EMPLOYMENT TRIBUNALS

Claimant: **Mrs Clara Alfred**

Respondent: **MTR Corporation (Crossrail) Limited t/a MTR Elizabeth Line**

Heard at: **London South Employment Tribunal**

On: **14 November 2023**

Before: **Employment Judge Miller-Varey**

Representation
Claimant: Mr Adewuyi Oyegoke
Respondent: Mr Richard Hignett (Counsel)

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. The Claimant is granted permission to amend her claim by the substitution of the label "Equal Pay" at paragraph 15 of the document headed "The Claim" (herein referred to as the Original Particulars) with the label "Claim for Unlawful Deductions from Wages" and by adding that the alleged unlawful deductions were made between March 2021 and ended in October 2022 (as per the dates clarified at p.52, paragraph 17 of the bundle).

2. Save as set out in paragraph 1, the Claimant is refused permission to amend her claim by reference to other changes proposed in the documents headed Amended Claims (herein referred to as the Amended Particulars) and Particulars of Claim (herein referred to as the Amendment Statement).

3. The Tribunal has no jurisdiction in respect of the proceedings on the complaints in respect of the pleaded matters under the Equality Act 2010 since they were not brought before the end of the 3 months starting with the date of the acts to which the complaints relate. Those complaints were also not made within a further period the Tribunal considers just and equitable.

4. The allegations at paragraphs 1 through to 5 inclusive of the Original Particulars are considered to have little reasonable prospects of success and a deposit order in the sum of £300 per allegation is accordingly made.

REASONS

Unless otherwise stated, references to page numbers in these reasons are to the correspondingly numbered pages of the preliminary hearing bundle

Background

1. This claim was presented to the Employment Tribunal on 17 January 2023. It arises out of the Claimant's employment as a Customer Experience Assistance for the Respondent who provides rail services. She makes complaints of unlawful discrimination and harassment and says she was constructively dismissed. Claims for notice pay, holiday pay and unlawful deductions from earnings, also feature.

2. The Claimant's employment began on 8 October 2018 and ended on 17 October 2022 when she resigned in writing with immediate effect. Early conciliation started on 20 December 2022 and ended on 17 January 2023 [p.17]. The Claimant presented her claim to the Tribunal the same day.

3. A response was entered on 20 February 2023. The claim is defended in its entirety.

The scope of the preliminary hearing

4. A private preliminary hearing for case management purposes took place before Employment Judge Tsamados on 28 September 2023. At paragraph 2 [p.58] the Employment Judge directed that this open preliminary hearing will consider:

   *Whether the complaints of **sex and race discrimination** have been brought within the requisite time limits under section 123 of the Equality Act 2010, any further case management, including the claimant's application to amend her claim to include a complaint of indirect discrimination, leave to the respondent if so advised to amend its Grounds of Resistance, clarification of the complaints and issues remaining and determine the length of and set dates for the final hearing.*

5. Thus, there is a preliminary issue which may determine liability, as well as case management issues before me.

6. Of note, in reference to the preliminary hearing, the order also said this:

   "whilst I envisage this purely being to consider whether those claims were presented in time, the Tribunal on the day is of course at liberty to consider whether it is appropriate to deal with whether there is conduct extending over a period of time, although it may well be that this is a matter best suited to be dealt with at the final hearing" [p.62, paragraph 33].

Procedure

7. The parties were directed to agree a joint bundle of "documents" [p.59]. The Tribunal was duly provided with a 65 page hearing bundle on 24 October 2023.

8. The Respondent's counsel, Mr Hignett, prepared a skeleton argument. This was served and read by the Claimant's representative Mr Oyegoke in the late afternoon on 13 November 2023. No directions had been made for the filling of evidence and neither side served written witness evidence. The Respondent furnished a single additional document which was the Claimant's letter of resignation dated 17 October 2022.

9. The letter said this:

Unfortunately, this resignation is due to the trauma and stress I experienced after the incident that happened to me at Abbeywood Station on the 16th September 2022 at 23:22pm while performing my duties as train sweep on the 9U13 train headed to the depot.

I was physically and verbally assaulted by a drunken passenger ,the police were involved and the incident report procedure was followed . No immediate support was offered to me. This incident brought back memories of what happened to me at Ilford Station on the 24th march 2020 when I was physically assaulted by my colleague miss Garbi and her dog that she brought to work.

This happened while I was also performing my duties too. The outcome of the case was never discussed with me , no support was ever given to me. My manager Mr Ty wallis called me at the time and the conclusion was to let go.

I have gone through my normal duties and come to work everyday with smiles on my face pretending that everything was okay.

I hoped and prayed that these memories would just go away so I would be able to go on with my normal life ....

Although I am very upset at the situation that has necessitated my resignation, but I believe strongly that the best thing for me is to vacate the position for my the sake of my mental state and well being.

I want to thank you for providing me this opportunity four years ago. It has allowed me to gather some experience and learn some new skills. I have also have the opportunity to work with some fantastic team .

10. The hearing took place via Cloud Video Platform.

11. The Claimant did not attend. The clerk telephoned her in advance of the hearing but there was no response. Mr Oyegoke explained the Claimant was unable to attend because she was unwell. I enquired about the nature of her illness and when she became affected by it. Mr Oyegoke confirmed that the Claimant became ill a couple of days prior to the link being sent out.

12. The Judge pointed out that the Tribunal would typically expect to hear evidence from the Claimant and queried whether Mr Oyegoke wished to make any application therefore. He confirmed that he did not and that he was happy to proceed in her absence. The Judge confirmed with Mr Oyegoke whether he was familiar with the evidence typically given in a hearing concerned with substantive time limits - he was. She also pointed out there was no direct evidence before the Tribunal from the Claimant going to the question of any just and equitable extension. His position was that some elements of the claim were acknowledged to be stand alone and some were continuing until resignation. The latter were the heads of claim he would submit should be allowed to proceed. He confirmed he

had taken instructions from the Claimant who was content for the preliminary issue to be determined based on these arguments.

13. I heard from Mr Hignett first, having agreed to hear the parties respectively in turn on the preliminary issue and then on the application to amend. However, having heard Mr Hignett's submissions on the preliminary issue, I observed the potential inter-relationship of the first two matters whereby the proposed amendments *may* be said to constitute continuing acts. I recalled that there was authority on the question of what order the Tribunal should approach the issues in i.e., whether it should determine the amendment questions first. I am grateful to Mr Hignett who undertook some research and brought to my attention the case of **Galilee v The Commissioner of Police of the Metropolis UKEAT/0207/16/RN**. The extract was shared electronically with Mr Oyegoke who was also given a short break to consider it. In the circumstances, I determined it was in the interests of justice to hear the parties on all matters and to provide a reserved written judgment.

14. I also indicated to the parties that I would be considering the authority of **E v X, L and Z UKEAT/0079/20,** providing them with the reference.

15. Since the hearing concluded, I in fact identified the specific authority that I did have in mind on how to resolve the interplay between determining time limits and a concurrent amendment application: **Sakyi-Opare v The Albert Kennedy Trust UKEAT/0086/20.** I shall return to this below.

Findings

16. I am clearly not tasked with determining the overall facts in relation to the complaints, as would occur at a final hearing. It is necessary however to record my findings about the complaints and the dates of them. That takes a more than usual degree of unpicking because of the way the proceedings have progressed to date. I also record my findings about why the claim was presented when it was.

The Original Particulars and their evolution

17. The ET1 was presented to the tribunal on 17 January 2023 [p.17]. The type and details of claim section was completed so as to include the following claims: unfair dismissal (including constructive dismissal), discrimination on grounds of age, on the grounds of race, and on the grounds of sex (including equal pay), notice pay, and holiday pay.

18. She then provided the details of her claim in an attached typed 4 page document headed "the Claim". I shall refer to this document as the Original Particulars.

19. There is an overarching paragraph below which numbered paragraphs appear under these headings: "Constructive (Unfair) Dismissal", "Discrimination (Sex)", "Discrimination (Race)", "Equal Pay" and "Holiday Pay and Payment in lieu of notice".

20. The document then concludes with an overarching paragraph which describes the material set out previously under the individual headings as *"examples of race and sex discriminatory conduct against the claimant as well as treatment which made it clear to the claimant that the respondent does not want her employment*".

21. Mr Hignett provided a chronological table of the allegations of discrimination, categorising them by reference to the complaint made or potential causes of action which he identified might apply from the Original Particulars. I have considered it closely and am satisfied that it is expressed in an accurate and neutral way. I have

adopted it and made my own annotations (shown highlighted). For convenience, I have added in against allegations 4, 5, 10, 11, 15 and 18 that they are pleaded under the constructive unfair dismissal banner. I have also added the dates which have been provided in respect of allegation 17 and 18, and the origin of the information.

No.	**2018**			
1	Nov	**Tony Brindley** at Romford asking C why she bears the English name Clara when she is black African	Direct race discrimination/ harassment	ET1 11
2	14 Dec	DCEM **Mohamed Quasim** asking C and other female staff on duty to unzip their fleece jacket in order to check C was properly tucked in	Direct Sex / sex harassment	ET1 7
	2019			
3	24 January	DCEM **Mohamed Quasim** asking C and other female staff on duty to unzip their fleece jacket in order to check C was properly tucked in	Direct Sex / sex harassment	ET1 7
4	27 January 28 January	Not being permitted to use staff toilet on Platform 2 and being remonstrated with by station manager **Lee Doyle** when she complained	Direct race discrimination Judge's note: there is no allegation that Lee Doyle remonstrated with the Claimant because of race or other protected characteristic. Part of the Constructive (Unfair) Dismissal allegation	ET1 2
5	4 March	**???** decision that Lee Doyle should interview C for position of Ticket officer	? Judge's note: There is no allegation of unfavourable treatment on grounds of sex, race or age Part of the Constructive (Unfair) Dismissal allegation	Et1 3

6	9 July	DCEM **Mohamed Quasim** asking C and other female staff on duty to unzip their fleece jacket in order to check C was properly tucked in	Direct sex/ sex harassment	Et1 7
7	19 Sep	DCEM **Mohamed Quasim** asking C and other female staff on duty to unzip their fleece jacket in order to check C was properly tucked in	Direct sex/ sex harassment	ET1 7
	2020			
8	25 March	**Gabriella Dragan** racially profiling C at Ilford station and bringing a dog to work that barked at her	Direct race	ET1 12
	2021			
9	February 2021	Not paid appropriate salary as a Safety Critical worker	Unlawful deduction of wages claim wrongly labelled as Equal Pay Equal Pay claim dismissed on withdrawal by EJ Tsamados – p.61	ET1 15
10	August 2021	**Roshan Patel**, Station supervisor at Woolwich asking C to handpick litter on the platform	Harassment, related to race? Judge's note: There is no reference to race or sex Part of constructive (unfair) dismissal allegation	ET1 4
11	7 September 2021	**Hayley Greenlade** breaching data rules by sending C's BRP to a colleague, TY Wallis	Direct race Part of Constructive (unfair) dismissal allegation Judge's note: Described as "also" discrimination	ET1 5
12	Sep/ Oct	Denied opportunity to attend special familiarisation at new Canary Wharf station	Direct race	ET1 13
	2022			

13	7 Feb	**Ty Wallis** failing to conduct a return to work interview following sickness 17 Jan – 7 February 2022	Direct race	ET1 14
14	12 April	**Ty Wallis** refusing to refer C to a female manager to arrange a meeting to discuss flexible working	Direct sex discrimination	ET1 8
15	16 September	C attacked by drunken customer at Abbey Wood station. No investigation. No support	Part of Constructive (unfair) dismissal allegation Judge's note: Claimant alleges: *The conduct here was also discriminatory* but **no** grounds/protected characteristic are identified.	ET1 6
16	17 October	Resignation/ termination	Constructive unfair	ET1 1
17	??? "This practise span the whole duration of the Claimant's employment" - see paragraph 9 of the Amended Particulars at p.47	Denied opportunity of being promoted to station controller	Direct race	ET1 9
18	??? 4 November 2018 up till around 20 February 2021 – see C's rep's letter of 19 October 2023 at p.63	Claimant made to work at faraway stations	Direct race	ET1 10

22. In these reasons I shall refer to the numbered allegations within the table as "Table Allegation X" etc.

23. The Respondent's Grounds of Resistance provide a detailed factual response to the matters relied on. They assert that the Claimant's case should be confined only to the constructive unfair dismissal and (as was then) the equal pay claim "which appear to be in time" [p.32 paragraph 24].

24. The parties were given notice of the September 2023 preliminary hearing for case management purposes on 20 April 2023 [pp.36 - 42].

The Claimant's Amendment Application

25. On 6 September 2023 [p.43] the Claimant's representative wrote to the Tribunal requesting to amend the claim and purporting to attach *"a"* document *"showing the amendments that I wish to make"*.

26. The letter further described the amendments as: the substitution of the correct name of the Respondent, adding a few words to certain heads of claims, replacing equal pay with unlawful deductions of wages and finally providing further details for the holiday pay and notice pay. The application was clearly prompted by points made in the Grounds of Resistance.

27. The letter asserted that all the facts relied on in respect of the amendment were included in the ET1 and the effect is merely to add a new label to facts already pleaded. The balance of hardship test was referred to.

28. Attached to the letter were in fact two documents. The first bears the heading "Amended Claims" (which I shall refer to as "Amended Particulars"). In appearance it resembles the Original Particulars with the addition of text in red. This is clearly the document to which the letter making the application makes reference.

29. Within this document, the heading to the constructive unfair dismissal claim remained unaltered. The only relevant change to it, which is shown in red, is to paragraph 6 [p.46], in the following terms:

    " the claimant relied upon all the above and all the allegations of discrimination and unlawful deductions wages stated therein to establish her unfair constructive dismissal".

30. In relation to the race claims, the proposed addition was to paragraph 9 [p.46] with the addition of the following words: *"this practice span the whole duration of Claimant's employment",* in reference to non-promotion.

31. The other *noted* changes were: asserting a flexible working request had been refused [p.47, paragraph 8], and substituting the previous equal pay claim with a new label of unlawful deductions from wages [p.48, paragraph 15].

32. The second document provided by the Claimant's representative, somewhat confusingly, is entitled Particulars of Claims [pp. 49- 54]. It is in fact much more akin to a witness statement.

33. It is not at all clear why this second document was even provided or what status the Claimant's representative intended it should have. It is written in the first person although does not contain a signed statement of truth from the Claimant. I shall refer to it as the Amendment Statement.

The Response to the Amendment Application

34. The Respondent's solicitors set out their position on the amendment on 19 September 2023 [pp. 56-57], in fact focusing on the Amendment Statement and not on the Amended Particulars. It made the point that the document, in aspects, replicated the Original Particulars, but there also appeared to be "additional background". Correspondingly it was wrong to suggest this was all material previously included in the ET1. I agree entirely with that assessment.

35. Materially, the Respondent indicated that its only objection to what was proposed by the two documents was to the inclusion of an indirect discrimination claim. That was not mentioned in the Amended Particulars at all. It was included in the Amendment Statement where the Claimant asserted [p.53, paragraph 29] that the reduction of staff policy at the twilight shift put the Claimant at a substantial disadvantage at work compared to those staff of caucasian group.

The hearing on 28 September 2023

36. At the hearing of 28 September 2023, Employment Judge Tsamados [p.59, paragraph 5] directed the claimant to provide further information by reference to paragraph 10 of the Amended Particulars (namely, each of the dates on which the Claimant alleges she worked shifts at faraway stations)

37. In reference to the two amendment documents, the Employment Judge recorded in his case summary that *"the claimant's claims are clarified as follows: constructive unfair dismissal; direct sex discrimination; direct race discrimination; indirect race discrimination harassment related to race; unauthorised deductions from wages and entitlement to notice pay. Apart from seeking the names of any comparators relied upon, the respondent's objection is to the indirect race discrimination complaint."* [p.61, paragraph 24].

38. I have not been provided with a copy of it, but the Employment Judge also recorded that the Claimant wished to withdraw her complaints of equal pay and age discrimination, and that these would be dismissed on withdrawal in a separate judgement [p.61, paragraph 26].

The reasons for the delay

39. In terms of the apparent reason, or indeed any explanation for proceedings not being issued sooner than 17 January 2023, the information from the Claimant is confined to the following.

40. Firstly paragraph 19 of the Amended Particulars [p.48] which states the following:

    "Insofar as the tribunal finds that any act complained of occurred more than 3 months less a day before its receipt of this claim that such act or omission is not part of a continuing act under section 123 a of the equality act 2010 the claimant would submit that it would be just and equitable in the circumstances for the Tribunal to extend time for submission of her claim under section 123(1)(b)".

41. Secondly, the Amendment Statement, at paragraph 35, repeats the foregoing paragraph verbatim. The only further addition is the Claimant's assertion that all the claims have been brought within the prescribed time [p.54].

Findings relevant to deposit orders

42. The Claimant commenced new employment on 24 October 2022 at a rate which, whether it is expressed gross or net, exceeds her earnings previously [ET1, p. 5].

43. During the course of the hearing I raised with the Claimant's representative what information he invited me to take into account in reference to the Respondent's alternative position that deposit orders might be made in respect of complaints with little reasonable prospects of success. I asked specifically about the means of the Claimant. His overriding position was that the making of deposit orders was inappropriate because there is a substantial case to be tried in which the claimant had behaved diligently and in which she is engaged. He confirmed he had a line of communication available to him during the hearing via text message with the Claimant. He did not in course of the hearing proffer any information about her means.

Submissions

44. Mr Hignett contended that all allegations predating 18 September 2022 are out of time. He argued there is a prima facie lack of jurisdiction in respect of allegations numbered 1 to 15 and number 18 of the table allegations.

45. With the exception of Table Allegation 9 he submits the acts are all discrete. They may have had continuing consequences but they are not in the nature of continuing acts. It is equally difficult if not impossible to characterise the events as a discriminatory state of affairs in the sense referred to in **Hendricks.**

46. The last pleaded act of sex discrimination, he says, is 12 April 2022 and the last pleaded act of race discrimination is 7 February 2022. Correspondingly, significant extensions would be required, even surmising an act extending over a period ending with those dates, respectively.

47. He submitted there is no sufficient basis to justify the tribunal taking the exceptional step of extending time.

48. He says the Claimant has not pleaded discriminatory constructive dismissal. The references in paragraphs 5 and 6 of the Original Particulars (Table Allegations 11 and 15, as annotated, show the formulation) do not put the dismissal as a race complaint. This would itself require amendment. He argues this should be declined on the basis there is no form of the amendment before the tribunal, it is a weak claim because of the terms of the resignation letter and because of such a claim being out of time.

49. The Claimant's representative submitted that it had been accepted by the Claimant following the preliminary hearing for case management that some acts were discrete and for beyond what a Tribunal could grant an extension of time for. An example of one accepted to be out of time was that at paragraph 18 on page 52. This is from the Amendment Statement and corresponds to Table Allegation 11 He made a similar concession in relation to paragraph 19 on page 52 which corresponds to Table Allegation 12.

50. With those exceptions he contended that a number of the acts were continuing, in particular, the claims made at paragraphs 14 to 17 on page 51 (which I again stress is the Amendment Statement and not the Original or Amended Particulars). These correspond to Table Allegations 8,9, 14 and 17, respectively.

51. Mr Oyegoke argued that the Respondent was taking too narrow an approach, and that there was sufficient indication in the original pleading of a claim for discriminatory constructive dismissal. He says the claimant contends that the dismissal and breaches of contract are shrouded in discrimination. Even if some of the allegations of race discrimination are out of time as freestanding claims, the Claimant wishes to rely on them for a discriminatory constructive dismissal claim.

The Law

(a) The ambit of the hearing

52. The decisions of the Employment Appeal Tribunal in **Serco Ltd v Wells [2016] ICR 768** and also in the more recent decision of **Liverpool Heart and Chest Hospital NHS Foundation Trust [2022] EAT 9** confirm that departing from an earlier case management order – including one directing the hearing of a preliminary issue - will require a material change of circumstances, a material omission or misstatement or some other substantial reason.

(b) Time Limits

53. The Equality Act 2010 (EqA 2010) provides time limits for bringing claims. The provisions relevant to this case are as follows:

123 Time limits

(1) Subject to section 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"

54. **E v X, L & Z UKEAT/079/20/RN** contains a useful review of the position in relation to preliminary hearing on time limits in cases under the Equality Act. I have had regard to the key principles distilled by Ellenbogen J.

55. I have also considered **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA** and **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA** in respect of the correct approach to continuing acts. The Tribunal should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine

whether they can be said to be part of one continuing act by the employer. In some cases, resolution of the whether the requisite connection exists between the alleged discriminatory acts may need to be left to the final hearing when all of the facts have been found. On the other hand, it is sometimes both fair and possible to determine even at a preliminary hearing that there is no continuing act. That leaves the way open for substantive consideration of whether there should be an extension of time on just and equitable grounds.

(c) Discretion to extend time

56. The tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b), EqA 2010). Following **Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23** caution must be exercised against over-reliance on the so-called "Keeble factors"(so named after **British Coal Corporation v Keeble [1997] IRLR 336** in which the factors of length of and reasons for the delay, the extent to which the cogency of the evidence may be affected and the steps taken by the Claimant to obtain advice were said to be relevant). The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, *including* in particular the length of, and the reasons for, the delay (as per Underhill LJ in Adedeji at paragraph 37) .

57. It was established in **Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 122** that the proposed merits of a claim which is not plainly so weak that it would fall to be struck out, are not necessarily an irrelevant consideration when deciding whether it is just and equitable to extend time or whether to grant an application to amend.

(d) Contruction of pleadings and amendment

58. The issue of whether a particular allegation or legal complaint already forms part of a claim form requires examination of the claim form as a whole and should be construed generously; **Ali v Office for National Statistics [2005] IRLR; Mecharov v Citibank UKEAT0019/17**.

59. However, changes to the text of a claim form – even for a simple typographical error - require the permission of the Tribunal; amendment is not a matter of agreement between the parties alone.

60. The principle authority in relation to amendment application is **Selkent Bus Company Limited v Moore [1996] ICR** in which a series of relevant considerations are identified. This is often referred to as the "Selkent" test and encompasses: (a) the nature of the amendment (is it the addition of factual details to existing allegations, does it amount to the addition or substitution of other labels for facts already pleaded, or does it represent the making of entirely new factual allegations which change the basis of the existing claim?); (b) the applicability of time limits, and (c) the timing and manner of the application (it is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery). The Selkent test also requires that consideration should be given to all of the circumstances, balancing

the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

61. The Employment Appeal Tribunal has issued further guidance in this area in **Vaughan v Modality Partnership [2021] ICR 53**5, and **Choudhury v Cerberus Security & Monitoring Services Limited [2022] EAT 172**. The critical point to be taken from both of those cases is that of paramount importance in the Tribunal's consideration when dealing with an application to amend is a practical approach of balancing of the injustice and/or hardship of allowing or refusing the proposed amendment.

(e) Order of play between amendment application and definitive determination of time limits

62. If a claim form is presented out of time with the result that the Tribunal has no jurisdiction to hear it, there is no claim capable of amendment: **Cocking v Sandhurst (stationers) Ltd [1974] ICR 650**. In **Sakyi-Opare v The Albert Kennedy Trust UKEAT/0086/20** the EAT found that the Employment Tribunal had materially erred in law by not determining an application to amend before the determination of time limits. That was because (as per Matthew Gullick sitting as a deputy judge of the High Court):

20. The Employment Tribunal was, in my judgement, required to determine the Claimant's application to amend before then addressing the time point that might have arisen in this case. The error made by the Employment Tribunal is, in my judgement, material to its ultimate decision because the Claimant was contending that her claim form should be amended to include events that had taken place after it was filed. In my judgement, only in the context of there being a determination one way or the other of that application could the Employment Tribunal then go on to consider the issue of whether any other part of the claim was out of time by reason of there being no "conduct extending over a period" and, if so, whether time should be extended. That is particularly so because the Claimant's case was that the more recent events of January 2019 demonstrated a continuous and ongoing sequence of harassment on the part of the Respondent towards her, going back to the earliest of the events with which her claim was concerned. Whilst the Employment Tribunal in its Reasons rejected the Claimant's argument on there being "conduct extending over a period", in doing so it did not address the application to amend or the substance of the January 2019 allegations.

21. Further, if the application to amend had been allowed then even if the Claimant's arguments regarding there being "conduct extending over a period" had still been rejected then the inclusion of the more recent January 2019 allegation in the claim would have been a relevant (and, I emphasise, relevant: not determinative) factor in considering whether to extend time for the earlier allegations insofar as they had been presented out of time.

(f) The components of a constructive dismissal claim

63. From the case law I derive the following relevant principles of general applicability to a claim for constructive unfair dismissal:

64. Whether there has been a repudiatory breach of contract should be objectively assessed and the employer's subjective intention is not relevant (**Leeds Dental Team Limited v Rose UKEAT/0016/13/DM**).

65. The breach may be of a particular express term (e.g., agreed wages) or of an implied term, including the duty not to undermine trust and confidence.

66. In general, there is well established distinction between cases where the fundamental breach is comprised of a course of conduct taken together and cases where a one-off, single act by the employer is relied upon as fundamentally breaching the contract. In particular the following principles are relevant:
67. The act precipitating the resignation in a last straw case need not itself be a breach of contract (**Lewis v Motorwold Garages Ltd 1986 ICR 157 AC**)

68. The last straw, if an incident which is part of a course of conduct that together constitutes a breach of the implied term of trust and confidence, will revive the employee's right to resign. In that situation it does not matter that they worked and affirmed the contract after earlier incidents forming part of the course of conduct (**Kaur v Leeds Teaching Hospitals NHS Trust 2019 1 ICR 1, CA)**
69. The last straw does not need to be proximate in time or of the same character to the previous act of the employer (**Logan v Celyn House Limited EAT 0069/12** and **Omilaju v Waltham Forest London Borough Council 2005 ICR 481**). It need not be blameworthy or unreasonable but must contribute to the breach of the implied term.
70. An act which is entirely innocuous cannot be a final straw, even where it is interpreted by the employee as hurtful and destructive of his trust and confidence. (**Omilaju**).

(g) Components of a discriminatory constructive dismissal claim

71. A last straw constructive dismissal may be unlawful discrimination even if the last straw itself was not an act of discrimination (**Lauren de Lacey v Wechseln Limited t/a the Andrew Hill Salon UKEAT/0038/20/VP**). As per Cavanagh J at paragraph 71 and onwards:

71. First, I do not accept the submission, made by Mr Allsop on behalf of the Respondent, that a "last straw" constructive dismissal can only be unlawful discrimination if the last straw itself was an act of discrimination. In the present case, the ET found that the last straw, the dog poo incident, was not an act of discrimination. In my judgment there can be cases in which the constructive dismissal is, overall, discriminatory, even though the last straw was not. ***The very essence of the "last straw" doctrine is that the last straw need not be something of major significance in itself. It need not even amount to a breach of contract, when looked at on its own. It need not have the same character as the other incidents that preceded it: see Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493; [2005] ICR 481, at paragraphs 15-16 . Rather, the significance of the last straw is that it tips things over the edge so that the entirety of the treatment suffered by the employee amounts to a repudiatory breach of contract. It follows by parity of reasoning, in my view, that a constructive dismissal may be unlawful discrimination even if the incident which tipped things over the edge was not itself discriminatory. Another metaphor that is sometimes used for a "last straw" constructive dismissal is the "death of a thousand cuts". If some of the deepest cuts were acts of discrimination, it should not matter that the final glancing blow, though painful, was not itself discriminatory.***

*72. Second, in my judgment, it is clear that, in a discriminatory constructive dismissal, time runs for the claim from the date of the acceptance of the repudiatory breach, not from the date or dates of the discriminatory events, if earlier. See **Meikle,** at paragraphs 49-53. It follows that a discrimination claim arising out of a constructive dismissal may be in time even if the discriminatory events that render the dismissal discriminatory are themselves out of time. It follows in turn that the fact that the incidents in allegations 7 i and 11 v were out of time for the purposes of a free-standing discrimination claim, or for a "discriminatory course of conduct" claim, does not mean that they should be disregarded for the purposes of a discriminatory constructive dismissal claim.*

[My emphasis]

(h) Deposit orders

72. By rule 39(1) of the Employment Tribunal Rules, a party may be ordered to pay a deposit not exceeding £1000 as a condition of continuing to advance an allegation or argument. The power is only available where the complaint has "little reasonable prospect of success" and it is must be exercised in accordance with the overriding objective (**Hemdan v Ishmael and anor UKEAT/0021/16/DM**).

73. In evaluating the prospects of success, it is clear that I am not limited to assessing the claim on the basis of pleaded facts; I am able to take into account the likelihood of disputed facts (both the claim and the response) being proved (**Garcia v The Leadership Factor [2022] EAT 19** and **Jansen Van Rensburg v Royal Borough of Kingston-Upon-Thames UKEAT/0096/07/MAA**).

Discussion and Conclusions

74. As defined the preliminary issue is in respect of "complaints of sex and race discrimination". I note there is no express reference to harassment under the Equality Act 2010 but nothing turns on that in my view. I am satisfied it was just a compendious way of describing the Equality Act claims except for the proposed indirect (as was then) race claim. The parties before me have addressed me on that premise and manifestly the same statutory provisions on time limits and case law has bearing to like degree.

(a) Definitive determination of the preliminary issue in the absence of oral or written witness evidence

75. I have described the circumstances of the Claimant not attending the hearing. This is clearly sub-optimal for the purposes of my making a substantive determination of the time extension point and to a lesser degree, the continuing act point. I say lesser because (a) it is clear that even with her attendance, I cannot positively determine in the Claimant's favour that there *was* a continuing act – she has not therefore lost any advantage and (b) even if she demonstrated a prima facie case of continuing act, there would remain still a clear necessity for an extension of time. So, it is the absence of evidence on the reasons for the delay which is the greater gap.

76. Be this as it may, these are not grounds to revisit the scope of the preliminary issue. The Claimant's representative, on instructions, was happy to proceed and the Claimant well understands – and in her Amendment Statement has commented upon – time limits. The point was taken in the Grounds of Resistance. She understands they are said to have been breached by her in this case. A fair

chance to explain why, has been given.

77. On the other hand, consistent with rule 39, the making of deposit orders is something I may consider at a preliminary hearing without the requirement for any advance notice. That is, subject to making reasonable enquiries into the paying party's ability to pay and reflecting on that information when deciding on the amount.

(b) The complaints within the ambit Preliminary Issue

78. I begin with an analysis of the "sex and race discrimination complaints" comprised in the claim as at the time it came before me. Subject to any amendment I may allow, that is the starting point for determining the time limits I must apply. A potentially crucial distinction is that for a discriminatory constructive dismissal, time runs for the Claimant from the date of acceptance of repudiatory breach not from the date or dates of the discriminatory events, if earlier. A further corollary of that is that some complaints may be time-barred as free-standing discrimination complaints but will still need to be considered in full at any liability stage of a final hearing, if there is a discriminatory constructive dismissal claim relying on the same events.

79. This analysis will also inform the exercise of my discretion of whether to consider any question of amendment *before* determining the preliminary issue. I consider **Sakyi-Opare** points to prior consideration of proposed amendments being just, where those amendments would affect time limit issues materially.

(c) Was there originally a claim for discriminatory constructive dismissal?

80. I begin with the Original Particulars. In my firm view, that claim does not include any complaint of discriminatory constructive dismissal.

81. This is because:

- The allegations are conspicuously and deliberately delineated. The material set out under the headings "discrimination (sex)" and "discrimination (race)" do not list or refer to the Claimant's dismissal in anyway at all. Conversely a number of serious allegations of discrimination are made under those headings which are not repeated or referenced in the constructive unfair dismissal section.

- The *only* allegation in relation to dismissal is described explicitly under the heading "constructive (unfair) dismissal". This harnesses six allegations in which race is mentioned as a partial cause in 1 (Table Allegation 4) and *"also"* discriminatory in two others (Table Allegations 11 and 15). Notably however, the allegation of allegation 15 being "also discriminatory" fails to identify the grounds or protected characteristic i.e., whether sex or race.

- None of this is changed by the generic preamble in the Original Particulars which says: *"These acts of discrimination and conducts which made it clear to the Claimant that she was not wanted in employment are intrinsically linked"*. That is too oblique given the points I have already made to amount to a pleading of discriminatory constructive dismissal.

- Relevant here is that the Claimant has engaged representation. With respect to Mr Oyegoke, I am not certain that he is a qualified legal professional. He is clearly experienced and knowledgeable about employment tribunal proceedings and claims though. This is evident from, not least, from the inclusion in the ET1 of a schedule of loss which references the basic award, the loss of statutory rights, the

delineation between the various claims under headings and the manner in which, prior to the case management hearing, he wrote to the tribunal making a formal application for leave to amend. In that email [pp. 43-44] he referenced the applicable rules of procedure and made submissions apposite to the principles upon which amendments are granted. He also concluded by indicating his compliance with both "rules 32 and 92" the Employment Tribunal Rules. The Claimant is not therefore to be compared with an unrepresented Claimant who through inexperience or oversight has simply failed to place the right legal label on a claim.

- That, on any objective basis, there was no pleading of a discriminatory constructive dismissal is also strengthened by the approach of the Respondent and the Tribunal since. I will explain further below.

(c) Has a discriminatory constructive dismissal claim been "allowed" or should it now be permitted?

82. The question then arises whether the complaints comprised in the claim have been altered since?

83. Clearly with the exception of amendment of the Respondent's name [p.58, paragraph 3], no formal amendment of any kind has been expressly permitted.

84. That said, during the hearing when I was admittedly less familiar with the close details, I was troubled by two matters about which I raised questions of the Respondent's counsel.

85. First, that the scope of the amendment issue before me was described in a very narrow way: "the claimant's application to amend to include a indirect race discrimination". Inferentially, might it be said that the other amendments were "de facto" accepted as appropriate for the exercise of the Tribunal's discretion. The circumstances in which a Tribunal might stand in the way of agreed amendments are perhaps quite limited –but would naturally include if there is no jurisdiction because the claims were brought out of time.

86. Second but on a related note, the Respondent essentially made no objection to the Amended Particulars or the Amendment Statement. It may also be argued that the new formulation of the constructive unfair dismissal claim in the Amended Particulars at paragraph 6 [p.46] somehow crosses the line, on an objective reading, to include all of the necessary elements of a discriminatory constructive dismissal – albeit still wrongly headed. I have in mind the assertion that *"the claimant relied upon all of the above* ***and all the allegations of discrimination and unlawful deductions of wages*** *stated therein to establish her unfair constructive dismissal claims"* . This reads like a bid to harness all of the other, much wider discrimination allegations mentioned in the Original Particulars which in scope and range would then begin to dominate the constructive unfair dismissal claim.

87. Having reflected on these three matters closely they do not alter my conclusion that discriminatory constructive dismissal is not a complaint in these proceedings at the current time. I have also concluded that it would not be appropriate to allow it to be added by way of amendment.

88. My reasons are these:

- I am satisfied that the Respondent's representative in penning the email of 19 September 2022 and attending the case management hearing of 28 September 2022 genuinely did not appreciate or understand the Claimant's claim included any

aspect of a constructive discriminatory dismissal or that such was now being proposed by way of an amendment. The whole position was predicated on their understanding as set out in their letter of 19 September that:

*"**Constructive unfair dismissal claim** – this arises from the original proceedings and it does not object to this being included"*

- Thus past non-opposition by the Respondent is no barrier, on abuse of process grounds or otherwise, to the position the Respondent now adopts.

- I am satisfied, on the balance of probabilities, that at the preliminary hearing for case management purposes (a) neither the Judge nor the Respondent had any independent understanding that any part of the unfavourable treatment alleged was the dismissal itself and (b) the Claimant's representative did not identify either then or following receipt of the minute, that the claim (either originally or as now formulated), was intended to include a claim for discriminatory constructive dismissal. I find that with some confidence. Had it ever been mentioned or articulated I am quite satisfied it would have been listed by the Judge in his list of clarified claims; it was not. It would also have a considerable bearing on the utility of hiving off time limits as a preliminary issue.

- It follows the Judge was not intending that any such claim(to the extent emobodied in the two new pleadings documents) should pass through without more. The framing of the narrow amendment issue before me is *not* to be equated with permission having been granted for the Claimant to rely on everything (save the indirect race claim) within the Amended Particulars or the Amended Statement with its unidentified changes and more expansive allegations.

- The Claimant's position before me is not in truth (or at least not primarily) one of seeking amendment to add a new claim on this point but of asserting that the discriminatory constructive dismissal claim has always "been there". Whatever might have been intended, and I am frankly sceptical that there was such an intention, that is wrong.

- To the extent the Claimant's claim was not pleaded but has been brought out with the proposed amendments, the Claimant cannot have it both ways. That would be unjust and unfair. The Claimant's representative's letter regarding amendment stressed that there were no new claims for the purpose. The Claimant cannot now say that it *was* being added newly, and her representatives just omitted to say so or to raise it transparently with the Judge and the other side at the last hearing. Her position through her representative was quite contrary. The parties have an obligation to assist the Tribunal to further the overriding objective of dealing with cases fairly and justly. I am entitled to take into account the manner in which the Claimant through her representative has dealt with the pleadings and amendments. This is not a case of mutual misunderstanding in my judgment; it has been brought about squarely by the failure of being forthright and transparent about what was being sought. Represented parties, especially, should not deluge the Tribunal or the Respondent with multiple versions of pleadings with different allegations and claims dotted about the place seeking or hoping that anything and everything so expressed is somehow "banked" as a claim.

- None of the above is the fault of the Respondent. It responded helpfully and cooperatively to the application to amend.

- The claim is now vastly out of time, taking the start of the limitation period to be 17 October 2022. There is no justification for this which is advanced and granting it – to encompass all the discrimination allegations would mean the Respondent had wasted costs in seeking this preliminary hearing, which they first did in the Grounds

of Resistance. (There would be little point in seeking to exclude at this early stage, allegations which would still require defending as "straws" because they have no fixed limitation period of their own).

- I do not believe the prejudice could simply be compensated in costs either; the amendment will increase the hearing length, and thus the length of time before which this case could be heard. It will be well over a year from now. By that time, memories about allegations as long ago as November 2018 will have faded and the quality of evidence will have diminished. I regard a material degree of forensic prejudice to the Respondent as inevitable. I take into account here (legitimately, as it is not capable of altering the applicable limitation period for the putative discriminatory constructive dismissal claim) the view I have formed of whether the discrimination allegations should proceed as freestanding complaints. This is set out further below but the upshot is, they should not. Accordingly, granting the amendment would significantly proliferate the scope of the proceedings for the Respondent who would otherwise be dealing with a much narrower claim.

- I consider the merits of the claim to be weak; a further reason to refuse to allow it. The resignation letter is not obviously written in haste and is probative. It nowhere mentions discrimination as a factor in the Claimant's resignation. If the dismissal was a death by a thousand cuts, the deepest cuts would not appear to be acts of discrimination.

(d) The new direct race discrimination claim – before or after the preliminary issue/ should permission to amend be granted?

89. I have next considered whether the application to include the new direct race claim should be considered prior *to* the preliminary issue. It is potentially material to the Claimant establishing a continuing discriminatory state of affairs which ended much closer to the provisional cut-off date than might otherwise be the case. In turn therefore, if granted, this could impact on the exercise of the just and equitable discretion.

90. The proposed allegation was not recited in the Amended Particulars but first appeared in the Amendment Statement, initially as a claim for indirect discrimination. On 19 October 2023 [p.63] the Claimant's representative asked to further amend the claim *"to read as Direct Race Discrimination"* but on the basis the particulars given of the indirect discrimination claim remained unchanged. Of relevance, the passages in the Amended Statement say this:

22. There was a change of policy one weeks previously before the incident on 16 September 2022 that reduced the number of staff to do twilight shift to one instead of two persons....

Indirect Race Discrimination
29. I believe that the Respondent's reduction of staff policy at the twilight shift and the way it was applied put me at a substantial disadvantage at work compared to those staff of causcasian group...."

91. In the materials advanced by the Claimant, there is something of a conflict whereby the policy is alleged variously to have started on 2 September 2022 [p.63 - the letter seeking further amendment] and 9 September 2022[p.52 - the text above]. Nothing turns on this. It is alleged to have been reversed shortly after the attack on 17 September 2022

92. I consider the provisional cut- off date for limitation purposes (i.e., the earliest possible date of discrimination in respect of which the claim could have been presented within the time limit, ignoring continuing acts and extensions) to be 21 September 2022. This is a little later than the Respondent who says the same date is 18 September 2022. In any event, if the amendment is granted in favour of the Claimant it has the potential, on a continuing act basis, to "save" claims that the Tribunal may not otherwise have jurisdiction for.

93. Given that, I deem it fair to consider that application first.

94. I refuse the application, having regard to the principles of amendment which I have set out. There are a number of reasons:

- The nature of the amendment is not the substitution of a new label to facts already described. The indirect discrimination claim was a wholly new with the Amendment Statement and was never in the Original Particulars. The indirect discrimination claim was never permitted to be added. It is a new factual allegation which alters the basis of the claim. It is substantial.

- Having regard to the earliest date of the application to amend (6 September 2023 – p. 43), the claim is brought over 7 months after the presentation of the claim. No good reason has been advanced for this, despite the very prolix nature of the Amendment Statement.

- Whilst I acknowledge that I need not determine now (**Galilee**) whether it would be just and equitable to extend time for the new direct discrimination claim, I see no basis for kicking the can down the road and allowing the time question to be determined at trial. One of the chief reasons is that the Claimant has understood that the issue of why the claims were presented outside of the primary time limit is the dominant issue before the Tribunal today – in fact for a far longer period of time as regards the original claims. She has not provided any direct evidence to explain the delay. In the face of the Tribunal querying the position, her representative has been clear that the issues today should go ahead.

- The claim is self-evidently weak. I am entitled to take into account the merits – where they are sufficiently clear – when considering an extension of time. The Claimant is asserting as the unfavourable treatment the application of a company policy about twilight working which meant she was working solo . But a policy by its very nature is apt to cover all workers in particular group or role; the Claimant is not asserting that this was a policy applied to her personally on grounds of her race or to black employees only. It is very difficult to see therefore how she could ever show the reason why she was captured and/or affected by the policy was her race.

- It follows that the amendment should not be allowed because it is a claim in respect of which there is no jurisdiction (because it is out of time and it is not just and equitable to extend time).

- Had I had not drawn that substantive conclusion about time limits, I would also say the amendment should be refused on the basis it is an unmeritorious claim on its face, there is no realistic basis to think that at a final hearing time would be extended (reflecting my own assessment above) and the balance of injustice and/or hardship favours the Respondent. On that latter point, in my assessment the Claimant will be precluded from pursuing a claim of highly speculative value that is highly unlikely to contribute to her other discrimination complaints. In contrast, there will be the potential impact on the quality of the evidence of the Respondent. The constructive unfair dismissal claim as originally drawn [p.14]

encompasses the lone working of the Claimant on 16 September 2022 but only in the context of whether this and the ensuing assault/ Respondent's response breached her employment contract. Much wider evidence would need to be examined about the reason for that policy and alleged differential treatment with causcasian employees if this allegation proceeded. This would be unfairly burdensome to the Respondent and contrary to the interests of justice.

95. The net effect of the above is that the extent of the discrimination and harassment complaints, and corresponding time limits fall to be judged for the purposes of the preliminary issue on the basis there is (a) no discriminatory constructive dismissal claim and (b) with the indirect race discrimination claim being excluded.

96. The question then arises the extent to which I may take into account in evaluating them any information about existing complaints which has been furnished after the presentation of the original claim. Mr Oyegoke was keen to rely in his submissions on paragraphs 14, 15, 16 and 17 of the Amendment Statement for timings, in order to show that they were ongoing matters. Those paragraphs do not relate matters chronologically. They correspond to the allegations in the Original Particulars set out as Table Allegations 14,17, 8 and 9, respectively.

97. I have highlighted the extent of the further detail provided. I bring them together here:

No. in Amendment Statement	No.	**2020**		Heading in pleading Highlighted – Judge's note	
16	8	25 March	**Gabriella Dragan** racially profiling C at Ilford station and bringing a dog to work that barked at her	Direct race	ET1 12
		2021			
17	9	February 2021 p.52, para 17 Amendment Statement "...till October 2022"	Not paid appropriate salary as a Safety Critical worker	Unlawful deduction of wages claim wrongly labelled as Equal Pay Equal Pay claim dismissed on withdrawal by EJ Tsamados – p.61 Claimant says now – para 17, p.48 of Amended Particulars – that this was discrimination on grounds of race.	ET1 15

		2022			
14	14	12 April	**Ty Wallis** refusing to refer C to a female manager to arrange a meeting to discuss flexible working Her manager would not arrange a meeting, especially to explore flexibility working from April 2022 until October 2022 – see paragraph 8 of the Original Particulars [p.14-15]. Contrast with the proposed addition: "The Claimant was not allowed flexible working from April 2022 up until October 2022" [p.47, para 8 of the Amended Particulars].	Direct sex discrimination	ET1 8
15	17	??? "This practise span the whole duration of the Claimant's employment" - see paragraph 9 of the Amended Particulars at p.47	Denied opportunity of being promoted to station controller	Direct race	ET1 9

98. From the table, the following is apparent.

99. **Table Allegation 8**: There is no arguable basis for contending that the alleged incident concerning the dog and warning of victimisation in March 2020 was ongoing at the time of the provisional cut-off date.

100. **Table Allegation 9**: There is an attempt to make a **new** *race* discrimination claim by reference to the re-labelled Equal Pay claim i.e. relabelled from Equal Pay to unlawful deductions from wages. I observe – again – that this is contrary to the

Claimant's representative's position in making the application.

101. I agree the Claimant may relabel the Equal Pay claim, but this may not extend to include a race allegation. That's because the deduction of wages point has never been argued on grounds of race discrimination, or for that matter an Equality Act claim at all. At its very highest, the original complaint – referencing equal pay but accepted by the Claimant not to be such a claim – is suggestive of sex discrimination. The position now adopted is therefore entirely incompatible with the Claimant's earlier position. As a new discrimination claim it is vastly out of time. That being so, whilst I can legitimately take note of further information - not being an amendment – about the period over which the wages were allegedly underpaid, this does not avail the Claimant because the position remains that it is not a pleaded discrimination complaint. The Respondent accepts as straightforward deductions claim, it has been brought in time.

102. **Table Allegation 14**: There is an attempt to include a new claim of refusal of a flexible working request. That arises from the new wording at paragraph 8 of the Amended Particulars [p.47]. I refuse to allow that claim to be added. This is a different and additional claim which runs counter to the Claimant's original position which demonstrably is one of seeking a meeting to explore flexible working. That is quite different to having been denied flexible working over a sustained period of 5 months. There is no good reason why the complainant should not have stated her case accurately the first time. I note too that the Respondent has already committed in its Grounds of Resistance to the fact that a written request was made on 12 April 2022 and considered at a meeting on 13 September 2022 [p.29, para 17]. Given the obligations of disclosure, I regard it as unlikely that it would commit to that position if in fact, there were instead refusals of a request for flexible working. The Claimant has produced no evidence tending to support any refusal. This means I evaluate the prospects as weak too. I do not allow it.

103. Looking then at Table Allegation 14 on the basis of the original sex discrimination complaint, the gravamen of it [p.14, paragraph 8] is that the Claimant' request for a meeting was ignored from April up to (an unidentified date in) October 2022 and this was by reason of her sex. Whilst the final sentence identifies the absence of a female manager as causing specific detriment, in my view that is not to the exclusion of the foregoing part which all appears under the banner of "Discrimination (sex)".

104. I again note the Respondent has pleaded that a meeting took place on 13 September 2022. This would clearly be before the provisional cut-off date. No note of the meeting has been produced.

105. I remind myself that I am not determining all of the facts of the underlying allegations of sex discrimination. However, I am still entitled to reach a conclusion on when time started running for the complaint made. This is not a strike-out preliminary hearing where I should approach the matter assuming the facts are as pleaded by the Claimant. It is also permissible to take into account that the Claimant understands the position adopted by the Respondent on this issue and has done from the receipt of the Grounds of Resistance. She has produced no evidence to contradict what has been said about the September meeting. Her Amendment Statement – prepared with sight of the Grounds of Resistance - simply repeats that a meeting was not arranged from April 2022 until October 2022. I am therefore faced with two sets of pleadings which conflict on a factual matter but in circumstances where the Claimant has, with the benefit of representation, foregone her opportunity to provide evidence to support what she is saying. Further, what she is saying lacks all specificity and detail and has been internally contradictory (no meeting v. refusal of FWR). On the balance of probabilities, I conclude that a meeting did take place on 13 September 2022 and therefore this

claim was not brought in time. It does also seem to me that on the basis this allegation is an omission, the provisions of s.123(4) might apply such that time starts from the expiry of the period in which a meeting might reasonably have been expected to be arranged (s.123(4)). That could be far earlier than 13 September 2022. As a matter of fairness to the complainant however, I make no conclusion on that since neither side have commented on what happened in connection with the proposed meeting between the completion of the form in April 2022 and the meeting on 13 September 2022. I treat this claim therefore as having been out of time, by a margin of about 8 days.

106. **Table Allegation 17:** In respect of the denied promotional opportunity, the original pleading in fact gives a little more away about timing. It says [p.15, paragraph 15]:

"The Claimant alleged that those newly recruited staff (Those that the Claimant trained on the job) who are white caucasians were promoted to station controller within six months of joining the Respondent. Whereas the Claimant ***who had been in employment over three years*** *at the time was denied such a promotion" [My emphasis]*

107. From that the Claimant is referring to promotion being granted to others but denied to her in or around October 2021. Should I then add the new wording suggested in the Amended Particulars and by the Amendment Statement i.e., that *"the practice spanned the whole duration of the Claimant's employment"* [p.47] and was a *"common practice of the Respondent"* [p.51, paragraph 15]?

108. I do not consider that would be appropriate. That's because the expanded allegation contains an inherent conflict. There is no enduring common practice referred to in the Original Particulars. It reads as an allegation of those staff being promoted at a time when the Claimant had been in post for over three years. That is a definable moment over two years ago. There is no allegation or particulars of it being repeated, as implied by "practice".

109. Further, the new suggestion of not simply being overlooked, but of having failed in an application [p.51, paragraph 15 - "*I even applied for such position"* is not particularised as to date and times either. This is completely unacceptable as the basis of an amendment. The Respondent is entitled to know the case it faces, the more so when the Claimant seeks to have a second bite at the cherry but with no greater clarity. It has already expressly pleaded that it has no record of the Claimant applying for a promotion or seeking feedback from line management on how to improve her chances on promotion [p.30, paragraph 18]. It cannot be expected to investigate and respond for a second time without knowing what or when the Claimant is referring to.

110. This allegation therefore remains as set out in the Original Particulars

(e) Conclusion on the preliminary issue.

111. I turn then to my conclusions on the preliminary issues.

112. In my judgment the individual allegations are all of them brought outside the time limit, when applied to them as individual acts. I have made the point already that the allegation in respect of promotion is a discrete one. That is not altered by the fact it may have had continuing consequences.

113. I also consider there is no reasonable argument that the sex and race discrimination complaints (judged in two groups or as one) were conduct extending

over a period.

114. They are separated in time. By way of example, a very substantial gap exists between March 2000 and February 2021. They involve seven different discriminators, in different locations and roles. The highest number of discriminatory acts alleged against one person is three, which all took place in 2019 and are not alleged to have been repeated since. The Claimant herself has provided no evidence of what nexus might exist and none is manifest. There is a bare assertion that the acts are "intrinsically linked" [p.13] but that alone is not sufficient. Examined closely the allegations read as unconnected acts of less favourable treatment by different people, in different contexts, taking place over a long period of time.

115. My conclusion therefore is the Claimant has shown no prima facie case of a continuing act which would take her for limitation purposes to the respective last allegations of each form of discrimination (i.e. 13 September 2022, very latest, for sex discrimination and 7 February 2022 for race discrimination).

116. I would also add, even were the Claimant to have shown a prima facie case that there could be a discriminatory state of affairs, I do not regard it as just and equitable that time should be extended. (And do not extend for each of the acts treated as freestanding acts, either)

117. The delay in issuing proceedings assuming the most generous interpretation to the Claimant, namely that Table Allegation 14 bookends a discriminatory state of affairs on grounds of sex and race which lasted until 13 September 2022, is certainly short.

118. However, the Claimant has made no attempt at all to explain it to the Tribunal. The fact of it being short does not of itself dictate that an extension is just and equitable. That would be akin to creating a de minimis rule whereby even though late, if the margin of delay is small, a complaint still gets through.

119. The resignation letter of 17 October 2022 hints at the Claimant having in the past silently coped with the effects of one of the allegations she now makes (Table Allegation 8). She says she is now suffering stress because of the assault. I accept entirely that an assault or even an approach from a drunk customer (which is all the Respondent acknowledges), would be greatly unnerving. The medical advice to the Respondent supports that it was. However, it is clear she did not in fact take the sick leave anticipated by the Respondent's occupational health. She began a new role a week later. I know that she was able to work until, at least 17 January 2023. She has not sought any lost earnings for that period. I remind myself too that there is less weight to be attached to a disabling illness unless it arises in the more critical weeks leading to the expiry of limitation. There is nothing to indicate ongoing trauma in December 2022. Doing the best I can therefore, no adequate explanation from any other source can be found.

120. I accept the Claimant will feel some disappointment by not being able to pursue these complaints, but I weigh that against the prejudice to the Respondent. At the risk of repeating myself, if the complaints were allowed to proceed this would involve it obtaining evidence about matters as long ago as November 2018. This will inevitably have a bearing on the quality of the evidence available to it, including the memories of the large number and variety of witnesses it will need to consult with. Having regard to the lack of any explanation, still less a cogent one, that is simply an unjust degree of prejudice. Parliament has enacted a primary time limit to protect against that.

121. My only further points on limitation are in reference to Table Allegation 14 and Table Allegation 16.

122. I have said already that none of the allegations get extensions on a freestanding basis, these two included.

123. Table Allegation 14 attracts potentially different considerations when analysed, as is my primary conclusion, as a freestanding complaint. It is the nearest by a long chalk to the provisional cut-off date. It does not alter my conclusion on an extension of time. I accept the scope of the Respondent's enquiry would be narrower and less historic. But there is simply no reason why the claim has not been advanced in time. I do not see significant prejudice to the Claimant either. Neither the meeting nor flexible working was raised formally as a grievance by her whilst employed [p.32, paragraph 31]. It does not feature in her resignation letter.

124. Table Allegation 16 in my judgment is not a pleaded allegation under the Equality Act 2010 at all. Over and above the fact it has always been lumped in under the constructive unfair dismissal heading, no protected characteristic has been identified in either the Original or Amended Particulars. It has no impact on time limits, therefore.

(f) Conclusion on deposit orders.

125. I turn finally to the question of deposit order(s) in respect of the constructive unfair dismissal claim.

126. The Respondent asserts that only two aspects have any sufficient prospect not to be struck out. However, Mr Hignett accepted during the hearing that a merits-based evaluation is not on the cards today. The two aspects are the trauma the Claimant alleges she experienced after 16 September 2022 incident and the alleged failure of the Respondent to offer the Claimant appropriate support in the period following the incident.

127. It seems the allegation in the Original Particulars proceeds on the basis of a last straw case, hence why matters going back to the Claimant's deployment to East Branch stations in October 2018 have been rehearsed. But it may equally argued on the basis that the last act alone constitutes a fundamental repudiatory breach (i.e., the alleged lack of support following a physical assault). That is certainly more compatible with the terms of the resignation letter which does not connect her resignation to any of the matters set out in paragraphs 1 – 5 of the Original Particulars.

128. I do also note the gap of just over a year between the penultimate straw at paragraph 5 (Table Allegation 11) and the last straw (Table Allegation 15). There is no authority of which I am aware which indicates as a rule of thumb or otherwise, a gap in time between alleged straws beyond which a claim of a course of conduct cannot be made out. Dyson LJ (as he then was) rejected in **Omilaju** that *"an act in a series"* had a technical meaning. I also appreciate that the last straw need not be proximate to the previous acts. However, it stands to reason in my view that a significant gap in time serves considerably to undermine the existence of a course of conduct that, in its cumulative effect, breached the implied term of trust and confidence.

129. I accordingly find that allegations 1 –5 of the Original Particulars are specific allegations for the purpose of rule 39(1) and that they have little prospect of success in being shown to be "straws" in a series. I therefore require the Claimant to pay a deposit of £300 as a condition of continuing to advance each of those

allegations.

130. Despite my raising the issue, no direct information was placed before me about the Claimant's ability to pay. I reflect that £1500 represents around 60% of her monthly gross earnings – surmising they remain broadly the same as in the ET1. For any person of average means is not insignificant. As against that, I am quite satisfied that the costs incurred by the Respondent in dealing with these weak allegations will amply exceed £300 each; it could well be in excess of the maximum amount of deposit i.e., £1000 each, having regard to the fact there are 3 witnesses at least, and one will involve a detailed examination of the policies and allocation of work to the Claimant when the opening of the Elizabeth Line was postponed. That goes back some 5 years. On the information I have therefore, the amount and nature of the deposit strikes the right balance between allowing the Claimant the opportunity to have heard a case which she believes will succeed but protecting the Respondent from potentially unreasonable expense.

Future case management

131. I indicated to the parties that I would seek to provide *indicative* directions for discussion and possible agreement between them. A consensus has the potential to avoid the expense associated with a further preliminary hearing, or at least a lengthy such hearing. That has been provisionally fixed, as I understand it, for a date in March. I make clear that the hearing should only be vacated if both sides have agreed the directions, and the Tribunal also agrees that is an appropriate course. It is highly desirable that the directions are set out in the form of a standard case management order since this brings in important details and additional guidance relevant to the procedural steps.

132. I have clarified in the judgment section above the exact claims that are going ahead, and the amendments permitted, and those that are not.

133. The necessary directions will then include (and should be discussed between the parties and if possible, an agreed draft submitted to the Tribunal) the following:

- **The Respondent should have the opportunity to prepare Amended Grounds of Resistance, if so advised**, to respond to the unlawful deductions from wages claim.

- **Listing the matter for final hearing**: The case can now proceed before a Judge sitting alone since it comprises a claim for ordinary constructive unfair dismissal and for unlawful deductions from earnings. Until the position in relation to payment of the deposits is known, it is not possible to identify the appropriate length of hearing. If all of the original allegations of constructive dismissal proceed, I expect it would take at least 3 days. The parties should share details between themselves as to likely witnesses and corresponding time estimates.

- **Agreement of a List of Issues:** This should be done between the parties once the position in relation to the deposits is known.

- **The Claimant should prepare an updated Schedule of Loss**

- **There should be disclosure** by list together with copies.

- **The Respondent should prepare a hearing bundle** after first agreeing the contents with the Claimant.

- **Witness statements should be exchanged simultaneously** and accompanied with a statement of truth. These will stand as the evidence in chief of the witness.

134. I stress the above are indicative and not binding orders. Any referral to the Tribunal should draw attention to the judgment and to paragraphs 131-133 of these reasons.

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Employment Judge **Miller-Varey**

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Date 2 January 2024

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/