will contact his GP.

133. I note that later that day, the conciliator having confirmed to him that the settlement is binding, the Claimant then states that he has been going through a pre-manic episode and that his decision making was impaired as a result. He also states that he did not think the agreement was binding until signed.

134. I have not been provided with a copy of any response to that email from ACAS and no evidence was presented as to whether or not they replied.

135. On 16 February 2021 the Claimant writes to the Employment Tribunal, informing them of a pre-manic episode, referring to the limited time he was given to decide, referring to not having had time to take advice and to his decision-making being impaired. He stated that leading up to the agreement he was suffering mentally and struggling to sleep and fatigue and sought medical help.

136. I note that the Respondent is unaware of these developments and is chasing ACAS for the signed COT3 agreement. In any event they issue payment pursuant to the COT3 24 February 2021.

137. The copies of the emails from the Claimant are the evidence I have from him.

138. He has not produced a witness statement for the purposes of this hearing.

139. This was an open preliminary hearing. The Claimant was not called to give evidence.

140. There are some inconsistencies in the Claimant's emails about which he would have been questioned had he given evidence and been available to answer questions. In particular the initial correspondence with ACAS appears suggestive of

141. I have not seen how the report from Dr Naeem dated 30 March 2021 was procured. I find the report assists the Claimant in that it confirms his history of anxiety and depression and the prescription of medicine on and off for many years. It is supportive of the Claimant

reporting to Dr Naeem that his depression worsened and that he had suicidal thoughts. The report refers to it emerging that during this time the Claimant accepted a decision which on reflection he regrets. The report suggests that the Claimant's health had by then improved due to counselling and medications.

142. The report is lacking weight by reason of the fact that it shows no indication of specific knowledge of the time the agreement was entered nor does it specifically place in time any of the matters concerning the Claimant's presentation to his GP.

143. The report suggests that during the time the Claimant agreed to the COT3 settlement the Claimant was in touch with the crisis team and taking propranolol, mirtazapine and promethazine with his anxiety and depression feeling. This contradicts the Claimant's own email evidence, for example some 4 days after accepting the offer, 3 days after accepting the terms of the COT3, the Claimant is writing to ACAS on 15 February 2021 suggesting that he is going to speak to his GP as opposed to having spoken to them.

144. The report agrees that the Claimant's decision was impacted by his low self-esteem and his mental health issues which had a negative impact on the Claimant's decision making at the time.

145. However that agreement, taking the report at its height, makes no suggestion that the Claimant lacked or may have lacked capacity at the time. There is no comment concerning capacity at all.

146. The suggestion in the report that the Claimant was taking promethazine at the time of agreeing to the COT3 (12 February 2021) is incorrect, the medical records show that that was prescribed first on 23 February 2021, some 11 days later.

147. Indeed I note that the Claimant's report of suicidal thoughts to his GP is first made 15 February 2021, and is timed after the Claimant had contacted ACAS to continue with his claim and ACAS having confirmed that the settlement was binding so he could not do that.

148. I note that the only entries produced in the medical records between the period 22 January 2021 and 15 February 2021 concerns waking with a headache, tests for spectacles and asking work for a larger computer monitor.

149. Taken at its height the Claimant's medical records do not support with great weight either the Claimant's assertion or his medical report conclusion that his decision making had been impacted by ill-health on 12 February 2021.

150. There is also nothing in the medical records which have been produced suggesting that the Claimant was then or has ever lacked capacity in any respect. There is nothing in the records to suggest that the Claimant may lack or may have lacked capacity at any point in time. The only reference to capacity is contained in the record dated 23 February 2021 which records that the Claimant has capacity.

151. I also note that in the email from the Claimant to the Tribunal 23 November 2021 the Claimant refers to recovering slowly with the help of the crisis team and his GP "before and after agreeing with the COT3" and being in a vulnerable stage.

152. However, I have no evidence concerning when the Claimant engaged with the crisis team. His medical records show that on 9 March 2021 the Claimant was "planning on" engaging with the MWBC (My Well Being College), not that he had done so.

153. I have no independent evidence before me of consultations with or appointments with MWBC around the time of the COT3 agreement or in the month afterwards.

154. I do not accept the Claimant's submission that the Claimant's medical evidence is persuasive and compelling.

155. I find the Claimant's evidence concerning his medical condition at the time of the COT3 agreement to be inconsistent.

156. Considering all of the above matters in the round, in my conclusion on the balance of probabilities, I do not find there to be good cause for concern that the Claimant was incapable of agreeing to the terms of the COT3 and executing the COT3's term to withdraw his employment tribunal claim.

157. I do not find that there is good cause to conclude anything other than that the Claimant suffers from ill-health, anxiety and depression, and was under pressure at the time he entered the COT3 agreement. However these matters are not in my conclusion, on these facts, good cause for concern over the Claimant's capacity.

158. I see no evidence in front of me which would lead me to conclude that there has at any point during these proceedings, or indeed at any time, been circumstances which would amount to good cause for concern as to the Claimant's capacity in any respects whatsoever.

Should an examination be undertaken, should there be a further hearing?

159. In the absence of good cause for concern that the Claimant may lack or may previously have lacked capacity, I would not order any assessment or any further hearing on this matter.

160. The Claimant invites me to make the assessment as to incapacity now. I decline to do so. That is not an issue unless and until there is good cause for concern over the Claimant's capacity and I have already concluded that there is no such good cause.

Has the Claimant's present claim been withdrawn, is it at an end?

161. Absent any good cause for concern over the Claimant's capacity, the Claimant unilaterally withdrew his claim on 12 February 2021 in clear, unequivocal and unambiguous terms. The Claimant's claim in this case is at an end and cannot be revived. ***Kahn*** applied. There has been an effective withdrawal of the claim for the purposes of Rule 51.

Has the Claimant preserved any rights to commence a further claim against the Respondent raising the same, or substantially the same, complaint?

162. No such claims were intimated at the time of withdrawal. None have been intimated during these proceedings. The Claimant has simply sought to 'continue with his claim'.

163. In the absence of an express application to preserve rights to bring a further claim Rule 52(a) is not engaged to prevent a dismissal of the Claimant's claim.

Is it not in the interests of justice to dismiss the claim?

164. I accept that the Claimant felt under pressure at the point in time he settled his case and that he was unwell at the time he did so.

165. I acknowledge that the Claimant wishes to reflect and withdraw from that agreement having taken advice after the agreement was entered.

166. I note again that the Claimant is seeking to continue with his claim but in considering the issue of dismissal under Rule 52, that is not a relevant factor to weigh into the balance.

167. Rule 52 can only serve to allow the Claimant to bring a fresh claim based on the same or similar facts.

168. Such a claim would be considerably out of time. I note that the 'relevant time' for considering the Claimant's disability status was between the period 15 April 2019 and 13 July 2020, which I take as the period over which the Claimant has complaints.

169. I note that the claims have already been settled through ACAS. That is a barrier to future proceedings in this tribunal based on the same or similar facts; there is no suggestion in this matter (except capacity) that the Claimant's claims have not been effectively contracted out in circumstances permitted under Section 144 of the Equality Act 2010.

170. I do not consider that the dismissal of the Claimant's case would represent a 'windfall' to the Respondent. The Respondent's is entitled to regard this matter as concluded under the COT3 settlement reached. If the matter is not dismissed, I would regard it as a windfall to the Claimant, the Respondent having terminated his employment and foregone their opportunity to undertake disciplinary processes, and having paid to the Claimant his settlement money.

171. Having taken all of the circumstances of this case into account, I believe that the issue of a Judgment of dismissal would be in the interests of justice.

172. The Claimant's claim is dismissed under Rule 52.

Employment Judge Knowles

11 January 2022

RESERVED JUDGMENT & RESERVED REASONS
SENT TO THE PARTIES ON

12 January 2022