Case No: 3322356/2019 (V)

EMPLOYMENT TRIBUNALS

Between:

Mrs T Akinyosoye-Rodney	**and**	Nottingham City Commissioning Group
Claimant		**Respondent**

At an Open Preliminary Hearing
By Cloud Video Platform

Held at: Nottingham
On: 8 January 2021

Before: Employment Judge R Broughton (sitting alone)

Representation
For the Claimant: Miss Bowen – counsel
For the Respondent: In Person

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

- The application to extend time under section 111 Employment Rights Act 1996 (ERA) is not well founded and is refused. The claim of unfair/ constructive unfair dismissal under section 94 and 98 of the ERA is struck out.

- The application for an extension of time pursuant to section 123 Equality Act 2010 (EqA) is well founded and succeeds.

- The Claimant's amendment applications are granted in part.

- The application for a strike out order under rule 37 and/or deposit order under rule 39 is granted with respect to one allegation and refused in respect of all other claims and allegations.

REASONS

Background

1. The claim was presented to the Employment Tribunal on 17 September 2019 following a period of ACAS Early Conciliation from 2 July 2019 to 16 August 2019. The Claimant was employed by the Respondent from 18 April 2017 to 17 April 2019. It is not disputed that the Claimant had accrued two years' continuous service as at the termination date and had been employed on a 2-year fixed term contract.

2. The claim originally came before Employment Judge Jeram on 3 January 2020 at a closed preliminary hearing. Employment Judge Jeram made a number of orders, including that the Claimant provide further information in relation to her complaints and listed the case for an attended preliminary hearing on 2 April 2020 to identify the claims, determine whether the claims had been brought in time and, if not, whether to extend time and to consider whether any claim should be struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 or a deposit order made pursuant to rule 39.

3. I then heard the preliminary hearing on 15 October 2020. The Respondent complained that, despite further particulars provided by the Claimant, it remained unclear what the claims were. The entirety of that hearing was spent trying to clarify the claims. Further orders were made as set out in the record of that hearing.

Issues for today's hearing

4. The matter has come back before me today to determine the following issues:

    4.1 the application to amend the claim;

    4.2 determine whether the time limit in respect of the claims of unfair dismissal and discrimination should be extended or the claims struck out on the grounds that they have been brought out of time;

    4.3 consider whether any of the claims/complaints should be struck out under rule 37 or the Claimant required to pay a deposit in order to proceed with any claim/complaint under rule 39;

    4.4 make further case management orders as appropriate, to include relisting the case for a final hearing.

Correction of the record of the preliminary hearing of 15 October 2020

5. I attached with my record of the October 2020 preliminary hearing 3 appendices. The first appendix set out what I understood from the preliminary hearing, the claims to be. I invited both parties to read through the appendices carefully. At the start of today's hearing the Claimant advised that the dates which I had set out at 10.2.1 and

10.2.2 in that appendix actually related to the same meeting which was not in March but in November 2018.

Evidence

6. The parties had agreed a joint bundle numbering 380 documents for today's hearing.

7. The Claimant had produced to the tribunal and the Respondent by email of 23 November 2020 a document which itself contained 3 appendices; Appendix 1 deals with the accuracy of the October 2020 order (referred to above). Appendix 2 set out further details of her claims and amendment applications which she asserted she had already made. Appendix 3 sets out a fresh application to amend the claim.

8. The Respondent submitted its response by email of 14 December 2020 and produced written submissions. I have considered those documents.

9. The Claimant had prepared a statement in support of her request for an extension of time which was set out at page 64 of the bundle. The Claimant relied upon that statement as evidence in support of her application for an extension of time and was then cross-examined by the Respondent.

10. In terms of the applications for a strike out and/or a deposit order, I did not permit the Respondent to cross-examine the Claimant on the facts of the case; those applications are to be determined on the documents, taking the case at its highest.

11. Both parties were given an opportunity to make further oral submissions.

12. The applications took the entirety of the hearing time, with significant cross examination of the Claimant by the Respondent. There was no time remaining for deliberations or case management.

Time Limit

Unfair/constructive unfair dismissal – sections 94 and 98 Employment Rights Act 1996

13. The parties agree that the Claimant's last day of employment was 17 April 2019 following the expiry of her fixed term contract.

14. The ACAS early conciliation certificate records the conciliation period commencing on 2 July 2019. The certificate was issued on 16 August 2019 (page 31).

15. The primary 3-month time limit therefore expired on 16 July 2019.The 45 days of early conciliation, when added to 16 July 2019 in accordance with section 207B (3) Employment Rights Act 1996 (ERA), extends the primary time limit to 30 August 2019.The Claimant then has the benefit of a one-month extension pursuant to section 207B (4) ERA from the date the Acas certificate was issued on the **16 August 2019.**

16. Any claim for unfair dismissal should therefore have been brought by **16 September 2019** pursuant to section 111(2)(a) ERA. The Claim Form was presented to the tribunal on 17 September 2019, one day out of time.

Discrimination complaints Equality Act 2010 (EqA)

17. The Claimant within her Claim Form referred to being bullied and harassed and as a result of that treatment she chose not to apply for the Programme Manager role when her 2-year fixed term contract came to an end (p 16 and 17).

18. Within the Claimant's 23 November 2020 document, she provided further particulars. She clarifies at paragraph 11 (page 8) that the termination of her employment was itself an act of discrimination. The termination date of the Claimant's employment would therefore be the last alleged act of discrimination, if part of a continuing act. The Tribunal today is not going to determine the issue of whether or not there was a continuing act but determine the issue of time limit based on the last alleged act of discrimination only. Whether or not there is a continuing act will be a matter to be determined at the final hearing after hearing all the evidence and legal submissions and is reserved for the final hearing.

Claimant's oral evidence

Stress

19. The Claimant complains that she was under immense stress around the deadline period for the submission of her Claim Form and attributes this stress to her working experience with the Respondent and the purchase of a new home while at the same time trying to secure alternative employment.

20. The Claimant alleged that a contributory factor in the delay in submitting her claim was her mental health. When asked about this by the Tribunal, the Claimant referred to issues with her self-esteem after she left the Respondent's employment. She has been on medication since April 2018, has tried to reduce it over the period but has had to increase the dosage a few months ago. The Claimant gave evidence that she found it very difficult to talk about her mental health and preferred "*not have these levels of discussions about her mental health*" because it upsets her.

21. It was evident to the Tribunal that the Claimant was in some state of emotional fragility during the hearing; she became emotional and tearful at times, as indeed she had during the previous preliminary October 2020 preliminary hearing.

22. The Claimant accepted under cross-examination that she had been aware from submissions served on her by the Respondent on 14 October 2020 (prior to the last preliminary hearing), that the Respondent had raised an issue about the Claimant not providing medical evidence in support of her assertion that her mental health. The Claimant accepted under cross examination that she had indicated to the Respondent that she would be able to produce medical records however she gave no evidence today that she had taken any steps to obtain any medical evidence prior to today's hearing. No medical evidence was put before the Tribunal today.

23. The Claimant was however well enough to start work as a courier from July 2019 (and was still working at the time she submitted the Claim Form) and had prior to that, been well enough to submit job applications and move house in the second week of July 2019. She accepted that, with help from her mother, she had been able to arrange the move and deal with the associated administrative tasks e.g. notifying the utility companies etc.

24. The Claimant raised as a reason for the delay in submitting the claim, not only her mental health but the various commitments and pressures she was dealing with it at the time, including her new job. With respect to her job, under cross examination she explained that her hours would vary but that she would sometimes finish at 7 pm or 5 pm and was working more or less 6 or 7 days a week and at weekends. She accepted overtime and additional shifts, which she could have refused but was not in a financial position to do so.

25. The Claimant conceded under cross examination that she could have refused one shift to specifically spend time submitting her Claim Form however she was "*chasing my tail*". She conceded that in terms of submitting the claim form she had "*left it to the wire because of stress*" but that it was a technical issue which ultimately meant that she could not submit it in time.

Technical Problems

26. The Tribunal find on a balance of probabilities that the Claimant did attempt to submit the claim on the 16 September. The Respondent was not in a position to produce evidence to rebut her evidence on that point and did not seriously challenge it under cross examination. The Claimant was however unable to explain what the nature of the problem was that she encountered in filing the form on line. She did not notify the Tribunal the next day of the difficulties she experienced and there is no evidence of any problems generally with the on-line system on the evening of the 16 September. The Claimant believed that she had taken screenshots of the error message when trying to submit the form however she had not produced the screenshots.

27. The Claimant believed that she had tried to submit the form at about 10:30 pm on 16 September, tried several times until giving up at midnight. The Claimant's evidence was that she submitted the form at 9 am the following day and while there was no evidence to confirm that, the timing was not disputed by the Respondent.

28. The Claimant was not sure what the technical problem was and conceded that it may have been something that she had done incorrectly when trying to submit the form, and that it was not necessarily a technical problem with the online system itself.

29. Although the Claimant had talked about confusion over time limits, she conceded that she understood that the time limit did expire on 16th September and therefore her lack of understanding and any confusion previously abut time limits, was not the reason why her claim was not submitted on time.

Legal Advice

30. The Claimant refers to not being able to afford to instruct a solicitor before she submitted her claim, she had however taken steps to obtain some advice about her employment situation in that she had spoken to someone at a Law Centre. After the last preliminary hearing on October 2020 she then "*broke the bank*" to pay for a half hour session with a solicitor before submitting the further amendment applications, including the application to add claims pursuant to the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. (hereafter referred to as the Fixed Term Regulations). The Claimant has savings of approximately £2,000 but explained that it was a question of priorities in terms of how she spent it and she

was not going to use the little savings she had on legal fees and put herself at a further detriment.

The Amendment Application

31. The amendments are claim of direct discrimination brought under section 13 EqA on the grounds of the Claimant's race.

Nanook from the North (section 13): Amendment 1

32. The Claimant has made an application to amend the claim to include:

> "*Over the course of my employment on several occasions, **Roz Howie** referred to me as 'Nanook from the North'; in reference to me wearing gloves and a fur lined cap during inclement weather. On at least 3 occasions she 'joked', "it's Nanook from the North" as I walked in and I found it annoying and derogatory. The fact that RH used the term on several occasions was intended, in my view to demean and embarrass me".*

33.. This specific allegation was not contained within the original Claim Form.

34. The Claimant complains of a number of incidents of what she considers to be harassment and bullying behaviour from her previous line managers, including Rosalyne Howie (RH) within the Claim Form but not this specific incident.

35. At the preliminary hearing on 3 January 2020, Employment Judge Jeram had referred at paragraph 12 of her record, to discussions with the Claimant in which the Claimant had indicated that there was at least one other comment that she felt was related to her race. Employment Judge Jeram made directions about an amendment application, explained how to make the application and referred her to the Presidential Guidance.

36. Following that hearing, the Claimant submitted a document on 31 January 2020 to the Tribunal copied into the Respondent within which (page 70) she made an application to make this amendment to the claim. That amendment was therefore submitted on **31 January 2020**, 4 ½ months from the date the claim form was presented. The order of 15 October 2020 (p.15) refers to this amendment application.

37. The Claimant's case is that the 'Nanook' comments were made during the period **September to December 2018** but cannot be more specific than that. The Tribunal notes that in the Respondent's report dated July 2019 (p.200) following the investigation into the Claimant's grievance, the 'Nanook from the North' comment is clearly mentioned and was investigated.

38. The Claimant had made this allegation during the internal grievance process and therefore the Respondent was on notice of this allegation even before the claim form was filed.

39. The Claimant gave oral evidence today that this allegation had not been included in the claim originally because during the Respondent's internal investigation into her grievance, RH had denied making the comment and she did not think that she would

be able to prove it. She is unable to call witnesses to support her claim that these comments were made and therefore had considered it 'ill advised' to include it. However, after Employment Judge Jeram had asked her to pinpoint examples of race discrimination and explained that she could make an application to amend her claim, she had reflected on other instances.

40. RH no longer works for the Respondent, she was however questioned during the investigation process about this allegation.

41. The Claimant referred to the negative impact this comment had on her, it was she alleges, usually said in the mornings when other people were present and it made her feel undermined. She described it as demeaning.

Spelling of name (section 13): Amendment 2

42. The document the Claimant submitted on the 31 January 2020, included various parts to it. This was in response to an Order by EJ Jeram requiring the Claimant to clarify what the claims of discrimination were and what were matters to be relied on as background only. It included a section headed amendments (where she set out the wording of the amendment application in respect of the 'Nanook' comment) and in a separate section provided 'further particulars for clarification of the claim'. Within that latter section, the Claimant referred to an allegation that RH when first introduced to the Claimant, mentioned that she found it difficult to spell her name when sending emails (para 1.3 p 65). The Claimant conceded today that this was not included within the part of her document 'headed amendments' however she had understood they would be "linked up".

43. With regard to this comment, the Claimant accepted that she did not object to it at the time because she had recently returned from sick leave and was lacking in workplace confidence; she felt because of her recent absence, she was "stepping on egg shells".

44. The Claimant's evidence is that she had been sent the witness statements from the internal investigation on 10 August 2019 and read them 9 months later in February or March 2020 and only then did she understand that there had been what she described as a "witch hunt" against her. Although she had read the witness statements in February or March, she still did not make the application to make the further amendments (which she applied to make at the October 2020 preliminary hearing), until the October 2020 hearing itself, some 7 months later, because as she explained, she did not understand that she could make an application in between hearings

45. The Claimant accepted that there was no reason why this allegation could not have been included in the original Claim Form. This was an allegation that she had made in April 2019 therefore making this claim was not reliant upon reading the witness statements from the internal investigation. The first time she accepted she had made this allegation within these proceedings was on 31 January 2020 and applied formally to add it as a claim on 15 October 2020.

46. The Claimant complains that this is a complaint of direct race discrimination. Counsel for the Respondent put it to her that it was not obviously about race, the same comment would have been made to anyone with a surname which difficult to spell

however, she alleges that it was said to make her uncomfortable and delivered in a 'flippant' way by someone who was the Equality Lead for the Respondent.

47. The Claimant alleges that it was the spelling and not the pronunciation which RH had mentioned however, she was taken to the notes from the internal investigation where the allegation that was put to RH was that when she had first met the Claimant, she had allegedly remarked; "You are the one with a name I cannot pronounce?" (paragraph 4.2.2, page 200). The Claimant also did not dispute under cross-examination that other members of staff had said that they had asked how the Claimant pronounced her surname but she raised no complaints about them because they did not also call her 'Nanook' or question if her aggression was down to her culture.

Treatment of Claimant's health issues compared to DD July 2018 (section 13): Amendment 3

48. The Claimant complains about how she was treated by RW in respect of her health issues as compared to the treatment shown to the Claimant's former colleague, DD. This application to amend was made during the preliminary hearing on the 15 October 2020.

49. The Claimant refers to RH not cancelling meetings with DD. At the last preliminary hearing, the Tribunal ordered the Claimant to provide further particulars of this claim, to include dates and occasions when the less favourable treatment/harassment took place. The replies (p.114) refer to references by RH and RW to the Claimant being late to meetings when DD was often late and this was deemed acceptable. There are no specific dates provided for the meetings when DD was late or did not attend at all or details of how RH and RW were 'supportive' of DD. The Claimant complains that she often felt on the outside of any dialogue, having to chase up to find out the status of projects but fails to provide details of those occasions, other than one occasion when she asserts that she has an email trial where staff were sent an email informing them, about DDs return to the office in February 2019, which she was not copied into. However, the allegation regarding communication around DDs return, appears to be an allegation about how DD treated the Claimant, not RH or RW. The Claimant confirmed at the October hearing, that she is not alleging discrimination by DD.

Amendment 4:

4.1 The Fixed Term Employees (Prevention of less Favourable Treatment) Regulations 2002

4.2 Victimisation claim

4.1 Fixed Term Regulations amendment

50. The Claimant explained today that she is not pursuing a claim of victimisation or direct discrimination with respect to how she was treated at the end of her contract and specifically about the alternative post that she did not apply for and/or the role of Head of Personalised Care (HPC) offered to DD, what she is seeking to do is amend her claim to include a complaint under the Fixed Term Employees (Prevention of less

Favourable Treatment) Regulations 2002 hereafter referred to as the Fixed Term Regulations. This application was made on the 30 November 2020. The Respondent opposes it on the basis that it is out of time and remains unparticularised.

51. The Claimant explained today that she is complaining that the Merged Programme Manager Role was in effect the job that she was doing for the Respondent and it should have therefore been given to her. She argues that she should **not** had to apply.

52. It is not in dispute that the Respondent had expressly informed the Claimant about the vacancy and told her how to apply. The Claimant complains, however, that she did not apply because she believed it was futile to do so in the context of how she had been treated.

53. The Fixed Term Regulations had been referred to at the preliminary hearing in October 2020 when counsel for the Respondent made the point that a breach of these Regulations had not been alleged. The Claimant had sought some legal advice after that October hearing and has made this application to amend. The Claimant's case is that she was not aware these Regulations before the October hearing but conceded that she could have taken some advice earlier and could have researched it. The Claimant referred in her application to other allegations she wanted to raise of alleged acts of victimisation (p.117 para 6.1 to 6.8 of the application) in support of the complaint

54. In terms of paragraph 6 of the amendment (paras 6.1 to 6.8) the Claimant explained, that these are the crux of the matter and show how she was treated. She wished she had read the investigation witness statements sooner. The additional factual details help explain her claim and would prejudice her if not included.

55. **The Claimant confirmed that the allegations set out in paragraphs 6.1 to 6.8 are allegations brought under the Fixed Term Regulations and are allegations of less favourable treatment under those Regulations.** However, she stated she was not sure whether they can be described as separate claims or just background in support of her claim in connection with why she did not apply for the HPC role; they are incidents which she states in effect prevented her from applying for the new role. She confirmed that all of those allegations could have been raised within the Claim Form. The allegation which the Tribunal understand the Claimant to be pursuing under the Fixed Term Regulations are;

    1. *The Merged Programme Manager Role: she should **not** have had to apply for this role because it was her job – her comparator DD was slotted into another role.*

    2. *The creation of the HPC was not mentioned to avoid C raising a complaint*

    <u>During the period November 2018 to April 2019</u>;

    3. *RH informed investigator Claimant (C) was underperforming, did not share those concerns with Claimant despite seeking advice from HR because she her fixed term contract was coming to an end.*

    4. *RH/RW had on denied at meeting on 13/12/18 that C was being performance managed*

5. *Failure to address performance issues with C to allow her to address them*

6. *Failure to follow performance management process*

7. *Performance issues were because of stereotyping/ unconscious bias [this is not a claim under the Fixed Term Regulations but a claim of race discrimination]*

8. *Dona Strain (DS) alleges meeting with C and DD was relating to Cs behaviour when C understood it was for C and DD to address DSs behaviour.*

9. *RW and DD supported DS to encourage her to put in complaint about C.*

10. *RW was supporting DS to meet with HR about C while C understood her to be progressing mediation between DS and C*

11. *Natalie Dunn stated in grievance investigation that RH had stated about C "don't worry she's not going to be here for much longer" and she was encouraged by DD to complain to RW about C.*

4.2 Victimisation claim

56. The Claimant confirmed today that the allegations at para 6.1 to 6.8 on pages 11 and 12 of her application (p 117 and 188 of the bundle) relate to the above claim under the Fixed Term Workers Regulation although the document itself refers to them as alleged acts of victimisation, albeit it does not reference the EqA.

57. The Claimant's document which she submitted setting out her amendment application, referred to victimisation and appeared to be a claim that she was not told about the role offered to DD to avoid her complaining about 'preferential treatment'. She does not allege expressly that there was a belief that she would make a complaint for the purposes of the EqA, or indeed who held this belief and the grounds for her maintaining that this was the reason for her treatment. She confirmed however that this is a claim under the Fixed Term Regulations however given the lack of clarify over what she said about this amendment, the Tribunal will address the possibility that she is also seeking to add a victimisation claim, which had been the Respondent counsel's understanding and is addressed in her submissions.

Treatment of health – pre - July 2018: Amendment 5

58. The Claimant had referred to returning from sick leave in July 2018 in the Claim Form but made no complaint about her treatment prior to that.

59 The Claimant had confirmed at the hearing in October 2020 that she was **not** bringing any claims in relation to events before July 2018 and had also made no complaints in the internal grievance about the events predating July 2018.

60. The Claimant explained that her reasoning for including these allegations, although she said she may be confusing matters, is to show the impact of not being fully supported. She went off sick; there was no support and it had an impact on her mental health.

The Claimant argues that in terms of the type of amendment, she is adding new factual details.

61. The Claimant has not particularised the complaints in relation to pre-July 2018 and conceded under cross examination that it may be difficult for those involved to recall what had happened before July 2018. Most of the relevant individuals have since left the Respondent's employment including the main putative discriminator, RH who had left the Respondent's employment on 14 September 2020. The Claimant accepted that there was no reason why she could not have included these allegations within the original Claim Form.

Respondent's submissions

Original claim – Time limits

62. The Respondent's key submissions in summary are as follows;

- Counsel submits the claim brought is one of ordinary unfair dismissal but in any event the time limits are the same and submits that it was reasonably practicable for her to present her claim in time

- The Claimant had produced no evidence from her doctor to support her assertions about the stress she is alleges she experienced.

- On the Claimant's own evidence, she had been not prioritised submitting the claim as there were other more pressing matters for her.

- There is no presumption of an extension.

- With regards to the technical difficulties in submitting the claim, there is no evidence to corroborate the Claimant's account. There is no evidence to say that the system was down and the Claimant accepted that she may herself be responsible for doing something wrong when she submitted the claim.

- The Clamant knew the time limit was 16 September 2019 and Counsel therefore argues that the claims of discrimination and unfair dismissal should be struck out.

Amendments and time limits

63. Counsel submits that the Claimant has had many months to take steps to decide what claims she was bringing. The fact that she did not know about her legal rights is not a justification to bring amendment applications so far out of time and it would not be just and equitable to allow them.

Nanook comment

- Turning to the Nanook comment, Counsel referred in her written submissions (page 119); that this allegation was not raised until 9 months after the date of termination, the comments were made between September and December 2018 and it would cause prejudice to the Respondent to allow the amendment as the perpetrator is no longer employment by the Respondent. These interviewed during the internal investigation all denied the comment was made.

Spelling of name – July 2018

- This amendment was made on 15 October 2020 there was no reason why that could not have been made in the original Grounds of Claim. It was set out in the 31 January 2020 document but Counsel argues it was not specifically raised as an amendment at that point so the employment tribunal will have to take it from the date that the actual application was made and thus it is significantly out of time. In terms of the merits of that amendment application, Counsel argues that other people had asked her to pronounce her name and she had only taken issue with RH saying the same thing and that there is no reasonable prospect that claim of direct discrimination would succeed.

Treatment of health issues compared to DD

- The amendments application was made on 15 October 2020. It is a new cause of action. It is unclear how this is linked to race and allegations are unclear.

The Fixed Term Employees (Prevention of less Favourable Treatment) Regulations 2002

- In terms of the Fixed Term Regulations, the application is made significantly out of time. This was first raised on 30 November 2020. Complaint is unparticularised with reference to the provisions of the 2002 Regulations.

Victimisation

- The application to amend to include a section 27 EqA claim was made on 30 November 2020, 19 months after the EDT and 14 months after issue of ET1. It appears to refer to not just the HPC role but also alleged lack of support. Precise basis of the claim is unclear, there was no protected act prior to EDT or allegation of discrimination by victimisation and the allegation is out of time.

Events pre- July 2018.

- The Claimant applied to include this complaint only in her application on 30 November 2020. She confirmed on the 15 October she was not pursuing this claim and the claim is unparticularised.

- Counsel complains that the amendments have been piecemeal and that the Claim Form should not be used as something to start the ball rolling: **Chandhok v Tirkey [2015] ICR 527**.

Strike Out and/or Deposit Order: Application

64. The Respondent applies for Strike Out/ Deposit Order in respect of the following allegations (adopting the paragraphs in the Order of the 15 October 2020 in summary are) and relies substantively on written submissions which make the following points in support of the applications;

- Allegations pre- July 2018:no factual allegations and not particularised
- Allegation 1.2.2.3: lacks particularisation

- Allegation 2.1: lacks particularisation and is vague
- Allegations about medication 3-5: unclear how could conclude because of race
- Allegation 6.4: suggestion by others goal posts moved- does not suggest related to race
- Allegation 10.1: email of 14 March 219 – difficult to see how linked to race
- Allegation of less favourable treatment in relation to health issues in amendment application: vague and unclear how test met.
- Direct discrimination in relation to dismissal: informed EJ Broughton not being pursued and unclear how could pursue given expiry of FTC
- Constructive unfair dismissal: no resignation and unclear what basis of claim is
- New victimisation claims: no protected act pleaded and causation unclear
- Fixed Term Employee Regulations: lack of articulation and not clear how test met

Claimant's submissions

65**.** The Claimant made brief submission with respect to the time limits and amendment application as follows;

- That the circumstances such as moving to a new house exacerbated the situation with regards to her ability to submit the claims in time.
- The 'Nanook' comment about the difficultly RH had in spelling her name; these are comments which were 'brought to the fore' as racist in context of the question whether she was aggressive because of her culture.

66. The Claimant declined to make any submissions on the application for a Strike Out/ Deposit Order.

Legal principles

Unfair dismissal

67. Section 111 ERA

> *"(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.*
>
> *(2) … an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*
>
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was* ***not reasonably practicable*** *for the complaint to be presented before the end of that period of three months.*"

68. ***Porter v Bandridge Ltd [1978] ICR 943 – CA*** - The onus of proving the presentation in time was not reasonably practicable rests on the Claimant.

69. ***Palmer and anor v Southend-on Sea Borough Council [1984] ICR 372 CA*** – Reasonably practicable does not mean reasonable nor physically possible, it means something like "reasonably feasible".

70. What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. As Lord Justice Shaw put in ***Walls Meat Company Ltd -v- Khan [1979] ICR 52 CA***: "*The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province*."

71. Lady Smith in ***Asda Stores Ltd v Kauser [EAT/0165/07*** explained it thus : "… *the relevant test is not* simply *a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done. …"*

72. In ***Akhavan-Moossavi v Association of London Government [EAT/0501/04]*** the Claimant presented his claim electronically on 24 July, which was the final day of the 3-month time limit. On pressing submit, he received a thank you message and informing him that an email acknowledgment would be sent within one day and that he should contact the tribunal if he did not receive it. He had not received the email confirmation by 3:45 pm the next afternoon and on ringing the tribunal office found that they had no record of his claim. He submitted it the following day, one day out of time. Although rejected by the employment tribunal, which drew attention to the guidance on electronic applications that accompanied the online claim form, stating that there was no guarantee that claim forms would be received on the same day. On appeal to the EAT, noted that while an electronic application can usually and reasonably be expected to be received on the date it was sent, something more is required of claimants in these circumstances in line with the tribunals guidance on electronic applications. However, given the ambiguous nature of the thank you message the claimant received, it could be read by an inexperienced claimant as acknowledging presentation of the claim. The Claim Form therefore was allowed to proceed.

73. Illness may prevent a claimant from submitting a claim in time, usually this will only constitute a valid reason if supported by medical evidence as to the extent and effect of the illness.

<u>Discrimination</u>

74. The section of the EqA which deals with the applicable time limits is section 123, which provides as follows:

> *(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

75. In ***Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 – CA***, the Court of Appeal stated that in its view, rigid adherence to a checklist can lead to mechanistic approach to what is meant to be a very broad general discretion. The best approach a tribunal considering the exercise of the discretion is to assess all the facts as is in the particular case that it considers relevant, including in particular the length of and reason for the delay.

Fixed -Term Employees (Prevention of Less Favourable Treatment) Regulations 2002

76. Section 3 less favourable treatment of fixed term employees

Regulation 3

(1) A fixed term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee-

(a) As regards the terms of his contract; or
(b) By being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) Subject to paragraphs (3) and (4) the right conferred by paragraph (1) includes in particular the right of the fixed term employee in question not to be treated less favourably than the employers treats a comparable permanent employee in relation to-

(c) the opportunity to secure any permanent position in the establishment.

(3) The right conferred by paragraph (1) applies only if-

(a) the treatment is on the ground that the employee is a fixed term employee and
(b) the treatment is not justified on objective grounds

(6) in order to ensure that an employee is able to exercise the right conferred by paragraph (1) as described in paragraph (2) (c) the employee has the right to be informed by his employer of available vacancies in the establishment

(7) for the purposes of the paragraph (6) an employee is "informed by his employer" only if the vacancy is contained in an advertisement which the employee has a reasonable opportunity of reading in the course of his employment of the employee is given reasonable notification of the vacancy in some other way.

Time limit

Regulation 7

(1) An employee may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 3 or (subject to regulation 6(5)), regulation 6 (2).

(2) Subject to paragraph (3) an employment tribunal shall not consider a complaint under this regulation unless if is presented before the end of the period of three months beginning-

(a) In the case of an alleged infringement of a right conferred by regulation 3 (1) or 6 (2) with the date of the less favourable treatment or detriment to which he complaint relates or where an act of failure to act is part of a series of similar acts or failures comprising the less favourably treatment or detriment the last of them

(b) In the case of an alleged infringement of the right conferred by regulation 3 (6) with the date, or if more than one the last date, on which other individuals, whether or not employees of the employer, were informed of the vacancy

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers it <u>just and equitable to do so.</u>

<u>Strike out application – section 37 and application for deposit order section 36 legal principles</u>

77. Employment tribunals must look to the provisions of rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

78. Rule 37 provides as follows:

> *37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> > *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

79. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely, to fail. Strike out is the ultimate sanction and, for it to be appropriate, the claim or part of the claim that is to be struck out must be bound to fail. As Lady Smith explained in ***Balls v Downham Market High School & College [2011] IRLR 217*** (paragraph 6):

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

80. Claims and complaints where there are material issues of fact which can only be determined by the employment tribunal will rarely, if ever, be apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested: In ***Anyanwu & anor v South Bank Student Union & anor [2001] ICR 391, [2001] UKHL 14***, Lord Steyn said:

> *"… For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. …."*

81. Lord Hope of Craighead added at paragraph 37:

> "*… I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence*. …"

Deposit orders rule 39

82. Rule 39 provides as follows:

> *39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

83. Just because a Tribunal concludes that a claim or allegation has little reasonable prospect of success does not mean that a deposition order must be made. The tribunal retains a discretion in the matter and the power to make an order under rule 39 has to be exercised in accordance with the overriding objective, to deal with cases fairly and justly having regard to all of the circumstances of the particular case: **Hemden v Ishmail and anor 2017 OCR 486 EAT.**

Direct Discrimination

84. It is also necessary to consider the law in respect of the discrimination claim that the Claimant advances.

Section 13 Equality Act 2010 provides that:

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

85. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

86. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift. **Madarassy v Nomuna International Plc [2007] IRLR 246**:

87. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

Amendment application – legal principles

88. The employment tribunal has a broad discretion to allow amendments at any stage of the proceedings under rule 29 of the Tribunal Rules. The discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in accordance with rule 2.

89. In ***Cocking v Sandhurst (Stationers) Ltd & anor [1974] ICR 650, NIRC*** how the key principles in exercising their discretion and involves tribunals having regard to all the circumstances and in particular to any injustice or hardship which may result from the amendment or a refusal to make it.

90. The then President of the EAT, Mr Justice Mummery, provided guidance on how the tribunal should approach applications for leave to amend in ***Selkent Bus Company Ltd -v- Moore [1996] ICR 386***. A tribunal must also carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and to the relative hardship that will be caused to the parties by granting or refusing the amendment. Mr Justice Mummery explained that relevant factors to consider would include the nature of the amendment, the applicability of time limits and timing and manner of the application.

Nature of the Amendment

91. The tribunal will have to decide whether the amendment of the claim the Claimant is seeking is minor or a substantial alteration pleading a new cause of action. Applications may involve the addition of factual details to existing allegations, addition or substitution of other labels for facts which have already been pleaded or more substantial amendments which involve entirely new factual allegations which change the basis of the existing claim.

Applicability of time limit

92. If the application to amend includes adding new claims or causes of action, the tribunal must consider whether that claim is out of time and, if so, whether the time limit should be extended.

93. Presidential Guidance on General Case Management for England and Wales Guidance Note 1:

Para 5.2 "*If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so whether the time limit should be extended. Once the amendment has been allowed, and time taken into account, then that matter has been decided and can only be challenged on appeal. An application for leave to amend when there is a time issue should be dealt with at a preliminary hearing to address a preliminary issue*."

Para 11.1: "*The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment".*

94. Rawson v Doncaster NHS Primary Care Trust EAT 0022/08: EAT observed that; "*if it would be just and equitable to extend time that would be a strong, although … not necessarily determinative, factor in favour of granting permission. It if is not just and equitable to extend time that would be a powerful, but again not determinative factor, against".*

95. **Galilee v Commissioner of Police of the Metropolis 2018 ICR:** EAT held that it is not always necessary to determine time points as part of the amendment application. Granting an amendment does not automatically deprive the respondent of any limitation arguments it might have in relation to the new claims. A tribunal can decide to allow an amendment subject to limitation points.

96. **Hammersmith and Fulham London Brough Council v Jesuthasan 1998 ICR 640 CA:** authority for the proposition that where the amendment is simply changing the basis or, or relabelling the existing claim, it raises no question of time limits.

Timing and manner of the application

97. It is relevant for the tribunal to consider why the application was not made earlier and why it has now been made. In ***Martin v Microgen Wealth Management Systems Ltd [EAT/0505/06]***, the EAT stressed that the overriding objective requires, amongst other matters, that cases are dealt with expeditiously and in a way which saves expense; undue delay may well be inconsistent with these aims.

Conclusions

98. To make it easier for the parties I have set out the conclusions in a separate Appendices and the parties are referred to those appendices

Summary

99. The Claimant confirmed at the October 2020 preliminary hearing that she was not pursuing a claim of race discrimination in respect of the offer of the HPC role to DD, however it has always been her case that she was in effect forced out because of the alleged discrimination she was subjected to by her managers (RW and RH) and that as a consequence of that discrimination, that she did not apply for the alternative role of Head of Personalised Care.

100. The Claimant alleges that the termination of her employment was thus an act of discrimination. This is confirmed at page 14 of the record of the October 2020 preliminary hearing (para 11). Whether this is a dismissal within the meaning of within section 39 (2)(c) EqA or whether this is a detriment claim under section 39 (2) (d) (where subject to issues of causation, the Claimant may still seek to recover losses arising from the termination of her contract on the basis that they are losses which 'flow' from the acts of discrimination), is a matter for the Tribunal to determine at the final hearing after hearing all the evidence and legal submissions. However, the crux of her claim has always been that she felt that she was treated differently on the grounds of her race and the comment about whether she was aggressive because of her culture, is clearly at the heart of it and the other comments and behaviours are she feels, to be viewed in the context of the 'unconscious' discrimination she considers to have been revealed/illustrated by that comment.

Case Management

101. The case will be listed for a 90-minute telephone case management hearing now to list the case for a final hearing and make case management orders.

Employment Judge Broughton

Date: 30 March 20

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Appendix 1

Time limits – conclusions on whether time should be extended

Unfair/ constructive dismissal claim - Employment Rights Act 1996

1.The Claimant was having to cope with a lot of pressures in her life following the termination of her employment, particularly around July 2019 when she was both working as a courier and moving into a new home. The Claimant was however able to work and organise that house move with all the ancillary administrative task that go with moving house and in the absence of any medical evidence, while I do not doubt how genuine her upset is (evident during the October 2020 and January 2021 hearings), there is no medical evidence to corroborate her account of the extent of the difficulties she was experiencing with her mental ill health. Further, her own evidence about her job and domestic circumstances was not consistent with someone who was not capable, for health reasons of being able to submit the claim form in time and she was in fact, only a day later in submitting a fairly lengthy claim.

2. The Claimant conceded under cross examination, that she was aware of the time limit and that it expired on 16 September 2019. The Claimant's evidence was that ultimately, she did not submit the claim in time because of problems registering the claim on-line. However, the Claimant was candid in admitting that the fault may have been with her and not a fault with the on-line system itself. Unfortunately, the Claimant admitted to leaving it until late in the evening on the 16 September before attempting to submit it, about 90 minutes before the end of the deadline to try. There was no satisfactory explanation for leaving it so late. However, even if left late, if there is a satisfactory explanation, the delay is not of itself fatal because the Claimant had until the expiry of the time limit.

3.The wording of section 111 ERA however is strict; an extension can only be granted where it where it was 'not reasonably practicable' to submit the claim in time. The onus of proving that the presentation of the claim in time was not reasonably practicable rests with the Claimant, was it reasonably feasible, was it possible to submit it and if so reasonable to expect it to have been done. She may have had difficulty submitting the form however, she has produced no evidence that there was any problem with the on-line system itself. The Claimant did not produce screen shots to evidence the difficulties she experienced and while the Tribunal accept her evidence that she had difficulties, she admits that those may have been difficulties for which she was responsible. The Claimant was then able to submit the form the next morning. The Tribunal is not satisfied that she has satisfied the burden of proving that it was not reasonably practicable to submit the form by the 16 September 2019. This may seem a harsh decision to the Claimant, however time limit are set by Parliament and there important reasons in the public interest, for ensuring that time limits are observed.

4. The claim of unfair dismissal under the Employment Rights Act 1996 is therefore struck out because it has been presented out of time. This is separate from the claim for dismissal as an act of discrimination under the Equality Act 2010.

5. **The application to extend time under section 111 of the Employment Rights Act 1996 is refused and the claim of unfair/constructive unfair dismissal under** section **94 and 98 of the Employment Rights Act 1996 is struck out.**

Discrimination claims – original claim

6. The Tribunal has a much broader discretion to extend time under section 123 Equality Act 2010 (EqA).

7. For the purposes of today's hearing the last act of discrimination is treated as the date of termination. As set out above, the Tribunal today is not making any determination today about whether there was a continuing act. Taking the date of termination as the act which triggered the limitation period for the purposes of dealing with the various applications today; the claim of race discrimination was presented one day out of time. The delay in presenting the claim was therefore only short.

8. The Claimant had attempted to submit the claim in time and Tribunal therefore accept that it was not a wilful disregard for the time limit on her part.

9. The Respondent was on notice of the allegations in that the original claim because it was largely an extraction from the Claimant's grievance which she had brought on 11 April 2019 while still employed by the Respondent. The grievance was subject to an investigation which involved interviews with RH and RW in June 2019, amongst other witnesses. A detailed investigation report was produced dated14 July updated on 25 July 2019.

10.The Respondent is prejudiced by the claim as a result of the departure of key personnel involved including one of the two putative discriminators, RH who left on 14 September 2020. RW remains employed. However, the claim was presented only one day late. The prejudice arises from the issuing of the claim itself, the additional delay does not of itself give rise to any material prejudice. The grievance and subject matter of the claim was investigated while those key individuals including RH remained employed and statements were taken and findings were made.

11.The Claims are arguable and to refuse the extension would deprive the Claimant of the claims in their entirety and thus deprive her of any potential remedy.

12.The Tribunal has taken into consideration the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay and the relative prejudice to either party of granting or refusing an extension. The Tribunal consider that the balance of hardship and prejudice favours the Claimant. Considering all the circumstances the Tribunal find that it **would** be just and equitable to grant an extension to the 17 September 2019 pursuant to section 123 (1)(b) EqA. The claim was therefore brought within time.

The application for an extension of time pursuant to section 123 EqA is granted. The claim for discrimination as set out in the claim form of the dated 17 September 2019, was therefore brought within time. Any decision about whether there was a continuing act and whether any previous acts or omissions were brought within time, is to be determined by the Tribunal at the final hearing.

Appendix 2

Amendment Applications

Amendment 1: 'Nanook' comment

1. The 'Nanook comment', is a further allegation of race discrimination.

2. The nature of amendment; the claim has from the outset been a claim that the Claimant was forced out and did not apply for the alternative role, because of discrimination. The Claimant made this application following the first preliminary hearing when asked by Employment Judge Jeram to identify the complaints for which she was seeking a remedy and those complaints which were background information to support the allegations pursued. It is a new allegation of discrimination not contained in the original claim for. The Claimant accepts that she had made a deliberate decision not to initially include it but then changed her mind.

3. The allegation is brought out of time. It is an allegation which was contained in the April 2019 grievance and is an allegation which the Respondent investigated as part of that grievance.

4. The reason the Claimant did not include this allegation initially was because she did not believe she could prove it because RH had denied the comment during the grievance investigation. RH had however accepted that she had asked whether the Claimant's culture was linked to her aggression/way she presented herself and her explanation for this was because of her past interactions with 'Jamaicans and Nigerians'. RH felt it was a legitimate way to see if there was a reason to explain the Claimant's aggression. The Claimant argues that what she was subject to was 'subconscious' discrimination.

5. Time limits; if there was a continuing act of which this formed part of it, the amendment was presented 9 months from the last act i.e. 9 months from the date of termination and approximately 4 months after the expiry of the time limit on 17 September 2019. In terms of the reason for the delay; the Claimant made a deliberate choice to not include the complaint, she was concerned about the merits of it. She was unrepresented at the time however, she did subsequently obtain legal advice albeit limited. She had taken some initial advice from the CAB and therefore knew how to obtain advice and had some limited funds to pay for professional advice. The application to amend was made promptly following the preliminary hearing before EJ Jeram in January 2019 and in accordance with the date provided by EJ Jeram for the Claimant to confirm the allegations of race discrimination.

6. The prejudice to the Claimant is that it may make it more difficult to show a continuing act and a pattern of such alleged acts of subconscious discrimination. The prejudice to the Respondent is that there is quite a significant delay and RH is no longer in their employment. However, the extant claims mainly concern RH and this allegation was part of the Respondent's investigation. Proving the allegation is not without its difficulties, however such cases are fact sensitive and inferences may be drawn from primary facts

7. The allegation is part of the alleged hostile/discriminatory environment which continued until she left the Respondent's employment and is the reason she alleges she did not apply for the alternative role. The allegation is a serious one and it can be very difficult for Claimant's to prove subtle forms of discrimination.

8. Ms Davies who carried out the investigation into the Claimant's grievance made the following comments in her report;

   Para 4.1.13 [202["Although *RH says she cannot recall making the comment about [* the Claimant's*] name she also indicated it would be something she could say. Coupled with her attempt to link behaviour with culture, even if she genuinely believed that she was being supportive, it is fairly safe to imagine that over the two years, other comments or actions could have lent themselves to painting a picture that [the Claimant] interpreted as racial profiling, harassment and even bullying. The impact of low level jibes or jokes, would build up over time into a situation that was very uncomfortable to the subject of such comments"*

9. Weighing up all the circumstances including the relative prejudice to each party, including that the Respondent was on notice of this allegation back in April 2019 and they conducted an internal investigation which involved RH, and taking into account the nature of the discrimination and behaviours alleged by the Claimant, on balance although there is prejudice on both sides to consider, the Tribunal consider that it slightly favours the Claimant and that the time limit should be extended on just and equitable grounds. It would be in accordance with the overriding objective of dealing with case fairly and justly to allow this amendment to the claim. While time limits have been considered on the basis that the termination is the last act of discrimination and the amendment application considered on that basis for today's purposes, this Tribunal is not determining the time limit issue, that is reserved for the final hearing. At the final hearing the Tribunal will have to consider after hearing all the evidence, whether there was conduct extending over a period (section 123 (3)(a) EqA). The Tribunal's final determination on whether there was a conduct extending over a period will be relevant to whether or not although this amendment is allowed, it is just and equitable to extend time, dependant on limitation issues which the Respondent should have the right to raise once the limitation period has been properly determined at trial.

10. The application has been clearly set out in the amendment application.

11. **The application is granted and the amendment is allowed subject to time limitation issues to be determined at the final hearing.**

Amendment 2: spelling of name

12. The same considerations apply as to the 'Nanook' comment in respect of the nature of the amendment application and the prejudice to the respective parties. This application however was not formally made until the hearing on 15 October 2020. It had however been mentioned in the 31 January 2020 document which clearly identified the allegation as one which the Claimant was relying upon in response to EJ Jeram's Order for her to identify her complaints of direct discrimination, therefore the Tribunal find that the Respondent was on notice that the Claimant was or would be seeking to rely on this allegation although the application to amend was not formally made until October 2020.

13. This allegation is now at would appear, put differently to how it was put during the grievance where it was alleged that RH has spoken about the difficulty, not of spelling the name but of pronouncing it. It was the latter allegation that was put to witnesses

and RH during the internal grievance hearing. During the interview with RH however she appears to make an admission that she may have said she could not say or pronounce her name; "*I don't recall saying it. I certainly wouldn't mean it in a derogatory way. It's the same with Marie I can never spell or say her surname*". [p.239]

14. The allegation is part of the same hostile/discriminatory environment which the Claimant alleges continued until she left the Respondent's employment and is the reason she alleges she did not apply for the alternative role. The allegation is a serious one and it can be very difficult for Claimant's to prove subtle forms of discrimination.

15. The Tribunal have weighed up the relative prejudice to both parties. The Respondent although not aware of the precise allegation, RH's response from the interview during the investigation into the Aril 2019 grievance, addressed the possibility of both commenting on the spelling and pronunciation of her name, denying that would have been discriminatory and she treated her the same as another colleague whose name she found difficult to spell or say.

16. Ms Davies who carried out the investigation on behalf of the Respondent, into the Claimant's grievance saw the importance of this allegation thus;

"Para 4*.2.11 [202] Commenting on the difficulty in pronouncing a name that is not of English origin is also another well – known dog whistle – highlighting the 'foreignness' of the* name *and therefore that the bearer is 'different' or 'not one of 'us' i.e. British. RH claims it would not have been her intention to cause offence but the negative impact of such insensitivity (the effect) at the very least would have been the same, regardless of intent"*

17. Given the nature of the allegation and the difficultly claimant have in establishing such forms of discrimination, on balance although there is prejudice on both sides, the Tribunal consider that it favours the Claimant. It would be in accordance with the overriding objective of dealing with case fairly and justly to allow this application subject to the same time limitation point as set out in respect of amendment no.2 i.e. whether it was brought in time or not will be determined at the final hearing when the date for limitation purposes is established.

18. The application has been clearly set out in the amendment application.

19. **The application is granted and the amendment is allowed subject to time limitation issues to be determined at the final hearing.**

Amendment 3: health issues as compared to DD

20. The application to include this allegation was not made until October 2020. It does give rise to a new allegation of discrimination not included within the original claim form however it does not change the basis of the existing claim in that it forms part of the allegation of an environment of hostility and discrimination from RH/RWs behaviour toward her. The amendment has been brought a year after the claim was first issued in September 2019. The claim is ill defined, the Claimant has not been

able to set out clearly the acts or omissions alleged to have occurred and the dates they took place. The Claimant cannot identify the meetings which it is alleged DD was late to attend or failed to attend and nor as she explained in what way RH/RW were not supportive.

21. This complaint is not one which the Respondent is able to respond to as pleaded, this is despite the Claimant being ordered to provide further particulars of this amendment by 21 November 2020 (within 14 days of the 7 November 2020 Order) for consideration at today's hearing.

22. Taking into account the delay in presenting the amendment application, the manner in which the application has been made and the relative prejudice to the parties, it would not be in accordance with the overriding objective of dealing with case fairly and justly to allow this application.

23. **The amendment application is refused.**

Amendment 4:

4.1 **The Fixed Term Employees (Prevention of less Favourable Treatment) Regulations 2002**

24. The Claimant clarified at the October 2020 hearing that she did not consider that the treatment she had received in connection with the HPC role was on the grounds of her race, she accepted that DD was treated differently because she was a permanent employee and was therefore slotted into another role. The Claimant did not apply for the alternative role because she felt it would be futile to do so, she had been working she complains in a hostile and discriminatory environment. On counsel for the Respondent mentioning that the Claimant had not issued a claim under the Fixed Term Regulations, because she was comparing her treatment to a permanent employee, the Claimant then sought advice and amended her claim. The Claimant paid for some limited legal advice, it did not extend to drafting her amendment application.

25. The amendment application the Respondent complains is unparticularised with reference to the Regulations.

26. The Claimant argues that the facts are in her claim and all she is doing is relabelling the facts to fit them within these Regulations. The facts in respect of the HCP role and that she was not slotted in and DD was, are in the claim form as originally drafted. It is not however a mere relabelling. The legal claims are distinctively different and impose a wider and different factual enquiry. The Respondent has a potential defence under the Fixed Term Regulations not applicable to the section 13 EqA claim.

27. Even where no new facts are alleged, the Tribunal must always balance the injustice and hardship of allowing the amendment against the injustice and hardship of granting it.

28. The original claim form clearly identifies the difference in treatment as being due to race and further it does not allege that the HPC role was the same role which the Claimant had been carrying out. It alleges that the Head of Personalised Care role

was is in effect a continuation of DDs old role, it does not allege that the HPC was the same role as the one which the Claimant had performed. Those facts are also not present in the further particulars provided after the first preliminary hearing in January 2020.

29. Counsel for the Respondent argues that the allegation does not appear to be a claim which 'fits' into the Fixed Term Regulations because the Claimant knew about the permanent position (HPC role) and declined to apply for it. However, her claim would appear to fall potentially within regulation 3(2)(c) in that was she was treated less favourably in relation to the "*opportunity to secure*" any permanent position, in that she had to apply for the new role once the role was merged and DD did not have to apply for the role she was slotted into. The Clamant has not however, despite having the benefit of some legal advice regarding this claim, set out the amendment clearly such that the Respondent tis able to respond to it. Despite the Claimant having had the benefit of legal advice her amendment does not identify what sections of the Fixed Term Regulations she is seeking to rely upon.

30. The other amendments set out in para 6 of the amendment application appear to be, at least those numbered under para 58 above; numbers 3, 4, 5, 6 and 11; complaints about a failure to follow the Respondent performance management process and support the Claimant with her performance, because she was on a fixed term contract and thus may fall within regulation 3 (1)(b); a detriment claim (subject of course to arguments around justification). That creates a difficulty for the Respondent in that a number of the individuals were involved; DS and RH are no longer employed by the Respondent and these allegations did not form part of the April 2019 grievance and thus had not been investigated at the time. It is now almost 2 years after the event and the Respondent will be tasked if this amendment is allowed to proceed, with defending a claim where there are not only issues around cogency of evidence but availability of key witnesses.

31. There is no dispute that the Claimant was not slotted in to the HPC role but the Claimant does not appear to allege that this was a decision taken by or solely taken by RW, but a business decision around the restructure. It is however a claim which is not a mere relabelling, there are significantly different facts alleged, including that the HPC was the same job that the Claimant was doing at the time and evidence will be required around the restructure and DD as a comparator not for the purposes of the EqA but a comparator under the Fixed Term Regulations which requires a different test of an appropriate comparator to be applied.

32. In terms of prejudice to the Claimant; the Claimant's main complaint as the Tribunal understands it, as always been and remains that she was forced to leave because of the hostile and discriminatory environment and that claim does not rest on this amendment application to include claims brought under the Fixed Term Regulations.

33. Taking into account the delay in presenting the amendment application, the manner in which the application has been made and the relative prejudice to the parties; the Tribunal find that it would not be in accordance with the overriding objective of dealing with this case fairly and justly, to allow an amendment to include claims brought under the Fixed Term Regulations.

34. **The amendment is refused.**

4.2 Victimisation

35. At the October 2020 hearing, the Tribunal identified that the complaint that the Claimant was not told about the role given to DD because of concern the Claimant may complain about what the Claimant referred to as 'preferential treatment' appeared to be better pleaded as a victimisation claim however it was unclear what the Claimant's case was around this issue and she was asked to clarify it.

36. The Claimant was provided with a copy of the EHRC guidance and required to provide further particulars of this claim. The Claimant appeared from her amendment application to be seeking an amendment to include a victimisation claim although she had also said that she was relying only on the Fixed Term Regulations in respect of the arrangements around the HPC role. To avoid confusion going forward, the Tribunal is going to address the possibility that the Claimant also intends to include a victimisation claim. The Claimant has however failed to explain whether she relies upon a protected act or belief by the Respondent that she would make a protected act, failed to identify whether she is alleging that the concern that she would make a complaint of preferential treatment (if that is her claim) related to a *protected characteristic* rather than because she was employed under a fixed term contract, fails to identify who it is alleged held this belief (if that is her claim) and who was responsible for withholding the information about the role offered to DD and further, on what grounds she alleges the failure to provide this information was linked to the making of or belief, that she may do a protected. Further, the Claimant has sought to amend her claim to allege that she was treated less favourably in the arrangements for the HPC role because she was on a fixed term contract, which is not consistent with an allegation that she was not told about the role offered to DD because of concern that she may make a protected act.

37. The amendment is not clearly pleaded such that there remains confusion around what and whether in fact, the Claimant is pursuing a section 27 claim in connection with these allegations and if so on what grounds.

38. The Claimant did not raise a grievance until after the team meetings to discuss the merger on the 5 and 18 March 2019. Further those meetings were not carried out by RW or RH but the Programme Directors, against whom the Claimant makes no allegations of discrimination or involvement in the previous acts of alleged discrimination. The Tribunal do not consider that this claim has any reasonable prospect of success and remains poorly pleaded, to allow the amendment would cause significant prejudice to the Respondent. The crux of the Claimant's case is that she was forced out and chose not to apply for the HPC role because of the hostile and discriminatory environment and that claim is not contingent on this amendment application. The issues around the failure to performance manage her through a formal performance management process do not appear to be in dispute and it is open to the Claimant to address that in her evidence and submissions and the Tribunal may draw whatever inferences it deems appropriate from those as primary findings of fact with regard to the Claimant's claims of discrimination. This amendment application however =is refused.

39. **Finding: The application to amend the claim to include a claim that not being offered the HPC role was an act of victimisation pursuant to section 27 EqA**

and/or the acts set out in para 6.1 to 6.8 were acts of victimisation under section 27 EqA (if indeed that was part of her application) is refused.

Amendment 5: Treatment of health – pre-July 2018

40. There is no reason why complaints about how she was treated prior to her return from sick leave in July 2018 could not have been included within the original claim form. The Claimant made a conscious decision not to include them. These matters were specifically raised with the Claimant at the October 2020 preliminary hearing when she stated very clearly that she was not relying on any matters which predated her return. It was clear at the October 2020 hearing that the Claimant considered that he crux of her claim related to events following her return in July 2018.

41. This amounts to a new complaint and the amendment has been brought significantly outside the time limit; the application was not made until October 2020, over a year after the time limit had expired for presentation of the claim.

42. The Claimant has not provided any details of this allegation, she merely refers to "events which pre-date July 2018" and to a lack of support before taking sick leave. The manner of the application is such that is cannot be responded to, there are no specific acts or omissions complained about, no individuals named and no dates provided.

43. There is an obvious prejudice to the Respondent given not only the delay in bringing these allegations but the lack of any detail in the amendment makes it impossible for them to respond to the allegations in any meaningful way. The April 2019 grievance did not relate to matters before her return in July 2018 but to events after, including the support provided on her return. Whatever the allegations are pre-July, they were not matters which the Respondent were put on notice about during that grievance process and had the opportunity at that time to investigate. There is obvious and serious prejudice by raising what amount to allegations which would involve substantially different areas of enquiry. In terms of cogency of evidence, the allegations involve individuals and witnesses who are no longer employed by the Respondent and who were not interviewed about these matters at the time of the Claimant's April 2019 grievance because she had not raised these complaints as part of her grievance.

44. Balancing all the relevant factors; having regard to the interests of justice and relative hardship that would be caused, the relative hardship favouring the Respondent, it is not in the interests of the overriding objective to allow this amendment.

45. **The amendment refused.**

Appendix 3

C. Strike out/ Deposit Order – Application

Allegations pre- July 2018:no factual allegations and not particularise

Finding: The amendment has not been granted and therefore this application is otiose.

Allegation 1.2.2.3: lacks particularisation

1. The Claimant alleges that she was undermined in that RH would have direct conversations with the managers rather than raising issues directly with her. The Claimant was required to provide further particulars including the date the conversations took place, what those conversation were and who they were with.

2. The Claimant is not able to identify dates, she refers still in general terms about finding out after the event about meetings with the PMs regarding programme objectives. There is evidence given by one of the PMs during the grievance investigation however where she refers to 'sensing' that RH sometimes came to the PMs to discuss things before coming to the Claimant.

2. This allegation is not particularised however, there is some support for this allegation within the grievance investigation. It is important particularly in cases of discrimination where there are disputed facts, for the Tribunal to base its decision on its findings after the individual claimant has had an opportunity to lead evidence and the Tribunal reminds itself that the drawing of inferences is of particular relevance in cases of discrimination (and this is a case where the main putative discriminator accepted that she had enquired whether the Claimant's reported aggression was due to her culture). Whether and what inferences are to be drawn once all the primary findings of fact are made is a matter for the Tribunal at the final hearing. The Tribunal does not consider that this allegation is bound to fail given the wider issues in the claim.

3. While this allegation in isolation appears to have little reasonable prospect of success, the Tribunal retains a discretion whether to make an order. This is a claim of a lack of support and difference in treatment, not overt discrimination but what the Claimant's describes as subconscious bias/discrimination. It is a fact sensitive case and this case may rest on inferences to be drawn from an accumulation of what may appear to be in some instances subtle differences in treatment. Although there is however on the face of it, little reasonable prospects of establishing this specific allegation in isolation, the making of a deposit order may of itself be potentially a fatal course of action. Disputes of fact in discrimination issues should as a rule, be decided only after hearing the evidence. Striking out or the withdrawal of this allegation will not reduce the hearing time to any material extent and indeed the Respondent made no submissions at all about the likely impact on the hearing time. The Tribunal has decided not to exercise its discretion to make a Deposit Order in the circumstances of this case.

Finding: The application for a strike out or deposit order is refused.

Allegation 2.1: lacks particularisation and is vague

4. The allegation is that RW supported DWs working groups. The Claimant was not at the October 2020 hearing able to provide dates or further particulars of the workings groups or events where RW supported DD. The only information the Claimant could provide was the failure by RW to attend the Claimant's own project launch in August 2018.She was ordered to provide further particulars; the particulars provided were limited to; "

"she went to all (or most) of Debbie's working groups and hardly attended any of the ones relating *to my side of the programme"*

5. The Claimant confirmed that despite not being able to identify dates of any specific working groups of DDs which were supported by RW.

6. While the Claimant cannot recall specific events other than her own launch in in August 2018, this is another allegation about a difference in the support which was provided and as with the previous amendment, the Tribunal does not consider that this allegation is bound to fail given the wider issues in the claim and the Tribunal do not consider that it is in the interests of the overriding objective to deal with case fairly and justly in all the circumstances, to make an order striking out this allegation despite the obvious difficulties in the merits of this allegation particularly when it is taken in isolation and out of context with the wider claims and other allegations

7 . While this allegation in isolation appears to have little reasonable prospect of success, the Tribunal retains a discretion whether to make an order. The Claimant can identify one important meeting of hers, where she was unsupported. She maintains that was part of a wider difference in the support provided. The Respondent does not allege that it will reduce to any significant extent the hearing time if this complaint is struck out. The Tribunal has decided not to exercise its discretion to Strike out or make a Deposit Order.

Finding: The application for a strike out or deposit order is refused.

<u>Allegations about medication 3-5: unclear how could conclude because of race</u>

8. The Claimant makes allegations about the failure to RW to arrange mediation between the Claimant and DD, that RW had been dishonest is asserting that she was unaware why the Claimant wanted mediation or failing to inform her that DD was not prepared to engage in mediation. The Respondent applies for a strike out or deposit order on the basis that it is unclear how this alleged treatment is because of race. However, the case is about a difference in treatment and a central element of that is a difference in how the Claimant was supported. The lack of support through mediation the Claimant identifies as a further illustration of that lack of support which she alleges was because of her race.

9. Ms Davies in her investigation report commented as follows;

"*Para 4.1.12 It was clear to everyone that the breakdown in relations between the two programme managers had a significantly detrimental effect on the project officers and the overall programme… yet despite the impact, save for a few less than robust*

attempts, the situation was allowed to continue…This is a management failing of both the line manager and the two programme directors" [197]

10. It is not alleged that the Claimant has no or little reasonable prospects of establishing the facts behind her allegation but the Respondent questions the prospects of establishing the connection to the Claimant's race, however the Claimant alleges that the failure to support a mediation process was because of her race and the allegation forms part of a broader allegation of lack of support. The Tribunal do not find that it has no or little reasonable prospect of success, particularly when seen in the context of the wider claim and allegations. The Tribunal do not consider that it is in the interests of the overriding objective to make an order striking out the claim or make a deposit order.

Finding: The application for a strike out or deposit order is refused

Allegation 6.4: suggestion by others goal posts moved- does not suggest related to race

11. The Claimant has identified one specific meeting which was cancelled and in terms of changing goalposts relies upon the comments of project manager who during the investigation carried out by Ms Davies, gave evidence that following a 3-way meeting with RH and RW she felt 'deflated' as it felt as though we were constantly changing direction and focus'.

10. This allegation forms part of the broader picture of a lack of support however, the Claimant here refers to the cancellation of plural meetings but admits that due to the passage of time she cannot identify more than one. Despite relying on the comment of a witness during the investigation, she has also still failed to explain what 'goalposts' had been changed. Despite the importance in discrimination claims of hearing the evidence and the wider narrative and context to this claim, there is with respect to this allegation an absence of any clarity over the nature of the allegation. The Claimant cannot identify one 'goalpost' which was' moved' and fatally it is not even clear what the alleged goalposts are which were moved.

11. This allegation has no reasonable prospect of success and is struck out.

Finding: The application for a strike out order is granted.

Allegation 10.1: email of 14 March 219 – difficult to see how linked to race

12. The Claimant complains that she received critical and derogatory emails. She identified one email dated 14 March 2019 and refers to the existence of two other emails; 1 April 2019 and 8 March 2018. The Respondent's application references only the 14 March email

13. The Tribunal was not taken to the content of this email during the hearing however, the Respondent is relying upon its written submission largely in respect of the strike out and deposit order application and the email appears in the bundle at page 175.

The email on the face if it includes comments which arguably may be perceived as critical (the Tribunal express no view as to whether those criticisms were reasonable or not), for example;

"…I am really concerned about the dialogue that is or isn't happening"; and.
"I was also rather concern about the agenda and items discussed as there does not seem to be a lot of focus.

11. The claim is about a broader picture of lack of support and that this was different to how a white colleague, DD was supported. Whether those criticisms were reasonable or not, is a matter which is better determined at the final hearing after hearing the evidence. Counsel did not make specific oral representations on this email or comment on the other emails identified by the Claimant which may or may not, support the allegation of criticism which amounts to less favourable treatment.

Finding: The application for a strike out or deposit order is refused

Allegation of less favourable treatment on relation to health issues in amendment application: vague and unclear how test met.

Finding: Amendment 3: application to amend had been refused. This application to strike out /deposit order it otiose.

Direct discrimination in relation to dismissal: informed EJ Broughton not being pursued and unclear how could pursue given expiry of FTC

12. The Claimant confirmed that the discrimination complaint is not being pursued in respect of the slotting of DD into another role, this was pursued as a claim under the Fixed Term Regulations, however that amendment had been refused.

13. The crux of the Claimant's claim from the outset has been that she felt unable to remain with the Respondent and apply for the alternative role because of the discrimination, whether this amounts to a dismissal under section 39 (2) (c) EqA or detriment section 39 (2)(d) claim (from which the Claimant may seek to recover losses which flow from that dismissal or those detriments, subject to issues of causation etc) is a matter that should be determined at the final hearing after hearing all the evidence and legal argument.

14. The parties are referred to the Tribunal's record of the hearing in October 2020. Annex 1 para 11 (page 96 of the bundle) where the Tribunal recorded its understanding of the Claimant's claim.

15. It is not in the interests of the overriding objective to make an order striking out this claim or an order requiring a financial deposit.

Finding: The application for a strike out or deposit order is refused

New victimisation claims: no protected act pleaded and causation unclear

Finding: The application to amend the claim to add a victimisation claim in respect of the failure to make the Claimant aware of the nature of the role which DD was 'slotted into' is refused and therefore this application is otiose

Fixed Term Employee Regulations: lack of articulation and not clear how test met

Finding: The application for a strike out or deposit order is now otiose.