EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Hannah Cullen		The Hillingdon Hospitals NHS Foundation Trust

Heard at: Watford **On**: 29 March 2021
Before: Employment Judge N Shastri-Hurst

Appearances

For the Claimant: In person
For the Respondent: Mr Sudra, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

1. The Respondent's application to strike out the Claimant's claims is successful only in relation to her holiday pay claim;

2. The Respondent's application for a deposit order is rejected;

3. The Claimant's application to amend her claim to include a discrimination claim is rejected.

REASONS

INTRODUCTION

1. The Claimant worked for the Respondent trust from 1 November 2004 to 28 October 2019 as an Overseas Officer. Following a period of ACAS early conciliation between 23 January and 23 February 2020, the Claimant presented her claim to the tribunal on 23 March 2020. This claim form

contained claims of constructive unfair dismissal and unauthorised deduction of wages. The Claimant also ticked the boxes at 9.1 which confirmed that as a remedy the Claimant was seeking "compensation only" and "if claiming discrimination, a recommendation".

2. The Respondent presented its response to the claim, asking for further and better particulars ("FBPs") of the constructive unfair dismissal claim and the wages claim. Employment Judge Lewis then made an order on 25 August 2020 that the Claimant was to provide the FBPs requested within the Respondent's response – [37].

3. The Claimant attempted to comply with this order by email of 26 September 2020, however this email did not give the required FBPs. That email did however set out that the Claimant suffers from autism, that her diagnosis was recent, and that, if she had known at the time of presenting her ET1 that she suffered autism, she would have also submitted a claim for disability discrimination – [39].

4. The Claimant then provided a large amount of information regarding her claims on 20 October 2020 – [41-56]. The detail within those documents was more like a chronology of events, and did not specifically address the FBPs requested.

5. Following this 20 October 2020 correspondence from the Claimant, Employment Judge Quill on 8 November 2020 confirmed that the original ET1 did not refer to discrimination in Box 8.1, and that the Claimant's correspondence of 26 September 2020 did not amount to an application to amend the Claimant's claim in order to include a disability discrimination claim. Employment Judge Quill set out what steps the Claimant needed to take if she were to try to pursue a discrimination claim – [57].

6. The Claimant accordingly submitted an application to amend her claim to include disability discrimination on 13 November 2020 – [59-67]. On 26 November 2020, the Respondent replied to the Claimant's application, arguing amongst other matters that the Claimant's claims of constructive unfair dismissal and unauthorised deductions of wages had no reasonable prospect of success – [68]. There was further correspondence from the parties to the tribunal, following which this matter was listed for a one-day preliminary hearing today, to consider:

    a. Whether the Claimant's claims of constructive unfair dismissal and unauthorised deductions of wages have no reasonable prospect of success;

    b. Whether those same claims have little reasonable prospect of success;

    c. Whether the Claimant's application to amend her claim to add disability discrimination will be permitted;

d. For further case management orders.

7. The Claimant represented herself during the hearing and Mr Sudra represented the Respondent. To assist me in making my decision I had a bundle of 312 pages, including a skeleton argument from Mr Sudra. I informed the parties at the beginning of the hearing that I had read all of the tribunal documents (i.e. pages 1 – 93) and asked if there were any further documents they wanted me to read before dealing with the hearing.

8. At this stage the Claimant mentioned that she had provided a skeleton argument that she had sent to the tribunal the night before the hearing. This had not made its way through to me (although Mr Sudra confirmed he had received a copy) and so the Claimant re-sent the document to the clerk, who forwarded it onto me. I took 25 minutes prior to commencing the hearing proper, to read that skeleton.

9. I am grateful to both the Claimant and Mr Sudra for their help today and the professional and courteous manner in which they both conducted themselves. I also found both their skeletons of great assistance.

Reasonable adjustments

10. From reading the papers, I was aware that the Claimant suffers from autism and various mental health conditions. I explained to her that she could tell me whenever she wanted a break, and that we would go through the day one part at a time. I informed her that she could ask me to explain anything at any time, and that she should just ask if she required a few minutes to gather her thoughts. At each new stage of the hearing, I asked whether the Claimant was ready to go ahead, or whether she wanted some time to gather her thoughts.

CLAIMS

11. Despite the Claimant's best efforts to provide FBPs regarding her constructive unfair dismissal and pay claims, and to clarify her proposed disability discrimination claim, I was initially still at a loss to understand the detail of certain aspects of her claim.

12. As above, the Claimant today helpfully provided a skeleton, which she told me set out her claims more clearly and succinctly. I therefore used that as a framework, and spent the morning of the hearing teasing out the detail of the different claims. I have set out the Claimant's claims in more detail below.

Constructive unfair dismissal

13. The Claimant alleges that the Respondent was in fundamental breach of her contract of employment by way of its actions prior to her resignation. She

relies upon the implied term of trust and confidence present in all contracts of employment.

14. The Claimant has set out the ten breaches she relies upon within her skeleton argument at paragraph 2. I set them out here for completeness and ease of reference:

    a. *At the start of my sickness John Mitchell stopped all communication and effectively shunned me even though he knew how mentally ill I was.*

    b. *Despite me being exhausted and mentally unwell, the Respondent (Liz Munoz and Sema Raj-Sahonta) never responded to my reasonable request to conduct a meeting at my home (approximately 5 minutes' drive from the Respondent).*

    c. *The Respondent failed to provide the correct Occupational Health Management Referral Form or discuss it with me or provide a copy for my records which was in breach of their own policy, they used a version which did not allow for an explanation of my illness to be discussed with Occupational Health where upon I should have been given the appropriate support and safeguarding at the earliest opportunity and that was detrimental to my health at the time and caused a further deterioration.*

    d. *Despite me requesting and encouraging Ms Munoz, Ms Raj-Sahonta and Occupational Health to contact my GP, the Respondent failed to contact my GP at any time, which would have safeguarded my wellbeing as the GP's medical report would have gone on record. The GP would have advised a history of long-standing stress and anxiety issues and confirmation of my referral for autism.*

    e. *The Respondent (Ms Raj-Sahonta) refused a reasonable request to record the first sickness absence meeting.*

    f. *The first sickness absence review meeting was carried out as an interrogation and it was more an initiation of gaining grounds for further dismissal.*

    g. *My outcome letter from the first sickness review meeting stated "if you return to work" rather than "upon your return to work". The template letters were altered away from the standard format i.e. "~~UPON~~" your return crossed out and replaced with "IF". This indicates from an early position that I was not wanted back and shows the intent that from the beginning the Respondent wanted to lead down a dismissal route.*

    h. *The second sickness absence review meeting "Stage 2" was clearly advertised as you enter the building for all to see which caused me distress, anxiety and embarrassment.*

i. *Despite me being distressed at the Stage 2 meeting and bearing in mind I was sick and mentally unwell, Ms Munoz emailed me that same afternoon to ask if I would like to apply for the full-time Band 4 position in the department.*
   i. *The Respondent (Mr Mitchell and Ms Munoz) knew I could not work full time hours;*
   ii. *I had previously been told by Mr Mitchell that I would be a part-time Band 5 (Assistant Overseas Manager) as support to Ms Munoz and to deputise in Ms Munoz's absence.*
   iii. *The Band 4 full-time job was "ear marked" for the Band 2 part-time worker that I employed to assist with admin on a temporary basis, which was before Ms Munoz joined the Respondent. This means that additional hours were being worked in the department. If I had been supported and I returned to work, the department would have been over staffed. No additional members of staff have been employed in the department since my resignation.*

j. *No weekly touch points or telephone calls from the Respondent to see how I was doing and no communication from the Respondent in the final weeks before my resignation.*

Pay claim

15. This is a claim for accrued but untaken holiday pay, based upon the Claimant's leaver's form at [101] in which it states she is owed 25 hours of annual leave.

Disability discrimination

16. The Claimant relies on depression, anxiety/stress and autism as being disabilities under s6 of the **Equality Act 2010** ("EqA"). I refer to the Claimant's "disabilities" throughout this judgment: I do however note that the Respondent has not conceded that these conditions amount to disabilities, nor have I made any judgment as to whether the Claimant was, at the relevant time, disabled pursuant to s6 EqA. The reference to "disabilities" is for ease, but it remains open to the Respondent to contest disability if the discrimination claims progress.

17. The Claimant had in her skeleton pared back the chronological narrative she had produced on 20 October 2020 and her application to amend on 13 November 2020, regarding her proposed claim of discrimination.

18. I spent a considerable amount of time with the Claimant picking out the points within her skeleton that are complaints, and then attempting to attach to them the most suitable label out of the five different disability discrimination claims and victimisation claim available to claimants within the EqA. In relation to each complaint, I asked Mr Sudra whether he agreed with my proposed label: evidently, I explained that I did not take his ascent to my labels to be an indication of agreement that those claims

have any merit, but made it clear I was simply trying to reach a position where the Claimant's potential claim could at least be framed within the relevant legislation, so that I can fairly and properly make a decision on her application to amend – see **Mbiusa v Cygnet Healthcare Ltd UKEAT/0119/18** below.

19. We were therefore able to frame the Claimant's case as seven acts of discrimination during her employment, and eight acts of post-termination discrimination/victimisation. These acts are listed below.

	Date of complaint	**Detail of complaint**	**Section of the EqA**
		Discrimination during employment	
1	01.07.19	Ms Munoz did not complete the Occupational Health referral form correctly. The correct form was not used. These inaccuracies led to an exacerbation of the Claimant's disabilities as compared to those who do not suffer with her disabilities	S19 – indirect discrimination
2	16.07.19	The Claimant asked if the Stage One meeting could be held at her home. This request was rejected	S20/21 – failure to make reasonable adjustments
3	18.07.19	The Claimant asked if she could record the Stage One meeting. This request was denied	S20/21 – failure to make reasonable adjustments
4	22.07.19	The conduct of the Stage One meeting was hostile, confrontational and the Claimant felt as if she was not believed. The Claimant alleges that the participants were aware of her mental state and used that vulnerability deliberately to make the situation worse for the Claimant.	S13 – direct discrimination
N/A	22.07.19	Also at the Stage One meeting, the Claimant suggested that the Respondent speak to her GP and/or obtain the GP's notes. The Respondent did not do this. Had they done so, they would have had a fuller understanding of the Claimant's health issues	This is a point that goes to the Respondent's knowledge of disability. It is not a claim in its own right, but is relevant.
5	28.08.19	The Claimant requested on both	S20/21 –

	& 11.09.19	these occasions that there be a different HR representative to Ms Raj-Sahonta at the Stage Two meeting. This was because of how Ms Raj-Sahonta had made the Claimant feel throughout the sickness absence process so far. This request was denied	failure to make reasonable adjustments
6	29.08.19	Ms Munoz invited the Claimant to apply for the full-time version of her role. Ms Munoz knew that the Claimant was unable to work full time, and that she in fact was exploring another role at that time (Band 5 role). The Claimant claims that this was done in order to unsettle the Claimant, in the knowledge of her conditions	S26 – harassment
7	12.09.19	The Stage Two meeting was held in a room with a glass panel in the door, meaning that passers-by could see that the Claimant was in a meeting. Also, there was a board in the entrance way to the building in which the meeting was held that stated that there was a formal Stage Two meeting in progress in that particular room. Therefore, it was obvious to passers-by that the Claimant was in a Stage Two meeting. The Claimant believes that this was done deliberately by her manager, knowing that the Claimant was of a fragile state of mind.	S26 – harassment
		Post-termination discrimination/victimisation	
		Note, the umbrella allegation here is that the Respondent breached its own policies, namely the Equality Policy, the Managing Sickness Absence Policy and the Dignity at Work Policy, along with the CARES values.	
1	13.03.20	It became known to the Claimant through the investigation report that the Respondent had not been able to provide the Claimant with a copy of her professional development review notes taken originally by Mr Mitchell, which contained positive	Ss26/108 – harassment

		feedback about the Claimant's performances, as well as information pertinent to her health conditions. The Claimant contends that these notes have been deliberately lost in order to cover up the Respondent's knowledge of her disability and her good conduct.	
2	Around 22.03.20 onwards	The manner in which the appeal process was dealt with. The Respondent did not acknowledge the Claimant's appeal when it was provided on 22 March 2020. It was not acknowledged until the Claimant chased this on 17 June 2020. There was also a delay in hearing the appeal. The Claimant believes that this was conduct they would apply to all ex-employees, but it had a particular disadvantage to her in that it caused the Claimant heightened anxiety and stress.	Ss19/108 – indirect discrimination
3	Around 28.10.19 onwards	The Claimant did not receive a completed leaver's form, and did not have an exit interview, at the time of her termination. The Claimant alleges that this was done deliberately in order to cause her more stress/anxiety.	Ss26/108 harassment
4	Post-February 2020	The Claimant asked Ema Ojiako (Terry Roberts' replacement) for a copy of the notes from the meeting she had with Mr Roberts on 30.12.19. Ms Ojiako failed to ever reply. The Claimant alleges that this failure to reply was deliberately done to cause the Claimant further anxiety/stress.	Ss26/108 harassment
5	Around 13.03.20	The investigation report produced on 13 March 2020 did not contain an important witness statement. The Claimant alleges that this statement was missed out as it would be quite damning for the investigation; they wanted to avoid dealing with that statement and knew this would cause the Claimant further anxiety/stress	Ss26/108 harassment
6	Around 15.09.20	The Claimant was sent an invitation letter to the appeal meeting for 15	Ss26/108 harassment

		September 2020. This invitation was sent from Ms Raj-Sahonta. Given the Claimant's experience of Ms Raj-Sahonta through the course of the sickness absence process, and that the Respondent knew the Claimant had previously asked for a different HR representative, the Claimant's anxiety and stress levels were heightened during the run up and in the appeal hearing/. The Claimant was concerned that Ms Raj-Sahonta would be on the call/Teams meeting.	
7	October 2020	At the appeal hearing on 5 October 2020, the Claimant was informed that she would receive the outcome letter by 15 October 2020. She in fact received it on 23 October 2020. One symptom of autism is that timelines and deadlines are very important, and any change to them can be distressing. The Respondent was aware that the Claimant had to provide FBPs to the tribunal by 20 October 2020. It is the Claimant's belief that the Respondent delayed the appeal outcome in order to see what the Claimant was intending to produce to the tribunal	S27 – post-termination victimisation
8	02.11.20	The Claimant was given a specific date from the Respondent on which she would receive communication from them. This deadline was missed. As above, such change in deadlines without explanation has a detrimental effect on the Claimant due to her autism. The Claimant alleges that the Respondent delayed this communication because the Respondent knew that the Claimant was at that time talking to ACAS and had certain tribunal deadlines to meet	S27 – post-termination victimisation

20. The above discrimination claims therefore form the basis of the Claimant's application to amend her claim to add those claims.

ISSUES

21. As above, the hearing today was listed in order to deal with the following matters:

    a. Whether the Claimant's claims for constructive unfair dismissal and unauthorised deduction of wages should be struck out as having no reasonable prospect of success under r37(1)(a) of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules");

    b. In the alternative, whether a deposit order should be made as the Claimant's claims for constructive unfair dismissal and unauthorised deduction of wages have little reasonable prospect of success under r39 of the Rules;

    c. Whether the Claimant's application to amend her claim to include a claim for disability discrimination, dated 13 November 2020, should be permitted.

LEGAL FRAMEWORK

Strike out

22. The Respondent applies to strike out the Claimant's claims under r37(1)(a) of Sch 1 of the Rules, which provides as follows:

> "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 on any of the following grounds:
>
> (a) That it is scandalous or vexatious or has no reasonable prospect of success; ..."

23. Generally, this power to strike out should only be used in rare circumstances – **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**. It is understood that, as a general rule of thumb, claims should not be struck out where there is a dispute of facts that go to the core of the claim – **Ezsias v North Glamorgan NHS Trust [2007] IRLR 603**.

24. I am also assisted by the case of **Balls v Downham Market High School and College [2011] IRLR 217**, in which Lady Smith held:

> "When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; 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. There must be *no* reasonable prospects."

25. Only in exceptional circumstances will a claim with contested facts be struck out – **Ezsias**. However, there are some caveats to the general approach of caution towards strike out applications. For example, when:

    a. "It is instantly demonstrable that the central facts in the claim are untrue" – **Tayside**;

    b. There is no real substance to the factual assertions the claimant makes, particularly in light of contradictory contemporaneous documentary evidence – **ED & F Man Liquid Products v Patel [2003] EWCA Civ 472**;

    c. There are no reasonable prospects of the facts needed to find liability being established. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence – **Ahir v British Airways plc [2017] EWCA Civ 1392 CA**.

26. When considering an application to strike out, a claimant's claim must be taken at its highest, as it is set out in the ET1, "unless contradicted by plainly inconsistent documents" – **Ukegheson v London Borough of Haringey [2015] ICR 1285**. It is important to take into account that a claim form entered by a litigant in person may not put that claimant's case at its best as had it been properly pleaded – **Hasan v Tesco Stores Ltd UKEAT/0098/16.** The best course of action in such a scenario is to establish exactly what the claimant's claim is, and, if still in doubt about prospects, make a deposit order – **Mbiusa v Cygnet Healthcare Ltd UKEAT/0119/18**.

Deposit order

27. The tribunal has the power to make deposit orders against any specific allegations or arguments that it considers have little reasonable prospect of success under r39 of the Rules:

> "39(1) Where at a preliminary hearing (under rule 53) the tribunal considers that any specific allegation or argument in a claim…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.
>
> 39(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

28. The rationale of a deposit order is to warn a claimant against pursuing

claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for making a deposit order.

29. The purpose of such an order is not to restrict disproportionately access to justice, hence any order made must be for an amount that is affordable by a party, and can be realistically complied with – **Hemdan v Ishmail and anor [2017] IRLR 228**.

30. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – **Adams v Kingdon Services Group Ltd EAT/0235/18**.

Application to amend

31. Under r29 of the Rules, the tribunal has general case management powers, which include the general discretion to grant leave to amend a claim.

32. The leading case on such applications is **Selkent Bus Company Ltd v Moore [1996] ICR 836**. In this case, the tribunals were reminded that the discretion to permit amendments is to be exercised "in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions".

33. In **Chief Constable of Essex Police v Kovacevic UKEAT/0126/13** the EAT held that it is "fundamental that any application to amend a claim must be considered in the light of the actual proposed amendment". However, a lack of particularisation need not result in the refusal of an application to amend if that problem can be remedied before the decision on the application is made – **Amey Services Ltd v Aldridge UKEATS/0007/16** paragraph 23.

34. The overall test for me to apply is to consider the balance the hardship and injustice that each party would suffer if I refused or granted the application respectively – **Selkent**.

35. More specifically, there are three elements that I will have a mind to:

    a. The nature of the application. There are three categories of amendments:
        i. amendments which alter the basis of the existing claim but do not raise a new separate head of complaint;
        ii. amendments which add or substitute a new cause of action but is linked to or arises out of the same facts as the original claim; and,
        iii. amendments which add or substitute a wholly new claim or cause of action unconnected to the existing claim.

In determining whether there is a new claim, or whether I am dealing with a change of label, it is necessary to look at the original ET1 and see whether there is a "causative link" with the proposed amendment – **Housing Corporation v Bryant [1999] ICR 123**.

b. The timing of the application. An application should not be refused purely on the ground that there was a delay in making it. Delay is a discretionary factor for consideration, which includes the need to consider why the application was not made earlier and why it is being made now.

c. The manner of the application.

36. Further, the tribunal is entitled to consider whether the new claim has reasonable prospects of success. If it has no reasonable prospects, it would make no sense if an application to amend could not be refused on that basis – **Gillett v Bridge 86 Ltd UKEAT/0051/17** at paragraph 26.

37. It is also important to consider the extent to which the amendment raises new issues of both fact and law. Generally, the more new issues there are, the less likely it is that the amendment will be granted – **Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148** at paragraph 48.

Time limits

38. If the amendment falls within the third category and is an entirely new claim, then it becomes necessary to consider time limits around the bringing of that claim, and whether the appropriate time limit should be extended under s123 EqA. The time limit is only one factor, although it is an important one and can be decisive – **Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07**.

39. The first issue is to determine when the new claim is deemed to take effect. The EAT, in **Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16** held that, where a new claim is permitted by way of an amendment application, it takes effect from the date on which permission to amend was given – paragraph 109(a).

40. The second issue for consideration is, if the claim is time-barred, is a tribunal obliged to consider the factors relating to both the application to amend and to a possible extension of the time limit at the same time? Again, I turn to the EAT in **Galilee**: a tribunal is entitled to either defer the whole question of amendment and limitation to be decided after evidence has been given, or to allow the amendment and leave the limitation issue to be decided at that later stage – paragraph 98.

41. The issue of extension of time on the ground of "just and equitable" has recently been considered by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**. In

this case, Underhill LJ warned against taking the rigid approach of using the oft-cited checklist provided in the case of **British Coal Corporation v Keeble [1997] UKEAT 496/98** when considering the factors relevant to a decision on time limits. At paragraph 37 of his judgment, Underhill LJ held:

> "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [EqA] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in **Keeble**, well and good; but I would not recommend taking it as the framework for its thinking."

42. The case of **Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576** acts as a reminder from the higher courts that "time limits are applied strictly in employment and industrial cases...A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule" – paragraph 25.

43. As set out by Langstaff J in **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13**, a claimant cannot hope to satisfy a tribunal to extend time unless they can answer two questions – paragraph 52:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the scone is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

FINDINGS OF FACT

44. I have only made findings of fact so far as they are relevant to the applications before me. Where I have not covered certain facts, it is because they are not relevant to the issues I have set out above.

45. I have not heard any oral evidence on these matters from either party (other than from the Claimant on the limited issue of her financial means). The facts that follow are therefore based solely on the documents I have seen. These findings will therefore, inevitably, be incomplete. It will be for the tribunal at the final merits hearing to make full findings on what actually occurred between the two parties throughout the relevant chronology. Any findings set out below are therefore not binding on any future tribunal.

<u>The Claimant's alleged disabilities</u>

46. The Claimant suffers with depression, anxiety, stress ("mental health conditions") and autism. Regarding the Claimant's mental health conditions, these arose at the earliest in 2015, following some traumatic events in her life. There were further such events in 2016 and 2017 which added to those conditions.

47. In terms of the Claimant's autism, the Claimant was referred by her GP for an autism assessment on 7 December 2018. She eventually received an appointment to attend an assessment in May 2020. There then followed a diagnosis of autism on 8 September 2020. Around this time, the Claimant informed the Respondent of that diagnosis. She however informs me that her manager, John Mitchell, was aware of her mental health conditions in around 2018 and also that she had been referred regarding exploration of autism in 2018.

Sickness absence 2019

48. The Claimant commenced work for the Respondent on 1 November 2004. From September 2016, she oversaw the Overseas Department. Between 17 June 2019 and 11 September 2019, the Claimant had taken such sickness absence leave so as to trigger the Respondent's sickness absence review process.

49. The Stage 1 sickness absence review meeting was held on 22 July 2019. This meeting was chaired by Ms Munoz as the Claimant's line manager, and Ms Raj-Sahonta from HR. The Claimant was supported by Ms Lynne Simpson, a colleague and Complaints Manager.

50. The Stage 2 meeting followed on 12 September 2019. The Claimant was supported by Ms Louise Bryn as a colleague (Assistant Head of Clinical Coding). Again, Ms Munoz and Ms Raj-Sahonta conducted the meeting.

51. On 20 September 2019, the Respondent circulated a CEO staff blog regarding mutual respect, fair treatment, and general well-being issues and the need to open communication about these issues amongst the Respondent's teams – [194]. There was a suggestion that the well-being of some employees was not being sufficiently protected, and this blog was, in a sense, a call to arms. The blog ends with the line:

> "There are so many things we can resolve quickly, they do not need to come to me or my executive colleagues for decisions".

52. The Claimant told me today that she read this, and realised that she was one of the members of staff who was falling between the gaps of well-being. She also said that the last line of the blog, quoted above, left her feeling like there was no-one left to turn to, and that she had nowhere left to go.

53. The Claimant resigned on 24 October 2019, giving notice until 28 October 2019. It is agreed that the Claimant was in fact paid for the full month of October, up to and including 31 October 2019.

54. Following her resignation, the Claimant raised some concerns with the former Chief People Officer, Terry Roberts, with whom she had a meeting on 30 December 2019. The Claimant also had a meeting on 6 January

2020 with Sarah Tedford, the Chief Executive Officer. On 23 January 2020, the Claimant entered into the ACAS early conciliation process, receiving the certificate of compliance on 23 February 2020.

55. An investigation into the Claimant's concerns ensued (summarised into seventeen allegations), under the Dignity at Work Policy, commissioned by Mr Roberts, and conducted by Andrew Caunce (Chief Pharmacist). The Claimant received the outcome of the internal investigation, produced by Mr Caunce on 13 March 2020: the report did not uphold the Claimant's concerns – [222]. Following receipt of that report, she appealed the decision to Cathy Cale (Medical Director) on 22 March 2020. The day after, she presented her ET1.

56. The Claimant emailed Sue Smith (Chief People Officer) on 24 July 2020, to inform her of an underlying health issue, namely her referral for a full diagnostic assessment for autism.

57. There was a delay before the appeal hearing was able to take place; it was eventually convened via MS Teams on 15 September 2020, then adjourned to and concluded on 5 October 2020 – [256-298]. The appeal officer was Sue Smith, supported by Anjali Joshi (Director of Operations) and Nishant Aggarwal (HR Business Partner). Mr Caunce attended to represent the management's case. Between these two dates, on 26 September 2020, the Claimant applied to "resubmit" her claim – [39].

58. On 20 October 2020, the Claimant provided three documents to the tribunal in an attempt to provide FBPs – [41]. Three days later, on 23 October 2020, the Claimant received the outcome of the internal appeal process, which upheld her appeal – [102]. Of importance is one particular passage at [103]:

> "Based on the information presented to us, we have identified a number of concerns regarding how you were treated prior to your decision to resign – these include poor communication around the sickness absence process and therefore the impact this had on your perception that you were not being supported by either your immediate line manager, your senior manager, and also the HR Representative.
>
> Whilst every effort was made to follow the Sickness Absence Policy and you were referred to Occupational Health and supported to access counselling and talking therapy sessions, your line manager was clearly inexperienced in dealing with sickness absence. It appears that this inexperience did exacerbate the situation, made the process somewhat robotic, and in our view could have been handled with more sensitivity and compassion in line with our CARES values.
>
> As stated within the Investigation Report, whilst it does not appear that there was any intention to deliberately upset you or treat you unfairly, the effect was that you did feel that you had been treated unfairly.
>
> It is therefore the conclusion of the Appeal Panel that the way in which your sickness absence was managed did constitute "unfair treatment" as outlined within Section 5.3 Examples of Unacceptable Behaviours within Section 5 Explanation of Terms and Recognising Bullying and Harassment within the Dignity at Work Policy".

59. The Claimant attended an "Outcome of Appeal" meeting on 2 November 2020, via MS Teams, hosted by Sue Smith, the Chief People Officer – [299-312].

60. On 8 November 2020, Employment Judge Quill invited the Claimant to apply to amend her claim, if this is what she sought to do. The Claimant so applied on 13 November 2020, to amend her claim to add a claim of disability discrimination.

61. The Claimant had some legal advice in 2020. Initially she went to a firm of solicitors in February/March 2020 (before the ET1 was presented), however they did not get into the meat of the claim as the Claimant was not satisfied with their service, as her case was to be dealt with by a trainee. In June/July 2020 (after receipt of the ET3), the Claimant sought assistance from another law firm, sending them the internal investigation report. She then went back to the original firm in December 2020.

Holiday pay

62. The Claimant only received her leaver's form at [101] following her Data Subject Access Request ("DSAR") in March 2020. That form is dated 28 October 2019, the date on which the Claimant's employment came to an end. The Claimant queried an entry on that form that stated she was owed 25 hours' pay.

63. Internal discussions took place within the Respondent in May through to July 2020, following the Claimant's query, in an attempt to get to the bottom of whether the Claimant was owed any outstanding holiday pay upon her departure – [94-96]. On 11 July 2020, Mark Handley, the Interim Assistant Director of Human Resources Operations, clarified that in fact the Claimant was owed 13 hours, not 25 – [94]. However, the Claimant was paid the additional three days of 29, 30, 31 October 2019, past the end of her notice period, which concluded on 28 October 2019. This meant that in fact, if anything, the Claimant technically owed the Respondent some pay.

64. This explanation was repeated to the Claimant in an email from Nishant Aggarwal, on 12 March 2021 – 113. Ms Aggarwal attached a copy of the Claimant's leaver's form – [114]. This form is different from the one at [101] in that it has been amended by handwriting, and signed again on 8 November 2019. The amendments show that the original 25 hours of annual leave to be paid was reduced to 13 hours. There is then a comment that states "taken 29 – 31/10/19" and also "paid to 31/10/19 all ok".

65. I clarified with the Claimant at the hearing that her claim for 25 hours' pay was based solely on the leaver's form at [101], and that she was not able to provide any further details. This is corroborated by the Claimant's own email to the Respondent at [115], in which she states:

> "Could you please break this down and simplify it for me further.
>
> Please also confirm how much annual leave I had taken from April 2018 – April 2019 and from April 2019 until I resigned. ..."

CONCLUSIONS

Strike out – holiday pay claim

66. The Claimant's claim for unauthorised deduction from wages relates to 25 hours of accrued but untaken holiday leave. The Claimant's case on this is that she was provided with a leaver's form that states on it that "A/L to be paid/recovered after last working day" was 25 hours – [101].

67. As I have set out in my findings, the Respondent subsequently explained that there had been an error in calculation, that the Claimant was only in fact owed 13 hours for accrued but untaken holiday leave, and that this was effectively cancelled out by the overpayment to the Claimant for the last three days of October 2019.

68. It therefore appears that the Claimant does not have a positive case that she can advance as to why she is owed 25 hours rather than the 13 hours the Respondent has calculated. The Respondent has shown that these 13 hours balance with the Claimant's overpayment for the last three days in October 2019.

69. I therefore conclude that this is a case where the Claimant has no chance of proving the facts she needs to prove (i.e. that she is owed 25 hours' holiday pay), in light of the documentation I have seen before me. There is no real substance to the Claimant's holiday pay claim. The Claimant's pay claim has no reasonable prospect of success, and therefore is struck out.

Strike out – constructive unfair dismissal claim

70. The Respondent's submissions on this aspect of its application in the skeleton produced on its behalf are predicated on the basis that the Claimant had not done sufficient to particularise her claim for constructive unfair dismissal. We have moved on from this position now as we have a defined list of ten breaches of the implied term of trust and confidence that the Claimant seeks to rely upon.

71. In brief, to be successful in a constructive unfair dismissal claim, the tribunal must be satisfied that:

    a. The Respondent was guilty of fundamentally breaching the Claimant's contract of employment;
    b. The breach(es) was (were) at least in part the reason for the Claimant's resignation; and,

c. The Claimant did not waive her right to resign in response to the breach(es) by affirming her contract.

72. In his oral submissions, Mr Sudra highlighted that the test for whether there has been a fundamental breach of contract is an objective (not subjective) one: it is irrelevant that a claimant may believe their contract has been breached. The question as to whether there has been a fundamental breach is a question of fact for the tribunal, which is highly context-specific. Mr Sudra reminded me that it has been held by Maurice Kay LJ that the "central question is whether it had 'clearly shown an intention to abandon and altogether refuse to perform the contract' (**Eminence Property Development Ltd**, at paragraph 61)" – **Tullett Prebon Plc and ors v BGC Brokers LP and ors [2011] IRLR 420**, paragraph 24.

73. I was also reminded that, even where conduct is likely or calculated to destroy the relationship between the parties, if there is a reasonable and proper cause for that conduct, then there will be no fundamental breach of contract. This goes back to the definition of a fundamental breach of the implied term of trust and confidence as set out in **Malik v Bank of Credit and Commerce International SA [1997] ICR 606**:

> "The employer shall not, without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".

74. Mr Sudra also highlighted to me that any act that is said to amount to a fundamental breach cannot be a small or trivial act. He relied upon the case of **Omilaju v London Borough of Waltham Forest UKEAT/0941/03/MAA**, in which it was held that, when dealing with a series of acts said to amount to a fundamental breach, it is important to take the conduct as a whole and assess the cumulative impact. The final act in the chain of conduct need not in itself amount to a breach of contract.

75. The law has since been developed further regarding cases where there is a series of acts that culminate in a "last straw". In **Williams v Alderman Davies Church in Wales Primary School UKEAT/01.08/19LA**, HHJ Auerbach held that, even if the alleged final straw is found to be entirely innocuous, the tribunal may still look back at the rest of the conduct relied upon. If that prior conduct amounts to a fundamental breach, which has not been affirmed, and the claimant resigns in response (at least in part) to that conduct, then his/her claim is made out.

76. Turning to consider the ten alleged incidents that led the Claimant to resign and taking the Claimant's claim at its highest, as I must, I note the following:

a. There are disputes of fact that cannot be resolved by looking at the documentation I have in front of me today: for example,

whether she was shunned by her manager (Mr Mitchell), or whether the Stage One meeting was conducted in a manner that was hostile;

b. The internal investigation appeal held that the Claimant had been subjected to "unfair treatment" regarding the conduct of her sickness absence process. I note that several of the alleged acts said to contribute to a fundamental breach stem from this process. This suggests that there is admission from the Respondent that there was at least something wrong with way in which the Claimant's sickness absence process was conducted;

c. It is alleged by the Claimant that there was a chain of events that spanned several months that led to her resigning. I accept that some of those acts appear on the face of it to be less likely to contribute to a fundamental breach than others. However, it will be a matter of evidence as to whether each and every one of these acts contributed to a fundamental breach, was the reason (at least in part) for the Claimant's decision to resign, and why also she resigned when she did.

77. Strike out is a draconian measure, that requires a high bar to be met by the Respondent, who, in such an application, bears the burden of proof to demonstrate that there are *no* reasonable prospects of success.

78. I am not satisfied that the Respondent has met that high burden, and I therefore reject the application to strike out the Claimant's constructive unfair dismissal claim.

Deposit order – constructive unfair dismissal

79. Again, taking the Claimant's claim at its highest, I am satisfied that the Claimant has more than "little reasonable prospects" of proving that she resigned (at least in part) due to the alleged breaches, and that she did not affirm her contract of employment in light of the cumulative effect that one must consider in last straw cases.

80. The one part of the constructive unfair dismissal test that has caused me to pause at this "little reasonable prospect" test is the first limb that any claimant must demonstrate, that there has been a fundamental breach of contract.

81. Mr Sudra for the Respondent argues that the course of conduct alleged to have taken place on the part of the Respondent is simply not serious enough to amount to a fundamental breach. I have some sympathy with that argument in relation to certain of the ten breaches alleged by the Claimant, and I have considered whether to make a deposit order in relation to some of the individual alleged breaches (for example, the seventh alleged breach regarding the wording of the template outcome letter).

82. However, the Claimant's case rests on an argument that the effect of all ten incidents taken together amount to a breach. I consider therefore that the issue of the weight of each individual alleged breach, and their individual contribution to any overarching fundamental breach is one that can and should be rightly left, unencumbered, to be pursued and explored at a final hearing. I am not satisfied that, taking an overall view of the ten alleged breaches and the alleged cumulative fundamental breach, I can find at this stage, on the evidence before me, that there is little reasonable prospect of the Claimant succeeding in her constructive unfair dismissal claim.

83. I therefore refuse the application for a deposit order.

Application to amend

Nature of amendment

84. Dealing first with the nature of the amendment, there is no suggestion of a discrimination claim within the ET1 at box 8.1or 8.2, nor is there any such detail within the Claimant's letter attached to the ET1 (her Grounds of Complaint at [17]). I agree with Employment Judge Quill's analysis that no discrimination claim appears on the face of the Claimant's ET1.

85. Although there is some overlap with the facts as now pleaded (and set out above) between the Claimant's constructive unfair dismissal claim and her pre-termination discrimination claims, those facts were not at all clear from the Claimant's original ET1 form. Furthermore, the post-termination discrimination claims are entirely unrelated to the facts contained within the original claim form, or indeed within the now clarified constructive unfair dismissal claim.

86. I therefore conclude that this is an amendment that falls within the third category set out in **Selkent**.

Timing and manner of the amendment application

87. The Claimant's ET1 was presented to the tribunal on 23 March 2020. Her application to amend is dated 13 November 2020. There was therefore an eight-month gap between the Claimant presenting her original claim and her seeking to amend her claim.

88. The Claimant explained that she thought she had raised a discrimination claim in her original ET1, and understood that she would be asked for further detail as and when the tribunal considered it appropriate. She did not understand that to tick the remedy box at Box 9.1 regarding recommendations was far from sufficient to raise a discrimination claim. The Claimant informed me that she did not understand herself to be disabled at the time of entering her ET1; however, at the time of presenting the ET1, the Claimant also told me that she believed she had

been discriminated against on the grounds of her health and thought she had indicated a desire to raise a discrimination claim on her ET1.

89. I accept that the Claimant had various deadlines approaching at the same time as the deadline for submitting her ET1. I also accept that she was told by an ACAS representative to do the best she could and to get her ET1 in on time, and that she could provide more details later on. However, all that was required of her was to tick the box marked "I was discriminated against" at Box 8.1, or even write a couple of lines in her Grounds of Complaint stating that she thought she had been discriminated against, yet she did not do so. I further note that the Claimant has been able to send in numerous and lengthy documents into the tribunal setting out the facts around her claim and her disabilities (even if they have needed some clarification today).

90. The Claimant only provided such details and made her application when it was made clear to her by Employment Judge Quill's order that she did not at that stage have a live discrimination claim, and would have to apply to amend.

91. I note however that the Grounds of Resistance, dated 12 May 2020, set out clearly that the Respondent had understood that the Claimant was only bringing claims of constructive unfair dismissal and unauthorised deductions from wages – [29]. I also note that Employment Judge Lewis' order of 25 August 2020 did not mention any discrimination claim, or ask for details about such a claim.

92. The Claimant told me that she did wonder why no-one had asked her for specifics about a discrimination claim. However, despite this concern, the first document she sent regarding disability discrimination is dated 26 September 2020, a month after Employment Judge Lewis' order. I consider that the lack of reference to discrimination in both the Respondent's Grounds of Resistance and Employment Judge Lewis' order should have prompted the Claimant to act more swiftly in applying to amend. Alternatively, given that the Claimant told me that ACAS advised that she could enter the ET1 and add more information later, she could reasonably have been expected to take steps to set out her discrimination claim without any need for prompting from the Respondent or the tribunal. I accept Mr Sudra's point here, that it is not for the Respondent or the tribunal to make the Claimant's case for her or to second guess the claims she was attempting to present in her ET1.

93. I bear in mind that the Claimant suffers from autism, however this has not prevented the Claimant from setting out facts that she relies upon for her claims in various documents. She also had access to some legal advice some time prior to her application to amend being made (at least four months).

<u>Time limits</u>

94. Given that I have found that this is an amendment application seeking to bring an entirely new claim, I need to consider the impact of time limits. If I were to allow the amendment, then the discrimination claim would be deemed to have been presented on the date of this order. The last act of alleged discrimination is said to have occurred on 2 November 2020, and therefore any claim relating to that act should have been presented to the tribunal on or before 1 February 2021. The discrimination claims would therefore be out of time by over two months.

95. I have heard the reasons for the Claimant's delay in making the application to amend, and am content that I can consider the issue of time limits at this stage in proceedings.

96. I remind myself that the starting point is that time limits must be strictly enforced unless the Claimant can prove that the application was brought in such time as was just and equitable after the expiration of the primary time limit.

97. I turn to the two questions set out by Langstaff J. Firstly, the reason for the delay in bringing the application to amend. As I have set out above, I consider that the Claimant could and should have provided some indication of her desire to pursue a claim for discrimination earlier than 26 September 2020, given that she understood from ACAS that she would be able to provide further detail after submission of her claim. Certainly, upon receipt of the Respondent's ET3, which only referenced constructive unfair dismissal and the pay claim, this should have alerted the Claimant to the need to act in order to make it clear that she was pursuing a discrimination claim.

98. In terms of the second question, why the amendment was not made sooner, I accept that part of the delay is due to the tribunal listing a hearing of the Claimant's application some four months after she made her application. However, I come back to my reasoning above: had the Claimant reacted sooner and raised discrimination earlier, then doubtless a hearing would have been listed earlier.

99. I turn to consider the prejudice that would be suffered by the Respondent if I were to extend time – **Miller v Ministry of Justice UKEAT/0003/15**. There is the inevitable prejudice of having to defend a claim to which the Respondent has a perfectly legitimate limitation defence; this is a staple prejudice relied upon by all respondents facing an extension of time application.

100. There may also be "forensic prejudice" suffered by a respondent: in other words, whether, due to the historic nature of any allegations, a respondent loses its ability to defend itself effectively due to faded memories of witnesses, or lost documents and so on. I do not accept the Respondent's argument that witnesses' memories will have faded so as to mean that they are disadvantaged in their ability to give evidence on the discrimination claims. The claims go no further back in reality than the

constructive unfair dismissal claim. Neither do I accept the argument that some of the Respondent's potential witnesses have left: this was a speculative statement made by Mr Sudra, who submitted that other employees of the Respondent (besides Mr Robertson) may have left. He was unable to tell me whether in fact any potentially relevant witnesses had left the Respondent's employ. I therefore find that there is no forensic prejudice to be suffered should I extend time. However, the lack of forensic prejudice is not decisive in favour of an extension of time.

101. As I have set out above, I consider that the Claimant could and should have acted more promptly in making the application to amend, particularly given that she understood that she had been discriminated against on the basis of her health at the time of entering her ET1. I am not satisfied that I have received sufficient answers to the two questions raised by Langstaff J so as to satisfy me that this is a case which should be an exception to the usual strict rules on time limits.

102. I therefore find that the Claimant's claim is out of time.

Balance of hardship and injustice

103. If I reject the Claimant's application to amend, she loses the ability to pursue her discrimination claim. She also therefore loses the opportunity of obtaining an award for injury to feelings. However, the Claimant's claim of constructive unfair dismissal survives and, if successful, the Claimant will be able to claim losses stemming from her dismissal.

104. If I allow the application to amend, the Respondent would face the obvious detriment of losing the ability to rely upon a perfectly legitimate limitation defence. A longer hearing will be required, leading to more costs incurred by the Respondent (and arguably also the Claimant, although she is representing herself). Not only will more evidence need to be heard (particularly regarding the post-termination claims) but submissions and deliberations will inevitably be longer as the tribunal will have to consider numerous different legal tests regarding the different discrimination and victimisation claims. There will also be an increased amount of disclosure which will in turn lead to more costs and tribunal time.

105. Mr Sudra submitted that the Respondent would suffer hardship given the time that had passed since the alleged acts of discrimination, and the potential loss of witnesses from the Respondent. I have set out my conclusions on this point in reference to "forensic prejudice" above, and do not consider this particular argument to hold much weight.

Conclusion

106. In conclusion, weighing up the balance of hardship and injustice, and the nature, timing and manner of the application (including reference to time limits), I refuse the application to amend. The balance of hardship and injustice falls in favour of refusing the application.

107. I should note that, even if I am wrong regarding my decision that the time limit here should not be extended, the fact that the claim would then have been in time would not have tipped the balance in favour of me permitted the application to amend. In other words, regardless of the time limit issue, I would have found that the application to amend should be refused, taking all relevant factors into account.

SUMMARY

108. In summary, the only claim that moves forward from this point is the Claimant's claim for constructive unfair dismissal.

109. In the presence of both parties, I listed a telephone closed preliminary hearing for 2pm on 19 May 2021.

110. From this point onwards, this matter will not come before me again, as I have given my view on the merits of the Claimant's claim.

_____
Employment Judge Shastri-Hurst

Date: …06/05/2021……..

Sent to the parties on: …….

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For the Tribunal Office

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Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.