EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100700/2017

Held In Glasgow on 7 June 2018

Employment Judge: Robert Gall

Mrs M Ornowska	**Claimant** **In Person**
Bryant Park Hospitality UK Ltd	**Respondent** **Represented by:-** **Ms L Shaw - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Judgment of the Tribunal is that the application made on 22 November 2017 by the claimant to amend the claim, the application being on3 in which it is sought to add to the claim (1) a claim of constructive dismissal under the Employment Rights Act 1996, (2) a claim of discrimination, the protected characteristic being race, under the Equality Act 2010 and (3) a claim in respect of breach of the Health and Safety at Work Act 1974, is refused.

2. The application by the claimant to amend the claim made on 30 May 201 8 is also refused.

3. The claim is struck out in terms of Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 as it has no reasonable prospect of success.

REASONS

1. This Preliminary Hearing ("PH") was set down in order to consider applications by the claimant to amend the claim and also to consider the application by the respondents to strike out the claim. The respondents were represented by Ms Shaw. The claimant appeared in person. She did not have legal representation when she presented the claim. She had solicitors acting on her behalf from July of 201 7 until 12 January 201 8. Her son was present at the PH for moral support.

2. The claimant has difficulty with speaking and understanding English. An interpreter or translator was present at the Tribunal. Having taken the appropriate affirmation, the interpreter translated for the claimant anything said in English at Tribunal. She also translated anything which the claimant said, speaking in Polish, into English. I was satisfied that the claimant understood any communication from me to either of the parties, including questions when she was giving evidence, and that she understood questions put to her in cross-examination. I also had no reason to doubt that her answers in Polish were being accurately translated to English.

3. The respondents lodged a bundle. There was an issue in relation to the amendments. The grounds of jurisdiction now potentially to be included in the claim would, if raised as a new claim be out of time. Evidence was taken from the claimant as to the circumstances in which the amendments were submitted. This was anticipated as aiding consideration of the issue of timing and in particular the lateness of the amendments proposed.

4. The respondents had, from a comment made in response to the amendment of 30 May 201 8, concluded that the claimant was seeking to introduce a claim of age discrimination. The claimant however clarified this and confirmed that no such claim was sought to be advanced by her.

5. The respondents sought that a deposit order be made in the event that the claim was not struck out. Evidence was therefore taken from the claimant as to her financial resources. Reasonable enquiries were made by the Tribunal in accordance with Rule 39 of the Employment Tribunals (Constitution & Rules of Procedure) Regulation 2013 ("the Rules").

6. The following are the relevant and essential facts as admitted or proved.

History to the Claim

7. The claimant was employed by the respondents.

8. On 29 March 2015, the claimant sustained injuries at work which it is alleged (this being a matter on which no admission is made by the respondents in their pleadings and about which evidence has not been heard) were as a result of an assault by a fellow employee. The injuries the claimant sustained were severe, involving a broken jaw and other injuries. The claimant did not return to work with the respondents after this incident. She ultimately resigned by letter of 21 November 2016. A copy of her letter of resignation appeared at pages 130 and 131 of the bundle.

9. Form ET 1 was presented by the claimant on 31 March 201 7. In a paper apart the claimant narrated the events of 29 March 2015 and the injuries caused. She concluded:-

> 7n *summary this assault resulted in serious physical wounds such as fractured jaw, damaged spine, scars and internal injuries, causing my vomiting m bleed.*
>
> *It also had long lasting and devastating psychological effects such as post-traumatic stress disorder, depression and low self-esteem.*

But worst of all is the apprehension from returning to work in fear of facing possible further discrimination, abuse or even criminal attacks there in the future and my complete loss of faith and trust in people. "

10. The claimant did not tick any of the boxes on Form ET1 referring to discrimination and protected characteristics as being a basis of claim. She did not tick the box stating that she was unfairly dismissed. She said that she was making another type of claim with which the Employment Tribunal could deal. She referred to four matters which were as follows :-

**1) Employer's failure to implement appropriate measures, procedures and staff training to ensure safety of their employees during working hours.*

1) Management's failure to immediately and appropriately address abusive and aggressive behaviour exposed by one of their employees towards another at work.

2) Management's failure to adequately follow health and safety procedures in contacting emergency services to a seriously injured employee on site.

3) Management's malicious behaviour attempting to cover up a criminal offence which took place on their business premises and prevention of course of justice."

11. Form ET3 was lodged opposing the claim. The respondents sought strike out of the claim on the basis that the Tribunal had no jurisdiction to hear the claim brought, it was further argued that the claim related to the incident of 29 March 201 5 and was therefore brought out of time given that it was presented on 31 March 2017.

12. A case management PH was set down for 22 June 2017. That took place and a Note was issued by the Employment Judge who conducted the PH, the Note being dated 30 June 201 7. A copy of that Note appeared at pages 43 to 48 of the bundle.

13. The Employment Judge noted that in the claimant's letter of resignation she had referred to constructive dismissal, various serious complaints about failures by the respondents as she saw it in their duty of care towards her and in their handling of the incident and its aftermath. He raised with parties the question of whether the claimant sought to pursue a claim of constructive dismissal. He said in paragraph 3 that as the claim stood it would require an amendment to bring a claim of constructive unfair dismissal before the Tribunal. He also said that as the resignation had occurred more than 18 months after the assault there was a potential difficulty that this very significant period of delay created for such a claim," *unless the claimant's resignation could be linked to the grievance she had sent shortly beforehand (if indeed it was sent). "*

14. The claimant was represented by her son at that PH. With agreement from Ms Shaw who appeared for the respondents and the claimant's son the Employment Judge gave to the claimant a reasonable period of time, which he said was in order to facilitate obtaining legal advice, to notify the respondent whether she wished to pursue a claim of constructive dismissal and if so to set out an application for permission to amend the claim to add such a claim. It was noted that whilst the respondents had said that such application would now be out of time, that was a relevant but not conclusive consideration.

15. Extensions of time were given to the claimant to comply with the Order made to state whether she wished to seek to bring a claim of constructive dismissal and to lodge an application to amend so to do.

16. The claimant obtained legal representation in the Tribunal claim with her solicitors notifying the Tribunal of this on 26 July 2017.

17. Further extensions of time were given to the solicitors in order to prepare and submit the proposed amendment to the claim. Ultimately that proposed amendment was submitted on 22 November 2017. A copy of the proposed amendment appears at pages 71 and 72 of the bundle.

Proposed amendment of 22 November 2017

18. This amendment sought to include a claim of constructive dismissal and a claim of race discrimination with the protected characteristic being nationality. It accepted that the claimant had not ticked the appropriate boxes, stating that she had difficulty completing the form as English was not her first language. It referred to the intimation given by the claimant in her letter of resignation as to constructive dismissal. It explained that the claimant had been unable to present her claim prior to 31 March 2017 due to continued ill-health since March 2015. The claimant had not had legal representation and funding had not been secured by way of legal aid until towards the end of August 2017.

19. In relation to race discrimination, the proposed amendment said:-

> *"The Claimant believes that the Scottish colleagues and European colleagues were treated differently. This was in the treatment that was provided to the claimant when she was assaulted in the workplace. The Claimant avers if she had been Scottish then her employers would have called for an ambulance for her, escorted to hospital and reported her assault to the Police."*

20. The respondents opposed the amendment being permitted. They lodged an objection to the application to amend which also contained an application for strike out. A copy of that objection and application appeared at pages 75 to 80 of the bundle.

21. A PH was set down to consider the application to amend and opposition to it. It was set down for 17 January 2018. On 12 January 2018 the claimant's then solicitors wrote intimating that they were no longer acting on her behalf, in those circumstances when the PH took place on 17 January, at the request of the claimant, a postponement was granted on the basis that the claimant explained that she had not had time to prepare to conduct the Hearing herself. A further PH was set down for the beginning of March. It did not proceed, due to severe weather conditions. The PH was then set down for 7 June 2018.

Proposed amendment of 30 May 2018

22. On 30 May 201 8 the claimant wrote to the Tribunal saying that she wished to apply to amend the claim seeking *"the following amendments to include a claim of Constructive dismissal* (pages 80K to 80P of the bundle).-

> *"1) A claim for discrimination on grounds of nationality and ill-treated Employer Act 2010 and handbook section C (1a) - "Discrimination", section C(1b) bullying and harassment, Employments Right Act 1996 (amended), Contract of Employment - Team Member section 9, notice period, "section 9.3 and Monitoring" section 17.2 (a, c, d, e).*
>
> *2) Failure to comply with the Health and Safety Regulations contained in the Contract and in the Health and Safety at Work Act 1974 section 2(1) and section 2(2). Handbook section 4(a), section 4(b), section 4(c) section 4(f), section 4(g), Monitoring section 17.2 (a, c, d, e).*
>
> *3) Breach of Contract - Employments Rights Act 1996 - a break of an implied term in your contract - These include things like providing a safe and healthy work environment as defined in the Health and Safety at Work Act 1974 and not allowing discrimination. "*

23. The claimant then explained the history to the incident and asked that the Tribunal consider the amendment *"to be in the best interest of justice".* She said that a fair Hearing was still possible despite the length of time which had elapsed and that she would be disadvantaged if the amendment was not granted. She referred to the time period of three months within which a claim required to be brought. She attached statements which she said supported her position. This application to amend was also opposed by the respondents.

Period between 29 March 2015 and 31 March 2017

24. The claimant was severely affected both physically and mentally by the events of 29 March 201 5. As mentioned above, she was absent from work from 29 March 2015 until her employment with the respondents terminated. She

attended her medical practitioner on various occasions and submitted Fit notes to the respondents. Copies of those Fit notes appeared in the bundle. A copy of a medical report from Dr Thornhill, Clinical Psychologist, appeared at page 160 of the bundle. It was dictated on 14 September 2016 and issued 15 September 2016.

25. That medical report stated that the claimant had a diagnosis of PTSD. It concluded by stating:-

> *"It is her opinion, which I share that she will never be able to return to work with yourselves. She had lost all confidence in whatever system should have been in place to ensure staff safety. She does not feel that yourselves, her employers, have taken the concerns that she had raised regarding this seriously enough. In order to overcome her symptoms and return to work she would need to feel confident of her safety. As this is not the case, it appears extremely unlikely, if not categorically impossible, for her to return to work with yourselves."*

26. In the period after the incident on 29 March 2016 the claimant had support and help in particular from her daughter. She made an application for compensation to the Criminal Injuries Compensation Authority. A letter from that authority addressed to Victim Support Renfrewshire from whom the claimant also obtained assistance, appeared at pages 121 and 122 of the bundle.

27. A victim statement form relative to the application to the Criminal Injuries Compensation Board appeared at pages 156 to 159 of the bundle.

28. In that form, in a passage which appears at page 159, the claimant states that one of the issues she has is that her employer and their senior staff failed to implement and follow basic safety regulations. She then gives examples of what she regards as being such failures.

29. On 13 October 2016 the claimant, assisted by her daughter, wrote to the Consulate General of the Republic of Poland. A copy of the letter appears at

pages 123 and 124 of the bundle. That letter contains the following statementsr-

> *7 believe that my Employer has neglected its legal and Health & Safety obligations and that my employer has discriminated against me and treated unfairly (s\c) by failing to protect and ensure my safety whilst in their employment and care.*
>
> *I believe my Employer is guilty of breaking a number of legal obligations, Health & Safety obligations and failed to maintain a safe working environment for myself and other employees. "*

30. The claimant also engaged with the local authority in relation to health and safety issues, writing to the relevant department regarding the incident. A copy of a letter written by that department to the respondents requesting information on the incidents appeared at page 128 of the bundle.

Advice taken by the claimant In the period from March 2015 to March 2017

31. In the lead up to termination of her employment by her resignation the claimant was aware of the existence of Employment Tribunals. She was aware that an Employment Tribunal would deal with a dispute between an employer and employee. She said to the respondents prior to resigning that she believed that the case would probably end up at an Employment Tribunal.

32. In her letter of resignation, a copy of which appeared at page 130 and 131 of the bundle, the claimant commences the communication with the respondents as follows: -

> *"In line with the grievance procedure, please consider this correspondence to constitute a formal letter of complaint and notice of termination of employment due to constructive dismissal on 21 November 2016 — fault ____ Ur Tha umpiuytrr ."*

33. The claimant goes on in that letter of resignation to detail the history to the incident and what she regards as failings of the respondents, introducing that history and those alleged failings as follows:-

"My reasons for my termination of employment and the reason of constructive dismissal are:-"

34. After resignation the claimant consulted with solicitors. She spoke with five lawyers. She discussed with those lawyers lodging a claim at the Employment Tribunal. The lawyers mentioned to her that there was a time limit for the bringing of such claims. They mentioned to her that there was a three month time limit applicable. They also said to her that there was a possibility of that time being extended. The claimant thought that time could be extended as she was ill. She did not have legal representation at the time when she lodged the claim, as mentioned above.

Claimants ability to pay any deposit order

35. The claimant is in part-time employment. She works around 14 hours per week and receives £400 per month in income. She obtains assistance with rental payments due. Her rental payment is approximately £30 per week together with £3 payable in respect of council tax. The claimant runs a car however has a car loan, the cost of which extends to £120 per month. She also meets utility bills and car insurance, mobile phone, road tax and petrol liabilities. Her son and daughter assist her with day to day expenses. She has no savings.

Issues

36. The issues for the Tribunal were:-

(1) Were either or both of the amendments lodged respectively in November of 2017 and May of 2018 to be permitted?

(2) Was the application for strike out made by the respondents to be successful?

(3) If the application for strike out was not successful was it considered appropriate by the Tribunal to make a deposit order in respect of any allegation or argument? If it was considered appropriate to

make a deposit order, what amount would be specified as requiring to be paid by way of deposit?

Applicable Law

37. Whether or not an amendment is permitted is very much a matter of discretion for the Tribunal. The well known case of ***Selkent Bus Co Ltd v Moore [1996] ICR 836 ("Selkent")*** confirms that. The case of ***Cocking v sandhurst Stationers Ltd and anor [1974] ICR 650 ("Cocking')*** also sets out well established principles to be applied by a Tribunal when it considers a proposed amendment. A balancing exercise has to be carried out by the Tribunal.

38. A Tribunal requires to identify whether what is proposed is the advancement of a new ground of claim or whether what is being proposed is a re-labelling of grounds already pled. The recent case of ***Reuters Ltd v Cole UK EAT 0258/17*** confirmed that, although based on the same facts as set out in the claim form, the addition of claims of direct and indirect discrimination by way of an amendment proposed was not re-labelling of the issue raised in the claim form, namely discrimination arising from disability. Different legal tests applied. The grounds of claim of direct and indirect discrimination would have been out of time brought as new claims. They were not permitted to be added by way of amendment, being viewed as new claims.

39. Where an amendment is brought in respect of a matter which, had it been a fresh claim, would have been out of time, there is no absolute bar against allowing that amendment. It is a relevant consideration for the Tribunal that the matter advanced in a proposed amendment would be out of time if brought as a fresh claim. The Tribunal appropriately gives consideration to the question of whether it was or was not reasonably practicable to bring that claim within the relevant time or whether it would be just and equitable to allow the claim to proceed, although late, depending upon the type of claim involved. There is not however time bar as such in operation in this consideration.

40. In relation to an amendment not being refused simply as the ground of claim would have been out of time if brought as a stand alone claim, a relevant case is that of ***Transport and General Workers Union v Safeway Stores Ltd EAT 0092/07.***

41. It is a relevant factor for the Tribunal to consider that a claimant has had legal advice in the period prior to a ground of claim being advanced. Similarly a Tribunal should keep in mind whether a claimant was or was not aware of Employment Tribunals and/or of there being a time limit for the bringing of claims. Illness on the part of a claimant, and the extent of that, should also weigh with the Tribunal in its deliberation. A Tribunal should keep in mind the prejudice to each party, if, on the one hand, an application to amend to bring in a new ground of claim is permitted or if, on the other hand, that application is refused.

42. The cases of ***Madarassay v Nomura International Pic 2007 ICR 867, and that of Igen Ltd v Wong [2005] ICR 931*** confirm that at the stage of consideration of evidence the burden of proof does not shift to the employer merely by virtue of the fact that there is a difference in status between the claimant and a comparator and a difference in treatment between a claimant and that comparator. That situation is relevant in that a Tribunal is entitled to consider pleadings, particularly those which have been submitted by a solicitor, to have regard what it is that a claimant offers to prove. A respondent should know that case by way of fair notice with it being insufficient for a bare assertion to be made by a claimant.

Strike Out

43. Rule 37 states that a Tribunal may strike out a case on the grounds that it has no reasonable prospect of success. Such a step being taken is clearly a draconian one in that it brings a claim to an end. A Tribunal must be satisfied that the claim as set out has no reasonable prospect of success. It may therefore be that a claim seems far fetched or perhaps unlikely to be successful. That is not enough to warrant strike out. There must be, in the view of the Tribunal, no reasonable prospect of success before strike out is

appropriate. There is therefore a high hurdle. That does not mean however that in appropriate cases strike out cannot be the course of action appropriately determined by a Tribunal. The case of ***Balls v Downham Market High School and College [2011] IRLR 217*** is helpful in that regard. Similarly the case of ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*** is helpful. It reminds the Tribunal that where central facts are in dispute and that a cautious approach to strike out is appropriate.

44. A Tribunal should also consider alternatives to strike out before strike out takes place. There may be the possibility, for example, of ordering that further details of a claim are lodged rather than the decision being to strike out a claim.

45. A Tribunal should be particularly cautious if it is to strike out a claim of discrimination. Such claims are recognised as being fact sensitive warranting, generally put, investigation of the facts in order that a proper determination can be made. The case of ***Anyanwu and Another v Southbank Students Union and Another [2001] ICR 391*** is to that effect.

Deposit Order

46. A Deposit Order can be made by a Tribunal under Rule 39. Such an Order can be made where the Tribunal concludes that a claim has little reasonable prospect of success. A deposit not exceeding £1,000 can be ordered in respect of any allegation or argument which is considered to have little reasonable prospect of success. The Tribunal must make reasonable enquiries into the ability to pay of the party against whom such an Order is to be pronounced.

47. A Deposit Order may be appropriate where a claim regarded by a Tribunal as not being particularly strong but not such that it has no reasonable prospect of success The test under the Rules must be applied. The case ***cA Anyanwu*** is of relevance in relation to whether a Deposit Order is appropriately made. That is confirmed in the case of ***Sharma v New College Nottingham EAT0287/11.***

Submissions

Submissions for the Claimant

48. Ms Ornowska referred to difficulties she had had with her physical and mental health since the incident on 29 March 2015. She said that her claim should be heard with the amendments being permitted. She had not been able to adhere to time frames for presentation of details of her claim due to her health. She had resigned as she felt that her contract was not being adhered to. She referred at various times to what she regarded as the deficiencies of the respondents in relation to health and safety matters.

49. The possibility existed of things being put right. Ultimately however that had not been possible. She had not worked for 1 year 8 months after the events of 29 March 2015. She had had huge difficulty in obtaining advice. She had difficulty communicating in English. She did not have a legal qualification and neither did her daughter. There had been no one to help to prepare the claim for a very long time. There had therefore been a huge gap in time between the incident and proceeding with the claim and also between the claim and the proposed amendment. There had been issues surrounding legal aid.

50. The amendments should be allowed as proposed. The motion to strike out should be refused. There had not been neglect on her part in proceeding with matters or in dealing with them.

Submissions for the Respondents

51. Ms Shaw referred to the written submissions for the respondents which appeared at pages 75 to 80 of the bundle. That summarised the arguments supporting the respondent's opposition to amendment and their application for strike out.

52. There was no jurisdiction in relation to the claim. It related to health and safety matters largely. The claim of constructive dismissal was not in the claim form. The amendment had not been submitted for some considerable time. There was nothing to say that it was not reasonably practicable for the

claim to have been brought within time. The burden of proof was on the claimant in this regard to show why it had not been brought within three months or within a reasonable time frame after that. Reference was made to the terms of paragraph 8 of the submission.

53. The claim of constructive unfair dismissal had no reasonable prospect of success. The incident itself was unforeseeable and was not a breach of health and safety. The claimant had not resigned until 18 months after the incident. She had suggested the reason for her not returning to work was due to a medical issue as opposed to any breach of contract.

54. In relation to the claim of discrimination, the protected characteristic being nationality, this claim also ought to have been presented in time. It was however presented a significant amount of time outwith the permitted period. There was no *prima facie* case of discrimination with there being no reason set out as to why the treatment said to have been experienced was considered as being related to the claimant's nationality. The respondents were given no notice therefore of the case that they were to fact in this regard.

55. As far as health and safety was concerned, there was no basis set out in which the Employment Tribunal had jurisdiction. This was not a whistleblowing case for example. The sections which the claimant referred to in the Health and Safety at Work Act did impose general obligations on an employer. They were not however peculiar to the claimant and did not form the basis of a claim to the Employment Tribunal. The proposed amendment now alleged that there had been breach of an implied term of contract in relation to keeping the claimant safe at work. That however was a ground of claim presented well out of time and in which there was no reasonable prospect of success. There had been an unfortunate event, namely an action by another employee who had no disciplinary record.

56. Having heard the evidence from the claimant as to her ability to pay any deposit, Ms Shaw submitted to the Tribunal that, if it was to make a Deposit Order, it should order that £20 be deposited in respect of each element of claim.

Brief reply from the Claimant

57. It was said by the claimant that there was a dispute as to whether the respondents could have prevented the incident. The claimant said that she had called for help but there had been no response. Health and safety had not been adhered to. She emphasised once more the effect of the assault she had suffered. She had had no legal help with preparation of the claim form. She herself had a lack of legal knowledge. Her position would be much weaker if the amendments were not allowed. There was no evidence to suggest that she had deliberately not pled the matters referred to in the amendments at an earlier stage.

Discussion and Decision

58. I was grateful to both parties for their submissions. Ms Ornowska gave evidence and advanced her case with the assistance of a translator. I was satisfied that she understood what was being said to her, questions asked of her and that what she wished to say was then being relayed in English by the translator.

Whether or not to allow either or both of the amendments

59. Prior to consideration and determination of the application for strike out, it was appropriate to consider the issue of whether either or both of the amendments were to be allowed. That would inform the decision on strike out in that the case in respect of which that decision was to be made would then either be the claim or the claim as amended by virtue of one or both of the amendments which had been sought.

60. I entirely accept that the claimant has been badly affected by the incident on 29 March 2015. It sounds horrific from the description given by the claimant. There clearly has been both a physical and mental impact. Her evidence was that she continues to be affected by flashbacks. She gave convincing evidence of finding it very hard to go out following that event.

61. That said, Ms Ornowska clearly managed to address in October 2016 her criminal injuries compensation claim, making the relevant application. In October of 2016 she also interacted with the Consulate General of the Republic of Poland in respect of matters flowing from the incident. She was involved in November of 2016 in reporting the respondents to the local authority in relation to health and safety matters arising from the incident.

62. I accepted the claimant's evidence that she had substantial help from her daughter in these dealings. I also accept that the claimant is not legally qualified and that her daughter likewise is not legally qualified.

63. The medical evidence before me at this Hearing comprised the letter from the Clinical Psychologist of 15 September 2016. That expressed an opinion as to the ability on the part of Ms Ornowska to return to work. It referred to diagnosis of PTSD. The medical report did not say that Ms Ornowska could not deal with paperwork or correspondence. I accept that that potentially was not a question posed of the Clinical Psychologist. Nevertheless her report was the only medical information that I had before me, other than the claimant's own evidence.

64. The claim was presented in March of 2017. Ms Ornowska had resigned in November of 2016. Her letter of resignation at page 130 of the bundle refers specifically to *"constructive dismissaF* on two occasions. Her evidence was that she had consulted with five lawyers between her resignation and presentation of the claim. Clearly however prior to her resignation she had awareness of the term of constructive dismissal. She also referred in her letter of resignation at page 131 to taking her case to an Industrial Tribunal. She had assistance from Victim Support when completing the criminal injuries compensation application form. Her evidence was that the lawyers with whom she had spoken between November 2016 and presentation of the claim form in March of 2017 had made her aware not just of a time limit for presentation of a claim but of that time limit being 3 months from resignation. They had also gone into the possibility of an extension of time potentially being applicable.

65. It is the case that Ms Ornowska did not have legal representation at the time the claim was presented. Nevertheless, there was the background advice and assistance which had been given to her since the time of the incident as narrated. There was also the legal advice as set out above which she had received following her resignation.

66. Against that background, the claim form, perhaps somewhat strangely, did not confirm that a claim of unfair dismissal or of discrimination was being made. The focus of the claim form, and indeed much of the correspondence which has been mentioned, related to health and safety deficiencies said to have existed on the part of the respondents.

67. It may be that the anticipation of the claimant was that there would in effect be a personal injury claim advanced on the basis of a failure in the duty of care alleged. She may have thought such a claim lay within the jurisdiction of an Employment Tribunal. Employment Tribunals do not however have jurisdiction in that area.

68. What I was therefore faced with was a situation where, with that factual background of Ms Ornowska having dealt with various matters, having familiarity with Employment Tribunals, time limits and the concept of constructive dismissal and also having received legal advice during the period, no claim of constructive dismissal or of discrimination had been made in the claim form. An application to amend was then intimated by solicitors towards the end of November of 2017 seeking to introduce a claim of constructive dismissal and of discrimination. This followed upon a Preliminary Hearing held on 22 June 2017 at which the possibility of a claim of constructive dismissal had been raised by the Employment Judge who had heard that PH as being potentially the claim which might be intended to be advanced by Ms Ornowska.

69. The foundation of the proposed constructive dismissal claim was set out in the amendment as being the fact that Ms Ornowska was unsupported in the workplace with the respondents being in breach of health and safety guidelines. It was said that she had been unable to present her claim due to

continued ill health since the attack in March of 2015. The proposed amendment referred to there being no legal representation in place with funding also being an issue.

70. The proposed amendment to introduce the claim of discrimination referred to the claimant's belief that Scottish and European colleagues were treated differently and that had she been Scottish an ambulance would have been called for, she would have been escorted to hospital and her assault would have been reported to the Police. There was nothing however to elaborate on this to provide the basis on which she had come to that view. No comparator was mentioned to illustrate where different treatment had been involved or would have been involved if a hypothetical comparator was being referred to.

71. In determining whether or not to allow the amendment, I gave careful consideration to the principles established in the well known cases of ***Selkent*** and ***Cocking.*** In my view the position was that new claims were sought to be added. This was not, as I read the claim and the amendment, a situation where grounds of claim already pled were now having a different label potentially attached to them. That was clearly also the view of the Employment Judge who heard the Preliminary Hearing in June of 2017 given the comments made in the PH Note.

72. I weighed up the fact that the claim of constructive dismissal was being advanced at the end of November 2017 following upon presentation of the claim in March of 201 7 and that the foundation of the constructive dismissal claim was said to be the actings of the respondents, or their inactions, at the end of March of 2015. Substantial time had passed therefore. If brought as a fresh claim, the claim of constructive dismissal would undoubtedly be out of time. It would be difficult to argue in that circumstance that it was not reasonably practicable for this claim to have been advanced prior to this point. I appreciated that the claimant had been ill. She had, nevertheless, managed to undertake some official, business like correspondence having regard to the claim made for criminal injuries compensation and to the correspondence with

the Consulate General and Glasgow City Council. Her daughter assisted her with that. She also had knowledge of the basis of a constructive dismissal claim and of that term. She had knowledge of the existence and purpose of Employment Tribunals or Industrial Tribunals. From November of 2016 she had interaction with solicitors and knowledge of a 3 month time limit existing for presentation of a claim.

73. The fact that a claim if brought as a stand alone or fresh claim would be out of time is not determinative the outcome of any application to amend, as stated above. It is however a factor. A further factor is that there should be certainty as to claims being brought or not being brought, hence the imposition of time limits.

74. There would undoubtedly be prejudice to the claimant if either or both of the proposed amendments are not allowed in that a claim of constructive dismissal and a claim of discrimination will not be able to taken. There will be prejudice to the respondents if the amendments are allowed in that they will face those claims. That will involve time and expense on their part. It will also potentially be the case that witnesses are no longer available. There is reference to at least one witness having left employment with the respondents.

75. A Tribunal must weigh all the relevant factors. It must have regard to the overriding objective.

76. In relation to the claim of discrimination which is attempted to be introduced by virtue of the proposed amendment, it is relevant that no details are given by her then solicitor on her behalf of the basis in which it is said that the claimant was treated differently due to her nationality. There is, in my view, simply the statement that there is a difference in nationality and an expression of an opinion, an assertion made by the claimant that she would have been treated differently had she been Scottish. She has not offered to prove how she came to this view whether from actual examples or on the basis of some other information or event.

77. I was particularly mindful of the health issues encountered by the claimant. I have much sympathy with her as, whatever the full background and facts of the incident are, she has undoubtedly suffered a severe physical assault with lasting consequences.

78. Nevertheless, in my view, weighing all the facts and circumstances and taking account of the relevant matters in consideration of allowing or not allowing a proposed amendment, I have come to the view that the amendment of 22 November 2017 should not be allowed. I am influenced by all of the relevant considerations as detailed above. In particular the passage of time, the fact that the claimant had knowledge of employment tribunals, had an awareness of time limits, had access to and obtained advice from lawyers and had dealt in the period with some related correspondence and situations weighed with me. I believe, on balance, consideration of the interests of justice leads to refusal of this application to amend.

Proposed Amendment May 2018

79. Ms Ornowska confirmed that age discrimination is not a claim which she seeks to being before the Tribunal. The proposed amendment in May of 2018 is largely repetition of the complaints already set out in the proposed amendment of November 2017. It does however refer to breach of an implied term that a safe and healthy work environment would be provided and that discrimination would not be permitted.

80. The reasons which applied in relation to consideration of the amendment proposed in November of 2017 seem to me to apply equally and to an extent with more weight when it comes to consideration of the amendment proposed in May of 2018 given the further passage of time and the vague nature of the amendment proposed.

81. Taking, as I saw it all relevant considerations into account, the balance weighed against allowing that amendment proposed in May of 2018 insofar as it extended beyond the terms of the amendment proposed in November of 2017.

82. For these reasons, both applications to amend are refused.

Application for Strike Out

83. With both applications to amend having been refused, the test of whether the claim had no reasonable prospect of success or, for a Deposit Order to be issued, whether it had little reasonable prospect of success, turned upon consideration of the claim as presented.

84. For the purposes of the consideration of this application it is appropriate to take the claimants case at its highest level and on the basis that the claim will be proved. This is as the respondents argue that the claim has no reasonable prospect of success on the basis that the Tribunal has no jurisdiction to make any finding against the respondents on the basis set out by the claimant.

85. In the setting out of her claim the claimant, in the part of the claim form which appears at page 10 of the bundle, makes reference to health and safety failings by the respondents and to the respondents attempting to cover up a criminal offence. In the expansion upon those points on the paper apart, a copy of which appears at pages 16, 17 and 18 of the bundle the claimant narrates the events which she has occurred on 29 March 2015. She concludes by stating:-

> *"But worst of all is the apprehension from returning to work in fear of facing possible further discrimination, abuse or even criminal attacks there in the future and my complete loss of faith and trust in people."*

86. As I read the claim form, including the paper apart, there is no claim set out over which an Employment Tribunal has jurisdiction. As mentioned above, the claimant does not mention any basis of discrimination, whether by way of a protected characteristic or by setting out grounds on which there is a stateable case of discrimination put forward. She does not advance a claim of unfair dismissal by making any reference to being required to resign or to leave her job due to the behaviour of the respondents, as she sees it. She complains about the behaviour of the respondents' employees towards her both by way of one assaulting her and by way of the others not assisting her

as she believes they ought to have. The claim is however far more in line with a personal injury claim on the basis of a failure by the respondents to have a safe system of work or to have proper safeguards in place for their employees. That of course might be subject of a claim being advanced in the Civil courts. Employment Tribunals are however creatures of statute and only have jurisdiction over those matters assigned to them in terms of statute. I do not read the claim form and paper apart as setting out any case over which an Employment Tribunal has jurisdiction.

87. Prior to reaching a conclusion upon the application for strike out, I considered alternative courses of action. Allowing specification of the claim to be undertaken was one such possible course. Making a Deposit Order was a further alternative option.

88. Where however the fundamental nature of the claim before the Tribunal is such that the Tribunal in my view has no jurisdiction, it did not seem to me that it was appropriate that an opportunity to provide further particulars of the claim was given. Adding more information about a claim which is not one with which the Employment Tribunal can competently deal does not aid the claimant and is a futile exercise.

89. Similarly, if the Employment Tribunal does not have jurisdiction then a Deposit Order is inappropriate as the claim has no reasonable prospect of success rather than having little reasonable prospect of success.

90. Although through proposed amendment a claim of discrimination was sought to be added, with the application to amend having been refused there is no claim of discrimination before the Tribunal. The strike out application must be considered on the basis of the claim as it is before the Tribunal at the point of consideration of that application.

91. It the claim has no reasonable prospect of success then the test under[1] Rule 37 is met and strike out is appropriate.

92. I appreciate that this may seem harsh to the claimant. It seems to me however that looking at the claim as originally presented and on the basis that the

proposed amendments to it have been refused for the reasons set out above, the claim has no reasonable prospect of success in an Employment Tribunal in that it does not narrate grounds which form the basis of a claim which can be made to the Employment Tribunal or which set up an application for a remedy which the Employment Tribunal has power to grant.

93. The application for strike out is therefore granted.

Deposit Order

94. Having granted the application for strike out, it is no longer appropriate to consider the application for a Deposit Order.

Employment Judge: R Gall
Date of Judgment: 26 June 2018
Entered in register: 29 June 2018
and copied to parties