



EMPLOYMENT TRIBUNALS

Claimant

Ms J Wall

Respondents

v Gannons Commercial Law Limited

OPEN PRELIMINARY HEARING

Heard at: London Central (By CVP remote videolink)

On: 4 May 2023

Before: Employment Judge Brown

Appearances:

For the Claimant: In person

For the Respondents: Ms J Gannon, Solicitor

JUDGMENT AT AN OPEN PRELIMINARY HEARING

- 1. The Claimant does not have permission to amend her claim by substituting her particulars dated for her original particulars.**
- 2. The Claimant's complaints are not struck out, nor is a deposit order made.**

REASONS

- This Open Preliminary Hearing ("PH") was listed, to consider:
 - (1) Any application to amend made by the Claimant, if the amendment was opposed by the Respondent.
 - (2) If time permitted, any application for strike out / deposit order.
 - (3) Case management.
- The hearing was conducted remotely by CVP Cloud Video Platform and proceeded smoothly.
- By a Claim Form presented to the ET on 28 January 2023 the Claimant brought claims for: constructive unfair dismissal; automatic unfair dismissal under s104C Employment Rights Act 1996; direct discrimination (s18 Equality Act 2010); indirect

discrimination (s19 Equality Act 2010); detriment contrary to s47E Employment Rights Act 1996 for having made an application pursuant to s80F Employment Rights Act 1996; and breach of contract – notice pay.

4. At a Preliminary Hearing on 23 March 2023 EJ Hodgson said that, on the basis of the original claim form, it was arguable that all the alleged detriments were unclear, and could not be responded to adequately or at all. He said that it was arguable that a fair hearing could not take place. He ordered the Claimant to make an application to amend her claim by 4 May 2023, clarifying the claim she wishes to bring. He ordered the respondent to set out in detail, in relation to each proposed amendment, whether the amendment was consented to, and if not, why not.
5. He listed today's hearing. He envisaged that the Tribunal may consider the application to amend, and then, if appropriate, and if time permitted, any application to strike out and any application for a deposit order. If appropriate, he envisaged that there should be further case management.

Amendment Application

6. The Claimant made an application to amend her grounds of complaint on 6 April 2023. Her amended grounds of complaint amended nearly every paragraph of her original 19 page grounds of complaint.
7. The amended grounds of complaint were now 55 pages in length and attached 45 exhibits.
8. I commented that they read more as a witness statement than as a set of pleadings.
9. The amended grounds of complaint also contained new factual matters not in the original grounds and recast the allegations of detriment and discrimination.
10. The parties and I agreed that the amended grounds were extremely unwieldy.
11. The Claimant told me that it was not her intention to introduce new factual allegations, but simply to give more detail and context, to address EJ Hodgson's observations.
12. Ms Gannon, for the Respondent, said that the Claimant should not be permitted to amend her pleadings so comprehensively. She said that the new pleading was so extensive it was impossible to identify all the new acts in it. She said that the Claimant should be required to rely on her original pleading.

Amendment Law

13. In deciding whether to allow an amendment the Employment Tribunal is guided by the principles set out in *Selkent Bus Company v Moore* [1996] IRLR 661. In deciding whether to grant an application to amend, the Tribunal must balance all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment: applications to amend range, on the one hand, from correcting clerical and typing errors and

the additional factual details to existing allegations and the additional substitution of other labels for facts already pleaded to and, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

14. Other factors include 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. Other factors to be considered include the timing and manner of the application: an application should not be refused solely because there has been a delay in making it, as amendments can be made at any stage of the proceedings. 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 the documents disclosed on discovery.

Amendment Decision

15. I decided that I would not permit the Claimant to amend her claim to substitute her new amended grounds of complaint for her original grounds of complaint. The wholesale amendment meant that this was a substantial amendment containing new factual matters which appeared to be new or different matters of complaint. Those would be out of time and there was no good reason for extending time.
16. Regarding the interests of justice and to the relative hardship caused by allowing or refusing the amendment, the Respondent would be put to significant time and expense providing an amended response to the new grounds. The new particulars did not add clarity to the claim, as EJ Hodgson had intended, but made it more unwieldy.
17. On the other hand, in so far as the Claimant had merely intended to add factual details of her existing complaints, she did not need to amend her claim in order to do so. She would not be disadvantaged by the refusal of the amendment. She could still rely on her original particulars and set out the further factual details of those in her witness statement for the Final Hearing.
18. There would be no hardship or injustice to the Claimant because she could set out the extra detail in her witness statement as background and context for her complaints.

Unless Order

19. EJ Hodgson had made an unless order against the Claimant on 23 March 2023 in the following terms:

“3.4 Unless the claimant gives the information set out below on before 16:00, 6 April 2023, she will be debarred from alleging that she was constructively dismissed, without further warning or order.

The information she must provide is as follows:

- 3.4.1 when she says she resigned;
- 3.4.2 how she communicated the resignation;
- 3.4.3 if the resignation was oral, she should give the words;
- 3.4.4 if the resignation was in writing, she must identify the documents - if it is an email, she must identify the email by recipient, date, and time; and
- 3.4.5 she must state what fundamental breach is relied on; if it is said to be a breach of the term of mutual trust and confidence, she should describe, briefly, the main elements constituting the breach.”
20. On 6 April 2023, the Claimant responded by letter, setting out her contentions under each of the headings EJ Hodgson had set out.
21. She said that:
- a) She had resigned on 23 November 2022 with immediate effect, although no express words to that effect were conveyed by her.
 - b) She communicated the resignation in writing to Tim Pyant, by sending an email dated 23 November 2022.
 - c) She set out the words of the email: ‘Dear Tim In the absence of a response from the firm, just a heads up that I have submitted my ACAS early conciliation and reported the firm to the Pensions Regulator.’ The Claimant also attached 5 documents for context: an email 11 November 2023 from Tim Pyant to Jennifer Wall, email of 15 November 2023 from Jennifer Wall to Tim Pyant, email of 23 November 2023 from Jennifer Wall to Tim Pyant, email of 10 August 2022 from Catherine Gannon to Jennifer Wall, P45 dated 6 January 2023.
 - d) She set out the “fundamental breach of trust and confidence” on which she relied. She said that the Respondent had failed to engage with the Claimant after 11 November 2022 about her return to work on 16 November. She said that the Respondent had engaged in a course of bullying and discriminatory conduct. She referred to her amended grounds of complaint. However, it appeared that the details she set out were also in the original grounds of complaint. The acts she relied on were:
 1. The Respondent’s failure to pay a return to work bonus – original grounds of complaint paragraphs [8] [42.3]
 2. The Respondent’s failure to pay the Claimant’s pension – original GoC [4.3] [38] [39] [40] [42.4] 47.2]
 3. The Respondent’s suggestion that the Claimant give up the security of her employment – original GoC [22] [23]
 4. Avoidance of the Claimant by Catherine Gannon – in original GoC at [16] [42.5] –only by Catherine Gannon failing to attend a meeting in Hyde Park

5. The Respondent's suggestions that the Claimant give notice and/or had resigned and the Respondent's stated intention to assume that the Claimant would have resigned if she did not return to work, on a date before the expiry of 12 months maternity leave, and that her job would only remain open until a date before the end of her maternity leave – original GoC [11] [15] [20] [30] [31]

6. The Respondent offering the Claimant an administrative assistant role – original GoC [24] – [29]

7. The Respondent making allegations about the Claimant's performance – original GoC [36] [42.1] [32.7] [20]

8. The Respondent reneging on an agreement that the Claimant would return to work in December 2022 – original GoC [11] [15] [20] [30] [31]

9. The Respondent's failure to respond to the Claimant's emails of 15, 21, 24, 29 September 2022 – original GoC [38] [39] [40]

10. The Respondent's email about the Claimant's first day back in the office, dated 16 November – original GoC [39]

11. The Respondent reminding the Claimant that she had no right to appeal the flexible working request – original GoC [36]

Failing to engage with the Claimant after 11 November 2022 – original GoC [40]

22. I decided that the Claimant had substantially complied with the terms of the unless order and that the Claimant's claim should not be struck out for non-compliance.

List of Issues

23. Ms Gannon, for the Respondent, contended that the Claimant's complaints should nevertheless be struck out.

24. I said that I would assist the parties to identify the issues in the claims before deciding any strike out application. I identified the issues in the claim and response as follows:

1 Constructive unfair dismissal;

1.1 The Claimant contends that the Respondent committed a fundamental breach of contract in that it breached of the duty of trust and confidence between employer and employee: Did the Respondent, without reasonable or proper cause, act in such a way as was calculated or likely to destroy or seriously damage the duty of confidence between employer and employee, by doing the following:

1. The Respondent's failure to pay a return to work bonus – original grounds of complaint paragraphs [8] [42.3]

2. The Respondent's failure to pay the Claimant's pension – original GoC [4.3] [38] [39] [40] [42.4] 47.2]

3. *The Respondent's suggestion that the Claimant give up the security of her employment – original GoC [22] [23]*

4. *Avoidance of the Claimant by Catherine Gannon – in original GoC at [16] [42.5] –only by Catherine Gannon failing to attend a meeting in Hyde Park*

5. *The Respondent's suggestions that the Claimant give notice and/or had resigned and the Respondent's stated intention to assume that the Claimant would have resigned if she did not return to work, on a date before the expiry of 12 months maternity leave , and that her job would only remain open until a date before the end of her maternity leave – original GoC [11] [15] [20] [30] [31]*

6. *The Respondent offering the Claimant an administrative assistant role – original GoC [24] – [29]*

7. *The Respondent making allegations about the Claimant's performance – original GoC [36] [42.1] [32.7] [20]*

8. *The Responding renegeing on an agreement that the Claimant would return to work in December 2022 – original GoC [11] [15] [20] [30] [31]*

9. *The Respondent's failure to respond to the Claimant's emails of 15, 21, 24, 29 September 2022 – original GoC [38] [39] [40]*

10. *The Respondent's email about the Claimant's first day back in the office, dated 16 November – original GoC [39]*

11. *The Respondent reminding the Claimant that she had no right to appeal the flexible working request – original GoC [36] Did 1. Failure or threatened failure to pay return to work bonus – original grounds of complaint [8] [42.3]*

12. *Failing to engage with the Claimant after 11 November 2022 – original GoC [40]*

13. *The Respondent thereby engaging in a course of bullying and discriminatory conduct?*

1.2 *If so, did the Claimant resign in response to the breach – and, if she did, when did she resign?*

1.2.1 *The Respondent avers that from June 2022 the Claimant wanted to leave the Respondent business in any event.*

1.2.2 *The Claimant contends that she resigned on 23 November 2022. The Respondent contends that she resigned on 14 September 2022.*

1.3 *Did the Claimant affirm the breach by waiting too long to resign?*

2 Ordinary Unfair Dismissal

2.1 *If the Claimant was constructively dismissed, given the date of dismissal, did she have 2 years' service to bring an ordinary unfair dismissal complaint?*

2.2 *If she did, has the Respondent shown a potentially fair reason for the dismissal?*

2.2.1 *The Respondent contends that the potentially fair reason for dismissal was Some other Substantial Reason – the Claimant was based in Wigan, 300 miles away from her office. Her job was in London. It was not practical for her to travel to London. She was unable to undertake the job she was hired to undertake.*

2.3 *The Respondent acted reasonably in dismissing the Claimant for that reason?*

2.3.1 *Did it undertake fair procedure?*

2.3.2 *Was dismissal a reasonable response?*

(Taking into account the circumstances, including the size and administrative resources of the employer and determining the issue in accordance with equity and the substantial merits of the case. The Respondent contends that it is a small employer, with a small number of employees)

3 Automatic Unfair Dismissal under s104C ERA 1996

3.1 *The Claimant brings a complaint of automatic unfair dismissal relying on both subsections s104C (a) and s104 (c)Employment Rights Act 1996;*

3.2 *Did the Claimant make an application under s80F ERA 1996?*

3.2.1 *The Claimant relies on her document dated 16 May 2022 requesting: Part time working 8:30 AM to 4:30 PM working mostly from home with occasional trips to the office for client meetings team building or training events etc. Ideally 2 1/2 or 3 days per week and/or possibly term time only. The Claimant contends she set out the impact of her new suggested working pattern and how it could be accommodated.*

3.3 *Did she allege there were grounds for bringing proceedings against the Respondent under s80H ERA 1996?*

3.4 *If she did, and the Claimant was constructively dismissed, was the principal reason for dismissal the fact that the Claimant had made an application under s80H ERA 1996 or alleged that there were grounds for bringing proceedings against Respondent under s80H ERA 1996?*

3.5 *The Claimant says that the principal reason the Respondent had treated the Claimant in those ways was the fact that she had made a flexible working request, or had suggested there were grounds for bringing proceedings.*

3.6 *If the Respondent dismissed the Claimant unfairly, what is the likelihood that the Claimant would have been dismissed in any event?*

3.6.1 *The Respondent will set out its contentions on Polkey*

3.7 *To what extent did the Claimant cause or contribute to her dismissal?)*

3.8 The Respondent will set out its contentions on contributory fault.

4 Direct discrimination (section 18 Equality Act 2010);

4.1 The Claimant says that the Respondent acted as it did because of her pregnancy, and / or illness she suffered as a result of her pregnancy and / or because she exercised or sought to exercise the right to ordinary and/or additional maternity leave

4.2 Did the Respondent treat the Claimant unfavourably by:

4.2.1 The Claimant was made to do additional non fee earning tasks which was a burden and was then criticised for her financial performance. (the Claimant says this was done because of her pregnancy and pregnancy illness and the fact she sought to exercise right to maternity leave);

4.2.2 The Respondent refused to permit the Claimant any paid keeping in touch days and did not make the Claimant feel she was welcome back. (the Claimant says this was done because of her pregnancy and pregnancy illness and the fact she sought to exercise right to maternity leave);

4.2.3 The Respondent refused to provide the return-to-work bonus it had promised to the Claimant. (pregnancy and pregnancy illness and sought to exercise right to maternity leave);

4.2.4 The Respondent refused to pay the Claimant's pension contributions since April 2021 (sought to exercise right to maternity leave);

4.2.5 The Respondent required the Claimant to attend a meeting in a public park on 12 May 2021 on the pretence of discussing her return to work and then Catherine Gannon failed to attend the meeting (pregnancy and maternity leave, but not illness).

4.2.6 The Respondent made baseless criticisms of the Claimant's work with a view to undermining her and suggested that clients had complained about her in its response to her flexible working request. (pregnancy and maternity leave but not illness).

4.2.7 The Respondent kept moving the goal posts and every job offer that was made was very quickly retracted or withdrawn. (pregnancy and maternity leave but not illness).

4.3 If so, has the Claimant shown facts from which the Tribunal could conclude that the unfavourable treatment was because of the s18 prohibited grounds as set out under the subheadings above?

4.4 If she has, has the Respondent shown that the prohibited grounds were no part of the reason it acted as it did?

5 Indirect discrimination (section 19 Equality Act 2010);

5.1 Did the Respondent apply the following PCPs:

5.1.1 Requiring employees to work full time 5 days a week from the London office;

5.1.2 Requiring part time, from home, employees to still work on 5 days per week, with only 12 days holiday per year, and paying such employees at a reduced salary (even allowing pro rata) from the original salary.

5.2 If the respondents did, did those PCPs put women at a particular disadvantage compared to men?

5.2.1 The Claimant contends that more women than men are sole parents with childcare responsibilities and are therefore less able to work full time, 5 days a week, and to attend the office each day, because of such responsibilities;

5.2.2 The Claimant contends that more women than men work part time because of childcare responsibilities and are therefore more likely to be disadvantaged by less favorable part time terms of employment including pay and holidays.

5.3 Was the Claimant put at such a disadvantage?

5.4 If so, has the R shown that the application of the PCPs was a proportionate means of achieving a legitimate aim?

5.5 The Respondent relies on the following as legitimate aims

5.5.1 There were genuine business reasons which included:

(a) The business has to be responsive to client's needs.

(b) Clients expect solicitors to be available to them.

(c) The business would not survive if clients were unhappy with their solicitors or had concerns that their needs were not being attended to in an efficient manner.

(d) There were only two corporate solicitors at the time.

(e) The performance issues the Claimant had before going on maternity leave needed to be addressed.

(f) Paragraphs 36-37, 42-46 of the Respondent's Grounds of Response.

ii. The Respondent business is a small law firm:

(a) The Respondent has limited resources.

(b) The Respondent has to be able to make a profit, otherwise it is not a viable business.

(c) The Respondent has to consider the impact on the business and the impact on other members of the team.

(d) *The Respondent had to consider client's desire, needs and welfare, as well as professional obligations.*

(e) *The Respondent had to consider how best to support and monitor the Claimant's work to adhere to professional standards.*

6 Detriment contrary to s47E Employment Rights Act 1996 for having made an application pursuant to s80F Employment Rights Act 1996;

6.1 *The Claimant relies on the same alleged unlawful acts in the direct pregnancy/ maternity discrimination complaint in her s 47E detriment complaint.*

6.2 *If the Respondent did those acts, did they amount to detriments?*

6.3 *If they did, did the Respondent do those detriments because the Claimant had made an application under s80F ERA 1996, or alleged the existence of circumstances which would constitute a ground for bringing proceedings against the Respondent under s80H ERA 1996?*

7 Breach of contract – notice pay.

7.1 *Was the Claimant entitled to resign without notice by reason of the Respondent's repudiatory breach of contract?*

8 Time Limits

8.1 *Are the complaints out of time?*

8.2 *In respect of the unfair dismissal complaint, if it is out of time:*

8.2.1 *Should the time limit for presenting the Claimant's claims be extended under the not reasonably practicable test?*

8.3 *In respect of the flexible working detriment complaints,*

8.3.1 *If they are out of time, should the time limit for presenting the Claimant's claims be extended under the not reasonably practicable test?*

8.3.2 *Was there a series of acts or failures, the last of which was in time, so as to bring the Claimant's claim in time Arthur v London Eastern Railway Ltd [2007] ICR 193?*

8.4 *In respect of the s18 and s19 EqA 2010 complaints*

8.4.1 *Was there a discriminatory state of affairs, or series of acts, the last of which was in time, so as to bring the Claimant's claim in time? Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686, [2003] IRLR 96*

8.4.2 *Should the time limit for presenting the Claimant's claims be extended under the just and equitable test?*

25. While this was not raised at the hearing, I noted while reviewing this note of hearing that, in her claim form, the Claimant alleges that the Respondent failed in its duty under s80G(1) ERA 1996. I cannot find any record of the Claimant having withdrawn that claim.
26. As it is contained in her pleadings, therefore, the following issues appear to arise in that claim:

“9 s80F–H ERA 1996

9. 1 Did the Respondent fail in respect of a duty under s.80G (1) ERA in that it did not deal with the Claimant’s application under s.80F in a reasonable manner?

9. 1. 1 Did it fail to consider the Claimant’s application adequately or at all, as shown by the speed of response and total refusal to every aspect of it. Was the response was predetermined and did the Respondent never have any genuine intentions of considering a part-time or remote role for the Claimant?”

Strike Out/Deposit Order Application

27. Ms Gannon contended that the Claimant’s complaints should nevertheless be struck out. or made the subject of a deposit order because of their lack of prospects of success.
28. in particular, she contended that the Claimant’s complaint of ordinary unfair dismissal should be struck out because the Claimant had no reasonable prospect of establishing that she had been employed for 2 years. Ms Gannon said that the agreed contemporaneous documents showed clearly that the Claimant had, in fact, resigned on 14 September 2022, using clear words of resignation, before she had accrued 2 years’ service.
29. Disclosure had not yet taken place. With the parties’ agreement, I looked at some contemporaneous documents which had been included with the Claimant’s amendment application.
30. I make clear that any comments I make in this regard are not intended to bind the Tribunal which conducts the Final Hearing.
31. I noted that, on 10 June 2021, the Claimant wrote to the Respondent saying that she could not commit to coming back to London full time in the near future, but would be happy to commit to coming into work a couple of days a month.
32. On 12 September 2021, the Respondent wrote to the Claimant saying that there was no position available for her that would support part time hours and there was no right of appeal from a decision to turn down flexible working. The Respondent said that, in its October payroll, it would pay the Claimant 43 days’ holiday for all her holiday entitlement due to 16 November 2022. It asked the Claimant to provide authority for her contention that the Respondent should pay her notice pay if she failed to return to work on 16 November 2022.
33. On 14 September 2021, the Claimant replied, saying,

“By your email below, reminding me that I have no right of appeal to the part time working request ... asking [me] to set out why I should be paid my notice and asking me to particularise my claims it is with an extremely heavy heart that I must consider this the final straw and therefore myself dispensed with by Gannons. I really had sincerely hoped to return to my job (or something similar) on a part time basis compatible with modern motherhood and working remotely as I always have done for the firm and consistent with the new business model which Gannons seems to be adopting in employing flexible self-employed consultants.”

I will focus on commencing ACAS early conciliation and direct my energies to the task of drafting the ET1 and particulars of claim that accompany it. That said, you will know that any constructive dismissal does amount to a wrongful dismissal which does lead to notice pay becoming due save for where there is gross misconduct.”

34. The Claimant sent the Respondent emails on 15, 24 and 29 September 2021 asking about payment of her pension, holiday pay and tax.

35. On 11 November 2021, the Respondent wrote to the Claimant saying,

“... In advance of your return to work following the end of your maternity leave, I thought I would drop you a quick email.

On your first day back (16 November 2022) I would ask that you come into the office at 10 am. I will ensure the systems are all up and running for you. You will be allocated a desk within the corporate team grouping. ... ”

36. Ms Gannon contended that the Claimant had used unequivocal words of resignation in her 14 September 2021 email to the Respondent. She contended that the Claimant had never done anything inconsistent with having resigned on that day and that she was only now contending for a later resignation date because she had realised her mistake in resigning before she had 2 years' employment. Ms Gannon said the Respondent genuinely believed that the Claimant had resigned on 14 September and it had only written to her 11 November to check that she had resigned and would not be returning.

37. The Claimant contended that the Respondent had not believed that she had resigned on 14 September because it had written to her on 11 November about her expected return to work on 16 November and had not issued her P45 until January 2022. In her claim form the Claimant had alleged that, on 10 August 2022, the Respondent had told her that she would be taken to have resigned if she did not return to work. She argued that it was only when the Claimant did not return to work after 16 November that the Respondent issued her P45.

No Strike Out of Deposit Order

38. I noted that, in determining whether an employee has resigned, the intention of the speaker is not the relevant test. Arnold J commented in *Gale Ltd v Gilbert* [1978] IRLR 453, [1978] ICR 1149: 'It is of course well-known that the undisclosed intention of a person using language whether orally or in writing as to its intended

meaning is not properly to be taken into account in concluding what its true meaning is. That has to be decided from the language used and from the circumstances in which it was used."

39. If the words used by the speaker are, on their face, ambiguous, then the test is how the words would have been understood by a reasonable listener. While the employer's honest and reasonable understanding is relevant evidence, ultimately the test is objective, *East Kent Hospitals University NHS Foundation Trust v Levy UKEAT/0232/17*.
40. I agreed with Ms Gannon that the Claimant appeared to use words of resignation, or asserted constructive dismissal, in her 14 September 2021 email. However, I considered that it was not necessarily clear, on the words of the email, from what date she said her employment was to end. The surrounding circumstances could be relevant, including that the Claimant was on maternity leave at the time and was discussing her a future return to work on 16 November. I considered that it was arguable that the true interpretation of her words was that she would not return to work at the end of her maternity leave.
41. As there was a lack of clarity on the face of the email regarding the date of termination of contract, on the basis of the email alone, I decided that it could not be said that the Claimant had unequivocally resigned with immediate effect.
42. I considered that the objective construction of the words could only be properly determined when all the relevant evidence had been heard. The full context of the ongoing negotiations between the parties would be relevant. It could be relevant that the parties were discussing the Claimant's future return to work. The Claimant was not due to return to work until 16 November. The fact that the Claimant was on leave, so that her contemporaneous absence from work was not an indication that she had resigned, could be significant. The Respondent had previously indicated that it would take the Claimant to have resigned if she did not return to work on a particular future date. That might be relevant to what an objective observer would understand.
43. Given the ambiguity, I could not say at a preliminary hearing, without all the evidence, that the Claimant had no, or little, reasonable prospect, of establishing that she resigned with effect from 23 November (when she would have had 2 years' service) , rather than on 14 September 2021. That being so, I would not strike, or make a deposit order, in respect of the Claimant's ordinary unfair dismissal case.
44. I did not make a strike out or deposit order on any of the Claimant's other claims.
45. Regarding time limits in the discrimination and detriment claims, the Claimant's grounds of complaint appeared to allege a course of conduct, or a continuing state of affairs, or a series of linked acts, as described in *Hendricks Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, involving the same people over a short period of time.
46. It was not possible at this hearing to make a decision on whether the allegations did, in fact, form part of a continuing act or series of linked acts. That could only be

decided after all the facts had been found at a final hearing. I refer to *Hendricks and Arthur v London Eastern Railway Ltd* [2007] ICR 193.

47. In the Claimant's direct, indirect and detriment claims, findings on whether the alleged acts had occurred, whether they amounted to a detriment, and causation of relevant acts, could only be fairly made at the final hearing, having heard all the evidence.
48. I considered that each of the alleged detriments / acts of unfavourable treatment could arguably amount to a detriment. They were context and fact sensitive. The Respondent and Claimant's versions of events were very different. The question of whether any detriment satisfied the test in *Shamoon* had to be decided after findings of fact. This was not a case where, taking the Claimant's case at its highest, it could be said that there was no prospect of success, or little prospect of success.
49. Regarding the alleged breach of trust and confidence in the unfair dismissal complaints, the Claimant relied on a course of conduct. No individual act needed itself to amount to a breach of contract. Again, whether there had been a breach of the duty could only be decided after fact-finding at a final hearing.
50. For the same reasons, I did not make deposit orders. Given the factual, context-sensitive nature of the allegations and the response, I did not consider that I was in a position, at this preliminary stage, to make a provisional assessment of the merits. I did not 'have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (*Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07, [2007] All ER (D) 187 (Nov)*), as Elias J.
51. I conducted a case management hearing after this Open Preliminary Hearing.

EMPLOYMENT JUDGE BROWN

On: 5 May 2023

SENT TO THE PARTIES ON

05/05/2023

FOR SECRETARY OF THE TRIBUNALS