EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms Z Ibnou Cheikh	v	**Old St Labs Limited & Ors**

PRELIMINARY HEARING

Heard at: London South (by CVP) **On: 6 February 2023**

Before: Employment Judge Truscott KC

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr G Anderson barrister**

JUDGMENT on PRELIMINARY HEARING

1. The claims against Mark Perera, Alexander Short and Adam Woolliscroft are dismissed as they are not within the jurisdiction of the Tribunal.

2. The claim for compensation for share options is has no reasonable prospect of success and is struck out under Rule 37(1)(a).

3. The claim for a bonus payment has no reasonable prospect of success and is struck out under Rule 37(1)(a).

4. The amendment is refused except for paragraph 17 in the amendment and paragraph 40 in the witness statement which provides further information in relation to the claimant leaving the employment of the respondent. Separate case management Orders have been made in respect of this claim. Otherwise the claim of sex discrimination has no reasonable prospect of success and is struck out under Rule 37(1)(a).

REASONS

Preliminary

1. This preliminary hearing was fixed to address the issues set out at a case management hearing on 30 August 2022 and are not repeated here.

2. The claimant provided a witness statement dated 6 February 2023 for the purposes of this hearing and gave oral evidence. The statement contained additional information in relation to the discrimination claims There was a bundle of documents to which reference will be made where necessary. The respondent provided a written submission and both parties presented oral argument.

Findings

3. The claimant was employed by the respondent between 30 September 2019 and 7 February 2021. Clause 7 of the contract of employment [125] provides for a performance bonus of up to 10% in the following terms:

> "The Executive may from time to time receive at the absolute discretion of the Company a bonus payment. The payment and amount of any payment is at the Company's absolute discretion. A payment at any particular time will not create any entitlement to or expectation of any future payment or the amount of any future payment."

4. The Tribunal had available to it the Rules of the Old Street Labs Share Option Scheme [40-72], the Notice of Exercise [73-74] and the Old Street Labs Share Option Scheme – Enterprise Management Incentive Share Option Agreement [75-114] which applied to the claimant but was not part of the contract of employment.

5. The respondent was adversely affected by the Covid-19 pandemic in March 2020 and the future was uncertain. To that end, Mr. Short sent around the business an email [155-156] on 30 March 2020 saying:

> "What was made acutely aware from our Chairman and lead investor was that the protection of cash in tough economic times that are on the horizon is critical. Ensuring we have enough cash to ride out the storm and thus protect the business is paramount. With this in mind it has been the board's decision to delay all bonuses across the entire business until the end of June 2020. At which point the board will make a final decision as to whether these bonuses will be paid or cancelled completely. Mark and I make these decisions with a heavy heart as we are all too well aware of the hard work you have all put in. With that we would like to offer you a supplement of shares in June if it is the case that bonuses are cancelled."

6. On receiving the email, the claimant wrote to Mr. Short [178]:

> "Thanks for the formal message, appreciated. I had suggested similar on friday to Matt so he had already given me the headsup. A strong cash position is key in times of recession (we were already heading that way, with or without Corona**.**

7. Instead of cancelling the bonuses, the respondent decided that it would make a grant of fully vested shares instead of cash. The claimant made some enquiries and received the shares in September 2020 [157]. She made no complaint.

8. She resigned on 8 December 2020 [162]. She thanked her managers, A Bitang and Mark Perera and said that she had enjoyed her time working with the respondent.

9. The claimant raised a grievance on 31 January 2020 complaining about the value of the share allocation in September, that it was not a cash bonus and alleged that somehow NICs were being avoided [169]. The respondent engaged in discussions with her about the calculation of the share allocation. On 10 February, the claimant thanked Mr. Short and Mr. Perera for their speedy actions in relation to her grievance and said that:

> "With regard to the bonus, thank you for clarifying the matter, it is indeed unfortunate that this got lost in communication, and the matter of the amount is adequately clarified for me."

10. She obtained an Early Conciliation certificate against her employer dated 23 February 2021 and against the individuals on 23 March 2021.

11. The claimant presented her claim to the Tribunal on 9 March 2021. In Section 8.2 of her Claim Form [8] she claims in relation to a share options scheme and a discretionary bonus under the heading "Unlawful deduction of wages through breach of contract". She also claimed sex discrimination narrating:

> "Throughout my employment numerous instances of discriminatory behaviour was manifested, from inappropriate comments over derogatory views on HR complaints, to behaviour that amounts to ostricizing me and ridiculing female employees in general. It also culminated into unequal treatment between male and female employees in terms of remuneration, but also in terms of pre-agreed role changes specifically discussed and agreed with me, and finally also relation to the lack of any negotiation or respectful treatment around my resignation which had been afforded to male employees resigning before me. Any complaint and escalation around inappropriate behaviour was swept under the rug."

12. On 21 August 2022, the claimant sent a proposed amendment [30] which, in short and using the paragraph numbers in her application sought to add new claims:

> Mr. Perera, noting blue highlights in the claimant's hair, said that his daughters wanted blue highlights (para. 4);
>
> In the early months of the claimant's employment, at an afterwork drink, Mr. Short did not speak to her (para. 5);
>
> At a work outing on 6 December 2019, there was no hot water at a white-water rafting centre (para. 8);
>
> At an awards night in December 2019, the prizes were barbie dolls sprayed gold (para. 9);
>
> At the start of the Covid pandemic and during lockdowns, Matt Perera announced that he would have 15-minute 'coffee check-ins' with employees at the start of the day, but never invited the claimant to one (para. 10);
>
> At 09:28 on 17 July 2020, Adam Woolliscroft said "May the schwatrz [*sic*] be with you Wagner, Matt. Matt's angels will miss you and so… will…. I… Take care buddy" (para. 11) (see [172]);
>
> In June/July 2020, Mr. Woolliscroft, in suggesting he, the claimant and Mr. Waites ought to have a dry run of a presentation to the board, "felt the need to justify their suggestion by stressing that he felt that I lacked the experience and skill on an executive summary level" (para. 14).

13. The claimant also provided what has been accepted as further information for existing claims by the respondent as follows:

At 09:19 on 28 January 2020, Justin Young responded, in a Slack exchange, “Speak to shorty’s mum”;
Failing to promote the claimant into a “Product Manager/Owner role” although no such role existed during the claimant’s employment;
Mark Perera failing to call her personally on the occasion of her resignation (between 9 December 2020 and 8 February 2021).

14. The claimant commenced new employment immediately on the cessation of employment with the respondent. The new employment turned out to be unsatisfactory. The claimant also detailed unfortunate personal circumstances and was treated for depression and provided evidence to that effect for April and May 2022 [184].

15. She provided further information in her witness statement.

Law

The early conciliation certificate

16. The claimant must obtain an early conciliation certificate before making a claim to the Tribunal. It is to be noted that only one certificate is required in respect of 'proceedings relating to any matter' in ETA 1996 s 18A(1), and that any additional certificate issued by ACAS in relation to that same matter will have been issued outside the statutory scheme and have no relevance to the other statutory provisions relating to early conciliation (**Commissioners for HM Revenue & Customs v. Garau** [2017] ICR 1121 EAT *and* **E.On Control Solutions Ltd v. Caspall** UKEAT/0003/19 (19 July 2019, unreported) at [51]*).*

ET1

17. The 2013 Rules are not prescriptive of the details of claim that must be provided and, in accordance with the overriding objective of avoiding unnecessary formality and seeking flexibility in proceedings (r 2(c)), there is considerable latitude for the claimant to decide how a complaint is pleaded. The Court of Appeal in **Secretary of State for Business, Energy and Industrial Strategy v. Parry** [2018] ICR 1807 CA said:

> 'Employment tribunals should do their best not to place artificial barriers in the way of genuine claims'

Bean LJ continued at [32] that:

> "I should add that, in holding that a sensible response could have been given to this claim, I am not laying down a general rule that the respondent to a claim in an employment tribunal must always be treated, for the purposes of rule 12(1)(b), as having detailed knowledge of everything that has occurred between the parties. If, for example, a claimant brings a claim for sex or race or disability discrimination without giving any particulars at all, or attaching the particulars from someone else's case, that ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected under rule 12(1)(b). But in many unfair dismissal cases there will be a single determinative issue well known to both parties, so that even if particulars are omitted from the ET1 the employer can sensibly respond…'.'

18. Where the claim is more complex and it is not for the respondent to guess what is being alleged against it, the complaint must be explained with sufficient clarity that it can sensibly be responded to. The then President of the EAT, Langstaff J, also stressed the importance of the accurate pleading of the claim in **Chandhok v. Tirkey** [2015] ICR 527. He described at [16] that:

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1'.'

Amendment

19. In the case of **Selkent Bus Company Limited v. Moore** [1996] ICR 836 EAT, the Employment Appeal Tribunal set out the test to be applied by a Tribunal in deciding whether to exercise its discretion to grant an amendment at 843-844:

> "(4) Whenever the discretion to grant an amendment is invoked, the tribunal should take into account *all* the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.
>
> (5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.
>
> (a) *The nature of the amendment*. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
>
> (b) *The applicability of time limits*. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.
>
> (c) *The timing and manner of the application*. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

20. The focus is “not on questions of formal classification [e.g., “relabelling” etc] but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted”. (**Abercrombie v. Aga Rangemaster Ltd** [2014] ICR 209 at [48]).

21. Time limits are “*a factor – albeit an important and potentially decisive one – in the exercise of the discretion*” whether or not to grant permission to amend (**Safeway Stores Ltd v. TGWU** UKEAT/0092/07 at [10] and [13]). Although **Selkent** says it is essential for the Tribunal to consider whether a complaint is made out of time and if so whether the time limit should be extended, in **Galilee v Commission of Police of the Metropolis** [2018] ICR 634 the EAT held it is not always necessary to determine time points as part of an amendment application. A Tribunal can decide to allow an amendment subject to limitation points being determined at a later stage in the proceedings, usually at the final hearing. That might be the most appropriate route in cases where there is alleged to be a continuing act and the Tribunal needs to make findings of fact on this issue.

22. Also relevant are: (1) the extent to which the amended claim would require the adducing of wholly different evidence from that required by the original claim; and (2) the nature of the explanation or excuse offered for the failure to plead the claim in the original ET1 Claim Form (**New Star Asset Management Holdings Ltd v**. **Evershed** at [16], [22] and [33]).

23. In the case of **Vaughan v Modality Partnership** [2021] IRLR 97 EAT**,** the Employment Appeal Tribunal reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. That balancing exercise is fundamental. The Tribunal’s focus generally should be on the: “real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding” The **Selkent** factors should not be treated as if they are a list to be checked off.

24. The assessment of the balance of injustice and hardship may include an examination of the merits but there is no point in allowing an amendment if it will subsequently be struck out. That extends to cases not only which are utterly hopeless but also to ones where the proposed claim has no reasonable prospect of success. The authority for that is **Gillett v Bridge 86 Limited** [2017] 6 WL UK 46.

The statutory definition of wages

25. The Employment Rights Act 1996 at section 13 prohibits an unauthorised deduction form the worker's 'wages'. The definition of 'wages' which is found in ERA 1996 section 27(1) which provides as follows:

> "In this part “wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including:

> (a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise;…

26. Section 27(2) then goes on to identify certain payments that fall outside the definition.

27. In section 27(1)(a), there must be something more than a mere causal connection between the employment and the payment. In **Delaney v. Staples** [1992] IRLR 191 HL, Lord Browne-Wilkinson emphasised the need to keep the 'normal meaning' of wages in mind when considering the definition. He stated:

> "… the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services it does not in my judgment fall within the ordinary meaning of the word “wages”'.'

28. The definition of wages in ERA 1996 s 27(1)(a) is limited by the condition that the payment must be 'payable under [the worker's] contract or otherwise'. This phrase was considered by the Court of Appeal in **New Century Cleaning Co Ltd v. Church** [2000] IRLR 27 CA where a majority of the Court of Appeal held that it was necessary for a worker to show that there was some legal entitlement to the sum in question, although the entitlement need not necessarily arise from an express term in the contract. It was in this sense that the phrase 'whether payable under his contract or otherwise' in ERA 1996 s 27(1)(*a*) had to be construed. As Bedlam LJ put it at [62]:

> "An example of a sum payable otherwise than under the contract would be a minimum wage payable by order of a wages council. Nor is it difficult to see how a fee, bonus, commission, holiday pay or other emolument referable to employment may be payable otherwise than under the contract of employment. Such payments may be customary or required by collective agreements without express provision being made in the contract of employment."

29. As a general rule discretionary payments do not fall within the definition of wages as there is no legal entitlement to the sum in question. It was held that an unjust enrichment claim based on *quantum meruit* could not be pursued as a deductions claim in the tribunal. Following **Delaney**, the essential characteristics of “wages” for the purpose of Part II are that they are for work done or to be done under a subsisting contract of employment. Based on equitable principles, a *quantum meruit* claim can only be brought in respect of additional work which went beyond the scope of the existing contract: **Abellio East Midlands Ltd v. Thomas** [2022] IRLR 288.

30. As such unjust enrichment claims are treated differently under Scots law (the rule there is to the effect that a person who has provided work or services under a rescinded contract is normally entitled to reasonable remuneration) it would appear that the scope to make use of the unfair deduction jurisdiction is greater.

31. Section 27(2)(e) excludes 'any payment to the worker otherwise than in his capacity as a worker'. This phrase was considered in **Nosworthy *v.* Instinctif Partners Ltd** UKEAT/0100/18 (28 February 2019, unreported). The case concerned a dispute over the claimant's entitlement under a share sale agreement to certain earnout payments and loan notes following the sale of some shares by the claimant to

IP Ltd. Although there was no dispute that the claimant had a contract of employment and so was a worker, it was held that her claim was in respect of deferred consideration for the sale of her shares. As a result, the disputed sums 'were provided to the claimant as a vendor of shares not in her capacity as a worker' and so her claim could not be brought under ERA 1996 section 23 as an unlawful deduction of wages.

Breach of contract

32. In 1994, the jurisdiction of employment tribunals was enlarged to enable them to hear and determine certain claims for damages for breach of a contract of employment by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623.

33. The claims to which the Order relates are (a) a claim brought by an employee for the recovery of damages for breach of his contract of employment or other contract connected with employment, or for a sum due under that contract, being a claim in respect of which a court of law would have jurisdiction (SI 1994/1623 art 3; ETA 1996 s 3(2)). It is to be noted that, in respect of s 3(2), the 'other contract' referred to must be one that the claimant has with the employer. In each case the claim must arise or be outstanding on the termination of the employee's employment (SI 1994/1623 arts 3(*c*), 4(*c*)).

Striking out

34. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially:-
>
> "(i) At any stage in the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds – (a) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
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> "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 words "no" because it shows 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 the 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…"
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> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the

> reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

35. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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36. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

37. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

> (i) Ordinarily, the claimant's case should be taken at its highest.
>
> (ii) Strike out is available in the clearest cases – where it is plain and obvious.
>
> (iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

38. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

39. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

Discussion and decision

Early conciliation

40. The claimant presented her claim to the Tribunal on 9 March 2021. She had entered Early Conciliation (and thus received an EC Certificate) in respect of her employer (Old Street Labs) [3]. While other respondents were mentioned, no Early Conciliation number was entered next to their names because she had failed to enter the process in relation to them. The claimant applied for and received EC Certificates for the other respondents *ex post facto*. While it may be possible to rectify the defect by providing a new claim containing the EC numbers, any such claim will be treated as presented on the date of the re-presentation (and so very long out of time): rule 13(4). The Tribunal is required to reject the claims against the individual respondents by applying ET Rules 2013, rule 10(c)).

The claim as it stands

41. The Tribunal considered the claims in relation to compensation from the operation of a share options scheme and a discretionary bonus both under (i) unlawful deductions from wages (ERA, section 13) and (ii) breach of contract (EoJ Order 1994)) and these are addressed later.

42. In relation to the sex discrimination narrative, in its Grounds of Resistance, the respondent correctly pointed out that much of that was too vague sensibly to respond to [27, para 21] and noted that in her grievance, raised on 31 January 2021 [168], she made no reference to any form of discrimination. The same is true of her resignation on 8 December 2020 [162].

The proposed amendment

43. As with the ET1, both the amendment and witness statement allege sex discrimination from the commencement of her employment. The detailed allegations she raises in her amendment application and witness statement are insubstantial and out of time. The suggestion that Mr. Perera commenting that his daughters would like blue hair like the claimants, or that using gold-sprayed barbie dolls as prizes (presumably to look like Oscars) are unlikely to give a ground of action under the Equality Act. The claimant's prospects in establishing that an outdoor recreation centre's failure to provide hot water is somehow the respondent's fault and an act of discrimination by the respondent is highly unlikely.

44. The further information, although adding to complaints in the ET1, is also insubstantial. “Speak to shorty’s mum” (thus the “derogatory views on HR complaints”) [139]; Failing to promote the claimant into a “Product Manager/Owner role” although no such role existed during the claimant’s employment. The claimant did not specify when this should have been done.

45. The claimant submitted that the matters of which she has complained were a continuing act because they involved the same individuals but this is not correct. The Slack messages at [139] are obviously part of a jocular exchange between “Justin” and his colleagues in the Engineering channel. Neither of Mr. Short, Mr. Perera nor Mr. Woolliscroft is involved. The claimant herself joins in with some banter about half an hour later. The failure to promote her is unrelated to any of the banter on the Slack group or Mr. Perera not speaking to her when she resigned. The basis of the complaint is not clear because she says that she had an “understanding with Matt Wagner” that “there would be a path to” a different role. She does not say on what basis there was any such “understanding” or why there being a “path” gives rise to a claim. As to Mr. Perera’s “failure” to speak to her when she resigned, these have no connection with the Slack messages or the failure to promote her.

46. In her evidence to the Tribunal, the claimant said that she had a tendency to procrastinate. This may be a reason but it does not excuse inaction. She also referred to a number of personal difficulties however, the Tribunal did not consider they were sufficient to make it just and equitable to extend time for making the claims. The Tribunal noted that the claimant said she had some HR/legal training [147-8] which she explained referred to Belgium and was limited in the UK. The Tribunal also noted the terms of all of her emails which were well formulated, detailed and articulate. The Tribunal did not accept her explanation that she did not realise that the claim had to be made in detail in England. Nor did the Tribunal accept that she thought she could not raise discrimination issues or indeed other matters whilst she was in employment. The claimant is highly intelligent and capable of finding out whatever she considered necessary to find out. The Tribunal does not accept her explanation for why she failed to plead her claim properly at the beginning having set out detail in the recent grievance. The Tribunal noted that the amendment request was sent 18 months after the claim was presented and days before the case management hearing.

47. In considering the balance of prejudice, the claimant suffers very little prejudice in not being permitted to take up the ET’s time with these matters. On the contrary, the allegations will require a significant increase in the scope of the enquiry to be undertaken. For example, the respondent will need to give disclosure in relation to historic matters which are unlikely to have been particularly memorable for the people involved and were not raised by the claimant until nearly 3-years after the event. Memories will have faded. The Tribunal decided that the claimant had not provided a satisfactory explanation as to why her claim was not detailed in full in the ET1. Even if it had been, the events bar one were out of time. The claimant has not satisfied that Tribunal as to why the ordinary rules pertaining to time limits ought not apply. The Tribunal decided that the amendment and additions in the witness statement to the sex discrimination claim should be refused with one exception.

48. To the extent that the claimant has subsequently provided further information supporting her claim, only the claim that Mark Perera failing to call her personally on

the occasion of her resignation between 9 December 2020 and 8 February 2021 appears to be in time. It is also the only claim in respect of which the claimant has named comparators (Messrs. Wagner, Brown, Basso and Poucher). It is difficult to understand as a sex discrimination complaint in the context that there were discussions between the claimant and the respondent about the benefits she would continue to enjoy post-departure [163-177]. There was correspondence about the matters that the claimant was concerned about. She raised a grievance and it was dealt with, with the claimant thanking both Mr. Perera and Mr. Woolliscroft for their "feedback on these matters and for a very speedy treatment of this grievance". It is not clear what the respondent has failed to do. Despite significant misgivings, the Tribunal has accepted that part of the amendment as providing further information and has produced separate case management orders in relation to that claim only. The hearing days were reduced to two days.

Share options claim

49. It was agreed that the claimant had share options pursuant to the share options scheme. The Scheme was governed by a share options scheme agreement [75]; the exercise of the options was governed by the rules of the Scheme at [40]. The claimant accepted that she "accepted the contracts".

50. The Tribunal has no jurisdiction under this provision to entertain what is, in effect, a property claim not a wages claim. It has no role in making declarations in relation to share ownership nor in valuing shares that the claimant says she owns or should own. Her claim is not a wages claim but she is saying that she should still be the owner of some shares and has estimated the sum due to her. Pursuant to section 27, the claimant must identify a "sum payable" to her that falls within the scope of sections 27(1)(a)-(j) and the option to own shares is no such thing, and show that it does not fall within the excluded payments in sections (2)(a)-(e).The claimant's claim fails because (a) the fact that she had share options (vested or not) does not mean that she was at any stage entitled to a payment and (b) but even if there was some entitlement to a payment (i) it cannot have been during the currency of her employment and (ii) it would not have been a payment referable to her status as a worker. It is noted that she would have had to pay the "Option Price" to exercise the option [150].

51. In considering the Scheme itself, there were certain formalities for exercising the shares which have not been fulfilled in terms of the Scheme (clause 7 of the Agreement [76] and rule 7.7 of the Rules [57]) and the Rules stipulated at rule 2.1(e) that no amount was payable in respect of the grant of an option to buy shares [49]. On the contrary, an option price was payable (which has not been paid) (rule 7.8 [55]). Rule 7.1(b) [55] provided that an option could only be exercised while the option holder remained an employee or office holder except in cases of death or being a Good Leaver (rules 7.2 and 7.3 [56]. The Rules provide for a participant's option to buy shares to lapse if they are a "Bad Leaver", rule 8(c) [58])] – a Bad Leaver is anyone who isn't a "Good Leaver": a Good Leaver is not someone who resigns [44]. The terminology is somewhat unfortunate as it is not suggested that the claimant has done anything wrong other than resign. Her work was recognised as of value in her assessment. Upon the exercise of an option, the shares would be transferred within 30 days (rule 7.11) [56]. Had circumstances been different, the claimant may have had a right to convert some of her options to shares (at an option price determined by the

Board (albeit higher than nominal value)). Even if she had been permitted by the Rules to exercise that option, that would have made her a shareholder – it would not have entitled her to any form of payment (except from either dividends or subsequently selling her shares to a willing buyer. Even if the claimant was able to say that she should have been paid something in relation to any shares and there is express provision to the contrary in the Scheme documents, no such payment would be referable to her status as a worker; instead they would be referable to his status as a shareholder or putative shareholder. It follows from the above that the wages claims in relation to have no reasonable prospect of success as wages claims.

52. Different considerations apply to the contract claim in that it is not necessary to apply the definitions in the ERA and that the question of reasonableness might arise. The claimant has no contractual rights with respect to share allocations: as the Scheme rules make clear at para.14.3(a) [65], the Scheme is entirely discretionary and does not form part of the contract of employment (see also clause 11(a) of the Agreement) [79]. Further, para.14.3 (c) stipulates that no claims can arise out of the operation of the Scheme. Accordingly, the claimant has agreed, as a matter of the contract, that she has no contract claim. Further, there has been no determination of any Option Price pursuant to rule 6. As a contract, therefore, the Scheme is too uncertain to be enforced. In any case, there is no breach of contract: the provisions with respect to "Bad Leaver" are clear [41]: a Bad Leaver is anyone who is not either a Good Leaver (as defined at [43]). The Board has a discretion to designate a leaver a Good Leaver, or to otherwise permit the exercise of the share options (para. 7.3) [54]: it did not do so. The effect of being a Bad Leaver is that any vested share options are subject to forfeit: 8(c) [58]. The claimant accepted the Rules according to paragraph 23 of her witness statement and her entitlement to shares was always subject to those Rules. In the circumstances, the claims in respect of the share options must fail.

53. The claim for her discretionary bonus must also fail. Clause 7 of the contract [125] provides for a performance bonus of up to 10% in the following terms. Instead of cancelling the shares, the respondent decided that it would make a grant of fully vested shares instead of cash. She received and accepted the shares in September 2020 [157] and still has them. In her grievance in January 2020, she complained about the value of the share allocation, complained that it wasn't a cash bonus, and alleged that somehow NICs were being avoided [169]. The respondent engaged in discussions with her about the calculation of the share allocation. On 10 February, the claimant thanked Mr. Short and Mr. Perera for their speedy actions in relation to her grievance and said that:

> With regard to the bonus, thank you for clarifying the matter, it is indeed unfortunate that this got lost in communication, and the matter of the amount is adequately clarified for me.

54. There were no further complaints from her about the conversion of the bonus to shares. As both a wages and a contract claim, it is out of time**. I**f she had any entitlement to a bonus, it would ordinarily have been payable in March 2020; the conversion to shares was announced in June 2020; they were allotted in September 2020. The claimant said that she was not aware that she could bring a Tribunal claim whilst she was in employment. The Tribunal did not accept this evidence. The Tribunal is satisfied that it was reasonably practicable for the claim to be made in time. The

claimant has at least some legal training and did not explain why it was not reasonably practicable to bring the claim on time, the claim falls to be dismissed. In any event, the bonus was discretionary. No sum was "properly payable" at any given date once the Board had exercised its discretion not to make bonus payments; further there was no contractual right to a bonus. Even if there was, the tenor of the claimant's 30 March message to Mr. Short was, effectively, to waive by agreement any right to any bonus [178].

Strike out

55. The Tribunal took the claimant's claims at their highest and considered all the material in the round. The share options and bonus claims cannot succeed in law and no additional evidence or amendment could change that position. The claimant's assertion that the decisions were unsatisfactory and unreasonable cannot stand in the face of legal interpretation of the documents and actings of the parties. Accordingly, they were struck out as having no reasonable prospects of success. On the basis of the guidance set out earlier and weighing all the relevant factors, the Tribunal considered that it is not proportionate for the discrimination claims as set out in the ET1 (bar one) to proceed to a full hearing as they have no reasonable prospects of success.

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EMPLOYMENT JUDGE TRUSCOTT QC
Date: 13 February 2023