Case No: 2205875/19

EMPLOYMENT TRIBUNALS

Claimant: **Ms. L. Matijosaitiene**
Respondent: **Good Eating Company Ltd**

London Central Remote Video Hearing **On: 19 October 2020**

Before: **Employment Judge Goodman**

Representation
Claimant: Mr. R. Singh, solicitor
Respondent: Mr. M. Elliston, HR Business Partner

PRELIMINARY HEARING

RESERVED JUDGMENT

1. The claim of victimisation because of the grievance on 1 April is dismissed on withdrawal.

2. All other claims are dismissed because they have no reasonable prospect of success.

REASONS

1. Today's hearing was listed by Employment Judge Norris to consider whether all or any of the claims should be struck out, either with respect to the unless order made on 7 July 2020, or under rule 37 as disclosing no reasonable prospect of success. Alternatively, the tribunal would consider making a deposit order as a condition of proceeding with any claim.

2. Trying to identify the claims in this case has a protracted history. The claim was presented to the tribunal on 20 December 2019. The grounds of claim in box 7 describe a grievance against an unnamed manager, on an unknown date, then a request in February 2019 to alter her working hours, difficult because of childcare responsibilities, and the narrative ended when she presented a grievance on 1 April 2019 about the proposal to alter her working hours. After the response was filed, the claimant was asked if there was anything else, as the form appeared incomplete. She replied:

> "I raised a grievance on 1 April 2019 challenging the change of hours as I thought it was discriminatory and also failure to show flexible working hours and against the company's policy".

3. In the meantime, the respondent had filed a response narrating the claimant's grievances and of disciplinary action in 2018-2019. Further information was sought about the acts of discrimination and victimisation. It was denied that being a single parent was the basis of any discrimination. Subject to clarification of the treatment complained of, it was asserted the claims were out of time.

4. There was a preliminary hearing for case management on 6 May 2020 before Employment Judge Norris. The claimant attended unrepresented. She declined the assistance of a Lithuanian interpreter. The claimant said that because of the grievance on 1 April 2019 she was given a first written warning on 23 July 2019 about her attendance record. She had sent a document to Employment Judge Norris before the hearing which referred to harassment, constructive dismissal and breach of health and safety, but gave little specific detail.

5. The sex discrimination claim that was explored by Judge Norris concerned the notification by the respondent's Jeremy Billard in February 2019 that they intended to alter her working hours, which would conflict with her childcare responsibilities. Judge Norris noted that if this was the sex discrimination, there was likely to be a problem about jurisdiction because it was out of time. The claimant also appears to have told Judge Norris that she did *not* say that any of the conduct identified as harassment was related to sex. Judge Norris also explored the reference to breach of health and safety. It appears from the case management summary that the claimant alluded to claiming personal injury for back pain. She was told the tribunal could not hear a personal injury claim. It was suggested she get legal advice on the claim. It was noted that the respondent had criticised her timekeeping before the grievance on 1 April. The conclusion of the hearing was that the claimant must tell the tribunal and the respondent by 3 June 2020 which claims she was pursuing against the respondent.

6. The claimant did not do so, and on 8 June 2020 an unless order was made: the claim would be struck out if she did not identify her claims against the respondents by 22 June 2020. The case was listed for a further case management hearing on 7 July.

7. On 22 June, the claimant's current solicitor, Mr Rashpal Singh, emailed saying that she was pursuing complaints of constructive unfair dismissal, sex and race discrimination, both direct and indirect, harassment and victimisation. He said she had not notified the full claims because she had overlooked the unfair dismissal box on the form, had been unpresented, and had difficulty with the English language. (The respondent replied that she had not resigned when she presented the claim, so would not have been able to bring an unfair dismissal claim, had conversed in English on 6 May, and had been represented at all internal hearings by her trade union). He sought a postponement of the hearing on 7July. The postponement was refused, but the unless order was extended, requiring the claimant to identify the legal and factual basis of the complaints of sex discrimination, and the place where they were to be found in ET1, or if not in ET1, to make an application for amendment of claim, by 6 July.

8. On 2 July Mr Singh filed a three page email, from the claimant to another

person, dated 11 June, which he called the "Entire Claim" document, as it is believed to be the text the claimant intended to input to her ET1, without realising that the online form has limited space. It starts with the text of page 7 of the claim form, then continues on two more pages, stating that the capability process was begun by the respondent in April after she had lodged her 1 April grievance because the "managers had ganged up against me". She identified her supervisor, Derli Chaves, as subjecting her to intense scrutiny from 1 April 2019, though without giving detail of that, until her last day at work, 27 August 2019, when it is said he challenged her because she spent too long on a toilet break. The claimant says this was because she was on her period. She had since been signed off sick. The health and safety concern was identified as a complaint about the trolley wheels, and raising concerns about cleanliness in the kitchen. Both of these meant management "decided not to do anything but have instead made my life difficult". She also referred to an expired warning the previous year for attendance. This document makes no mention of her resignation or of unfair dismissal, which may indicate that it was prepared for submission with ET1.

9. Mr Singh said this was what she had intended to submit with her original claim form and Judge Norris decided to give the claimant the benefit of the doubt on this, because English was not her first language, although she was concerned that this document contained much detailed material which had not been brought to the attention of the tribunal in the claimant's email of 5 March, or in her longer email of 4 May.

10. The respondent objected that references in the entire claim document to her management by Derli Chavas had not been mentioned in the later internal grievance.

11. At the hearing on 7 July the claimant's solicitor at first said that she only wished to pursue complaints of harassment and victimisation, and there was no complaint of direct sex discrimination, but later asked that the treatment alleged as harassment to be a direct sex discrimination claim in the alternative. Judge Norris identified that the only incident was appeared to be in time was the episode on 27 August 2019 about the toilet break taking longer than usual.

12. The respondent points out that at the time she complained about 27 August conflict, she said it was back pain, with nothing about her period being the reason for taking a protracted toilet break – in the email the claimant sent to the respondent on 31 August about this episode she said: "as I indicated in my grievance, I have been hounded and harassed by some of my managers ever since I complained about my hours being changed. I was working on the day despite me not feeling well with back pain. Derli came up to me in the middle of my colleagues and spoke to be very rudely saying things along the lines don't stand to do something". This was identified as embarrassing and humiliating. According to the respondent, after this incident the claimant did not return to work. For some weeks she was certified unfit by neck and shoulder pain, then back pain from 15 October, with anxiety and low mood. At a return to work meeting on 25 November 2019, she said all the absence was work-related. She did not respond to requests for occupational health investigation, and was still off sick when she resigned on 29 December 2019, shortly after presenting the claim to the tribunal.

13. Judge Norris noted that Mr Singh did not give details of specific treatment save for the 27 August incident, and had said to the tribunal that the claimant had not been keeping a record of the events of which she now complained. Judge Norris made a further unless order that the claimant must now set out the legal and factual basis for her claim within 14 days or it would be struck out.

14. On 21 July Mr Singh filed an amended statement of claim. In an email he said that the claimant now relied upon "new facts and other incidents", but it was "not practicable to decipher the facts and incident from the entire claim document", and "it is not practical to say which new facts can be determined to be subject of an application for amendment". He asked for the amended claim to be accepted and allowed in its entirety. He also submitted that all the conduct of the respondent was a series of discriminatory acts, such that the time limit should be extended.

15. The amended statement of claim contains a great deal of new material. There was no application to amend.

16. This is the background to Judge Norris's decision, in the light of the amended statement of claim, to list today's hearing, to consider whether there has been compliance with the unless order, and whether any claim should be struck out.

Conduct of the Hearing

17. The representatives and the claimant joined the hearing by CVP. On one or two occasions the claimant dropped the connection and proceedings paused until she could rejoin.

18. In the first part of today's hearing I explored with the claimant's representative what the claims were, and considered representations on whether the claimant should be allowed to amend her claim. In the course of this it came to light that the tribunal's paper file was incomplete; further, no bundle, electronic or paper, had been filed for the hearing by either party. At my request the parties emailed me, at various times during this part of the hearing, the following : the "entire claim" document dated 11 June 2020 which was before Judge Norris at the July 2020 preliminary hearing, the full version of the amended Statement of Claim filed 21 July 2020 (only 7 pages out of 13 had been printed off by the tribunal staff), an email the claimant had sent the respondent on 31 August 2019, and a letter from the tribunal to the parties about this hearing on 28 September 2020. (Some of these difficulties with documentation arise from remote working when the building was closed for lockdown, when few administrative staff attended work, and some from continuing staffing and training problems since reopening, which mean that even now many documents are not being printed for files). I also asked about the content of the claimant's various grievances, alleged as protected acts, but copies were not supplied. For those I rely on indirect information, such as the passage quoted in paragraph 12, though it is not clear whether the claimant was referring there to a 1 April grievance or a 19 August grievance.

19. After a 30 minute adjournment for me to ensure I had read all the additional material properly, I heard the respondent's application to strike out the claims. At this stage the claimant's solicitor Mr Singh had also been able to seek the

claimant's instructions on the identity of two comparators, and on the content of the grievance. The parties were aware that if not struck out I would be considering a deposit order. Judgment was reserved because of the difficulty of recording a CVP remote hearing, but there was discussion of hearing length for case management purposes.

Amendment of Claim

20. I was not prepared to accept without more that the amended statement of claim document contained only further information of the original claims. Mr Singh, pressed to state what was new material in the amended statement of claim, identified 2 episodes. The first of these is in paragraph 16, which refers to Derli on 21 March 2019 sending the claimant to work at an office with a supervisor (Valentina) when it was known she had complained about her. This was said to be an act of sex discrimination because there were 2 male employees who were not sent to work with her. The second episode is in paragraph 17, that on 25 July 2019 claimant was rebuked (by Mr Billard) for eating in the hospitality kitchen, but her male supervisor was not so rebuked, and other male staff often did so and were not rebuked, while she had frequently been told she was not allowed to eat in the hospitality kitchen.

21. However the amended Statement of claim does on my reading contain significant amounts of other new material. Paragraphs 5 to 8 concern conflict with a supervisor called Valentina, identifying 2 particular episodes, on 23 November 2018 and 11 January 2019, as well as more general allegations for the period 5 -14 January. The claimant lodged a grievance against Valentina in January. Nothing further is said about this grievance in the amended statement of claim, but in the February 2020 response the respondent had identified that a formal grievance about Valentina had been made on 14 January 2019, expressing "non-specific concerns about the manner in which she was addressed" by her over alleged performance issues, and as a precaution they assigned Derli Chaves to supervise her instead. They said the claimant was informed on 10 April that her grievance was not upheld, and she did not appeal. This could be further information about the initial general passage on ET1 referring (without dates) to an unnamed supervisor, though it might also be about her 1 April grievance.

22. It is suggested in the amended statement of claim that when Derli Chaves took over from Valentina after the grievance had been lodged, he treated her critically, as he "favoured males (sic) staff as he felt that they did not engage in any conflict with other supervisors and managers. The claimant believes she would not be subjected to this kind of continuous criticism for work and she was made a target of supervisor of her sex". It is not suggested that male staff had complained about supervisors.

23. The paragraphs about Jeremy Billard asking the claimant to change the working pattern, the grievance about that (although it is not mentioned that this grievance was upheld), the capability procedure leading to a written warning on 23 July are substantially the same as the earlier material; in the course of this section the claimant states that she had been late for work on a few occasions in March and April 2019, and that on 6 March 2019 Mr Billard had assessed that her timekeeping and attendance needed improvement. His assessment predates the claimant's grievance about him.

24. The amended statement of claim states at paragraph 15 that the claimant made a third grievance, on 16 August 2019 (the entire claim document dated this grievance 19 August), about the first written warning, and that it was victimisation and discrimination, but says nothing about the content of that grievance, or how the warning amounted to victimisation and discrimination, saying only that she could not engage with the grievance process because she was too ill, and that it remained outstanding when she resigned. It is asserted that this grievance is a protected act in a victimisation claim.

25. In paragraph 18, which is subdivided into 7 subparagraphs, the claimant identifies as harassment the conduct of supervisor Derli Chaves between May and August 2019 "which amount to treating less favourably than her 2 male colleagues on numerous days during the week in the above period". It is also alleged that Derli created a hostile environment towards the claimant and in his demeanour. He made notes about the claimant's timings and breaks. She was told she worked too slowly. He would time how long she took to do tasks, and would shout at her to hurry up when she was in the toilet. On 17 May he shouted at her to complete some trolley orders and when the claimant said she wanted a break to make a complaint about his behaviour, she was not given a break. The conduct was reported verbally to a female manager, who took no action. She was accused of going home and leaving an agency worker unsupervised on 21 June 2019, and when the claimant explained that he was rostered to finish after her, was told she was get on with her dishes and cleaning and setting up rooms. The final subparagraph is about the 27 August 2019 episode, when it is stated the claimant told Derli she was on her period and so needed more time, and "he replied "you women" and stormed off."

26. This passage also notes that the claimant herself had begun making notes on her phone which she would write up after work; this conflicts with what Mr Singh said at the earlier hearing about the claimant having no records.

27. It is possible to view paragraph 18 as further information about the section in the "entire claim" document about subjecting the claimant to scrutiny after 1 April 2019, although the only particular incident mentioned in the entire claim email is the one on 27 August.

28. Paragraph 19 refers, without detail, to the claimant having "always spoken out in relation to health and safety issues at work and frequently raised concerns, in particular… the poor condition of the trolleys", and that managers had stated simply that it cost too much to replace the trolleys and instead ordered new wheels for them. In August 2019 the trolleys had fallen over on 2 occasions. There is no mention of the grievance about the trolleys in the amended statement of claim, or in the "entire claim" document. The respondent in ET3 stated that on 20 August they received a collective grievance signed by 3 people, including the claimant, dated 5 August, raising concern about the trolleys. The Respondent says they acknowledged receipt and arranged a meeting to discuss the concerns on 2 September, but none of the signatories responded or attended, and they had assumed it had been withdrawn.

29. Paragraph 20 says: "due to raising health and safety issues and the grievances against the managers claimant feels she has been the target of collusion by managers to adapt the approach of criticising her timekeeping,

performance and in doing so the behaviour and conduct of supervisors and managers has amounted to treating the claimant less favourably than how the other 2 male colleagues in her team and other male kitchen staff have been treated. The conduct of the supervisors and managers taken together amounts to sex discrimination".

30. The final paragraph, 22, lists the following claims:

> (a) sex discrimination under section 18 (amended by Mr Singh today to section 13) of the Equality Act.
> (b) unwanted conduct by Derli from January 2019 to August 2019 amounting to harassment. (It is not stated that this related to any particular characteristic).
> (c) "the Claimant's raising issues of health and safety and Grievances are protected acts and the Respondents belief that the claimant would take proceedings through the Tribunal amount to victimisation, (section 27 Equality Act 2010), of the claimant and the detriment which the claimant has been the loss of employment by resigning, and health being affected as stated above".

Chronology

31. I have pieced together a chronology from the information in the claim form, the claimant's other documents, and the dates of grievances and outcomes in the response, which having been served in February was available to the claimant's solicitor when taking instructions and drafting the amended statement of claim in July. In the chronology that follows, facts taken from the claimant are marked C, and from the respondent, R.

32. 17 September 2011 – employment starts -C
25 January 2017 – letter of concern about lateness and absence -R
8 June 2018 – written warning for absence - C
First difficulty – November 2018 – aggressive treatment by supervisor Valentina - C .
14 January 2019 - claimant notes that she is treated more harshly by Valentina than male colleagues unknown date – claimant raises grievance about rude behaviour of supervisor -C. (10 April it is not upheld, no appeal – R).
18 February 2019 manager Jeremy Billard asks her to change her hours of work from 10 to 6.30 to 7 to 3.30. Claimant says this is not possible because of her childcare arrangements - C.
6 March 2019 – Jeremy Billard tells claimant her timekeeping and attendance require improvement – C.
1 April 2019 claimant lodges grievance about change of hours. Claimant states in ET1 that when she told Jeremy Billard she was going to raise a grievance he told her that if he did she did not like it she should go and look for a new job. (In the amended statement of claim it is stated that she was informed by a colleague after raising a grievance that this been said; it upset the claimant) - C.
30 April – C notified of capability procedure – C and R.
17 May 2019 - R tells C her working hours will remain the same, and the previous informal arrangement is now a formal flexible working agreement. Also told that due to ongoing difficulty with the claimant's attendance record and quality of performance, they could explore redeploying her - R.

4 June 2019 - capability meeting about respondent's concerns. Meeting continued 9 July 2019, but claimant does not attend. First written warning improvement notice issued 23 July 2019 -C. (2018 warning having expired - R).
29 July claimant wrote saying she would not appeal but wanted to lodge a grievance that this decision had been made because she had raised a grievance.
16 August 2019 claimant submits grievance that the disciplinary warning was victimisation- C and R.
20 August -Collective grievance dated 5 August handed to R on 20th of August about trolleys. Respondent replied setting up a meeting. No signatories reply or attend- They treated the grievance as abandoned.
27 August -toilet break incident. C's last day at work- C.
21 October 2019 – Day A – early conciliation
21 November 2019 – Day B early conciliation
20 December 2019 – ET1
29 December – C resigns

Application to Amend – Relevant Law, Discussion and Conclusion

33. Although ordered to submit an application to amend with the amended statement of claim, the claimant's solicitor had not done so. Having identified what he considered to be new, he was invited to make an application to amend. I reminded him of the relevant factors in **Selkent Bus Company v Moore**, namely, whether the amendment was mere relabelling, or the addition of new facts and claims, the effect of the amendment on any time limits, then the nature and timing of the application, and then, considering these factors, the balance of prejudice between the parties and whether is possible to have a fair trial.

34. The claimant's solicitor asked to amend by the addition of new material identified as paragraphs 16 and 17. Other material he said was further information about the existing claims described in the entire claim document, and was linked to the matters already pleaded, and was "part and parcel of conduct on the part of supervisors". On timing, the claimant had struggled due to English being her second language. It was denied there was significant prejudice to the respondent.

35. The Respondent objected that the first written warning decision (23 July 2019) was the earliest act that was in time. As for the 27 August episode, the email the claimant sent at the time indicated that she had had back pain, and that she was about to see an emergency doctor, and mentioned nothing about her time in the toilet. Further, the amended statement of claim was the first mention of male staff being treated more favourably. The grievances she presented at the time did not say this.

36. After first stating there was no claim for unfair dismissal, the claimant's solicitor then asked for an amendment to add this claim. Asked to identify the repudiatory conduct on which she relied (there being no pleading on the dismissal) he replied that it was the discriminatory and harassing behaviour of the respondent, and that she had therefore lost confidence in being fairly treated. He added however that it was not argued that the health and safety complaints were a factor in her decision to resign.

37. Having regard to the **Selkent** factors, I do not allow an amendment to add a claim of unfair dismissal. Clearly it is a major addition. There is no pleading as what the respondent did in the four months between the claimant ceasing work with back pain and deciding to resign, and this would require other evidence additional to the matters to be considered in the other claims. On time limits, clearly it is out of time. The test in section 111 of the Employment Rights Act 1996 is whether it was not reasonably practicable to present a claim in time. The claimant did not have to go to ACAS again for early conciliation - **HMRC v Sera Garau (2017) ICR 1121** – and so her time expired on 28 March 2020. As she had already been to ACAS and presented a claim (and was a union member) she knew about how to claim or where to go for information. Even if (though it is improbable that she could show this) it was not reasonably practicable to add a claim until the dismissal wasdiscussed at the 7 May hearing, or until she had legal advice in late June, it cannot be that a further period until 19 October is reasonable - section 111 adds this proviso where a tribunal finds it not reasonably practicable. Finally, the nature and timing of the application, coming so long after the claimant was ordered to clarify her claims and apply to amend if there was any new claim, is unimpressive. There is prejudice to the respondent in having to investigate and hear evidence on the additional months of employment, it will lengthen the hearing time, and prejudice to the claimant may be less, as she waited a long time after the harassment complained of, and may have difficulty showing that repudiatory conduct was the reason for resigning.

38. Nor do I allow the addition of the matter in paragraph 16 of the amended statement of claim. This is about an episode in March 2019, which has nothing to do with the main thrust of her claim, which was about ill treatment for complaining on 1 April. It is also improbable as act of sex discrimination, as the claimant's account of this treatment was that it was because she had complained of Valentina's conduct. If a man had complained about Valentina, he might also have been so treated. The claimant does not say men had complained about her or any other supervisor. Importantly, it is long out of time, whether made in December 2019 or July 2020. It could only survive as part of a course of conduct of being unpleasant to people who complained about supervisors, but there is no attempt to show that men who complained about supervisors were treated in this way. The claimant says only that she was a woman working with two men. There must be prejudice to the respondent when it requires oral evidence to decide the episode, and it now over 18 months since it happened. In so saying I assume it is not mentioned in the claimant's various grievances, or she would have said so. The prejudice to the claimant of not being able to bring this episode before the tribunal is outweighed by the prejudice to the respondent of having to investigate it so late.

39. Paragraph 17 is about Jeremy Billard rebuking the claimant for eating in the hospitality kitchen. It does not involve Derli. If it contains a general complaint that men were allowed to eat there and women were not. This is the first mention of it, or the alleged remark. The claim brought in time was about Derli subjecting the claimant to intense scrutiny after she complained about the proposed change in her hours, not about differential treatment in the use of kitchens. The claimant did not mention this episode in her "entire claim" document. It is not explained why not. The respondent did not know about it until a year after the event, and so has to investigate oral evidence, without knowing even now who the other males are, at a time when people may have

no recollection of the incident at all. This is significant prejudice to their defence. The prejudice to the claimant is less, as she has already put Derli's conduct before the tribunal. The amendment is not allowed.

The Claims

40. I explored with the parties the claims and issues, in preparation for the applications to strike out. They are:

    1. Direct sex discrimination under section 13 of the Equality Act. These are the actions by the supervisors Valentina and Derli from November 2018 onward, up to and including the July 2019 warning, and the episode on 27 August 2019.

    2. Harassment related to sex, the same actions.

    3. Victimisation. The protected acts being the grievance on 1 April 2019, and the grievance on 19 August 2019. The consequential treatment for the first grievance is the capability procedure and the 23 July warning. The consequential treatment for the second grievance is further critical supervision by Derli from 20-27 August.

    4. Detriment for the health and safety issue brought to the respondent's attention, contrary to section 44(1)(c) of the Employment Rights Act. The respondent confirmed that there was no safety committee or safety representative at these premises. The consequence of this was said to be Derli's treatment of her between 20 and 27 August 2019. Mr Singh clarified that the claimant's resignation was not caused by that treatment in the workplace, or by the way the respondent handled the grievance. There are no particulars of the complaints of trolleys and food hygiene, either in the entire claim document or in the amended statement of claim. It is known from ET3 that she had complained with others about trolley safety.

    5. Detriment for making Protected Disclosures. These are mentioned but not particularised in the claim form, and not referred to at all in the amended statement of claim.

    6. "Other Payments". This box was ticked in the claim form. The claimant has clarified that this was about remedy, not that she was owed money.

The Victimisation Claims

41. In exploring whether the 1 April grievance was the protected act I asked Mr Singh whether in it she had complained of discrimination or harassment, or unequal treatment because of a protected characteristic namely the difference in sex. The claimant in the claim form said: "I thought it was discriminatory and also a failure to show flexi working hours and against the company's policy". I wanted to find out if she meant discrimination against mothers, parents, single parents, or just unfairness in not following their own flexible working policy. After the hearing break, Mr Singh confirmed that the grievance did show a complaint of breach of the Equality Act, and said he had the claimant's instructions to withdraw the victimisation claim. Accordingly, it is

dismissed on withdrawal.

42. I was not clear whether Mr Singh's instructions also included a victimisation claim based on the 16 (or 19) August grievance in which she complained that the disciplinary warning was discriminatory. That is not therefore dismissed. This part of the victimisation claim is to be considered in whether there is no reasonable prospect of success, or failure to comply with the unless order, or little reasonable prospect of success.

43. For completeness, it was not stated that the January grievance about Valentina alleged a breach of the Equality Act, and it is unlikely that a complaint about a woman would be read as a complaint that Valentina was unpleasant because the claimant was a woman.

Should the Claims be Struck Out?

44. Rule 37 of the Employment Tribunal Rules of Procedure provides that "at any stage of the proceedings the tribunal may strike out all part of the claim or response on any of the following grounds – (a) that it is scandalous or vexatious or has no reasonable prospect of success". Tribunals have been warned that they should be especially cautious not to strike out Equality Act claims and Public Interest Protected Disclosure claims, which may be fact sensitive, before evidence has been heard, unless it is clear, taking the claimant's case at its highest, or by reference to documents, that it has no reasonable prospects of success. If there is reason for doubt, a deposit order is the better option.

45. Rule 38 on Unless Orders states that an order may specify that if it is not complied with by the date specified the claim or response or part thereof shall be dismissed without further order. If such an order is made and a claim struck out for non-compliance, a party has 14 days to apply to set it aside on the basis that it is in the interest of justice to do so.

46. It is arguable that the amended statement of claim filed on 21 July does not comply with the unless order, because it did not identify by reference to the form or grounds of claim, what was in the original pleading, and there was no application to amend to cover new material. It can be said that there has been at least an attempt to comply, and it contains much further information about otherwise sketchy claims, but the end result has been disappointing, as it has not assisted the tribunal to identify the claims in a structured way. For example, there is no mention of protected disclosures (though whistleblowing was briefly mentioned on the claim form), and the health and safety complaints were not separately identified, and were instead swept up into a Equality Act victimisation claim. It was not stated that the protected acts alleged breaches of the Equality Act, and even after this hearing, it is not clear to the tribunal whether in her August grievance the claimant used the words "discrimination" and "victimisation" in the loose sense often used by non-lawyers to mean general unfairness, or whether the wording of the grievances in fact referred to protected characteristics from which a complaint of a breach of the Equality Act could be identified by an informed employer. Nevertheless, frustrating as this is, it is better justice at this stage to consider whether the claims now identified should be struck out as having no reasonable prospect of success under rule 37, than because the claimant has still not clarified her claims as ordered.

Protected Disclosures

47. What were the disclosures? In the entire claim document, the claimant referred to being unfairly treated "because I always speak on many issues especially health and safety concerns", going on to mention the trolley wheels, and some complaints about food hygiene. This is very loose both as to what was said, and when, unless it is about the 5 August document handed in on 20 August. The subject matter, health and safety, qualifies for protection. The information conveyed was that the trolley wheels made the trolleys unsafe. The lack of any detail of what was said or written means that it could not be clear that the claimant had a reasonable belief that this was a matter of public interest. The amended statement of claim might be expected to identify what information she gave, and when. It makes no mention at all of protected disclosures. The account of complaints about the wheels that she does give shows new wheels were ordered, but not when, or that this caused resentment. The trolley falling over in August 2019 is mentioned in paragraph 19, but not that she lodged a grievance about it. There is nothing about food hygiene. If this is the claimant's case at its highest, and with the benefit of legal advice, she has no reasonable prospect of success in showing that she disclosed information tending to show that health and safety was endangered and that she made the disclosure in the public interest. It is also not clear on her case that a disclosure, if made in August, materially influenced unfavourable treatment in the form of unpleasant treatment by Derli. On the claimant's own account, Derli was already watching her every move in connection with her attendance record, because she had complained about Valentina and Jeremy Billard; her accusations against him go back to March 2019.

48. I conclude that the protected disclosure claims should be struck out as having no reasonable prospect of success.

Health and Safety Detriment

49. The claimant's solicitor did not identify the relevant statutory provision, but on the respondent's admission a complaint about the safety of the trolleys would meet the requirement of section 44(1)(c). In the absence of other particulars this is assumed to be the written collective grievance sent to the respondent on 20 August. If subjected to detriment it will have occurred between then and 27 August, the last day in the workplace. On the claimant's case the grievance on this is unmentioned; it has been identified by the respondent, who on their account in ET3, undisputed by the claimant, who was sent it on 25 February 2020, properly invited her and others to a meeting about it and treated it as abandoned when nothing happened. The claimant has no reasonable prospect of showing that Derli's behavior towards her in connection with a long toilet break was materially influenced by a complaint about the trolleys. For a long time the respondent had been critical of the time she spent working, on the claimant's account Derli's close scrutiny went back to 1 April, and the respondent was concerned even before that. This claim is also struck out.

Victimisation

50. The claim based on the 1 April grievance having been withdrawn, I consider

whether the claimant will be able to show that her grievance of 16 or 19 August was protected under the Equality Act.

51. The claimant must know what she said, but there is nothing in her case as now particularised to show that the grievance referred to a relevant protected characteristic indicating a breach of the Equality Act which would make this grievance protected for section 27 of the Equality Act. She has had several opportunities to clarify the case, but even with legal representation has not done so. Not identifying this suggests that the grievance did not state matters amounting to a complaint of breach of the Equality Act.

52. I add that it is unlikely that she can show that Derli's behaviour from 19 August (the date the claimant gave) to 27 August, was influenced by the grievance being about discrimination. Even if he knew about it, on her own account he was already scrutinising her closely and had been since 1 April. Also on her account, in March, before either grievance was lodged, she had been told her attendance record required improvement, she did not appeal the warning, suggesting the facts indicated poor attendance or timekeeping, and she had been given earlier (though now expired) warnings for this. I conclude there is no reasonable chance of success in the remaining victimisation claim.

Harassment Related to Sex; Direct Discrimination because of Sex

53. The claimant's three page narrative in the ET1 and entire claim document starts: "Most of the time, things have been good with the company but unfortunately for a while now things have changed for the worse as bullying, intimidation, health and safety breaches and failure to follow procedure are now rife in the company, lies telling by management are pervasive. All these vices have meant many people have resigned and left the company". Next, she mentions her grievance about an unnamed manager (probably the Valentina episode in January 2019, but it could be 1 April) and says that her manager's attitudes towards her changed after that. Then she describes the proposal to change hours, and 1 April grievance, and that "after that day, things got from bad to worse for me at work". She was targeted for scrutiny while her other colleagues were not. Following that her flexible working hours were confirmed and she got the capability hearing invitation. There is a lengthy description of the disciplinary meeting and a complaint about the female manager's handling of it. Finally, she mentions pursuing further grievance, and then states that Derli put her under a regime of intense scrutiny from 1 April 2019. Throughout this, the only mention of treatment related to being a woman, rather than treatment related to having made complaints about supervisors, is that she took a long toilet break on 27 August because she was on her period. This narrative does not show that the claimant considered her treatment by managers was because she was a woman, and that men were not scrutinised to see if they attended work at the right time, or spent enough time working, or that men with poor attendance records were not or would not have been disciplined by the capability process. It shows that the claimant considered her unfair treatment was because she had complained about her managers, one male (Jeremy Billard 1 April) and two female (Valentina in January, Shirley Haims, who conducted the meeting leading to the warning, in August 2019).

54. There are plenty of pointers, on the claimant's case, that her attendance record was considered poor. There is nothing in the amended statement of claim about male comparators save that Valentina did not treat the 2 men in her team (only one of whom is named) in the same way, and while she says that Derli favoured male staff, she says explicitly that this was because they did not "engage in any conflict" with supervisors and managers. In paragraph 9 the claimant asserts for the first time that she was threatened with dismissal for not agreeing to a change of hours, saying that this is discriminatory because she was woman with child arrangements to be considered, but there is no comparison with men with child arrangements, and there is no indirect discrimination claim. It is then stated that Derli did not question men if they were late to work or late back from a break. This is all new material. It lacks detail of when and how the men failed in their timekeeping. It overlooks that her attendance record had been a cause for concern for some time, but she does not complain that earlier warnings about her record were discriminatory, and she agrees with the facts. There is nothing overt relating to women save for the response ("you women") when she said her period was the reason for a long break. The claimant said many people left the company, but not that women in particular were treated unfairly. It is a very bare claim, relying on the difference in sex without much else. More seriously, it shows a significant change in direction from the one first set out by her. The amended claim document adds material about treatment of men that was not there before, when the focus was on ill treatment for complaining about the proposed change in hours. The case has changed from discrimination because the claimant was a single parent to one of men getting more favourable treatment, but without specifying that they too were late, taking long breaks, and so on, which would make them material comparators. I conclude that the claimant has no reasonable prospect of success. Any prospect of success would depend on the hope of something turning up. That is not reasonable.

55. The same goes for the harassment claim. It is unlikely the one-off "you women" comment would be found of itself to be hostile or intimidating in the context of his frustration at her long break, when this was a frequent cause of complaint, and in the absence of any other conduct showing hostility to the claimant as a woman, rather than as a worker whose attendance was unreliable.

56. I conclude that both the sex discrimination and harassment claims should be struck out under rule 37.

57. For completeness, had I not done so, I would have ordered the claimant to pay a deposit of £200 as a condition of proceeding. Despite the explicit direction to do so, the claimant had not brought evidence of means to the hearing. After it ended the claimant's solicitor sent part of a letter from DWP showing she and her partner currently receive Universal Credit of £537 per month. There is no calculation, so I do not know if there is other income, or what the outgoings are, or what savings they might have. In July Mr Singh had said she was furloughed, suggesting she has been in employment since resigning. That said, evidently the claimant has a low income. The deposit is therefore set at a level which it is hoped will make her consider seriously her chances of succeeding in the claim, but will not bar her access to justice if she were to decide to go ahead. As Mr Singh will have explained, the real deterrent of a deposit order is not the deposit itself, but the risk of having to pay the respondent's costs.

EMPLOYMENT JUDGE - Goodman

DATED : 22nd Oct 2020

JUDGMENT SENT TO THE PARTIES ON

22/10/2020

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FOR THE TRIBUNAL OFFICE