EMPLOYMENT TRIBUNALS

Claimant: Mr N Schofield

Respondents: Mr P Dawson (1)
Mr J Dawson (2)

Heard at: Manchester (by CVP) **On:** 15 May 2023

Before: Employment Judge Allen
(sitting alone)

REPRESENTATION:

Claimant: Mr M Ferron, Advocate
Respondents: Mr P Dawson (one of the respondents)

JUDGMENT

The judgment of the Employment Tribunal is that:

- the Employment Tribunal does not have jurisdiction to hear the claimant's claim against the respondents as a result of the ACAS COT3 agreement which he entered into with them on 21 September 2022. The claim for victimisation is dismissed.

REASONS

Introduction

1. The claimant was employed by Bolton Textiles Group Limited from 16 July 2007 until 29 March 2018. The claimant previously brought an Employment Tribunal claim against that company and the two respondents to this claim, for unfair dismissal and disability discrimination. That claim was concluded by way of an ACAS COT3 agreement. The case number was 2414841/2018. The COT3 agreement was agreed on 1 September 2022 and signed on 26 and 27 September 2022.

2. Following the conclusion of the COT3 agreement, the company (Bolton Textiles Group Limited) entered into liquidation. The claimant alleges that the respondents in this claim settled the first claim when they knew that Bolton Textiles Group Limited were going to be entering into liquidation, because there had been a petition for liquidation on 30 August 2022. The respondents in this claim contend that liquidation of the company arose as a result of an application from a third party.

3. The claimant alleges that the respondents to this claim victimised him pursuant to Section 27 of the Equality Act 2010 by purposefully settling that claim. In the victimisation claim, the claimant relies upon the previous Employment Tribunal claim as being the protected act.

4. Since the COT3 agreement, I understand that the claimant has obtained a County Court Judgment and a High Court Enforcement Order against the two respondents to this claim, for the sums due under the terms of the COT3 agreement. No sums have yet been paid to paid him. The first respondent (Mr Philip Dawson) has now entered into bankruptcy. The second respondent (Mr Joshua Dawson) remains solvent.

The Issue for this Preliminary Hearing

5. A previous Preliminary Hearing (Case Management) took place on 29 March 2023 before Employment Judge Ross. The Case Management Order made following that hearing recorded (in relation to this hearing) that:

> *"the purpose of the hearing is to determine whether or not the Tribunal has jurisdiction to hear the claimant's claim for victimisation. The issue is whether the ACAS conciliated agreement on case number 2414841/2018 bars the claimant from bringing a victimisation claim"*.

6. At the start of this hearing the parties agreed that what was recorded in the previous case management order was the issue I was being asked to determine at this hearing.

Procedure

7. The claimant was represented by Mr Ferron, an Advocate (but not a qualified solicitor or barrister). The respondents were both represented by one of the respondents (Mr P Dawson), being the father of the other respondent.

8. The hearing was conducted by CVP remote video technology.

9. In advance of the hearing, the claimant had provided a bundle of documents which ran to 57 pages and included a copy of the previous signed COT3 Agreement. The respondent had provided a complete copy of one of the response forms to the claim, which had previously been provided incomplete (with the incomplete version having been included in the bundle).

10. In advance of the hearing, the claimant's representative provided a written submission document, and the respondents provided a document prepared in response.

11. Prior to the start of the hearing, I read the contents of the bundle and each of the documents prepared.

12. At the start of the hearing, the issue of the first respondent's bankruptcy was raised with the parties. The parties were asked whether the case should technically be stayed in the light of the bankruptcy. Neither party had undertaken a detailed analysis of the first respondent's position in the proceedings in the light of having been declared bankrupt. It was also not entirely clear how the bankruptcy had come about (and technically under what provisions/arrangements). I noted that, in any event, the second respondent was not bankrupt and therefore the case would be able to proceed against him. I made the pragmatic suggestion that, at this hearing, I would determine the preliminary issue which had been identified as it applied to both respondents. I emphasised that the parties would need to consider the first respondent's bankruptcy, and the impact that it had on the proceedings, following the hearing. The parties agreed to that approach. The first respondent agreed to provide to the Tribunal and the claimant the specific documents regarding his bankruptcy, following the hearing (which he has now done).

13. I heard submissions from the claimant's representative about why he believed that the Tribunal had jurisdiction to consider the claimant's claim. I also asked the representative some questions. I then heard submissions from the first respondent (on behalf of both respondents) as as to why he said the claim should not be allowed to proceed.

14. I noted that part of the key wording from the COT3 Agreement which needed to be considered, referred to the subject matter of the previous claim. I had not been provided with the relevant documents from the previous claim. The claimant's representative agreed to provide the claim form and response forms for the previous claim, together with a copy of the relevant Case Management Order. Both parties agreed that I could consider those documents when making my decision.

15. In his submissions, the claimant's representative referred to some case law. In the Case Management Order which she had made, Employment Judge Ross had also explicitly referred to a list of authorities (cases) that she believed might be relevant. I confirmed that I would consider all of those cases, before reaching my decision. The parties agreed that I could do so.

16. The case had been listed for a three-hour hearing to determine the issue. In the light of the fact that (after submissions) the respondent needed to locate and provide the documents which related to the previous claim, and I needed to look at those documents and the authorities, the parties agreed that it was sensible for the judgment to be reserved. It was explained to the first respondent that if he disagreed with the documents sent by the claimant he could say so, but he would need to do so quickly after he had seen the email which sent those documents. The claimant's representative has sent me the documents which he said he would about the previous claim. The first respondent responded by suggesting that the content of what had been sent was a little shy, but he has not subsequently provided any additional documents. I have read the documents provided.

17. In this document I have provided my judgment and my reasons. At the end of the hearing, the claimant's representative emphasised that this judgment may be relevant to a forthcoming hearing in the previous claim (2414841/2018) which is listed to be heard on 7 June 2023 (I believe it is due to determine a costs application). I have not been provided with the papers relevant to that application, but I understand that this judgment may be referred to in that hearing and I have endeavoured to ensure that the Judgment has been provided early enough for it to be available for that hearing.

Facts

18. Both submissions made reference to the history of the matter and the previous proceedings, including a previous settlement agreement which had been proposed but not ultimately concluded. It was clear that the circumstances of that potential agreement were the subject of dispute between the parties. For the purposes of the decision which needed to be reached in this case, those background facts did not appear to me to be relevant to the issue which I needed to be determined.

19. In the previous claim (2414841/2018) the claimant had brought claims for unfair dismissal, disability discrimination (brought under sections 13, 15, 21 and 26 of the Equality Act 2010), wrongful dismissal and failure to provide written reasons for dismissal, against the relevant company. His claims for disability discrimination (or, at least, some of them) were also brought against the two respondents named in this claim.

20. A COT3 agreement was reached between the parties via ACAS on 21 September 2022, which accordingly had resolved those previous proceedings on that date. The agreement had been signed by, or on behalf of, the claimant on 26 September. It had been signed by solicitors for the respondents on 27 September 2022.

21. That COT3 agreement provided for the respondents to pay a sum to the claimant in instalments, with the first instalment being payable on 20 October 2022. The date for payment of the last instalment has passed. None of the instalments have been paid by any of the respondents.

22. In his submissions, the first respondent contended that he and his son were the ones who were now the victim. He was critical of the claimant and his representatives for the way in which the proceedings were being pursued and was critical that the claimant had not accepted a proposal to receive payment in instalments. I would highlight that the COT3 settlement agreement which had been agreed, provided that the respondents would pay sums to the claimant which they have not paid. In those circumstances, the respondents were clearly at fault in their failure to comply with the terms which they had agreed. I understand why the claimant has sought to enforce the terms of the agreement and why he has pursued claims to recover what is due to him. The first respondent's criticisms were misplaced.

23. It is not necessary for me to reproduce all of the words of the COT3 agreement in this Judgment. In the terms of that agreement, the claimant

withdrew his previous claim. He also agreed that the claim could be dismissed.

24. It is relevant to highlight that the "*Respondent*" in the COT3 agreement was a defined term. It was defined in that agreement as being the first, second and third respondent to the previous claim (being the company and the two respondents to this claim). The "*Claim*" was defined as being the previous claim which was being settled against all three respondents.

25. The end of Clause 6 of the COT 3 agreement provided the following:

> "*The Claimant warrants that he will not reactivate the Claim or issue any further and/or new claim or claims of any nature against the Respondent or any of the Respondent's current or former officers, directors or employees in relation to or in connection with the subject matter of the Claim".*

26. In Clause 7 the payment was accepted in full and final settlement of the claim and (including only the relevant wording):

> "*all and any claims which the Claimant has or may have in the future against the Respondent … whether arising from his employment or its termination including, but not limited to, claims under … the Equality Act 2010 … excluding any claims by the Claimant to enforce this agreement or in respect of accrued pension rights*".

27. Clauses 14 and 15 of the COT3 agreement were not standard terms commonly found in such agreements. Those provisions included terms which addressed the ability to recover costs if the claimant needed to take steps to enforce the terms of the agreement.

28. On 16 December 2022, following a period of ACAS Early Conciliation between 24 October and 5 December 2022, the claimant entered this claim against the two respondents named.

29. This claim is for victimisation. In the Case Management Order made following the previous preliminary hearing in this case, Employment Judge Ross recorded that the claimant's representative was not seeking to reopen the COT3 settlement, instead the claimant was bringing the victimisation claim. She recorded that the protected act was the previous claim. The detriment was stated to be that in, or around, September 2022 the respondents purposefully settled that claim, when they knew that the first respondent to the previous claim (the company) was entering liquidation because they had petitioned for liquidation on 30 August 2022. During this hearing it was clear that there was a dispute about who had petitioned for liquidation in the company and whether that was expected to result in liquidation being entered into, but those disputes are not relevant to the decision which I need to reach.

30. In the detailed grounds of claim for this case, it was stated that the claimant's claim was for post termination victimisation. Under the heading "*post termination victimisation*" the claimant provided an explanation of the victimisation claim being pursued. For the purposes of reaching my decision I

have considered the claim to have been accurately summarised by Employment Judge Ross in her case management order. I would however observe that what was said in the detailed grounds of claim under the heading I have referred to, suggested that the victimisation allegations were broader than the summary, as it referred to the following as being an act of victimisation (or part of it): the respondents' "*actions and conduct throughout the proceedings*"; and "*their actions during the negotiations*".

The Law

31. Section 144 of the Equality Act 2010 provides that the term of a contract is unenforceable by a person in whose favour it would operate, insofar as it purports to exclude or limit a provision of or made under the Equality Act. However, Section 144(4)(a) provides that the section does not apply to a contract which settles a complaint if the contract is made with the assistance of a conciliation officer. There was no dispute that the COT3 agreement entered into by the claimant was made with the assistance of an ACAS Conciliation Officer and accordingly was not rendered void by Section 144 of the Equality Act 2010.

32. The issue to be considered therefore was the proper construction of the terms of the COT3 agreement.

33. As the claimant's representative highlighted, the starting point on construction of the contract was what was said by Lord Hoffman in **Investors Compensation Scheme Ltd -v- West Bromwich Building Society** [1998] 1 WLR 896, being:

> *"the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract".*

34. Reference was also made by the claimant's representative to **BCCI -v- Ali** [2001] ICR 337 in which Lord Bingham said:

> "*In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified"*

35. An issue in this claim is whether the terms of the agreement reached can and/or do apply to future claims which the claimant may not have had in mind at the time he entered into the agreement.

36. In the **BCCI** judgment, the House of Lords found that the claim for stigma damages and the rights which arose, which was at the heart of the appeal,

was not one which, upon a fair construction of the relevant document, the House of Lords could conclude the parties had intended to provide to be released. The House of Lords highlighted that, in that case, the parties had not used language which left no room for doubt.

37. The claimant's representative also referred to the key decision in **Royal National Orthopaedic Hospital Trust v Howard** [2002] IRLR 849 in which Judge J Reid QC said:

> "*In our judgment, the law as to contracts for release is pretty straightforward. The law does not decline to allow parties to contract that all and any claims, whether known or not, shall be released. The question in each case is whether, objectively looking at the compromise agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction has to be placed on the scope of the release. If the parties seek to achieve such an extravagant result that they release claims of which they have and can have no knowledge, whether those claims have already come in existence or not, they must do so in language which is absolutely clear and leaves no room for doubt as to what it is contracting for. We can see no reason why as a matter of public policy a party should not contract out of some future cause of action. We take the view that it would require extremely clear words for such an intention to be found*".

38. In that case it was found that there was nothing in the agreement to indicate any intention to contract out of future claims.

39. In her Case Management Order, Employment Judge Ross also referred to three recent authorities which provided some assistance on the interpretation of the judgment in **Howard**. Those three cases I have considered and are **McLean v TLC Marketing Plc** UKEAT/0429/08, **DWP v Brindley** UKEAT/0123/16 and **Aryunescu v Quick Release (Automotive) Limited** [2022] EWCA Civ 1600. In the latter case, the Court of Appeal found that a COT3 agreement did cover a victimisation claim arising from the decision not to make a job offer which occurred after the date when the agreement had been entered into. The Court of Appeal emphasised the need to consider the **Howard** decision in its entirety. It highlighted that the Employment Appeal Tribunal in **Howard** had observed that a party could enter into an agreement to settle some future cause of action which had not yet arisen at the time of the settlement agreement, but that it would require extremely clear words for such an intention to be found.

40. In his written submissions the claimant's representative also referred to two authorities regarding contracting out provisions: **Hilton UK Hotels Limited v McNaughton** EATS/0059/04; and **Bathgate v Technip UK Limited** [2023] IRLR 4. He also included a quote from Hansard which addressed the words "*a particular complaint*" as used in the provisions which govern settlement agreements (section 147 of the Equality Act 2010, which did not apply in this case). I have noted what was said, but have explained above in more detail the case law which applied to COT3 agreements and which I have found of assistance in reaching my decision.

Conclusions – applying the law to the facts

41. I fully understand the claimant's complaint that the respondents have not paid the sums which they are due to pay under the terms of the COT3 agreement. In broad terms, that complaint is entirely understandable. Where parties enter into an agreement (including a COT3 agreement) they should adhere to the agreement's terms, including paying all sums which they have agreed to pay. However, the mechanism for enforcement after non-payment is one which is not dealt with by this Employment Tribunal, but rather is dealt with by the County Court and (where the payment isn't made) by the High Court. I understand that the claimant has taken steps to enforce the agreement in the other Courts.

42. As part of the claimant's submissions, it has been asserted that the COT3 agreement could not remain binding where the consideration agreed within it had not actually been provided, that is the sums due had not been paid. It was stated that the respondents had provided no consideration. I do not accept that submission. The agreement was binding when it was entered into via the ACAS conciliation officer. There was consideration from both parties as part of the agreement. The fact that one party has not complied with the agreement, does not mean that the agreement ceases to apply. The non-payment is a matter to be addressed as a breach of that agreement, and under the enforcement procedures available. It does not mean that the COT3 agreement ceased to be a valid agreement or otherwise ceased to apply.

43. I have considered the claimant's submissions on the basis that they were made, which is that what was being alleged was victimisation which occurred after the agreement was reached and which was not envisaged at the date of the agreement. In his submissions, the claimant's representative gave the example of a reference given after the COT3 agreement, and he contended that such an agreement could not simply preclude such a future victimisation claim (and the agreement reached did not do so). He asserted that the statute does not permit settlement of a claim that had not crystallised or whose existence was not known about at the time.

44. As a general principle, I do not accept that submission. In the section on the law above I have explained where the authorities (in particular reading **BCCI**, **Howard** and **Aryunescu** together) make clear that a future cause of action which has not yet arisen at the time of the agreement can be covered by that agreement provided that extremely clear words for such an intention can be found.

45. As the relevant previous cases make clear, what I am required to do is to carefully consider the terms of the COT3 agreement to ascertain the meaning that the document would convey to a reasonable person (with the background knowledge which would have been reasonably available to the parties in the situation they were in when they entered into the agreement). I must make an objective judgment based upon the materials.

46. Clause 6 of the agreement expressly provided that the claimant would not issue any further or new claim or claims of any nature against the respondents. I find that those are extremely clear words which evidenced an

intention to cover any future claims which might arise. However, the terms of clause 6 contained a limitation. Clause 6 is limited to future claims "*in relation to or in connection with the subject matter of the Claim".* Based upon the summary of the victimisation claim recorded by Employment Judge Ross, I would have found that this victimisation claim was related to or in connection with the previous claim. I found that a claim that the previous claim was purposefully settled, must relate to or be in connection with that claim. However, I noted that the wording in clause 6 included the words "*the subject matter of the Claim*". I do not find that this victimisation claim, as summarised by Employment Judge Ross, is related to or connected with the subject matter of the previous claim as I understand it from the previous pleadings. As a result, I found that clause 6 of the COT3 agreement did not cover this claim or stop the claimant from pursuing it.

47. Clause 7 of the COT3 agreement is entirely distinct from clause 6 and therefore I have considered the meaning of that provision separately. The limitation on clause 6 was not reproduced in clause 7. The words used were very broad and included "*all and any claims*" and importantly expressly stated that they covered claims he "*has or may have in the future*". I find that those were extremely clear words which evidenced an intention to cover any future claims which might arise including any claims which had not been identified at the time of the agreement. The provision expressly provided that it covered claims under the Equality Act 2010, and therefore a claim for victimisation was within the ambit of the clause. The wording which limited the extent of clause 7 was "*arising from his employment or its termination*". The detriment relied upon in the victimisation claim is the respondents purposefully settling the previous claim. I found that the respondents purposefully settling claims of discrimination which occurred in employment, was something which arose from the claimant's employment or its termination.

48. For the reasons I have explained in the previous paragraph, I did find that clause 7 of the COT3 agreement did record that the terms of that agreement were agreed to be in full and final settlement of claims which included what was claimed in this victimisation claim under the Equality Act 2010. The agreement was not rendered unenforceable by section 144 of the Equality Act 2010 because the contract was made with the assistance of the ACAS conciliation officer. Nothing in the cases considered otherwise meant that what the parties agreed cannot have settled this claim, because the agreement contained extremely clear words which evidenced that the parties intended to settle claims based upon a cause of action which had not yet arisen at the time of the agreement and about which the claimant was not aware at the time.

49. As I have explained I have reached this decision based upon the arguments as advanced by the claimant's representative and on the assumption that the victimisation claim was a claim which arose after the previous agreement. I have decided that the victimisation claim cannot proceed as the claimant is barred from pursuing it as a result of the ACAS conciliation agreement in the previous claim (and therefore the Tribunal does not have jurisdiction to consider it). Whilst it is not therefore necessary for me to do so, I have also considered whether that argument was in fact correct. I have found that the

subject matter of the victimisation claim was the actions of the respondents in purposefully settling the claim. Those actions occurred following the termination of the employment, but they cannot have occurred after the agreement was entered into. The action/alleged detriment of purposefully settling the claim must, logically, have occurred prior to the COT3 agreement being entered into (or, at the very latest, at the moment the agreement was made). That means that what was being considered was not comparable to a subsequent act which occurred after the agreement (such as a later reference), as the claimant's representative submitted. The victimisation claims were not genuinely future claims at all, they were claims which existed at the time of the COT3 agreement (albeit that the claimant may not have been aware of them). I found that such claims were clearly settled by the terms of clause 7, based upon the meaning that the words used would have conveyed to a reasonable person at the time, as the words clearly and unequivocally settled claims which the claimant had at the time against the respondents.

50. Whilst it is not necessary for me to have considered or determined the issue, I would also highlight that there is a degree of circularity about the victimisations claims, the agreement, and enforcement of the agreement. The COT3 agreement did clearly address what would occur if the respondents did not make payment to the claimant on the dates required. Clause 7 expressly excluded any claims to enforce the agreement. Clauses 14 and 15 addressed to some extent what would happen if action was required. If these claims had proceeded, at a later hearing, there would have needed to have been some consideration of whether the claim was genuinely one of victimisation rather than one which re-opened the COT3 settlement itself. However, I have restricted myself in reaching my decision, to the issue it was identified I needed to determine.

51. For the reasons I have explained, I have found that the Employment Tribunal does not have jurisdiction to consider this victimisation claim against these respondents, as the terms of the COT3 agreement reached in the previous proceedings settled such a claim.

Employment Judge Phil Allen
18 May 2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON 19 May 2023

FOR THE TRIBUNAL OFFICE