



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Arvunescu

v

- 1. Quick Release
(Automotive) Ltd**
- 2. Dynamite Recruitment
Solutions Ltd**

OPEN PRELIMINARY HEARING

Heard at: Watford

On: 15 & 16 July 2019

Before: Employment Judge Wyeth

Appearances

For the Claimant: In person

For the First Respondent: Mr J McCracken, Counsel

For the Second Respondent: Mr Matt Fox, Managing Director

JUDGMENT

1. In accordance with r34 of the Employment Tribunal Rules of Procedure 2013, the second respondent is to be removed as a party to these proceedings.
2. The claimant's claim is struck out and dismissed in its entirety as the tribunal has no jurisdiction to hear any of his complaints.
3. For the avoidance of doubt, the trial listed for 4 and 5 November 2019 is no longer required and vacated.

REASONS

1. The claimant was employed by the first respondent from 6 May 2014 until 6 June 2014 as an engineering release coordinator. He was based in Woking at the site of a contractor ("the Contractor") of the first respondent. The first respondent is a registered company in England and Wales and has its

registered office in Leigh-on-Sea, Essex. The correspondence address for the first respondent provided by claimant on his ET1 form is the same as that used by the first respondent, namely: Suite 12, Churchill House, West Flaunden, Essex. It is agreed that the first respondent provides data management solutions to the Contractor.

2. In so far as it is relevant, the claimant describes himself as a Romanian national and is currently living in France.
3. Following the termination of the claimant's employment in 2014 by the first respondent, the claimant brought proceedings against the first respondent for race discrimination under claim number 2700958/2014. Notably, that claim was compromised by way of a COT3 settlement agreement entered into on 1 March 2018 with the assistance of an ACAS conciliator. Shortly afterwards, the claimant commenced ACAS early conciliation ("EC") on 10 April 2018 against the first respondent. An ACAS EC certificate was issued on 10 May 2018.
4. By way of a claim form issued on the same day, 10 May 2018, the claimant brought further complaints of victimisation, direct age and race discrimination, discrimination arising from disability and breach of contract in relation to a vacancy he applied for with a company in Germany. The particulars annexed to the claimant's ET1 are rather discursive and I have not found them easy to follow. Nevertheless, Employment Judge George, with the claimant's assistance and agreement, identified the claims that he intended to bring within his ET1 and the relevant issues at a preliminary hearing on 14 December 2018. Those claims and issues are helpfully recorded in her case management summary ("the Summary"). The Summary was sent to the parties and there was specific direction that if either party considered the Summary to be inaccurate in any way, they were to notify the tribunal within 14 days. In actual fact, at the claimant's request there was a correction made to the Summary, albeit a relatively minor one. At paragraph eight, EJ George had failed to refer to direct age discrimination and she corrected that point in the amended summary. There were no other changes.
5. For simplicity, the relevant part of the Summary is extracted and set out in the Schedule to this Judgment and Reasons as it contains a comprehensive outline of the claims and issues being pursued by the claimant. The Summary also provides a useful outline of the claimant's case at paragraphs five to nine.
6. Even though the claimant has not named the second respondent in his ET1, EJ George considered it prudent to add the second respondent as a party to these proceedings to ensure that they attended this Preliminary Hearing despite the fact that she was unable to conclusively identify any claim the claimant was seeking to bring against the second respondent or why they might be liable to him in some way.
7. Following the case management hearing, EJ George ordered this Open Preliminary Hearing to deal with the following seven preliminary issues:

- 7.1 Does the Employment Tribunal lack jurisdiction to hear the present claim on the basis that the issues which are raised in it were compromised by the COT3 Agreement between the claimant and the first respondent in case number 2700985/2014?
 - 7.2 Does the Employment Tribunal have jurisdiction to hear the breach of contract claims under article 3 of the Extension of Jurisdiction (Employment Tribunals) Regulations 1994? [With regard to these particular claims, EJ George cross-refers to the issues identified at paragraphs 13.17 and 13.18 of the Summary – see paragraph 8 below and/or the annexed Schedule]
 - 7.3 Does the Employment Tribunal have jurisdiction to hear the negligence claims brought by the claimant?
 - 7.4 Are there no reasonable prospects of success of any or all of the claims such that they should be struck under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013? This will include consideration of the question of whether the failure to proceed with the claimant's application for the role of Engineering Releasing Co-ordinator was an act of the first respondent.
 - 7.5 Alternative to issue 4 above, are there little reasonable prospects of success of any or all of the claims such that they should be the subject of a deposit order under rule 39(1) of the Employment Tribunal Rules of Procedure 2013?
 - 7.6 Should the claimant be permitted to amend his claim to include allegations that the torts of perjury and/or forgery have been committed by the first respondent in relation to the preparation of the bundles in his 2014 claim and an appeal to the EAT in relation to it?
 - 7.7 Should Dynamite Recruitment Solutions Ltd remain a second respondent in the proceedings?
8. With regard to the issue at paragraph 7.2 above, EJ George recorded in the Summary the following at paragraphs 13.17 [see 8.1 below] and 13.18 [see 8.2 below]:
- 8.1 The claimant alleges that the first respondent is in breach of contract by failing to provide him with a reference. This raises the following questions:
 - 8.1.1 Was there an implied term of the COT3 that the first respondent would provide a full and frank reference to the claimant on request?

- 8.1.2 Was there an implied term of the contract of employment between the claimant and the first respondent that the latter would provide a full and frank reference to the claimant on request?
- 8.1.3 Was German law or alternatively Romanian law the applicable law for the contract of employment which ended in 2014?
- 8.1.4 If so, then under German or alternatively Romanian law, was it a breach of contract not to provide a full and frank reference to the claimant on request?
- 8.1.5 The claimant also argues that there was an implied promise from 2014 on termination of employment that the first respondent would provide him with a reference on demand. It appears that the claimant argues first this is relevant to the question of whether there was an implied term of the contract of employment as set out in [8.1.1 above] and secondly that this amounted to a separately enforceable contract.
- 8.2 Did the respondent breach the COT3 or alternatively the contract of employment by failing to provide the claimant with a reference?

The Hearing

- 9. At the start of this hearing, the claimant clarified the following points. His case was that there was an implied term under the contract of employment that he had with the respondent in 2014, that a reference should be provided. He explained that it was not his case that there was an implied term under the COT3. Secondly, after some discussion with the claimant and an opportunity for him to reflect on the position, the claimant accepted that this Employment Tribunal has no power to hear any alleged negligence claim or allegations regarding the torts of perjury or forgery. Therefore, he indicated that he was no longer pursuing those matters and that I did not need to address them. Accordingly, I was left to determine the five remaining issues in this case in so far as it was necessary to do so.
- 10. In readiness for this hearing, EJ George ordered that each side should send to the other by 22 February 2019 all documents they wished to refer to at this open Preliminary Hearing or which were relevant to the issues to be determined. An agreed bundle of documents was to be prepared by 22 March 2019. Accordingly, I had before me a short bundle of documents prepared for the purpose of this hearing. Unfortunately that bundle was not paginated but was arranged instead by numbered dividers.
- 11. In so far as either party wished to rely on witness evidence, provision was made for statements to be exchanged by 26 April 2019. The parties confirmed at the outset that neither wished to rely on any witness evidence but instead wanted the matters determined on the basis of submissions only.

12. I was alive to the fact that any dispute of fact could not be resolved without evidence and therefore I would need to be aware of the extent to which such conflict might be material to the matters I have determined.
13. Both sides agreed at the outset that it would be sensible to deal first with the question as to whether the second respondent should be removed as a party to these proceedings, as depending upon the outcome of that issue, the second respondent would be released from the proceedings and thus avoid any need to attend on the second day.
14. I heard from the claimant first in relation to that matter and then I heard submissions from Mr Fox for the second respondent. Rather than give my decision on that matter immediately, I decided as a precaution that I would wait to hear the claimant's submissions on the other issues so as to be sure that nothing arose in relation to those matters that might have had any impact on whether or not the second respondent should be removed as a party. I was able to give my decision on that issue, along with reasons, at the end of the first day. I set out my reasons on that discrete issue immediately below.

The removal of the second respondent

15. The claimant told me that after he had been dismissed from the first respondent he approached the second respondent which is a recruitment company. He says that he approached them around June/July 2014 to apply for a job, very shortly after being dismissed from the first respondent. Although there is a very small possibility that his contact with them happened subsequently, in all probability he would have approached them before he issued his previous claim on 26 July 2014.
16. He maintains that the second respondent eventually told him that the vacancy he was interested in was not available. That was not a vacancy that involved either the first respondent or either or the two German companies that are referred to in these proceedings below.
17. He was advised, he says, by the second respondent that another vacancy elsewhere was coming available and needed to be filled the following day. As a consequence, he says he was called in for an interview on that same day and it was suggested to him that he would be offered the position subject to a favourable reference from the first respondent. Notably the claimant cannot be specific about the date of this event. He then says that nothing happened thereafter, and he heard nothing more. If that is correct, I find it surprising that the claimant did not follow the matter up at all.
18. Indeed, the claimant says it was not until a year later that he went back in 2015 to ask the second respondent if they had obtained a reference from the first respondent. The claimant maintains that someone from the second respondent told him that they had not received a reference or obtained a reference for him.

19. The claimant considers that was ambiguous and that they did not provide an explanation as to why they had not obtained a reference from the first respondent. He says he went back to the second respondent in 2018 to ask why they had not obtained a reference from the first respondent and they did not reply. That is the extent of his case against the second respondent.
20. The claimant accepts that his complaint in relation to the matter in 2018 was more to do with what he considered to be a breach of the GDPR but feels that there might have been some discrimination in relation to the failure by the second respondent to obtain a reference from the first respondent. I asked the claimant to explain why he felt that in those circumstances he had some kind of complaint or claim against the second respondent. Specifically, I asked him why he was asserting that the second respondent should be liable in any way for the claim he was now pursuing against the first respondent. The claimant's response was that he may have a victimisation claim against the second respondent. He was not at all clear as to the basis upon which he felt that such a complaint could be advanced, let alone, sustained.
21. On behalf of the second respondent, Mr Fox explained that his company no longer held records prior to May 2018. In order to ensure the second respondent is GDPR compliant, they had deleted the records relating to individuals who have in the past expressed an interest in being candidates if those individuals have never been placed in a role by the second respondent or who had never been employed by the second respondent. He stated there had been a deliberate 'purge' on the gathering or harvesting of information that was not to do with individuals with whom the second respondent was working.
22. As a consequence, he was only able to respond on the basis of what he understood the claimant's position to be from what the claimant had alleged to him directly about his claim. The claimant had told him that in 2014, the claimant applied for a vacancy on the website. Mr Fox explained that he had little if any information to enable him to piece together precisely what position the claimant applied for. Nevertheless, he was able to confirm that the claimant had never been employed by the second respondent (which the claimant does not dispute). Mr Fox stated that he was told by the claimant that the claimant came into the office for an interview and the claimant says that he was offered a role, subject to getting references. Mr Fox can find no records to support that assertion. Mr Fox nevertheless disputes that this would have been the position, because he says the process that the company follows whenever they confirm an assignment is to send formal Assignment Details Confirmation to any candidates so that they know exactly what they are being offered.
23. He does accept that the claimant contacted his office in 2015. The claimant produced an e-mail that he received from someone from the second respondent stating that they did not have a reference for the claimant. That e-mail was sent on 27 February 2015, and it said the following:

“Good morning. I can confirm that we do not have references on file for you so this has been the effect of not being able to help you. We have not had any contact with EL and are unsure who she is currently”

24. There was then no contact, Mr Fox says, from the claimant for three years, at which point the claimant made contact in around 7 May 2018 to ask whether there was no reference by way of an e-mail.
25. I note that the claimant lodged his claim on 10 May 2018. Not only did the claimant not add the second respondent as a party, he did not mention anything that might suggest that the second respondent should be a party. If the claimant felt that he had a case or any cause of action against the second respondent I consider it odd and inconsistent that he would then lodge a claim only three days after receipt of that e-mail and not include them as a party or make any reference to this possibility.
26. In any event, taking the claimant’s case at its best, I cannot see how the second respondent can in any way be found to be liable or how there can be any prospects of success in pursuing a claim against the second respondent for victimisation, or for that matter, any of his other claims. If the first respondent did refuse or fail to provide a reference to the second respondent, it is impossible to see how or why that is the fault of the second respondent.
27. Furthermore, the second respondent has absolutely no connection to the first respondent. The only possible link that the claimant can suggest is that he had put forward the first respondent as a potential referee to support him with an ‘expression of interest of employment’ that he was pursuing via the second respondent. The second respondent, for whatever reason, never received a reference. On that basis there is no claim and it would certainly not be enough to shift the burden of proof from the claimant to the second respondent. I am satisfied that it is entirely proper and in the interests of justice to remove the second respondent as a party.
28. With regard to the remainder of the hearing, it was decided that I would hear submissions from the first respondent before lunch on the remaining four issues and then have a break to allow the claimant to gather his thoughts and hear from him in relation to his submissions in response.

Applications by the claimant

29. The claimant made an application at the start of his submissions to have the skeleton argument prepared by Mr McCracken to be struck out as it had been served later than 1 July 2019 (the date specified in the subsequent order made by EJ George in correspondence dated 7 March 2019). The respondent had applied by e-mail on 5 July 2019 to serve this by 12 July 2019. I noted that the claimant had received this in advance of today’s hearing and had prepared an 11 page response to that document headed “*something made up in a hurry*”, which he did not produce until just before the start of this hearing. I did not consider that either side was materially prejudiced in any way by the lateness of each of the written skeletons being

produced by both sides. The claimant was clearly able to respond to the first respondent's in time for the hearing and he acknowledge subsequently that much of the content is not relied upon by the first respondent. Furthermore, whilst I considered the content of both documents, I reminded myself and the parties that I was not in any way bound by them. In accordance with the overriding objective, proportionality and equity, I did not exclude either of the documents and paid appropriate regard to the content of each.

30. There was also an application by the claimant objecting to me considering the content of the COT3 Agreement entered by the claimant and first respondent on 1 March 2018. Having heard the claimant's submissions, I refused that application on the basis that it would have been an absolute abuse of process for me not to have taken account of the COT3 and consider its wording given the issues that I am required to determine. As a matter of common sense, it would not be possible to enable justice to be done if that document or any of the content was excluded from these proceedings. I could not possibly decide the first issue in this case without having consideration of what the two parties had agreed as part of that settlement. Quite simply, the claimant was not in a position to oppose or resist me considering the COT3 Agreement and on that basis I would consider it.

The facts

31. This claim was presented on 10 May 2018 after a period of ACAS Early Conciliation commencing on 10 April 2018 and ending on 10 May 2018. The claimant's case is that in about January 2018, he applied for the role of Engineering Releasing Co-ordinator in Cologne with a German company which he claims to be a wholly owned subsidiary of the first respondent. In submissions, the claimant was unclear about whether he was applying for a role within KCIIG GmbH, which is a German company, or the "subsidiary company" as he describes it, known as Quick Release GmbH (also a German company). The first respondent says that it was in a joint venture with KCIIG GmbH, both of whom each owned a 50% shareholding of Quick Release GmbH. Insofar as there was a dispute of fact about this (no evidence was produced by either side to clarify the point), it was not material to the matters to be determined at this hearing. The claimant does not say that he applied to a company which is the same legal entity as the first respondent to this claim. His case is that the first respondent was in some way responsible for the fact that he did not get the job with the company he describes as a wholly owned subsidiary (disputed by the first respondent), Quick Release GmbH, or for that matter, KCIIG GmbH.
32. As the claimant explained to EJ George at the previous preliminary hearing, his claim is that the failure to advance his application was: a) victimisation; b) direct discrimination because of race and/or age; and c) unfavourable treatment for a reason arising in consequence of disability, by the first respondent. With regard to the claim of disability discrimination, the claimant maintains that he has been diagnosed with schizoid personality

disorder since submitting his 2014 claim and that he has communication difficulties as a result of this condition. His allegation of disability discrimination is that the first respondent refused his application because it perceived him to have communication difficulties which arise in consequence of his personality disorder. Need it be said, these claims are made against the first respondent under section 39(1) of the Equality Act 2010 on the basis that the claimant was applicant.

33. As recorded in EJ George's Summary, in addition, the claimant says that he requested a reference via Ms EL of the first respondent in or around January 2018 and she failed or refused to provide one. He accepts that his last communication with EL was on 23 January 2018. He says that without such a reference from a previous employer, he was effectively unable to progress his application with the German company.
34. His primary claim in relation to the failure or refusal to progress his application to the German company is that it is victimisation. Furthermore, in anticipation of the first respondent maintaining that the failure of his application was because of a need for the appointee to be a recent graduate, or because of communication difficulties which the first respondent relied upon as the reason for dismissing the claimant after his very short period of employment in 2014, he claims in the alternative direct age discrimination and disability discrimination (contrary to section 15 of the Equality Act 2010) respectively.
35. Before me at this Hearing were copies of e-mails to and from EL and the claimant. They appear at tab 4 in the Bundle. It is necessary for the purposes of this decision to examine with some care, what was said. The claimant sent an e-mail to EL on 22 January 2018 at 14:40:58. In the relevant part of that email (which appears midway through) the claimant states:

"I should reply to your question soon. However, firstly please give quick consideration to the following topic: when I enquired about the new roles available in [Cologne], it really had absolutely nothing to do with the tribunal. Please feel free to reply knowing I should not refer in the case to any information thereby disclosed. I really refer to your position with HR, with the interest of really pursuing a new role in [Cologne] and asking for your help in this respect! I am asking this in the context of requiring employment once again and I really fail to be in a proper condition to pursue all sorts of interviews again and again. You might consider as an attempt towards a partial settlement, in respect of the speculative damages included in the Schedule of loss. Although, again, it has nothing to do with the tribunal. I also happen to be around Cologne today (and perchance tomorrow or the day after?!) and could take the opportunity to stop by. I couldn't help feeling extremely excited that Rojda said she found me nice. I well anticipated you were going to find my request rather bizarre. Regards, Adrian."

36. In response to that e-mail, EL sends a reply on the same day at 18:07. She says:

“Hi Adrian, I look forward to receiving the list of e-mails you would like me to forward. Regarding the applications for opportunities in Cologne you would need to contact Rojda as she looks after recruitment in Cologne for QR GmbH and KCIG, her e-mail is [....]”.

37. There is then a reply to that e-mail from the claimant dated 23 January 2018 at 07:41:58:

“E[...], Thanks for the (obvious) advice. I have just submitted an official application. However, on the other hand they already had my profile since 2014 ... and I have no idea what conversations you had about me after June 2014. It should definitely appear problematic to seek employment given the dispute... But maybe you could mend that with a kind reference or something to that end..... other than that Mr F[...] hated me because he found me weird. And, in retrospect, that I somewhat tend to fall in rather problematic terms with a few previous employers.... which is just an unfortunately coincidence to be their fault J [sic] Regards, Adrian”

38. In reply to that e-mail, EL sent a further message at 11:00:

“Hi Adrian – Unfortunately, I have no influence over the recruitment process. Regards E[....]”

39. On 19 February 2018, the claimant received an e-mail from KCIG which can be found at tab 2 of the Bundle. Again, the content of that e-mail is significant for the purposes of what I have to determine:

“Dear Mr Arvunescu
Thank you once again for your application and the interest shown in our company. Unfortunately, we are currently unable to offer you a position that matches your qualifications or expectations. We are very sorry to say that we therefore can no longer proceed further with your application. Please accept our best wishes for your career. Sincerely, Career Team, KCIG GmbH.”

40. As referred to above, in the Bundle at tab 6, there is a copy of the COT3 Agreement between the claimant and the first respondent entered on 1 March 2018. The claimant signed that document on each page and also at the conclusion.

41. As is usual, the COT3 sets out terms of a settlement whereby the respondent agreed without admission of liability to pay the claimant a specified sum of money on 1 April 2018, subject to the agreement being entered and compliance with its terms.

42. The second bullet of clause two of that agreement states that:

“The claimant agrees that the payment set out in paragraph 1 [for these purposes I accept that this was referring to the first bullet paragraph in clause 2] 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 [my emphasis].*

The last sentence is of some potential significance.

43. The third bullet states:

"For the avoidance of doubt, the settlement in paragraph 2 [which I accept is referring to the second bullet paragraph] includes but is not limited to:

- the claimant's claim presently before the employment tribunal case number 2700958/2014;
- any other statutory claims whether under the Employment Rights Act 1996, the Working Time Regulations 1999, the Equality Act 2010, the Employment Relations Act 1999, the Employment Relations Act 1999 [*sic*] or otherwise;
- any claims arising under any EU directive or any other legislation (whether originating in the UK, EU or elsewhere) applicable in the UK; and
- any claim for any payment in lieu of notice, expenses, holiday pay or any other employee benefits or remuneration accrued during the period of the claimant's employment by the respondent."

44. For completeness, during his submissions, the claimant referred me to one page of a truncated document at tab 3 of the Bundle which appeared to show various international graduate opportunities said to be around the time of the claimant's application although there is no obvious reference to the first respondent or any other company associated with it in any form directly or indirectly within that document. Indeed, there does not appear to be mention of any company within that document.

The law

45. The relevant law relating to the COT3 is at s144, Equality Act 2010. Section 144 states:

- (1) A term of a contract is unenforceable by a person in whose favour it would operate in so far as it reports to exclude or limit a provision of or made under this Act.
- (2)
- (3)
- (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 settlement agreement.
- (5)
- (6)

46. It is common ground between the two parties that this is not a settlement agreement and that the COT3 falls under section 144(4)(a) (an agreement made with the assistance of a conciliation officer).
47. Insofar as it is relevant, the reference to section 120 is reference to claims under the category of 'work' falling within the jurisdiction of the employment tribunal.
48. Unlike settlement agreements, COT3 agreements do not need to relate to particular proceedings. Indeed, the statute, does in fact, make a distinction between the two types of agreements. To that extent, cases such as Hinton v University of East London [2005] ICR 126 CA for example (which I note the claimant has referred to in his submissions), are of limited value as the thrust of the decisions relate to settlement agreements and what is meant by relating to "particular proceedings".
49. That said, Livingstone v Hepworth Refractories Ltd [1992] ICR 287 EAT does provide some assistance. In that case the EAT held that a COT3 Agreement under the 1978 Act [the precursor to the Employment Rights Act 1996], did not cover a claim under the Sex Discrimination Act 1975 or the Equal Pay act 1970 unless expressly stated to do so. This was because the wording of section 77(4) of the Sex Discrimination Act [the precursor to the Equality Act 2010] made it clear that an agreement would only be effective under that section if it settled a complaint under that Act or under the Equal Pay Act. The same principal continues to apply by virtue of section 144(4), Equality Act 2010 in respect of discrimination claims under that Act. Thus, for these purposes, it is necessary for the COT3 to refer to the Equality Act if it is to exclude a claim under that Act.
50. The initial question for this tribunal is whether the complaints that the claimant pursues by way of this claim are ones that are covered by the ordinary language of the COT3 and thus fall under the terms of it (so as to fall within s144 Equality Act 2010).
51. In so far as it might be relevant, in Royal National Orthopaedic Hospital Trust v Howard [2002] IRLR, 849, the EAT considered whether a COT3 barred a claim that arose from an employer's future act not contemplated by the parties at the time of the agreement. The EAT held that "the law does not decline to allow parties to contract that all and any claims, whether known or not, shall be released". Accordingly, it is possible to release a party from any liability in relation to matters that may not have been known about or even contemplated at the time the COT3 is entered should they arise in the future. The question is whether, looking objectively at the agreement, this was the intention of the parties or whether some limitation must be placed on the scope of the agreement. As explained by the EAT, if the parties wish to achieve the "extravagant result" of contracting out of claims of which they have and can have no knowledge (whether those claims already exist or not) they must use language which is "absolutely clear and leaves no room for doubt as to what it is they are contracting for."

52. Even if a settlement agreement or COT3 is found to be ineffective in barring an employee's statutory claims it should nevertheless be remembered that his or her contractual (as opposed to statutory) claims will have been settled provided there is a binding agreement between the parties. This point was made by the EAT in Sutherland v Network Appliance & Another [2001] IRLR 12.
53. The contractual jurisdiction of employment tribunals is governed by section 3, Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. Under s3(2) Employment Tribunals Act and Article 3 of the Order, for a tribunal to be able to hear a contractual claim, brought by an employee, that claim must arise or be outstanding on the termination of the employee's employment and must seek one of the following:
- a) damages for breach of a contract of employment or any other contract connected with employment;
 - b) the recovery of a sum due under such a contract; or
 - c) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract.
54. There is no requirement that the contractual claim arise in circumstances which also gives rise to proceedings already or simultaneously before the tribunal but, in accordance with Article 3(a), the claim must be one that the civil court in England or Wales would have jurisdiction to hear and determine.
55. When considering what is meant by "outstanding" or arising on the termination of the employee's employment the EAT offered guidance in Peninsular Business Services v Sweeney [2004] IRLR 49. In that case, the EAT held that a claim for commission did not *arise* on the date of the employee's termination because at that stage, he had only a prospective right to the payment of commission for which he could not sue until it had matured into an actual right. Accordingly, if a payment is only contingently due, it is not possible to claim payment until the contingency has happened. Before then, all that be claimed is a declaration of entitlement to the payment if and when the contingency does happen, but a claim of that sort does not fall within Article 3. Whilst the facts of Sweeney are very different to the present case, that decision provides some illustrative assistance in terms of how to apply the principals of the relevant provisions.
56. In his submissions, the claimant raised the matter of relevant applicable law. The claimant sought to persuade me that the applicable law in terms of his contract should either be German law or possibly Romanian law because he is a Romanian national. I was not persuaded by his submissions for reasons set out in my conclusions below but for completeness I make reference in very short outline to the following potentially relevant applicable law.

57. The claimant made reference to potential rights under European directives. Whilst it was not entirely clear precisely what directives he was intending to refer to, in so far as it is necessary to refer to them I did note the effect of Articles 20 to 23 of the Recast Brussels Regulation. Under those provisions, where an employer is domiciled in a European Union Member State, the employee may sue it: a) in the courts of the Member State where the employer is domiciled (Article 21(1)(a)); b) in the courts of the place where (or from where) the employee habitually works or last habitually worked (Article 21(1)(b)(i)); c) if the employee does not or did not habitually carry out his or her work in any one country, in the courts of the place where the business which engaged the employee is or was situated (Article 21(1)(b)(ii)); or d) if the dispute arises out of the operation of a branch, agency or other establishment of the employer, in the place where that branch, agency or other establishment is located (Article 20(1)).
58. Article 63(1) of the Recast Brussels Regulations provides that a company is domiciled at the place where it has its: a) statutory seat; b) central administration; or c) principal place of business. Again, in so far as this might be relevant, the question of which country's domestic law is the applicable law to resolve an employment dispute is governed by international conventions. Within the EU the basic rule set out in Articles 3(1) and 8(1) of the EU Regulation on the law applicable to contractual obligations, known as the 'Rome I Regulation' is that an employment contract is governed by the law chosen by the parties. This choice may be made expressly, in a choice of law clause or be 'clearly demonstrated by the terms of the contract or the circumstances of the case' (Article 3(1)).
59. In accordance with Strickland v Kier Limited and others EAT 0130/17, where the parties have agreed a choice of law clause, and one party wishes to rely on it in a dispute, it will be up to that party to produce evidence of the prevailing legal position. Where the parties have not made a choice, Article 8(2)-(4) of the Rome I Regulation applies to determine the applicable law of the contract. This provides that the contract should be governed by the law of the country: a) in which, or from which, the employee habitually carries out his or her work in performance of the contract (even if he or she is temporarily employed in another country) (Art. 8(2)); b) in which the place of business through which he or she was engaged is situated (where the applicable law cannot be determined in accordance with Article 8(2)) (Art. 8(3)); or c) with which the contract is 'more closely connected' than either of the countries identified under Article 8(2) or (3) above, if such a close connection appears in the circumstances as a whole.
60. Under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the tribunal has the power to strike out claims in certain circumstances. The relevant ground relied upon in this case is r37(1)(a) namely, that the claim "is scandalous or vexatious or has no reasonable prospect of success".
61. It is trite law that the power to strike out a claim (particularly one of discrimination) on the ground that it has no reasonable prospect of success

should be exercised only in the most obvious of circumstances and not usually when central facts are in dispute (Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391, HL; Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, CA). That is not to say, however, that discrimination claims involving factual disputes should never be struck out. In Ezsias, the Court suggested that an exceptional case where strike out might be appropriate is where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

62. More recently, according to Underhill LJ in Ahir v British Airways plc [2017] EWCA Civ 1392, CA:

“Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between ‘exceptional’ and ‘most exceptional’ circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically it is higher than the test for the making of a deposit order, which is that there should be little reasonable prospect of success.”

Furthermore, the Court accepted that the test for strike-out on this ground with its reference in rule 37(1)(a) to ‘no *reasonable* prospect of success’ was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having ‘no prospect of success’.

Conclusions

63. Applying the relevant law to the facts I reach the following conclusions.
64. I find that the COT3 agreement does indeed compromise the claims that the claimant seeks to bring for the following reasons.
65. On any objective reading of the COT3, and taking the normal meaning of its wording, that wording is unequivocal. It specifies quite clearly that it is “*in full and final settlement of all or any costs, claims, expenses or rights of action of any kind whatsoever, wheresoever, howsoever arising under common law, statute or otherwise ... 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.*” Further on in that same paragraph it unequivocally states “*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*”.

66. In the following paragraph it states again unequivocally '*for the avoidance of doubt, settlement in paragraph 2 includes but is not limited to...*' and then in addition to the claimant's original claim (No. 2700958/14) lists other matters that are being compromised, one of which is any other statutory claims whether under the Employment Rights Act 1996, the Working Time Regulations 1990 or the Equality Act 2010.
67. The claimant struck me as a highly intelligent individual who has given a tremendous amount of thought to his claim and has prepared lengthy submissions that contain references to particular cases and law that only with real effort and diligence could an unqualified and untrained individual find and identify to be relevant. That provides some context when determining what the parties intended when they signed this agreement. The agreement was entirely clear in the wording used. Even if it could be said the claimant was unaware at the date of entering the COT3 agreement of circumstances which might give rise to the claims that he is now seeking to bring, which I reject on the basis of what is before me, such unknown claims are nevertheless covered under the terms of the COT3.
68. Notwithstanding the above, even if I am wrong on that, this is not, in my view, a case that engages authorities such as Hinton or Royal Orthopaedic Hospital Trust, because as a matter of chronology I am satisfied that the claimant knew before he signed this agreement of the potential claims he is now seeking to bring. That is apparent from the contemporaneous documentation that is before me. It cannot be said that he was unaware of the fact that he was not going to be provided with a reference by EL before entering the COT3 Agreement because in response to his suggestion that she might be able to provide a reference she told him by email on 23 January 2018 that she had "no influence over the recruitment process". Taking the claimant's case at its best, he certainly must have known the position at the point at which he received a rejection of his application on 19 February 2018.
69. Furthermore, notably, he records in his email of 23 January 2018 that "*it should definitely appear problematic to seek employment given the dispute*". Whether or not he had real cause to believe that, prior to entering the COT3 Agreement the claimant was alive or at least should have been alive to the allegation that he now says gives rise to the claim that he is seeking to bring. All of these matters would have been in his mind at the point at which he signed the COT3 Agreement: an agreement that is clearly worded and specifies without any ambiguity or doubt that such claims will be compromised.
70. It was open to the claimant to inform the ACAS conciliation officer that he wanted an exception applied to the terms of the agreement. That did not happen. This is not a case of excluding claims that were not known about at the time or, indeed, future claims. As is entirely apparent from the documentation, the claimant would have known as at 18 February 2018 that his application was not being progressed. Further, he would have known that nothing had changed with regard to the position between the e-mail communications he had with EL, the rejection of his application and the time

at which he entered the COT3 Agreement. More importantly, absolutely nothing had changed between the date of entering the COT3 Agreement and the claimant commencing ACAS Early Conciliation on 10 April 2018 and subsequently issuing his present claim on 10 May 2018 for allegations of victimisation, discrimination because of race, age or discrimination arising from disability. For that reason I consider that the claimant's claims are compromised as part of the settlement and are not matters upon which a tribunal can or should adjudicate.

71. Even if the claimant had a claim for breach of contract as alleged (which I reject for reasons set out below), I also consider that the claimant's claim for breach of contract is compromised because of the wording of the COT3 Agreement to which I have already referred above, albeit that it does not fall under s144 Equality Act 2010.
72. Again, in the event that I might be wrong on that point, I consider that this tribunal does not have jurisdiction to hear the breach of contract claims under Article 3 of the 1994 Order. Again, I am entirely satisfied that the tribunal has no power to consider any failure to provide the claimant with a reference, even if there was an implied or express or statutory term requiring one to be provided. Applying the principles and similar reasoning identified in the case of Sweeney above, even if there was an implied term that the respondent would provide a reference (which, again, I reject), it cannot be said that the alleged breach of contract claim arose out of the termination of employment or indeed was outstanding at the time of termination of employment. If there was such an implied term, all the claimant could expect is a declaration that he was entitled to a reference upon request and that is not a matter that can be dealt with by this tribunal.
73. Again, even if I might be wrong about that then I consider the suggestion that there was an implied term in the claimant's earlier contract of employment (in 2014) that he would be provided with a reference upon request to be wholly unsustainable and fanciful. Save for the issue of the relevant national law which I address below, there was no basis (either evidentially or otherwise) put to me to so much as give rise to an assertion of that kind.
74. In short, I consider the tribunal has no jurisdiction to determine whether or not the issues as identified by EJ George in 13.17 and 13.18 are relevant. They are not matters with which this tribunal could concern itself.
75. As to the question of the relevant applicable law, I find that there is no basis for accepting the claimant's submission that German or Romanian law should be the applicable law in terms of the contract. On the agreed facts in this case, and taking the claimant's case at its best, he was employed by the first respondent for a short period of time in 2014. He was dismissed by the first respondent in 2014 and his present claim (like his previous one) is against the first respondent. The first respondent has a registered office in Essex. It has a correspondence address in Essex, it is an English company registered in England and Wales. It is a company that employed the

claimant in England and Wales. He was employed to work in Woking. There is absolutely no connection whatsoever between the claimant's employment and Germany. The only basis upon which the claimant says that German law should be applicable is because he was looking to apply for a job in Germany subsequently. I took note of what the claimant said about the possibility of him then transferring to Germany at a later stage but that does not give any grounds for a submission or argument, let alone a finding, that German law should apply in terms of his employment contract with the first respondent at any time. The same applies to his suggestion that Romanian law should apply in the alternative.

76. Notwithstanding the above, the claimant has not produced any evidence to show that a different law should apply, nor has he produced any evidence that if a different law did apply, the law of that particular land is such that a reference should have been provided by way of an implied term.
77. The applicable law in this case is English and Welsh law and there was no implied term entitling the claimant to a reference.
78. For all the reasons set out above, the claimant's claims must be struck out for lack of jurisdiction. Nevertheless, for completeness, in the alternative, even after exercising the caution most recently highlighted by Underhill LJ in Ahir, I consider that this is precisely the type of case that can and should be struck out as having no *reasonable* prospect of success.
79. With regard to all of the discrimination claims (of direct age and/or race discrimination and discrimination arising from disability) it is difficult if not impossible to see how the claimant can have a claim (even if there are disputes of fact about who owns or controls the German company to which he applied to work) against the first respondent in these circumstances. There is no evidence to suggest that the first respondent had any involvement in the decision by the German company, KCIG GmbH (or Quick Release GmbH), to refuse to progress his application for employment. Even if it did, it is difficult, if not impossible, to see how the claimant can have a claim against the first respondent because an alleged subsidiary company refused him employment allegedly because of his age and/or race or for a reason arising in consequence of his disability. Even taking account of the possibility of any arguments about individuals aiding, instructing or inducing discrimination (which were not advanced before me and of which there was no evidence) it is fanciful to suggest that liability for any of the claimant's complaints would not rest exclusively with the company that determined not to progress his application for employment which, in this case, was not the first respondent.
80. Indeed, not only is there an absence of any evidence to support such an assertion, there is positive evidence before me suggesting entirely the contrary. EL specified in the email already referred to above, that she had no influence over the recruitment process. Of course, that should be treated with a degree of scepticism because it could be argued that EL might be inclined to make that out to be the position regardless and because that of

itself does not conclusively indicate that no one at the first respondent had no such influence. Nevertheless, on the basis of what has been provided there is nothing before me to suggest that the first respondent had any influence over what should happen in relation to the claimant's attempts to secure employment with the company outside of the English and Welsh jurisdiction.

81. For the same reasons, I consider that the claimant's complaint of victimisation also has no reasonable prospect of success. Other than the fact that the claimant happened to be employed in the UK for the first respondent against whom he happened to have brought a claim and was applying to a company in Germany that apparently had links to the first respondent, the case appears to be based on mere assertion. The claimant relies on nothing more than the documentation to which I have referred above.

82. I therefore conclude that the claimant's claims are not matters than can be advanced in this tribunal and must be dismissed.

Employment Judge Wyeth

Date: 3 October 2019

Sent to the parties on: ...08.10.19.....

.....
For the Tribunal Office

SCHEDULE

Extract from Case Management Summary of EJ George of 14 December 2018

The issues

The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Disability

- 13.1. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of schizoid personality disorder?

EQA, section 13: direct discrimination because of race

13.2. Has the first respondent subjected the claimant to the following treatment:

13.2.1. Failing to progress or rejecting his application for a role based in Köhn (Cologne) which he alleges was with a wholly owned German subsidiary of the first respondent?

13.3. Was that treatment “*less favourable treatment*”, i.e. did the first respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators.

13.4. If so, was this because of the claimant’s race (the claimant is a Romanian national) and/or because of the protected characteristic of race more generally?

EQA, section 13: direct discrimination because of age

13.5. Has the first respondent subjected the claimant to the following treatment:

13.5.1. Failing to progress or rejecting his application for a role based in Köhn (Cologne) which he alleges was with a wholly owned German subsidiary of the respondent?

13.6. Was that treatment “*less favourable treatment*”, i.e. did the first respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators.

13.7. If so, was this because of the claimant’s age (he describes himself as older than a young graduate) and/or because of the protected characteristic of age more generally?

13.8. If so, has the first respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The first respondent has yet to plead a legitimate aim but has leave to amend its response to reply to the claims as now understood.

EQA, section 15: discrimination arising from disability

13.9. Did the following thing(s) arise in consequence of the claimant’s disability:

13.9.1. Communication difficulties.

13.10. Did the first respondent treat the claimant unfavourably as follows:

13.10.1. Did the first respondent fail to progress or reject the claimant's job application for the role of Engineering Releasing Co-ordinator in about January 2018?

13.11. Did the first respondent treat the claimant unfavourably in that way because of the claimant's communication difficulties?

13.12. If so, has the first respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The first respondent has yet to plead legitimate aim but has leave to amend its response to reply to the claims as now understood.

13.13. Alternatively, has the first respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Equality Act, section 27: victimisation

13.14. Did the claimant do a protected act? The claimant relies upon his complaint of race discrimination against the first respondent which was presented to the employment tribunal in 2014 under Case No: 2700958-2014.

13.15. Did the first respondent subject the claimant to any detriments as follows:

13.15.1. Did the first respondent refuse or fail to provide the claimant with a reference? The last communication which the claimant had with the first respondent about a reference was on 23 January 2018.

13.15.2. Did the first respondent fail to progress or reject the claimant's application for the role of Engineering Releasing Co-ordinator in about January 2018?

13.16. If so, was this because the claimant did a protected act and/or because the first respondent believed the claimant had done, or might do, a protected act?

Breach of contract

13.17. The claimant alleges that the first respondent is in breach of contract by failing to provide him with a reference. This raises the following questions:

13.17.1. Was there an implied term of the COT 3 that the first respondent would provide a full and frank reference to the claimant on request?

- 13.17.2. Was there an implied term of the contract of employment between the claimant and the first respondent that the latter would provide a full and frank reference to the claimant on request?
- 13.17.3. Were German law or alternatively Romanian law the applicable law for the contract of employment which ended in 2014?
- 13.17.4. If so, then under German or alternatively Romanian law was it a breach of contract not to provide a full and frank reference to the claimant on request?
- 13.17.5. The claimant also argues that there was an implied promise from 2014 on termination of employment that the first respondent would provide him with a reference on demand. It appears that the claimant argues first that this is relevant to the question of whether there was an implied term of the contract of employment as set out in 13.17.1. above and secondly that this amounted to a separately enforceable contract.
- 13.18. Did the claimant breach the COT 3 or alternatively the contract of employment by failing to provide the claimant with a reference?
- 13.19. Are the claims of breach of contract brought by the claimant within the jurisdiction of the employment tribunal as set out in art.3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 in that they are,
- 13.19.1. Within s.3(2) of the Employment Tribunals Act 1996, in other words are they claims for damages for breach of a contract of employment or other contract connected with employment, claims for a sum due under such a contract or claims for the recovery of a sum in pursuance of any enactment relating to the terms of performance of such a contract?
- 13.19.2. Not one of the kinds of claim expressly excluded from the jurisdiction of the employment tribunal under art.5 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 and
- 13.19.3. Outstanding on termination of employment?

Other claims

- 13.20. The claimant argues that, in failing or refusing to provide him with a reference, the respondent was in breach of a tortious duty of care to provide one. It was explained to the claimant that, as a creature of

statute, the employment has no jurisdiction to hear claims based upon the tort of negligence: it has no inherent jurisdiction.

Remedy

13.21. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy. The claimant argues that the actions of the respondent were career-ending for him and argues that the employment tribunal should award damages for the effect upon his future career prospects of the stigma of being associated with bringing employment tribunal claims against the respondent under the principles set out in Abbey National plc v Chagger [2010] I.C.R. 397 CA.