mf

EMPLOYMENT TRIBUNALS

Claimant: **Dr B Beeka**

Respondent: **Coventry University London Campus Ltd**

Heard at: **East London Hearing Centre**

On: **27 September 2018**

Before: **Employment Judge Russell (sitting alone)**

Representation
Claimant: **Neither present nor represented**
Respondent: **Ms E Hodgetts (Counsel)**

JUDGMENT & ORDERS

The judgment of the Employment Tribunal is that:-

1. **The Claimant's application for a postponement is refused.**

2. **The Claimant's application for Employment Judge Russell to recuse herself is refused.**

3. **The claims referred to below at paragraphs 17(1)(a) to (e), 17(3)(a) to (c), 17(3)(d) in respect of any allegation before September 2016, 17(3)(e) and 17(4)(a) to (b), (d), (j) and (k) are struck out.**

4. **The allegations referred to below at paragraphs 17(2)(a) other than for June to September 2017; paragraph 17(2)(b); paragraph 17(4)(c); paragraph 17(4)(g) and paragraph 17(4)(h) have little reasonable prospects of success. <u>The Claimant is ORDERED to pay by 16 November 2018 a deposit of £500 in respect of each allegation as a condition of being able to continue to advance it in these proceedings.</u>**

5. **UNLESS the Claimant provides by 4pm on 16 November 2018 for each and every protected act or protected disclosure or matter within section 44(1) Employment Rights Act relied upon:**

    (1) The date

(2) If in writing, identify the document.
(3) If orally, to whom and the relevant information disclosed;
(4) For protected disclosures, the relevant matter which it tends to show.

then her claims of victimisation, whistle-blowing detriment and health and safety detriment will stand dismissed, save for the extent that she relies upon her complaint to Dr Cullinane dated 24 February 2017 and her grievance dated 4 December 2017 as a protected act and/or protected disclosure.

6. The claim is stayed generally from 23 November 2018.

REASONS

Postponement

1 The Claimant has applied for a postponement of today's hearing on medical grounds, stating that she is unfit to attend. By way of background today's preliminary hearing was listed following a case management hearing which I conducted on 21 May 2018. The Respondent had made an application for strike out and/or deposit orders, raising time points, which was listed for hearing on 28 and 29 August 2018.

2 On 24 August 2018, the Claimant applied for a postponement of the hearing on medical grounds. She provided a medical certificate which stated that for the period 23 August 2018 to 9 September 2018 she was not fit for work by reason of labyrinthitis. Despite, as the Respondent noted, the medical evidence failing to comply with the Presidential Guidance I considered it just to postpone the hearing which was re-listed for the 27 and 28 September 2018 as the additional delay was not significant. The parties were advised that no further postponement would be granted unless there was adequate medical evidence which must give a prognosis for the Claimant's condition and a history of previous incidents and treatments.

3 On 13 September 2018, the Claimant wrote to the Tribunal requesting a postponement of the relisted hearing. She relied upon two reasons: firstly, 28 September 2018 was a Friday and she was unable to attend due to her religious beliefs and, secondly, there had been late disclosure of documents and amendments. Upon considering the application, I vacated the Friday hearing but was satisfied that any issues regarding disclosure could be considered today and were unlikely to be relevant to the time points in any event. Following that decision, the Claimant re-applied for postponement on medical grounds. She attached a copy of a doctor's certificate dated 8 January 2018 which stated that she was unfit for work until the 29 January 2018 due to depression anxiety. As the application was only referred to me yesterday, the decision to refuse the application was communicated the same day by email at 4.14pm with my reasons. The new medical evidence did not relate to the Claimant's ability to attend a hearing in September 2018, fitness for work is not the same as fitness to attend a hearing, there was no medical evidence as to the Claimant's current state of health, its cause, prognosis or her likely ability to attend a

hearing in the future. The Claimant was advised that if she did not attend the hearing, her written representations and the content of her written applications would be considered.

4 Before my email was sent, and unbeknownst to me, the Claimant had again emailed the Tribunal, stating that she had not been given sufficient guidance as to what format was required for the medical evidence. Attached to the email was a medical certificate which the Claimant said confirmed that she was very ill as stated, had lost her voice and had other ongoing continuing vertigo symptoms. In fact, the medical certificate which is dated 26 September 2018, states only the following:

> "**To Whom it May Concern,**
>
> **I have reviewed the above patient at London Doctors Clinic; please accept this letter as a formal sick certificate.**
>
> **Mrs Beeka attended London Doctors Clinic today with symptoms of a viral illness and stress-related symptoms including vertigo.**
>
> **This sick certificate extends from 26 September 2018 until 16 October 2018 inclusive**."

5 The medical certificate provided does not address the Claimant's fitness to attend a hearing (as opposed to fitness to work), it refers to a viral illness, stress and vertigo and does not support the Claimant's assertion that she had lost her voice.

6 At the outset of today's hearing, I reconsidered the Claimant's application in light of the further medical evidence and having regard to the guidance in **Andreou v Lord Chancellor's Department** [2002] EWCA Civ. 1192. The final hearing in this case is listed to take place over five weeks in January and February 2019. It is imperative that sensible case management and consideration of time points which may narrow the scope of the claim takes place without undue delay in order for the case to be prepared in a proportionate manner in accordance with the overriding objective. The medical evidence provided by the Claimant is inadequate and does not address the points identified when I granted the first short postponement, namely a prognosis for the Claimant's condition and a history of previous incidents and treatments. The short postponement already granted has not led to the Claimant's attendance today; there is no medical evidence upon which I could be satisfied that a further short postponement would result in a different outcome. The Claimant is capable of providing detailed written submissions, for example a nine page document was sent to the Tribunal today. The Claimant was aware of the issues to be decided today and the Respondent sent her its Skeleton Argument on 25 September 2018. I am satisfied that the Claimant has had a fair opportunity to set out in writing her representations on the matters she knew that that the Tribunal is considering at this hearing. Balancing the prejudice between the parties and having regard to the overriding objective, I refused the application to postpone.

Recusal

7 In advance of today's hearing, the Claimant applied for me to recuse myself on grounds of apparent bias, relying on **Porter v Magill.** The first conduct relied upon by the Claimant is that in the Case Management Summary for the hearing on 21 May

2018, I wrote: "**the details of the Claimant's complaint could well be described as discursive and lacking focus.**" As I went on to say, this was not helpful to the Tribunal nor ultimately was it likely to be helpful to the Claimant who may be better advised to focus upon the heart of her complaints and distinguish between that and matters which may be better described as background. The Claimant also relies upon my refusal to accede to her application for a stay of the Tribunal proceedings pending determination of subsequently issued High Court proceedings and/or decision to hear it after the Respondent's application for strike out or deposit orders. Finally, the Claimant asserts that there is apparent bias insofar as I have refused to direct the Respondent to reply fully to her Scott Schedule.

8 In considering the application, I had regard to the procedural history of the claim to date. The details accompanying the claim form ran to 32 pages of text. In advance of the Preliminary Hearing, the Claimant had produced a draft list of legal and factual issues running to 55 pages. As she was then represented by Counsel, I directed that the Claimant set out her claims with greater particularity and that the Respondent should then identify those upon which it took a time point. By the time the Scott Schedule was submitted, the Claimant was again acting in person and it ran to some 167 pages. The Respondent replied only by identifying the time points (rather than responding to the substance of the allegations) in accordance with my direction and it has opposed the Claimant's subsequent application for a stay.

9 I was directed by Ms Hodgetts on behalf of the Respondent to **Bennett v London Borough of Southwark** [2002] EWCA Civ. 223 as authority for the proposition that a Tribunal should be slow to recuse itself unless there are proper grounds upon which it should do so. The Tribunal must have reached the point at which it can properly form the view that recusal is the appropriate course of conduct. In that case, the reason was the advocate's abhorrent and offensive behaviour. In this case it is said to be decisions that I have made and the way in which I expressed myself in the preliminary hearing. Again, in deciding the application the Tribunal may need to consider whether, given the potential injustice to the other side and the public expense which recusing themselves would bring, they cannot perhaps after a break continue with the hearing with unclouded minds. It notes that some litigants or representatives tend to believe that to provoke actual or apparent bias against themselves can achieve what an application for adjournment cannot. At paragraph 19 it is made clear that courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation. Finally, at paragraph 38, Ward LJ reminded tribunals and courts that judicial duty is to be performed without fear as well as without favour. He notes that there is a worryingly increasing challenge to the court's authority with allegations of bias not being uncommon. He held that judges, members of tribunals, magistrates will have to rise above such challenge because all must be confident in their ability to judge impartially.

10 As a starting point, I note that the Claimant is entitled to make an application for recusal if she thinks it warranted and I am required to consider it objectively. The Claimant should be reassured that I do not hold the making of the application against her. Nevertheless, for the application to succeed I must be satisfied that a reasonable, objective bystander present in the Tribunal room (or privy to the correspondence

referred to above) could conclude that there was bias against the Claimant.

11 I consider that such an objective bystander would conclude that the comment in the Preliminary Hearing Summary was intended to assist the Claimant and enable the case to be dealt with in a proportionate manner. It falls far short of expressing any view as to the merits of the claims or interlocutory applications. Similarly, the objective bystander would conclude that a contested application for a stay should properly be decided on oral submission rather than on paper, particularly where a hearing is already listed. The application for stay depends upon the overlap between the issues between the Tribunal and the High Court and the risk of findings of fact which may embarrass a senior court. This requires identification of the issues in the Tribunal having regard to time limits and therefore the determination of the strike out and deposit orders. Furthermore, it is not objectively reasonable for the Respondent to incur the cost of a substantive response to issues which may be struck out as out of time. For these reasons, whilst the Claimant may disagree with them, I am not satisfied that any of the case management decisions to date could reasonably or objectively be considered to show bias or partiality. The application to recuse is refused.

Strike out - time

12 The Claimant's complaint was presented to the Tribunal on 4 March 2018 following a period of ACAS conciliation. Any act prior to 6 October 2017 will be out of time unless it forms conduct extending over a period and/or part of a continuing act.

13 An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

14 In **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548, the Court of Appeal approved **Hendricks** and reminded the Tribunals that it is for the Claimant to show a prima facie case. In other words the Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. In **Lyfar,** the Court of Appeal accepted that it was permissible to divide a claimant's allegations into separate categories by reference to distinct periods of time.

15 In **Aziz v FDA** [2010] EWCA Civ 304, the Court of Appeal suggested that a relevant, but not conclusive, factor could be whether the same individuals or different individuals were involved in the incidents. Another way of formulating the prima facie test was that the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an

ongoing state of affairs (applying **Ma v Merck Sharp & Dohme Ltd** [2008] EWCA Civ 1426). The Court of Appeal accepted that the history of Ms Aziz's dealings with the FDA fell into three clearly defined periods and considered each period. There may be a prima facie continuing act during each discrete period, but the Tribunal must then consider whether there was a continuing act *between* the periods.

16 If the claim is presented outside the primary limitation period, the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- Time limits in employment cases should be observed strictly and an extension is the exception not the rule, see **Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576.

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended;

- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues;

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** [1977] IRLR 336.

17 The Claimant is not present today and therefore I had careful regard to the content of the pleaded case and her other written representations in the case so far. The Claimant's details of her complaint are a lengthy narrative which does not identify clearly the way in way her claim is advanced. In the Claimant's absence and trying to discern the details from the generalised, I consider that the Claimant's complaints in her claim form may be summarised in the following way.

(1) Specific offensive behaviour and comments

(a) 28 August 2014 (racial offensive comments by Mr Morrison, Mr Peluso and Ms Still).
(b) 4 September 2014 (aggressive and offensive ranting, Mr Morrison).
(c) 7 January 2015 (Mr Taylor told her to do what Mr Watkins says).
(d) 27 April 2016 (racially offensive comment by Mr Taylor).

(e) September term 2016 ('snide comments and laughing' by 'people' including Mr Terzeon and Mr Pillai).
(f) 12 October 2017 (Mr Taylor said '**people in our part of the world don't lie**;" and referred to the Claimant as being very provocative).
(g) 12 October 2017: Mr Pillai "**said something about God and Jesus saving her**'" (para 13 v).

(2) Unfair allocation of work.

(a) Marking test papers. Between June to September 2015, April 2016 and June to September 2017 (Mr Watkins). June 2016 (Mr Watkins and Mr Terzeon).
(b) 29 April 2016 ACO cases (Mr Watkins and Mr Taylor)
(c) Improperly timetabled four days per week, rather than two or three (December 2016 and 2017, March and April 2017. No individual named).
(d) Given an inappropriate timetable between March and April 2017 (Ms Khan)
(e) From September 2017, had a marketing module removed and was overloaded with work after notification of pregnancy (Mr Watkins, Mr Taylor, Ms Milecka-Forrest, Mr Terzeon, Mr Pillai and Ms Khan).

(3) Improper performance criticism.

(a) November 2014 performance review reduced (Mr Nabor).
(b) November 2016, students and staff claimed not to know who she was (no individuals named).
(c) 8 February 2017 (not attending a meeting, Mr Nabor).
(d) 2014-2017 Victimising the Claimant's students (by 'people on Mr Watkins' team). Changing her students' scores (September 2016 by Mr Taylor; March 2017 by Mr Taylor, Ms Milecka-Forrest, Ms Xu and Mr Golson)
(e) May 2017 (rogue email accusation by Mr Price, acting on behalf of the chief executive, Ms Hannah).
(f) 4 October 2017, the Claimant was chastised by Mr Taylor for working from home when she had a pregnancy related illness.
(g) 5 October 2017, the Claimant was criticised by Mr Taylor for not replying to an email;
(h) 6 October 2017, Mr Watkins and Mr Taylor improperly criticised the Claimant's performance.
(i) 11 October 2017, criticised for not attending a zoo away day which she had been excused on grounds of her personal beliefs regarding animal captivity (Mr Watkins).

(4) Lack of support.

(a) Failure to progress her complaint in September 2014 (Ms Still and Mr Watkins).
(b) Frustrated her access to the shared L drive (September 2014 by

Ms Still; 5 July 2016, unnamed).

(c) Excluded from guest lectures/lectures not published (November and December 2014, Ms Still and Mr Watkins. May 2015, August 2015 and April 2016, unnamed).

(d) Undermined the Claimant's modules (January 2015, Mr Watkins, Mr Nabor and Ms Still; April 2015 Mr Young).

(e) GO9 conference hall cancelled/not allocated (December 2016 to June 2017, no decision maker named).

(f) Failure to provide cover. (April 2017 - Mr Watkins, Mr Taylor, Ms Milecka-Forest and Ms Khan; July 2017 – Mr Groucutt).

(g) May 2017 not allocated another teaching room ('timetabling').

(h) July to September 2017 timetabled to teach in rooms immediately after Mr Morrison (no decision maker named).

(i) 28 August 2017, allocated Mr Taylor as line manager despite the previous problems.

(j) From October 2015: problems with access to term module supervision lists (no decision maker named)

(k) Not given birthday cards in 2015 to 2017 (colleagues).

(5) Not being promoted or given development opportunities. 2012/13 MBA Oil and Gas Management Lead (no named decision maker). 2014 Entrepreneurship Lead (Mr Watkins, Mr Taylor and Mr Morrison). December 2014 Lead teaching fellow (no named decision maker). 2014/15 Research lead ('likely ensured' by Mr Watkins and Mr Taylor). 2016 Senior Fellow Higher Education Academy (Mr Nabor misrepresented a teaching observation). February 2017 Associate Head Research Consultancy (no named decision maker but 'likely' Mr Taylor and Mr Watkins felt slighted so resorted to bullying and harassment etc.) September 2017 PPDR (as a result of Claimant's expressed desire for managerial training, Mr Watkins and Mr Taylor made up performance allegations). Module leadership (2014-2017, each time a role came up, Mr Watkins discouraged her with racism, harassment, victimisation, lying and bullying). Research Methods October 2017 (Mr Taylor and Mr Watkins by their untrue performance criticisms).

(6) 12 October 2017, meeting called at short notice, in breach of procedure, in which her attendance and performance were improperly and falsely criticised. Aggressive and intimidating behaviour during the meeting by Mr Watkins and Mr Taylor; being told she should do whatever they wanted and that '**people from our part of the world don't lie**'. Withdrawal of the Claimant's Location Independent Working.

(7) Improper handling of her grievance from 4 December 2017, subjected to false accusations and further unjustified criticisms.

(8) Detriments as a result of her grievance. January 2018, illegally or falsely changing details of the Claimant's line manager on the HR system. 26 February 2018, becoming aware that her absence records had been improperly amended to show the zoo day as an unauthorised absence. Being allocated Charlotte Hamilton as HR representative for liaison despite her being implicated on at least three of the Claimant's discrimination concerns.

(9) Broad allegations against Mr Taylor from April 2016 of "using his influence" on others to behave as alleged at paragraphs (2) to (4) above.

18 The Claimant asserts that she suffered a miscarriage in October 2017 as a result of the Respondent's conduct and that she was signed off for work-related stress on 30 October 2017. Under the heading "Detriment due to disclosures", the Claimant makes allegations of dumbing down and illegality but it is hard to discern specific disclosures or detriments caused by the same. On the victimisation claim the protected act is said to be 24 February 2017, the Claimant's complaint to Dr Jo Cullinane that Mr Nabor was bullying and/or perpetuating bullying of her; a 2 March 2017 email to Dr Cullinane agreeing to the bullying complaint being dealt with informally and her 4 December 2017 grievance.

19 The Claimant concludes that this was a four and half year discrimination campaign which had caused her aggravated injury and hurt injury to feelings. The claims were brought as acts of direct and indirect discrimination, harassment and victimisation in respect of race, ethnic origin, religion, sex, pregnancy, health and safety and/or whistle-blowing.

20 The Respondent resisted all claims and complained that they were inadequately particularised for them properly to respond.

21 In her 53 page draft list of legal and factual issues, the Claimant identified the legal causes of action relied upon and then set out the alleged detriments. The content of the alleged detriments is the same as the claim form and the final 23 pages are a cut and paste of the claim form details without any further attempt at analysis of the legal basis upon which any particular detriment is claimed.

22 As set out above, at the Preliminary Hearing on 21 May 2018 I required the Claimant to provide a table setting out particulars of her claim. At the hearing itself, the only progress made was confirmation that the claim of indirect discrimination was brought only in respect of a team event at London Zoo in September 2017. The Claimant was granted an extension of time to provide the information after her solicitors came off the record.

23 On 6 July 2018, the Claimant submitted a Scott Schedule running to some 176 pages. Rather than increasing the degree of focus, the Scott Schedule has instead added to the confusion. For example, under the first heading "Direct Discrimination" the first allegation is said to be being called at short notice to a catch-up meeting on 12 October 2017 without an agenda at which Mr Taylor and Mr Watkins levelled a number of misrepresentations and fabrications without evidence. That is clearly a reference to the 12 October 2017 meeting as pleaded in the claim form. However, in the date column of the table it is said to have occurred not only on 12 October 2017 but also for the period 2014 to 2018, with the detriment column making a generalised allegation of "**management spearheading, harassment and victimisation using their team ensuring opportunity denial; given more onerous mundane work; demeaning humiliating, insignificant issues about conduct, attendance/performance being unduly highlighted, criticised formal and informal grievances not taken seriously or dealt in an appropriate manner, withholding my rights, finance loss, injury to feelings and life from being bullied and by managers**."

24 Most of today's hearing (which lasted the whole day even with the absence of the Claimant) was spent carefully reading the claim form and the Schedule, analysing the comments made by the Claimant and attempting to identify those detriments for which there was a specific allegation with a relatively discernible date as opposed to the overly generalised assertions such as those on page 4, where an the allegation of direct discrimination is: "**Meeting attendance lies falsehood kickstarts 2014-2018**", followed by "**Threatened to do anything John wants 2014, 2015, 2017**". This pattern extends over the four years of the Claimant's employment. Large sections of the Schedule, are again cut and paste directly from the claim form, for example from page 49 under the heading "Detriment Due to Disclosures Public Interest Disclosure Act 1998 & Employment Rights Act 1996" the assertions are taken verbatim from paragraph 20 of the claim form. Moreover, and contrary to the Claimant's position at the earlier Preliminary Hearing, the table purports to include further claims of indirect discrimination. It appears that the Claimant has either not understood or chosen not to engage with what was required of her.

25 Overall, the Schedule assists to the limited extent that it makes more clear the victimisation detriments, specifically that: in January 2018 her HR record was falsely amended to show Ms Milecka-Forrest as her manager from August 2016 and erasing five other line managers from that period; that from January 2018 HR referred to the Claimant being on holiday rather than sick leave; the allocation of Ms Hamilton as HR liaison, and the amendment of the Claimant's leave records as discovered on 26 February 2018.

26 In attempting to understand the claims brought, I also read and took into account the Claimant's witness statement although this was again largely a cut and paste repetition of the contents of the claim form. There were some additional details, for example, on the first page the Claimant named 10 people said to have carried out the discrimination with a further 8 named individuals said to have played conscious or unconscious roles. Nevertheless, the complaints were very generalised. By way of example of the Claimant's style in setting out her claims, her first sentence about Mr Watkins reads:

> "**Malicious Ring leader perpetrator; Kick-starts the bullying and racism in 2014, attacks my "A" dissertation students, threatens me to unjustly inflate Aaron's student assessment scores, threatens that I dumb down the research rubric in final term module M029/34, character defamation always says "Nasty" fabrications about me, leads, enables and protects every perpetuator listed here that bullies me, supports racist insults as listed in each staff's section, says I am not entitled to receive or see any evidence of their baseless accusations and defamation since they are my line managers (since August 2017) so I should just accept the lies, harasses me while pregnant and contributes to my miscarriage, in breach of duty of care immediately after continues the harassment instigating discriminatory timetabling of 4 days teaching weekly opposed to colleagues 2-3 days, dictates I must mark scores for less competent JT while injured, victimises students who appreciate me, laughs at my name like a bully in playground, threatens that I do what he had Aaron wants otherwise I will lose my job and others, meddles with my overall 100% positive student feedback, supports my being called 'black bitch', 'provocative' or 'when it comes to you', known micro-manager and dictator, expects me to abandon my pre-schedules to attend mirage meetings, says with AT that I just accept hearsay lies as I'm not entitled to evidence, marks unfairly, vindictive, commits common assault via threats, lies**

> **about everything, commits gross misconduct consistently etc JW, CS, AT lead the breach of contract, breach of duty, discrimination, harassment, victimisation, whistleblowing, safety, defamation issues etc)"**.

27 I further took into account the timeline attached to the grievance submitted by the Claimant on 4 December 2017. Consistent with the claim form, the Claimant groups her complaints into the following categories: racial abuse in August 2014, June 2016 and 12 October 2017 and then improper 'attacks and lies' about performance from 2014, although many dates are not given.

28 In advance of today's hearing the Claimant also submitted a number of documents in part complaining that the Respondent had not replied in detail to the issues identified in her Scott Schedule but only stated which it considered out of time. The most recent was the email sent at 9.24am today. The Claimant is correct that no substantive response to the Scott Schedule has been provided by the Respondent. They were not required to do so, either at the last Preliminary Hearing or in subsequent correspondence.

29 In her email today, the Claimant addresses the effect of rules 37 and 39 dealing with strike out and deposit orders. I remind myself that this was prepared after receipt of the Respondent's skeleton. In summary, the Claimant's position is that it is the Respondent who should be required to pay a deposit or be struck out. She describes her claim form as a clearly elucidated, year by year account showing different continuing acts of discrimination and whistle-blowing. The Claimant submits that the Scott Schedule should not be considered in isolation but in combination with the ET1 and makes the point that discrimination and whistle-blowing claims are particularly fact sensitive, and tribunals are strongly encouraged to hear and consider them. The Claimant then goes on to set out her assertions that the Respondent, its solicitors and Counsel are committing perjury in their defence to her claims.

30 On behalf of the Respondent, Ms Hodgetts submitted that I should strike out any claims prior to 6 October 2017. She submitted that the allegations covered distinct periods of time and/or distinct categories of allegation, for example, the allegations of racial abuse are discrete to the events in 2014, one possible comment in April 2016 and the alleged comments in the meeting on 12 October 2017. As for other the generalised allegations of lack of support or improper criticism, Ms Hodgetts summarised these as a complaint by the Claimant that for great periods of time she had too much work to do and was wrongly criticised when not turning up for things. On the Claimant's own chronology, according to Ms Hodgetts, there was a break in any allegations of discriminatory treatment between mid-2015 and mid-2016 other than discrete complaints about marking scripts. A complaint which is very different to her earlier complaints about specific, offensive comments.

31 I accept the Claimant's submission that the whole body of her pleaded case should be considered when trying to identify the claims being brought. I have sought to do so in some detail above and have concluded that the later documents add little further detail and no clarity to that originally pleaded. I accept that this is a case in which it is appropriate to adopt the approach approved in **Lyfar** and **Aziz** to divide the Claimant's case into separate categories. I also bear in mind that it is the Claimant who bears the burden of establishing prima facie evidence of a reasonably arguable

link between the conduct relied upon. In considering whether she has done so, it is necessary to consider holistically any possible connections between the different categories of conduct and those involved, bearing in mind that findings in one category may permit inferences in others.

32 However, on balance, I accept the submission of Ms Hodgetts that the Claimant's complaints can broadly be described as complaints of specific and explicit discriminatory comments and of a failure to manage her and her workload in a non-discriminatory manner. Looking at the substance of the complaints, in the complaints of specific offensive behaviour, the Claimant makes discrete allegations against Mr Morrison, Mr Peluso and Ms Still specific to the autumn of 2014. There is a significant gap between the alleged racially offensive comments by Mr Taylor – from 27 April 2016 to 12 October 2017. I then considered the other categories of complaint insofar as they concerned Mr Taylor, bearing in mind the importance of a holistic approach to allegations in discrimination claims. On unfair allocation of work, there is again a gap between April 2016 and October 2017 insofar as Mr Taylor is said to have been directly responsible. Similarly, with the exception of student scores, there is no direct allegation against Mr Taylor until October 2017. The same pattern arises with lack of support, with the allegations against Mr Taylor essentially starting from August 2017 when he becomes the Claimant's line manager. I am not satisfied that the Claimant's general assertion that Mr Taylor was 'using his influence' on others to act in a discriminatory manner (presumably inducing them to discriminate) without any prima facie evidence in support is sufficient to provide a reasonably arguable basis for contending that his conduct so linked the complaints as to amount to an ongoing state of affairs.

33 Looking still further at the chronology of the matters about which complaint is made by the Claimant and even taking the cautious approach of permitting the Claimant to argue matters where there is some evidence that she may be able to establish a link sufficient to show a continuous state of affairs, I am satisfied that all claims prior to 2015 are out of time. They are distinct in substance, in those involved and there are clear gaps in the chronology which viewed overall render them distinct allegations and not part of an ongoing state of affairs.

34 The Claimant's complaints during 2015 and 2016 are largely directed at Mr Watkins. He is a common link throughout that period in allocation of work, performance criticism and a lack of support. This is not entirely surprising given his role as Head of Management and Human Resources with management responsibility for many of the areas about which the Claimant complains. Certainly I am persuaded that, giving the Claimant the benefit of the doubt as she is not here today and taking her case at its highest, there is a reasonably arguable basis upon which she can assert that there was a sufficient link between the complaints of unfair allocation of work (marking and timetabling) and lack of support (being excluded from guest lectures, not having her own lectures published and not being provided with cover).

35 For the other complaints in 2015/16, for example regarding Mr Nabor or where no person is named or it appears unconnected to the complaints made against Mr Watkins on the face of the evidence, such as access to the shared L drive or term module supervision, I am not satisfied that the Claimant has discharged the burden upon her (light though it is at this stage) to show a 'reasonably arguable' case for a

continuous state of affairs. The same is true of the category concerned with promotion and development opportunities. In essence, the Claimant does not assert that she applied for the roles and that Mr Watkins decided not to appoint her. The case is more nuanced. The Claimant believes that she should have been appointed or that she was discouraged from applying because of the alleged bullying by Mr Watkins. Insofar as there was any alleged wrongdoing by Mr Watkins (or indeed Mr Taylor in his management role), this is in the areas of support, performance and workload and not in the non-appointment to the various roles identified. It follows, that each of these claims is out of time.

36 Turning finally to unfair allocation of work, performance criticism and lack of support in 2017, I accept that it is reasonably arguable the Claimant will be able to show that they are part of a continuous state of affairs. The acts become closer connected chronologically and are repeats of similar issues intensifying towards the autumn of 2017. The only exceptions are the meeting with Mr Nabor in February 2017, the email from Mr Price in May 2017 and the birthday cards as these involve entirely different people and there is no evidence of any arguable link.

37 For those acts not capable of being part of a continuous course of conduct, I considered whether it was just and equitable to extend time in any event. If an extension is refused, the Claimant still has complaints which she may advance and which, if she is succeeds, will enable her to be properly compensated in financial or non-financial awards. By contrast, such claims are now considerably out of time. Memories will have faded, particularly regarding the offensive comments where no contemporaneous investigation took place. The additional number of witnesses required will disproportionately add to the time and cost of the hearing. There has been no acceptable explanation for failure to bring the claims at the time, for example in 2014 when very offensive comments were allegedly made. I decline to extend time and, adopting the categories above, the following complaints are struck out as being out of time:

Paragraph 17(1)(a) to (e)
Paragraph 17(3)(a) to (c)
Paragraph 17(3)(d) in respect of any allegation before September 2016
Paragraph 17(3)(e)
Paragraph 17(4)(a) to (b), (d), (j) and (k).

Strike out and Deposit– Merits and Conduct

38 The Respondent made an application to strike out the remaining claims on the grounds that they had little reasonable prospects of success and/or that there had been a failure to comply with the order in terms of further particulars; in the alternative a deposit order.

39 An Employment Judge has power to strike out a claim on the ground it has no reasonable prospect of success under Employment Tribunal Rules of Procedure 2013 rule 37. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, **Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley [2012] CSIH 46** at 30 and **Balls v Downham Market High School & College [2011] IRLR 217 EAT**. In the

latter case, Lady Smith said:

> **"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral submissions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect**".

40 A case should not be struck out where there are relevant issues of fact to be determined **A v B [2011] EWCA Civ 1378.**

41 The Employment Tribunal Rules of Procedure 2013 rule 39, provide that if an Employment Judge considers that the contentions put forward by a party in relation to any matter to be determined by a Tribunal have little reasonable prospects of success, he or she may order that party to pay a deposit of an amount not exceeding £1,000 as a condition of being permitted to advance that allegation in the proceedings. Before making the Order a Judge must take reasonable steps to ascertain the ability of the party to comply with the Order.

42 I took into account the draconian nature of strike out claims, the public policy reasons for hearing discrimination claims, the fact that the Claimant's case must be taken at its highest on a strike out and that the Tribunal as yet has heard no evidence. For those reasons and whilst there are certainly some allegations which do not readily disclose a link between the protected characteristic and the treatment about which complaint is made, I am satisfied that it is necessary that the Claimant have the opportunity to have her case determined on evidence and that strike out on merits is inappropriate.

43 For the reasons set out above, I am satisfied that the Claimant has failed to comply with what was required of her in the provision of a table properly setting out each claim, each protected characteristic and the particulars of the treatment relied upon. This is particularly evident in connection with the protected disclosure claim where the Claimant has simply cut and paste the content of the claim form into the Scott Schedule, despite her attention being drawn at paragraph 2.1(f) to (i) of the Orders of the detail required. The same is true of the need to identify the protected acts in the victimisation claim and which part of section 44(1) Employment Rights Act 1996 the Claimant is relying upon as the basis of her health and safety detriment claim.

44 Even where there has been a breach of the Order, and despite the disproportionate time required of the Tribunal to deal with the identification of the issues in the Claimant's case, I am not satisfied that a strike out order is appropriate. Rather, I consider that the less draconian sanction of an Unless Order is proportionate.

45 The Claimant is not here; she is a litigant in person. It is possible that she has misunderstood rather than deliberately failed to engage with what is required of her. As explained at the previous Preliminary Hearing, in identifying the issues the Claimant must focus and provide the requisite particulars. This is not an invitation to resubmit material that has already been submitted and which has been said to be inadequate.

Further cutting and pasting of the existing claim will not comply. The Claimant must provide specific answers to the specific questions. In order for the response to comply, *for each alleged protected act and/or disclosure,* there must be a specific date, a specific document or the gist of the information with the specific name of the person to whom it was made. Failure to do so will be treated as non-compliance. By way of example to assist the Claimant, one protected act could be expressed as follows:

(a) 4 December 2017.
(b) Written grievance letter sent to Dr Janet Hannah and Joanne Oguzie.
(c) Alleging race discrimination.

UNLESS the Claimant provides by 4pm on 16 November 2018 for each and every protected act or protected disclosure or matter within section 44(1) Employment Rights Act relied upon:

(5) The date
(6) If in writing, identify the document.
(7) If orally, to whom and the relevant information disclosed;
(8) For protected disclosures, the relevant matter which it tends to show.

then her claims of victimisation, whistle-blowing detriment and health and safety detriment will stand dismissed, save for the extent that she relies upon her complaint to Dr Cullinane dated 24 February 2017 and her grievance dated 4 December 2017 as a protected act and/or protected disclosure.

46 Having declined to strike out on either the merits or conduct, I considered the Respondent's final application for a deposit order. Unlike strike out, rule 39 permits the Tribunal on such an application to form a broad overview of the merits and likelihood of success on the information currently available, including the Respondent's defence. Taking the Claimant's case at its highest, I could not say that there were *no* reasonable prospects of the Claimant arguably showing a link. However, I am persuaded by Ms Hodgetts that there are *little* reasonable prospects of the Claimant showing that complaints of unfair allocation of work (marking and ACO cases) and lack of support (being excluded from guest lectures, not having her own lectures published and not timetabling) are part of a continuous discriminatory state of affairs rather than discrete, everyday disagreements about the arrangement of work in a university setting.

47 There is no evidence before me today as to the Claimant's means. I am told by the Respondent that the Claimant's public Twitter profile shows her as working for the University of Sheffield and Companies House records show directorships of two consultancy businesses. I am told that the Claimant may also be the director of an oil business in Nigeria but I do not take that into account as it is not confirmed by reliable, publically available sources. The Claimant has had full opportunity to make representation as to her means (not least having had Ms Hodgett's skeleton) but has not done so.

48 I remind myself that a deposit is not intended to a barrier to justice but a pause to consider whether or not apparently weak claims should be pursued. Doing the best I can on the limited information before me, I am satisfied that it is appropriate to order

the **Claimant to pay a deposit of £500 by 16 November 2018** on each of the factual allegations at:

(1) paragraph 17(2)(a) other than for June to September 2017;
(2) paragraph 17(2)(b)
(3) paragraph 17(4)(c)
(4) paragraph 17(4)(g) and
(5) paragraph 17(4)h).

50 It appears that each factual contention may be relied upon within a number of legal causes of action (for example, direct race discrimination, victimisation, whistle-blowing detriment). Having regard to the overall level of the deposit, I did not consider it just to require a separate deposit to be paid for each cause of action. The factual bases of the assertions are the same and therefore the deposit was made as a condition of advancing the factual contention.

Stay

49 The Claimant's Tribunal claim was issued on 4 March 2018. At the Preliminary Hearing on 21 May 2018, the Claimant's representative indicated that she had resigned her employment. There was then no constructive dismissal claim before the Employment Tribunal and I directed that if one were to be presented, the claims should be consolidated. No such second Tribunal claim has been presented.

50 On 15 June 2018, the Claimant issued High Court proceedings for breach of contract, breach of duty, harassment and defamation, expecting to recover more than £320,000 in damages. The Respondent defends the claims. The High Court Particulars of Claim rely upon substantially the same factual allegations as those in these Tribunal proceedings. There are some claims exclusively within the jurisdiction of the Tribunal, for example, whistle-blowing and claims brought under the Equality Act 2010. There are some claims exclusively within the jurisdiction of the High Court, for example, defamation and breach of the implied duty of care with regard to personal injury caused by workplace bullying and/or health and safety failures. There are also areas of overlap, for example, in the High Court the Claimant relies upon the conduct of the Respondent identified in these proceedings as a breach of the implied term of trust and confidence in her breach of contract claim. However, the cause of action is pre-termination breach rather than constructive dismissal and therefore within the **Johnson v Unisys** 'exclusion zone' for this Tribunal.

51 The Claimant has applied for the stay of the Tribunal proceedings pending resolution of the High Court matters. Again, in the Claimant's absence I took into account her written representations to the Tribunal in advance of this hearing. She submits that there is significant overlap on the factual disputes to be resolved and relies upon case law to the effect that the higher courts take precedence over the lower court proceedings which should be stayed. In particular, she relies upon the cases of **GFI Holdings v Camm** UKEAT 0321/08; **Mindimaxnox LLP v Gover & Ho** UKEAT/0225/10/DA and **Andrew John Halsted v Payment Shields Group Holdings Ltd** EWCA Civ. 524.

52 The Respondent opposes the application for a stay. In her submissions, Ms

Hodgetts relied upon what she described as the broad discretion in the Tribunal in deciding whether or not to order a stay. Ms Hodgetts accepts the general principle that the High Court is the more important forum where there are complex factual matters. However, she relies upon paragraph 28 of **Mindimaxnox** where it is noted that Tribunals today deal with many highly complex issues relating to equal pay and discrimination. This alone is not a reason to usurp the jurisdiction of the Tribunal. The central question is whether or not, in light of those disputes, it is more appropriate for the matters to be determined by the High Court. This is a question of balance.

53 As HHJ McMullen QC held at paragraphs 30 and 33 of **Mindimaxnox,** where there is a very substantial factual dispute, the proceedings are more appropriately to be brought in the High Court. Findings of fact made by the Employment Tribunal which may give rise to embarrassment as they could bind the more senior High Court Judge who would find it difficult not to be bound by the earlier findings.

54 Another relevant factor is complexity of the legal matters, even where it was recognised in **Mindimaxnox** that Tribunals make decisions on complex legal matters all the time and are bound by judicial oaths and responsibilities. Where there is considerable overlap it is appropriate for the Tribunal to cede to the High Court, paragraph 37 of **Mindimaxnox**.

55 Ms Hodgetts drew my attention to the judgment of Tugendhat J in **BUQ v HRE** [2012] EWHC 2827 QB, highlighting the risk that the claimant there was motivated by a desire not to have to give evidence and was using the concurrent claims in the Tribunal and the High Court as a means of avoiding a hearing and/or introducing delay. Tugendhat J was concerned by the delay caused by adjourning the High Court proceedings but did so as he accepted that the Tribunal in that case would be better placed in the High Court to determine the truth or otherwise of the sexual misconduct allegations.

56 As set out above, there are discrete causes of action brought by the Claimant in each jurisdiction but they involve significant areas of factual overlap. This coupled with the factual and legal complexity lead me to conclude that it is appropriate at this stage to stay the Employment Tribunal proceedings pending a determination of the High Court. Whether this is by the High Court hearing the claims and making their own findings of fact which will bind the Tribunal or by deciding that the Tribunal is the appropriate forum to make the necessary findings of fact must be a matter for the High Court to decide in this case. It is submitted on behalf of the Respondent today that the Claimant has shown no serious motivation to have her case heard and that I should take this into account in exercising my discretion. I do not consider that I can safely make any such finding. The Claimant has only recently issued her High Court claim. Time will tell whether or not there is force in the Respondent's submission and, if so, what appropriate action should be taken either in the High Court or the Tribunal.

57 The application for a stay is granted but it will not come into effect until **23 November 2018.** Compliance with the Unless and Deposit Orders will neither embarrass the High Court nor impinge upon claims within its domain. They are necessary and proportionate to define the extent of the Tribunal claims which are to be stayed and which may later come back for hearing.

Case Management

58 As a result of today's hearing, the scope of the Claimant's Tribunal claim has been more closely defined. The striking out of the older allegations has reduced the risk of evidence becoming stale and the possibility that the stay and possible postponement of the hearing from January 2019 will prevent there from being a fair trial. Furthermore, if the case proceeds in the Employment Tribunal it will now only require nine days for hearing rather than the 20 days originally listed. This is more proportionate and in accordance with the overriding objective.

59 In the circumstances, I have vacated the hearing dates from 14 to 31 January 2019. The hearing is still listed for **4, 5, 6, 7, 11, 12, 13 and 14 February 2019** and I have added **Friday 15 February 2019**. The parties will not be required to attend on this final day as it is intended for the Tribunal alone to deliberate in chambers.

60 The parties are kindly requested to notify the Tribunal by 23 November 2018 of the current state of the High Court proceedings and whether or not those remaining February 2019 hearing dates need to be vacated.

Employment Judge Russell

16 October 2018