THE EMPLOYMENT TRIBUNALS

Claimant Ms S Simon-Hart

Respondent Metlife Europe Services Limited

Heard at London Central Employment Tribunal (by video link)

On 21-22 October 2024
In Chambers 16 December 2024

Before Employment Judge Langridge

Representation:

Claimant In person
Respondent Matthew Bignell, counsel

JUDGMENT

Rule 29 & 37 Employment Tribunals Rules of Procedure 2013

(1) The claimant's application to amend her claim is refused.

(2) The claimant's claims are struck out under Rules 37(1)(a) & (b), on the grounds that they are scandalous or vexatious or have no reasonable prospect of success and/or the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious.

ORDER

Rules 53 & 56 Employment Tribunals Rules of Procedure 2013

(1) The claimant's application for this preliminary hearing to be heard in private and/or for certain evidence to be treated as inadmissible at this hearing is refused.

REASONS

Introduction

1. The claimant was employed by the respondent as Assistant General Counsel from 8 July 2019 until her employment ended through a settlement agreement dated 7 June 2023. Under the settlement agreement the claimant received various severance payments which included an element of statutory and enhanced maternity pay. The due date for all payments was 24 June 2023.

2. The claimant presented an application to the Tribunal (ET1) on 13 March 2024 giving her termination date as 24 November 2023. She made various complaints relating to her former employment and its termination, namely:

    a. that she was paid less than white and/or male colleagues;

    b. pregnancy discrimination in that she was investigated during maternity leave for her use of the company credit card;

    c. unfair dismissal on the same grounds, and also on the grounds of the respondent's failure to follow its own disciplinary procedure, and the fact that the respondent sought to terminate the employment during the claimant's maternity leave;

    d. breach of contract in respect of the respondent's failure to follow its disciplinary procedure, as well as a breach of trust and confidence.

3. No claim for breach of the settlement agreement was pleaded.

4. The factual and legal basis for the claims was not set out with any detail or clarity. However, the foundations of the claimant's arguments were firmly rooted in the manner in which the respondent conducted its investigation into her personal use of the company credit card.

5. The remedies sought by the claimant included reinstatement or reengagement and compensation amounting to around £400k. This was based on the settlement agreement being rescinded and also misrepresentations which she says occurred after it was entered into. During this hearing the claimant said she was in fact relying on misrepresentations made both before and after the date of the settlement agreement, though the only specific representation she identified was the respondent’s promise to pay the maternity pay due to her on 24 June 2023.

6. In its Response the respondent stated that the effective date of termination was agreed under the terms of the settlement agreement to be 7 June 2023, the date the agreement was entered into. There was no dismissal and the claims were brought in breach of the terms of the agreement. The respondent sought to strike out the claims under Rules 37(1)(a) & (b), and reserved its position on costs.

7. The agenda for the preliminary hearing today was to deal with the claimant's application for a private hearing, her application to amend, issues about the Tribunal's jurisdiction and the respondent's application to strike out the claims.

8. The claimant produced extensive documentation including a witness statement extending to 173 pages (of which 12 pages amounted to evidence and the rest comprised documents and authorities), a written application for a private hearing and a skeleton argument. The documents included references to other, new issues which were not the subject of the ET1 issued or the proposed amendments to the claim. The claimant also gave oral evidence. However, her witness statement did not offer evidence relevant to possible extensions of time to bring her original or amended claims. She answered the Tribunal's questions on this and other aspects of her claims so as to clarify the Tribunal's understanding of her position.

9. The respondent's documents comprised a 300 page bundle, a skeleton argument and an authorities bundle. An extract from the respondent's Employee Handbook was added to the evidence. Ms Amy Tomlinson gave oral evidence as the respondent's Head of Human Resources.

10. The claimant's application for this hearing to be heard in private was essentially based on her desire to prevent evidence about the credit card investigation from being made public, and her objection to the inclusion of without prejudice correspondence relating to the settlement agreement negotiations. On the latter point, the claimant revised her position during the hearing and took the view that the without prejudice content was in fact helpful to her. The claimant's reasoning contained some inherent contradictions. On the one hand she wanted to protect the privacy of the information, and yet the main thrust of her claims would, if successful, entail setting aside the settlement agreement and reverting to the position the parties would otherwise have been in. The claimant's main concern was the potential damage to her professional reputation if information about the investigation was aired at a public hearing. However, if the claims were allowed to proceed, it is inevitable that this evidence would be at the forefront of the case and made public both at the hearing and through publication of the Tribunal's judgment.

11. Rule 56 states that preliminary hearings shall be conducted in private except where a determination under Rule 53(1)(b) or (c) is involved. The latter Rules apply where the Tribunal may determine any preliminary issue or consider striking out a claim under Rule 37, as was the case here. The claimant's application was therefore refused.

Amendment application

12. The claimant provided revised Particulars of Claim dated 24 June 2024 attached to a new draft form ET1. In this she scored out her previous grounds and referred to the new Particulars. She also ticked boxes in the new draft ET1 indicating she wished to claim:

    a. notice pay;
    b. holiday pay;
    c. arrears of pay; and

d. other payments (unspecified)

13. By this time the claimant was no longer seeking reinstatement or reengagement.

14. The new Particulars of Claim set out lengthy arguments and causes of action, nearly all of which can be distilled down into one issue of fact: the late payment of some maternity pay on 24 November 2023 instead of on 24 June 2023. Arising from this fact the claimant asserted, among other things, that:

    a. The delayed payment and the tone of the respondent's emails about this led her to experience stress and anxiety and injured her feelings.

    b. The late payment amounted to a breach of both the employment contract and the settlement agreement.

    c. It was an express term of both those contracts that she would be paid her maternity pay on 24 June 2023.

    d. That both contracts were subject to implied terms which had been breached, citing in support of this breaches of the respondent's maternity policy, the statutory duty to pay maternity pay, breach of the duty of good faith and breach of fiduciary duties.

    e. The respondent had committed a breach of contract, a breach of the duty of care, direct maternity discrimination under the Equality Act 2010 and victimisation under section 27 of that Act.

    f. That the respondent had make misrepresentations when it promised to pay maternity pay on 24 June 2023 but did not do so; and this was so fundamental that it had the effect of rescinding the settlement agreement. Alternatively, the settlement agreement had been repudiated.

    g. That, notwithstanding the above assertions, the claimant wished to "preserve the integrity of the settlement agreement to the extent possible, pending determination of the breach of contract matters".

    h. That she should be awarded compensation for mental distress and injured feelings, based on the breach of contract claims and a claim for breach of fiduciary duties.

15. In this pleading the claimant stated that the extent of the issues with her maternity pay came to light on 24 October 2023.

16. The claimant's application to amend followed later, on 8 July 2024. The amendments sought were to:

    a. Expand the breach of contract claim so as to plead breach of the settlement agreement;

b. Expand the maternity discrimination claim to plead a breach of the statutory maternity pay rules;

c. Request a stay pending the Tribunal's decision on jurisdiction, or a decision of the County Court on the claims.

17. The claimant submitted that her intention was simply to expand upon the breach of contract claim already brought, and said she relies on facts already pleaded. In acknowledging the issues with time limits, the claimant explained that she had not known of the breach until 24 October 2023 and had only recently become aware that she could bring a breach of contract claim to the Employment Tribunal.

Findings of fact

18. The claimant was employed by the respondent as Assistant General Counsel from 8 July 2019. She became pregnant and began her maternity leave on 6 February 2023. Her son was born on 27 February 2023. The respondent operated a maternity policy which formed part of its Employee Handbook. Through that policy certain benefits such as maternity leave and pay were made available to the claimant, but they did not form part of her contract of employment.

19. The other events relevant to this decision took place for the most part in 2023. On around 9 March 2023 the respondent became concerned on learning about the claimant's personal use of the company credit card. She had been using the card for personal expenses and repaying them in full each month. The respondent's concern was twofold: that any such use was against company policy; and the extent of the usage was itself concerning. The matter was referred to a special investigation unit. The claimant's ability to participate in the investigation was limited because she had recently given birth, but she was nevertheless able to provide the respondent with some information in response to the inquiry. The claimant's position was that she was given permission to use the credit card by an executive assistant, provided she paid the balance in full each month. The respondent says the executive assistant had no such authority.

20. The investigation unit produced a draft report which was never finalised. No steps were taken towards conducting a disciplinary meeting with the claimant and she was never sanctioned. Instead, the respondent initiated negotiations in early May 2023 for a settlement agreement by which the claimant would agree a termination of her employment in exchange for various payments. The terms of the settlement agreement were agreed and the claimant was advised about their terms and effect by a solicitor. The termination date was originally identified as 28 May 2023 but was later pushed back by agreement to 7 June 2023.

21. Under the settlement agreement the respondent agreed to pay the claimant various sums, including:

a. enhanced maternity pay and contractual pay up to the termination date, plus accrued holiday pay;
b. £30,750 as payment in lieu of notice, which incorporated enhanced maternity pay;

c. £1,478.40 representing the claimant's residual entitlement to statutory maternity pay;
d. a severance payment of £61,500, plus pension contributions.

22. The date for payment of all sums was agreed to be the first available payroll date after the termination date, which was 24 June. The respondent paid the agreed sums identified in the settlement agreement to the claimant on that date.

23. As would be expected, the settlement agreement contained extensive provisions by which all potential claims were disposed of and compromised, whether arising from the claimant's employment or its termination. The agreement stated in terms that it complied with section 203(3) Employment Rights Act 1996 and section 147(3) Equality Act 2010. The particular claims identified in the recitals were unfair dismissal and discrimination based on sex, maternity and pregnancy. Those claims and many others were set out in detail in Schedule 1 to the settlement agreement, which included also any claim for breach of contract and equality of terms.

24. The settlement agreement included terms requiring the claimant to give credit for (or fully repay) the sums paid under it, in the event that she brought proceedings against the respondent in breach of her promise not to do so. The agreement did not exclude the claimant's right to bring a claim to enforce its terms.

25. For its part, the respondent agreed to immediately discontinue the internal inquiry into the credit card use, and to provide the claimant with a reference.

26. Having been legally advised when entering into the settlement agreement the claimant initially had no issue about its terms or its effect on the ending of her employment. She had no complaint about the calculation of the sums paid on 24 June. It was not until August 2023, when the claimant applied for and was refused maternity allowance, that she became aware that the respondent may not have fully met its obligations to pay SMP. Neither she nor the respondent was previously aware of any problems with the maternity pay calculations. On 1 September emails were exchanged between the parties after the claimant raised a query with the respondent. She had been under a misapprehension about maternity allowance, and the respondent replied to explain that she had no such entitlement because she had received SMP for the full period of her entitlement. The respondent had calculated this on the basis of a 39 week period, as if the claimant’s employment had not ended during her maternity leave. Numerous emails followed on 6 September, with the respondent providing increasingly detailed explanations for how the maternity payments were calculated, as well as figures. The claimant replied to say that this information was helpful, though she remained unhappy about the position.

27. By the time of the email exchanges between 1-6 September 2023 the claimant was aware that there may be an issue with the amount of the maternity pay she was paid on 24 June 2023 under the settlement agreement.

28. On 18 September the respondent wrote again to apologise for the ongoing confusion and to set out its further detailed calculations. On 23 October the claimant wrote to the respondent expressing her frustration and saying it was “perverse” for

the respondent to have incorporated her residual SMP entitlement into the settlement agreement and PILON rather than treating it as a separate entitlement. This was at odds with the terms of the settlement agreement which in clause 3.1(a) expressly provided for payment of a PILON and in addition £1,478.40 for the claimant's residual entitlement to SMP.

29. The respondent looked into the calculation of the maternity pay and the result of its investigations was that two adjustments had to be made to correct some shortfalls. One arose because in around March/April 2023 there had been a change to the SMP rate and this had a consequential effect on the enhanced element of the maternity pay. This had not been picked up by the respondent's external payroll provider. The second issue arose from the parties' agreement to defer the termination date by seven days to 7 June 2023. A total top up payment of £2,831.01 therefore had to be made.

30. On 24 October the respondent wrote to the claimant apologising for its error and saying that the shortfall totalling £2,831.01 would be be paid on 24 November, the next available payroll date. That was done.

31. On cross-examination at this hearing the claimant confirmed she was "alive to the dangers of limitation" by the time of the 24 October email. By this time she had all the information necessary to make a decision about whether to bring a claim in respect of the late payment.

32. The claimant was not happy with this outcome and on 6 November wrote to the respondent with an email headed "Reservation of rights on respect of the company's breach of the settlement agreement". Although she knew the above payment was forthcoming, the claimant stated that she was not waiving her right to treat the late payment as a breach. She referred to "any interest or losses" arising, though without particulars. She mentioned also that information had come to light after the settlement agreement and intimated that she may have a claim for pay discrimination based on race and/or gender. Again, no particulars were provided.

33. On 3 January 2024 the claimant initiated EC with Acas. However, she did not give the conciliation officer permission to contact the respondent about her claims and in reply to the respondent's attempt to clarify what claims she was intending to bring, the claimant asked that they make no direct contact with her. Early conciliation was therefore unsuccessful and on 14 February Acas issued its certificate.

34. In a letter before action sent to the respondent on 12 February, the claimant advised her intention to bring claims both in the Employment Tribunal and the County Court, the latter forum being for a claim for breach of the settlement agreement. The breach was said to be the late payment of the maternity pay without payment of interest. Although the payment had been made and accepted, the claimant stated that the breach was a continuing one which she had not waived. She sought compensation of £50,000, to cover her time spent on the matter and potential statutory (and unspecified) employment claims. No County Court claim was made, but an ET1 was presented to the Employment Tribunal on 13 March 2024. In late June the claimant submitted revised Particulars of Claim but this attempt to amend the claim was subject to a formal application to amend which followed on 8 July.

35. In the meantime, further correspondence had been exchanged between the parties and HMRC in January 2024, when full details of the issue between the parties were supplied to HMRC. Their determination followed on 12 July 2024, when they stated that the respondent's liability for SMP had been met via the settlement agreement and the shortfall was rectified by the payment made in November 2023. There was therefore no further liability for SMP.

Relevant law

36. The Tribunal has general case management powers by virtue of Rule 29 of the Rules of Procedure 2013, including the power to amend a claim. Rule 2 states that:

> *"A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules."*

37. The overriding objective is to:

> *"… enable Employment Tribunals to deal with cases fairly and justly, which includes, so far as practicable –*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense."*

38. In reaching this decision the Tribunal took into account the authorities referred to below and those relied on by both parties in their submissions (whether or not explicitly referred to in this judgment).

39. The key authority on the principles to be considered in amendment cases (cited by both parties) is Selkent Bus Company Ltd v Moore [1996] ICR 836 (also discussed in Olatunde v Viewber Ltd [2023] EAT 158). Three core principles are to be taken into account:

    a. The nature of the amendment (for example whether it is a substantive change involving a new cause of action, or a relabelling of facts already pleaded);

    b. The applicability of any time limits; and

    c. The timing and manner of the application.

40. In giving its guidance, the court in Selkent stated that:

> "Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account *all* the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."

41. The importance of this balancing exercise was emphasised in Vaughan v Modality Partnership [2021] ICR 535. In TGWU v Safeway Stores UKEAT/0092/07 the court said it is essential to consider whether a fresh claim has been brought in time because this is an important factor in the exercise of the discretion to amend.

42. The question of jurisdiction derives from the Employment Tribunal Extension of Jurisdiction (England & Wales) Order 1994 ('the 1994 Order'). Article 3(c) permits breach of contract claims to be brought before an Employment Tribunal where:

> *"the claim arises or is outstanding on the termination of the employee's employment"*

43. In Miller Bros & FP Butler Ltd v Johnston [2002] ICR 744 the claimant had resigned and sought to bring an unfair dismissal claim, despite having entered into a settlement agreement shortly after the end of employment. The court considered the wording of Article 3(c) and determined that it had to be interpreted as limiting jurisdiction to a claim that was outstanding on the termination of employment or which arose on termination in a temporal sense. This does not prevent a claimant from seeking to enforce the terms of a settlement agreement as a claim for damages for breach of that contract: Rock-it Cargo Ltd v Green [1997] IRLR 581.

44. Article 7 of the 1994 Order provides that an Employment Tribunal:

> *"shall not entertain a complaint in respect of an employee's contract claim unless it is presented –*
> *(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or*
> *(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated …"*

45. Article 7(c) supplements this by permitting a possible extension of time:

> *"… where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such period as the Tribunal considers reasonable".*

46. A 3 month time limit applies also to claims for unfair dismissal and discrimination.

47. Section 111(2) Employment Rights Act 1996 states:

> *"an Employment Tribunal shall not consider a complaint [of unfair dismissal] 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"

48. Section 123 Equality Act 2010 provides that discrimination claims:

"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"

49. These time limits are subject to extensions of time under the Early Conciliation (EC) provisions, provided that EC is initiated with Acas within the primary three month time limit.

50. All three statutes therefore permit the Tribunal to consider exercising its discretion to extend time, though the tests are different. For the Tribunal to consider such an extension, it would have to be satisfied that it was "not reasonably practicable" for the claimant to have brought her clams in time (breach of contract and unfair dismissal), or that it would be "just and equitable" to extend the time (discrimination).

51. The power to strike out claims derives from Rule 37(1). The relevant principles are that the Tribunal may strike out all or part of the claim on the grounds that:

"(a) it is scandalous or vexatious or has no reasonable prospect of success;

(b) the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious."

52. In Cox v Adecco UKEAT/0339/AT the court emphasised the importance of analysing carefully the nature of the claims before making any decision to strike out:

"… it was important to properly identify the issues in a case before considering whether to strike out a claim; … that, in the case of a claimant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stress of a hearing, and reasonable care should be taken to read the pleadings and any other core documents that explained the case the claimant wished to advance… "

53. At this preliminary stage, where evidence is not generally heard, the claimant's case should be taken at its highest, based on the pleadings and any other documents in which the claim is set out: Jamu v Asda UKEAT/0221/15/DA. The exercise of evaluating the case may be assisted by asking the claimant to clarify her claims at a preliminary hearing, as happened here. It is not for the Tribunal to conduct a mini-trial of the issues but rather to consider whether there are grounds under Rule 37 based on the claims as pleaded.

54. In Chandock v Tirkey [2015] ICR 527 the court made clear that it will be a rare case where discrimination claims are struck out, and there is a high public interest in examining the facts in such cases, bearing in mind that discrimination claims are generally fact sensitive. However, there is no blanket ban and a Tribunal can properly strike out a discrimination claim. The court held that:

> "There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in *Madarassy v Nomura [2007] ICR 867)*:
>
> "… only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

55. As a general rule, Tribunals should be slow to strike out cases where the central facts are in dispute: Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.

Claimant's submissions

Amendment:

56. The claimant submitted that her claims were in time because she initiated EC on 3 December 2023, within three months of 24 October 2024 when she became aware that maternity pay had not been paid correctly. She relied on Abercrombie v Aga Rangemaster Ltd [2013] ICR 606 EAT in support of the argument that new facts warranted a just and equitable extension of time. The claimant also submitted that the respondent was under various post-employment duties towards her, citing Bliss v South East Thames Regional Health Authority 1987/EAT/0058/04 on the duty to pay SMP. She argued for a post-employment duty of good faith and a duty not to discriminate against a former employee. Using the terminology of constructive unfair dismissal claims, she said that a failure to pay salary on time can justify an employee treating this as a repudiatory breach of the employment contract.

57. The claimant further submitted that the respondent had breached its duty of trust and confidence in respect of the internal inquiry and the negotiations which led to the settlement agreement. It misrepresented the status of the inquiry. She referred to Miller Bros in support of the position that the Tribunal has jurisdiction over post-termination breaches. Furthermore, relying on Craig v Abellio [2022] EAT 43, the issue is one of late payment of wages in an employment relationship.

58. In oral submissions the claimant developed her points further. She said she was not aware until 1 September 2023 that further SMP was outstanding and payable by the respondent. From that date until 24 October 2023 she had suspicions about the calculations but no independent evidence. She said 24 October represented the first point when she considered it came to her reasonable knowledge that she could present a claim. Whether taking that date or 24 November 2023 when the shortfall was paid, her referral to Acas was still within the three month period to present a

claim. She did not include a breach of contract claim in her first ET1 because she understood from Acas that this could not be pursued in the Tribunal. The ET1 was submitted one month after the EC certificate, but the respondent was always under notice that she intended to make a breach of contract claim, from which other claims could then be brought. It was only in July 2024 that HMRC confirmed that the respondent had fully discharged its SMP obligations. Her application to amend would always have been subject to what HMRC said.

59. The Tribunal asked questions to try and clarify the claimant's position, in particular why the late payment remained a live issue and why she was still seeking to add such a claim, given that the sum was in fact paid. The claimant said that rectification of the breach is not enough to extinguish a claim. She relied on the fact that the respondent's behaviour towards her was negative and not in line with its post-termination obligations towards her. A period of three months of going back and forth with the respondent undermined the premise of the settlement agreement. She experienced a loss of trust in the respondent following her discovery of the underpayment and considers the respondent’s actions fundamentally undermined the settlement agreement as a whole, supporting her claim for rescission. It is more appropriate to pursue the claims in the Employment Tribunal since it has jurisdiction over the statutory claims under the Employment Rights Act 1996 and the Equality Act 2010.

60. The claimant submitted that the termination of her employment was connected to disciplinary allegations. The unfair dismissal claim falls within the Tribunal's jurisdiction where the respondent's conduct was unfair or discriminatory or they did not disclose the facts fully. As for the discrimination claims, the Tribunal has specific expertise to determine whether the conduct during her maternity leave was discriminatory. The Tribunal also has experience of breach of contract claims and this makes it a more appropriate venue for that issue. It is a more cost-effective and accessible venue for claimants.

61. The claimant accepted that she included no breach of contract claim in her ET1 in relation to the settlement agreement. Her intention was to have an adjudication on whether the late payment was a fundamental or repudiatory breach, and then to treat the settlement agreement as if it had never happened, which would in turn open up further statutory claims. In other words, the claimant sees the breach of the settlement agreement as a gateway claim to bring her other statutory claims.

62. As for the other new claims identified in the revised Particulars of Claim, such as notice pay, the claimant clarified her intentions. If the settlement agreement is repudiated, that would take her to a position where her employment has not been terminated. She acknowledged that she received the severance payments, and accepted that it would be appropriate for these to be deducted from any compensation. However, if she were deemed still to be employed by the respondent then that would change the calculations. That said, the claimant no longer seeks reinstatement or re engagement, as she feels the relationship has deteriorated to a point where she would not be able to return to work.

63. The claimant made broad allegations that the respondent made representations both before and after the settlement agreement which she says were misleading; for

example that the investigation was not concluded, and that it was a disciplinary investigation which could possibly lead to disciplinary proceedings. The respondent never used the word 'disciplinary', but it has now put it into this Tribunal hearing and this is an issue because professionally the claimant would have to disclose the existence of any disciplinary proceedings to any future employer.

64. The claimant said the settlement agreement was repudiated on 24 October 2023 and that she accepted the breach that same day when she emailed the respondent reserving her rights.

65. When asked to identify what act of race discrimination she complained of and when the last act occurred, the claimant said it went on until her termination date and the less favourable treatment related to the pay that she received compared to others. The sex discrimination claim arises from the same issue.

66. Finally, the claimant submitted that if the Tribunal decides to decline jurisdiction on her breach of contract claim, her other statutory claims should be stayed pending determination in a county court.

Jurisdiction:

67. In answer to the respondent's submissions on Sweeney v Peninsula Business Services [2004] IRLR 49, which involved a failure to pay commission falling due after the employment ended, the claimant sought to distinguish her case because some of the payments due to her had accrued before the termination date. She relied on Rock-It Cargo in support of her claim being outstanding on the termination date, so as to bring it within Article 3(c) of the 1994 Order.

68. Referring again to Miller Bros, the claimant distinguished that case where a settlement agreement was entered into after the termination of employment, whereas in her case the settlement agreement brought the employment to an end. This brings it within the Tribunal's jurisdiction because the payments were due under that agreement.

Strike out:

69. The claimant submitted that the threshold for striking out is a high one under Rule 37. She said there are factual disputes as well as limitation issues, and these should proceed to a full hearing to be determined. The claims are not frivolous or vexatious but based on the claimant's entitlements in her employment relationship. As for the discrimination claims, striking out should be a last resort and only in clear-cut cases where there is no reasonable prospect of success.

70. In answer to Tribunal questions, the claimant clarified aspects of her claims. She said she has not yet taken steps to quantify any remedies, and acknowledged that a breach of contract claim based on the settlement agreement might not lead to a significant remedy. She does, however, see rescission as a remedy. If the settlement agreement were reopened, this would allow her to seek wider remedies, most notably in respect of the unfair dismissal and the respondent's conduct of the disciplinary process. It would be a gateway to other claims. It would also potentially

be “punitive” towards the respondent in terms of its conduct. At best, this was questionable from the start of her maternity leave. At worst, it was a flagrant disregard of her employment protection and wellbeing.

71. A stay of proceedings would preserve the claimant's rights in the event that the settlement agreement were rescinded. It would not prejudice the respondent because if there were no rescission the claims would not be allowed to proceed.

Respondent's submissions

72. The respondent's skeleton argument can be summarised briefly. It opposed any amendment partly on time grounds. Just as the original claims were out of time, the proposed amendments were more so. Those amendments were not even fully particularised in the redrafted Particulars of Claim. Furthermore, the claims were all compromised by virtue of a legally binding settlement agreement, and the Tribunal has no jurisdiction to hear claims arising after the claimant's employment ended. It would be an abuse of process to allow the claims to proceed in these circumstances.

73. On jurisdiction, the respondent made submissions on time, pointing out that the claimant's claims are well outside the 3 month statutory time limits. Any claim falling within the Tribunal's jurisdiction would relate back to the claimant’s employment, which ended on 7 June 2023. The claimant has not argued for an extension of time nor produced evidence in her witness statement to support the relevant statutory tests.

74. As for the settlement agreement, the Tribunal has no jurisdiction to hear claims for breach of that contract because no such claim was outstanding at the termination date. The due date for the maternity pay element of the severance payments was 24 June 2023, after the employment ended. Article 3(c) of the 1994 Order permits breach of contract claims to be brought before an Employment Tribunal where:

> *“the claim arises or is outstanding on the termination of the employee's employment”*

75. The respondent relied on Miller Bros & FP Butler Ltd v Johnston [2002] ICR 744 in support of its argument. Furthermore, the claimant has not put forward any legally coherent argument as to why she is not bound by the settlement agreement. In her revised Particulars of Claim the claimant relies variously on that agreement having been repudiated, terminated or varied, as well as arguing that misrepresentations were made after it was entered into. The correct payments were made to the claimant, albeit a relatively small sum was paid late due to administrative error, and the claimant has retained all of the payments made to her.

76. The respondent sought to strike out the claims pursuant to Rules 37(1)(a) or (b), citing Bennett v Southwark London Borough Council [2002] ICR 881 in support of the proposition that scandalous, unreasonable or vexatious conduct encompasses cases where the bringing or continuation of the claims is an abuse of process.

Amendment:

77. In his oral submissions Mr Bignell expanded upon the above arguments. On amendment, he referred to the overriding objective and the need to take account of all relevant circumstances, as well as balancing the relative injustice or hardship to the parties, relying on the Selkent guidance.

78. The revised Particulars of Claim deal with an alleged breach of express and implied terms regarding SMP, and also misrepresentation. The claimant makes various assertions of misrepresentation regarding the negotiations and internal inquiries regarding her use of the credit card. The closest arguable pleading of the points the claimant now makes about the conduct of negotiations is that the respondent misrepresented that all sums due to the claimant were paid on 24 June 2023.

79. The application to amend was submitted on 8 July, well after the previous preliminary hearing. The claimant seeks to expand the breach of contract claim so as to include both the settlement agreement and her contract of employment. The reference in the ET1 to the alleged failure to follow a disciplinary process must relate to the employment contract and so this is not a type 1 Selkent case where an existing claim is expanded by pleading new facts. The breach of contract claim relating to the settlement agreement is not predicated on facts already pleaded. The relevant facts are that the respondent did not pay maternity pay in full and told her differently. Therefore it is not a type 2 amendment where there is a substitution of a claim based on facts already pleaded. Instead, it is a type 3 amendment with a new claim based on new facts.

80. The claimant has now ticked boxes in the proposed new ET1 in respect of notice pay, holiday pay and other claims, none of which have been raised before and which are entirely new.

81. On time limits, the respondent submitted that the Tribunal has no jurisdiction to hear the new claims unless they were presented within three months from the termination date or within three months from the last day worked, relying on Article 7 of the 1994 Order. The last day worked is arguably 3 February 2023, but at the latest 7 June 2023, the termination date. On this basis, the limitation period expired on 6 September 2023. Relying on Gallilee v Commissioner of Police of the Metropolis UKEAT/0207/16/RN, any amendment could only take effect on permission to amend being granted, which would make it more than 16 months out of time.

82. Under Article 7(c) of the 1994 Order, there can be an extension of time if it was “not reasonably practicable” to present the claim in time. The claimant has not provided a sufficient explanation for the delay, but in any event she did not present within a reasonable period, as is apparent from the correspondence dated 1 September. It was possible for her to put in a protective claim in time even if the claimant did not have evidence until later. In any event, on the claimant's own case it had been confirmed to her by 24 October that there had been an underpayment. By November she asserted that there was a breach of the settlement agreement and reserved her rights regarding rescission.

83. The claimant relies on a lack of understanding that she could bring a breach of contract claim in the Tribunal, yet she accepted on cross-examination that she could have done her research earlier than February 2024. From September 2023 she was able to complain to HMRC, look into the calculations, conduct correspondence at length with the respondent and form a view that there was a breach. On 24 November the claimant accepted the payment made and took no further steps until she contacted Acas on 3 January 2024. It was in June 2024 that the respondent first became aware of any breach of contract claim, which is far beyond a reasonable period. The other new claims concerning notice pay and holiday entitlement are well out of time.

84. Following the November payment, it is hard to see any surviving breach and all that the claimant has referred to is interest. The respondent's maternity policy is explicitly described as not being contractual in nature. Therefore maternity payments are not contractual. In any event, the alleged breach by not making the payment on 24 June 2023 post-dates the termination date.

85. The balance of prejudice favours refusing the application, and there is a clear prejudice to the respondent having to face such claims as well as a drain on Tribunal resources. The breach of contract claims are not only out of time but also very weak. The prejudice to the respondent is that it would have to face very weak arguments and be put to considerable time and cost in defending claims which will not succeed.

86. The claimant replied briefly to the respondent's submissions. She did not include reference to misrepresentations in her revised Particulars of Claim, but this document predated the disclosure of documents by the respondent on 19 August 2024 (when it sent her the bundle for the preliminary hearing), and therefore it was not possible to determine the misrepresentations that she now puts forward in her witness statement. The claimant relies on the common law proposition that payment of wages is a matter which goes to the heart of an employment contract, relying on Societe Generale v Geys [2012] UK FC 63.

Jurisdiction:

87. The breach of contract claim covers an alleged breach of the employment contract and an alleged breach of the settlement agreement. Aside from the time points which affect both of them, Article 3(c) of the 1994 Order permits claims to be brought only if they are "arising or outstanding on the termination of employment". The claimant's contact of employment had neither an express nor an implied term entitling her to SMP. That is a statutory not a contractual right. Although the claimant relies on the Statutory Maternity Pay Regulations 1986, that does not imply SMP into an employment contract. The enhanced element of the maternity pay was paid under the respondent's non-contractual maternity policy. For these reasons, there cannot have been a breach of contract for the purposes of Article 3(c). The non-payment happened after 24 June 2023 and was therefore not outstanding on the prior termination date. Nor does Article 3(c) apply to the claim arising from any breach of the settlement agreement, as that only arose on 24 June 2023.

88. In Rock-It Cargo the settlement agreement was concluded prior to the termination date and the payment was due to be made when the employment later came to an end. The employer did not do so, and the claimant was able to bring a breach of contract claim because, unlike the present case, it was outstanding on the termination of employment.

89. Sweeney v Peninsula has parallels to the present case. The claimant had resigned before his commission payment was due to be paid. The court expressed an obiter opinion which supports the respondent's argument that the payment is only outstanding if it is an enforceable but unsatisfied claim on the termination date. In the present case the claimant was only entitled to the payments under the settlement agreement on the first payroll date after the termination date, so the entitlement crystallised on 24 June 2023. Applying the obiter comments in Peninsula, that claim falls outside the Tribunal's jurisdiction.

Strike out:

90. All of the claimant's claims were compromised by virtue of section 203 Employment Rights Act 1996 and section 147 Equality Act 2010. They should therefore be struck out under Rule 37(1)(a) as an abuse of process.

91. As for the merits of the claimant's arguments on rescission and repudiatory breach, she is relying on principles relating to constructive dismissal cases, which are not relevant – for example, Craig v Abellio. The claimant did not give any clear notice to treat the settlement agreement as repudiated and in her email of 6 November she merely reserved her rights. The claimant also kept all the payments made under the agreement. As for rescission, the only alleged misrepresentations were made after the settlement agreement was entered into.

92. Finally, the respondent opposed the claimant's request for a stay, if the Tribunal should decide it has no jurisdiction on the breach of contract claims. Following Air Division v McMillan EAT, this is usually considered where there are parallel proceedings, which is not the case here. There would be no purpose to a stay, There would be prejudice to the respondent from the duplication of proceedings. The claimant started her employment more than 5 years ago. Separate proceedings would be years away, and at the edge of the usual 6 year limitation period. There would inevitably be a loss of evidence.

Conclusions

93. Making due allowances for the claimant representing herself and being unfamiliar with the legal complexities of the case, it was nevertheless difficult to understand her arguments. They lacked clarity and were at times contradictory. What came across most strongly is that the claimant feels aggrieved about the respondent's late payment of part of her maternity pay, and that sense of grievance has reawakened strong feelings about the original handling of the credit card investigation. On the one hand the claimant acknowledges there is little value in any remedy for that late payment, yet she seeks to rescind the settlement agreement and revert to a position as if her employment had never ended. Her new Particulars of Claim stated she wished to “preserve the integrity of the

settlement agreement to the extent possible", and yet she seeks to rescind that agreement.

94. The ET1 dated 13 March 2024 was clearly intended to be a protective measure, submitted on the mistaken understanding that she could not seek to enforce the settlement agreement in the Employment Tribunal. The claimant argues that the respondent's breach of that agreement means it should be rescinded, not so much to give her a substantive remedy for that breach, but more in an attempt to create a gateway that would open up statutory claims. These are claims which the claimant signed away when she agreed to end her employment in consideration for a severance payment of £61,500. The claimant is unclear on the subject of alleged breaches, focussing on the late payment in November 2024 and yet referring throughout her submissions to the implied duty of trust and confidence. This exists during the life of an employment contract but not on the same basis afterwards. Similarly, the claimant refers to post-termination duties which are not relevant to this case, such as fiduciary duties.

95. The claimant submitted that employers are under a duty not to discriminate against former employees. It is correct that section 108 Equality Act 2010 provides post-employment protection in certain cases. However, at no time has the claimant identified any factual or legal basis for alleging that the shortfall in maternity pay was an act of discrimination. Her revised Particulars of Claim make a simple statement that she experienced maternity discrimination and victimisation, but neither claim is pleaded in such a way as to show why she believes that the non-payment happened *because* she exercised her maternity rights or because she made a protected act. Rather, the claimant relies on the non-payment as a breach of contract claim which, if successful would open the way for her to allege that being investigated during maternity leave was pregnancy discrimination, and that she was paid unequally compared to white and/or male colleagues.

96. The claimant's credibility was also an issue to an extent, especially when dealing with significant dates. Starting with her ET1, the claimant gave a termination date of 24 November 2023 when she knew that her employment had ended through the terms of the settlement agreement on 7 June 2023, and the later date was only relevant as the point when the shortfall was paid.

97. In her opening remarks the claimant told the Tribunal that she had no knowledge of any breach of the settlement agreement until the respondent confirmed the position on maternity pay in November 2023. This was in contradiction to the claimant's own pleaded case where in her application to amend she acknowledged having knowledge of the breach on 24 October 2023. The claimant maintained that she initiated EC with Acas on 3 December 2023 but it is clear from the EC certificate that this happened on 3 January 2024. Any informal contact with Acas prior to this was not compliance with the EC requirements.

98. These issues may well be explained by a lack of familiarity with the arena of the Employment Tribunal, but overall it was difficult to gain a clear understanding of the claimant's position. The fact that she introduced new allegations in her witness statement (for example, suggesting it was indirect discrimination to seek a

termination of employment during maternity leave) did not help the Tribunal in its task.

99. When asked to clarify the basis of on which she alleged that the respondent breached the settlement agreement, the claimant's answers wavered between compliance with legislation on SMP and compliance with the settlement agreement terms, as well as saying that the late adjustment to the SMP was effectively an amendment to the agreement. When pressed she explained that it was a breach of contract because the payment was supposed to be made on 24 June 2023. When asked how that breach survived the payment made on 24 November 2023, the claimant initially referred to the statutory rules, then explained that it was about interest for breach of contract. She said the settlement agreement was supposed to extinguish the parties' relationship, but the late payment undermined their relationship in a fundamental way. She felt disparaged and her feelings were hurt. By that time, of course, no relationship of any kind existed between the claimant and the respondent.

100. Turning to the three elements of this decision, the Tribunal had to decide first whether to allow the claimant to amend her claims, then consider whether the Tribunal has jurisdiction to hear the claims, and determine whether or not any claims should be struck out. The time points arising in the case overlapped across the various arguments, and for convenience they are dealt with separately below.

Time points:

101. The circumstances relevant to limitation were addressed in detail during the course of this hearing, through the claimant's oral evidence and in discussion during her submissions. She explained her state of mind in the period between September 2023 and 13 March 2024, but had nothing to say about the period immediately following 24 June, because she had no knowledge of any problem with her maternity pay until later.

102. On cross-examination the claimant initially disputed that by the time the respondent wrote to her on 6 September 2023, she had enough information to know that her full maternity pay had not been paid, in other words that there might have been a breach of the settlement agreement. She then conceded the point. At that stage she felt that the respondent should settle the payments amicably and uphold the settlement agreement.

103. By 24 October 2023 at the latest the claimant was fully aware of the position, and knew that the respondent had underpaid her full entitlement to maternity pay by £2,831.01. She also knew how this error had arisen. The fact that the respondent's external payroll providers had not picked up some changes affecting the calculations in no way pointed to any conduct of a discriminatory nature. The claimant did not initiate EC with Acas until 3 January 2024 and when the ET1 followed on 13 March the claimant chose not to include any claim for breach of the settlement agreement. She said this was because Acas had advised her that this fell outside the Tribunal's jurisdiction. She only later discovered that she could bring such a claim, by doing some research.

104. The claimant gave a range of explanations for not presenting her claim sooner. She said that at the time of the September correspondence she was seeking advice from a friend who is a tax consultant. She did not seek advice from a lawyer or from anyone else. She did not feel this was warranted and wanted to stay on good terms with the respondent (even though she was no longer employed). She conceded that September was a good time to have taken advice. As a legally qualified person she was capable of doing her own research, but in September she was still on maternity leave until mid-November, then there was Christmas, and she had also sought to negotiate with the respondent. These were also the reasons she did not seek advice from a CAB or advice centre. After her son started nursery on 1 February 2024 the claimant said she had more time to look into it and started to do some research then. She accepted that she could have started her research sooner but said she is "not a numbers person" and had had a number of conflicting schedules of calculations from the respondent.

105. The claimant had opportunities to research the possible breach of the settlement agreement but she did not feel this was reasonably practicable as she was on maternity leave. Until the claim was filed in March, she was still in discussions with the respondent. She accepted that she could have sought legal advice but she was out of work at the time and the respondent had not offered to pay for that. She said the respondent was under a duty to ensure she had advice on the settlement agreement and any amendment would fall under that. Initially she did not consider it appropriate to seek legal advice, as her initial approaches to the respondent were based on an intention to fix an error. Going to law would be a last resort.

106. The claimant was open to seeking advice from other people who would not make a charge and could have done so before March 2024. When asked to clarify why she had not sought advice from a CAB or similar, the claimant said she had not thought things would get this far and had hoped it would settle amicably. After that she had started her research.

107. When asked questions relevant to the Tribunal's discretion to extend time in certain circumstances, the claimant replied that she thought she was in time because the claims were all based upon a breach of contract. The claimant's position was therefore somewhat contradictory and confusing. What is not in dispute is that the claimant was unambiguously aware of position with the calculations by 24 October 2023 and on 6 November she was explicitly reserving her rights. On cross-examination she confirmed that she foresaw rescission as a possible remedy at that point. She also said that she did not bring any claim because there was "no evidence or basis" for it until 24 October. She said:

> "When it was confirmed on 24 October that there was clear evidence of a breach, that breach continued until after I reserved my rights on 6 November, and the respondent made the payment of £2,831 on 24 November."

108. The November payment fully met the respondent's duty to pay SMP. The claimant did not quantify or seek payment of any consequential losses such as interest, preferring instead to attack the entirety of the settlement agreement.

109. The claimant's approach to the time issues was therefore inconsistent and confusing. She felt the problem could be resolved amicably, and yet her revised Particulars of Claim present a very different picture of someone who wishes to litigate over the "tone" of the respondent's communications. Despite being alive to the limitation issues – to the point of accusing the respondent of 'playing the clock' – the claimant did not treat the matter with any urgency or priority. She delayed by months, even after 24 October.

110. Preferring to resolve the matter amicably is reasonable, but the difficulty for the claimant is that it *was* resolved. The payment was made. After reserving her rights in November 2023, the claimant still did nothing to initiate her claims for months. She was nevertheless able during that period to spend a lot of time corresponding with the respondent and HMRC. In the circumstances I conclude that it was reasonably practicable for the claimant to have brought her claims under the Employment Rights Act 1996 and/or for breach of the settlement agreement within 3 months of 7 June 2023 or 24 June 2023 respectively. Any claims under the Equality Act 2010 could also have been brought in time, and there is no evidence before me to warrant an extension of time on just and equitable grounds.

Amendment:

111. Applying the Selkent principles, I considered the nature of the amendments the claimant was seeking to make to her claims. The original ET1 pleaded claims for:

    a. discriminatory or unequal pay by comparison with white and/or male colleagues;
    b. pregnancy discrimination for being investigated during maternity leave;
    c. unfair dismissal;
    d. breach of contract due to the failure to follow a disciplinary procedure, and a breach of trust and confidence.

112. The new claims sought to be added were:

    a. breach of the settlement agreement, including misrepresentation and breaches of implied duties;
    b. breach of the statutory maternity pay rules;
    c. notice pay;
    d. holiday pay;
    e. arrears of pay.

113. None of the amendments amounted to a clarification or relabelling of the claims originally pleaded, but rather all of them amounted to entirely new claims not previously identified. I therefore accept the respondent's submission that these are 'type 3' Selkent amendments in that they are substantive and introduce new causes of action. The only breach of contract claim in the ET1 related to the handling of the investigation. The only pregnancy- or maternity-related allegation was to be investigated during maternity leave, and it had nothing to do with pay. The remaining claims were entirely new, not particularised, and included in the amended claim only as a consequence of seeking to go behind the settlement agreement.

114. The timing and manner of the claimant's application is a factor I have taken into account. Having brought her claim on 13 March 2024 the claimant then waited a further three months before presenting her revised Particulars of Claim, and several more weeks before submitting a formal application to amend on 8 July. The fact that these new claims were introduced months after the ET1 was presented, and a considerable amount of time after the relevant events, is a significant feature of the balancing exercise to be carried out. The relevant events occurred or crystallised on the termination of the employment on 7 June 2023 and on 24 June 2023 when the alleged breach of the settlement agreement occurred. The later dates in 1-6 September and 24 October 2023 are relevant to the question of any extension of time. Even if time were counted from 6 September, when the claimant had enough information to make a decision, EC was not initiated until four months later.

115. Taking account of all the circumstances, the Tribunal's task is to balance the injustice and hardship of allowing the amendments or refusing them. I had no difficulty in concluding that the balance should be exercised in favour of refusal. Putting aside the serious time issues affecting the new claims (as well as the original ones), and the substantial periods during which the claimant took no action, there is a fundamental question at the heart of this case. When the respondent entered into the settlement agreement with the claimant, it did so on the clear understanding that this would compromise and dispose of any and all claims arising from her employment and its termination. The express terms of the agreement made that plain to both parties, each of whom was legally advised. They knew and expected that any issue about the claimant's pay or conditions would disappear on completion of the settlement agreement. Any issue or claim about maternity rights or equal pay or discrimination would likewise be covered by the claimant's waiver of claims. The respondent was entitled to believe that some finality had been reached on the termination of the claimant's contract. The only reason this did not happen is that a relatively modest sum of £2,831.01 was not paid when it should have been paid due to an administrative error. As soon as that error came to light, the respondent took steps to make the further payment.

116. The claimant had already received compensation and benefits in excess of £90,000 through the settlement agreement, and if the shortfall was a breach (which is not for this Tribunal to make a final determination), then it was not in the nature of a fundamental or repudiatory one. In any event, the claimant did not accept any repudiation but instead reserved her position. There is clear injustice and hardship to the respondent if the amendments were allowed, as it would open up protracted litigation with questionable value, in circumstances where it has already made a significant payment to the claimant in order to avoid that very scenario.

117. For all these reasons, the application to amend is refused.

Jurisdiction:

118. Article 3(c) of the Extension Order 1994 states clearly that any breach of contract claim may be brought to an Employment Tribunal where it arises or is outstanding

on termination of the employment relationship. Applying Miller, it cannot be said that this was the case here. The effective date of termination was 7 June 2023. No claim had arisen or was outstanding on that date. All potential claims had been extinguished by the terms of the settlement agreement. The underpayment of maternity pay occurred on 24 June 2024, after the termination date. As with Sweeney v Peninsula, the absence of a liability in existence at the termination date defeats the claimant's attempt to bring the breach of contract claim to the Tribunal.

Strike out:

119. The final aspect of this decision is the respondent's application to strike out all claims. Its primary position is that to bring the claims is an abuse of process because they were all compromised under the settlement agreement. This brings the case within Rule 37(1)(a) in that the claims are scandalous or vexatious or have no reasonable prospect of success. Rule 37(1)(b) also applies because the the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious on the same grounds.

120. I agree with the respondent's submissions that for the claimant to bring or pursue these claims is an abuse of process and falls with the scope of Rule 37(1)(a) & (b). When taken through the terms of the settlement agreement on cross-examination the claimant accepted that it amounted to a disposal and waiver of all claims, and that she had knowledge of her claims at that time. Even during the course of this hearing, the claimant seemed unclear as to her expectations of this litigation. The remedies set out in her revised Particulars of Claim are strongly focussed on compensation for hurt feelings. Her desire for “punitive” measures to be taken against the respondent for the tone in which they dealt with the queries about the shortfall in the maternity pay is concerning.

121. I have also considered whether it can fairly be said that the claims have no reasonable prospect of success. The factual basis of the claims is not actually in dispute (contrary to the claimant's submission), and so the caution expressed in Ezsias does not weigh against a strike out. Following Chandock, it is permissible to strike out discrimination claims where, for example, it is clear that they are time-barred, or where the case depends on a mere assertion of a difference of treatment alongside a difference in protected characteristic.

122. The equal pay claim was raised on the basis of information the claimant says she learned after her employment ended. She gave no particulars whatsoever in her ET1, nor any clarification at this hearing. Indeed, it is the claimant's case that the ET1 was a way to reserve her rights. It is therefore nothing more than a speculative indication of a claim, but in any event, it was brought well beyond the 3 month limitation period which ran at the latest from 7 June 2023 and expired on 6 September 2023.

123. Pregnancy discrimination is said to arise from the respondent's investigation into the personal use of the credit card during maternity leave. This too is a bare assertion which does not disclose any facts from which a Tribunal could conclude that the reason for the investigation was the claimant's pregnancy. The claimant did not challenge Ms Tomlinson’s evidence that the respondent became aware of

the credit card usage on 9 March 2023. This presents an apparently innocent explanation for the timing of the investigation, which is capable of displacing any inference of unlawful maternity discrimination. The claimant pleads no facts whatsoever which are capable of shifting the burden of proof to the respondent in accordance with section 136 Equality Act 2010.

124. In any event, this claim is also out of time because the 3 month limitation period ran at the latest from 7 June 2023 – assuming to the claimant's benefit that the handling of the investigation was conduct extending over a period for the purposes of section 123(3) Equality Act 2010.

125. The unfair dismissal claim has no prospect of success in circumstances where the claimant agreed to her employment being terminated through the terms of a settlement agreement. The respondent's argument that there was no dismissal is very likely to succeed and without this the claimant has no basis for a valid claim.

126. The breach of contract claim which relies on the respondent's failure to follow its disciplinary procedure has no reasonable prospect of success. Firstly, the Employee Handbook makes clear that the disciplinary procedure did not have contractual effect. As with the unfair dismissal claim, the circumstances in which the employment ended are at odds with the notion that the claimant was entitled to the benefit of a formal procedure being followed. Indeed, it was precisely to avoid a disciplinary process that the parties entered into the settlement agreement.

127. In any event, the above two claims are also out of time because the 3 month limitation period in each case ran from 7 June 2023 and expired on 6 Sept 2023. The fact that all these claims were brought well beyond the limitation period adds significant weight to the argument that, if allowed to go forward, they would have no reasonable prospect of success.

128. Balancing the prejudice to the respondent of allowing these unmeritorious claims to continue at great inconvenience and expense, and in the face of the terms of the settlement agreement entered into freely by the claimant, I conclude that all claims set out in the ET1 dated 13 March 2024 should be struck out.

Summary:

129. The claimant's original claims in the ET1 could only proceed if she had not entered into a legally binding settlement agreement, or if a court or Tribunal determined that she was no longer bound by it due to the respondent's repudiation of that contract. The settlement agreement was designed to, and did, supersede the employment relationship. The express and implied terms applicable during employment ceased to apply on 7 June 2023.

130. I have expressed some views about the potential breach of the settlement agreement by virtue of the underpayment of maternity pay, but I decline to make a formal determination of the point. This is not least because it is clear that the Tribunal does not have jurisdiction to deal with a breach of contract claim under the terms of Article 3(c) of the 1994 Order, there being no claim arising or outstanding on 7 June 2023. The question of breach was relevant to my decision

on the merits of an amendment application and in that context I considered that it was not appropriate or proportionate to allow such a claim to proceed.

131. I note that at the time of the 24 June 2023 payment, both parties understood that the sums paid were correctly calculated to ensure that the claimant's statutory maternity entitlements were paid in full, alongside the enhanced payments. It transpired that an administrative error was made, and once discovered, the shortfall was paid.

132. After considering the claimant's pleaded case, her amended Particulars of Claim and submissions, I was not persuaded that any of her arguments had merit. The legal authorities and Mr Bignell's submissions for the respondent presented strong support for the decision not to allow these claims to go forward in the Employment Tribunal. The claimant's submissions were based largely on an erroneous understanding of the law on employment relationships, and she relied very heavily on principles applicable to the duty of trust and confidence implied into a contract of employment. But this case revolved around the terms of a different contract in the form of the settlement agreement. Whereas a failure by an employer to pay wages does go to the root of an employment contract, in this context a relatively small underpayment pursuant to a settlement agreement is not comparable.

133. Balancing injustice and hardship, I have concluded that the new claims should not be permitted to proceed by way of amendment. The new breach of contract claim does not fall within the Tribunal's jurisdiction by virtue of the 1994 Order. The bringing or pursuing of the claims warrants a strike out under Rule 37, because it is an abuse of process and the claims have no reasonable prospect of success. The serious limitation issues created additional obstacles for all claims, and I was provided with no evidence justifying an extension of time.

Employment Judge Langridge

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON

10 January 2025

JUDGMENT SENT TO THE PARTIES ON

16 January 2025

.....

AND ENTERED IN THE REGISTER

.....

FOR THE TRIBUNAL