EMPLOYMENT TRIBUNALS

Claimant: Miss Griselda Amissah

Respondents: (1) London Borough of Islington
(2) Andrew Turnock
(3) Theonitsa Sergides

Heard at: Bury St Edmunds Employment Tribunal **On: 2 November 2023**

Before: Employment Judge Michell (sitting alone)

Appearances:

For the claimant: In person
For the respondent: Ms Sinead King (counsel)

RESERVED JUDGMENT

1. The claimant is given permission to amend her claim to add a complaint of race-related harassment in respect of all the allegations of direct race discrimination already specified in her claim form and Further and Better Particulars dated 26 June 2023 (though all such claims are dismissed pursuant to paragraphs 3-5 below). Otherwise, her application to amend her claim is refused.

2. The claim of unfair dismissal was not presented within the applicable time limit. It was reasonably practicable to do so. The claim of unfair dismissal against the first respondent is therefore dismissed.

3. The claims against the second respondent under ss 13 and 26 of the Equality Act 2010 were not presented within the applicable time limit. It is not just and equitable to extend the time limit. All claims against the second respondent are therefore dismissed.

4. The claims against the third respondent under ss 13 and 26 of the Equality Act 2010 were not presented within the applicable time limit. It is not just and equitable to extend the time limit. All claims against the third respondent are therefore dismissed.

5. The claimant is to pay a deposit of £700 as a condition of being permitted to continue with her claim of discriminatory constructive dismissal (s. 39(2)(c) EqA) against the first respondent. The terms of the deposit order are set out under separate cover. All other claims against the first respondent are dismissed

A. BACKGROUND

Listing for today's hearing

1. By a claim presented to the tribunal on 29 January 2023, the claimant asserts that she was directly discriminated against on grounds of race (because she is black), and that her acceptance of voluntary redundancy amounted to a constructive dismissal- namely, an acceptance of breach by her employer (R1) of the implied term of trust and confidence.

2. At a preliminary hearing before Employment Judge Macy on 17 July 2023, the bases for the s.98 Employment Rights Act (ERA) constructive unfair dismissal and the s.13 Equality Act (EqA) direct discrimination claims were set out; albeit the list of issues was said to be a "working" one "*that will require further amendment at the public preliminary hearing if that is necessary*".

3. The matter was also listed for a preliminary hearing in public to consider:
   a. The claimant's application to amend her claim to add a further factual allegation to her direct race discrimination claim about the comments made by the second respondent (R2) on 15 September 2022, and to add a complaint of race-related harassment in respect of all the events specified in her claim form and further and better particulars (FBPs); and (if thought necessary)
   b. The preliminary issues of jurisdiction:
      (i) Whether the complaint of unfair dismissal has been made to the Tribunal within 3 months (plus early conciliation extension) of the effective date of termination;
      (i) If not, whether it was reasonably practicable for the claim to be made to the Tribunal within the time limit;
      (ii) If it was not reasonably practicable for the claim to be made within the time limit, was it made within a reasonable period;
      (iii) Whether the complaints of race discrimination were made within the time limit of three months (plus early conciliation extension) of the act to which the complaint relates;
      (iv) If not, were the complaints made within a further period that the Tribunal thinks is just and equitable.
   c. The respondent's application to strike out the claimant's claims under Rule 37(1)(a) of the Tribunal Rules, on the grounds that the claims have no reasonable prospect of success; and/or in the alternative, the respondents'

application for a deposit order in respect of the claimant's claims under rule 39(1) of the Tribunal Rules.

d. Further case management, if necessary. (There was no time for this, beyond provisionally listing a 3 hour case management preliminary hearing on 5 February 2024 at 10.00am.)

4. The listing for this hearing was originally in early October 2023, but it was adjourned in order for the claimant to get legal advice.

Today's hearing

5. Today was a remote hearing on the papers, which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable, and all issues could be determined at a remote hearing.

6. I was referred to a 92 page bundle prepared by the respondents, a 15 page witness statement from the claimant which had 5 appendices and also set out a variety of detailed legal submissions; a 17 page skeleton argument produced by Ms King; an Agenda produced by the claimant, and a Schedule of Loss totalling about £152,000. I was also given copies of 7 authorities relied upon by the parties, which I read. During the course of the hearing, R1 supplied a copy of the claimant's contract of employment, a payslip from August 2022, and the claimant's 2021-2022 P60. I heard evidence from the claimant, who was questioned by Ms King. Both parties made oral submissions. The claimant presented her case in a particularly cogent and intelligent way.

B. THE FACTS

7. The claimant worked as a teacher at Grafton Primary School (the school) from 28 September 2015 until 31 August 2022 (EDT), following her acceptance of voluntary redundancy and her resignation on 13 May 2022. The school has 81 members of staff, of which 53 are said to be from a BME background. It has an 'outstanding' OFSTED rating.

8. The claimant's employer was R1. R2 was head teacher at the school until his retirement on 31 August 2022. The third respondent (R3) was the assistant head, and since 1 September 2022 has been the school's acting head.

9. The claimant is articulate and capable. During her time at the school, from about September 2020 she acted as a trade union representative. As a member of the union, she also had access to advice and support -which she apparently sought and received when she brought her June 2022 grievance.

10. The identity of R1 as the claimant's employer ought to have been clear enough to her. For example:
    a. Her pay slips (to which she had access at least until the EDT) are from 'Islington Schools'.
    b. Her contract of employment names R1 as the employer. (She said she did not have a copy of her contract. But she sensibly accepted in her evidence that she could have asked for it.)
    c. Her P60 for 2021-2022 (which was sent to the wrong address in 2022, but which would have contained substantively the same information about her employer when sent to her at the appropriate address in previous years) also names R1.
    d. The HR issues she had with the school from time to time were taken up by her with R1's HR department

11. The claimant said in her evidence that she was unaware R1 was her employer until about 7 December 2022, and that until that time she thought she was employed by R2 and R3. I was surprised by that evidence, especially given paragraph 10 above. But in any event, she had the means to find out who her employer was -e.g. during her notice period. She could also have asked her trade union/R1's HR department/R2 or R3/colleagues at work, both before and after the EDT.

12. The claimant's assertion in evidence that she was "*not in the mind set*" to clarify the name of her employer during her notice period does not, in my judgment, change the fact that she could easily and should have done so.

13. After the claimant's resignation, but before her departure from the school, on 13 June 2023 the claimant brought a grievance making a variety of complaints about what she described as "mistreatments" by R2 and R3, going back to early 2020. None of those complaints had been mentioned in her resignation email. There, she simply said she would "*like to express my interest in accepting voluntary redundancy given the full time UPS role that has been deleted*…". She did not suggest in her written grievance, or during the grievance process, that any of the conduct at issue was related to her race – this, despite having union assistance with the grievance.

14. Moreover, the claimant did not bring any other grievance (race-based or otherwise) about any of the matters about which she now complains prior to June 2022, notwithstanding the fact that the grievance procedure provides that complaints/grievances ought to be brought within 3 months.

15. In her evidence, the claimant did not explain why she had not brought any earlier grievance. She said she did not make any allegations of race discrimination

against any of the respondents in her grievance or prior to the ET1 "*due to my lack of awareness of the alleged racial discrimination until I spoke to an ex senior colleague in October [who told her] 'it's because you're black'*". She also claimed that she spoke with a relative, who "*helped me to contextualise my experiences using a comparator*" thereby enabling her to "*recognise the racial discrimination at play*".

16. Given the claimant's obvious intelligence, her assured presentation of her case, and her role as a trade union representative, I have to say I found this account very hard to credit.

17. The claimant worked at the school until 21 July 2022, which was the end of the school term. Thereafter, and until the EDT, she was in the school holiday period. She did not approach ACAS pre-EDT.

18. The grievance was not determined by R1 until after the EDT, in 2023. (The claimant did not suggest before me that any delay in finalising the grievance process impacted in any material way on the timing of her presentation of the ET1.)

19. The claimant started a new job the day after the EDT. It is not yet clear when she applied for that job. It paid a slightly smaller salary.

20. Before the claimant presented her claim, and towards the tail end of the 3 month post-EDT period, she approached ACAS for the purposes of the early conciliation (EC) procedure. She obtained EC certificates in respect of both R2 and R3, for which 'Day A' was 25 November 2022, and 'Day B' was 6 January 2023. In those two certificates, the names of R2 and R3 are given. In both cases, their address is said to be the school.

21. The claimant said she asked her trade union for assistance with the EC process in about early December 2022, but did not get that advice until mid December. (She did not explain why she left it so long to ask for advice.) However, as set out above, the claimant was herself a trade union representative, from September 2020. She had trade union assistance for her June 2022 grievance. She could and in my judgment should have sought advice about the EC process/the identity of her employer (if in doubt) from the trade union at an earlier stage. Moreover, as the complex legal arguments contained in her witness statement illustrate, the claimant is capable of doing her own legal and other research in order to establish and articulate her rights.

22. On 1 December 2023, ACAS sent the claimant an email headed "Amissah v. [R3]" and stating: "*we have recorded the employer's name as shown in the title of this email. Please check this is the correct full legal name and let us know if any change is needed. <u>The correct name can typically be confirmed on your contract or pay slips or via the Companies House website</u>*" (underlining added).

23. On 7 December 2023, the claimant then obtained another EC certificate -which named 'London Borough of Islington Education'[1] as a further prospective respondent, and gave R1's address. On the certificate, 'Day A' is 7 December 2022, and 'Day B' 18 January 2023. The reason for using 'London Borough of Islington Education' is that the claimant apparently looked up the name of her employer on the HMRC website on about 7 December 2022, and those were the details given.

24. The claimant did not satisfactorily explain the delay between 1 and 7 December 2023.

25. The claimant then had correspondence with ACAS on 10 December 2023 concerning the interplay between the EC certificates and whether or not she could "*change the name of my employer*". By that date, of course, she had already commenced the EC process against R1.

26. As set out above, she presented her claim on 29 January 2023. In her ET1, the claimant sets out a list of alleged acts/omissions by R2 and R3 as the bases for both claims. That list wholly or mostly replicates the factual allegations in her 13 June 2022 grievance- except, of course, that they were now framed as race discrimination allegations. The last act/omission she relies upon in respect of her claim against R2 occurred on 1 June 2021. The last act/omission for her claim against R3 occurred on 14 January 2022.

27. One of those historical allegations against R2 relates to an email sent by R2 to R3 on 19 November 2020. In the email, apparently written in response to a query by the claimant[2] about pay progression, R2 said "*shall we take a contract out*?" The claimant says in her witness statement this "*involve[s] references to hiring someone to kill an employee (me)"* and is a "*death threat… that left me with psychological and emotional damage*"*.*

28. The 19 November 2020 email was not sent to the claimant at the time, and she only "discovered[3]" it in May 2022. She says it was this email which prompted her acceptance of voluntary redundancy -though she did not mention the connection at the time[4].

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[1] This is the name which the claimant used in her ET1. It was amended without issue at the 17.7.23 hearing.

[2] The email does not name the claimant. But I was told by Ms King that the grievance investigator found it was "almost certain" that it referred to her.

[3] This is the word she uses in the FBPs. The circumstances of that "discovery" are not entirely clear. It must have been on or before 13.5.22.

[4] Of course, as a matter of law, she did not have to mention it, or other issues she says she had. See e.g. **Weathersfield Ltd v Sargent** [1999] ICR 425. But it is perhaps surprising she did not do so, especially if the impact on her was as stark as she says. I was not given a copy of the claimant's grievance. But the claimant did not say in her evidence that she blamed the 19.11.20 email in the grievance for prompting her acceptance of voluntary redundancy.

29. In her evidence before me, the claimant accepted that by the time she saw the 19 November 2020 email (18 months on), she no longer thought "*someone was going to kill me*". But she considered that the language "*contributed to a hostile environment*" and was harassment, "*even if in jest*".

30. Following an order from the tribunal made on 5 June 2023, under cover of an email dated 26 June 2023 the claimant provided her FBPs. They included an additional allegation of direct race discrimination and harassment (s26 EqA) in relation to comments made by R2 in the context of a grievance investigation hearing on 15 September 2022. The relevant comments, which the claimant highlighted in her FBPs, are recorded as part of an 11 page transcript:

    "*CH asked if [R2] had spoken to SA but [R2] could not recall. He stated that when he found out SA was on leave. There were elements of exclusivity in the way SA worked. There was another incident in an IT session. [R2] wanted to find out what SA was doing but she was very hard to reach. She was not happy to agree to using the Discovery Channel and was asked to do an action plan which she ignored. SA was essentially in silo and when SLT, not unreasonably, wanted to find out what was happening - and because he had tried to do his best to engage and invite her to the IT lead - he was constantly meeting a brick wall. There were no meeting and no discussions with [R2]. CH asked if there had been no collaboration and [R2] confirmed this. He stated that he does not held [sic] grudges*".

31. The claimant asserts in her FBPs that R2's above words "*further disparaged my character and perpetuated harmful stereotypes by portraying me as the angry black uncooperative woman [and] reinforced racial biases and discrimination".* In her witness statement for the preliminary hearing, she says:

    "*this portrayal of me as uncooperative and resistant to engagement creates a narrative that aligns with racial stereotypes, painting me as an obstructive individual... the language used, such as 'constantly meeting a brick wall', further perpetuates a negative image of me and undermines my professionalism based on racial biases... This characterisation of my behaviour and attitude not only unjustly tarnishes my reputation but also reinforces harmful stereotypes associated with black individuals. By labelling me as uncooperative and obstructive without considering potential underlying factors or alternative perspectives, it perpetuates discriminatory treatment and creates a hostile work environment*."

32. The claimant did not receive a copy of those notes from R1 until some time after presentation of the ET1, in April 2023.

33. The claimant further sought to allege by way of amendment that all the other matters said in the ET1 to be acts of direct race discrimination by R2 and R3 were also harassment for s.26 EqA purposes.

C. LEGAL PRINCIPLES

(1) Early conciliation

34. It is mandatory for most claimants who wish to bring an employment tribunal claim to first contact ACAS and provide certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation via the EC process.

35. If the tribunal exercises its discretion to add a respondent to a claim, that claim is not invalidated because the EC undertaken was with the original respondents. Nor is it necessary for EC to have been undertaking in respect of the newly added respondent. See e.g. **Drake International Services Ltd v Blue Arrow Ltd** [2016] ICR 445, EAT.

36. Exact precision in the detail given to ACAS for EC purposes is not required. If e.g. a prospective claimant has done enough to identify the prospective respondent to comply with the requirements notwithstanding an error in the latter's name, that will suffice. See **Mist v Derby Community Health Services NHS Trust** [2016] ICR 543. This is because one of the purposes behind the whole EC process is "*to avoid formalities fettering a fast and fair process of justice*" (**Drake**, para 35)

(2) Time limits

Unfair dismissal

37. The time limits in relation to a claim for unfair dismissal are in section 111 ERA. Subsection (2) provides:

> *"… an employment tribunal shall not consider a complaint … unless it is presented to the tribunal -*
> *(a) before the end of the period of three months beginning with the effective date of termination, or*
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."*

38. That provision is to be read subject to section 207B ERA, which in effect extends the time limit to accommodate the EC procedure.

39. As to the meaning of "not reasonably practicable", the issue is pre-eminently one of fact for the employment tribunal. The burden of proof is on the claimant.

Whether something is "reasonably practicable" is "*a concept which comes somewhere between whether it is reasonable and whether it is physically capable of being done*" (per HHJ Shanks, **Stratford on Avon DC v. Hughes** [2020] 12 WLUK 628). Various matters may be relevant for an employment tribunal to consider. See further **Northamptonshire County Council v. Entwistle** [2010] IRLR 740 (para 5, per Underhill LJ). They include whether or not the claimant was aware of the right to claim unfair dismissal, or understood/was confused about the time limit for bringing such a claim. (These are not matters relied upon by the claimant here.) The question of what the substantial cause of the failure to present the claim within time was, and whether there was any "substantial fault" on the part of the claimant, is also relevant. See **Palmer v Southend Council** [1984] ICR 372.

Discrimination

40. Section 123 EqA provides that (subject to any EC extension afforded pursuant to s140B EqA) proceedings ought to be brought within three months of the act of the date to which the complaint relates, or such other period as the tribunal thinks just and equitable.

41. When the discriminatory act is said to be a dismissal, time runs from the effective date of termination rather than the date of notice. See e.g. **Gloucester Working Men's Club & Institute v. James** [1986] ICR 603.

42. Conduct "extending over a period" is to be treated as done at the end of the period- s.123(3) EqA. That applies to a continuing course of discriminatory conduct/maintenance of a continuing policy/state of affairs. **Hendricks v. MPC** [2002] EWCA Civ 1686. The correct test is whether the acts complained of are linked -as distinct from "*a succession of unconnected or isolated specific acts*." A relevant factor is whether the same individuals were involved**.** See **Aziz v. FDA** [2010] EWCA Civ 304.

43. The test to be applied at a preliminary hearing is that the claimant must show a *prima facie* case- in other words, a "*reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs*". **Aziz**.

Just and equitable extension

44. As regards any 'just and equitable extension' pursuant to s.123(1)(b) EqA, the onus is on the claimant to satisfy the tribunal that they should be treated as a suitable exception to the general rule that claims are to be brought in time. **Robertson v Bexley Community Care** [2013] IRLR 434.

45. Factors such as the reason for delay[5], whether the claimant was aware of their rights to make a claim, the conduct of the employer, the length of the extension sought, and the balance of prejudice as between the parties, are all material. Tribunals do not need to follow a formulaic approach to factors which may be relevant, especially when no reliance is placed on them. **Chohan v. Derby Law Centre** [2004] IRLR 685.

46. Other points to note for present purposes are:
    a. A failure to provide a good excuse for the delay in bringing a relevant claim will not inevitably result in an extension being refused. **Concentrix CVG Intelligent Contact Ltd v Obi** [2023] IRLR 35, *per* HHJ Auerbach at [49]–[50]. However, it is important. As is put in Harvey: "*even without a formal rule, the absence of a good reason for the delay is likely to weigh heavily in the balance of whether it would truly be 'just and equitable' to extend time*".
    b. An important factor in deciding whether or not to extend time may be whether the delay has affected the ability of the tribunal to conduct a fair trial of the issues. See **DPP v. Marshall** [1998] ICR 518.
    c. If there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But the converse does not follow. If there is no forensic prejudice to the Respondent, "*that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts*." **Miller v. MoJ** [2016] UKEAT/0003/15.
    d. The weakness of a claim (even if it is not hopelessly weak) may be a relevant factor to take into account when deciding if it is just and equitable to extend time- though caution is needed where the full evidence will not be available. See **Kumari v Greater Manchester Mental Health NHS Foundation Trust** [2022] EAT 132 (26 April 2022, unreported) at [63].

(3) Amendment

Order of applications

47. An out of time claim may be brought in time by an amendment application. In **Sakyi-Opare v Albert Kennedy Trust** UKEAT/0086/20 (24 March 2021, unreported), the tribunal had held it was not just and equitable to extend time. In doing so the tribunal had failed first to determine the claimant's application to amend her claim to add reliance on new post-ET1 detriments. The EAT held that the tribunal should have determined the amendment application before assessing just and equitable arguments. The EAT stated (at [21]) that if the amendment application had been

[5] The tribunal is entitled to take into account delay up to the final hearing- not just prejudice to a fair trial occasioned by the delay between the end of the 3-month limitation period and the date when the proceedings were initiated. **Stott v. HMPS** [2003] EWCA Civ 1513.

allowed, the existence of the new detriments would have been a relevant (but not determinative) factor in determining whether or not it was just and equitable to extend time for the original, out-of-time, claim.

Discretion to allow amendment

48. The tribunal must consider all the relevant circumstances, balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. See **Selkent Bus Co v Moore** [1996] IRLR 661, EAT [paras 21-24]. There, Mummery J (P) highlighted as being among the relevant circumstances:
    a. the nature of the amendment - whether it is the addition of factual details to existing allegations on the one hand, or to the making of entirely new factual allegations on the other;
    b. the applicability of time limits - considering whether the complaint is out of time and, if so, whether the time limit should be extended; and
    c. the timing and manner of the application - including consideration of why the application was not made earlier and why it is being made now.

49. There is discretion to allow an amendment where a claim presented at that point would be out of time. However, where the claim would be out of time (including after consideration of whether to exercise the discretion to extend time on grounds of justice and equity), then unless the new claim is closely connected with that originally pleaded (i.e. because it is a mere relabelling and/or arising out of the same facts or substantially the same facts as are already in issue), the application to amend should only be allowed in special circumstances: **Abercrombie v Aga Rangemaster Ltd** [2013] IRLR 953, *per* Underhill LJ at [para 50].

50. Poor merits can lean against allowing an out of time amendment, even if the merits are not so poor as to be utterly hopeless. **Gillett v Bridge 86 Ltd** UKEAT/0051/17.

51. When considering whether an amended claim is brought in time, it is deemed to be made at the time at which permission is granted for the amendment: see **Galilee v. CMP** [2018] ICR 634 at [para 109(a)], where it was held there is no doctrine of 'relation back' in the procedure of the employment tribunal.

(4) Discrimination

Discriminatory constructive dismissal

52. Section 39(2) EqA provides that an employer must not discriminate against an employee by dismissing them Dismissal will include constructive dismissal. See e.g. **De Lacey v Wechseln Ltd (t/a Andrew Hill Salon)** [2021] IRLR 547. There, it was held (*per* Cavanaugh J) that a 'last straw' constructive dismissal can amount to

unlawful discrimination if some of the matters relied on, even if not the last straw itself, were acts of discrimination. This, even though such matters may themselves be out of time as regards any free-standing claim that might have been based solely on them. The question he adopted, following HHJ Auerbach's wording in **Williams v. Governing Body of Alderman Davies Church in Wales Primary School**, was whether "*the discrimination thus far found had sufficiently influenced the overall repudiatory breach in response to which the employee resigned*".

'Unreasonableness'

53. The ET is not entitled to draw an inference of discrimination merely because an employer has treated the employee unreasonably and that they have a protected characteristic. **Law Society v. Bahl** [2003] IRLR 640, EAT [*per* Elias J para 94].

Harassment

54. The ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment -albeit the claimant's subjective perception of the conduct in question must be considered. **Driskel v Peninsula Business Services Ltd** [2000] IRLR 151. Tribunals "*must not cheapen the significance of [the words used in s.26]... They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*." **Grant v HM Land Registry & EHRC** [2011] IRLR 748 (*per* Elias LJ, para 47.).

55. Similarly, in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 EAT it was held *per* Underhill J para 22 that "… *dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended … it is… important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase*".

56. When assessing the effects of any one incident of serval alleged harassments, then: "*it is not sufficient really to consider each instant by itself. We obviously must consider each incident by itself but in addition, we must stand back and look at the impact of the alleged incidents as a whole*" **Grant**.

Detriment

57. An unjustified sense of grievance (no matter how keenly felt) will not constitute a detriment for s.13 EqA purposes. **Shamoon v. Chief Constable of the Royal Ulster Constabulary**.

(5) Strike out

58. The test of 'no reasonable prospect of success' is a high hurdle to pass, with the stress on 'no'. It is not enough to show that a claim will possibly fail or is likely to fail: **Balls v Downham Market High School and College** [2011] IRLR 217.

59. Discrimination cases are generally fact-sensitive, "*and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest*". **Anyanwu v South Bank Students' Union** [2001] IRLR 305 [para 24, per Lord Styne].

60. Nevertheless, where there are no reasonable prospects of success, it remains appropriate for a discrimination claim to be struck out and inappropriate for it to continue to take up the tribunal's resources. See **Anyanwu** [para 39, per Lord Hope].

(6) Deposit order

61. The making of a deposit order requires a lower threshold to be passed- as Harvey puts it, "*a lesser degree of certainty of failure"* is needed. See further **Hemdan v Ishmail** [2017] IRLR 228, where the essential purpose of such an order -to discourage the pursuit of claims with little prospect of success- is discussed.

62. When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. **Van Rensburg v Royal Borough of Kingston-upon-Thames** UKEAT/0095/07.

D. APPLICATION TO FACTS

Amendment

R2's interview notes

63. As set out above, the claimant only received the notes of R2's 15 September 2022 interview in April 2023. The fact that she was seeking to amend the claim was raised at the 17 July 2023 preliminary hearing, the claimant having raised the allegation in her FBPs, some two month post-discovery.

64. So, the amendment application is made out of time, albeit her 'date of knowledge' was more recent than 15 September 2022.

65. The factual nexus between the already pleaded case and new allegation, and R1's apparent delay in producing the notes for the claimant, all go in the scales in favour

of allowing the amendment. The claim is also at a relatively early stage (albeit the EDT is already over a year ago.)

66. However, the apparent weakness of the new claim weighs very heavily against allowing the amendment. It is significant to note that the interview notes contain a variety of other comments about the claimant which are not challenged at this stage, or included within the amendment application. The language of R2 in the passage relied on does not contain overtly racist language (though, of course, it does not need to do so). And I find it very difficult indeed to read the notes, on any proper analysis, as reinforcing *"harmful stereotypes associated with black individuals".* It reads as R2 expressing -rightly or wrongly- difficulties he perceived he had in his working relationship with the claimant, in the context of a grievance interview where he ought to have been able (within appropriate boundaries) to express and explain himself.

67. Mr King endeavoured to persuade me that as R2's words were articulated in a grievance meeting, I was as a matter of law precluded for making a finding of harassment. She relied on **Greasley-Adams v Royal Mail Group Ltd** [2023] EAT 86 in that respect. I think her submission goes too far. But she is right to say, relying on that case and common sense, that the context matters. The fact R2 was answering questions put to him by a third party about the claimant's grievance further militates against a finding of discrimination. I think there is (at best) little reasonable prospect of the tribunal finding that anything material which R2 said was on grounds of race; or, that what he said amounted to a 'detriment' (at least, properly assessed in the light of **Shamoon** above); or, that what he said was race-related; or, that his words had the proscribed purpose or effect. It would "cheapen the significance" of the words used in s.26 EqA to find otherwise.

68. Putting the above factors into the balance, I reject this part of the amendment application.

Harassment

69. The application to categorise each act of direct race discrimination in the ET1 also as s. 26 EqA harassment is, as Ms King sensibly accepts, essentially a relabelling exercise- albeit of course the parameters and tests to apply under ss 13 & 26 EqA are somewhat different. I allow that amendment- although for the reasons set out below the merits of the s.26 claims look weak to me (and the lack of merit again goes against inclusion).

Unfair dismissal claim against R1

70. I find that the unfair dismissal claim against R1 was presented out of time, and that the tribunal does not have jurisdiction to hear it. The claimant has not convinced me

that it was not reasonably practicable for her to bring the claim against R1 within the 3 month time limit (allowing for any EC time extension). Even if it was not practicable for her to comply with that time limit, I find that she did not bring the claimant against R1 within a reasonable period thereafter:

a. The claimant left it until very late in the initial post-EDT 3 month period to approach ACAS. She was entitled to do that. But it left her with little or no time to correct any mistakes or omissions in relation to the EC process.
b. In the light of my findings above, I do not think any confusion as to the correct identity of the employer (assuming there was such confusion) made it impracticable to bring the claim in time. The claimant ought to have established (if she did not know) that R1 was her employer before the expiry of the 3 month time period.
c. R1 was not included in the first tranche of EC certificates. The claimant could and should have included R1.
d. By the time of Day A for the EC certificate naming R1, the 3 month time period had expired (on 30 November). Day A for that EC certificate came 7 days too late -and the claimant has not satisfactorily explained that 7 day time lapse.

71. I acknowledge that the claimant's initial approach to ACAS, in relation to R2 and R3, was within 3 months of the EDT. I also acknowledge the force of the claimant's submission that, had she simply issued the claim against R2 and R3 and relied on the EC certificates for R2 and R3, she *may* have been able to amend the claim so as to introduce R1 e.g. as the appropriate respondent to the unfair dismissal claim. Cf. **Drake International Systems Ltd and Others v Blue Arrow Ltd**, UKEAT/0282/15/DM, to which I was referred in submissions. (As set out above, in that scenario the tribunal would have been entitled to look to the merits of the prospective claim when deciding whether or not to allow the amendment.)

72. However, I do not think that avails her, given that she did in fact go through the EC process with R1-albeit (for the reasons set out above) too late- and include R1 as a respondent to her claim. I do not think the claimant is right to say that "*the original claim [can now] be amended to include [R1] as a respondent*". R1 is already included. It was reasonably practicable for her to have brought her unfair dismissal claim against R1, having engaged in the EC process in relation to R1, in time.

The EqA claims

73. All EqA claims were presented out of time, in respect of each respondent, as explained below.

R2

74. I will assume for present purposes that the claimant has made out a *prima facie* case that the various allegations against R2 amount to 'conduct extending over a period' for s.123(3) EqA purposes.

75. However, most of the allegations are very stale, dating back to early 2020. The most recent in time in the ET1 for R2 was 1 June 2021. So, any 'conduct extending over a period' for R2 ended long before the commencement of EC and presentation of the ET1.

76. The 19 November 2020 email which R2 sent to R3, and which is said to have prompted the claimant's resignation, was only discovered by her in early May 2022. But that 'date of discovery' is still over 6 months before the EC process was commenced in R2's case.

77. In the claimant's favour are the fact that:
    a. The 'mistreatment' on which the claimant relies in the ET1 was raised as part of the claimant's June 2022 grievance - albeit not as race-related complaints (which would have been a very significant factor for investigatory purposes).
    b. Several of allegations set out in the 17 July 2023 List of Issues focus on the content and interpretation of paperwork/emails, rather than relying on oral conversation etc.
    c. In the light of what is said in the ET3, R2 appears to be in a position to provide a substantive reply to many of the allegations.

78. However:
    a. As explained above, onus is on the claimant to persuade the tribunal that it is just and equitable to extend time in her favour. The claimant has not, in my judgment, advanced any good or plausible reason for not bringing her race discrimination claims -or even a complaint of race discrimination- considerably sooner.
    b. Because the claimant did not raise a grievance or a complaint of race discrimination about the 2020 and 2021 issues she apparently had with R2 or R3 at the time, or in her 2022 grievance, no enquiry was then made regarding discrimination; nor was any consideration given as regards any comparators.
    c. It may be expected for memories to have already faded (and to continue to face) after so long a lapse of time. Thus, for example, the notes of R2's 15 September 2022 interview shows various points where R2 indicates he can no longer recall certain details. This can prejudice the respondents. The ET3 does yet not address all of the allegations raised.

d. Though I appreciate I do not have all the evidence before me, and thus must exercise due caution, I consider all or most of the discrimination claims against R2 (and R3) have little reasonable prospect of success:
   i. There is scant evidence of a race connection in respect of any of the matters about which complaint is made. Most if not all of the allegations appear to amount to the claimant belatedly saying that the respondent was unreasonable, and that she is black, and that therefore she has been discriminated against. That, as explained above, is not enough. See for example items 1, 2, 4 and 5, 8, 11, 12, 14, 15 & 17 from the 17 July 2023 List of Issues. (The same would have applied to the allegation in relation to the 15 September 2022 notes.)
   ii. It is not obvious how several of the matters complained of can be said to have had, properly construed, the requisite detrimental impact. See for example items 6, 7, &15 from that List.
   iii. Several of the allegations on the face of them appear to have an obvious non race-related answer: see for example items 2, 3, 6, 7, 8, 9, 11, 12, 15, 16, & 17 from that List.
   iv. The fact the claimant did not complain of race discrimination at the time - and has not presented a plausible reason for not doing so- in my view probably further weakens the claimant's case. If she did not discern any 'bad conduct' as race-related at the time, it would probably be a challenge to persuade the tribunal of the requisite race connection.
   v. I think it would probably "unduly cheapen" the words of s.26 EqA to categorise as 'harassment' any or most of the items relied upon (viewed individually or collectively).

79. I therefore am not satisfied that it is just and equitable to extend time in the claimant's favour, so as to allow her claims against R2 to continue.

R3

80. As regards R3, the last alleged act of discrimination happened on 14 January 2022. I again assume for present purposes that the claimant has made out a *prima facie* case that 'conduct extended over a period' in respect of each allegation made against R3. But even so, 14 January is still the longstop- over 10 months before early conciliation began, and over a year before the presentation of her claim.

81. As regards any 'just and equitable extension', see further paragraphs 78(a)-(d) above, which substantively also applies to R3. I am not satisfied that it would be just and equitable to extend time to allow her to proceed with her claims against R3.

R1

82. If the claims against R2 and R3 fall away, as well as the unfair dismissal claim under ERA, what is left under EqA against R1?

83. The claimant did not argue before me that her resignation amounted to a discriminatory constructive dismissal by R1 for the purposes of s.39(2)(c) EqA. Such an argument does not appear to have been articulated at the 17.7.23 preliminary hearing, either; nor is it in the 'working version' of the List of Issues prepared at that hearing. However, as the claimant alleges constructive dismissal, and as she relies on the same factual allegations to found her discrimination claims as her unfair dismissal claim, it must in my judgment already be part of her case that the constructive dismissal was also discriminatory for s.39(2)(c) EqA purposes.

84. The key date for the alleged discriminatory constructive dismissal is the EDT, rather than the date of the alleged discriminatory acts/omissions of R2 or R3 which found the claim, or the date of resignation. This brings forward the time frame considerably. However, the EC process for R1 still began 7 days after the expiry of 3 months after the EDT. So, the s.39(2)(c) EqA claim is still out of time.

85. Should a just and equitable extension be given in this case? I bear in mind that is 'just and equitable' for s.123(2)(b) EqA purposes is not the same as what was 'reasonably practicable' for s.111(2)(b) ERA purposes. A different and more liberal statutory test applies under EqA. The mere fact that I have rejected the unfair dismissal claim does not of itself mean that time cannot be extended for the s.39(2)(c) EqA claim.

86. Against allowing an extension, I repeat the points set out at paragraph 78 above.

87. However:
    a. The claimant did engage with the EC process with the 'discriminators' R2 and R3 prior to 30 November 2022 (i.e. within 3 months of the EDT).
    b. The claimant engaged with the EC process for R1 some 7 days later. So, she was significantly less out of time for a s.39(2)(c) claim against R1 than for her ss.13 and 26 EqA claims against R2 and R3.
    c. The claimant will need to prove she was constructively dismissed. That burden lies with her.

88. For those reasons, albeit with some hesitation, I consider that it is 'just and equitable' to extend time to permit the claim to proceed.

<u>Strike out/deposit order</u>?

89. I do not think it is appropriate at this stage for me to strike out the s.39(2)(c) claim against R1 on merits-based grounds, before the evidence is heard and the witness evidence is assessed. I remind myself that the claimant will not need to establish that each and every allegation of 'mistreatment' was race discrimination. "*Sufficient*

influence" [of] the overall repudiatory conduct, such that the constructive dismissal should be found to be discriminatory" will suffice.

90. However, there appear to me to be significant weaknesses in the discrimination allegations against R2 and R3 (as explained above), on which the claim against R1 must be substantially founded. There are (at least) potential presentation difficulties in the fact that the claimant did not mention the 'last straw' in her resignation letter- in which she simply accepted voluntary redundancy. I therefore think there is little reasonable prospect of the s.39(2)(c) EqA claim succeeding. If the claimant wishes to pursue it, she will need to pay a deposit.

91. The claimant is presently earning about £48,000 pa gross. She told me she had no savings. She did not mention any significant debts. She indicated she could afford to pay a deposit order totalling about £700, if payable within about one month. She must pay that sum by 31 December 2023 if she wishes to continue to advance the s.39(2)(c) EqA claim against R1.

Employment Judge Michell

12 November 2023
Sent to the parties on:

13 November 2023…….

For the Tribunal:

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