



EMPLOYMENT TRIBUNALS

Claimant: Ms. K. Ragouba

Respondent: Washwood Healthcare Ltd t/a Wellbeing Pharmacy

Heard at: Birmingham **On:** 4 & 5 March 2020

Before: Employment Judge Hughes

Representation

For the Claimant: In person

For the Respondent: Miss G Nicholls, Counsel

Interpreters: The Employment Tribunal was assisted by Mr Osman (day 1) and Mrs Mahmoud (day 2)

JUDGMENT having been sent to the parties on 11 March 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1 These reasons concern a Preliminary Hearing before me and were provided orally at the same time as my judgment. The Claimant has since requested written reasons. I shall set out the judgment here for ease of reference, although it has already been promulgated.

(1) The application to amend to add allegations 1 to 6 and 8 to 10 of the schedule of allegations is not allowed. These claims are out of time and it is not just and equitable to extend time. Further, and in any event, they are not allegations of direct sex discrimination which is how they are put.

(2) Allegation 7 (the only allegation included in the Claim Form) is out of time by over two and a half years. It is not just and equitable to extend time because the alleged discriminator left the respondent's employment towards the end of 2017 and to allow this allegation to proceed would severely prejudice the respondent. Further, and in any event, it has no reasonable prospect of success as an allegation of direct sex discrimination which is how it is put.

(3) The application to amend to add new allegations of direct race and religious discrimination (allegations 12 to 17) is not allowed. These claims are out of time and it is not just and equitable to extend time. The application was made in November 2019 and concerns events in May to July 2017. I do not accept

these allegations could not have been made sooner. Further, and in any event, allegations 12, 13, 16 and 17 have no reasonable prospects of success as allegations of direct race or religious discrimination which is how they are put. In addition, the alleged discriminator in respect of allegations 12 to 16 left the respondent's employment towards the end of 2017 and to allow these allegations to proceed would severely prejudice the respondent.

(4) The application to amend to add Allegation 11 (which would be in time by reference to the presentation date of the Claim Form but was not included in it) as an allegation of direct sex discrimination is not allowed. Allegation 7 which is the only allegation included in the Claim Form has been dismissed so technically there is no claim to amend. Further, and in any event, it is clear that this is an allegation of failure to make reasonable adjustments (if anything) and not of direct sex discrimination. The claimant has been found by another Judge not to have been disabled at the material time. Consequently, this allegation is struck out as having no reasonable prospect of success.

(5) Further, and in the alternative, in the light of the history of this litigation, I have concluded that a fair hearing is no longer possible.

(6) For the above reasons, this claim is dismissed.

(7) The respondent reserves the right to pursue a costs application and [shall] inform the Employment Tribunal and the claimant in writing by **19 March 2020** whether this application is pursued.

Background and Issues

2 The Claimant presented this claim on the 11 May 2018 having complied with the Early Conciliation requirements. EC commenced on 29 January 2018 and the Certificate was dated 1 March 2018. Her dates of employment have been clarified to be the 12 May 2016 to 12 January 2018, on which date she was dismissed from her employment. References in square brackets are to page numbers in the trial bundle. The reason given for her dismissal was ill-health incapacity/SOSR. On 13 November 2017, in a telephone call with the Respondent's solicitor, the Claimant confirmed that she did not know what prospects there were of returning to work [1f]. From the dismissal letter dated 5 January 2018 [1a onwards] it appeared there had been discussions about reasonable adjustments to the Claimant's role and some options had been discussed [1e] but her doctor had said he could not give anticipated return date because the situation "remained uncertain" [1a]. The letter concluded: "On review of your GP's report and the information available to me, I come to the conclusion that your employment is to be terminated on the grounds of ill-health capability as you are unlikely to be able to undertake your role in the near future and that there are no adjustments which can be made to enable you to return to work any sooner". The Claimant was dismissed with one week's notice.

3 A number of relevant points arise from the Claim Form. The effective date of termination of employment was given as 25 January 2018 (which was erroneous – that was the date of her unsuccessful appeal). At paragraph 8.1 [8] the Claimant ticked boxes to claim of unfair dismissal, disability discrimination, sex discrimination and at 8.2 stated she claimed indirect discrimination [9]. In the details of claim, the Claimant said she worked for the Respondent on a voluntary basis for two months and was employed on 11 July 2016. The Claimant said she was given a contract and asked to fill in the hours she was working (20 per week

9 to 2 Monday to Thursday). The Claimant said she enjoyed the job, her hours suited her situation (a single mother with three children, and she had a clean disciplinary record. She said things changed when a new Manager, Ms Sabiha [Khaliq], started work in May 2017 [14]. The Claimant said Sabiha did not give her mobile phone number to her, so she could ring if she was going to be absent but did give the number to one other colleague. The Claimant also referred to following correct procedures if she was made aware of them. She made reference to a disciplinary allegation against her of “purposefully misconstruing reasonable requests and instructions from her manager” i.e. Ms Khaliq. In summary, the Claim Form contained one complaint which appeared to be that she was disciplined for not phoning in sick. There was no information about other allegations or the alleged disability. However, in her Claim Form the Claimant replied to the question “Do you have a disability?”, “No” [11].

4 The Employment Tribunal ordered the claimant to produce a disability impact statement and send that and copies of her medical records to the Respondent by 25 October 2018 [26].

5 In the Claimant’s witness statement and during her oral evidence, she said she had taken limited legal advice from a solicitor by telephone about completing the Claim Form, which had included a discussion about time limits. She then completed the Claim Form herself. A solicitor was named by her on the Claim Form but has not come on record at any point, from which I conclude it was one-off advice.

6 The Claimant confirmed in her evidence to me that she had taken advice from the Citizens Advice Bureau, the Birmingham Peoples Centre, FRU and the solicitor referred to in paragraph 5 above. The Claimant said she had tried to get further advice from the solicitor, but she was off sick, so she tried to find a different solicitor.

7 The Respondent submitted a Response Form on 15 June 2018 (in time). The Respondent did not accept that the Claimant was a disabled person. The Respondent raised a number of preliminary issues, specifically: that the Claimant had insufficient service to claim unfair dismissal (which was correct); that she had failed to provide a disability impact statement and her medical records as ordered; and applied for a strike-out saying that the claims had no reasonable prospects of success and/or because it was unreasonable for the Claimant to provide no proper information about the claims and allegations made. The Respondent defended all claims. It was the Respondent’s case that the Claimant was invited to a disciplinary hearing on 28 June 2017. There were four allegations, including failing to follow the absence reporting procedure and being deliberately obstructive. The Respondent then received grievance letters from the Claimant complaining about Ms Khaliq (one dated 9 June and received on 30 June, the other dated 2 July 2017) and accusing her of bullying and discrimination. There was a disciplinary hearing on 19 July which resulted in a final written warning. A grievance meeting took place on 24 July 2017, but the grievance was not upheld. The Claimant was signed off sick with stress and anxiety on 1 August 2017 and remained off sick until she was dismissed for capability because the medical evidence did not confirm an anticipated date when she would be able to return to work. The Respondent said that the Claimant appealed providing a GP letter saying she could be fit to return on a phased basis in February, after a period of annual leave. The Respondent

dismissed the appeal because there was no certainty that the Claimant could actually return to work.

8 A Preliminary Hearing for case management (PHCM) was listed on 13 November 2018. Just prior to that the Claimant sent emails to the Employment Tribunal which were not copied to the Respondent attaching a disability impact statement and some medical evidence [26a to 29]. The Respondent did not receive these until 7 November 2018 (overnight) [28]. The Respondent confirmed that it did not accept the Claimant was disabled and set out some reasons why.

9 The litigation has a long and complex history, such that this is the sixth Preliminary Hearing and, it is fair to say, very little progress has been made to-date. The Claimant failed to attend the PHCM on 13 November 2018. This caused Acting Regional Judge Findlay to make an Unless Order that the Claimant must, by the 27 November, set in out in writing to the Employment Tribunal (copied to the Respondent) (1) an explanation of why she was not present at the Hearing on the 13 November and provide documentary evidence (including medical evidence, if appropriate) in support of that reason; (2) confirm that she intended to pursue the disability discrimination and/or sex discrimination claims; and (3) set out clearly the allegations which form the basis of her claim for that type of discrimination, and when they were said to have occurred. The Judge gave the reasons for making the Order as follows: -

“It is unclear from the documentation provided so far by the Claimant what is the nature of any claim for the disability or sex discrimination made by her. The Case Management Hearing listed for today was set up in order to identify the issues clearly and give directions so that a fair trial is possible. Unless the Claimant is prepared to cooperate, and further the overriding objective by providing clear details of her claims, a fair trial will not be possible. [30]”

It should be noted that this Order was made well over a year before the Hearing before me.

10 The Claimant replied on 20 November 2018 saying she was unable to attend because she felt incredibly anxious and stressed; that she intended to pursue her claim of disability discrimination based on anxiety and depression, and her sex discrimination claim. She said her manager (i.e. Ms Khaliq) had authorised time off for her daughter’s illness with Chicken Pox, but later retracted that fact, and then took disciplinary action and that this was because the Claimant was a single-parent and Ms Khaliq had no children. She said the disability discrimination was harassment by being “put down in front of patients” and degraded by being told she had “the mind of a child”. No further allegations were set out and dates were not given. No allegations of any other form of discrimination were made [32-33]. The Claimant attached medical evidence regarding her non-attendance from her GP stating she had been a patient since September 2017 and had ongoing serious mental health problems which: “Are quite disabling for her in that she is unable to leave the house due to serious anxiety. As a consequence, I am aware she has missed appointments”. The letter said that the Claimant was being prescribed Citalopram and has IBS [34-35]. On 28 November 2018, the Respondent sent an email saying that the claim should be struck out because the Claimant had failed to comply with the Unless

Order [36]. Judge Findlay did not strike the claim out but made further case management Orders and listed the case for a telephone PHCM on 28 May 2019.

11 On 14 February 2019, the claimant sent a schedule of 14 allegations covering the period 25 May 2017 to 31 July 2017 May 2017 [40-41]. It is fair to say that it is difficult to see how most of them could conceivably amount to sex discrimination or disability discrimination. The Claimant attached documentary evidence. There was then further correspondence between the parties which, insofar as it is material, is dealt with below in paragraphs 18 to 21.

12 On 28 May 2019 there was a telephone PHCM before Judge Richardson where she listed a one-day Preliminary Hearing on 10 September 2018. The purpose was to determine; (1) whether the claimant was disabled as defined by the EA10 at the date of the dismissal/appeal hearing in January 2018; and (2) whether any of the complaints of sex discrimination and, subject to (1), disability discrimination, are out of time [56-62]. Further correspondence between the parties ensued which, insofar as it is material, is dealt with below in paragraph 18 to 21.

13 At the Preliminary Hearing on 10 September 2019 Judge Wynn-Evans decided the Claimant was not disabled at the material time and dismissed her disability discrimination claim. He had insufficient time to deal with the time limitation point and listed a further one-day Preliminary Hearing on 13 January 2020 to determine the time limit point on the sex discrimination complaints and/or whether to strike them out. He recorded that the Claimant had not applied to amend her claim. Judge Wynn-Evans' decision on the disability discrimination issue is the subject of an appeal to the EAT by the Claimant, which has not been determined. Consequently, I proceeded on the basis that there was no disability discrimination claim before me.

14 At some point between that date and 4 November 2020 the Claimant told me she was provided with pro-bono advice by Ms. Sophie Garner under the ELIPS scheme which assists litigants on the Employment Tribunal. The Claimant said this was the first time she told anyone about experiences which could amount to race/religious discrimination and she been unable to clarify her allegations before then because of poor English and mental ill-health.

15 The claimant wrote to the Employment Tribunal on 4 November 2020 withdrawing her sex discrimination complaint and instead asking to amend to add allegations of direct race/religious discrimination. She attached a list of allegations which had previously been labelled as disability or sex discrimination. She also added further allegations which had not previously been made.

16 The Preliminary Hearing on 13 January 2020 came before Judge Dean. The amendment application was added to the list of issues to be determined. The Claimant confirmed she was withdrawing her sex discrimination complaint and instead wanted to amend to add allegations of direct race/religious discrimination. The Hearing then had to be postponed because the Claimant was not well enough to continue with it.

17 The re-listed Preliminary Hearing took place on 5 February 2020 before Judge Harding and she set out the complex chronology of the litigation in her Order [144-154]. I have set most of it out in the paragraphs above However, the

following further matters were recorded by Judge Harding. The hearing started late because the Claimant objected to the Interpreter. Enquiries were made to see if another interpreter could be found. The Claimant then withdrew the objection (paragraph 16). At paragraph 17, Judge Harding recorded that she told the Claimant her understanding was that she wanted to withdraw the sex discrimination complaint, but that the Claimant told her that was not correct and she wanted to pursue it. Consequently, and subject to the amendment application, the only remaining claim was of sex discrimination. The unfair dismissal claim had been struck out earlier because the claimant had insufficient service. The disability discrimination complaint had been struck out because the Claimant did not meet the definition of disability at the material time. Judge Harding recorded that she asked the Claimant whether her case was that the dismissal decision was influenced by the fact that she is a woman/single-parent and the Claimant said it was not and that she accepted she was dismissed because of long-term sickness absence (paragraph 25).

18 In paragraph 13, Judge Harding set out details of the amendment application and quoted from the letter and an attachment sent on 4 November 2019. At paragraphs 19.1 – 19.8 Judge Harding set out details of the sex discrimination complaints which, as noted above, spanned the 25 May 2017 to the end of July 2017. Judge Harding explained that all those allegations were out of time. There was then a break for the Claimant to consider whether there were any further allegations. In paragraph 24 it is recorded that the claimant identified three further complaints relating to June 2017, 19 July 2017, and what is now agreed to be in respect of a meeting on 19 January 2018 [24.1@150].

19 In paragraph 27 Judge Harding set out details of the complaints of race/religious discrimination at 27.1 – 27.4 which spanned the period May to June 2017 and at paragraph 28 two complaints said to be direct discrimination because of religion on 13 and 27 June 2017. The alleged discriminator was Ms Khaliq. Two of the allegations are serious i.e. that in June 2017 Ms Khaliq criticised the Claimant for wearing a headscarf and said that staff should only wear trousers knowing that the Claimant wore skirts for religious reasons.

20 In paragraphs 29 and 30 [152], Judge Harding set out the purpose of today's Hearing. Firstly, whether any of the list of claims of direct discrimination because of sex, set out in her Case Management Order were effectively an application to amend the existing claim and, if so, whether the amendment application should be allowed. Secondly, whether any of the race or religious discrimination claims amounted to an amendment application and, if so, whether to allow it. Thirdly, whether any or all the claims were out of time and, if so, whether it would be just and equitable to extend time. Fourthly, whether to strike out the claims on the grounds that: there is no reasonable prospect of success; or because the manner in which the claims have been conducted is unreasonable; or for non-compliance with the Employment Tribunal Rules; or on the basis that a fair Hearing is no longer possible. Finally, in the alternative whether the payment of a deposit should be ordered on the basis that some of the claims have little reasonable prospect of success.

21 In paragraph 33 of Judge Harding's Order [153] she recorded the fact that the Claimant had set out information about extensions of time and whether to grant amendment applications in a number of different documents, Judge Harding said that the Claimant should therefore send to the Respondent a witness statement.

She made it clear the witness statement was not to deal with any of the claims and complaints and should instead focus on evidence relevant to the amendment application and to time limits. She included guidance about what the statement should address.

The Hearing before me

22 Judge Harding had hoped that the interpreter who was present at the Hearing before her could be booked for this Hearing. The Employment Tribunal staff attempted to do so, but this was not possible. It was not possible to book an interpreter for both days of the Hearing either so Mr Osman assisted the Court yesterday and Mrs Mahmoud assisted the Court today. The Claimant has told me she is happy with them and I should like to record my thanks to them.

23 The documents before me were: a trial bundle - R1; a schedule of the allegations which the Claimant is seeking to bring - R2; the Respondent's representative's written submissions - R3; some medical information handed in by the Claimant on the morning of the second day of the Hearing - C1; and written submissions from the Claimant handed in this afternoon, after the Claimant was given time to seek assistance - C2.

24 The Claimant gave evidence yesterday and suggested bringing her son along to give evidence today, but I said that this would not be possible because there was no witness statement for him. The Claimant said there were witnesses that she wanted to give evidence at the hearing. None of those people had attended. With assistance from the Respondent's representative and the interpreter we managed to identify some handwritten witness statements in R1. Document 127 was incomplete (the second page was missing). There were also similar documents at 136-140 and 51. The document at 51 is an account of what took place on the 27 June 2017. The document at 127 refers to the Claimant and the team being happy and professional and says the new manager Ms. Sabiha [Khaliq] was constantly picking on the Claimant. Documents 136-140 are testimonials from customers saying that the Claimant was welcoming, happy, and smiling at work. I explained to the Claimant that those witness statements are not relevant to the issues I must decide today.

25 At the end of yesterday's hearing, I explained to the Claimant that the Respondent's representative would be present at 9.15 this morning to give her a copy of her written legal submissions so that she could have time to consider them. In fact, this morning the Claimant applied for an adjournment to seek legal advice because she claimed she did not expect to have to deal with the legal submissions today. I am clear the Claimant was told by me exactly what would happen today and this was interpreted for her. I said to the Claimant that she could try to get some advice from the Citizens Advice Bureau, but it was unlikely they would be able to help without an appointment. The Claimant did go to the Citizens Advice Bureau and I understand they assisted her to produce document C2. This adjournment meant that legal submissions could be heard until 1.35 p.m. but at least the Claimant had the opportunity to get legal advice. I understand from the Claimant that her witness statement and other documents such as document C2 were produced by various advice workers asking her questions, the Claimant answering those questions and the Claimant then checking and signing the documents and her witness statement.

26 The Claimant put two grievance letters about Ms Khaliq. The first was dated 9 June 2016 [42] which was sent to Miss Hingley (a Director of the Respondent company). The Claimant complained that Ms Khaliq had: tried to change her contract to decrease her hours; corrected her in front of colleagues and patients which was inappropriate and caused patients to complain; told her (the Claimant) she could not have time off when she called in sick to look after her children who were also ill; had made her work more difficult; and had told the Claimant off over some advice she was giving to a patient. The Claimant said she was still learning and should have been told afterwards how she should have dealt with the patient. The Claimant said that Ms Khaliq interfered with her work all the time and was rude and moody when she asked questions. She described Ms Khaliq as “unhelpful and unsupportive”. The Claimant said this had made her unmotivated and demoralised. The Claimant said that Ms Khaliq was also rude to other staff. She concluded by saying that she had always enjoyed her job when working for the previous manager, but the way she was being treated by Ms Khaliq was making her working life unpleasant and that she hoped the Respondent would take that seriously. There was also a grievance letter to Mr Pal who I understand is also a Director. Mr Pal is of Indian origin and is a Sikh. The Claimant alleged that Ms Khaliq had behaved unprofessionally towards her and caused her to feel embarrassed, humiliated, and uncomfortable. The Claimant alleged Ms Khaliq’s behaviour amounted to bullying and discrimination. This appears to be the first time the word “discrimination” was used. The Claimant said she felt she was being forced to resign and that if no action was taken, she would have no other choice but to initiate legal proceedings. The Claimant did not in fact initiate legal proceedings at that point but clearly knew she could do.

Schedule of Allegations – R2

Allegations of direct sex discrimination

27 I shall now deal with the allegations of direct sex discrimination in the Schedule of Allegations - R2. Allegations 1 – 4 concern Ms Khaliq and her alleged behaviour between the 25 May and the end of July 2017. Allegation 1 is that she told the Claimant she was on a zero hours contract. This allegation was first made by the Claimant in a statement first provided on 14 February 2019. Allegation 2 is that the Claimant was pressured to work full time, her working hours were changed without consent, and Ms Khaliq told her she had to work until 6 p.m. This allegation was not made in any of the statements subsequently provided by the Claimant. Allegation 3 is that Ms Khaliq took away some of the Claimant’s duties and responsibilities and asked colleagues not to help her or share information with her. This allegation was first made by the Claimant in a statement provided on 14 February 2019. Allegation 4 is that on 27 June 2017 Ms Khaliq gave the Claimant permission to take time off work to look after her children, the claimant took the day off, and Ms Khaliq then denied she had given the Claimant permission. This allegation was first made by the Claimant in a statement provided on 26 August 2019. None of those allegations are set out in the Claim Form. Furthermore, if they had been, they would have been out of time. It is far from clear how the first three allegations could amount to direct sex discrimination rather than mistreatment or poor management. Allegation 4, given the reference to being given permission to take time off work to look children which Ms Khaliq later denied had been given, could possibly amount to an allegation of sex discrimination but would be fact sensitive in respect of whether permission was in fact given. As such, it would require evidence from Ms Khaliq, who ceased to work for the Respondent shortly after the alleged events.

28 Allegation 5 is that on 27 June 2017 Miss Hingley told the Claimant the Respondent expected her to be at work every day regardless of her children's conditions. That is potentially an allegation of indirect sex discrimination. It was not included in the Claim Form and, if it had been, it would have been out of time. This allegation was first made by the Claimant in a statement provided on 26 August 2019.

29 Allegation 6 is that on 19 June 2017 the claimant was disciplined for being absent from work. It was first made in the Claimant's statement provided on 14 February 2019. It is not an allegation of sex discrimination. It is not in the Claim Form and, if it had been, it would have been out of time. I shall come back to Allegation 7 because the Respondent accepts that it was in the Claim Form. Allegations 8 to 10 related to June and July 2017. Allegation 8 is that in June 2017 Ms Khaliq told the Claimant she had "the mind of a child". It was first made in the Claimant's statement provided on 14 February 2019. Allegation 9 is that the Claimant was given short notice of a disciplinary hearing that took place on the 19 July 2017. It is made against Miss Hingley. It was first made in the Claimant's statement provided on 26 August 2018. Allegation 10 is that in June 2017 Ms Khaliq told the Claimant she would have to follow the usual holiday procedure and that the Claimant emailed about holiday but received no reply. The allegations are not in the Claim Form and, if they had been, they would have been out of time. They are not allegations of sex discrimination. Allegation 11 is that on 19 January 2018, at a meeting to consider the claimant's employment, the respondent's solicitor, Ms Morris, told the claimant she would have to return to full-time working. That allegation is not in the Claim Form. If it had been, it would have been in time. It was first made in the claimant's statement provided on 26 August 2020. It is potentially an allegation of indirect sex discrimination, but it is not an allegation of direct sex discrimination.

30 Allegation 7, which is the only allegation made in the Claim Form, is that on 27 July 2-17 Ms. Khaliq refused to give the Claimant her mobile phone details. I asked the Claimant some questions about this when she was giving evidence. She told me that two members of staff had been given the number - a male by the name of Hassan and a female by the name of Halima. To her knowledge, three colleagues did not have the number, one was a male called Bilaj, one was a female called Nazish and one was a female called Samira. Unsurprisingly, the Respondent's representative submitted that this information would indicate that this was not sex discrimination - a female had the phone number and a male did not have the phone number. In reply to that, the Claimant said this was a direct race discrimination complaint. It is not listed in the Schedule of Allegations (R2) as a race discrimination allegation.

Schedule of Allegations – R2
Allegations of direct race/religious discrimination

31 I shall now turn to the allegations of direct race or religious discrimination which are set out at paragraphs 12 – 17 of the Schedule of Allegations - R2. Allegations 12 – 16 relate to the conduct of Ms. Sabiha Khaliq for the period from May to the end of July 2017. Allegation 12 is that Ms. Khaliq shouted at the Claimant and asked colleagues not to help her between May and July 2017. That allegation is not in the Claim Form. It was first made in the statement provided by the Claimant on 4 November 2019. Allegation 13 is that on 31 May 2017, Ms

Khaliq told the Claimant to submit her resignation if she was not happy. Allegation 16 was that on 13 June 2017 Ms. Khaliq shouted at the Claimant in front of colleagues and patients and called her into a meeting, shouted at her again and accused her of lying. That allegation was not in the Claim Form. It was first made in the statement provided by the Claimant on 14 February 2019.

32 Those allegations are not contained in the Claim Form. It is difficult to see how they could amount to discrimination on the grounds of race or religion. They are all out of time.

33 Allegation 14 is that Ms. Khaliq openly criticised the Claimant's headscarf. Allegation 15 is that Ms. Khaliq told staff only to wear trousers when she knew the Claimant wore skirts for religious reasons. Those are serious allegations of religious discrimination or harassment.

34 I am told that Ms. Sabiha left the Respondent's employment towards the end of 2017 and may not be contactable or willing to give evidence. The final Allegation, Allegation 17, is that on the 27 June 2017 Mr Pal accused the Claimant of saying she disliked her job and did not like working in Washwood Pharmacy. That allegation was not in the Claim Form and was first made in the witness statement provided by the claimant on 14 February 2019. It is not an allegation of discrimination because of race or religion.

35 The preliminary issues which I had to determine sitting alone were:

35.1 Whether any of the direct sex discrimination complaints the claimant wished to pursue against the respondent were not contained in the Claim Form and, if so, whether the claimant needed to apply to amend and/or would be granted leave to do so;

35.2 Whether any of the direct race and religious discrimination complaints the claimant wished to pursue against the respondent were not contained in the Claim Form and, if so, whether the claimant needed to apply to amend and/or would be granted leave to do so;

35.3 Whether the allegations were presented in time and, if not, within such period as the Employment Tribunal thinks just and equitable (section 123 Equality Act 2020).

35.4 By reference to Rule 37 Schedule 1 of The Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the Rules"), whether to strike out any of the claims or allegations on grounds:

- (a) That it is scandalous or vexatious or has no reasonable prospect of success;
- (b) that the manner in which the proceedings have been conducted by the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) For non-compliances with these Rules or an order of the Tribunal;
- (d) that it has not been actively pursued;
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response

36 As regards amendments, the legal principles are well established. In Selkent v Moore [1996] IRLR 661, the Employment Appeal Tribunal said that all relevant circumstances should be taken into account and balance the injustice and hardship of granting the amendment against the injustice or hardship of refusing it. The following are usually relevant: the nature of the amendment (contrast corrections, adding further factual detail and new labels to existing factual allegations with entirely new allegations: the applicability of time limits; whether to extend time for an out of time allegation; and the timing and manner of the application. It is relevant as to whether the amendment would add a new cause of action altering the factual enquiry required – see Evershed v New Asset Star Management EAT/0249/09. There is a difference between re-labelling matters already complained of, and adding new matters.

37 As regards time limits, again the legal principles are well-established. The Employment Tribunal has a wide discretion to extend time on a just and equitable basis, but the Employment Tribunal must be convinced it is just and equitable to extend time – see Robertson v Bexley Community Centre [2003] IRLR 434 CA. The Employment Tribunal can take into account Limitation Act factors (as listed in section 33(3) of the Limitation Act 1980) but the enquiry is not limited to those factors. Other relevant factors may be: the existence of outstanding grievance procedures, but that is only one factor (Apeloqun-Gabriels v London Borough of Lambeth & anor [2002] IRLR 116 CA); mental health issues are not the only factor but a significant one (DCA v Jones [2007] EWCA Civ 894; and numerous cases on whether the error of a representative can be taken into account, which are highly fact-sensitive but do not rule it out as a factor. It has been held that failing to adopt a checklist approach risks leaving out a significant factor – London Borough of Southwark v Afolabi [2003] IRLR 220 CA. Finally, in Lowri Beck v Brophy [2019] EWCA, it was held that the question is essentially one of fact for the Employment Judge, absent any question of perversity.

38 The law is also well-established regarding applications to strike out or order a deposit. In North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA it was held that if a case is fact-sensitive, it is inappropriate to strike out. Case law also recognises that striking out is a draconian measure and other alternative, such as an Unless Order should be considered (see, for example, Girvan v Humberside Probation Trust EAT/0179/09. The Employment Tribunal should assume the Claimant will prove the facts alleged and that this is the totality of the evidence – see Ferguson v British Gas Trading Ltd [2009] EWCA Civ 46. Striking out for non-compliance with an Order applies to the whole claim (RBS v Abraham EAT/0305/09). In Community Law Solicitors & others v Methuen EAT/0024/11, the EAT said that a claim should have been struck out where the only argument was that the Claimant was of a different sex or race to their replacement and in Patel v Lloyds Pharmacy Ltd EAT/0418/12 it was held that: “It cannot be right to allow a case to succeed which otherwise has no reasonable prospect of success because something may turn up”. As to cases where a fair trial is no longer possible, in Bolsch v Chipman [2004] IRLR 140 EAT, it was held that there were three key questions: (1) did the conduct relate to the manner of the proceedings?; (2) did the conduct make it impossible to hold a fair trial?; and (3) was there a step short of barring the wrongdoer that would be proportionate?. In Liddington v 2Gether NHS Foundation Trust EAT0002/16 an Employment Judge’s decision to strike out the claim after repeated (and unsuccessful) case management to clarify the claims was upheld (see also Hussain v UPS Ltd EAT/021/17).

Submissions and Conclusions

39 I have incorporated the submission into the background, issues and law set out above and also make brief reference to them in these conclusions.

40 I shall deal first with Allegations 1 – 6. They were not in the Claim Form, nor were they a re-labelling of what was there. Consequently, the Claimant has to apply to amend to add those allegations. They are some years out of time. I do not think the Claimant should be allowed to do so. It has been observed by the Employment Appeal Tribunal that a Claim Form does not serve as an opportunity to get the ball rolling, such that it can be added to over and over again. That unfortunately, is exactly what has happened in this case, I accept that the Claimant was unwell for some of this period, but I note that she has had the benefit of legal advice. She took advice prior to dismissal and made reference to it in her second grievance letter. She has since taken more legal advice, albeit that she is critical of some of it. It is possibly stating the obvious to say that if the Claimant was unhappy with the advice from the Solicitor named in the Claim Form, that is a matter for her to take up with her. Allegations 8 to 10 are also applications to amend and, for the same reasons, I do not accept the Claimant should be allowed to do so. For the reasons already stated, none of these are (as a matter of law) allegations of direct sex discrimination.

40 My conclusion is that the Claimant is seeking to attach labels to allegations of mistreatment in order to be able to claim discrimination and is prepared to change those labels when it is pointed out that she has no prima facie case. Allegation 7 is a good example of this. Allegation 7 is out of time. It is plain from what the Claimant said yesterday that it does not work as a direct sex discrimination allegation, which was why she then suggested it could be race discrimination, although legally that does not work either. It would not be in the interests of justice to extend time on Allegation 7 to allow the Claimant to pursue it out of time. Allegation 7 is the only allegation in the Claim Form from which it follows that the Respondent's representative is right to say that the Claimant is seeking to amend a Claim Form containing an allegation that I have decided cannot proceed. That is another reason for not allowing the amendment applications.

41 Allegations 12 - 17 concern the amendment application to add direct race and/or religious discrimination. My decision is not to allow this. The Claimant has had ample opportunity to identify these allegations before November 2019 and has not done so. last year and she chose not to do so. I accept that the Claimant believes she was badly treated by Ms. Sabiha Khaliq, which may well be so. However, poor management does not equate to discrimination. I note that two of the allegations would, if proven, amount to religious discrimination and/or harassment, although the same cannot be said of the others. I think it unbelievable that the Claimant would not have included those two allegations in her Claim Form and instead chose to solely refer to the alleged failure to provide a contact number. If they had occurred, they would surely have been set out there, rather than the much more trivial allegation which was. Furthermore, they are almost three years out of time. The Respondent would have great difficulty defending them given that Ms. Sabiha Khaliq is no longer is employed by it. The balance of hardship is heavily in favour of the Respondent in that regard.

42 The final allegation is Allegation 11 which would have been in time if included in the Claim Form. Since it was the most recent allegation, it is quite astounding that it was not included. Furthermore, it will be clear from the findings I have made about the content of the dismissal letter that what was being considered were whether there were potential reasonable adjustments for the Claimant. If anything, this is a reasonable adjustments allegation which had been re-labelled as a direct sex discrimination allegation. That is because the reasonable adjustments complaint cannot be pursued due to the Claimant being held not to be a disabled person. I have had regard to document C2 in this context, but this appears to cover the period of complaints about Ms. Sabiha Khaliq rather than the allegation about what occurred on the 19 January 2018. I do not accept that this is an amendment application that should be allowed. I do not accept that the allegation has any reasonable prospect of success.

43 Further, and in the alternative, had I not made the decision above regarding the amendment/time limit issues, I would have struck this claim out because it is very clear from the history that the claimant has behaved unreasonably in her conduct of these proceedings (viewed objectively) and has failed to comply with Orders. In addition, it is my conclusion that a fair hearing is no longer possible. I also have in mind the overriding objective (Rule 2): this case concerns less than one year's employment; the sole allegation contained in the Claim Form was misconceived; despite the flexibility afforded to her, the Claimant has failed to properly articulate her claims; and the consequence is that the time spent by the Employment Judges and Respondent in dealing with this case is wholly disproportionate and has caused huge expense to the public purse, thus delaying claims which may have merit being heard.

44 For the above reasons, I have decided that the Claimant's claim to this Tribunal should be struck out in its entirety.

Signed by: Employment Judge Hughes

Signed on: 9 June 2020