



EMPLOYMENT TRIBUNALS

Claimant: Mrs Sharon Reeve

Respondent: Barking, Havering and Redbridge University Hospital
NHS Trust

Heard at: East London Hearing Centre

On: 10 May 2023

Before: Employment Judge Sugarman

Representation

For the Claimant: Ms Pankowski – Paralegal

For the Respondent: Ms Crawshay-Williams - Counsel

JUDGMENT

1. All of the Claimant's claims of indirect disability discrimination are dismissed upon withdrawal.
2. All of the Claimant's claims of indirect age discrimination are dismissed upon withdrawal.
3. The claims in boxes 5 and 6 (only) in the "Reasonable Adjustments" section of her Scott Schedule sent to the Tribunal on 10 May 2023 ("the Scott Schedule") are dismissed upon withdrawal.
4. The direct age and direct disability discrimination claims in boxes 18 and 19 in the Scott Schedule are struck out on the basis they have no reasonable prospect of success.
5. The harassment related to age and harassment related to disability claims in box 13 in the Scott Schedule are struck out on the basis they have no reasonable prospect of success.

6. **The direct age discrimination allegations in boxes 17, 20, 21, 22, 23, 24, 25 and 26 of the Scott Schedule have no reasonable prospects of success are struck out. For the avoidance of doubt, the direct disability discrimination claims are not.**
7. **The harassment related to age allegations in boxes 5, 10, 11 and 12 of the Scott Schedule have no reasonable prospects of success and are struck out. For the avoidance of doubt, the harassment related to disability claims are not.**
8. **The s15 claims set out in boxes 4 and 6 under the heading “Discrimination Arising from Disability” have no reasonable prospects of success and are struck out.**

REASONS

BACKGROUND

1. This a complex case which has had a long procedural history, as set out more fully in the Case Management Summary accompanying the Case Management Orders I have made following the Preliminary Hearing.
2. At the Preliminary Hearing, the Indirect Discrimination claims were withdrawn and have been dismissed, as were the claims of a failure to make reasonable adjustments set out in boxes 5 and 6 of the Claimant’s Scott Schedule.
3. Once the claim had been clarified and applications to amend made, the Respondent pursued its application to strike out and/or for deposit orders.

DISCRIMINATION CLAIMS

4. The Respondent made a written application to strike out and alternatively for a deposit order by email dated 8 May 2023. It averred that any discriminatory act which occurred wholly before 24 March 2021 was out of time and should be struck out because (a) there was no reasonable prospect of it being established that it formed part of a continuing act and (b) there was no reasonable prospect of the Claimant establishing that it was just and equitable to extend time.
5. Ms Crawshay-Williams refined and narrowed that ambitious application at the hearing. She did not allege that every single act which predated 24 March 2021 ought to be struck out (or a deposit order made) but rather alleged that those allegations which named Mrs Karemo, Mrs Halford and Ms Blackabee as the person responsible ought to be because the allegations against them were out of time and a contention that those acts formed part of a continuing act with an “in time” acts committed by someone else had no or little reasonable prospect of success.

6. The Claimant, an Administrative & Clerical Assistance, worked in different departments under different managers throughout her time with the Respondent as follows:
 - 6.1 June September 17 – March 2019 in the Employee Relations team;
 - 6.2 March 2019 – April 2020 in the Education and Training Team when Mrs Karemo was responsible for her secondment;
 - 6.3 April – November 2020, when she worked as a PA to Mrs Halford, the Chief Nurse / Deputy CEO;
 - 6.4 November 2020 – 28 July 2021: the Claimant worked in the Patient Experience Team under Mrs Miles Gales.

7. Ms Crawshay-Williams submitted the allegations of *direct age and disability discrimination* set out in the agreed updated Scott Schedule that ought to be struck out were:
 - 7.1 Allegations 17, 20, 21, 22, 23, 24, 25 and 26 levelled against Mrs Halford. These are allegations of direct age and disability discrimination (except allegation 26 which is only age) spanning the period August 2019 - 23 November 2020;
 - 7.1.1 17: accused her of not putting a link in a calendar for a meeting – 17 September 2020;
 - 7.1.2 20: didn't sign a birthday card for the Claimant – 3 November 2020;
 - 7.1.3 21: created a role for Mrs Blackabee without notice to the Claimant – 20 November 2020
 - 7.1.4 22: moved the Claimant to cover a Band 5 and 6 role but she only got paid for a Band 5 role – 23 November 2020;
 - 7.1.5 23: criticised the Claimant over a missing diary entry – 9 November 2020
 - 7.1.6 24: gave a project to Mrs Blackabee because she said the Claimant was underperforming – 17 November 2020
 - 7.1.7 25: told the Claimant she was overqualified for the PA role, did not help the Claimant – August 19
 - 7.1.8 26: paid the Claimant less than Mrs Blackabee and did not give her any career progression – July 19
 - 7.2 Allegations 18-19 are levelled against Mrs Karemo. These are allegations of direct age and disability discrimination on 6 July 2020, 9 and 14 October 2020:

- 7.2.1 18: failed to engage with the Claimant or reply to her emails – 9 October
 - 7.2.2 19: walked away and refused to engage with the Claimant on several occasions or provide information about annual leave, 6 July 2020 and 14 October 2020.
8. Ms Crawshay-Williams submitted the allegations of *harassment* set out in the agreed updated Scott Schedule that ought to be struck out were:
- 8.1 Allegations 5, 10, 11 and 12 levelled against Mrs Halford. These are allegations of harassment related to age and disability spanning the period 29 May 2020 – 29 October 2020;
 - 8.1.1 5: sent an email to the Claimant accusing her of not following instructions – 29 May 2020;
 - 8.1.2 10: blamed the Claimant for a meeting not being correctly recorded in her diary – 29 October 2020;
 - 8.1.3 11: shouted at the Claimant accusing her of not putting a meeting link in her calendar;
 - 8.1.4 12: told the Claimant to phone an organisation to find who someone was.
 - 8.2 Allegation 13 is levelled against Mrs Blackabee. This is an allegation of harassment related to age and disability relating to an incident on 17 November 2020 when Mrs Blackabee is said to have given the Claimant information causing her to become distressed as she had to prepare for a meeting at short notice.
9. Ms Crawshay-Williams accepted that, unlike Mrs Karemo and Mrs Blackabee, Mrs Halford was mentioned in the Scott Schedule in relation to two harassment allegations dated *after* 24 March 2021 (thus potentially in time):
- 9.1 Allegation 2: “Five senior management staff held a meeting to discuss C” on 23 April 2021. This is said to be harassment related to age and disability. The Claimant refers back to paragraph 35 of the Particulars of Claim. The Respondent made the point that Mrs Halford is not in fact mentioned in paragraph 35. At the time of this meeting, the Claimant was being managed by Mrs Miles-Gale. Mrs Halford is said to have been involved because she was the Chief Nurse. Other than holding a meeting, no specific allegation is made in the Scott Schedule though at paragraph 35 of the Particulars, the allegation is that those in the meeting did not consider the Claimant had mental health problems and needed support at work;
 - 9.2 Allegation 14: “The Claimant made a grievance against management and later on the same day she received a letter stating she was not performing at work”. Ms Crawshay-Williams submitted, and the Claimant accepted, that Mrs Halford was the subject of the grievance and that it was Mrs Miles-Gale

who sent her the letter about her performance. As such, this is not in fact an allegation about Mrs Halford's conduct after 24 March 2021.

10. Ms Crawshay-Williams then turned her attention to the Section 15 Equality Act 2010 claim and submitted the following allegations had no or little reasonable prospects of success because they were out of time:
 - 10.1 Allegation 4: An allegation that Mrs Karemo did not give the Claimant a permanent role on 18 February 2019;
 - 10.2 Allegation 6: An allegation that Mr Wishart told the Claimant she could not cover part of her role and lead on job evaluation which dates from the end of 2018.
11. Ms Crawshay-Williams accepted that Mrs Halford was mentioned as responsible for an *in time* act after 24 March 2021 in allegation 5. This is an allegation that Mr Wishart told the Claimant that Mrs Halford would give her six months money to leave the Respondent. This is said to have happened on 13 May 2021. The Respondent submitted:
 - 11.1 This is an allegation of s15 discrimination, it is very different to the substance of the claims of direct discrimination and harassment;
 - 11.2 The allegation is of a different factual nature to the other allegations because it relates to offering an inducement to the Claimant to leave the organisation;
 - 11.3 The thrust of this complaint is against Mr Wishart. The same allegation is made in Harassment – Allegation 3 and Direct Discrimination – Allegation 7 and only Mr Wishart is mentioned, not Mrs Halford.
12. In summary Ms Crawshay-Williams submitted that
 - 12.1 the Claimant's allegations were made against many individuals over a long timeframe and related to a range of different subject matters. The claims levelled against Mrs Blackabee, Mrs Karemo and Mrs Halford were out of time and could not sensibly be said to be part of a continuing act;
 - 12.2 As to whether there was an arguable case for a just and equitable extension, the claims could have been brought much earlier. The Particulars of Claim were lengthy and contained a lot of dates suggesting contemporaneous records were made at the time. The Claimant only started a period of sickness absence in July 21 and was able to work before then and could have lodged a claim. Her email sent the day before the hearing (paragraph 17b) suggested she had spoken to others about discrimination and bullying and could have got advice and proceeded with a claim before she did. She has benefited from union representation and could have made enquiries about bringing a claim. The balance of prejudice favoured the Respondent because even if these allegations were not permitted to proceed, it would not be end of the Claimant's claims, she had a long list of claims that would continue. Only the historic allegations would be lost. However, the prejudice to the Respondent was significant if the allegations proceed. It will have to

call additional witnesses to deal with historic allegations that are out of time and in circumstances where memories are likely to have faded. The hearing length will increase placing an additional burden on both parties.

13. Ms Pankowski on behalf of the Claimant submitted that:

- 13.1 All acts of discrimination form part of a continuing act. The fact the Claimant had lodged a grievance naming all the managers she worked for supported that contention. She worked under each without a break in between;
- 13.2 The Claimant's position is that all of those against whom allegations are fall under the umbrella of Corporate Nursing and that they were essentially one team, evidenced by the fact there was a meeting of senior managers on 23 April 2021 which included Mrs Miles-Gales and Mrs Halford (though not Mrs Blackabee or Mrs Karemo);
- 13.3 There was an "in time" complaint against Mrs Halford, namely that she gave instructions to Mr Wishart to offer the Claimant 6 months to leave the organisation, as is set out in paragraph 45 of the Particulars of Claim;
- 13.4 Even though she was managed by Mrs Miles Gales latterly, she believed all those involved talked to each other and made decisions together;
- 13.5 Mrs Halford was at the meeting on 23 April. The Claimant accepts she ought to have mentioned that in the Particulars of Claim. I have given her permission to amend to do so.
- 13.6 If out of time, it would be just and equitable to extend time. This was on the basis that there would be (unspecified) prejudice to the Claimant if the claims were not permitted to proceed but no prejudice to the Respondent because it was aware of her claims. All of the circumstances had to be factored in, including that she had evidence to support her claim, though that was not identified at this stage.

The Law

Time Limits

14. The time limit provisions are contained in s123 of the Equality Act 2010:

'123 Time limits

- (1) *Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of –*
 - (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
 - (b) *such other period as the employment tribunal thinks just and equitable. ...*

- (3) *For the purposes of this section –*
- (a) *conduct extending over a period is to be treated as done at the end of the period;*
 - (b) *failure to do something is to be treated as occurring when the person in question decided on it.*
- (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
- (a) *when P does an act inconsistent with doing it, or*
 - (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*
15. The leading case on the meaning of “act extending over a period” is still **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530. The test is not whether the employer operated a policy, practice or regime. The focus should be on the substance of the complaint and the issue is whether there was an ongoing situation or continuing state of affairs amounting to an act extending over a period as distinct from a succession of isolated or specific acts.
16. The question of whether a continuing act can include acts of discrimination of a different kind was considered in **Robinson v Royal Surrey County Hospital NHS Foundation Trust** UKEAT/0311/14/MC. At paragraph 65 HHJ Eady (as she was) held:
- ‘When considering whether a Claimant has made out a prima facie case that that of which she complains amounts to conduct extending over a period, however, I can allow that it might be appropriate to consider that conduct as comprised of acts that, taken individually, fall under different headings. Such an assessment will inevitably be fact and case specific, but if the Claimant was, for example, complaining that putting her on particular shifts was a continuing act of direct discrimination and then, as the other side of that particular coin, that failing to put her on different shifts was a failure to make reasonable adjustments, I cannot see why she would not be entitled to say that those matters should be considered together as constituting conduct extending over a period.’*
17. If any claim has been presented after the primary time limit imposed by s123(1)(a) then the tribunal cannot entertain the complaint unless it is just and equitable to do so.
18. The general rule is that employment tribunal time limits are strictly enforced and the ET should ask whether a sufficient case has been made out to justify exercising what is a discretion in favour of an extension of time. It is not a question of extending time unless there is a good reason for not doing so (see **Robertson v Bexley Community Centre** [2003] EWCA Civ. 576).

19. However, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limit which will shut out an otherwise valid claim “unless the claimant can displace them”– see **Chief Constable of Lincolnshire Police v Caston** [2010] IRLR 327, paragraph 31.
20. The factors set out in s33 of the Limitation Act 1980 are relevant to the assessment of what is just and equitable; per Smith J in **British Coal Corporation v. Keeble** (1997) IRLR 336, §8. They are not however a checklist that needs to be specifically itemised in the judgment (see **Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ. 23 per Underhill LJ at paragraph 37.
21. The factors a Tribunal can take into account can be many and varied but will often include the reason for the delay, whether the claimant was aware of her rights, whether she has had advice, whether the claimant was unable to bring proceedings due to ill health, the length of the extension sought and whether a fair trial remains possible.
22. Whether there is a good reason for the delay or indeed any reason is not determinative but is a material factor **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194, CA.
23. The Tribunal must consider the relative prejudice to each party **Pathan v South London Islamic Centre** EAT 0312/13.
24. In **Miller v MoJ and Thompson v MoJ** UKEAT/0003/15/LA, UKEAT/0004/15/LA, Laing J in the EAT held that if there was forensic prejudice to the respondent, that may be “crucially relevant”. However, the converse is not necessarily true so that if there is no forensic prejudice, that is not decisive and “may not be relevant at all”.
25. In **Kumari v Greater Manchester Mental Health NHS Foundation Trust** [2022] EAT 132, the EAT held

‘The tribunal is therefore not necessarily always obliged, when considering just and equitable extension of time, to abjure any consideration of the merits at all, and effectively to place the onus on the respondent, if time is extended, thereafter to apply for strike-out or deposit orders if it so wishes. It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn into a complex analysis which it is not equipped to perform.’

Strike Out/Deposit Order

26. The Tribunal has the power to strike out a claim if it has no reasonable prospect of success (Rule 37(a) of Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 - "The Rules"). If the Tribunal considers that an allegation or argument has little reasonable prospect of success, it can make a deposit order (Rule 39).
27. In **Tayside Public Transport Company Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, an unfair dismissal case, the Court of Session held, at paragraph 30:

Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel (2003) CP Rep 51, Potter LJ at para 10).

28. Particular care is needed in discrimination claims. They are certainly fact sensitive and often oral evidence is required before concluding whether or not it is appropriate to draw inferences of discrimination from primary facts, **Anyanwu v South Bank Students' Union [2001] IRLR 305, HL**.
29. In **Balls v Downham Market High School [2011] IRLR 217** Lady Smith emphasised that test is not whether the claim is *likely* to fail but whether there are *no* reasonable prospects of success. That is not the same thing as there being no prospects of success at all, per **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603** at para 25.
30. At the strike out stage, the Tribunal should take a Claimant's pleaded case at its highest where there are matters of factual dispute, unless there is a compelling reason not to do so (see e.g. **Roy v Stephenson Harwood Services Ltd EAT 0145/17**).
31. In **Hawkins v Atex Group [2012] IRLR 807** however, Underhill P cautioned against excessive restraint in relation to striking out claims:

"...judges should not be shy of making robust decisions in cases where there is realistically only one possible outcome even if the issue is formally one of fact".

32. In **Ahir v British Airways Plc [2017] EWCA Civ. 1392** Underhill LJ held at paragraph 16:

"...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.

33. A case may have some reasonable prospects when regard is had to the overall picture and all allegations taken together so care has to be taken not to focus on individual factual allegations, see **Qureshi v Victoria University of Manchester** [2001] ICR 863.
34. It is not a relevant factor when determining a strike-out application that the relevant facts for the claim would have to be heard in any event (**ABN AMRO Management Services Ltd v Hogben** UKEAT/0266/09 per Underhill LJ at [16]).
35. In **E v X, L and Z**, UKEAT/0079/20 the EAT held that where the issue on a strike out application is whether or not the alleged discrimination formed part of an act extending over a period, the test at summary stage is whether the claimant has established “a prima facie case” or “a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an ongoing state of affairs”. If not, the relevant allegations can be struck out. If so, the question of time limits and continuing acts is not definitively resolved but is deferred to the final hearing. Ellenbogen J set out 13 points that could be distilled from the authorities at paragraph 50 which I have regard to. The following paragraphs are of particular relevance here:

*“...2) It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: **Robinson** ;*

*3) Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: **Sridhar**;...*

*5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**;*

*6) An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: **Aziz** ; **Sridhar** ;*

7) *The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: **Aziz**;...*

9) *A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: **Robinson** and paragraph 47 above;*

13) *...caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham***

Application to the Facts

36. The Claimant worked in a number of different roles during her time with the Respondent under different managers.
37. The only claims where Mrs Karemo is alleged to be responsible for the discrimination are in relation to acts that occurred a long time before the Claim Form was lodged, on 18 February 2019 (the s15 claim) and on 6 July 2020 and 9 and 14 October 2020. The former is a complaint about not giving the Claimant a permanent role but a temporary one only. The latter are complaints of failing to engage with the Claimant or reply to her. There are no in time allegations made against Mrs Karemo. Although different individuals can be responsible for different acts forming part of a continuing act, there is scant basis for such a finding here.
38. The Claimant avers the fact she worked for the different managers without a break suggests there was a continuing act. That does not follow. In any event, there are gaps between the different acts relied upon. The fact that all of these different departments may fall under the umbrella of Corporate Nursing is also not good evidence of a continuing act. The Claimant said it was her belief that all the managers talked and made decisions together but that is neither pleaded nor has she adduced any evidence of it, nor would it seem remotely likely for the acts of discrimination she has pleaded. For example, it is highly unlikely that Mrs Karemo acted in concert with other more senior managers or other managers generally when she is alleged to have walked away from the Claimant or refused to engage with the Claimant about annual leave. There is certainly no evidence or pleaded case that she did. Such a claim is speculative at best.
39. The subject matter of the allegations against Mrs Karemo differs from those made in time against others too.

40. The Claimant has not adduced any evidence or cogent argument in support of a contention that she has a reasonable prospect of establishing the claims against Mrs Karemo are in time or that it is just and equitable to extend time to the extent required. She relies on general unspecified prejudice in circumstances where the prejudice to the Respondent of allowing it to face further historical claims is greater. **I conclude that the claims have no reasonable prospect of success and I strike out all direct discrimination claims in boxes 18 and 19 and the s15 claim in box 4.**
41. The same is true for the claims against Mrs Blackabee. The last allegation made against her is dated 17 November 2020. The subject matter of this allegation is different from the other in time allegations against others, namely that she provided her with information that caused her to become distressed. There is no basis think there is any prospect of the Claimant establishing Mrs Blackabee was acting in concert or at the behest of others, as the Claimant appears to believe.
42. There is no reasonable prospect of the Claimant being able to establish this formed part of a continuing act in the **Hendricks** sense and no reasonable prospect of establishing that is just and equitable to extend time. **I therefore strike out the harassment related to age and disability claims in box 13.**
43. Similar applies to the s15 claim in box 6, the allegation that Mr Wishart told her she could not cover part of her role and lead on job evaluation. This is an allegation that dates from the end of 2018. Mr Wishart is mentioned later on but in the context of relaying information from others (e.g. Harassment claims 3 and 4). This allegation is a long time before any of the later allegations in any event and the subject matter is again different. It also appears inconsistent with her claims later that she had too much work and was unable to cope. This is an allegation she ought to be allowed to lead on job evaluation. **I conclude there is no reasonable prospect of this being found to be part of a continuing act and therefore strike out the s15 claim in box 6.**
44. The allegations against Mrs Halford are more difficult. The direct discrimination and harassment allegations against her generally date from the time when the Claimant was her PA are prima facie all out of time. They relate to Mrs Halford's treatment of her as a line manager and include allegations about her being unfairly critical of her work, not signing a birthday card but also include allegations about treating her differently to others in relation to pay and opportunities for progression.
45. The strike out application is not premised on the merits of these allegations but on them being out of time. I must take the Claimant's case at its highest for the purposes of this application.
46. The difference between Mrs Halford's position and that of Mrs Karemo and Mrs Blackabee is that there are some in time allegations for which she is said to be responsible, namely:
 - 46.1 Attending a meeting on 23 April to discuss the Claimant at which, no doubt, Mrs Halford would have been the most senior employee, and at which the

Claimant's mental health problems were allegedly overlooked, as was her need for support. This is pleaded as harassment related to disability and age. Mrs Halford would have been attending not as the Claimant's line manager but in her capacity as Chief Nurse. It is connected in the sense it would tend to show, if proven, a continuative and unsympathetic attitude to the Claimant's disability and an unwillingness to make allowances for it. It does not appear to have anything to do with age though;

- 46.2 The allegation that she was behind an offer to leave the Respondent with a payment in May 2021. Although it was Mr Wishart who relayed it, the Claimant's case is that the driver or originator was Mrs Halford. This is pleaded as a different type of discrimination – s15 – though that does not mean it cannot form a continuing act with other alleged acts of discrimination of a different type and of course, s15 is a form of disability discrimination. Factually, it is a different type of allegation, a suggestion that in her capacity as Chief Nurse (rather than line manager) she was taking steps to engineer the Claimant's departure. The other allegations are, as set out above, are about her line management. Nevertheless, at its highest, it might be said to be sufficiently connected to her earlier actions which are said to be unlawful because of or related to disability. If she sought to exit the claimant because of something arising from disability (as I must assume at this stage) that could be sufficiently connected to harassment or direct discrimination when she was her line manager 6+ months earlier.
47. The fact the Claimant named Mrs Halford in a grievance does not assist the Claimant because the focus as to be on the acts of the alleged discriminator, not the Claimant's complaints about the same.
48. The Claimant's argument that Mrs Halford had some role to play in the later events involving Mrs Miles-Gales, though these are not alleged to be joint decisions, may have more force by reason of the fact she is alleged to be up the direct management chain from Mrs Miles-Gales and, on the Claimant's case, attended the meeting on 23 April demonstrating some continuing involvement in the management of the Claimant even at this time.
49. Mrs Halford's involvement is more recent than that of Mrs Karemo and Mrs Blackabee, though is still significantly out of time apart from the two acts alleged to be in time. Indeed, there is a gap of 5 months between the alleged acts in November 2020 and 23 April 2021.
50. Mindful that I have to take the Claimant's case at its highest, whilst I have real doubts that she will be able to establish a continuing act even if the in time allegations are found to be discriminatory (about which I make no assessment at this stage), I cannot conclude at this stage the direct disability and disability related harassment claims naming Mrs Halford have no or little reasonable prospect of success.

51. I am persuaded however that the direct age discrimination and harassment related to age claims against Mrs Halford have no reasonable prospect of success on time grounds. Age appears to have nothing whatsoever to do with the in-time acts Mrs Halford is alleged to be responsible for. The meeting in April is criticised for failing to take into account the Claimant's mental health and the offer of money to leave is said to be related to something arising in consequence of her disability, not her age. There is no apparent link between any earlier alleged acts and the later acts on age grounds. **I therefore strike out the direct age discrimination claims in boxes 17, 20, 21, 22, 23, 24, 25 and 26 and the age related harassment claims in boxes 5,10,11 and 12 on the basis they have no reasonable prospect of success.**

CONSTRUCTIVE DISMISSAL

52. By way of a second Claim Form in Case Number 3204751/2022, the Claimant brought claims of constructive unfair dismissal and wrongful dismissal (notice pay). The Claimant resigned on 1 July 2022.
53. At a Preliminary Hearing on 7 December 2022 in front of Employment Judge Ross, as set out in paragraph 47 of the Case Management Order of the same date, the Claimant confirmed that she relied upon the implied term of mutual trust and confidence and that the last straw she relied upon was the grievance outcome letter she received on 26 November 2021. The incidents she relied on before that date leading up to the last straw were the alleged incidents of discrimination set out in the Scott Schedule. As such, the latest date for the breach of contract was 26 November 2021.
54. The Respondent applies to strike out the claim of constructive unfair dismissal and the claim for notice pay, or seeks a deposit order for the same, on the basis that the resignation did not occur for some seven months after the alleged final straw and as such the Claimant had obviously affirmed the contract and lost any right she may have had, which the Respondent denies, to treat herself as constructively dismissed. The Respondent avers that the Claimant accepted any breach and affirmed the contract by remaining in employment for so long.
55. The Claimant was on sick leave from July 2021 and did not return to work before her resignation in July 22. The Respondent accepts that being on sick leave can be a pointer against affirmation, for example if the claimant was unable to make a decision, but in this case there was a prolonged delay and she was well able to make a decision. Indeed, she was conducting litigation against the Respondent in that period because her first claim was filed on 30 June 2021 before she went off sick. On 10 September 2021 she provided further and better particulars of claim. A detailed Schedule of Loss was served, seemingly with some assistance, on 14 December 2021. There was a PH on 20 December 2021 at which the Claimant was accompanied by Ms Pankowski and there was no suggestion that sickness prevented her giving instructions.
56. The Claimant continued to receive sick pay throughout that period of time and the Respondent says evidences affirmation.

57. In response, the Claimant pointed out that she appealed the grievance outcome in December 2021, which suggests she was not accepting the outcome or affirming the contract. The grievance appeal hearing was not until 4 February 2022 and the outcome was not received by her until 22 March 2022. Thereafter, she said she wanted to stay in work and was trying to resolve matters via her union representative who was in discussions with the Respondent's management. It was only when the Respondent made it clear that was not going to work, and instead convened formal meeting to dismiss her, that she realised there was no prospect of a negotiated return and resigned.
58. In other words, she did not accept the earlier breaches and appealed against the grievance finding. After the appeal she did not simply carry on working or receiving sick pay but rather there was an on-going dialogue to resolve the situation. Only when that broke down did she resign. I have not seen any evidence about the dialogue however.
59. Ms Pankowski said at one stage that 22 November was *the beginning* of the breach. However, that runs contrary to the case which was put, agreed and finalised before Employment Judge Ross on 7 December 2022 and upon which this application was made and is considered.

The Law

60. I have set out the law on strike out / deposit above.
61. In order to succeed in the claim for constructive unfair dismissal, the Claimant must first prove she was dismissed. Thus, she must prove the Respondent committed a fundamental breach of contract, that she resigned in response to that breach and that she did not affirm any breach by delay or otherwise (**Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221). Per Lord Denning MR, the employee

“must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged”.
62. Affirmation can be through an act further performing the contract, unless there is a protestation, reservation of rights or provision of a chance to remedy:

*If the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: **Farnworth Finance Facilities Ltd. v. Attryde** [1970] 1 W.L.R. 1053.”*
63. Tribunals should bear in mind that there can be a lot of pressure on employees when there has been a repudiatory breach. Per Jacob LJ in **Bournemouth University Higher Education Corpn v Buckland** [2010] ICR 908:

When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation.

64. However, there comes a point when the employee was act. In **WE Cox Toner (International) Ltd v Crook** [1981] ICR 823, the claimant was accused of misconduct by his fellow directors and was threatened with dismissal. There then followed 6 months of protracted correspondence about it. The allegations were not withdrawn. A month thereafter, the claimant resigned. A tribunal upheld the complaint finding no affirmation because he did not accept the position but protested about it until it became clear the respondent would not alter its position. The EAT disagreed. The delay had persisted for 7 months during which the claimant continued working and was paid. Even if it was arguable he was working under protest for 6 months, he delayed a further month after the position had been made clear and that was fatal.

Application to the Facts

65. There is a period of more than 7 months following the last straw relied upon by the Claimant through to her resignation. Although she appealed the grievance outcome, the appeal had concluded by 22 March 2022. It was 3 more months before the Claimant resigned.
66. Although she was off sick during this period, she was clearly able to litigate and did so. She does not rely on sickness as a reason for failing to resign.
67. Rather, she says there were discussions going on between her union and management to try to resolve the issue. No detailed in her pleadings or evidence has been adduced in relation to those discussions. She has not provided any detail about the content was nor their timing. Although I have to take her case at its highest, it is far from clear what the detail of her case actually is on why it was she did not resign between 22 March and 1 July, other than the fact she hoped to resolve matters by negotiations and when it became clear that was not possible and she was threatened with dismissal, she resigned.
68. Taking her case again at its highest, I cannot say it has no reasonable prospect of success. It may possibly that a delay 7 months post breach given what was going on did not constitute affirmation. However, in my judgment, her claim does have little reasonable prospect of success and so the threshold criterion for making a deposit order is satisfied. The period is a lengthy one. She continued to receive sick pay and remained long after the grievance appeal was dismissed. There may be have negotiations thereafter but there appears little prospect of that being found to be a good reason to delay so long.

69. I must still consider whether it is appropriate to make such an order, there being a two stage test, emphasised by Eady P in **Rojha v Zinc Media Group plc** [2023] EAT 39. I have considered whether to make such an order and considered the Claimant's means and have set out the conclusions in the private Case Management Summary and Order.

**Employment Judge A Sugarman
Date: 8 June 2023**