EMPLOYMENT TRIBUNALS

Claimant: Miss L Marsden

Respondent: The Welsh Netball Association

Heard at: Cardiff Employment Tribunal (hybrid)

On: 26 January 2023

Before: Employment Judge G Cawthray

Representation
Claimant: Mr S Marsden (Claimant's father - not legally qualified)
Respondent: Ms S Harty, Counsel

RESERVED JUDGMENT

1. The Respondent was in breach of clause 6.1.6 of the contract of employment, and should have met the costs of: physiotherapy before the appointment of Ms Dursley; the Claimant's MRI scan and the Claimant's operation on 22 December 2021. To be clear, the Tribunal concludes that the Respondent is not liable for costs of physiotherapy provided other than by Ms Dursley after 3 November 2021, as it does not consider those costs to be losses flowing from a breach by the Respondent.

REASONS

Issues

2. At the outset of the hearing, the Tribunal spent time considerable time discussing both preliminary and substantive issues with the parties.

3. The issues to be determined were discussed and agreed as set out below.

4. The Claimant asserts that the Respondent breached clause 6.1.6 the contract of employment which meant that the Claimant had to pay her own private medical treatment costs.

5. In order to determine whether there was such a breach, a number of issues must be considered:

    a. Was the injury sustained by the Claimant a Player Injury? This requires consideration of whether or not the Claimant was in breach of clause 3.2.2 of the contract of employment, namely whether or not she was authorised to train and play netball at her university, whether she was obliged to play to the best of her skill and ability and maintain fitness and whether the Claimant was in breach of clause 3.3.3 of the contract of employment, namely whether or not she requested consent for medical treatment.

Evidence/Procedure

6. A Bundle had been agreed between the parties and amounted to 257 pages. The day before the hearing the Respondent's representative amended the Bundle to add an additional two-page document, and also re-ordered some of the contents. This meant the Claimant had brought to the hearing a printed Bundle which had different pagination to the electronic Bundle provided to the Tribunal and the Respondent's representative. After much discussion the parties agreed that it was workable for the Claimant to use the earlier version of the Bundle, as it contained all the same documents save for the late addition of a two-page document that they were able to access, and additional time was afforded during the course of the hearing to ensure that all parties, including the Tribunal, were referring to the same document.

7. The Claimant had produced a written witness statement, and gave oral evidence. The Claimant also called an additional witness, Ms Liz Bloor, from the Netball Players Association. Ms Bloor had also produced a written witness statement and gave oral evidence.

8. The Respondent called a Ms Vicki Sutton as its witness. Ms Sutton had a written witness statement and gave oral evidence.

9. Both parties gave closing oral submissions. Neither party identified any case law or specific legislation for the Tribunal to consider. The Respondent's representative was asked if there was any particular case law that they sought to rely on, but stated there was not.

10. The Tribunal explained the process and procedure of giving evidence and making submissions and the importance of bearing in mind the issues for determination.

Facts

11. Set out below are the Tribunal's findings of fact.

<u>The written contract of employment</u>

12. The written contract of employment comprises an offer letter and terms and conditions. There are several key terms within the contract that are relevant to the Claimant's claim, and these are set out in full below.

Key Terms

2. Obligations of the Player

You agree that You will:-

attend Matches in which the Club is engaged;
participate in any Matches in which You are selected to play for the Club;
attend at any reasonable place for the purposes of and to participate in training and Match preparation; and
undertake such other duties and to participate in such other activities as are consistent with the performance of Your duties and as are reasonably required of You.

You agree that you will play to the best of Your skill and ability at all times and that You will maintain a high standard of physical fitness at all times.

3.2 The player agrees:-…

3.2.2 to train and play netball solely for the Club or as authorised by the Club or as required by the Rules, subject to any central contract in place from time to time with Welsh Netball, England Netball or a Governing Body;

3.3 The player agrees that she shall not:-…

3.3.3 except in the case of emergency arrange or undergo any medical treatment without first giving the Club proper (and/or the Club's insurer), details of the proposed treatment and physician/surgeon and requesting the Club's consent (and/or the consent of the Club's insurer where such consent is required) which the Club will not unreasonably withhold having due regard to the provisions of the Code of Practice.

6.1 The Club shall:

6.1.6. promptly arrange appropriate medical and dental examinations and treatment for the Player in respect of any Player Injury and which in case of mental illness shall be limited to the provision of support which is detailed in the Club's policy of medical insurance (details of which shall be provided to the

Player pursuant to clause 6.1.1). The Club shall be responsible for the full cost of required treatment, whether or not this is covered in the medical insurance policy entered into pursuant to the League Rules. This obligation shall continue in respect of any examinations and/or treatment the necessity for which arose during the currency of this Contract notwithstanding its subsequent expiry or termination until the earlier of completion of the necessary examinations and/or prescribed treatment and a period of six months from the date of expiry or termination thereof save that where the Player moves to another Club during such period such cover shall continue subject to the terms of any policy of insurance in place at the Club to which the Player moves;

13.1 This Contract and the documents referred to herein constitute the entire agreement between the Club and the Player and supersede any and all preceding agreements between the Club and the Player.

"Player Injury" shall mean any injury or illness (including mental illness or disorder) sustained by a Player when performing her obligations under this Contract (other than any injury or illness which is directly caused by or results directly from a breach by the Player of her obligations under clause 3.2 of this Contract or of any other of her obligations which amount to Gross Misconduct.

Discussions and understandings regarding contract and playing netball

13. At the relevant times, namely September 2021 to April 2022, the Claimant was a fifth-year medical student at the University of Birmingham.

14. The Claimant was a keen netball player, and played to a good standard. The Claimant played for her university team, which had been coached by Ms Danni Titmuss-Morris. The Claimant had also previously played for the Wasps, which was also coached by Ms Titmuss-Morris.

15. During the summer of 2021, Ms Titmuss-Morris, who was at this time the Head Coach of Celtic Dragons, approached the Claimant about her joining the Celtic Dragons. The Celtic Dragons is a Superleague netball team based in Cardiff that is owned and operated by the Respondent. Ms Titmuss-Morris was responsible for identifying and bringing on board potential players. The Claimant attended a Celtic Dragons training session in September 2021 to assist her in reaching a decision on whether to join the team as a paid employee.

16. Ms Titmuss-Morris is still employed by the Respondent, but was not called as a witness by the Respondent.

17. As Head Coach of the university team, Ms Titmuss-Morris was fully aware that the Claimant played netball for her university. The Tribunal accepts the Claimant's evidence that prior to signing a contract of employment she had various conversations with Ms Titmuss-Morris during the summer/early autumn

of 2021 in which she clearly indicated that she wished to continue playing for her university netball team, should she decide to join Celtic Dragons.

18. The Tribunal also accepts the Claimant's evidence that at no time prior to being provided with a contract of employment, or after, was she given any information by Ms Titmuss-Morris, or anyone else at the Respondent, about the need to obtain any specific form of authorisation to continue playing for her university team.

19. The Claimant understood, based on the discussions that she had with Ms Titmuss-Morris, that she was permitted to continue playing for the university and that she was encouraged to do so by Ms Titmuss-Morris.

20. The Claimant was employed by the Respondent as a Netball Player. On 27 September 2021, after reading the contract, the Claimant signed a contract of employment. The contract commenced on 1 October 2021 and was for a fixed period of 10 months.

21. The contract is based on a standard template produced by England Netball. The Claimant's contract was prepared and issued by Ms Vicki Sutton. Ms Sutton commenced the role of CEO on 1 December 2021, but was employed by the Respondent in other roles prior to this date. The standard template is populated with the players details.

22. The Claimant's contract specifies her line manager was Sarah Palmer, but contact was with Ms Titmuss-Morris, both during the pre-employment recruitment phase and subsequently.

23. Ms Sutton, in oral evidence, stated that Ms Titmuss-Morris informed her in December 2021 that she had not consented for the Claimant to continue playing netball for her university team. This detail was not set out in Ms Sutton's witness statement. The Tribunal find that this is what Ms Sutton believes she was told, but there is no corroborative evidence.

24. Ms Sutton explained that there was no set process for players obtaining authorisation, there was no guidance, policy or form.

25. Ms Sutton also explained that authorisation for players to play for other clubs is given by Ms Titmuss-Morris. The decision as to whether a player is permitted to train with and play for another club or not rests with Ms Titmuss-Morris.

26. Ms Sutton, in oral evidence, referenced two players who had sought permission via email to play for clubs other than Celtic Dragons. However, these emails had not been disclosed and were not in the Bundle. The Tribunal is not able to reach any finding of fact on the content or date of such emails.

27. The Claimant explained in oral evidence that she had a friend, who also played for Celtic Dragons and studied at the University of Birmingham and played for the university team, and that she questioned her friend about the approval she had obtained to continue playing for the university and that her friend told her

she had discussed the matter with Ms Titmuss-Morris and no written approval or formal permission had been given.

28. The Tribunal accepts the evidence of Ms Bloor that there is a widespread practice of players engaged by Superleague teams playing for other teams, typically at the players local or university club. The Tribunal is unable to make any specific findings in relation to how other clubs operate any authorisation process but accepts Ms Bloor's evidence that she is not aware of any formal authorisation process but considers the usual approach is by discussion with the team coach.

29. The Tribunal accepts that, based on the conversations the Claimant had with Ms Titmuss-Morris, she understood that Ms Titmuss-Morris had no concerns with the Claimant continuing to play for her university team and that as she had not been told that she could not, she considered she had consent to do so.

30. The Claimant believed that she had done all that was necessary to continue to play netball with her university team and firmly believed that she was permitted do so, even after signing the contract of employment.

<u>The injury</u>

31. The Claimant's first training session with Celtic Dragons was due to take place on 5 October 2021.

32. On 4 October 2021 the Claimant attended a netball training session at her university at which she injured her knee. The following day, 5 October 2021, the Claimant booked and attended a physio appointment in Birmingham, where she lived and studied.

33. The Claimant contacted Ms Titmuss-Morris by message, on 5 October 2021, to say that she had injured her knee the previous evening at university training and had seen a physio and thought that she had soft tissue damage. She also stated she would see the physio again the next week. Ms Titmuss-Morris did not reply to the message.

34. The Claimant sent a further text message to Ms Titmuss-Morris on 11 October 2021 to notify her she was still not able to train, but would attend the session. The following day Ms Titmuss-Morris and the Claimant exchanged text messages about the situation. Nothing in the text messages in the Bundle on 12 October 2021 indicate that Ms Titmuss-Morris was concerned by the Claimant having attended a local physio, indeed Ms Titmuss-Morris asked the Claimant how her physio appointment went and stated *"Is this Dan at UoB you're seeing?".* The Claimant replied *"No it's Mike Garmston who Georgia recommended".* In response Ms Titmuss-Morris stated *"Ok cool – thanks lou".*

35. There are further text messages, although from the copies in the bundle the dates are not all clearly identifiable. It appears a telephone discussion took place between the Claimant and Ms Titmuss-Morris on 26 October 2021.

36. The Claimant commenced rehabilitation exercises as recommended to her by Mike Garner.

37. The Claimant was not given any guidance by Ms Titmuss-Morris, the person she had contact with at the Respondent, on she should manage seeking advice and treatment for her injury. She was not told that she should manage the situation differently and was not directed to the Chief Medical Officer.

38. At the time the Claimant injured her knee the Respondent did not employ a physio. A physio, Beth Dursley, was appointed and commenced work for the Respondent in early November 2021. The Respondent employed a Chief Medical Officer, Mr Angus Robertson, who was also a knee specialist. However, the Claimant was not made aware of this by Ms Titmuss-Morris (or anyone else at the Respondent) and was not referred to see Mr Robertson until after Ms Dursley commenced employment.

39. The Claimant spoke with Ms Dursley on 3 November 2021 and had a face-to-face meeting with her on 9 November 2021. The Claimant informed Ms Dursley of the rehabilitation exercises that she had been told to do and that she had been privately referred for an MRI scan. Ms Dursley noted this had been arranged by the Claimant, and not the Respondent.

40. On 5 November 2021 the Claimant, via text message, told Ms Titmuss-Morris that she had booked an MRI for the following week. Ms Titmuss-Morris replied *"That awesome news!!".*

41. The Claimant attended physio appointment with Ms Dursley on 9 November 2021. It was discussed again that she was seeking an MRI. Based on the notes and messages, there appears to have been no objection to the Claimant having an MRI scan.

42. On 15 November 2021 the Claimant informed Ms Titmuss-Morris and Ms Dursley of the results of her MRI scan and that she would see physio again to see what that meant. Ms Dursley replied on 15 November 2021 asking the Claimant if she was going for an orthopeadic opinion.

43. At some point shortly prior to 17 November 2021 Ms Titmuss-Morris stated, in response to the Claimant informing her that she was due to see the physio, *"Yep, absolutely fine – just keep me and Beth in the loop [fingers crossed emoji]".*

44. Following a physio appointment, the Claimant updated Ms Titmuss-Morris further via text message on 17 November 2021, explaining that the physio felt there was no immediate need for surgery, that she should continue with strengthening exercises, but also that she was trying to get an orthopaedic opinion to cover all bases. Ms Titmuss-Morris replied the same day and the key responses were that she told the Claimant to make sure she mentions she plays netball, to link in with Beth (Ms Dursley) and to arrange a catch up. A

telephone discussion appears to have taken place between the Claimant and Ms Titmuss-Morris at some stage between 17 and 23 November 2021.

45. Following the Claimant's private MRI scan Ms Dursley liaised with Mr Robertson, who also reviewed the scan results. The Claimant attended a consultation with Mr Robertson, on a free from charge basis, on 25 November 2021. At the consultation the Claimant and Mr Robertson discussed surgery being required, and Mr Robertson noted at that stage the Claimant informed him of her preference to try and continue with rehabilitation. The letter records the fact the Claimant informed Mr Robertson that she did not have private medical insurance. Mr Robertson had informed the Claimant that he would not undertake the surgery due to location, as an operation would be better at her home or close to her parents.

46. Prior to attending Mr Robertson the Claimant liaised with Ms Dursley, and informed Ms Dursley she did not have private health insurance.

47. The Claimant also attended a Celtic Dragons team bonding evening on 25 November 2021.

48. A telephone discussion appears to have taken place between the Claimant and Ms Titmuss-Morris on 29 November 2021.

49. On 29 November 2021 the Claimant, via text message, informed Mr Dursley that she had decided to contact a surgeon in Leeds and asked for Mr Robertson's number so that she could contact him and discuss. Ms Dursley passed the Claimant's contact details to Mr Robertson so that he could contact the Claimant. Although the Claimant referenced speaking with Mr Robertson, there was no corroborative evidence to be able to determine whether or not Mr Robertson contacted the Claimant or not after this date.

50. The Claimant spoke with a friend about her injury, and was becoming increasingly concerned about her recovery, particularly given that she was in her final year at medical school and had a job as a junior doctor lined up for the summer of 2022. She booked a private appointment with an orthopedic surgeon in Leeds, near her mother's house, in order to get a second opinion and attended an appointment with Mr Nick London on 9 December 2021. Mr London recommended reconstructive surgery.

51. The Claimant informed Ms Dursley and Miss Titmuss-Morris via text message on 9 December 2021 that she had been advised to have an operation and that it was booked for 22 December 2021. Ms Dursley replied to the message, assuring the Claimant they would work together on her rehab. The Claimant attend a pre-season event in Manchester with the Celtic Dragons on 10 and 11 December 2021.

52. A discussion took place between the Claimant and Ms Titmuss-Morris on 13 December 2021 regarding arrangements for payment of her operation. Ms Titmuss-Morris, in a text message following the discussion, informed the Claimant that the VNSL insurance runs from 1 November and therefore she

wasn't covered. There is no evidence to suggest that Ms Titmuss-Morris and Ms Dursley did not agree to the Claimant undertaking the operation.

53. The Claimant followed up the next day, 14 December 2021, querying the contract terms and asked Ms Titmuss-Morris if she should contact Sarah Palmer or Ms Sutton.

54. It appears the Claimant spoke with Ms Titmuss-Morris on 20 December 2021, prior to her operation, and the Claimant also sent clause 6.1.6 of the contract of employment to Ms Titmuss-Morris via text message on 20 December 2021. The Tribunal finds that it was likely that the Claimant raised concerns about payment for her operation during her telephone call with Ms Titmiss-Morris on 20 December 2021.

55. The Claimant attempted to contact both Ms Palmer and Ms Sutton, but Ms Palmer was on annual leave and although a call was arranged with Ms Sutton for 23 December 2021, the day after her operation, the call never took place.

56. The Claimant regularly updated Ms Titmuss-Morris, and also Ms Dursley from 3 November 2021 via messages and telephone calls and was open about the treatment she had sought and was receiving.

57. There is no reference in any text message within the Bundle from Ms Titmuss-Morris, or anyone else at the Respondent, indicating or stating that the Claimant was not covered by insurance due to the fact the injury occurred whilst training at university, nor were any concerns raised about how the injury occurred until after the Claimant sought reimbursement.

58. The Tribunal accepts the Claimant's evidence that, save for what is stated in the contract of employment, she was not given any guidance or advice about managing treatment and medical appointments or expenditure by the Respondent.

59. Following her operation, the Claimant was in contact with Ms Dursley.

60. The Claimant's employment was terminated on grounds of incapacity on 23 April 2022, after being informed that she was being deregistered and served notice in 23 February 2022. The Respondent commenced VNSL de-registration in early February 2022.

<u>Insurance arrangements</u>

61. At the date of commencement with the Respondent, the Respondent had in place an insurance policy with Howden Group.

62. On 16 December 2021 the Respondent confirmed the provision of a Sports Key medical insurance with the Vitality Netball Super League (VNSL). This covered

all the athletes apart from the Claimant. This policy covered employees of the Respondent for any netball activity, not just VNSL.

63. Following her operation on 22 December 2021, the Claimant contacted the Netball Players Association to seek assistance in recovering her medical costs.

64. Ms Bloor, Netball Players Association, corresponded with Ms Sutton regarding the Claimant's situation in January and February 2022.

65. The VNSL has regulations that the Superleague teams must adhere to, the relevant rule regarding insurance is set out below:

    Part 1, Section A Rule 9.3 –
    Medical:

    9.3 All Teams must have Medical Insurance cover for all Registered Players, Replacement Players, Training Partners and Replacement Training Partners but not Temporary Replacement Players. This policy will be administered centrally by the Board (on behalf of England Netball), with all such Players required to be a part of this scheme except where specific exemptions exist (e.g. Players covered by BUPA scheme as part of Roses programme or TASS, or the medical provision provided for Scottish Thistle players through the Scottish Institute of Sport).

66. The Respondent was considered to be in breach of the VNSL regulations by not having in place appropriate medical insurance for the Claimant. It was determined that the Respondent had not put in place the recommended medical insurance scheme, and was fined in this respect. The Respondent sought to appeal the fine but was out of time.

67. In an email from Ms Sutton to Ms Bloor, Ms Sutton states made enquiries with what she references as NGB insurers. It is not clear which provider Ms Sutton is referencing.

Law

68. The Employment Tribunal has the power to deal with breach of contract claims outstanding on the termination of employment under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

69. A breach of a contract of employment occurs when a party fails to fulfil an obligation imposed by the terms of the contract.

70. A breach of contract gives the innocent party the right to sue for damages — i.e. financial compensation for losses flowing from the breach. The general principle applicable to all types of claim for breach of contract is that damages

should return the innocent party to the position that party would have been in, but for the breach.

71. There are a wide variety of ways in which a contract can be breached.

72. The parties did not direct the Tribunal to any legislation or case law but the Tribunal, in order to reach its conclusions, has considered the legal principles, and in particular the following cases:

Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC

White v Bristol Rugby Ltd 2002 IRLR 204, QBD

Bushaway v Royal National Lifeboat Institution 2005 IRLR 674, EAT

Cosmos Holidays plc v Dhanjal Investments Ltd 2009 EWCA Civ 316, CA.

Arnold v Britton and ors 2015 AC 1619, SC

Campbell v British Airways plc EAT 0015/17

Conclusions

73. The Claimant asserts that the Respondent breached clause 6.1.6 the contract of employment meaning that the Claimant had to pay her own private medical treatment costs.

74. As set out in the Issues above, in order to determine whether there was such a breach, a number of issues must be considered.

Player Injury

75. Considering whether or not the injury falls within the definition of Player Injury firstly involves determination of whether or not the Claimant was in breach of clause 3.2. Put simply, the Respondent asserts that the Claimant was in breach of clause 3.2 because she was not authorised to play for her university team, and therefore the injury was in consequence of the Claimant's breach.

76. It is worth repeating clause 3.2.2:

3.2.2 to train and play netball solely for the Club or as authorised by the Club or as required by the Rules, subject to any central contract in place from time to time with Welsh Netball, England Netball or a Governing Body.

77. The Respondent maintains that authorisation was not given, and that authorisation requires action, that it is not passive.

78. The Tribunal's findings of fact are set out above. There are no set or clear processes defining how authorisation is given, but the Respondent accepts that it is Ms Titmuss-Morris who gives authorisation on the part of the Respondent.

79. When considering a standard online dictionary definition of the word authorised the Tribunal notes the word authorised means officially permitted or empowered.

80. In all of the circumstances of this case, bearing in mind the Claimant had discussions with Ms Titmuss-Morris, the employee representing the Respondent in dealings with the Claimant, the fact there was no established or particular form that authorisation must have been set out in and that the Claimant was encouraged to continue playing for her university team it is concluded that the Claimant was, before she signed the contract of employment, authorised by the Respondent to train and play for her university team.

81. The Respondent further argues that any conversations that took place between Ms Titmuss-Morris and the Claimant were not legally relevant due to the existence of an entire agreement clause at clause 13.1 of the contract of employment, again set out below for ease of reference.

    13.1 This Contract and the documents referred to herein constitute the entire agreement between the Club and the Player and supersede any and all preceding agreements between the Club and the Player.

82. It must be determined whether the authorisation given to the Claimant prior to her signing the contract of employment does not stand following signature of the contract containing the above entire agreement clause.

83. It is necessary to set out some general information about the operation of contracts of employment.

84. Contracts of employment are made up of a variety of terms and conditions which set out the obligations of the parties. Ideally the contract will be a comprehensive document which sets out clearly all the significant terms of the employment relationship. In practice, however, this is not usually what happens. Contracts may be partly written and partly oral. Even where there is one document described as 'the contract', it will rarely contain all the terms that govern the relationship. Contractual terms may be come from a variety of sources. A contract is usually made up of express terms, implied terms and statutory terms but may also contain terms incorporated from other documents, such as works rules.

85. If express terms are wholly in writing, then deciding what they mean is simply a matter of interpreting the document containing them. This is subject to two exceptions. The first is where it is alleged that the written agreement mistakenly fails to reflect an earlier oral agreement or a continuing common intention, so that the written agreement should be 'rectified', and the second is where the

parties have a common intention to mislead as to the true nature of their rights and obligations under the contract, i.e. the contract is a sham. In all other circumstances, the general rule is that communications outside the written contract may provide context and background but may not be substituted for the terms of the written agreement itself.

86. The Supreme Court in *Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC*, acknowledged that employment contracts are an exception to ordinary contractual principles as the circumstances under which they are agreed are often very different from those under which commercial contracts are agreed, as employers are largely able to dictate the terms. The Court held that *'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.*

87. When interpreting the express terms of a contract, the court or tribunal's aim is to give effect to what the parties intended. In ascertaining intention the words of the contract should be interpreted in their ordinary sense in context.

88. The correct interpretation of employment contracts requires that 'the particular provision must be construed in the context of the clause as a whole, and the clause itself must be construed in the context of the contract as a whole, which must in turn be considered in its factual matrix or against the circumstances surrounding it' as set out in *Cosmos Holidays plc v Dhanjal Investments Ltd 2009 EWCA Civ 316, CA.*

89. In *Arnold v Britton and ors 2015 AC 1619, SC*, Lord Neuberger summarised the general principles that apply to the interpretation of express contractual terms thus: 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [above]. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contractual agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.' This case concerned the interpretation of a service charge clause in a holiday lettings agreement, however, Lady Wise confirmed in *Campbell v British Airways plc EAT 0015/17* that Lord Neuberger's observations applied equally to the interpretation of pay terms within an employment contract.

90. It is unusual for express terms to represent the sole source of all the terms relevant to a contract of employment. However, there is nothing to prevent the parties from inserting a clause — known as an 'entire contract' or 'entire

agreement' clause — which stipulates that their entire bargain or agreement is contained within the four corners of the written contract. The purpose of such a clause is to ensure that any oral or written representations, and/or any terms that might otherwise be incorporated from extrinsic sources, do not form part of the contract of employment.

91. In *White v Bristol Rugby Ltd 2002 IRLR 204, QBD*, a professional rugby player signed a three-year contract to move from his previous club to a new club run by BR Ltd. The contract expressly stated that it was subject to an 'entire agreement' clause, with the consequence that no oral representations made in the course of negotiations applied in respect of its express terms and conditions. The agreement also provided for a £15,000 salary advance on signing. The claimant in that case later decided not to join Bristol Rugby Ltd and asserted that he had been told during pre-contract negotiations that he could opt out of the contract on repayment of the salary advance. The club, however, refused to accept the repayment and the claimant sought a declaration in the High Court that he was not bound by the contract and that he was not required to play for the club. Refusing this application, the High Court held that the 'entire agreement' clause prevented the claimant from relying on the oral opt-out term.

92. In the present case, it has been found that the Claimant was given authorisation to continue to train and play for her university club prior to signing the contract. Further, as set out above, at no time until after the Claimant requested payment for her medical treatment did anyone at the Respondent raise any concerns or explain to the Claimant that she was not authorised to train and play for her university. However, the contract does contain a clear "entire agreement" clause.

93. When considering application of an "entire agreement" clause, it is necessary for a Tribunal to examine the reality of the contractual dealings between the parties and be satisfied that the written contract accurately represents the whole arrangement.

94. If there are inconsistencies in the way the contract is performed in practice, then the entire contract clause may be held not to be conclusive, as was the case in *Bushaway v Royal National Lifeboat Institution 2005 IRLR 674, EAT* in which the EAT held that the entire agreement clause was not, in that case, conclusive when the written agreement was looked at in the context of what was actually negotiated and how it operated in practice, it was clear that it did not reflect the entire bargain between the parties. It was therefore permissible to look beyond the written terms of the agreement when determining the question at hand.

95. It is important to note that the contract in this case is an industry template, and the version given to the Claimant was simply populated with the Claimant's details by staff employed by the Respondent other than Ms Titmuss-Morris.

96. As set out in the finding of fact above, not only did Ms Titmuss-Morris in conversations permit and encourage the Claimant to continue to train and play for her university team but the operation within the Superleague involves

players at both the Respondent and other Superleague teams training at and playing for other teams. The Respondent has no established procedure or form for authorising training and playing at other clubs, and the decision rests with Ms Titmuss-Morris. The contract permits training and playing netball outside of the Respondent with authorisation. In this case, it was found that there was intention for the Claimant to be permitted to train and play elsewhere. Although the Claimant suffered an injury very soon after signing her contract, no concerns at all were raised about her inuring herself whilst training at university, thus reinforcing the position she had authorisation to do so and demonstrating this was how the contract operated in practice.

97. Accordingly, in this case, it is concluded that due to the inconsistencies between what is set out at clause 13.1 and the operation of the contract in practice, the entire agreement clause is not conclusive.

98. It is concluded that the Claimant had authorisation to train and play netball. The Claimant was not in breach of clause 3.2.

99. The next question to consider in order to determine whether the injury occurred by the Claimant falls within the definition of Player Injury is whether the injury was sustained when performing her.2 obligations under the contract.

100. *"Player Injury" shall mean any injury or illness (including mental illness or disorder) sustained by a Player when performing her obligations under this Contract (other than any injury or illness which is directly caused by or results directly from a breach by the Player of her obligations under clause 3.2 of this Contract or of any other of her obligations which amount to Gross Misconduct*

101. The Claimant's position is that she was required by the contract to keep fit and active and play netball to the best of her ability. She maintains this obligation was met by her playing netball outside of Celtic Dragons.

102. The contract of employment sets out the obligations on the Claimant as below.

2. Obligations of the Player

You agree that You will:-

attend Matches in which the Club is engaged;

participate in any Matches in which You are selected to play for the Club;

attend at any reasonable place for the purposes of and to participate in training and Match preparation; and

undertake such other duties and to participate in such other activities as are consistent with the performance of Your duties and as are reasonably required of You.

You agree that you will play to the best of Your skill and ability at all times and that You will maintain a high standard of physical fitness at all times.

103. In the context of the operation of the Superleague teams, namely that most players play for other clubs, and in consideration of the words "*you will play to the best of Your skill and ability at all times and that You will maintain a high standard of physical fitness at all times"* the Tribunal consider that it is reasonable to conclude that attending authorised netball training falls within a commitment made by the Claimant to enable her to play to the best of her skill and ability and to maintain a high standard of physical fitness in accordance with the Obligations of the Player, as set out above.

<u>Arrangements for Medical Treatment</u>

104. The Respondent further submits that the Claimant was in breach of clause 3.3.3 for not requesting the consent of the Respondent prior to arranging or undergoing medical treatment, thus meaning that it is not liable to pay for any medical treatment. As set out in the findings of fact above, the Claimant attended physio appointments, had an MRI and underwent an operation on her knee.

105. Clause 3.3.3 states:

3.3 The player agrees that she shall not:-…

3.3.3 except in the case of emergency arrange or undergo any medical treatment without first giving the Club proper (and/or the Club's insurer), details of the proposed treatment and physician/surgeon and requesting the Club's consent (and/or the consent of the Club's insurer where such consent is required) which the Club will not unreasonably withhold having due regard to the provisions of the Code of Practice.

106. Clause 6.1.6 states:

6.1 The Club shall:

6.1.6. promptly arrange appropriate medical and dental examinations and treatment for the Player in respect of any Player Injury and which in case of mental illness shall be limited to the provision of support which is detailed in the Club's policy of medical insurance (details of which shall be provided to the Player pursuant to clause 6.1.1). The Club shall be responsible for the full cost of required treatment, whether or not this is covered in the medical insurance policy entered into pursuant to the League Rules. This obligation shall continue in respect of any examinations and/or treatment the necessity for which arose during the currency of this Contract notwithstanding its subsequent expiry or termination until the earlier of completion of the necessary examinations and/or prescribed treatment and a period of six months from the date of expiry or termination thereof save that where the Player moves to another Club during

such period such cover shall continue subject to the terms of any policy of insurance in place at the Club to which the Player moves;

107. Dealing first with the issue of requiring consent. The Respondent contents that the Claimant was in breach of clause 3.3.3 as she did not request consent before arranging or undergoing medical treatment.

108. The contract does not specifically set out how consent must be requested, nor does it set out how consent must be given.

109. Also noting that the contract does not set out how clause 3.3.3. and 6.1.6 operate together. Clause 3.3. sets out what the Claimant shall not do, whereas clause 6.1 sets out what the Respondent must do. The clauses do not reference each other, and therefore arguably, they operate independently, meaning that the obligations on the Respondent as set out in clause 6.1.6. apply regardless of any consent given under clause 3.3.3.

110. A material breach can make a contract void, and render terms unenforceable.

111. The Respondent emphasized in it's submissions that there is a difference between informing and obtaining consent. The contract, at 3.3.3, requires the Claimant to give details of the proposed treatment and request the Respondent's consent (which was not to be unreasonably withheld).

112. A standard online dictionary definition of requesting is – asking politely or formally for something. A standard online dictionary definition of consent is – permission for something to happen or agreement to do something.

113. The contract does not set out any particular method or form of making a request.

114. Other than the initial physio appointment, the Claimant provided regular and clear details of proposed treatment. Ms Titmuss-Morris and Ms Dursley were regularly engaged by the Claimant and were aware and seemingly supportive of the steps the Claimant was taking.

115. The Claimant was given no guidance about how to manage the situation and was not told of the potential consequences of her arranging and seeing a local physio.

116. Although the Claimant promptly sought an immediate physio appointment on 5 October 2021, the day following her injury, she did so in a situation where the Respondent had no physio in place at the time. The Respondent, at that stage, or in the weeks after, could have advised the Claimant to approach the matter differently. It could have told her that if she did not follow a particular process the Respondent may not be responsible for costs. It did not give the Claimant any such direction or information.

117. In regards to the first physio arrangement, the Claimant clearly did not

request consent. The Respondent made no submissions on whether or not at that stage the injury was an emergency. Based on the information regarding the injury, the Tribunal does not consider it to have been an emergency, but considers the Claimant took sensible, prompt pragmatic steps to see someone close to where she lived.

118. She did however thereafter provide details of the proposed treatment and physio arrangements. The Respondent submits that the Claimant only informed, and did not request consent.

119. When looking at the message communications, and considering the Claimant's evidence, the Tribunal considers it is reasonable for the Claimant to conclude that the Respondent was consenting to her actions, and although she did not specifically use wording such as "I request", the context and detail of the messages are important, noting that she was given suggestions and points to relay to medical practitioners and was discussing the situation.

120. In regards to the operation, it is clear the Claimant did make a request by querying the provision of clause 6.1.6 before undergoing treatment.

121. Prior to her operation, Ms Titmuss-Morris told the Claimant the operation was not covered by the Respondent's insurance. She was not told that the costs of the operation would not be covered because the injury was not considered to be a Player Injury or because she was considered to be in breach of 3.3.3. Indeed, according to the ET3 - Grounds of Resistance it was not until 11 January 2022 that the Respondent reported the Claimant's injury to its insurer. The Claimant was not told that the Respondent did not consent to

122. Indeed, the Respondent, after the appointment of Ms Dursley did provide treatment to the Claimant, and there was no indication from Ms Dursley that the injury was not considered a Player Injury.

123. There is no evidence of an established process for reporting injuries and requesting consent for treatment. In the circumstances, the Tribunal does not consider the actions taken by the Claimant to be a material breach of the contract, and considered in the full context, the Claimant took sensible steps.

124. The matter of payment/meeting costs is different to that of consent.

125. The Respondent could and should have taken, at least from 5 October 2021 after her first physio appointment, responsibility for planning, managing and providing, notwithstanding the fact that in the early stages it did not employ its own physiotherapist.

126. The obligation on the Respondent to promptly provide medical examination and treatment between 5 October and 3 November 2021 was not met. Although the Claimant had made very prompt arrangements for a first physio appointment on the day after her injury, the Respondent did not at that point step in and arrange for treatment. The Respondent appears to have had

a Chief Medical Officer, but she was not informed of this and was not directed to him until after Ms Dursley's appointment in November 2021. In this respect the Tribunal concludes that the Respondent was in breach of 6.1.6 of the contract of employment.

127. The Respondent did provide physio support for the Claimant from 3 November 2021, but the Claimant also continued to see a physio based in Birmingham. As the Respondent was at this stage providing medical treatment, in regards to physio the Tribunal does not consider there to be a breach in respect of physio treatment required from 3 November 2021, as the necessary treatment could have been, and to some extent was, undertaken internally. The Tribunal can understand why the Claimant may have wished to continue to see Mr Garmston locally, and is not criticized for doing so, particualy in view of the fact the management and responsibility for treatment was not clear. However, she did not query how such continuing physio treatment would be paid for or make any requests in this respect.

128. The Claimant made the Respondent aware that she was being referred for an MRI, and again did not take any actions to assume responsibility for this or suggest an alternative route.

129. Clause 6.1.6 not only places an obligation on the Respondent to arrange for medical treatment, it also requires the Respondent to meet the costs: "*The Club shall be responsible for the full cost of required treatment, whether or not this is covered in the medical insurance policy entered into pursuant to the League Rules".*

130. The Claimant had initially tried a conservative and rehabilitative approach, but after recommendation that surgery take place, she opted for surgery. Indeed, surgery was envisaged as an option by the Respondent's Chief Medical Officer and the Claimant was aware he would not operate.

131. The Claimant's submission is that the Respondent's position in this litigation is driven by the fact that the Claimant was not properly insured under the appropriate VNSL scheme. Although the Respondent had insurance with the Howden Group this was not compliant with the VNSL rules, as evidenced by the fact the Respondent was later fined in this respect. The Claimant should have been appropriately insured and the Tribunal notes that the VNSL compliant scheme covers all netball activity. The Claimant's position is that if the appropriate insurance had been in place, the Respondent would have paid for her treatment.

132. The Tribunal notes that the reason given by the Respondent for non-payment of her operation was that she was not covered by insurance.

133. Clause 6.1.6 obliges the Respondent to pay for the full cost of the requisite treatment, regardless of whether or not it is covered by insurance. If

the Claimant had been properly by the VNSL insurance scheme it seems likely that the insurance would have paid for the treatment, but that is not an issue for this Tribunal. The contract requires the Respondent to be responsible for the full cost of the required treatment whether or not it is covered by the insurance required by the VNSL.

134. Accordingly, the Tribunal concludes that the Respondent was in breach of clause 6.1.6, and should have met the costs of physiotherapy before the appointment of Ms Dursley, the Claimant's MRI scan and the Claimant's operation on 22 December 2021. To be clear, the Tribunal concludes that the Respondent is not liable for costs of physio therapy provided other than by Ms Dursley after 3 November 2021, as it does not consider those costs to be losses flowing from a breach by the Respondent.

135. A separate remedy hearing will be listed.

Employment Judge G Cawthray

Dated 10 March 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 13 March 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche