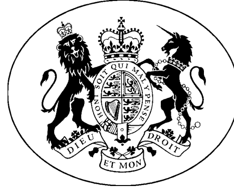

EMPLOYMENT TRIBUNALS

Claimant: Mrs J L Evans

Respondents: (1) Cartrefi Cymru Co-Operative Limited
(2) Ms Nicola Phillips

Heard at: Cardiff **On:** 2 March 2020

Before: Employment Judge S Jenkins (sitting alone)

Representation:
Claimant: Mr J Evans
Respondents: (1) Mr G Probert (Counsel)
(2) Mr A Roberts (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim that the First Respondent failed to make reasonable adjustments pursuant to Section 21 Equality Act 2010 was not brought within the required time limit, and it is not just and equitable to extend time. That claim is therefore dismissed.

2. The Claimant's claim against the First Respondent of harassment on the ground of disability pursuant to Section 26 EqA 2010 was not brought within the required time limit and it is not just and equitable to extend time. That claim is also therefore dismissed.

3. The Claimant's claim against the First Respondent of discrimination arising from disability pursuant to Section 15 EqA was brought within time, but only in respect of her contention that the imposition of a final written warning regarding her failure to carry out the required number of supervisions.

4. The Claimant's claims of victimisation under Section 27 EqA against the First Respondent were brought within time.

5. All bar one (the allegation of "presiding over an environment in Brecon where malicious rumours were allowed to circulate which were false and of detriment to my character" of the Claimant's claims against the Second Respondent were not brought within the required time limits and it is not just and equitable to extend time. All claims, bar the one specified, against the Second Respondent are therefore dismissed. I have issued a separate Deposit Order in respect of the one remaining claim.

6. The First Respondent's applications for the Claimant's claims to be struck out or for her to be ordered to pay a deposit as a condition of continuing with any of them are refused.

REASONS

Issues

1. The Preliminary Hearing was to consider the following matters:

   (i) Whether the Claimant's claims of discrimination i.e. those brought under Sections 15, 20/21, 26 and 27 of the Equality Act 2010 (2EqA") against either or both Respondents, were presented within the time limits set out in Sections 123(1)(a) and (b) of the EqA?

   (ii) Dealing with this issue may involve consideration of whether there was an act and/or conduct extending over a period and/or whether time should be extended on a "just and equitable" basis.

   (iii) Given the date the claim form was presented and the dates of Early Conciliation, any complaint about something that happened before 11 January 2019 was potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.

   (iv) If any of the Claimant's claims of discrimination against either Respondent are considered to have been brought in time, or if not, it is considered just and equitable to extend time:
   (a) Whether to strike out any of the claims against either or both Respondents because it has no reasonable prospect of success; or

   (b) Whether to order the Claimant to pay a deposit (not exceeding £1,000) as a condition if continuing to advance any of her claims if the Tribunal considers that claim has little reasonable prospect of success.

(v) The clarification of the issues and the making of Case Management Orders relating to the conduct of the Final Hearing.

2. In the event, as Judgment was reserved, the making of Case Management Orders was not able to be addressed and a further Telephone Preliminary Hearing will need to take place in respect of that.

Background

3. I heard evidence from the Claimant and considered the documents in bundles separately prepared by the Claimant and by the Respondents to which my attention was drawn. I also considered the submissions of the Claimant and both Respondents.

Findings

4. I heard evidence only from the Claimant and the focus of her witness evidence was on the advice she received from her Trade Union representatives during the relevant periods, and acutely what she contended to be their failure to advise her appropriately on time limits.

5. In addition to findings on those matters, I set out additional factual background. However that background should not be considered to amount to findings of fact which bind any future Tribunal as they simply record the Claimant's contentions. In particular, I was conscious that the Claimant's contentions of various verbal discussions with the Second Respondent may potentially be refuted by the Second Respondent who was not present to give evidence.

6. By way of background, the First Respondent is an organisation which supports people with learning disabilities in Wales. The Claimant commenced employment on 3 October 2012 and was ultimately employed as a Service Manager for the mid-Wales region. During that period the Second Respondent was her Line Manager.

7. The Claimant was diagnosed with chronic lymphocytic leukaemia in 2017 which is, and is accepted by the Respondents to be, a disability for the purposes of Section 6 EqA.

8. The Claimant contended that she raised verbally with the Second Respondent, in January or February 2018, the requirement for a reasonable adjustment to be made to her role. The adjustment requested was for her to be allowed to work from home for up to 2 days each week. The Claimant contended that the Second Respondent refused those requests, and indeed was dismissive of her in the manner of those refusals.

9. The Claimant discussed possible adjustments to her work with the First Respondent's HR Department in March 2018 and was issued with an appropriate application form to make a flexible working request. She did not however complete that form at the time, she says because she knew that it would be refused and feared being treated to her detriment if she were to submit the form.

10. The Claimant and the Second Respondent had regular supervision meetings, the last of which took place on 31 May 2018. It appears therefore that the last possible date on which a verbal request for reasonable adjustments could have been made of the Second Respondent was on 31 May 2018.

11. The Claimant made contact with her Union on 7 August 2018 and had a discussion with her Union Representative, Pat Jones, on 9 August 2018. The Claimant's evidence was that she discussed her broad concerns about her treatment by the Second Respondent during that conversation and not just the question of reasonable adjustments.

12. Ms Jones sent an email on 11 August 2018 to the First Respondent's HR Director asking for the reasonable adjustment of being allowed to work from home for an average of 2 days a week. The email noted that, "*unfortunately Joanne does not feel her manager has been understanding about her needs and she was told that Cartrefi can't offer this. The only adjustment Joanne has been offered is to cut her contracted hours*". That email was copied to the Claimant and the Claimant sent a further email on 12 August 2018 noting that she had spoken to a member of the First Respondent's HR Department previously who had been extremely helpful but that she had "*declined to apply due to it being brought to my attention by my manager that this would never be acceptable and that if I could not cope I was to drop my hours*".

13. The matter appears to have been passed to the member of the First Respondent's HR Department who had previously dealt with the Claimant, Angelica Winter. She then sent an email to the Claimant's Union Representative on 14 August 2018, noting that she had spoken to the Second Respondent who had agreed to the request to work from home for two days a week in principle but that she would like to meet with the Claimant to discuss the technicalities of the arrangement and how it might best work.

14. A meeting was arranged for 16 August 2018 but had to be postponed due to the inability of the Union Representative to attend. It appears however that there was a telephone discussion between Ms Winter and the Claimant on 16 August 2018 as that is referred to in an email from Ms Winter to the Claimant noting that she was due to be on leave until 3 September and that

hopefully a meeting could be arranged for that week. In the email, Ms Winter went on to say that, in the meantime, she knew that the Second Respondent was keen to make some accommodations so that the Claimant was comfortable in work and that it was understood that the Claimant would be working at home for two days a week for the next two weeks, to be discussed further when a meeting could take place with Union representation in attendance, hopefully in the week beginning 3 September 2018. The email had a consent form attached in relation to an Occupational Health Assessment which the Claimant indicated she returned the following day, i.e. 17 August 2018.

15. However, separate from that, albeit the Claimant contends that it was retaliatory and amounted to victimisation, concerns arose in relation to the Claimant's conduct. She was not initially suspended, but the letter was sent to her on 17 August 2018 inviting her to attend a "Statement Meeting" on 21 August 2018. It was not clear from the documents whether that meeting took place, although there was reference to a "Second Statement Meeting" on 25 October 2018 so it is possible that the earlier meeting had taken place. Nevertheless, there was a further meeting on 29 August 2018 at which the Claimant was suspended, and she remained under suspension during the subsequent investigation and disciplinary hearings which culminated in her dismissal on 14 January 2019.

16. At the final disciplinary hearing, the Claimant was faced with eight specific allegations. One was not proven; seven were proven, including one allegation of failure to carry out supervisions. In terms of sanctions, the First Respondent determined that a written warning would be appropriate in respect of two allegations, and that a final written warning would be appropriate in relation to four allegations, including the allegation of failure to carry out supervisions. The letter is not clear on whether that meant that each of those four allegations would have led to a final written warning, or whether the four allegations viewed collectively led to a final written warning.

17. It was also concluded that one allegation, that the Claimant had knowingly provided false information to the disciplinary investigation and a safeguarding investigation, was considered to be gross misconduct. As a consequence of that, the Claimant was ultimately dismissed. She appealed against that dismissal by letter of 24 January 2019 but the dismissal decision was upheld following an appeal meeting on 18 February 2019, confirmed in a letter of 25 February 2019.

18. The Claimant indicated in her witness statement that she had relied upon the advice of her Union throughout and that they had failed to advise her appropriately. Her complaints about the service she received from her Union go back to as far as August 2018, but the matters relevant to the time limit issue arose first some time after 25 October 2018. The Claimant, in her

evidence, stated that "*after the second Statement Meeting*" she regularly asked her then representative, Phillip Warlow, in person and by telephone, whether she should lodge a grievance or if she had recourse to the Employment Tribunal. She went on to say that she was told that she should wait until proceedings had come to an end and to "not muddy the waters". As I have noted, the second Statement Meeting took place on 25 October 2018, so these discussions with Mr Warlow must have taken place after that date, but the Claimant was unable to be more precise as to when the discussions took place.

19. She went on to say that, after her dismissal and throughout an internal complaint process she followed with her Union, she was incorrectly advised of the limitation date for raising an Employment Tribunal claim for disability discrimination. Looking at the documents referred to in that respect, I noted an email from Mr Warlow dated 28 March 2019 in which he appeared to pass on advice from another Union Officer. That advice covered the merits of the Claimant's disability discrimination and unfair dismissal claims. The advice regarding disability discrimination purely focussed on the issue of reasonable adjustments and on the decision that the Claimant be suspended, which appears to have been contended by the Claimant to have been manufactured to avoid the Claimant's request to work from home, i.e. potentially to be an allegation of victimisation.

20. The only reference to time limits within the email occurred under the heading of "Unfair Dismissal", where it was noted that any claim would have to be lodged with ACAS by 13 April 2019, i.e. three months less one day from the date of dismissal.

21. The Claimant subsequently pursued an internal complaint about the service she received from her representatives, and, in an email she sent on 29 March 2019, she noted that, should it be required, she would be submitting her request for Early Conciliation to ACAS by 13 April 2019.

22. The reference to 13 April 2019 occurred again in an email from the Union's Branch Administrator on 10 April 2019 where it was again noted that, as the Claimant had been dismissed on 14 January, then ACAS Early Conciliation must be lodged by 13 April 2019. A further email was then sent from the Union's Regional Manager on 13 April 2019 noting that the Claimant would be submitting an Early Conciliation application by that date and reminding her that she would need to do so that day to avoid missing the limitation date. In the event, the Claimant had already made contact with ACAS on 10 April 2019.

23. The ACAS Early Conciliation Certificate was issued on 1 May 2019 and the Claimant submitted her claim form on 28 May 2019. That was in time in respect of the unfair dismissal claim and indeed any act which took place

on that date. However, in relation to discrimination complaints, which must be brought within three months of the act complained of, it meant that any matter which occurred prior to 11 January 2019 was potentially out of time unless it could be considered to be part of conduct extending over a period which ended on or after 11 January 2019.

24. In terms of other findings from the Claimant's evidence and her answers under cross-examination, she confirmed that she was aware of the concept of reasonable adjustments under the Equality Act at the time that she was making her request to work from home. She also noted that during her discussion with Mr Warlow when the "not muddy the waters" comment was made, that discussion had covered both unfair dismissal and the potential for discrimination, including harassment, and covered the way that she had been treated by the Respondents throughout.

25. The Claimant also confirmed that she knew of the existence of Employment Tribunal time limits in general terms but did not know the detail and did not research them herself. Her case was that she was reliant upon her Trade Union at all times. She confirmed that she had had no discussion with her Trade Union about her ability to bring any claim against the Second Respondent specifically.

26. The Claimant also confirmed that the indication given to her in August 2018 that she would be allowed to work from home for two days a week was a reasonable response although she queried that a two week period would have been long enough to assess the success of the change to her working practices. In my view however, the email sent to the Claimant by Ms Winter on 16 August 2018 did not provide for a limited two week trial period, but simply referenced the fact that the Claimant would be working at home for two days a week for the following two weeks, i.e. the period when Ms Winter was away on holiday, and that the matter would be discussed further on her return in September 2018. Obviously, events overtook that intended meeting.

27. In terms of other relevant findings, I noted that the decision to suspend the Claimant was not taken by the Second Respondent, but was taken by Siobhan Carey, Regional Director; and that the decision to dismiss the Claimant was taken by a disciplinary panel consisting of Geraint Jenkins, Assistant Director, and Nicola Powell, Area Manager.

The Claims

28. As already noted, the Claimant submitted her claim form on 28 May 2019. These included claims under Sections 15, 20/21, 26 and 27 of the Equality Act 2010. The essentials of the claims under each heading appeared to boil down to the following matters (the references to paragraph numbers are to the relevant numbers in the particulars of claim attached to the Claim Form):

    <u>Reasonable adjustments (Sections 20/21)</u>

    (a) The requirement that she attend the workplace every day and not be allowed to work from home (para 10)
    (b) The failure to refer her to Occupational Health (para 31)

    <u>Discrimination arising from disability (Section 15)</u>

    (a) Failure to allow her to work from home (this was ultimately withdrawn by the Claimant at the Hearing) (para 15)
    (b) Not conducting regular health discussions with her, including in her last supervision with the Second Respondent on 31 May 2018 (para 17)
    (c) Not carrying out supervisions between her and the Second Respondent after the 31 May 2018 and being ostracised and intimidated by the Second Respondent (para 18)
    (d) The imposition of a Final Written Warning regarding her failure to carry out the required number of supervisions (para 34)

    <u>Harassment (Section 26)</u>

    (a) Sarcastic remarks by the Second Respondent relating to the Claimant's request to work from home (para 35)
    (b) The reference to ostracism and intimidation (para 18)

    <u>Victimisation (Section 27)</u>

    (a) The protected acts were contended to be the Claimant's request for reasonable adjustments and her making of a complaint to UNISON about the First Respondent's refusal to comply with its duty (para 32), with the alleged victimisation being set out in para 33 as follows
    (i) A contrived investigation
    (ii) Setting the Claimant up to fail by placing her under restricted duties
    (iii) An unnecessary, isolating and excessively long suspension with no review or updates on its expected duration
    (iv) Presiding over an environment in Brecon where malicious rumours were allowed to circulate which were false and of detriment to the Claimant's character
    (v) A disciplinary process that was a character assassination
    (vi) Decisions made by the disciplinary panel and appeal panel that were not evidenced

(vii) The termination of her contract.

Submissions

29. The submissions of both Respondents were very similar and focused principally on the fact that the claims had been brought substantially out of time, focussing on the fact that the Claimant was suspended on 29 August 2018 and was therefore not in work after that as a "bright line" in relation to time limits. The Second Respondent's representative in particular noted that her contact with the Claimant ceased at that point.

30. The direction of the Court of Appeal in Robertson -v- Bexley Community Centre [2003] IRLR 434 that the exercise of the just and equitable discretion is "the exception rather than the rule" was relied upon by both Respondents. The First Respondent also made reference to the guidance of the EAT in Abertawe Bro Morgannwg University Local Health Board -v- Morgan (UKEAT/0305/13 that a litigant must provide answers to two questions as part of the entirety of the circumstances which the Tribunal must consider, the first is why the primary time limit has not been met and the second being why, after the expiry of the primary time limit, the claim was not brought sooner than it was.

31. I was also referred to the case of British Coal Corporation -v- Keeble [1997] IRLR 336, which suggested that the factors listed in Section 33 of the Limitation Act 1980, which relates to the discretion to extend time in civil cases, would be relevant. That section requires consideration of the prejudice which each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case and in particular the following matters:

   - the length of and reasons for the delay;
   - the extent to which the cogency of the evidence is likely to be affected by the delay;
   - the extent to which the party sued had cooperated with any requests for information;
   - the promptness with which the Claimant acted once he or she knew the facts giving rise to the cause of action; and
   - the steps taken by the Claimant to obtain professional advice once he or she knew of the possibility of taking action.

32. With regard to prejudice, the Second Respondent noted that the EAT in Miller -v- Ministry of Justice (UK EAT/0003/15) had noted that there were two types of prejudice; the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice with a respondent may suffer if the limitation period is

extended by many months or years; and that whilst forensic prejudice is usually "crucially relevant", even if there was little or no forensic prejudice, the prejudice of losing a limitation defence remains customarily relevant.

33. The Claimant's submissions focused on the difficulties caused to her by the advice received from her Union. The Claimant also contended that many of the matters complained of formed part of a course of conduct extending over the period up to her dismissal, referring particularly to the EAT decision of Hale -v- Brighton and Sussex University Hospitals NHS Trust (UK EAT/0342/16) which noted that a decision to instigate disciplinary procedures is not necessarily a one-off act and can create an ongoing state of affairs to which an employee is subject.

Conclusions

34. I considered whether the Claimant's claims under the various sections of the Equality Act had been brought in time separately, before considering any required extension of time.

Reasonable adjustments

35. With regard to the potential adjustment of working from home I could see that, even taking the Claimant's case at its highest, any refusal to make such an adjustment occurred prior to 14 August 2018. At that point, it was agreed that the Claimant could work from home for two days each week, and the Claimant herself in evidence confirmed that she felt that was a reasonable stance. The Claimant contended that the imposition of the two week trial period following that was not reasonable, but, as I have noted above, I did not consider that any form of limitation was put in place, and that it was only the case that matters would be reviewed after a two week period, as that was a convenient time to do so following the return from holiday of the relevant HR Manager.

36. Similarly, the Claimant's contention that the Respondent had failed to complete an Occupational Health Assessment also related to a period in August 2018. The consent to undergo an Occupational Health Assessment was provided by the Claimant to the Respondent on 17 August 2018, at a time at which the relevant HR Manager was away on holiday. That referral was not therefore made until the Claimant was suspended and then was overtaken by that event.

37. I did not consider that a failure to refer the Claimant to Occupational Health would in any event, of itself, have been a failure to implement a reasonable adjustment, but even if it had, I did not consider that that took matters further than 29 August 2018 in terms of time.

38. The Claimant's claims of failure to make reasonable adjustments therefore were not made within time and it would therefore be necessary for me to decide that it would be just and equitable to extend time in order for them to proceed.

Discrimination arising from disability

39. As I have noted above, the assertion that the failure to allow the Claimant to work from home was discrimination arising from disability was withdrawn by the Claimant during the course of the Preliminary Hearing.

40. The asserted discrimination said to arise from the Claimant's disability in the form of a failure to conduct regular health discussions and supervisions, including the last supervision on 31 May 2018, by definition occurred, at the latest, on that date. Similarly, the Claimant's contention that there were no supervisions by the Second Respondent after the 31 May 2018, and that she was ostracised by the Second Respondent must have ended, at the latest by 29 August 2018. Both those matters therefore, on their face, were out of time, and I would need to decide whether it was just and equitable to extend time in order for them to be maintained.

41. The claim that the imposition of the final written warning in relation to the failure to carry out supervisions was discriminatory was however clearly in time, as reference to that was only made as part of the overall disciplinary sanction which was confirmed on 14 January 2019. That element of the Claimant's claim therefore continues.

Harassment

42. The conduct alleged to amount to harassment focused on the allegedly sarcastic remarks of the Second Respondent and the alleged ostracism of the Claimant by the Second Respondent. As I have noted, the Second Respondent had no contact with the Claimant following her suspension on 29 August 2018, and therefore the last possible date on which any such remarks or treatment can have occurred would have been that date. Again therefore, on the face of it, that was made out of time and I would need to consider whether it would be appropriate to extend time in order for it to continue.

Victimisation

43. In this regard the protected acts were said to have been made in the form of the Claimant's request to work from home and her complaint to her Trade

Union about that. I had an initial concern that those matters would not amount to protected acts for the purposes of Section 27 EqA. However, I was satisfied that the Claimant's email of 12 August 2018, in which she confirmed that she had declined to apply for flexible working due to the concern that she had alleged had been expressed by the Second Respondent that this would never be acceptable and that if she could not cope she should drop her hours, did potentially amount to a protected act.

44. In any event, as far as time matters were concerned, my focus was on whether the detrimental treatment which was alleged to have occurred as a result of the protected act had been in time. In that regard, I noted that, apart from one aspect, the assertion, set out at point (ii) in paragraph 33 of the particulars of claim (set out at sub-paragraph (ii) under the heading "Victimisation" in paragraph 28 above), of "setting the Claimant up to fail by placing her under restricted duties", the asserted detrimental treatment related to the investigation, the suspension and the ultimate decision to dismiss the Claimant. Bearing in mind that the dismissal was clearly in time, and applying the direction of the EAT in the Hale case, I considered that those elements of the victimisation claim had been brought in time and could therefore proceed. However, the assertion of being set up to fail by being placed under restricted duties had been brought out of time.

Extending time

45. With regard to the question of whether to extend time in respect of the various claims which were out of time, I noted the guidance of the Court of Appeal in the Robertson case that the exercise of discretion is the exception rather than the rule. I also noted the guidance provided by the British Coal Corporation case and the various factors set out in Section 33 of the Limitation Act, and the general question of prejudice.

46. I noted that the Claimant appeared to place the blame for her not submitting her disability discrimination claims in time at the door of her Union. In that regard I was conscious that, whilst any failure on the part of a Trade Union properly to advise a Claimant would be likely to be fatal in respect of an unfair dismissal claim and the stricter "reasonable practicability" test, that was not such a compelling factor in relation to extending time in a discrimination case. However, the Limitation Act factors of the length of and reasons for the delay, the promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action, and the steps taken by the Claimant to obtain appropriate professional advice once she knew of the possibility of taking action, led to the conclusion that it would not be just and equitable to extend time.

47. The Claimant confirmed that she was aware of the principle of making reasonable adjustments under the Equality Act as far back as January or

February 2018 when she first raised the question of working from home. She also confirmed that she was aware that there were Tribunal time limits although she was not aware of the detail of them. Also, the Claimant's evidence was that she had discussed discrimination matters with her Trade Union at some point after October 2018 but she did not then appear to return to the point until 28 March 2019.

48. Whilst a discussion at that point was still in time in respect of the dismissal, it was already by then out of time in relation to any matter which had arisen prior to 29 December 2018. Furthermore, the tenor of the discussions with the Union at the time appeared to focus on her dismissal and the prospect of pursuing an unfair dismissal claim arising from that. Indeed, the complaints raised by the Claimant with the Union about the way she had been advised focused purely on the unfair dismissal claim until the Claimant's email of 1 May 2019, when she referred to wishing to "extend" her original complaint as there had been a failure to notify her of the submission dates required for disability discrimination cases.

49. I also noted the direction provided by the EAT in the case of Thompson -v- Ministry of Justice (UK EAT/0004/15) that a distinction is to be drawn between negligent advice and reliance on equivocal advice which is not negligent but leaves doubt as to whether the time limit has expired. In the latter case, the EAT directed that claimants should bring their claims to protect their position.

50. In this respect, the reference by the Claimant to her discussion with her Union Representative to "not muddy the waters" and to wait for internal proceedings to come to an end, might have justified delaying pursuing any matter of disability discrimination until those internal proceedings were concluded. However, the Claimant was dismissed on 14 January 2019 and did not pursue any further matter with her Union with regard to pursuing claims until 28 March 2019. In the circumstances, I did not consider that she acted appropriately promptly and nor did she take steps to obtain appropriate advice about taking her disability discrimination claims further. In conclusion, I did not consider that it would be appropriate to exercise my discretion and to decide that it was just and equitable to extend time.

51. Ultimately that meant that, in addition to the Claimant's claim of unfair dismissal against the First Respondent, only her claims of discrimination arising from disability in the form of the imposition of the final written warning for failing to carry out the required number of supervisions, and the remaining elements of the victimisation claim could proceed.

Strike out and deposit order applications

52. I then considered the Respondents' applications to strike out the Claimant's discrimination claims, those that then remained, or, alternatively, to order a deposit to be paid as a condition of continuing them, due to there being no reasonable prospects of success, or there being little reasonable prospects, respectively.

53. With regard to strike out claims, I was conscious of the direction provided by the House of Lords in Anyanwu -v- South Bank Students Union [2001] IRLR 305, that discrimination cases should not be struck out except in the very clearest of circumstances. The EAT, in Balls -v- Downham Market High School and College [2011] IRLR 217, had also noted that strike outs should not be ordered where there was a material dispute on the facts. Those directions led me to conclude it would not be appropriate to order any of the Claimant's remaining discrimination claims to be struck out, as I could not say that the circumstances of this case were appropriately clear.

54. With regard to deposit orders, I noted that there was more leeway for me to make such an order, and that the EAT, in Van Rensburgh -v- Royal Borough of Kingston Upon Thames (UK EAT/0095/07), had noted that a Tribunal is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. The EAT directed however, that the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

55. In applying those directions to the question of deposits, I took a different view in relation to the First Respondent to that in relation to the Second Respondent.

56. As I have noted, the discrimination claims that remain for consideration are the imposition of the final written warning in respect of the failure to carry out the required number of supervisions, set out at paragraph 34 of the particulars of claim; and the various assertions of victimisation, set out at paragraph 33 of the particulars of claim. Whilst I do not consider that those claims will necessarily have particularly strong prospects of success against the First Respondent, it is difficult for me to form a definitive view on them without considering the actual evidence relating to them. I did not therefore consider that it would be appropriate to order a deposit to be paid by the Claimant in respect of continuing with these claims against the First Respondent.

57. However, with regard to the Second Respondent, she had no involvement with the final written warning issued. I considered the guidance provided by the cases of A v B [2010] EWCA Civ 1378 and Ahir -v British Airways PLC [2017] EWCA Civ 1392, which indicated that a Tribunal can appropriately

strike out a claim where there are no relevant issues of fact to be determined or where it is considered that the allegations being advanced are inherently implausible. In that regard, bearing in mind the complete lack of involvement of the Second Respondent with the imposition of the final written warning, I did not see that there are facts which can point to her having discriminated against the Claimant in respect of that and therefore the Claimant's claim under Section 15 EqA against the Second Respondent is struck out.

58. Turning to the claims of victimisation insofar as they can relate to the Second Respondent, again, many of the seven separate allegations of detrimental treatment set out in paragraph 33 of the particulars of claim (those set out sub-paragraphs (i), (iii), (v), (vi) and (vii) under the heading "Victimisation" in paragraph 28 above) cannot relate to actions of the Second Respondent and therefore are struck out against her. In fact, it is more straightforward for me to deal with the one which could potentially remain i.e. item (iv) "presiding over an environment in Brecon where malicious rumours were allowed to circulate which were false and of detriment to my character", item (ii) "setting me up to fail by placing me under restricted duties" having been brought out of time.

59. With regard to the assertion of presiding over the environment in Brecon where malicious rumours were allowed to circulate, the Claimant, in further and better particulars provided in response to a request from the Respondents in November 2019, noted that these malicious rumours were that she had been sacked for theft. In the further and better particulars the Claimant referred to the Second Respondent being present at a particular meeting and therefore being aware of those malicious rumours and having done nothing to rectify the situation.

60. It is not easy to see how the Claimant will, even if it is ultimately accepted that the Second Respondent was present at the meeting and that those comments were made, establish that that would amount to detrimental treatment arising from a protected act asserted to have been made in August 2018. In the circumstances therefore, I considered it appropriate to order that the Claimant should pay a deposit as a condition of continuing with this assertion of detrimental treatment arising from a protected act against the Second Respondent. In view of the Claimant's limited means, I ordered that a deposit of £10.00 would be required to be paid, and I have issued a separate Deposit Order in respect of that.

61. To be clear, that is the only claim that I consider it appropriate to remain against the Second Respondent, whether by reason of time limits or there being no reasonable prospect of success. That means that if the deposit is not paid then all the Claimant's claims against the Second Respondent will stand dismissed.

Employment Judge S Jenkins
Dated: 24 March 2020

JUDGMENT SENT TO THE PARTIES ON

……28 March 2020……….

……………………………………………….
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS