EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E MacFarlane	**v**	**Commissioner of Police of the Metropolis**

Heard at: London Central by CVP **On**: 8 October 2020

Before: Employment Judge A James

Representation

For the Claimant: In person

For the Respondent: Mr P Martin, counsel

JUDGMENT

(1) The claimant's application to amend the claim to include claims for detriment/automatically unfair dismissal for whistleblowing (Sections 47B/103A Employment Rights Act 1996 and Rule 29 Employment Tribunal Rules of Procedure 2013) is refused.
(2) The tribunal does not have jurisdiction to consider a claim for 'ordinary' unfair dismissal (Section 98 ERA 1996) since the clamant does not have two years' service and that claim is therefore dismissed.
(3) The claim for automatically unfair dismissal for health and safety (Section 100 Employment Rights Act 1996) is dismissed on withdrawal.

REASONS

Background Facts

1. The claimant worked for the respondent between 3 August and 10 December 2019 as a Community Assessor. The claimant stopped working for the respondent on 10 December because of health and safety concerns.

2. Early conciliation was commenced on 7 January and ended on 7 February 2020. The claimant states in her claim form, dated 18 February 2020, in box 8.1 that her claim is:

   A kind of constructive dismissal because of failures of health and safety, and lack of support after an incident.

3. Box 8.2 and 15 state:

   I worked as Community Assessor for Met Police to assess new police candidates in Day One process in Empire State Building, ESB. Other Met operations work there, including Counter Terrorism and Organised Crime, so it's a high security, high target building. There are c.50 Assessors and 2 or 3 Assessment Centre Managers, ACMs on Floor 13 to process c.96 new candidates every day. Assessors are regularly Quality Assured and attend training to ensure consistency with College of Policing marking. Day One is candidate's first contact with Met after application. Assessors are vetted, candidates are not - they pass document check, but there's nothing in place to imagine that of c.400 a week, each may not be genuine and may be there for criminal or terrorist intent.

   *On 19/11/19 I assessed a candidate in the Early Intervention exercise who was extremely alarming, dangerous and threatening. I realised that if he crossed the line into violence I'd not be able to control the situation. Myself and the role play actor were extremely shaken. I'd no way of alerting Security. I began to realise the unsupported danger I'd been in. *Assessors have no on-boarding training or briefing in Health and Safety. *Assessors have no panic buttons and have never had a discussion about personal safety. *There was no Security presence. *Assessors are completely untrained civilians in the middle of a high target building. *Candidates are allowed unescorted through staircase lobby without CCTV which leads directly to Counter Terrorism floors. *Assessors have never had a security drill, there are no emergency procedures, even ones which normally exist in public and work buildings.*Health and Safety contacts were 3 years out of date.*

   I reported these points, many others, and possible solutions to my HR contact Mark Camilleri, multiple times, but no action was taken.

   On 10/12/19 I was assigned to Early Intervention but I knew there was still nothing in place if anything went wrong. I felt complete dread, alarm and loss of trust. I felt forced to leave the building and the job that day. I'd repeatedly asked HR for Whistle-blowing and Grievance procedures, with no response. On 12/12/19 I got the contact and phoned Met Whistle-blowing team, Department of Professional Standards DPS. They gave me Whistle-blowing status, visited Floor 13, agreed urgent action was needed and immediately arranged Security Patrols and First Aid training. The Grievance team took my case but dropped it on 24/12/19.

   The candidates' experience is designed to be pressured because of the nature of the job, and Assessors are told to be friendly and tell them our names. There is a Red Flag reporting system if they swear or act inappropriately, when they are escorted out by Security and their application is over. The dangerous candidate was not properly Red Flagged - he was just let go. I discovered he had been Red Flagged in another exercise, and, I found out later, in a third, and so allowed to continue. I was extremely alarmed by what had happened, and what could so easily have happened. I left just several minutes after his cohort, and so he could have been waiting outside for me in the dark, already knowing my name. There was no thought about my security in leaving the building.

   Other assessors told me they were forbidden by an ACM from discussing the incident or issues of personal safety.

I spent 3 further weeks working at ESB and communicating my concerns with HR. The Met and HR throughout have accepted that my experience and the lapses in health and safety and security I reported were appalling and unacceptable. HR promised to escalate and address them, but ultimately without any result. During this time I worked for 2 days in unacceptable working conditions - I informed HR, but there has still been no response to that. This just added to my distress.

I took the day after the incident off to recover - Assessors are not paid for days off, even in those circumstances. None of the ACMs or HR got in touch with me although I'd informed them of the reason. On the evening of the incident I emailed HR and asked if there was support available in processing the traumatic experience. It wasn't until 13 days later that I was given the phone number of the Employee Assistance Programme.

I was told my Grievance had been dropped because I wasn't a Met employee, although the Met's own Grievance document states that the process is for all employees, workers, volunteers and contractors, highlighting problems with the Community Assessor contract (sic). Worker or self-employed, that makes no difference to the Met's duty of care in my place of work. I had to walk out of the job and my income through lack of support and complete loss of confidence.

The personal cost and stress to me has been enormous. The incident itself was traumatic, and after, I lost sleep with the stress. I felt embattled and unsupported, used and ignored.

4. A telephone preliminary hearing for case management purposes took place on 16 June 2020 (CMPH). During that hearing, the claimant stated that her claim was purely about what she referred to as her constructive dismissal by the respondent because of her raising health and safety concerns. The claimant accepted that she did not have two years' service so could not take an (ordinary) unfair dismissal claim.

5. Only employees can take claims under section 100 of the Employment Rights Act 1996, although such claims do not require two years' service. The claimant argued at the case management hearing on 16 June that she did not have to be an employee to take such claims because she had been advised by ACAS that workers could take claims about health and safety. I had to keep reiterating to the claimant that only employees can take such claims. Eventually the claimant accepted that. She also confirmed that her case '*has always been a health and safety unfair dismissal*'.

6. The claim was listed for an open (i.e. public) preliminary hearing (OPH) on 8 and 9 October 2020 to consider the question of employee status. In addition, that hearing was to consider the following question: "*If the Claimant is an employee, what is the legal and factual basis of her Claim under section 100 Employment Right Act 1996"*.

7. I specifically asked the claimant on 16 June 2020 whether she was saying that the alleged failure of the respondent to act on her complaint was due to the nature of the complaint? The claimant replied that she was forced to leave her job because her complaint was not taken seriously and no action was taken about the health and safety concerns she raised. I again asked the claimant why she thought that was the case. She replied that when she emailed SSCL and reported the incident she asked if there was any help available. She spoke

to Mark Camilleri a manager and asked him for support. It took him two weeks to provide the EAP telephone number. The claimant specifically told me that she was not suggesting that the lack of response was due to her raising a health and safety issue. She did not know why Mr Camilleri did not respond. I ‘‘would have to ask him that’. The claimant confirmed that her complaint was solely about the dismissal itself.

8. In its grounds of resistance (GOR) dated 25 March 2020 the respondent states at para 15:

   At Box 8.2 the Claimant appears to foreshadow a claim for whistleblowing but again fails to set out the legal basis for such a claim. To the extent to which the Claimant seeks to bring a claim pursuant to s.47B(1) ERA, the Respondent contends that the Claimant has never alleged that she suffered a detriment by any act or omission done by the Respondent on the ground that she has made a protected disclosure and so the Respondent contends that such a complaint would have no reasonable prospects of success and so should be struck out.

9. At the CMPH on 16 June, the claimant appeared to take exception to the suggestion in the GOR that she was making a protected disclosure (referred to from now on as a ‘whistle-blowing’) claim. The claimant made it clear that she was not making a whistle-blowing claim.

10. Three days later on 19 June 2020, the claimant wrote to the tribunal to say that she would like to amend the legal basis for her claim. She now seeks to pursue her claim as a whistle-blowing claim.

11. As a result, the tribunal made the following directions:

    (1) The claimant is to send draft amended details of claim setting out the factual and legal basis of the protected disclosure claim to the tribunal and to the respondent's solicitor by 4pm on 1 July 2020.

    (2) The respondent is to send in a written response to the claimant's application by 4pm on 8 July 2020.

    (3) The claimant is to send any written response to the respondent's response by 4pm on 15 July 2020.

12. The claimant sent amended details of claim to the tribunal on 25 June 2020. In these, the claimant states:

    “*The legal basis of the claim is Whistleblowing law which is located in the Employment Rights Act*”.

    A bit further on she states, regarding the CMPH:

    “*Until this point [i.e. the CMPH] the Claimant has not been required to set out the legal basis of the Claim, she has now been able to clarify the legal basis of the Claim under Whistleblowing Law. … The claim is for automatically unfair constructive dismissal. …. Having made protected disclosures, the Claimant’s status as employee or worker is not relevant, as Whistleblowing Law caters to workers of all employment forms and not just employees.*”

13. As for the protected disclosures, the claimant says:

    “*The Claimant made repeated protected disclosures to the Respondent, from 20 Nov 2019, after the incident with a candidate on 19 Nov 2019. The Claimant*

believed these concerns were in the public interest and informed the Respondent about multiple failures of Health and Safety and Security on Floor 13. The Claimant can demonstrate that she made the protected disclosures in phone calls, meetings, and several emails to the prescribed person. The Claimant emailed the Respondent multiple times with concerns: 20 Nov, 21 Nov, 22 Nov, 25 Nov, 26 Nov, 08 Dec 2019. These emails detail lists of Health and Safety and Security concerns, the protected disclosures."

14. As for the health and safety failures, the claimant stated:

The Claimant reported multiple failures of Health and Safety to the Respondent which can be summarised as 40 separate points, including…

There then follows 17 separate bullet points setting out various health and safety concerns. The claimant did not specify in the 25 June document which of the alleged health and safety failures listed in bullet point format were made in which email or the specific information that they disclosed.

15. The claimant then states that the incident with a candidate on 19 November 2019 was a '*failure of the Red Flag system'*. Information about this is also relied on as a protected disclosure.

16. Under the heading 'Implied Contract', the claimant states:

"*The Claimant can demonstrate that the Respondent's failure to act on the Claimant's protected disclosures amounted to a breach of the implied expectation that the Respondent would take reasonable steps to ensure the Health and Safety of all workers and visitors in their premises*".

17. The claimant later states (page 7):

On 10 Dec 2019, the Claimant was again assigned to the same exercise as the incident with the candidate on 19 Nov 2019. The Claimant was very alarmed at the lack of action and measures taken about her concerns, and that the Red Flag system would not prevent a similar incident as on 19 Nov 2019. The Claimant was also alarmed that her reports about intolerable working conditions on 04 Dec 2019 and 05 Dec 2019 had not received any response. The Claimant had hoped and trusted that the Respondent would address her concerns and put measures in place to improve Health and Safety and Security, but at that moment felt a complete lack of trust and faith in the Respondent. The lack of response had caused the Claimant intolerable stress. The Claimant therefore felt forced to resign, which amounts to automatically unfair constructive dismissal.

18. Finally, the claimant stated:

Note: The Claimant had previously assumed that the days of intolerable working conditions were happenstance and due to the poor practice and general lack of care to the wellbeing of Assessors demonstrated by the other failures in Health and Safety reported. <u>However, remarks in the Preliminary Hearing have made the Claimant question if the Respondent's lack of response to those days was not merely poor practice, but deliberate because she had made the protected disclosures.</u> (my emphasis)

19. The respondent sent a detailed letter in response on 8 July 2020, arguing that the:

[A]mendment amounts not to a minor matter but a substantial alteration describing a new complaint. It is clearly a new complaint as it is one which three days earlier the Claimant clearly stated she was not making.

20. Further, the respondent argued that the amendment contains *entirely new factual allegations which change the basis of the existing claim*". These include 13 new factual allegations which are said to amount to whistleblowing. The amended claim also contains a new allegation about a failure of the respondent to provide a suitable reference.

21. The claimant responded in a detailed 16-page document sent to the tribunal on 15 July 2020. In that document, in relation to her attempts to raise a grievance, the claimant states:

Clearly, the Claimant had followed the correct procedures, but the Respondent had failed to act. Situations that could lead to constructive or unfair dismissal could include raising a Grievance which the employer refuses to look into.

22. The claimant also asserts in the 15 July document;

[The] Claimant can demonstrate that the Respondent's failure to act on the Claimant's protected disclosures amounted to a breach of the implied expectation that the Respondent would take reasonable steps to ensure the Health and Safety of all workers and visitors in their premises

…

When the Claimant contacted the Met's Department for Professional Standards on 13 Dec 2019, they visited Floor 13 and put immediate remedial measures in place, such as arranging a Security patrol on the Floor. The Claimant naturally believes that the DPS would not have put these measures in place if they were not necessary, further demonstrating that the failings were serious.

23. As for the provision of a reference, the claimant states that she has just been provided with a pro forma reference. She continues:

Employment applications ask for contact details of previous employers, and so the photocopied letter is useless as a reference.

Insofar as that raises matters not in her original claim form, she stated that she was willing to remove this from her claim.

24. As for the information setting out the alleged breaches of health and safety, the claimant lists the emails within which the various allegations were made. It does not set out the information contained within each of the emails which is said to amount to a protected disclosure. That could however be clarified if necessary by the provision of further information and disclosure of the documents.

25. As for the detriment claim, the claimant states:

The Claimant can demonstrate that she made significant efforts to communicate serious concerns to the Respondent, that the Respondent was aware of the Claimant's concerns and that they failed to act upon them. Continued failure to act on the Claimant's concerns meant she had no choice but to leave the job on 10 Dec 2019 which was an automatically unfair constructive dismissal, resulting in the detriment of loss of income.

In the email by Judge A. James of 29 June 20, the Claimant was asked to clarify how the events of 04 Dec 19 and 05 Dec 19 related to her protected disclosures. The Amendments contain those details, which fully particularise the events. The Claimant believes that the Respondent's lack of response to the events exemplify how the Claimant's protected disclosures and related concerns about Health and Safety were ignored by the Respondent, and that the Respondent showed no care for the Health and Safety of the Claimant. The detriment remains the automatically unfair constructive dismissal.

26. Finally, the claimant states:

The Claimant believes that the Respondent had no intention of appropriately responding to her protected disclosures or taking them seriously, and that they simply expected the Claimant would give up on the concerns about Health and Safety and Security she had raised for herself and others. The Claimant believes that the Respondent deliberately failed to act because she had made protected disclosures. (My emphasis)

27. I originally intended to deal with the application on the papers. However, if the application had been refused, it would have ended the claimant's claim. Bearing in mind the guidance in *Smith v Gwent District Health Authority and another; Davies v South Manchester District Health Authority and another [1996] [CR 1044*, I decided to convert the preliminary hearing listed for 8 and 9 October 2020 into a 3-hour preliminary hearing to consider the following questions:

> *(1) whether or not the claimant's application to amend her claim to a protected disclosure claim as set out in her letters of 25 June and 15 July 2020 should be granted;*
> *(2) depending on the answers to that question, and if any claims remain, whether or not those remaining claims should be struck out because they have no reasonable prospect of success?*

The parties agreed that it could take place by video link (CVP).

28. At this hearing, the claimant stated words to the effect of:

> *Only on the morning of 10 December, when I walked in there, that was the moment when I completely lost faith. I knew they were not going to act, not going help me, not respond to my very genuine fears ….. Where I pointed out issues, I also offered solutions. On 10 December, I walked in ready for a day's work, but I suffered a catastrophic loss of faith and trust on that day.*

29. Mr Martin suggested to the claimant that some changes were made by the respondent. The claimant agreed but stated that those changes were only made after the claimant had left, on 13 December 2019.

Decision on application

30. When the discretion to grant an amendment is invoked, a tribunal is to apply the principles set out in the case of *Selkent Bus Co Ltd v Moore [1996] IRLR 661, [1996] ICR 836*. Those require a tribunal to consider all the relevant circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The following non-exhaustive list of factors are relevant to the exercise of discretion. The nature

of the amendment; the applicability of time limits; and the timing and manner of the application. When considering the balance of hardship overall, a tribunal may take into account its assessment of the merits of the new claim (*Gillett v Bridge 86 Ltd UKEAT/0051/17 (6 June 2017, unreported)*, at para 26). I consider that as well, below.

31. The *Selkent* principles are well known to employment lawyers but not to litigants in person (LiP). The respondent had referred to the *Selkent* principles in its 8 July reply, so the claimant was aware of them and responded to them in her response of 15 July. Nevertheless, since the claimant was representing herself, and in an attempt to ensure that the parties were on a more even footing, I asked Mr Martin to address me first, so that the claimant could hear how his arguments were structured. This was on the basis that Mr Martin would then be given an opportunity to address me on any points raised by the claimant which he had not already dealt with.

32. The *Selkent* factors are considered in turn below. Neither party asked me to consider any other factors and it was not apparent to me that any other factors were relevant in this case.

The nature of the amendment

33. The claimant has made it clear throughout that she is not pursuing separate detriment clams. The reference in the ET1 to "*intolerable working conditions on 04 Dec 2019 and 05 Dec 2019"* is a reference to the continuing concerns she had working for the respondent, not to any separate detriment. The claimant's claim, as stated in Box 8.1, and as emphasised by the claimant throughout these proceedings both orally and in writing, is essentially about her 'constructive dismissal'.

34. The term 'constructive dismissal' is used below to encompass a claim for 'dismissal' pursuant to either section 47B or 103A (which depends on whether the clamant was a 'worker' or an 'employee' of the respondent). I note that both employee and worker status is disputed by the respondent but for the purpose of this application, I have assumed that the claimant will succeed in showing that she is one or the other. Had the amendment application been allowed, that issue would have needed to be determined, probably at a separate preliminary hearing. I also use the term 'resigned' below to refer to the circumstance surrounding the refusal of the claimant to continue working for the respondent.

35. The amendment proposed by the claimant is not in my view simply a relabelling, or a clarification of existing claims. If allowed, it would substantially alter the existing factual and legal basis of her claim. Whilst the essence of the claim is still the alleged 'constructive dismissal', the contents of the 25 June and 15 July documents substantially add to the factual and legal basis upon which that is argued.

36. At the CMPH on 16 June 2020, the claimant stated that her case was not a whistleblowing case and appeared to take exception to the suggestion by the respondent in its ET3 that it might be. Her position changed on 19 June 2020. Whilst that was only three days after that hearing, her express disavowal of any whistleblowing claim on 16 June does in my view mean that the claimant's application to amend her claim to a whistle-blowing claim does introduce a new type of legal claim.

37. The claimant has today explained why her position changed. She says she is not a lawyer and was not aware that she had to set out the legal basis of her claim in the ET1. I accept that and no criticism is intended of the clamant in making the point. Nevertheless, her express disavowal of a whistleblowing claim on 16 June is clearly of some importance to the consideration of this factor.

38. The further details provided by the claimant on 25 June did not say which disclosures of information were made in which particular emails or conversations; and the specific information put forward in those emails is not set out, just a summary. Further details were provided on 15 July but it is still not clear what disclosures of information were made, in which emails or conversations. In a further document dated 1 September 2020 16 disclosures are put forward and the information disclosed is set out although it is still not clear if the 'information' set out is what was actually said or a summary of it. So even at this stage, despite three further lengthy documents setting out the basis of the whistle-blowing claim, crucial details are potentially still missing. When considering amendment applications, the tribunal should have before it a fully pleaded amendment. Were that the only issue however, I would have considered that it could be dealt with by the provision of further information and disclosure of relevant documents.

39. As for the alleged breaches of health and safety law, only five are referred to in the original claim form. There were in the 25 June document, 17 allegations although those have now been reduced to sixteen in the 1 September document. There is also the introduction of an allegation that the raising of an issue under the 'Red Flag' reporting system was a protected disclosure. Whilst the Red Flag reporting system is mentioned in the claim form, there is no detail as to whether this was raised with anyone and if so who, when and what was said about it, if anything. It is still not entirely clear whether it was raised at any other time that on 10 December when the claimant 'resigned' or whether it is relied on as a protected disclosure at all. Again however, that could have been dealt with by the provision of further information if necessary.

40. The issue of the reference is a new allegation. It was not referred to in the claim form, and no details have been provided as to how or why the provision of a pro forma reference is alleged to be related to any whistleblowing. The claimant has not pressed me on the issue today so I assume it is not being pursued as a separate allegation. If it was I would have refused an amendment of the claim to include such an allegation, mainly because of time limit issues although also because it appears to have little prospect of success. It appears to me that it is a side issue in any event, especially since it was not specifically mentioned by the claimant at this hearing.

41. The background facts set out above show that the claimant was not originally alleging that the failure to properly protect her health and safety was <u>because</u> she made protected disclosures. On 16 June, the claimant specifically told me that she was not suggesting that the lack of response was due to her raising a health and safety issue. Further, the claimant made clear on 16 June that she was not raising any separate claims for detriment. Her claim was just about the dismissal. The position put forward from 25 June onwards wholly contradicts that earlier position and introduces a new claim. In effect, despite the previous indications to the contrary, the claimant is introducing a whistle-blowing

detriment claim; the detriment being that because of the nature of her complaints, the respondent failed to deal with them.

42. Bearing in mind all of the above, I am of the view that the claimant is raising a whole new set of factual allegations, and by applying to amend her claim to a whistleblowing claim, is raising a wholly new legal claim as well. That substantially changes both the factual and legal basis of her claim. This is not simply a relabelling exercise, or the clarification of existing claims.

Applicability of time limits

43. Time limits are therefore a particular issue for me to consider (see *Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16*, *[2018] ICR 634*). The applicable time limit test to be applied in a whistleblowing claim is whether or not it was reasonably practicable to submit the claim in time and if not, whether the claim was submitted within such further period as the tribunal considers reasonable. Given that at the preliminary hearing on 16 June 2020, the claimant confirmed that she was not pursuing such a claim, her application on 19 June to amend her claim to include a whistleblowing claim is out of time by over two months, when the time spent in Acas EC is added to the usual three month time limit from the date of the dismissal.

44. The claimant has suggested, as set out above, that she did not need to set out the legal basis of her claim until she was requested to do so. Whilst that is partially true, the claim form should at least have contained sufficient information to raise a whistleblowing claim. As the respondent identified, it appeared that the claimant might have been intending to raise a whistle-blowing claim, it was nowhere near sufficiently particularised.

45. Further, at the CMPH on 16 June 2020 the claimant was specifically requested to clarify the factual and legal basis of her claim, in order for the issues which needed to be determined at the final hearing to be identified. I take due notice of the fact that the claimant is a litigant in person and that she has experienced some difficulty obtaining free legal advice. I also note however that the claimant was able to do so within days of the last preliminary hearing taking place. Further, the original claim form was presented in time. Whilst not determining the time limit issue (since I have not heard any evidence), I consider that a tribunal considering the question of time limits would be likely to find that it would have been reasonably practicable for the claimant to have presented her claim in time; and that in any event, the claim was not submitted within such further period as a tribunal would consider reasonable. It would therefore fail for that reason in any event, even if the amendment application was allowed today.

Timing and Manner of Application

46. The application to amend the claim to a whistleblowing claim was made on 19 June, following the preliminary hearing on 16 June when the claimant specifically stated that she was not pursuing a whistleblowing claim, and that her claim was purely about the dismissal.

47. The claimant acted reasonably promptly after the preliminary hearing to amend her claim. Nevertheless, the application is still made over six months after her employment ended.

The Balance of Hardship Test

48. Bearing in mind the above factors and my conclusions in relation to them, I turn to the balance of hardship test. As stated above, this requires a tribunal to consider all the relevant circumstances and to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

49. In applying that test I have, as I am entitled to, considered the potential merits of the claim put forward by the claimant. The basis of the claimant's claim is that the respondent did not protect her health and safety and was asking her to work in unsafe conditions. I am not determining whether or not there is any merit in that allegation itself. The claimant has come across to me at this hearing as a person who, rightly or wrongly, was genuinely concerned about the health and safety of herself and others as a result of what she thought were unsafe working practices.

50. It is not my job at this stage to determine whether the working practices were indeed unsafe or that the claimant's concerns were well-founded. No evidence has been presented on that issue. What I can say is that this was a constructive unfair dismissal claim pursuant to section 98 Employment Rights Act 1996, the claimant had two years' service and had been an employee of the respondent, I would have no hesitation in allowing that claim to proceed. Indeed, I doubt that the respondent would argue otherwise. It would then be for the tribunal to determine the facts.

51. Given the lack of service however and the way the claim is now pleaded, I have to consider whether, if there was indeed a failure to protect the claimant's health and safety, and the claimant made protected disclosures about it, it was the nature of those disclosures – ie they amounted to whistleblowing - that was the reason why nothing was done about them. I conclude that the claimant has little prospect of persuading a tribunal that was the case. It contradicts what is set out in the claim form and it contradicts the clear position adopted by the claimant on 16 June that there was no such link and that her claim was purely about her 'constructive dismissal'.

52. Until 25 June 2020, the claimant's position was that her complaints were not taken seriously leaving her no alternative but to resign. It was only the "*remarks in the Preliminary Hearing [that] have made the Claimant question if the Respondent's lack of response … was not merely poor practice, but deliberate because she had made the protected disclosures".*

53. Until that date, the way the case was put was that the reason the claimant resigned was because of the alleged failure by the respondent to act on her concerns. Whilst that might be a possible basis to argue an ordinary constructive unfair dismissal claim in relation to if the claimant had the necessary service and had been an employee, it is not a sufficient basis to argue such a claim under sections 47B or 103A Employment Rights Act 1996.

54. Up to and since 25 June, the claimant has continued to put forward assertions that continue to make it clear that her claim is really about constructive unfair dismissal claim. These include the following assertions:

(1) *I felt forced to leave the building and the job that day;*

(2) the reference, under the heading '*Implied Contract*' to *"a breach of the implied expectation that the Respondent would take reasonable steps to ensure the Health and Safety of all workers and visitors in their premises";*

(3) *at that moment I felt a complete lack of trust and faith in the Respondent;*

(4) *Situations that could lead to constructive or unfair dismissal could include raising a Grievance which the employer refuses to look into;*

(5) At the hearing itself, *"I suffered a catastrophic loss of faith and trust on that day".*

55. Having considered all of the above, I consider that the balance of hardship is in favour of the respondent and not the claimant. I accept that my decision means the claimant will not be able to pursue any legal redress for what she genuinely believes was unlawful behaviour by the respondent. However, the law does not provide a remedy for any potential dispute between workers and their employer. Those rights are prescribed by the common law and more importantly, by statute/regulations passed by Parliament.

56. Parliament has decided that unfair dismissal law applies only to employees and that an employee must have two years' service before they can bring a claim. Parliament has also imposed a strict three-month time limit in relation to the taking of many Employment Tribunal claims, including claims for whistleblowing, subject to any extension of time due to Acas early conciliation.

57. If I were to allow the amendment, the respondent would be put to considerable time and costs in defending a claim that would be likely to be found to have not been submitted in time and which would be likely to fail for that reason alone. Further preliminary hearings would be necessary on time limits, on employee/worker status and agency (in relation to SSCL). Even if the claim cleared those formidable preliminary hurdles, I conclude that the automatically unfair dismissal/detriment claim has very doubtful merits. It is highly significant in my view that it was not until after the 16 June hearing that the claimant specifically argued that the failure to deal with her complaints was due to the nature of them, rather than simply being down to '*poor practice and general lack of care to the wellbeing of Assessors*'.

58. I had specifically asked the claimant on 16 June to confirm whether or not she was arguing that the reasons that her complaints were not dealt with prior to her resigning was because of the nature of those complaints. The claimant specifically stated that was not the case. The claimant only put forward the argument that there is indeed such a link on 25 June. I mean no criticism of the claimant in saying that this change in her position appears to be more to do with the fact that unless that position is maintained, her claims must fail, than because the claimant genuinely believes that it was the case. In any event, looked at objectively, I conclude that it is unlikely that the claimant will succeed in persuading a tribunal that was the reason why her complaints were not dealt with. No information has been put forward to support that position. It remains a bare assertion, made very late in the day. Further, the fact that the respondent did, albeit belatedly on 13 December 2019, take some steps, supports the respondent's position on this issue, rather than the claimant's.

59. In all of these circumstances, I conclude that the balance of hardship is very much in favour of the respondent. I therefore refuse the application to amend the claim form to include a whistleblowing claim.

Outcome

60. The amendment application is refused.

61. There are potentially two claims remaining before the tribunal. The tribunal does not have jurisdiction to consider an ordinary unfair dismissal claim, because the claimant does not have two-years' service or more. The claimant accepts that. It is not clear that such a claim has been accepted by the tribunal but for the sake of completeness, such a claim will be formally dismissed because the tribunal does not have jurisdiction to hear it.

62. As for the health and safety automatic unfair dismissal claim, the claimant has made it clear from 19 June 2020 that the legal basis of her claims is whistleblowing law. She has previously confirmed that she was "*no longer pursuing her claims under section 100 Employment Rights Act 1996*". The claimant has helpfully confirmed today that she is formally withdrawing that claim. It is therefore dismissed on withdrawal.

_____

Employment Judge A James
London Central Region

Dated 14 October 2020

Sent to the parties on:

15th Oct 2020

For the Tribunals Office