EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Malik	**v**	Harrods Limited

Heard at: Central London Employment Tribunal On: 23 June 2021

Before: Employment Judge Norris, sitting alone (via CVP)

Representation:
Claimant – Ms J Rhule, Solicitor
Respondent – Mr B Randle, Counsel

RESERVED JUDGMENT WITH REASONS – PRELIMINARY HEARING

1. The Claimant has worked for the Respondent, a well-known store in Knightsbridge, since February 2017. She was originally employed as a Transaction Service Associate and then a High Value Cash Associate but currently works as a Retail Operations Associate.

2. According to the Respondent, the role of High Value Cash Associate aims to "facilitate the taking of high value cash payments within the store and to ensure that the Respondent complies with anti-money laundering regulations within the UK", including carrying out customer due diligence, completing necessary paperwork, visiting the shopfloor with the customer if required and being responsible for transporting the cash to the cash office.

3. On 25 November 2020, the Claimant submitted to the Employment Tribunal a claim in which she had ticked "other payments" in answer to question 8.1: "Please indicate the type of claim you are making by ticking one or more of the boxes below". She had also ticked "another type of claim" and had inserted "breach of duty of care, breach of contract, unlawful deduction of wages" beneath that box. She had ticked box 10.1 to indicate that she was making a "whistleblowing" claim.

4. The Claimant had submitted a separate document with her claim form in which she set out the details of what she was claiming. She repeated that the "points to be addressed" were "breach of duty of care, breach of contract, unlawful deduction of wages". She said that in 2019 she had raised issues about the risks encountered by herself and her colleagues in the High Value Cash Transaction (HVCT) Team; she considered that they were prone to abuse, both by customers when approached by those in the HVCT Team and by colleagues (who I infer might thereby lose sales). Following a transaction in December 2019, the Claimant said, she was physically attacked by two female customers. A colleague in Security

Investigations (Mr Frietas) apologised to the Claimant for having escorted the customers to Customer Services thereafter, saying he had not realised until he watched the CCTV how bad the attack had been. The Claimant does not suggest that Mr Frietas appeared to resent her in any way or sought to treat her to her detriment as a result of this or any other incident.

5. In October 2019, the Claimant had been hospitalised with sepsis and pneumonia for six days. On her return, she was signed off for a further month. I infer that the above incident with the two female customers must have occurred shortly after her return. On an unknown date several years earlier, it appears that the Claimant's father had been kidnapped in Pakistan and the Claimant said this led to her being diagnosed with PTSD in or around May 2020. From documentation disclosed for the PH, and to which I return below, it appears that prior to that, at the end of 2019 and in early 2020, the Claimant had a "depressive episode".

6. On 17 December 2019, the Claimant was herself questioned by the Security Investigations Team about a transaction she had carried out on 2 December 2019. The Claimant was suspended and, following an investigation, given a final written warning at a disciplinary hearing on 27 February 2020. She says that she was asked to consider a position elsewhere within the store and that she refused to change her role or sign a contract as (she told managers) she would be appealing the decision. Nonetheless, she said, her contract was changed on 16 June 2020 and backdated to 15 April 2020 so that she incurred £238.71 lost wages, and even though her appeal was successful in that the sanction was reduced to a first written warning, her "demotion" was not reconsidered. The Claimant did not say how, if at all, she sought to link any disclosures she had made to any detriment suffered. She did not suggest that the "demotion" constituted a dismissal.

7. In an ET3 lodged on 1 May 2021, the Respondent confirmed that the Claimant had been the subject of an investigation and disciplinary process between December 2019 and March 2020 and that she initially received a final written warning that was downgraded on appeal to a written warning. In relation to the change in the Claimant's role, the Respondent asserts that it was not considered appropriate for her to continue as a High Value Cash Associate following her breach of processes in two relevant policies as well as the Behaviour Policy, and therefore it offered her three alternative roles, two of which carried the same salary and the third, Retail Operations Associate, was the one the Claimant accepted on 17 March 2020, effective 23 March 2020. This new role attracts a salary of £2,000 per annum less than the Claimant's previous role while requiring some of the same responsibilities as she had before, but without the high value cash transactions.

8. The Respondent argues that the Claimant's claims are out of time. For this Preliminary Hearing it prepared a bundle of 56 pages, including an ACAS EC Certificate showing that the Claimant entered Early Conciliation between 30 September and 30 October 2020. Accordingly, it says, unless the Claimant can show continuing acts, conduct complained of that took place before 1 July 2020 falls outside the primary limitation period and, the Respondent argues, the Tribunal does not have jurisdiction to hear such complaints.

9. The Claimant submitted a schedule of loss in April 2021. This claimed: £20,000 for "breach of duty of care", £15,000 for "breach of contract", £333 unlawful deductions from wages, £9,000 for "injury to feelings", £30,000 for "injury to feelings", £4,120 (being ten weeks' pay for time the Claimant has spent with her counsellor), £3,327 (eight weeks' pay for "time spent on communications") and, in several of those instances, uplifts of 10-25%. In light of what I have decided below, I do not make any comment on how realistic such amounts might be.

10. On 8 June 2021, Springhouse, a firm of solicitors, went on the record for the Claimant. They (Ms Rhule) applied under separate cover to amend the claim. They withdrew the complaints of breach of contract and breach of the duty of care and sought to put "new labels" on the facts already pleaded (although as I noted at the PH, the way in which the Claimant now seeks to put her complaints would require her to show a breach of contract. Ms Rhule accordingly sought to reinstate that complaint). The "new labels" that the Claimant sought to apply were unfair dismissal, detriment for whistleblowing and/or health and safety detriment, and disability discrimination and personal injury as a consequence of the disciplinary process.

11. In summary, in the amended particulars of claim the Claimant repeated the assertions that she had previously made about unsafe working practices that she claimed to have brought to the Respondent's attention. She contended that the Respondent had instigated the disciplinary proceedings against her in December 2019 and thereafter imposed sanctions (including making unlawful deductions from her wages) and that this conduct constituted detriments for raising health and safety complaints under section 44 Employment Rights Act 1996 (ERA) or alternatively for making protected disclosures, contrary to section 47B ERA. She complained that the demotion to her present role was automatic unfair dismissal contrary to section 103A ERA as well as being substantively unfair pursuant to section 94.

12. Further, the Claimant said that she had been diagnosed in May 2020 with PTSD but before that had been being treated for depression and that this amounted to a disability, for which the Respondent had failed to make reasonable adjustments in applying a provision, criterion or practice to complete the HVCT paperwork perfectly on every occasion. She contended that her dismissal was a detriment under section 15 Equality Act 2010 (EqA) because of something arising in consequence of her disability (the "something arising" being lapses in concentration). She contended that her mental health had suffered because of the treatment, leading to her depression and PTSD in 2020 and PTSD again in 2021; this is the personal injury to which she referred.

13. As to jurisdiction, the Claimant contended that the acts complained of were part of a continuing act and/or that time should be extended on a just and equitable basis if not.

14. Ms Rhule relied in her skeleton argument on the Court of Appeal authority of *Ahuja v Inghams*[1] in which it was made clear that where there is no injustice to a Respondent, the Tribunal should not be discouraged from using its "very wide and flexible" jurisdiction to do justice by allowing amendments, even if an application in that regard is made at a comparatively late stage in the proceedings. Both parties agree that I should consider the *Selkent*[2] factors and balance the hardship and prejudice of allowing the amendment application against the hardship and prejudice of refusing it.

15. I am satisfied that the amendments now being advanced by the Claimant as the complaints on which she wishes to rely are an almost wholesale replacement of the complaints originally advanced. As such they would require a completely different scope of enquiry in legal – and indeed, factual - terms from the complaints as originally submitted. The only common complaints between the two claims are the allegation of unlawful deductions and that of breach of contract, although the latter is now advanced on a very different basis. Further, as I set out below, the

[1] 2002 ICR 1485
[2] Selkent Bus Company Limited v Moore [1996] ICR 836

Claimant seeks however to extend the allegation of unlawful deductions to the present day by arguing that it is ongoing, which would require a further amendment.

16. It is incorrect to assert that the Respondent would not require any new witnesses to deal with the amended grounds of complaint. The only justiciable complaints in the Employment Tribunal that were set out in the original claim were those of unlawful deduction from wages and (potentially) breach of contract, though with the complication that the Claimant remained employed by the Respondent. However, on the facts pleaded, they were both out of time:

    a. The period over which the unlawful deductions were said to have been made was not entirely clear from the original claim form. It appeared however that the Claimant was claiming for a very defined period between 15 April 2020 and 16 June 2020. This is supported by the schedule of loss, from which it appears the Claimant was told that she had been overpaid in that two-month period at the rate attaching to her previous role but following the issue of her new contract. The difference is £2,000 a year, or £166.67 per month. Therefore, the two months' "recoupment" by the Respondent would be £333 gross, which is the figure in the Schedule. It seems likely that the figure originally given in the particulars of claim of £238.71 is the net figure and expressly relates only to that period. In that case, the unlawful deductions claim is apparently several months out of time.

    b. As for the breach of contract complaint, though the Claimant did not originally phrase it in this manner, Ms Rhule confirmed that she bases it on the principle in *Hogg v Dover College*[3] in that (she says) the Claimant's new contractual terms are so different from the old ones as to amount to the termination of her old contract and the formation of a new one. The Respondent observes however that the principle in *Hogg v Dover College* does not extend to finding a termination where there has been a variation of a contract by consent.

    c. Notably, however, in any event, that change in contractual terms took place in March 2020, again well before the cut-off date for limitation purposes on July 1 2020.

17. Accordingly, I find that the Claimant did not submit an in-time claim for either of the two potentially valid complaints she had.

18. The Claimant's explanation both for why any aspect of the claim was out of time and for the delay in making the amendment application was her health, and specifically her mental health. Late on the evening before the PH, Ms Rhule had sent to the Employment Tribunal and to the Respondent's solicitor a copy of two letters (Mr Randle had not seen them but did not take any point on the Claimant's reliance on them):

    a. One, dated 19 December 2019, was from a CBT Therapist Ms Powell at Richmond Wellbeing Service and appeared to be addressed to the Claimant's GP, Dr Flood. It gave a provisional diagnosis for the Claimant of "Depressive Episode". It said that the Claimant had described a "low mood and anxiety following health problems and stress at work". Although she had had some suicidal thoughts, she also clarified that as her daughter was a protective factor, she had no plan or intent to act on them;

[3] [1990] ICR 39 EAT

b. The second document was a letter of 26 May 2020 between the same parties. On this occasion, Ms Powell gave a diagnosis of PTSD and said that the Claimant was on a waiting list for one-to-one therapy. She said that the underlying symptoms related to an incident in 2002 (I infer from what was said elsewhere by the Claimant that this was her father's kidnapping) but that the Claimant believed they had worsened following a "stressful situation at work".

19. Early on the morning of the PH, Ms Rhule sent in a third additional document. This was headed "outcome graph" and appeared (though it did not bear the Claimant's name) to be a chart plotting the Claimant's mental health symptoms between 19 December 2019 and 8 March 2021, on a scale ranging from healthy/mild (these, it said, being below the recommended threshold) to moderate, moderately severe and severe (i.e. above the recommended threshold).

20. From 19 December 2019 until around 12 February 2020, the Claimant's symptoms ranged from their peak, in the middle of the "severe" range, to the middle of "moderately severe". It should be noted that there was a break of over seven months when no scores were recorded. Thereafter, there was a fluctuating but overall downward trend to "mild" by November 2020, which quickly increased back to "moderately severe" at the end of that month, where it stayed until mid-February 2021. Thereafter, there was another quite steep change, this time back down to the low end of "moderate" and down to mild once more by March 2021.

21. I conclude from this that during the period when the Claimant faced disciplinary proceedings she was, understandably, highly anxious and stressed. Given the absence of any recording between February and September 2020, I infer that the Claimant was not having active treatment for her mental health during that period and her symptoms subsided once she began her new role and even during her appeal. By November 2020, when she completed her original claim form, her symptoms were in the "mild" range and were actually at their lowest for a year; they were not, as Ms Rhule submitted at the PH, "moderate". They then spiked for three months before returning to the low end of "moderate", becoming "mild" again from the middle of February 2021 onwards.

22. The evidence does not show that the Claimant "lacked the cognitive understanding of the processes and procedures relating to bringing a claim" as asserted, nor do I accept that it was reasonable for her to believe that she had to await the outcome of the disciplinary appeal hearing before contacting ACAS. It was confirmed that the Claimant, who is clearly educated and articulate and was/is engaged to perform in a position requiring high levels of compliance and accuracy, is also a member of a union. I note that she says she was accompanied by a union official to her hearings.

23. Ms Rhule did not have any instructions on the steps the Claimant had taken to familiarise herself with the process or to take advice, or if she had not done either of those things, why she had not done so. There has also been no explanation for why the Claimant did not instruct solicitors until mid-2021, shortly before the PH itself, despite apparently knowing both of her potential claims and the time limits associated with them for many months before that.

24. Accordingly, I find that the original claim was presented out of time as regards both the complaints that the Tribunal potentially had jurisdiction to hear (as they were originally framed), and that it was reasonably practicable for it to have been presented within time. Had I not so found, I would have found that it was not presented within a reasonable period thereafter.

25. That being so, the amendment application would in legal terms not be an application to amend at all, but an application to present a wholly new claim, all of which is out of time save possibly in one regard. It was, I believe, common ground between the parties that amending an existing claim to include complaints that are out of time is a less onerous exercise than bringing an entirely new claim wherein all the complaints are out of time. Notwithstanding my conclusions above, I make it clear that I give the Claimant the benefit of the doubt and consider her claim as an amendment application rather than an entirely new claim. The elements are now, in summary:

    a. Unfair dismissal
    As I have noted above, this is said to have occurred with the Claimant's "demotion" in March 2020. The application from her solicitors was submitted in June 2021, i.e. considerably out of time; the test is one of reasonable practicability.

    b. Whistleblowing/health and safety detriment
    The Claimant says that the Respondent's conduct from December 2019 and culminating (arguably) with the issue of the written warning, which I note took place at the partially successful appeal in September 2020, was because she had made a qualifying disclosure, or more than one, and/or because she had made allegations of a breach of health and safety.

    This aspect of the Claimant's case as she proposed to amend it was confusing. In the first place, there was the alternative argument (below) that the reason or principal reason why the Claimant was subject to disciplinary proceedings was because of something arising in consequence of a disability. Secondly, despite the chronological nexus (the disciplinary proceedings and the warning following the alleged protected acts) there is no causal link asserted between them. Indeed, the Claimant accepts that she did make a mistake with the paperwork (putting her signature to a document in error) in early December 2019, which mistake she ascribes however to her mental health difficulties.

    In any event, these allegations are similarly out of time and again the test is one of reasonable practicability.

    c. Failure to make reasonable adjustments
    The Claimant argues that her depression (later diagnosed as PTSD) constituted a disability and should have been taken into account in the disciplinary process. She says she has occasional lapses in concentration when she has been troubled by insomnia arising from her depression and that this was what led to her error that caused the disciplinary action to be taken against her.

    As I have noted above however, the Claimant's original diagnosis in December 2019 was of a "depressive episode… low mood and anxiety" which thankfully appears to have responded very well to the therapy she was offered. It is unclear if or when the Claimant sent this document to the Respondent, but I consider it unlikely at this stage that the Respondent would have actual or deemed knowledge of a disability, based solely on this letter. The Claimant told the Tribunal that she did not impart the fact of her PTSD diagnosis to the Respondent's HR manager Ms Andrews until May 2020. Up until then, she said, she had had general anxiety but felt it was clear that this had not been the correct diagnosis.

This complaint is also out of time, but the test in this instance is whether it would be just and equitable to extend time.

d. Unlawful deductions.
The Claimant now seeks to argue that in fact the deductions from her salary did not cease in June 2020 as previously argued but are ongoing. It is this element that is potentially one of amendment and not a wholly new application, and one which, if accepted, would therefore lead to the rest of the application being one of amendment only.

26. As to the Claimant's consent or otherwise to the new role, I was taken by the Respondent to the email exchanges in the bundle between the Claimant and Ms Hoque, the Respondent's Employee Relations Specialist, in February and March 2020:

    a. On 27 February 2020, the Claimant emailed Ms Hoque: "… I would appreciate the list of vacancys [sic] that we spoke about".
    b. Ms Hoque replied (the date has been removed but it would appear to be on or around 28 February) saying: "I understand that Dave Matson spoke to you about these roles too. … given that Kaz has found that you have breached policies… the business do [sic] not find it appropriate for you to return to that role given the nature of the role and risk to the business. … Therefore the business have found these suitable alternatives: 1) Safe deposits – salary matched… 2) Quality Control … 3) Transaction Services – all the same functions as before but no high value transactions – salary to be reduced by £2,000 to reflect reduction to duties in line with role banding. 4) Other vacancies – we would also be happy to consider any other vacancies you find…".
    c. On 9 March the Claimant declined the role within Safe Deposit saying, "I do not connect my conversation about the role with Dave to this JD [job description] and must therefore decline the position".
    d. The following day, Ms Hoque emailed the Claimant saying: "….If you do not want to take this or any of the other roles proposed, then as previously advised, you can either 1) return to transaction services, however without HVCT responsibilities, which will impact pay as per attached 2) you can also review any vacancies within the business and let us know which ones you want to be considered for – you will have until the end of you [sic] annual leave to do this though".
    e. On 17 March the Claimant confirmed "I have decided that in these uncertain times I will return to Transaction Services with a drop in salary of £2,000 and no HV dealings. This is of course dependant on the outcome of the appeal. which I will send over to you once I have received the final decision documents" [sic].

27. The Claimant's new contract was produced on 16 June but backdated to 15 April with confirmation that save for the new title and salary all other terms and conditions remained the same. I was not shown any evidence that the Claimant subsequently withdrew her acceptance of the role, whether before or after the conclusion of the appeal process.

28. In light of the above, I consider it highly unlikely that the Claimant would be able to show that the move to the role of Retail Operations Associate amounted to a constructive dismissal, whether fair or unfair, under the rule in *Hogg v Dover College*:

    a. Firstly, she was given a completely free hand in deciding whether to

maintain her existing salary in another role for the Respondent or whether to take around a 10% drop in salary with the commensurate removal of the very elements of the role in High Value transactions of which she had been complaining.

b. Secondly, I have to say that her reasons for rejecting the Safe Deposit role with its equivalent salary – set out above at paragraph 26(c) - are not understood by me and have not been explained adequately or at all.
c. Thirdly, the Claimant expressly consented to the drop in salary of £2,000 and as I have stated, did not seek thereafter to revisit the issue. This was therefore not a breach of contract. It was a variation by consent.

29. It follows that the reduction in salary would not constitute unlawful deductions, because the Claimant had signified in writing her agreement or consent to be paid the lower amount, in line with section 13(1)(b) ERA. The repayments for April and May 2020 would accordingly be permitted by virtue of section 14(1)(a) ERA meaning that there were no unlawful deductions in those months, and there was no ongoing chain of deductions that could bring any of the Claimant's claims in time. I also consider for the reasons I have set out above that it was reasonably practicable for the Claimant to have brought her claim in time and/or to have made her application to amend at a much earlier stage.

30. Even if I am wrong on this, as I have noted above, there is nothing before me to suggest any causal link whatsoever between the Claimant making a protected disclosure (or more than one) and/or making complaints about potential or actual breaches of health and safety on the one hand and the disciplinary proceedings to which she was subject on the other. Mr Matson, who it appears talked to the Claimant about the other roles that she might undertake in the business, also appears to be the person to whom the Claimant says she raised these health and safety concerns. She has not suggested expressly or by inference that he or anyone else reacted in a negative way to those concerns, whether directly or indirectly. She says in fact that when she suggested to Mr Matson that two people should go to assist a sales associate who was being subjected to rude and aggressive behaviour at the hands of a customer, he agreed providing there were enough people to answer the phones.

31. It appears to be mere speculation on the Claimant's part that the Respondent, in terms, retaliated against her by bringing disciplinary proceedings which she acknowledges followed her own error; and indeed, as Mr Randle submitted, ultimately the sanction that was imposed after the appeal hearing was one of the lowest formal sanctions available to the Respondent. The assertion that the warning was because of "something arising in consequence" of a disability, i.e. her lack of concentration leading to an error, also undermines the assertion, made in the alternative, that it was because of the Claimant's raising health and safety concerns and/or making protected disclosure(s). Clearly it could not have been for all three reasons.

32. As for the disability discrimination complaints under section 15 and of a failure to make reasonable adjustments, clearly these would require substantial new evidence including in the form of an enquiry as to the stage at which, if at all, the Claimant's medical condition constituted a long-term and substantial impairment within the meaning of the EqA, how and whether the Respondent knew or ought to have known it constituted a disability (which as I have indicated above appears to be very unlikely) and then a potential revision to the Respondent's pleadings if these new grounds were allowed in if it wished to argue the disciplinary proceedings were a proportionate means of achieving a legitimate aim (for the section 15 complaint). I also consider it very unlikely that in a job where the full and accurate completion of paperwork is of paramount importance to prevent

money laundering, it would be considered a reasonable adjustment to remove that requirement even where an Associate could show they suffered from a mental impairment.

33. I am also mindful that while the Claimant says now that her mental health difficulties were caused by the Respondent's conduct towards her, the medical evidence she has produced for the PH (supporting what she has said in her particulars of claim: "I have gone on to be diagnosed with PTSD for an event that happened several years ago. This was the kidnapping of my father in Pakistan") shows that on the contrary, she had suffered a trauma in 2002 and that her symptoms in 2019/2020 "related" to that, albeit they were worsened once she encountered workplace stress arising from the disciplinary proceedings.

34. In the circumstances, if I was minded to extend time, I would have considered a deposit order. I had asked for the Claimant to send in any evidence she wanted to rely on in relation to her means so that I could consider the amount if such an order was made. I was informed by the administration that no such evidence was received in the four weeks following the PH. Accordingly, I would have made an Order in the maximum amount for each complaint pursued.

35. However, I am not minded to extend time, whether I consider the application as one of amendment or late presentation of a claim. The Respondent reminds me that one factor in assessing whether to permit an amendment is the merits of the claim (*Gillett v Bridge 86 Limited*[4]). The merits of the new complaints are, as I have set out above, very limited indeed, such as to mean deposit orders would be made for each of them. If I take the Claimant's case at its highest and assume, for instance, both that she will be able to show her mental impairment was such as to amount to a disability at the relevant time and that the Respondent knew or ought to have known that she had a disability and the impact that this would cause, I still consider it extremely likely that the Respondent would succeed in showing objective justification for the warning administered and/or that it is not a reasonable adjustment to disregard errors in essential paperwork, as I have said above.

36. I am conscious that I have not seen all the evidence on which the Claimant might rely but I was not told that there would be anything forthcoming from her side that might assist her evidentially. Indeed, in the initial claim the Claimant did not assert expressly or by inference that there was any causal link between the treatment of which she complains and the making of protected disclosure(s) or whistleblowing.

37. While I appreciate that the Claimant will be prejudiced by being unable to advance the complaints on which she now relies, I consider that prejudice to be relatively minor, given their lack of merit, while the prejudice to the Respondent of allowing such claims would be far greater. In addition to the cost and inconvenience of having to defend an entirely new set of legal and factual complaints, the Respondent was never put on notice of them contemporaneously through the internal disciplinary or grievance process or otherwise; not only will memories have faded but the witnesses will have had no reason to commit the circumstances of the case to memory in the first place. Were this a new claim presented so far out of time, I would not have considered it "just and equitable" to extend time without any adequate explanation for the delay.

38. In the circumstances:

    a. The complaint of a breach of the duty of care is dismissed on withdrawal.
    b. The complaints of breach of contract and/or unlawful deductions from

[4] (UKEAT/0051/17 unreported)

wages were presented substantially out of time:

i. The Claimant has not shown that there is an ongoing series of deductions.
ii. The breach of contract claim in the original claim form was merely an alternative label for the deductions alleged, and as such (since the Claimant remained employed by the Respondent on presentation of the claim) the Tribunal would not have had jurisdiction to hear it because it is not a complaint outstanding on the termination of her employment.
iii. It was reasonably practicable to present the complaint of unlawful deductions in time (and even if it was not, it was not presented within a reasonable period thereafter) and the Tribunal accordingly does not have jurisdiction to hear it.

c. The application to amend the claim to add complaints of "automatic" unfair dismissal, "ordinary" unfair dismissal, disability discrimination, detriment for whistleblowing and/or health and safety detriment is refused.
d. Therefore, the claim is dismissed in its entirety.
e. The Preliminary Hearing fixed for 16 August 2021 is accordingly vacated.

Employment Judge Norris
Date: 1 August 2021
JUDGMENT SENT TO THE PARTIES ON

02/08/2021

FOR THE TRIBUNAL OFFICE