EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Col MF Roohan	**v**	**Ministry of Defence**

PRELIMINARY HEARING (OPEN)

Heard at: **Central London Employment Tribunal** **On:** **28 & 29 January 2019**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **Ms D Gilbert, Counsel**
For the Respondent: **Ms L Robinson, Counsel**

JUDGMENT AT A PRELIMINARY HEARING

1. The Claimant's claim that the Respondent has failed, in breach of the *Working Time Directive,* to pay her holiday pay is dismissed on withdrawal by the Claimant.

2. Allegations 23.1 and 23.2 in the Second Claim were presented to the Tribunal out of time and are struck out.

3. All other issues regarding time limits in the Second Claim shall be determined at the Final Hearing.

4. Allegation 82.23 in the (amended) First Claim is dismissed on withdrawal by the Claimant.

5. All issues regarding time limits in the First Claim shall be determined at the Final Hearing.

6. The Tribunal has jurisdiction to hear the Claimant's claim regarding her medical discharge because she had raised a valid Service Complaint in respect of it.

REASONS

This Preliminary Hearing

1. By a claim form presented on 19 May 2017, case number 2206004/2017, ("the First Claim"), the Claimant brought claims of direct sex discrimination, sex harassment and victimisation against the Respondent. The Claimant provided further and better particulars of her First Claim on 1 September 2017. The Claimant's First Claim was stayed, on the Respondent's application (which was opposed by the Claimant) from 18 August 2017 – 21 May 2018.

2. The Claimant made an application to amend her First Claim on 18 June 2018.

3. The Claimant presented a second claim form, case number 4113019/2018, on 30 July 2018 ("the Second Claim"), bringing further claims of direct sex discrimination, victimisation and failure to pay holiday pay/breach of Working Time Directive and unlawful deductions from wages against the Respondent.

4. This Preliminary Hearing had been listed to determine a number of applications made by the parties in the two claims.

5. After discussion between the parties at the outset of the Preliminary Hearing, the parties identified the following matters and issues for determination:

    5.1. The Claimant pursued, and the Respondent opposed, the Claimant's application to amend her First Claim.
    5.2. The Claimant withdrew allegation 82.23 in the (amended) First Claim and, on that basis, the Respondent agreed that all arguments regarding time limits and continuing acts in the First Claim should be determined at the Final Hearing.
    5.3. The Respondent contended that allegations 23.1 and 23.2 and 30.1 and 30.2 in the Second Claim had been brought out of time and should be struck out at this Preliminary Hearing.
    5.4. The parties agreed that the only new causes of action in the Second Claim were allegations 23.1, 23.2, 30.1 and 30.2.
    5.5. The Respondent contended that the Tribunal had no jurisdiction to hear allegation 82.29 (the Respondent's handling of Claimant's Service Complaints) in the First Claim, nor did it have jurisdiction to hear allegations 23.1 and 23.2 (leakage to Mr I Clark) and 30.1 and 30.2 (decision to discharge the Claimant) because there had been no valid Service Complaint in respect of those allegations.
    5.6. The Respondent made applications for Deposit Orders in respect of the Claimant's allegations:
        5.6.1. First Claim: allegations 82.2, 82.7, 82.8, 82.9, 82.10, 82.12, 82.13, 82.14, 82.29.
        5.6.2. All the complaints in the Second Claim.
    5.7. The Claimant withdrew her claim that the Respondent has failed, in breach of the *Working Time Directive,* to pay her holiday pay.

The Claimant's Application to Amend

6. The Claimant's application to amend dated 18 June 2018 was accompanied by an "Amended Details of Claim" document. It redrafted the First Claim by inserting both the Further and Better Particulars served on 1 September 2017 (underlined and in red ink) and additional paragraphs, added on 18 June 2018, underlined and in blue ink.

7. The Respondent did not object to most of the Further and Better Particulars being added to the First Claim– it accepted that most were, genuinely, Further and Better Particulars of the original First Claim. It did object to the Further and Better particulars in paragraphs 82.3, 82.4, 82.16.1, 82.16.2 and 82.16.3.

8. The Claimant clarified which of the 18 June 2018 paragraphs had been added by way of background only, and which were relied on as allegations/claims. The Respondent did not object to the Claimant amending her claim to include more background paragraphs, but did object to the Tribunal allowing the Claimant to add new allegations/claims.

9. The new background paragraphs were: 82.1, 82.14.4, 82.14.6, 82.14.7, 82.15.2 – 82.15.19, 82.16.4, 82.17.1 – 82.17.10 (some subparagraphs were repetition of others in any event), 82.18.1 – 82.28.8, 82.18.12 – 82.18.17, 82.18.19 – 82.18.21, 82.20.1 – 82.20.4, 82.20.9 – 82.20.10, 82.21, 82.25, 82.26, 82.27.1 – 82.27.12, 82.28.2, 82.28.6, 82.28.8, 82.28.9 apart from the first and last sentences, 82.28.10 – 82.28.17, 87.

10. The Claimant withdrew some paragraphs (some were repetition): 82.11, 82.17.1, 82.17.3, 82.23.

11. The new allegations/claims were: 82.2 – 82.10, 82.12, 82.13, 82.14, 82.14.1-82.14.3, 82.14.5, 82.14.8, 82.15.1, 82.16.1 – 82.16.3, 82.17.9 (Mr Halliwell presenting his separation direction in a different manner), 82.17.11, 82.18.9 – 82.18.11, 82.18.18, 82.19 and all subparagraphs, 82.20, 82.20.5 – 82.20.8, 82.24, 82.27, 82.28, 82.28.1, 82.28.3 – 82.28.4, 82.28.7, 82.28.9 first and last sentences, 82.29 (relied on as victimisation only), 85, 86, 88, 89.

12. The Claimant gave evidence. She told the Tribunal that she had prepared her own Service Complaints. However, while she had submitted Service Complaints on 1 June 2018 and 20 February 2018, she was off work, sick, and had been advised by her medical advisers to limit the time she spent on Service Complaints and internal workplace processes. The Claimant said that she had understood that the internal investigations were to take priority, because her First Claim had been stayed by the Tribunal for 6 months to allow the internal processes to be undertaken. The Claimant told the Tribunal that she was very unwell during 2017 – 2018 and did not even dress herself most days. The Claimant referred to a medical report by Dr Christopher Barker Consultant Psychiatrist, Bundle pages 418 – 423, dated 6 March 2017, which recorded that the Claimant had been unable to work since April 2016 because of an adjustment order and depression. The report said that the Claimant had been exhausted, had had difficulty sleeping and that low mood had coloured her thoughts and made her prone to thinking errors since

about January 2016. Dr Barker said that the Claimant would recover 6 – 12 months after stressors were removed.

13. The Claimant's Counsel, Ms Gilbert, said that, while the amendment pleaded new causes of action, in many cases, the facts of these causes of action had been pleaded in the original claim. She said that there would be little hardship and injustice to the Respondent in allowing the amendment, in that the amendments were made at a very early stage of the proceedings. The Respondent had been able to respond to all the amended allegations in its ET3 Response filed after the stay of the proceedings had been lifted.

14. Ms Gilbert contended that, when the Claimant presented her First Claim, she had had 5 Service Complaints outstanding at the time, and dealing with the internal investigations in respect of these would have been overwhelming, even for someone in good health. The Claimant, however, was significantly ill and, even now, will require breaks during the proceedings when her claims come to a Final Hearing. Ms Gilbert said that, although the Claimant did have legal representation when she submitted her First Claim, her legal representatives still needed to take instructions from the Claimant, who had limited ability to engage in the Tribunal process. In any event, Ms Gilbert contended that there had been little delay in presenting the amended claim, because it had been served only one month after the stay was lifted. Ms Gilbert said that the Tribunal should take into account, in deciding whether to allow the amendment, the fact that the matters in the amendment were highly likely to be referred to in the Tribunal proceedings in any event, so that they would not lead to any increased time or costs.

15. Ms Robinson, for the Respondent, said that, by the date the First Claim was presented (19 May 2017), the Claimant had been able to submit 5 different Service Complaints, on 26 May 2016, 22 August 2016, 5 October 2016, 23 September 2016 and 11 April 2017. She submitted 2 further Service Complaints on 1 June 2017 and 20 October 2018. The Claimant had therefore shown herself to be capable of raising detailed Service Complaints throughout the relevant period and there was no evidence that she was unable to engage with the legal process. The Claimant had the assistance of solicitors when she presented her First Claim and there was no reason why she could not have pleaded all her complaints in her original pleading – the allegations she now relies on were already in her detailed Service Complaints.

16. Ms Robinson said that there would be clear hardship and injustice caused to the Respondent in having to deal with substantial new factual allegations which were presented out of time. She argued that the last date of the new allegations was 2 May 2017 – more than 13 months before the amendment application was made. Ms Robinson said that many of the amended allegations were years out of time and added wholly new allegations. The Respondent would be required to call evidence to meet every one of the new allegations if they were added by way of amendment. If the Claimant were only permitted to refer to them as background, the Respondent could decide whether it wanted to call evidence in relation to them.

17. Ms Robinson referred to the Presidential Guidance on Amendment - General Case Management (2018) and said that the amendments sought were clearly "substantial" amendments, to which the time limits applied.

Amendment Law

18. In deciding whether to allow an amendment the Employment Tribunal is guided by the principles set out in *Selkent Bus Company v Moore* [1996] IRLR 661. In deciding whether to grant an application to amend, the Tribunal must balance all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment: applications to amend range, on the one hand, from correcting clerical and typing errors and the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

19. Other factors include the applicability of time limits: if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended. Other factors to be considered include the timing and manner of the application: an application should not be refused solely because there has been a delay in making it, as amendments can be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made, for example the discovery of new facts or new information appearing from the documents disclosed on discovery.

20. Even if there is an entirely new claim presented out of time, the Claimant may still be allowed to amend, taking into account the balance of injustice and hardship. In considering whether to allow an amendment the Tribunal should analyse the extent to which the amendment would extend the issues and the evidence, New *Star Asset Management Holdings Limited v Evershed* [2010] EWCA Civ 870.

Nature of the Amendments

21. I looked at each of the new claims/allegations and considered whether they added new facts and causes of action, or whether they added further factual particulars to claims already pleaded. I decided as follows:

21.1. 82.2 – 82.10:

21.1.1. 82.2 – new allegation pleading new facts and cause of action;

21.1.2. 82.3 – further particulars of allegation already pleaded;

21.1.3. 82.4 – further particulars of allegation already pleaded;

21.1.4. 82.5 – first amended sentence: further particulars of allegation already pleaded. Second amended sentence (allegation regarding Surgeon Rear Admiral Walker) – new allegation pleading new facts and new cause of action;

21.1.5. 82.6 - further particulars of allegation already pleaded;

21.1.6. 82.7 – 82.9 – new allegations pleading new facts and causes of action;

21.1.7. 82.10 – Second sentence, in red - further particulars of allegation already pleaded. Third and fourth sentences, in blue – further particulars of allegations already pleaded. Last sentence in blue, "The Claimant alleges that these behaviours were on the grounds of her gender – she knows of no case where a male colleague was publicly humiliated and treated in this manner" – further particulars of allegations already pleaded. That is, the amended particulars of Mr Smith's actions are further particulars of the allegation against Mr Smith.

BUT all remaining sentences in blue: (1. allegations that no remedial action was taken, despite the Claimant complaining to B. Bricknell and 2. none of the email recipients addressing Mr Smiths' treatment of the Claimant) - new allegations against different individuals, pleading new facts and causes of action.

21.2. 82.12 & 82.13 – new allegations pleading new facts and causes of action;

21.3. 82.14 and 82.14.1 - further particulars of allegation already pleaded;

21.4. 82.14.2 & 82.14.3 – new allegations pleading new facts and causes of action;

21.5. 82.14.5 & 82.14.8 – new allegations pleading new facts and causes of action;

21.6. 82.15.1- further particulars of allegation already pleaded;

21.7. 82.16.1 – 82.16.3 - further particulars of allegation already pleaded;

21.8. 82.17.9 - (Mr Halliwell presenting his separation direction in a different manner) further particulars of allegation already pleaded;

21.9. 82.17.11 - further particulars of allegation already pleaded;

21.10. 82.18.9 – 82.18.11 - further particulars of allegation already pleaded;

21.11. 82.18.18 - further particulars of allegation already pleaded;

21.12. 82.19 and all subparagraphs - further particulars of allegation already pleaded

21.13. 82.20, 82.20.5 – 82.20.8 - further particulars of allegation already pleaded;

21.14. 82.24 - further particulars of allegation already pleaded;

21.15. 82.27 - further particulars of allegation already pleaded;

21.16. 82.28, 82.28.1, 82.28.3 – 82.28.4, 82.28.7, 82.28.9 first and last sentences – further particulars of allegation already pleaded;

21.17. 82.29 (relied on as victimisation only) - new allegations pleading new facts and causes of action;

21.18. 85 - further particulars of allegation already pleaded

21.19. 86 - further particulars of allegation already pleaded

21.20. 88 - further particulars of allegation already pleaded

21.21. 89 - new allegation pleading new facts and causes of action.

22. Where I identified amendments as being further particulars of allegations already pleaded, the relevant allegations had been specifically set out in the original claim. The amendments were typically made by adding further sub paragraphs below the original pleaded allegations.

Amendment Discussion and Decision

23. I considered that it would cause considerable injustice and hardship to the Claimant if she were not permitted to amend her claim to add further particulars of allegations that she had already pleaded. If she were prevented from adding particulars of these allegations, she could be prevented from bringing the allegation, because the allegation would not have substance without factual particulars of it.

24. I considered that adding further particulars to allegations already pleaded amounted to a more minor amendment, to which the time limits did not apply. The application to amend was made at a relatively early stage of the proceedings, shortly after the stay of proceedings was lifted and before the Respondent had submitted its ET3. The Respondent had responded to all the amended allegations in its ET3 Response.

25. I considered that these further factual particulars would be highly likely to be referred to in detail in evidence, in any event, because they related to allegations the Claimant had made in her original claim.

26. I considered, therefore, that comparatively little hardship and injustice would be caused to the Respondent by permitting the Claimant to amend her claim by adding further particulars to claims already pleaded. The amendments were made at an early stage and the Respondent had been able to respond to all in its ET3 Response. The additional particulars would not add to the time and expense involved in the proceedings because they would be very likely to be referred to in evidence, in any event.

27. I allowed the Claimant to amend her claim to include the amendments which I identified as adding further particulars to claims already pleaded.

28. However, I did not permit the Claimant to amend her claim to the allegations which I identified as new allegations pleading new facts and causes of action. These were substantial amendments, to which the time limits applied and they had been brought many months out of time. I accepted the Respondent's submission that the last date of the new allegations was 2 May 2017 – more than 13 months before the amendment application was made; and that many of the new allegations were

years out of time. I considered that, even if the Respondent had responded to these allegations in its ET3, it would cause hardship and injustice to the Respondent to have to meet allegations about matters which had taken places many years previously. Memories of the relevant events would inevitably have faded.

29. I decided that it would not be just and equitable to extend time for the new allegations. By the date the First Claim was presented (19 May 2017), the Claimant had submitted 5 different Service Complaints, on 26 May 2016, 22 August 2016, 5 October 2016, 23 September 2016 and 11 April 2017. She submitted 2 further Service Complaints on 1 June 2017 and 20 October 2018. The Claimant had submitted these herself. This demonstrated that she was capable of setting out detailed allegations against the Respondent throughout the relevant period. I agreed with the Respondent that there was no evidence that the Claimant was unable to engage with the legal process. There was no medical evidence to this effect and the Claimant had, in fact, submitted Service Complaints and had instructed legal representatives who were assisting and advising her. I decided that there was no reason why the Claimant could not have pleaded all her complaints in her original pleading, given that the allegations she relies on were contained in her Service Complaints.

30. Accordingly, there was no injustice and hardship to the Claimant in refusing her permission to bring new claims which she could and should have brought at the time she submitted her original claim.

31. The parties agreed, having received my decision on the amendment application, that the Claimant should file and serve a final Details of Claim document, setting out which parts of the claim are background and which parts are allegations, by 4pm on 22 February 2019. The Respondent shall notify the Claimant of any challenge to the final Details of Claim by 4pm on 1 March 2019.

Time Limits – Second Claim – Allegations 23.1 and 23.2

32. The Second Claim was presented on 30 July 2018. Allegations 23.1 and 23.2 therein referred to information in the Claimant's allegations, which were being investigated by the Police, being leaked to Mr I Clark, one of the subjects of the allegations, in about April 2017.

33. The Claimant contended that the Claimant's claims had been consolidated and that this allegation should be seen as forming part of the course of conduct alleged in the consolidated claims.

34. I decided that allegations 23.1 and 23.2 had been brought out of time when they were presented on 30 July 2018. It did not matter that the claims had now been consolidated, the Second Claim did not itself plead a continuing course of conduct, of which allegations 23.1 and 23.2 were part. That claim pleaded only two causes of action, the leakage to Mr Clark in April 2017 and, separately, a claim regarding the Claimant's discharge from the Army on medical grounds, pursuant to a decision taken on 8 February 2018.

35. I did not extend time for the allegations 23.1 and 23.2. As set out above, I considered that the Claimant was capable of engaging in the legal process. She

had legal advisers and had already submitted a claim to the Tribunal. The Claimant was aware of the facts of allegations 23.1 and 23.2 but failed to bring a claim in respect of them in time and there were no grounds for extending time.

Time Limits – Second Claim – Failing to Assist the Claimant

36. The Respondent contended that the Claimant had not entered ACAS Early Conciliation in respect of her Second Claim until 31 May 2018, but that the last date on which the Claimant alleged the Respondent had failed to assist her was 6 October 2017, so that the claim regarding failure to assist the Claimant was 2 ½ months out of time.

37. By *s123(2) Equality Act 2010,* complaints of discrimination in relation to Armed forces cases may not be brought after the end of

    37.1. the period of 6 months starting with the date of the act to which the complaint relates or
    37.2. such other period as the Employment Tribunal thinks just and equitable.

38. By *s123(3)* conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.

39. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The question is whether there is “an act extending over a period,” as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed', paragraph [52] of the judgment.

40. At paragraph [49] of the judgment, LJ Mummery said that it was too soon, at a Preliminary Hearing stage, to decide whether acts, which were alleged to constitute an 'act extending over a period', did amount to a continuing act, or whether they were isolated acts and had been brought too out of time.

41. In this case, the Claimant alleged that the Respondent’s failure to assist her to return to work was a discriminatory state of affairs which extended over the whole of her employment, until its end. Ms Gilbert told me that the Respondent was obliged to identify opportunities for the Claimant to return to work right up until the decision to discharge her on 8 February 2018.

42. It seemed to me that those were matters which could constitute a continuing discriminatory state of affairs. Following *Hendricks*, I concluded that the decision on whether the Respondent’s failure to assist the Claimant to return to work and her medical discharge were part of a continuing act should be made at the Final Hearing, after the Tribunal has heard all the relevant evidence.

Service Complaints – Jurisdiction

Allegations 82.29

43. By *s121(1) Equality Act 2010,* a member of the armed forces may not bring a complaint under the *EqA 2010* relating to acts done when they were serving as a member of the armed forces unless "..(a) the complainant has made a service complaint about the matter, and (b) the complaint has not been withdrawn."

44. The Respondent contended that the Employment Tribunal did not have jurisdiction to consider the Claimant's complaints in amended paragraph 82.29 and in relation to her medical discharge from the Army because she had not brought Service Complaints in respect of those matters. It relied on *Molaudi v MoD* [2012] EWCA Civ 576 in contending that a Service Complaint must be a "valid" Service Complaint, and not one which had been rejected by the military authorities, in order for the Claimant to be able to bring a claim to the Tribunal relying on it.

45. I have not permitted the Claimant to amend her First Claim to bring the allegations in 82.29, so that allegation is not proceeding. In any event, I would have decided, following the Court of Appeal decision in *Molaudi*, which approved the EAT decision in the same case (UKEAT/0463/10) when it refused permission to appeal, that the Claimant would have to have brought a valid Service Complaint in respect of the matters in paragraph 82.29, in order for the Tribunal to have jurisdiction to hear them. The Claimant's Service Complaint regarding the matters in paragraph 82.29 was rejected by the Respondent because Service Complaints cannot be raised in respect of the handling of other Service Complaints. She had not, therefore, brought a valid Service Complaint in respect of the matters in paragraph 82.29 and the Tribunal had no jurisdiction to hear her complaint in that regard.

46. I did not consider that *Duncan v MOD* [2014] 10 WLUK (42) permitted a complaint to be brought to the Employment Tribunal where a Claimant's Service Complaint about the matter had been rejected as invalid by the Respondent. *Duncan* concerned a statutory requirement that Service Complaints be referred to a Defence Council. That statutory requirement has since been repealed and is not relevant to the current claim. In any event, *Duncan* was effectively a consent judgment in the EAT, which was not fully argued. Insofar as the Claimant relied on *Duncan* as authority for the proposition that a claim can be brought to the ET in the absence of a valid Service Complaint, I considered that the EAT judgment in *Molaudi* was more persuasive because it directly concerned that issue and was made after full argument.

Medical Discharge

47. The Respondent also argued that the Claimant had not brought a Service Complaint in respect of her medical discharge from the Army. The Claimant again relied on *Duncan,* wherein the parties agreed that ". . . a purposive construction of s 121 [is] required to achieve a lawful balance between the statutory aim to enable the Armed Forces to determine complaints internally prior to litigation and a Complainant's right of access to a court/tribunal within a reasonable time," paragraph [15] of the judgment.

48. I rejected the Respondent's argument that the Claimant had not brought a Service Complaint about the "matter" of her medical discharge from the Army. In her Service Complaint 5, the Claimant complained in detail about the Respondent's handling of her return to work after sickness, including telling her that there were no options for her return to work. At paragraph 31 of her Service Complaint 5 she said that she had been asked to confirm her availability to attend an appointment on 7 May 2017, which the Claimant said, "is intended to be a Full Medical Board for the purpose of confirming the decision to progress my discharge from Service on medical grounds, having never been afforded any opportunity to return to work."

49. The Respondent's letter, "Acknowledgment of Your Service Complaint 5 and Notification of Admissibility" summarised the Service Complaint and said, "Your principle complaint is an allegation that during the period from 1 February 2017 to 11 April 2017, Col (Ret'd) Jeremy Owen.. and Col Suart Campbell… deliberately obstructed your attempts to return to work … thus making your medical discharge inevitable."

50. The Respondent accepted the Claimant's Service Complaint 5 as admissible but then stayed it, "until you have exhausted the relevant Special to Type appeal processes set out at Chapters 12 and 13 of PAP 10, following your recent medical board."

51. Ms Robinson confirmed, in argument at the Tribunal, that the conclusion of the PAP 10 process would either be

    51.1. The Claimant's return to work (suitable alternative employment), or

    51.2. Her medical discharge.

52. I concluded that the Claimant had, in Service Complaint 5, complained that the Respondent had not assisted her to return to work and had already made, or would inevitably make, a decision to medically discharge her from the Army. The fact that her Service Complaint 5 was then stayed until an appeal process was completed, so that the final medical discharge decision was delayed thereafter, did not mean that the Claimant had not complained about the matter of her discharge.

53. I accepted that a purposive construction of *s121 EqA 2010* was required, in order to give proper effect to the Claimant's right of access to a court/tribunal within a reasonable time.

54. I did not consider that *s121 EqA* required the Claimant to make a further Service Complaint about her medical discharge, when it took effect at a later date, in circumstances where she had already complained that she was going to be medically discharged and her Service Complaint in that regard had been stayed to allow the process of her discharge, or return to work, to be completed. Interpreting *s121 EqA* as requiring the Claimant to submit repeated Service Complaints about the same subject matter, when she already had a live, but stayed, relevant Service Complaint, would be an unwarranted restriction on the Claimant's right of access to a Tribunal.

55. Accordingly, I concluded that the Tribunal had jurisdiction to hear the Claimant's complaint about her medical discharge.

Deposit Order

56. If, at a Preliminary Hearing, an Employment Judge considers that and specific allegation or argument in a claim or response has little reasonable prospect of success, he or she may make an order requiring that party to pay a deposit not exceeding £1,000 as a condition of continuing to advance the allegation or argument, *r39(1) ET Rules of Procedure 2013*.

57. When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07, [2007] All ER (D) 187 (Nov). Although, as Elias J pointed out in that case, the less rigorous test for making a deposit order allows a tribunal greater leeway to take such a course than would be permissible under the test of no reasonable prospect of success, the tribunal 'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (para 27).

58. The Respondent confirmed that it sought deposit orders in respect of the following allegations in the Claimant's amended Details of Claim: paragraphs 82.2, 82.7, 82.8, 82.9, 82.10, 82.12, 82.13, 82.14, 82.29.

59. I have already decided that 82.2, 82.7 – 82.9, part of 82.10, 82.12, 82.13, most of 82.14 and all 82.29 are wholly new claims pleading new facts and causes of action. They have not been permitted to proceed because I have not allowed the Claimant to amend her claim to include them.

Allegation 8.10 – Mr Smith

60. Regarding the part of 82.10 which survives – the allegations against Mr Smith – I decided that, on the Claimant's case, she has pleaded more than a difference in protected status and a difference in treatment (*Madarassy v Nomura International plc* [2007] ICR 867, CA). The Claimant relies on the alleged highly unusual and unreasonable, public and humiliating nature of Mr Smith's communication. While unreasonableness is not evidence of less favourable treatment, per se, unexplained unreasonable treatment, coupled with less favourable treatment and a difference in protected characteristic, can, in certain circumstances be sufficient to shift the burden of proof to the Respondent *Zeb v Xerox (UK) Ltd* UKEAT 009115, paragraph [26] Simler P. It seemed to me that it was for the Full Hearing to decide factual disputes and determine whether inferences should be drawn. I did not have a proper basis for doubting the likelihood of the Claimant being able to succeed in this aspect of her claim. It was not appropriate for the Tribunal to make a deposit order in respect of this allegation.

Allegation 82.14 – Allowing Mr Flannagan to Appeal

61. Regarding the surviving part of 82.14, that is, 82.14 and 82.14.1, the Respondent contended that it could have permitted Mr Flannagan to complain about the outcome of his Bullying and Harassment allegations through a number of different routes, so that it was highly unlikely that the Tribunal would find that permitting him to do so via an appeal was an act of discrimination.

62. The Claimant contends that Air Marshal Evans' decision was in breach of a number of provisions of the MoD Bullying and Harassment Policy. It could be appropriate for a Tribunal to infer less favourable treatment from a Respondent's breach of its own policy, which a Respondent might normally be expected to follow.

63. Again, I considered that it was for a Full Tribunal to make findings of fact and consider whether to draw inferences, having heard all the evidence. I did not have a proper basis for doubting the Claimant's ability to succeed in this aspect of her claim and I did not make a deposit order in respect of it.

Second Claim

64. The Respondent contended that it was not in dispute that the Claimant, herself, said in May 2016 that there were limited opportunities in alternative posts and that she struggled to see how she could return to work. It argued that it was unlikely, therefore, that the Tribunal would find that the Respondent's failure to find the Claimant alternative work and her medical discharge were acts of victimisation or direct discrimination.

65. The Claimant contended that, when she said that she struggled to see how she could return to work, this was before the bullying and harassment investigation had been completed. Her statement had to be understood in that context.

66. I considered that the Claimant had made detailed discrimination and victimisation allegations about the Respondent's approach to her return to work, both in paragraph 82.28 of the amended First Claim and in her Second Claim. It was wholly premature for the Tribunal, at a Preliminary Hearing, to form a provisional view on the likelihood of her claims in this regard succeeding. These were detailed factual allegations which needed to be considered, together, at a Final Hearing. I did not make a deposit order in relation to the Second Claim.

Orders

67. I made the Orders set out in the attached Order document.

Dated: 6 February 2019

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Employment Judge Brown

JUDGMENT AND REASONS SENT TO THE PARTIES ON

6 February 2019
FOR THE TRIBUNAL OFFICE