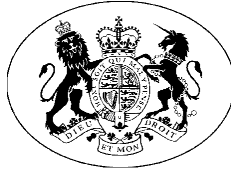

**EMPLOYMENT TRIBUNALS**

| | |
|---|---|
| **Claimant** | Miss Alex Caulkett |
| **Respondent** | Richard Fulke Johnson and Eve Johnson Houghton T/A Eve Johnson Houghton Racing |
| **Heard at** | Watford Employment Tribunal |
| **On** | 25 January and 9 February 2023 |
| **Before** | Employment Judge Othen (sitting alone) |

**Representation**

| | |
|---|---|
| Claimant | Mr Ismail (counsel) |
| Respondent | Mr Dear (solicitor) |

# RESERVED JUDGMENT

1. The Employment Tribunal has jurisdiction to hear the claims brought by the Claimant against the Respondent in this claim, in light of a COT3 agreement entered into between the parties on 15 October 2021

# REASONS

## Introduction

1. The Respondent is a racehorse training business and runs a racing stable with approximately eighty racehorses. The Claimant was employed by the Respondent as a Stable Lass/Work Rider from 6 February 2019. Her employment was terminated by way of a COT3 agreement on 15 October 2021.

2. The Claimant claims that she was dismissed, that her dismissal was unfair and also brings claims of pregnancy/maternity discrimination.

3. The Respondent contests the claims. It contends that the tribunal does not have jurisdiction to hear them as they were settled by way of the COT3

agreement dated 15 October 2021. The Claimant disputes this and asserts that the COT3 agreement was concluded by her under duress and should be set aside. She further asserts that her claims of pregnancy/maternity discrimination were not settled under the terms of that COT3 agreement.

4. The Claimant was represented by Mr Ismail of counsel and gave sworn evidence. The Respondent was represented by Mr Dear, solicitor, who called sworn evidence from Sarah Scott, the Respondent's Racing Secretary at the material time of the claim. I considered the documents from an agreed 126-page bundle of documents which the parties introduced in evidence.

**Preliminary Issues for the Tribunal to decide**

5. The preliminary issue for the Employment Tribunal to decide during this hearing, as confirmed by a Notice of Hearing dated 20 May 2022 was whether it has jurisdiction to hear the claims brought by the Claimant against the Respondent in light of a COT3 agreement entered into between the parties on 15 October 2021 ("the COT3 Agreement").

6. From the preliminary hearing, the specific preliminary issues to determined were:

6.1 Issue 1

6.1.1 Whether the COT3 Agreement is voidable on the grounds of duress; and if it is so voidable:

6.1.2 Whether it should be set aside; and/or

6.1.3 Whether it is a valid or enforceable "agreement" under section 203(2)(e) Employment Rights Act 1996 or a valid or enforceable "contract" under section 144(4) Equality Act 2010.

6.2 Issue 2

6.2.1 Whether the COT3 Agreement settles or waives the Claimant's claim of pregnancy/maternity discrimination.

**Findings of fact**

7. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

8. I have attempted to confine my findings of fact to the issues which are relevant to the preliminary issues defined above and to avoid any findings of fact which could affect the outcome of further hearings, where at all possible. My findings were based only on the documentary and witness evidence before me at the preliminary hearing. A different Tribunal at a substantive hearing may make different findings of fact based on evidence which is adduced on the substantive issues.

9. The Respondent employs around twenty staff members comprising "Stable Lads and Lasses" amongst other roles.

10. It is run by Eve Houghton (EH). Its Racing Secretary is/was Sarah Scott (SS) who deals with most of the administration duties for the Respondent and is also the main point of contact for employees when EH is busy or away. The Respondent also employs a "Head Lad and Lass" to whom the rest of the stable yard staff should report for various day-to-day issues.

11. The Claimant, who is currently nineteen years of age, was employed by the Respondent as a Stable Lass/Work Rider. She had a difficult personal background. She was primarily brought up by her grandma following social services involvement in her home life and parental neglect. She had a difficult relationship with her mother which meant that at the age of sixteen, she needed to move out of her home.

12. She has learning difficulties although has not been formally diagnosed with any clinical diagnosis. She left school at the age of thirteen and has no GCSEs or other academic qualifications. She struggles to understand what she reads.

13. She started working for the Respondent in February 2019 when she was sixteen. EH was aware of her difficult home life, personal circumstances and need to leave her family home. As she had been riding horses since a very early age, she was offered her role. She had no written contract of employment.

14. Whilst working for the Respondent she completed an apprenticeship as an Equine Groom. She was encouraged to do that by EH with whom she says she initially had a good relationship. She did very well, gaining a distinction. She explained during cross-examination that she took pride in her work did not find the apprenticeship difficult because there was no academic work required and most of the activities were practical.

15. The Claimant's take home pay was approximately £280 per week. As part of her role, she was also provided with shared accommodation on the stable yard. She lived in the "Stable Bungalow" with another Stable Lass (G) and T, a Stable Lad.

16. At the beginning of 2021, she began a personal relationship with T. In approximately June 2021 she became pregnant. The Claimant says that after her pregnancy, the attitude of EH changed towards her. She said during her evidence that she thought she regarded her as "useless" when pregnant and that she didn't want her to live or work there from that point. She suffered with morning sickness and had problems getting up for the early morning shift and felt unsafe riding the horses.

17. Her claims and allegations are disputed by the Respondent and I make no findings of fact about these claims or allegations. EH did not give evidence at the preliminary hearing.

18. On 29 September 2021, during the evening, there was an incident at the Stable Bungalow involving the Claimant, T and G.

19. A written statement provided by G the next day [120] reports that she was woken up the previous night by T kicking the Claimant's door. She told him to "*sort his act out*" and she checked on the Claimant. He then hit the window and the wall with a golf club, breaking it and shouting "*look what you have done*" to the Claimant. She then stayed in the living room with the Claimant until he started shouting again. She eventually fell asleep and T and the Claimant were still arguing.

20. G reported to the Respondent's office the next morning (30 September 2021) to tell EH and SS what had happened. She showed them photos of the damage to the bungalow, presumably on her phone.

21. A written statement from SS [117] states that T was called to the office at 11am the same morning regarding the incident. He admitted to damaging the property with the golf club, was suspended and agreed to leave the Stable Bungalow. The statement from SS notes her duty of care to the Claimant and to G and that T fully accepted that he was at fault damaging the property and being violent and intimidating towards other members of staff.

22. The Claimant was working on her early shift when she found out about T's suspension. She asked permission from the Head Lad to leave her shift early to go and speak to him before he left. She reports that she was panicking. It was approximately 11:30 am and her shift was due to finish at 12 noon. She was given permission to leave by the Head Lad at that point, as confirmed by a written statement from him [116]. It is the Respondent's case that she said she would only be five minutes. The Claimant does not remember saying that but in any event, events were overtaken by what subsequently took place.

23. There was then an altercation at the Stable Bungalow between the Claimant and SS who had attended there with a colleague whilst he was packing his possessions ready to leave. A written telephone note from an adviser at the National Trainers' Federation dated that day reported that SS had telephoned her to ask for advice and explained that she was concerned about the Claimant being in the Stable Bungalow with T on her own. She was reportedly "*worried about leaving her with him, concerned to safeguard a vulnerable person"* [123].

24. The Claimant's evidence is that she wanted to be left alone to discuss things with T as he did not have a mobile telephone and she did not know where he would be going. She was very distressed and anxious, told SS and her colleague to "*fuck off*" and then went into a bedroom to get away from them. T left the Respondent's premises.

25. After this, the Claimant did not feel able to attend her shift again at 4pm. She sent a text message to SS at 13.05 to advise her of this and stated that she would be back the following morning. SS replied "*OK*" [54].

26. At 22.47 that day (30 September 2021) the Claimant texted AH to ask her for some emergency leave. She apologised for not finishing her shift that day and

provided some explanation about the events of the previous evening. She asked her to reply by message because "*I'm likely to burst into tears*" [49].

27. On Friday 1 October 2021, EH replied to the Claimant by text to confirm that she would agree to one week's leave. She also stated that she wanted the Claimant to come to a meeting and asked for a written statement of events of 29 September 2021. The Claimant responded the same morning, by text, with a very brief written statement which basically confirmed the events which were already known by the Respondent [54].

28. The same afternoon, at 16.14, the Respondent sent the Claimant an invitation letter to a disciplinary hearing on Monday, 4 October 2021 [52]. It informed her about three potential allegations of gross misconduct against her and warned her that the meeting could result in her dismissal. The three allegations stated were:

28.1 *"Unacceptable behaviour by you towards other members of staff in shared accommodation.*

28.2 *Walking out of work and leaving your work colleagues in the lurch.*

28.3 *Taking un-authorised time off".*

29. During cross-examination, SS was asked about the allegations in turn. She admitted preparing the letter and writing the allegations with EH. She knew at that time that the Claimant was off work because of stress.

30. When asked what was meant by the Claimant's unacceptable behaviour, she explained that this was bullying of G by her. She was asked to explain any evidence of this bullying and she could refer to no documentary evidence but said that she had received a telephone call from G's mother who was worried about her daughter. She said: "*she would have rung me that morning, the day after* [29 September 2021]". She confirmed that she did not take a statement from G about this although she couldn't explain why. The Claimant disputes ever having bullied G and, in her evidence, confirmed that she had thought that G and her were friends. She stated that no one had ever told her of any allegations that she had bullied G at any time during her employment and that this hearing was the first time that this had been alleged.

31. I find that, based on the evidence before me in this hearing, there was no credible evidence of any complaints of bullying by the Claimant against G. The statement of G that was taken at the time makes no reference to this and is consistent with a friendly relationship with the Claimant, complaining about T's violent behaviour and even saying at one point that she "*checked on Alex*" before she went to bed. The content and tone of that statement is inconsistent with any bullying by the Claimant of her.

32. An email from G's mother reports that she was unhappy with and scared of T's behaviour and goes into significant detail about this but does not mention the Claimant. Reports of SS made at the time, as set out above, are also inconsistent with her belief that the Claimant bullied G, stating that the Claimant

was vulnerable and that she owed a duty of care to her. As such, and based on the witness and documentary evidence in this hearing, I do not believe that SS and EH had any reasonable basis to allege that the Claimant had bullied G or that this comprised a credible disciplinary allegation of gross misconduct.

33. With regard to the second and third allegations that the Claimant had walked out of work and had taken unauthorised time off, SS agreed in cross-examination that she had been aware at the time of writing the letter of the Head Lad's statement that he had permitted the Claimant to leave work at 11:30am to go and speak to T at the Stable Bungalow. She said however that the Head Lad should not have given permission. When asked therefore why the disciplinary allegation was put to the Claimant rather than to the Head Lad, she responded "*I don't know what to say*". She also confirmed being aware of the permission that EH had given her for a week's leave thereafter.

34. Based on the evidence before me, I do not believe that there was any credible basis for the disciplinary allegations of gross misconduct that the Claimant had walked out of work or had taken unauthorised time off. She had permission to leave work when she did. There is a dispute as to whether she should have returned to work after leaving at 11:30 as her shift finished at 12 noon but SS knew where she was at that time as she was concerned about her vulnerability being in the stable bungalow with T on her own and a return to work would have only been possible for a few minutes during that time line anyway. Later that day, the Claimant had texted SS to inform that she would be unable to return to her shift at 4pm and SS had indicated her agreement by replying "*OK*". Thereafter, she had asked EH for emergency leave and this had been agreed. As such, on this evidence, I do not believe that EH or SS believed these allegations to amount to potential gross misconduct.

35. At this point (on receipt of the disciplinary hearing invitation letter on 1 October 2021) the Claimant was staying with a friend. The friend's house was near to the Claimant's stepsister who is a lot older than her. She did some research on the internet and advised the Claimant to ask for more notice for the disciplinary hearing and subsequently helped the Claimant to prepare a response and further text messages to SS and EH over the days that followed. Her text response that evening asked for a minimum of five days' notice, provided some further explanation about the events of 29 September 2021 and confirmed that she had been given permission by the Head Lad to leave her work on 30 September 2021 [51].

36. SS replied the same evening to agree to rearrange the hearing for 8 October 2021. She also gave the Claimant contact details of a representative from the National Association of Racing Staff (NARS) [55].

37. On 4 October 2021 the Claimant was in contact with the NARS representative, sending him some screenshots of previous texts and a copy of the disciplinary hearing invitation letter. There was some discussion about the Claimant's pregnancy [73]. She was subsequently advised by him, on 5 October 2021 to see her doctor and sign off work sick. By way of various text messages and emails on 7 October 2021, the disciplinary hearing which was arranged for 8 October 2021 was postponed as the NARS rep was unavailable [60 to 63].

38. The same day, the Claimant texted SS to inform her that she was self-certifying as sick for the following seven days because of stress and anxiety. SS subsequently agreed with her that she would take those days as holidays [60/61].

39. On 12 October 2021, early that morning, the Claimant went to the Stable Bungalow to get some possessions. She was told by G that she was not allowed into the bungalow on her own. She sent SS a text at 8.47 to ask: "*what is the case with this as I still live there unless I get told otherwise?*" [61]. SS replied sometime later to say: "*I'm down a 15 minutes* [sic]". Again the Claimant asked for clarity and was told that SS intended to come and see her. The Claimant responded to say:

39.1 "*if….I'm not allowed there on my own this makes me homeless, I'm 4 months pregnant and I would need an eviction date with a certain amount of notice before I have to leave the bungalow*" [62].

40. SS replied to say that if she had come into the office "*we could have talked*". The Claimant replied that she did not know she was supposed to do that and that she still didn't understand what was going on [62]. The Claimant then informed her NARS rep about the situation stating: "*I'm really confused because I didn't get suspended….so as far as I'm aware I still live there but apparently I'm not aloud* [sic] *to be there on my own*".

41. The Claimant continued to ask SS for clarity about her living accommodation and she was told by SS later that day (12 October 2021):

41.1 "*Hi Alex, currently you are an employee and on sick leave which you are taking holiday and as soon as you return there will be a formal meeting, I will be sending you another letter detailing this hearing and what the hearing will be about*" [64].

42. The Claimant alleges that G was told by the Respondent to tell the Claimant that she was not permitted to enter the Stable Bungalow on her own. When this was put to SS in cross examination, she did not deny it. I found her evidence on this issue to be unconvincing and evasive. She explained that G was there on her own and she (SS) didn't want any sort of confrontation, that there was only one key to the property and that it was "*agreed*" that the Claimant should let "*us*" know when she was going to attend the property because G felt uncomfortable with the Claimant there. This is inconsistent with the Claimant's text that she did not know that she was meant to come into the office first. SS could provide no explanation about why she did not reassure the Claimant that she had not been evicted or made homeless, stating "*we tried our best at the time: text is not a good way to communicate*".

43. I find that, based on the evidence before me, the Respondent did intend to restrict the Claimant's access to the Stable Bungalow and did encourage or authorise G not to allow her in when she went there. After this point, despite repeated requests from the Claimant, the Respondent did not provide her with any reassurance or confirmation that she was permitted to enter. I find that the only reasonable conclusion from this evidence was that the Respondent

wanted the Claimant to believe that she could not enter the Stable Bungalow after she had left it on 30 September 2021 and did not intend to permit her to move back in after her period of sickness absence. This may have been, in whole or in part, out of genuine concern for G but the effect on the Claimant amounted to the same thing.

44. At 15.43 that day, EH sent the Claimant a second disciplinary hearing invitation letter [86]. The same allegations of gross misconduct were repeated. The letter also contained some additional content:

44.1 "*an additional matter has now arisen and I am writing to give you advance notice that I wish to discuss this with you at the hearing. It is not a disciplinary matter but relates to your personal relationship with* [T] *who is no longer employed by us*."

45. The letter goes on to refer to T's violence and its effect on other employees, stating that the Claimant's relationship with him will have a "*disproportionate effect on your ability to carry out your role and for others to have the confidence in you that is necessary*". It then says:

45.1 "*For those reasons I believe that we need to bring your employment to an end as well, and as this will not be a dismissal for gross misconduct then I would be able to provide a reference confirming your dates of employment and you would be paid your notice. I would also provide you with a letter to the council confirming that your employment has ended and that you are required to vacate your accommodation*".

46. She says that she would like to discuss matters with the Claimant at a meeting at which her dismissal because of her "*close connection with* [T]" and her potential dismissal for gross misconduct will be considered and she ends by saying:

46.1 "*However, if you would prefer not to have that discussion with me and accept the difficulties that your relationship with* [T] *will cause, then I can issue your dismissal letter, the letter for the council and pay you your notice straight away*".

47. The Claimant sent a copy of this letter to her NARS rep. straight away saying "*I don't really know what it means*" [81]. Her evidence is that she was shocked by it, felt alone and felt blackmailed into splitting up with T or losing her job. When challenged in cross examination that she had support from her sister, she said that her sister did not have a clue what to do. She agreed that she discussed the letter with her NARS rep. but said that he advised her that it appeared as if EH was going to try to "*get rid*" of her "*any way possible*". The Claimant confirmed that the NARS rep. did say that "*pregnant women are the hardest to get rid of*" but that she did not know what he meant by this and that she regarded it as a passing comment. She denied, when questioned in cross examination, that she knew that this meant that there was particular legal protection for pregnant women and said that there was no discussion between her and her NARS rep. about any link between her pregnancy and the intention to sack her. I accept her evidence in this regard as I found it credible in all the

circumstances and there was no other evidence to the contrary which was presented to me.

48. The Claimant's NARS rep. explained that although it was his job to attend a disciplinary hearing with her, she didn't want to take the risk of attending it. She thought that EH had made up her mind that she must leave, that there was no option of keeping her job, that she had already been evicted and that EH had "*dangled the carrot*" of the eviction letter as part of the agreement offered.

49. Less than 24 hours later on 13 October 2021, the Claimant sent a text message to SS to forward to EH as follows:

49.1 "*Dear Eve, thank you for your email, I accept your proposal of which you have promised to supply me with reference, wages, a letter to the council (could you PLEASE provide me with a letter to the council at the earliest opportunity as I am now homeless). I can't live with my mum, I can't live with* [T]*. I am and have been sofa surfing for the past 2 weeks, obviously this cannot continue and winter is drawing near. I am literally homeless. Please could you send this to my email asap as at the moment I am in band D and I need to be in band A which is priority housing*".

50. She asked for a time and date when she could collect her belongings and those of T from the Stable Bungalow, thanked EH for everything that she had done for her and pasted a copy of an email from her council housing team requesting a copy of her eviction notice [66/67].

51. The following day on 14 October 2021, SS confirmed to the Claimant that EH had contacted ACAS to conclude a binding agreement which would take a few days. She explained the purpose of this agreement solely as being that "*this will give you certainty that Eve will give you a reference as promised and also the letter to the council*" [68]. The Claimant again asked when she could collect some possessions from the Stable Bungalow (she repeated this again on 15 October 2021 saying that she was completely out of clothes). She followed this with texts to request the position regarding her maternity pay as she did not know when she would receive her next income and SS confirmed that she was entitled to statutory sick pay.

52. On 15 October 2021, the Claimant was contacted by ACAS who sent a copy of a draft COT3 to her, with which the conciliation officer had been provided by the Respondent's solicitor. He informed her that ACAS do not provide any legal advice and stated that "*I know you want to move this on as quickly as possible*" [93].

53. On the same day at 11.03, the Claimant chased SS for a copy of her eviction letter. SS replied to state "*it will be sent as soon as we have the [ACAS] agreement*" [71].

54. It is clear by this point that all parties are aware that the COT3 agreement needed to be completed urgently because of the Claimant's desire to obtain a copy of an eviction letter to send to the council. The Claimant's evidence is that this was a priority for her and that she believed she would not be able to

obtain it until the COT3 agreement was concluded. ACAS were aware of this as confirmed by an email from the relevant conciliation officer [113]. This is consistent with the aforementioned text from SS [71] and an email from the Respondent's solicitor to ACAS, also on 15 October 2021 [97]. Indeed, SS confirmed in cross examination that the letter to the council was conditional on the Claimant accepting a mutual agreement and that this letter would be needed by the Claimant to show to the council.

55. The Claimant stated that when she told her NARS rep. about the COT3, he advised her that he wouldn't get involved in any settlement as his role was only help her keep her job and to attend any disciplinary hearings etc. She therefore did not send a copy of the agreement to him.

56. The terms of the COT3 agreement state amongst other things that:

56.1 "*The Claimant agrees that her employment with the Respondent ended on 15 October 202I and that she will vacate her accommodation at The Bungalow with effect from that date, The Claimant agrees that all her allegations against the Respondent submitted to ACAS under Early Conciliation number NE102694/2I will be considered settled and withdrawn and she may not bring any Employment Tribunal claim regarding some or all of those allegations subsequently.*

56.2 *The Respondent, without admission of liability, agrees to pay the Claimant her notice of £720 subject to deductions for income tax and employee national insurance ("the Settlement Sum") within 7 days of the Respondent receiving a form COT3 incorporating this wording, signed by the Claimant or on her behalf.*

56.3 *The Claimant agrees to accept the Settlement Sum in full and final settlement of all and any claims of whatever nature she may have whenever, whether before or after entering this Agreement which are connected with or arising out of her employment with the Respondent and/or its termination and made against the Respondent including but not limited to, her claims under Early Conciliation number NE 102694/21 and all other claims for which an ACAS Conciliator has a statutory duty to conciliate on, save for any claim by the Claimant to enforce this Agreement, any claim relating to latent personal injury of which she is not currently aware or ought reasonably to be aware of at the date of signing or in relation to her accrued pension rights. The Claimant confirms that she is not currently aware of any such claims*."

56.4 "*The Respondent will, on the date that this agreement becomes legally binding, send a letter to the council in the terms set out at Appendix 2*".

57. Appendix 2 is a letter to the Claimant's local authority housing team confirming the termination of her employment and the requirement for her to leave her tied accommodation with immediate effect.

58. The ACAS conciliator went through the terms of the COT3 with the Claimant over the telephone (the Claimant said this was done quickly). When questioned in cross examination and by me about what she had been informed about the COT3 she answered consistently that she didn't understand what he

was explaining. She knew that the agreement was about her leaving and that it meant that she couldn't be sacked and that she would get the eviction letter. She said that she did not read the COT3 because she knew that she wouldn't understand it. She was in a hurry and wanted to sign the COT3 as soon as possible as the quicker she signed it, the quicker she would get her eviction letter. She was worried that EH would change her mind and sack her anyway and she felt blackmailed into signing it. She said that she has/had no idea what was meant by her "*allegations"* or *"claims*" under the early conciliation number which is noted in the COT3. At the time, she raised no allegations to the Respondent or to ACAS because it was the Respondent who approached ACAS in the first place about the agreement and this was so she could leave with her notice pay, a letter to the council and a reference.

59. SS confirmed in her evidence that she had no involvement in the discussions with ACAS or with writing the COT3 terms (although she did sign the COT3 on behalf of the Respondent and was with the Claimant when she did so too). The COT3 terms were solely handled by the Respondent's solicitor. When specifically asked whether she was aware whether the Claimant intended to bring any pregnancy discrimination claims against the Respondent she confirmed that that she did not know. When asked whether she discussed <u>any</u> potential claims with EH at the time, she confirmed that she did not and when specifically referred to the "*allegations"* and *"claims*" as stated in the COT3 she confirmed that there was no discussion about this and that she was not aware of any claims or allegations at the time.

60. At page 113 in the bundle is an email from the ACAS conciliator to the Claimant's solicitor who is instructed now, confirming his memory of discussions regarding the COT3 and his role in assisting the Claimant. He confirms that the Respondent initiated the matter with ACAS, that both parties confirmed to him that the matter was "*regarding a potential disciplinary process and dismissal*" and that as such, that it was allocated with an internal jurisdiction of "*unfair dismissal*". He further states:

60.1 *"..although both parties mention that Alex was pregnant, neither party at any stage told me or gave me the impression that there was any claim or potential claim for any form of discrimination, including maternity/pregnancy and I had no reason to bring that subject into any conversation. My understanding was that both emphasised it to explain the need for a letter to use to assist in housing".*

61. The COT3 was declared binding by ACAS at 15.16 on 15 October 2021, both parties having confirmed acceptance of its terms.

62. The Claimant and her daughter were rehoused by South Oxfordshire District Council at their current address on or around August 2022.

**Relevant law**

63. Mr Ismail and Mr Dear provided me with written and oral submissions and an agreed bundle of authorities of 391 pages. After the hearing, further written submissions were specifically requested by me on the legal effect of duress

and possible remedies. Those submissions were received with a further bundle of authorities from Mr Ismail of 263 pages. I have considered and referred to those submissions where necessary in reaching my conclusions.

COT3 Agreements

64. S.203 of the Employment Rights Act 1996 provides that:

*"(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports-*
*(a) to exclude or limit the operation of any provision of this Act, or*
*(b) to preclude a person from bringing any proceedings under this Act before an Employment Tribunal.*
*(2) Subsection (1)-*
*...*
*(e) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996"*

65. Sections 18A to 18C of the Employment Tribunals Act 1996 set out the authority and scope of a conciliation officer to promote settlements of Employment Tribunal claims.

66. In similar terms, s.144 of the Equality Act 2010 provides that:

*"(1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of or made under this Act.*
*...*
*(4) This section does not apply to a contract which settles a complaint within section 120 if the contract—*
*(a)is made with the assistance of a conciliation officer, or*

*(b) is a qualifying [F2settlement agreement ].:".*

Contractual Status

67. In its chapter (e): "*Classification of Contracts According to their Effect*" Chitty on Contracts 34th Edition (Chitty) confirms that: "*A voidable contract is one where one or more of its parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by affirmation of the contract to extinguish the power of avoidance. In English law, contracts may be voidable, e.g. for misrepresentation,* ***duress****, undue influence, minority, lack of mental capacity, drunkenness or under statute*" (my emphasis) (1-076).

Employment Tribunal Jurisdiction

68. The EAT case of Hennessy v Craigmyle & Co Ltd [1985] ICR 879 and the more recent case of Cole v Elders' Voice [2021] ICR 611 both confirm that an Employment Tribunal can investigate the circumstances in which a COT3 agreement/contract, as defined by statute above, is valid or can be avoided at common law, or in equity, for duress or any other eligible reason.

Duress

69. The case law authorities on duress evidence an evolving debate about its foundational principles. This is also accompanied by analysis and commentary featured in Chitty amongst other publications. From those authorities, the following important features emerge, some of which partly or wholly overlap:

69.1 **An absence of consent**: many of the older cases on duress were premised on the notion that the party alleging it must be seen to have had his/her choice "overborne" or destroyed, so that they entered into the contract involuntarily. There has been a series of cases which undermine this principle but in the case of economic duress in particular, there have been several important and more recent decisions in which duress was defined in such terms. For example, in Pao on v Lau You Long [1980] AC 614, it was insisted that:

"… *the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act*." (636)

69.2 **Illegitimate pressure**: the (lack of) consent given must have been induced by pressure which the law does not regard as legitimate. In Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel) [1983] 1 AC 366 (HoL), Lord Scarman confirmed that the real issue is whether there has been illegitimate pressure, the practical effect of which is compulsion or an absence of choice:

"*The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no practical choice open to him*." (400).

69.3 In DSND Subsea Ltd v Petroleum Geo Services ASA [2000] B.L.R. 530, Dyson J summarised this principle as follows:

"*In determining whether there has been illegitimate pressure, the courts take into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressure of normal commercial bargaining"* (131).

69.4 **Causation**: in all cases of duress, it is necessary to establish that the alleged 'victim's' agreement to the contract was caused by the duress, however, the relevant tests on causation differ according to the type of duress which is alleged. As such, the specific tests relevant to economic duress are discussed in paragraph 72.1 below.

Economic Duress

70. A small body of relatively recent cases have now clearly established economic duress as a type of 'illegitimate pressure' along with other categories, such as threats to the person.

71. In its analysis on economic duress case law, Chitty concludes:

"*Although the doctrine of economic duress is now firmly established, there remains considerable doubt and some disagreement over the circumstances in which relief will be granted, and how the decisions are best explained*." (10-027).

72. Despite this, it is evident that the following additional[1] principles are important to cases which are alleged to fall within this sub-category of duress:

72.1 **Causation – "but for test":** in the case of Huyton SA v Peter Cremer GmbH [1999] 1 Lloyd's Rep, 620, Mance J said:

"… *the minimum basic test of subjective causation in economic duress ought … to be* a '*but for*' *test. The illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching. There may of course be causes where a common sense relaxation … is necessary, for example in the event of an agreement induced by two concurrent causes, each otherwise sufficient to ground a claim of relief, in circumstances where each alone would have induced the agreement*." (636).

72.2 **No reasonable alternative**: it has been debated in cases from the House of Lords downwards whether there is a separate and independent need for a Claimant of economic duress to demonstrate that (s)he had no reasonable alternative but to conclude the contract (for further discussion, see paragraph 74.3 below).

Economic Duress and Settlement Agreements/COT3 Agreements

73. The above principles of economic duress were considered in the case of Hennessy v Craigmyle & Co Ltd [1986] IRLR 300. The Claimant contended that the threat of summary dismissal, if he did not sign an agreement (equivalent to a COT3) meant that it was voidable because of duress. He had advice from his solicitor and received a lump sum and continuing fringe benefits for a limited period "*in full and final settlement of all claims*", as stated in the agreement.

74. On the facts of the case, the Court of Appeal held that there had been no economic duress. However, in so doing, Sir John Donaldson emphasised the evidence and principles which led to that conclusion and indicated their application in comparable cases:

[1] Additional to those set out at paragraph 69 above.

74.1 **Relevance**: on considering whether the doctrine of economic duress could still apply to such circumstances, he concluded that this would be "*entirely a question of fact for the tribunal" (468) and further* commented that:

"…*the common law is a living thing. Its principles may not change but its application confirms to changing circumstances*" (468).

74.2 **The significance of an ACAS conciliation officer**: he concluded that:

"*The purpose of section 140, read with section 134 of the Act of 1978, is undoubtedly to ensure that employees shall not surrender their rights without first receiving independent advice and assistance from skilled conciliation officers of Acas. Nevertheless, it does not follow that such intervention will, in all circumstances, eliminate the possibility that duress was such as to amount to a coercion of will vitiating consent, which is the basis of economic or physical duress as a ground for avoiding a contract. It must, however, make the possibility more remote*" (465).

74.3 **No Real Alternative**: he said that:

*"As is the norm when that phrase is used, in fact there was a very clear alternative, namely, to complain to an industrial tribunal and to draw social security meanwhile. It may have been a highly unattractive alternative, but nevertheless it was a real alternative. Economic duress can only provide a basis for avoiding a contract if there was no real alternative. With the benefit of hindsight, Lord Scarman's meaning* [Pao On] *might have been better expressed if he had said: "It must be shown that the payment made, or the contract entered into, was an involuntary act." (468).*

74.4 **Rarity: his contention:**

*"For my part I can see nothing wrong with the observation of the industrial tribunal that if the applicant was entitled to avoid the settlement in the circumstances of this case, so would many other claimants. This was characterised by Mr. Tyrrell as a "floodgates" argument. I do not so understand it. It is entirely sensible to observe that in real life it must be very rare to encounter economic duress of an order which renders actions involuntary. It follows that if the applicant's situation was not uncommon, it is highly unlikely that he was subject to the necessary degree of economic duress" (470).*

Legal Effect of Duress

75. Chitty succinctly summarises the effect of duress on contractual obligations as such:

75.1 "*Despite earlier doubts, it now seems clearly established that a contract entered into under duress is voidable and not void; consequently a person who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased; and if he has voluntarily acted under it with a full knowledge of all the circumstances he may be held bound on the*

*ground of ratification, or if, after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it*."[2]

76. The above paragraph summarises the law established in a number of cases, including Pao on and Hennessy

Remedies

77. As a matter of English law, a contract can be set aside

77.1 (at common law) on the basis of duress, or

77.2 (in equity) on the basis of undue influence.

78. Duress and undue influence overlap, in practice, to a considerable degree. This notion was discussed in detail by the Court of Appeal in the case of Halpern v Halpern & Anr [2007] EWCA Civ 291 (see paragraph 89 to 90 below).

Recission

79. In In Pakistan International Airline Corporation v Times Travel UK Ltd [2021] UKSC 40, [2022] 3 WLR 727, Lord Burrows stated that:

"*62. Duress in the law of contract focuses on an illegitimate threat (or illegitimate pressure) which induces a party to enter into a contract. If duress is established, the remedy for the threatened party is rescission of the contract (sometimes referred to as the avoidance, or setting aside, of the contract).*"

80. Caselaw regarding recission in cases of misrepresentation establishes that the burden of proof is on the party seeking to deny recission, to show that the relevant agreement cannot be set aside and this is consistent with Borelli v Ting [2010] UKPC 21, a case concerning duress:

"*34. An agreement obtained through duress is invalid in the sense that the party subject to the duress has the right to withdraw from the agreement, though that right may be lost if that party later affirms the agreement or waives the right to withdraw from it.*"

81. The case of Halpern considered the differences between recission at common law and in equity. Those differences are principally of academic interest and as such, will not be referred to in detail in this judgment in the interests of clarity and efficiency.

Effect of Recission

82. As a general principle, the effect of rescission on a contract is that it is completely reversed as if there had been no contract. If possible, the parties should be returned (or, where the rescission is equitable, substantially

[2] Chapter 10, section 2 (i)

returned) to the position that they were in before the contract was ever entered into.

Bars to Recission

83. The right to recission is not automatic. Along with estoppel and some other grounds, there are two potential bars to claiming this remedy. The first of these, as set out in paragraphs 67 and 75.1 above, is affirmation; the notion that despite an entitlement to rescind a contract, a party affirms it instead. Second is the impossibility of restoring the parties to their original position as regards the rights and obligations which have been created by the contract (referred to as the legal doctrine of 'restitutio in integrum' – restoration to pre-contractual positions).

Affirmation

84. Once a party has affirmed a contract, (s)he will lose their right to rescind. This manifestation can be express or implied through words, conduct or (in very limited circumstances) through inaction. The following principles are relevant:

84.1 **Unequivocal action**: In order to constitute an affirmation, the evidence of the party's election not to rescind must be unequivocal. The relevant act must be consistent with an election to affirm and wholly inconsistent with a desire to rescind the contract.

84.2 **Knowledge:** in order for valid affirmation to take place, the 'affirming party' must have actual knowledge of all the material facts which would have entitled them to rescind the contract. More modern authorities on the issue such as Peyman v Lanjani [1985] Ch 457 as well as commentary in Chitty[3] establish that they should have knowledge of their legal right to rescind**.**

84.3 **Freedom from duress:** at the material time of the alleged affirmation, the 'affirming party' must also be free from the effects of duress[4].

84.4 **Delay:** delay in and of itself does not amount to affirmation and this is consistent with the well-known employment cases of constructive dismissal such as Western Excavating (ECC) LTD v Sharp 1978 ICR 221**.** It should, however, be taken into account as a relevant fact. Delay is of more direct relevance to equitable rescission; it may render it inequitable for a court to order rescission. Delay will be considered from the '*moment at which the undue influence [or duress] has ceased to operate*' (Mutual Finance Ltd v John Wetton & Sons Ltd [1937] 2 KB 389, 397). From that time, a party should seek rescission within a reasonable time. What constitutes a reasonable time (that is what degree of delay constitutes a bar) will depend upon all the circumstances of the case.

Restoration to pre-contractual positions

[3] Chapter 7, paragraph 7.
[4] Allcard v Skinner (1887) 36 Ch 145 at 187

85. Where a contract is rescinded, the general requirement is that there must be full restitution on both sides. The defendant will make restitution to the Claimant and the Claimant will make counter-restitution. A party who seeks to rescind a contract must, as a general condition of obtaining this remedy, give back all they obtained from the transaction and this requirement (to make counter-restitution) is based on a need to avoid unjust enrichment by the party seeking rescission.

86. However, the requirement of restitutio in integrum ("restitutio") does not mean that the parties should simply be restored to the position in which they stood immediately prior to the agreement, so that, in a case where the agreement was induced by duress, for example, the defendant is simply restored to the position created by their illegitimate threats. Rescission may be required to put the parties in the position in which they would have been had the defendant not applied illegitimate pressure in order to procure the agreement. The case of Borelli v Ting [2010] Bus LR 1718 considered the actions of a former chairman and chief executive officer who used illegitimate means to procure a settlement agreement with liquidators. It held that a requirement of restitution in such cases resulted in an unacceptable outcome:

"*because the parties cannot be restored to the position created by the illegitimate means employed by [the former chairman], which resulted in the settlement agreement, the liquidators are bound by that agreement*" [39]

87. In Armstrong v Jackson, [1917] 2KB 66 McCardie J remarked that the phrase "restitutio in integrum" "*is somewhat vague. It must be applied with care*". Commentary within Chitty suggests that a different approach must be taken in cases involving non-money benefits for which a flexible, pragmatic and equitable approach is required. In Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218, Lord Blackburn said that:

"*the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract".*

88. Furthermore, in O'Sullivan v Management Agency and Music Ltd [1985] 1 Q.B., Fox LJ held that:

*"[t]he question is not whether the parties can be restored to their original position; it is what does the justice of the case require?"*

89. Prior to the case of Halpern, there was doubt about the extent to which 'restitutio' was a requirement of rescission for common law duress. In this 2007 case though, Carnwath LJ argued that since duress and undue influence deal with much the same subject matter, the rules of equity should prevail in relation to any difference between common law rescission for duress and rescission for undue influence in equity. If this approach is adopted it would mean that in the case of rescission for duress, the requirement of 'restitutio' is to be applied following the flexible approach of equity.

90. The following paragraphs from Halpern are referred to in the written submissions of the Claimant:

*"74. ... To expand the example, one may imagine someone persuaded by improper means to pay an excessive amount for work done on his house, for example re-tiling of his roof. It is hard to see why it should matter whether the improper means was a threat or a fraudulent misrepresentation. In either case, one would expect the law to find a means to enable him to recover his money, without requiring him to undo the work to the roof. It may be open to debate whether he should be required to give any credit for the value of the work done, assuming it was a value to him. But there could be no justification for any such counter-restitutionary requirement, if the evidence was that the re-tiling had not in fact been needed.*

*75. ... I would be inclined to agree with the deputy judge that rescission for duress should be no different in principle from rescission for other "vitiating factors". However, the practical effect of counter-restitution, in the terms explained by Lord Blackburn in Erlanger, will depend on the circumstances of the particular case. In the present case, if (contrary to Clarke J's expectations) the defendants are able to establish that their consent to the compromise agreement was procured by improper pressure (whether that is characterised as duress or undue influence), it would be surprising if the law could not provide a suitable remedy. The form of the remedy, whether equitable or tortious, is a matter which cannot sensibly be decided until the facts are known, not only as to the nature and effect of the improper pressure, but also as to the identity and significance of the documents destroyed."*

COT3 Agreements: Scope and Terms

91. **Meaning of terms**: general principles on the familiar approach to contractual construction are set out in cases such as Investors Compensation Scheme Ltd v West Bromwich [1998] 1 WLR 896 which established that a court must ascertain:

91.1 "*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 in which they were at the time of the contract."*

92. **Intention**: those principles were endorsed and specifically applied in the House of Lords case of Bank of Credit and Commerce International v Ali [2001] 1 AC 251, which considered a wide, all claims settlement agreement clause:

92.1 "*I consider first the proper construction of this release. 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*".

93. **Unspecified claims**: The EAT case of Livingstone v Hepworth Refractories plc [1992] ICR 287 specifically considered the scope of COT3 terms settled via ACAS and the extent to which they settled unspecified claims:

93.1 *"We cannot say…. that a conciliation officer when acting under the Act of 1978 is wearing "any number of hats" and dealing with all other matters which could possibly arise. It is of course helpful for parties to be able to wipe the slate clean, but the agreement must relate to those matters which are within their presumed contemplation at the time*."

94. In the Court of Appeal judgment in Ali, Lord Bigham of Cornhill specifically referred to the possibility of an all-claims settlement:

94.1 "*The law does not decline to allow parties to contract that all or an 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*."

95. Endorsing that view however, he also qualifies it as such:

95.1 *"This seems to me to be both good law and good sense: it is no part of the court's function to frustrate the intentions of contracting parties once those have been objectively ascertained.*

95.2 *But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware"*

96. **Clear Words**: Finally, the case of Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR 849 considered the scope of a COT3 term which was "*in full and final settlement of these proceedings and of all claims which the applicant has or may have against the Respondent….whether arising under her contract of employment right or the termination thereof*". Within that judgment, Judge Reed QC stated at paragraph 9:

96.1 "*... 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 they are 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. But we take the view that it would require extremely clear words for such an intention to be found*."

97. On the face of it therefore, aspects of the EAT judgment in the case of Arvunescu v Quick Release (Automotive) Ltd [2022] EAT 26 appear to be a little at odds. In this case, the COT3 contained the following wording:

97.1 "*the payment … is accepted in full and final settlement of all or any costs, claims, expenses or rights of action of any kind whatsoever, wheresoever and howsoever arising under common law, [statute] or otherwise (whether or not*

*within the jurisdiction of the Employment Tribunal) which the Claimant has or may have against the Respondent or against any employee, agent or officer of the Respondent arising directly or indirectly out of or in connection with the Claimant's employment with the Respondent, its termination or otherwise. This paragraph applies to a claim even though the Claimant may be unaware at the date of this agreement of the circumstances which might give rise to it or the legal basis for such a claim*."

98. It also contained a list of potential claims which: "*For the avoidance of doubt, the settlement … includes but is not limited to*"

99. In Arvunescu , the Claimant appealed against the strike-out of his victimisation claim against the Respondent. The Claimant had worked for the Respondent for one month in 2014 in an engineering role. The Respondent dismissed him and he issued a claim for race discrimination. That claim was settled by way of a COT3 agreement in March 2018. In May 2018, the Claimant issued the victimisation claim. He alleged that in January 2018 he had applied for a job with a German company that was a subsidiary of the Respondent, and that he was rejected for the role in February 2018 on the ground of having done a protected act, namely bringing the race discrimination claim in 2014. He alleged that the Respondent had declined to provide him with a reference.

100. The EAT held that the Employment Tribunal was right to strike out his claim. It found that as he received the rejection email for the engineering role in February 2018, the alleged victimisation and the alleged help given by the Respondent took place before the COT3 agreement was signed. On that premise, the victimisation claim was caught by the COT3 agreement. The terms of the COT3 indicated that it was intended to have a very wide application. Further, although a claim under s.112 did not necessarily require a connection with previous employment, the connection was an essential factual element of the instant case.

101. In his judgement, Michael Ford QC contrasts the facts of this case with that of Howard which was concerned with whether the COT3 covered a future claim which had not arisen at the date on which those terms were concluded. He explained that in Howard, the particular wording of the COT3 only covered existing and not future claims.

102. The relevant conclusions from Arvunescu are as follows:

102.1 "*I have not found this point easy, but I consider the better interpretation is that the clause in the COT3 does embrace the actual discrimination under section 112 which is alleged to have occurred in this claim. In construing the clause, I consider it is relevant to bear in mind that its wording and intended reach appears to be very wide: hence the references to claims "of any kind whatsoever, wheresoever and howsoever arising", the phrase "arising directly or indirectly out of or in connection with his employment its termination or otherwise", and the wide list of claims specifically listed "for the avoidance of doubt", which includes claims under the EqA"*. [62]

102.2 "…*I am reinforced in that view by the phrase at the end of the clause, by which the clause was meant to apply even if the Claimant was unaware of "the legal basis for such a claim*" [66]

102.3 "*Finally, I do not consider that the background to the COT3 helps to resolve the issue. Even assuming the parties knew at the date it was signed that the Claimant might be considering bringing another claim, I consider the background does not assist in resolving the issue on this appeal. On the one hand, it might be said that if the Respondent wanted to exempt such a claim, they should have said so clearly; but, on the other, if the parties had such knowledge, it would also be a factor suggesting that the clause was intended to wrap up everything once and for all. My conclusion is based on the construction of the clause itself*". [67]

103. The EAT judgement was upheld by the Court of Appeal[5] and LJ Lewis made this particular comment:

103.1 "18…*that conclusion* [that the claim against the Respondent was in scope of the COT3 terms] *is reinforced by consideration of the context in which the settlement agreement came to be made. The purpose underlying the COT3 agreement, as appears from its terms, is to settle claims the appellant may have against the Respondent as at the date of the agreement, i.e. 1 March 2018. There had been a relationship of employer and employee between the parties. That relationship had ended after just over a month. That had led to litigation. The context in which the agreement was reached, and the wording of the agreement itself, indicates an intention to settle claims connected with the appellant's employment which existed as at 1 March 2018 whether or not they were known about at that date. The claim alleging a contravention of section 112 of the 2010 Act in January or February 2018 is a claim against the Respondent which is connected with the appellant's employment with the Respondent and which existed at the date of the settlement. The purpose underlying the settlement agreement was to settle all such existing claims*"

**Conclusions**

Issue 1: The Validity of the COT3

Economic Duress

104. In applying the above principles set out in paragraphs 69 to 74 to the facts of this case, I find as follows:

105. **Absence of consent**: the Claimant's true consent was completely undermined when she entered into the COT3 agreement. I find that her decision to conclude the agreement was involuntary. This is supported by the fact that it took her less than 24 hours to confirm her agreement to the Respondent of the offer which had been made in its letter dated 12 October 2021. Furthermore, her agreement to the COT3 terms was immediate, without challenging or questioning any of them. From the Claimant's receipt of the COT3 agreement to the confirmation by ACAS of binding terms, the whole process took a matter

[5] [2022] EWCA Civ 1600

of hours. The fact is that the Claimant wanted to conclude this agreement as quickly as possible.

106. **Illegitimate pressure**: the Claimant's submissions rely on three aspects of alleged illegitimate pressure. They are as follows:

106.1 "*trumped up allegations of gross misconduct made in bad faith;*

106.2 *unlawfully denying the Claimant her right to occupy the Stable Bungalow;*

106.3 *a threat of wrongful and / or unlawful dismissal*."

107. Based on the evidence before me in this hearing, I have found that the allegations of gross misconduct made by the Respondent in its two disciplinary hearing invitation letters, and in particular, the letter which put forward the original 'deal' on which the COT3 was based, had no credible basis. Further, that the Respondent put these allegations of gross misconduct to the Claimant knowing that they had no credible basis.

108. I also found that the Respondent intentionally restricted the Claimant's access to the Stable Bungalow from 12 October 2021 onwards. Although it did not forcibly or physically evict her, it did not allow her to enter the bungalow, stay there or get any of her possessions. Furthermore, on repeated occasions, it failed to dispute or correct her assertion that she was homeless from that point, to offer her any reassurance that this was not the case or to offer alternative or temporary accommodation. There was no dispute on the facts that the Claimant had a lawful right to occupy the Stable Bungalow as part of her contractual terms of employment. Therefore, the Respondent's intentional restriction of her entry or right to quiet enjoyment of her home was unlawful and was a fundamental breach of her contractual terms.

109. The Respondent's letter dated 12 October 2021 did not expressly threaten to dismiss her. However, the construction and exact words of this letter are significant. It starts by restating the alleged grounds of gross misconduct, grounds which I have found on the evidence to be false. It then considers the issue of the Claimant's personal relationship with T and says that this will undermine the Claimant's ability to perform her role and for others to have confidence in her. It then states: "*for those reasons I believe that we need to bring your employment to an end* ***as well****…*" (my emphasis). This clearly indicates a concluded need for her employment to terminate, either for her personal relationship or for gross misconduct. Therefore, although this is not a letter of dismissal, it explains a decision, for the reasons explained.

110. Had the Claimant been dismissed at that stage, either because of her personal relationship with T or for the allegations of gross misconduct which were stated, based on the evidence of this hearing, it would be legitimate to conclude that this dismissal would have been wrongful and unfair and as such, unlawful.

111. As such, is taken as a whole, I am of the opinion that the Respondent subjected the Claimant to illegitimate pressure. I am also of the view that this pressure can be clearly "*distinguished from the rough-and-tumble of the pressure of*

*normal commercial bargaining*"[6] . It can likewise be contrasted with the guiding case of Hennessy which considered a situation not unusual to COT3 agreements. In short, that was a case in which the Claimant had been induced to sign an agreement as an alternative to dismissal. Employers often and regularly encourage their employees to enter into agreements on this basis in order to avoid a fair disciplinary process. That is a relatively common commercial practice and as such, would not be considered as illegitimate pressure in accordance with the economic duress case law principles.

112. That was not the case here. In this case, I have concluded on the basis of the evidence before me that the Respondent knew the Claimant to be in a vulnerable position. It knew that she was young, pregnant, suffering from stress and anxiety, in a potentially violent relationship, with very limited income, with no or little family support, no basic academic qualifications and nowhere else to live (other than the accommodation provided by the Respondent). Whilst in those circumstances, the Respondent intentionally made unsubstantiated accusations of gross misconduct against her, indicated its intention to dismiss her and, most importantly, denied her access to her home and her possessions within that home until she concluded the COT3.

113. It was within that context that it made the offer to the Claimant that if she "*would prefer not to have that discussion*" (regarding her potential dismissal because of her relationship or for gross misconduct) then it could issue the Claimant with her "dismissal letter" as well as the letter to assist her with council accommodation and her notice pay "*straightaway*".

114. In the days that followed and until the conclusion of the COT3, the Respondent:

114.1 knew that the Claimant did not have legal advice or representation in concluding the COT3;

114.2 knew that she had little or no income;

114.3 told her that it would not issue her with an eviction letter (to enable her to access priority housing with her local authority) until she signed the COT3 agreement;

114.4 offered no alternative accommodation and did not confirm that she could access the Stable Bungalow, and

114.5 failed to respond to specific requests for the Claimant to get clothes or other possessions.

115. In those circumstances, I am of the opinion that the Respondent acted in bad faith and applied illegitimate pressure on her to induce her to conclude the COT3 terms. It may have been perfectly legitimate to investigate the Claimant's conduct in the events of 29 September 2021 or to consider the effect of her ongoing personal relationship with T after his dismissal. Any threat to dismiss the Claimant at that stage, dependent on the circumstances and in accordance with the authority in Hennessy may not, of itself have been

[6] DSND Subsea Ltd v Petroleum Geo Services ASA [2000] B.L.R. 530

illegitimate. However, it is the combination of factors, most notably the intentional restriction of the Claimant's access to her home accommodation which rendered the actions of the Respondent illegitimate in my view.

116. **Causation**: I find that, but for the illegitimate pressure applied on her, the Claimant would not have concluded the COT3. She believed that if she did not sign the agreement, she would be sacked. She believed that she was homeless and had been evicted. She knew that she could not get her eviction letter unless she concluded the agreement. This was an urgent priority for her and all relevant parties knew this.

117. **No real alternative**: in the Respondent's submissions, it understandably, and with relevance, relies on this point to draw an analogy with the case of Hennessy, to claim that the Claimant did have an alternative course of action. This alternative may have been "*highly unattractive*", in the words of Sir John Donaldson, but it was an alternative. In Hennessy, that alternative was the option to bring a claim to an industrial tribunal and to draw benefits. The Respondent points to the fact that the Claimant in this case, had been staying with friends, had sought advice and support from her sister and asserts that this could have continued until she obtained legal advice.

118. There are important and unusual circumstances which distinguish this case from Hennessy and which have led me to the conclusion that the Claimant had no real alternative but to sign the COT3 when she did. Some of those circumstances are further explained in paragraph 122**.** below but the most important of these was the fact that at the material time, the Claimant was homeless. She genuinely and legitimately believed that she had nowhere to live and the Respondent allowed her to believe this. She had even run out of clothes to wear. As such, if she had taken the "unattractive alternative" which was set out in Hennessy she could have tried to seek legal advice and to claim state benefits but would have continued to be homeless, at least for the foreseeable future, and would not have been able to access local authority accommodation (as someone classed as unintentionally homeless). She needed an eviction letter in order to do this and the Respondent had told her that she could have the eviction letter once the COT3 was signed. As a pregnant, vulnerable young woman with no or little immediate income, on the evidence, I do not consider this outcome to have been real alternative for her.

119. **Rarity**: in its submissions, the Respondent legitimately referred to the need for certainty in concluding COT3 agreements. This was so for the Respondent in this case but also from a wider policy perspective, especially in a process during which ACAS conciliators offer support to the parties who conclude such agreements. Hennessy is authority for the fact that economic duress, to an extent which induces involuntary conclusion of a COT3 "*must be very rare*". I have taken those issues very much into account in my decision.

120. I am, however, of the opinion that the circumstances of this case fall into that "very rare" category.

121. I am of that view for all the reasons stated above and on the basis of the following summary which comprises my findings of facts relevant to the preliminary issues, on the evidence before me:

122. This is a case of a Claimant who, until 29 September 2021 had a good work record and was good at her job. She was highly dependent on her employment, the income and most notably the accommodation which it gave her. The Respondent knew this. On 29 September 2021, while pregnant, she was involved, as a potential victim, in a violent incident. Her conduct during this incident and in its immediate aftermath appears to have been relatively blameless. She then became ill, with anxiety, at least in part as a result of this incident. At this stage, the Respondent raised unsubstantiated allegations of gross misconduct, indicated its decision to dismiss her and prevented her access to her home accommodation. She believed that she was homeless and would be sacked. The Respondent then induced her to enter into an agreement, telling her that its purpose was for her benefit, so that she could obtain the eviction letter which she urgently needed. She raised no claims or allegations against the Respondent at any time and there were no specific claims or allegations settled in the COT3 despite its stated intention to the contrary. The only monetary term of the COT3 resulted in payment of her two weeks' notice pay to which she would lawfully have been entitled in any event. She did not have access to legal advice. The assistance offered by ACAS was limited in scope with no enquiries made about the Claimant's reported claims, allegations or personal situation, particularly in light of the emphasised, urgent need for an eviction letter. The Respondent was represented by a solicitor. There is no evidence that the Respondent considered a settlement agreement which would have given the Claimant access to independent legal advice. It was clearly to the Respondent's advantage that the COT3 was concluded swiftly and the effect of this was that the Claimant's employment was immediately terminated along with her right to occupy its accommodation and all other associated liabilities.

123. In all the circumstances of the case therefore I consider that the Claimant entered into the COT3 dated 15 October 2021 under duress.

Legal Effect

a) The result of my conclusion in paragraph 123 is that the COT3 is voidable and I must therefore consider whether to set it aside (rescind it) or whether any bars to recission are made out, set out in paragraphs 75 to 90.

Affirmation

124. **Unequivocal action:** the Claimant's case is that she indicated her intention to rescind by first contacting ACAS on 2 December 2021 to initiate the compulsory early conciliation process and thereafter by submitting her ET1 complaint which expressly referred to the fact that the COT3 "*is void owing to duress*". I accept that such action was inconsistent with any election to affirm the contract. The Respondent contends that she had already affirmed the contract by then, by, for example, relying on the eviction letter to her local housing authority. There was no evidence before me to that effect. In any event

though, this contention is undermined by the conclusion at paragraph 125 below.

125. **Knowledge:** there was no evidence before me that the Claimant was aware of her legal right to rescind the COT3 agreement (or in plain terms: that she may not be bound by its terms for legal reasons) until she had access to legal advice from her solicitor who then contacted ACAS and submitted the ET1 application on her behalf. On the balance of probabilities, I consider that this would have been unlikely for the Claimant.

126. **Freedom from duress:** the main effect of the duress ("illegitimate pressure") on the claimant was that she was homeless. The only evidence before me as to when that changed was the Claimant's confirmation, during cross examination that she was re-housed to her current address in August 2022

127. **Delay:** the Respondent asserts that the Claimant's delay between the conclusion of the COT3 and the submission of the ET1 application form is consistent with affirmation. I disagree with this for the following reasons:

127.1 The correct landmark, in my opinion, is the date on which the Claimant entered the early conciliation process via ACAS. Early conciliation is compulsory and is the first step in initiating a claim. The claimant would not have been permitted to submit her claim without taking this step and it was self-evident, in so doing, that it indicated her rejection of the COT3 agreement.

127.2 The period of time between the COT3 conclusion on 15 October 2021 and early conciliation commencement on 2 December 2021 was six weeks and six days. Given all the circumstances of the Claimant at the time (which are documented in the findings of fact) this is not a period of unreasonable delay.

127.3 This assertion does not take account of the conclusions outlined in paragraphs 125 and 126 above.

Restoration to pre-contractual positions

128. This is arguably the most difficult principle to consider and to apply to this case. The Respondent contends that the Claimant benefitted from the terms of the COT3 to receive her notice pay and the eviction letter and that restitutio would not be substantially possible. Indeed this is factually true as it would be impossible in the circumstances to return the Claimant and Respondent to their original positions and relationship before the COT3 was concluded. Furthermore, there is no evidence before me about the Claimant's willingness or ability to pay back the £720 notice pay to the Respondent. Finally, I am acutely aware of the lack of legal authority on this issue in the Employment Tribunals.

129. However, despite these issues, I must apply the guidance from the cases outlined in paragraphs 86 to 90 above regarding the equitable principles of practical justice. In particular, in applying the case of Halpern (which is as close to the facts of this case as I have read on this issue):

"… *It would be surprising if the law could not provide a suitable remedy*".

130. As Halpern suggested, the practical effect of counter-restitution must depend on the facts of a particular case. In this particular case, I consider that the following facts are relevant to the issue of practical justice:

130.1 **Payment of the Claimant's notice pay:** it is salient that the only monetary benefits received by the Claimant under the COT3 was payment of her lawful entitlement to notice pay. She did not receive any other payments. Had the Respondent dismissed her in the circumstances relevant at the time, she would have been lawfully entitled to this notice pay and had the Respondent not paid it, it would have been in breach of its statutory obligations. Indeed, the Claimant would argue and has argued in this case that termination of her employment was in breach of her statutory right not to be unfairly dismissed under the Employment Rights Act 1996 and as such, would entitle her to additional compensation. Furthermore, the Respondent could seek an offset or repayment of this amount either as part this claim, should it result in an order for payment of compensation to the Claimant or as a separate claim by the civil courts.

130.2 **Eviction letter:** as previously indicated, there was no evidence before me in this case about the extent to which the Claimant had used this letter for her benefit. Indeed, a letter simply confirming the termination of her contractual accommodation may have been something which was requested or provided by the Respondent after the Claimant's dismissal in any event. It does not seem to me to be consistent with the principles of practical justice for such a letter to be withdrawn.

130.3 **Factual reference:** there was no evidence before me as part of the case that the Claimant had made use of the factual reference which was provided as part of the COT3 agreement.

130.4 There were no other benefits received by the Claimant as part of the COT3 contract.

130.5 The Respondent had indicated its decision that the Claimant's employment must be terminated or to dismiss the Claimant as an alternative to mutual termination of her employment. Arguably therefore, to place the parties back in their respective positions before the duress or the COT3 would have resulted in the Claimant's dismissal or resignation. In those circumstances, absent the COT3, she would be entitled to pursue the claims which form part of this case to the Employment Tribunal in any event.

131. Given the above facts, the need to avoid 'unjust enrichment' of the Claimant and the requirement for a flexible, pragmatic and equitable approach to the principle of 'restitutio', I conclude that this is not a bar to recission of the COT3 agreement on the facts of this case.

Issue 2: The scope of the COT3 terms

132. I am asked to determine whether or not the Claimant's claim of pregnancy discrimination is waived by the COT3 dated 15 October 2021. As such, I apply

the principles from the case law authorities set out above to this COT3. Specifically, I must consider the following terms of that agreement:

132.1 *"2. …. The Claimant agrees that all her allegations against the Respondent submitted to ACAS under early conciliation number NE102694/21 will be considered settled and withdrawn and she may not bring any Employment Tribunal claims regarding some or all of those allegations subsequently".*

132.2 *"4. The Claimant agrees to accept the Settlement Sum [previously defined as "her notice of £720 subject to deductions from income tax and employee National Insurance"] in full and final settlement of all and any claims of whatever nature she may have whenever, whether before or after entering this Agreement which are connected with or arising out of her employment with the Respondent and/or its termination and made against the Respondent including but not limited to, her claims under Early Conciliation number NE 102694/21 and all other claims for which an ACAS Conciliator has a statutory duty to conciliate on, save for any claim by the Claimant to enforce this Agreement, any claim relating to latent personal injury of which she is not currently aware or ought reasonably to be aware of at the date of signing or in relation to her accrued pension rights. The Claimant confirms that she is not currently aware of any such claims."*

133. There is no evidence whatever that the Claimant made any allegations against the Respondent at any point. Therefore, clause 2 of the COT3 as set out above did not settle the Claimant's potential pregnancy discrimination claim. The relevant question therefore is whether the wide settlement term at clause 4 includes the pregnancy discrimination claim.

134. In its submissions, the Respondent refers to the case of Arvunescu and invites me to apply it to this case. Indeed, on first examination, clause 4 of this COT3 and the general settlement clause in Arvunescu are similar and there are also some similarities on the facts of each case. They both, for example, considered claims which were based on facts predating the conclusion of the agreements.

135. I have compared each clause and the judgment in Arvunescu which based the *"intended reach"* of that wide clause on the *"construction of the clause itself"* and not, it said, on the background which led to it. I have considered the extent to which I can and should apply that principle to clause 4 of this COT3.

136. In so doing, I have also considered the differences in the clauses: they are not identical. The Arvunescu clause is wider, more specific and refers to a list of specific, potential claims. In addition, the EAT judgment places particular *importance on "the phrase at the end of the clause, by which the clause was meant to apply even if the Claimant was unaware of "the legal basis for such a claim"".* Such a phrase does not appear in this clause.

137. Furthermore, it is evident, from the Court of Appeal judgment in particular that the context of the agreement in Arvunescu **was** of relevance. This is specifically relied on by LJ Lewis. The pertinent facts which he recounts are that:

137.1 There had been an employment relationship of just over a month;

137.2 There was then employment litigation;

137.3 The agreement in question settled the claims in that litigation.

138. This context, as well as the clause wording, influenced the Court to decide that the parties intended to settle all claims connected with the Claimant's employment (at that date) whether or not they were known about. The intention of the parties, about the meaning of the terms which were concluded, was therefore a relevant factor. This conclusion must be right as it is consistent with all the case law principles from the Court of Appeal and the House of Lords in paragraphs 91 to 96 above. The idea that the terms of an agreement can be considered in total isolation, as if divorced from the parties and the circumstances from which they came and could therefore have exactly the same meaning in any other context, appears inconsistent with all of the other authorities on this issue.

139. The facts in Arvunescu differed significantly from the facts of this case. In this case, there was never any employment litigation before the COT3 agreement. There were never any allegations made and the Claimant had raised no intention to bring any claims. The COT3 was initiated purely by the Respondent to facilitate the Claimant's termination of employment. The only evidence about the intention of the parties was that the terms:

139.1 meant that the Claimant was not dismissed;

139.2 resulted in an eviction letter, notice payment and factual reference for the Claimant.

140. Other than the COT3 wording itself, there was no other evidence before me that it was intended to settle any claims of pregnancy discrimination, particularly as no such claims were known. This was not understood by the ACAS conciliator who discussed it with the Claimant, nor the parties, and for me to infer that intention, in the absence of any evidence, would be inconsistent with the guiding case law principles.

141. Therefore, I conclude that the COT3 dated 15 October 2021 did not settle the Claimant's current claim of pregnancy/maternity discrimination.

**Declarations**

142. I therefore make the following declarations with regard to the COT3 agreement between the Claimant and Respondent dated 15 October 2021:

142.1 that it is rescinded and therefore set aside, the Claimant having entered into it under duress; and:

142.2 that it was not a valid or enforceable "agreement" under section 203(2)(e) Employment Rights Act 1996 and was not a valid or enforceable "contract" under section 144(4) equality act 2010; and

142.3 that it did not settle the Claimant's current claim of pregnancy/maternity discrimination submitted under claim number 3301362/2022 and that as such, the employment Tribunal has jurisdiction to hear it.

*V. Othen*

Employment Judge Othen
24 April 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27.4.2023

GDJ

FOR THE TRIBUNAL