



EMPLOYMENT TRIBUNALS

Claimant

Ms. E. Yarkhan

v

Respondent

Primark Stores Limited

PRELIMINARY HEARING (OPEN)

Heard at: London Central

On: 8 and 9 August 2019

Before: Employment Judge Mason

Representation:

Claimant: In person (supported by PSU)

Respondent: Mr. S. Nicholls, counsel

Interpreter in the Arabic language: Ms. N. Smith

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant was a disabled person during the Relevant Period by reason of (i) migraines (with associated vertigo) and (ii) depression.
2. The Tribunal does not have jurisdiction to consider claims of discrimination on grounds of race, religion or belief arising out of allegations numbered 54 and 55 on the Scott Schedule as they were not presented in time and it is not just and equitable to extend time.
3. The Tribunal has jurisdiction to consider the claim of discrimination on grounds of race, religion or belief arising out of allegation number 68 on the Scott Schedule; it was presented out of time but it is just and equitable to extend time.

REASONS

The procedural background

1. By a claim form (“ET1”) presented on **22 March 2018**, the Claimant claims disability discrimination, race discrimination and religion or belief discrimination. She named two respondents: (i) “Primark” and (ii) “Primark Stores Ltd” having obtained separate Acas Early Conciliation certificates in respect of each respondent.
2. The Claimant says in her ET1 that she is disabled by reason of the following impairments:
 - (i) Migraines
 - (ii) Stress and depression
 - (iii) Vertigo
 - (iv) Sinusitis/ Rhinitis/Allergies
3. The Claimant identifies as Asian British Pakistani and her religion is Muslim.
4. At the time she presented her claim she was still in the Respondent’s employment; she resigned on 7 June 2018 and her last day of employment was 23 June 2018.
5. The Respondent lodged a response (“ET3”) defending all the claims and disputing that the Claimant is disabled.
6. On **20 July 2018**, Employment Judge Clark conducted a closed Preliminary Hearing (“PH”):
 - 6.1 EJ Clark dismissed “Primark” from the proceedings.
 - 6.2 The Claimant was allowed to amend her claim to add a claim of constructive constructive unfair dismissal.
 - 6.3 The Respondent was ordered to amend a draft list of issues and send it to the Claimant so that she could *“take some legal advice before responding to the questions and gaps in the draft issues”*.
 - 6.4 The Claimant was ordered to provide *“particulars of her discrimination and other claims where indicated in the amended draft list of issues...”*
 - 6.5 EJ Clark made directions regarding the disability issue.
 - 6.6. Further directions were made for the final hearing.
7. Following EJ Clark’s orders:
 - 7.1 On **26 July 2018**, the Respondent sent to the Claimant a revised List of Issues.
 - 7.2 On **10 August 2018**, the Claimant responded:
 - (i) Under the heading *“Race Discrimination”* in paragraph 11(b) she was asked to set out *“the act or omission the Claimant alleges amounted to less favourable treatment with reference to her ET1”*; she wrote *“See ET1 para. 1.3 A, B, C”*.
 - (ii) Under the heading *“Religion or Belief Discrimination”* in paragraph 12(b) she was asked to set out *“the act or omission the Claimant alleges amounted to less*

- favourable treatment with reference to her ET1*"; she wrote "See ET1 para. 1.3 A, B, C".
- 7.3 On **22 August 2018**, the Claimant provided lengthy particulars of her constructive unfair dismissal claim
- 7.4 On **4 September 2018**, the Claimant provided a Disability Impact Statement.
- 7.5 On **10 September 2018**, the Claimant wrote to the Tribunal asking for permission to amend her claim. She did not specify the amendment(s) requested.
- 7.6 On **14 September 2018**, the Respondent sent to the Claimant a draft Scott Schedule listing the allegations based on its understanding of the ET1 and the Claimant's mark-up on the List of Issues.
- 7.7 On **7 December 2018**, the Claimant returned to the Respondent the draft Scott Schedule having added a significant number of allegations (around 67) dated between December 2009 and October 2017 (highlighted in blue).
- 7.8 On **18 December 2018**, the Respondent opposed the Claimant's application to widen her claim to include these allegations. The Respondent also applied for the Claimant's claims of race and/or religion and belief discrimination to be struck out on the grounds that the Tribunal does not have jurisdiction to hear them and they do not, therefore, have any reasonable prospect of success (Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013). Alternatively, the Respondent sought a deposit order in respect of these allegations on the basis they have little prospect of success (Rule 39 2013 Rules).
- 7.9 On **12 February 2019**, joint instructions were sent to Dr. Singh and Professor Arya [367-375].
8. On **21 February 2019**, EJ Clark postponed the FMH (1-9 April) and listed a PH for 8 and 9 April 2019 to consider:
- 8.1 the question of disability if necessary following receipt of joint medical experts' reports;
- 8.2 the scope of the Claimant's claim in light of her correspondence of 7 December 2018 and the Respondent's objection to the apparent widening of her claims; and
- 8.3 whether the claims for race, religion and belief discrimination should be struck out or a deposit ordered.
9. On **24 February 2019**, Dr Singh provided a medical report.
10. On **28 March 2019**, Professor Arya provided a medical report. The Claimant questioned his report on 24 April 2019; Professor Arya responded on 3 May 2019 and further emails were exchanged (21 May to 28 May 2019).
11. On **3 April 2019**, the Respondent conceded that the Claimant is disabled by reason of migraines but not by the other alleged conditions.
12. EJ Elliott conducted a further PH on **8 and 9 April 2019**:
- 12.1 EJ Elliott refused the Claimant's application to amend for the reasons set out in her decision (sent to the parties on 11 April 2019). The claims which are

highlighted in blue on the Scott Schedule (as appended to my separate Orders) are the allegations disallowed by EJ Elliott, with the exception of allegation 89 which the Respondent accepts is highlighted in blue in error. The Claimant has unsuccessfully applied for a reconsideration of that decision and unsuccessfully appealed to the Employment Appeal Tribunal.

- 12.2 EJ Elliott listed this case for a further PH to take place on 8 and 9 August 2019 to consider:
- (i) whether the Claimant is a disabled person under s6 of the Equality Act 2019 ("EqA"); and
 - (ii) the Respondent's application to strike out the claims under Rule 37 of the 2013 Rules or to order a deposit under Rule 39 of the 2013 Rules.
13. On **17 May 2019**, the Claimant wrote to the Tribunal raising a number of points including:
*"4) Request to label the two points of ET1
Following the preliminary hearing I realised that there is one point in my Scott schedule which is not labeled which I left at time of writing to get back it later but clearly I did not for whichever reasons. I am requesting to have the permission to label this point, I feel it is just and [equitable] to be able to label the point. For the ease of reference, please find Scott schedule attached. The point that I am talking about is page 34 dated 4 of January 2018, point number 89. Failure to do return to work."*
14. At the PH before me on **8 and 9 August 2019**, the Claimant verbally applied for leave to make further amendments to her claim to add to a number of allegations (75, 76, 77, 78, 81, 82, 84, 85, 86, 87, 88 and 89 of the Scott Schedule) claims of race/religious discrimination in addition to disability discrimination.
15. Mr. Nicholls on behalf of the Respondent informed me that the Respondent's application to strike out was limited to the allegations numbered 54, 55 and 68 on the Scott Schedule on the basis they are out of time.

Issues at the open part of the PH on 8 and 9 August 2019

16. The issues before me were as follows:
- 16.1 whether the Claimant is a disabled person under s6 of the Equality Act 2019 ("EqA"); and
 - 16.2 consideration of the Respondent's application to strike out allegations 54, 55 and 68 (Scott Schedule) under Rule 37 of the 2013 Rules on the basis they are out of time; or to order a deposit under Rule 39 on the basis these allegations have little prospect of success.

Procedure at the PH on 8 and 9 August 2019.

17. The Claimant was not represented but had the support of the PSU on both days. Mr. Nicholls, counsel, represented the Respondent. The Claimant has a back condition and I made it clear to her she was free to stand and move around as necessary and I would be sympathetic to requests for breaks. I am

grateful to Mr. Nicholls and the Claimant for their courtesy throughout the hearing. The Claimant presented her case eloquently and with dignity.

18. The Claimant speaks fluent English but an interpreter (Arabic) was present throughout to assist her with any words she did not understand.
19. The Respondent provided a large bundle of documents (421 pages) and the Claimant a smaller bundle. We spent some time merging these documents. Documents in the Claimant's bundle which were not already in the Respondent's bundle were added to the Respondent's bundle at the end as a new Section D (pages 422 to 482). I made clear that I would only consider documents to which I was taken to.
20. The Claimant gave evidence with regard to the disability issue and adopted her Disability Impact Statement as her evidence-in-chief. She was cross-examined by Mr. Nicholls.
21. I listened to submissions from both Mr. Nicholls and the Claimant and then reserved my decision. There was insufficient time to consider the Respondent's application for a deposit order.

Disability issue

Law relevant to the disability issue

22. One of the protected characteristics under the Equality Act 2010 ("EqA") is disability (s4 EqA).
23. The starting point is the definition of disability in section 6 EqA:
"6. *Disability:*
(1) *A Person (P) has a disability if –*
(a) *P has a physical or mental impairment, and*
(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
24. This definition is supplemented by provisions in **Schedule 1 EqA** including:
"2. *Long-term effects:*
(1) *The effect of an impairment is long-term if*
(a) *it has lasted for at least 12 months,*
(b) *it is likely to last for at least 12 months, or*
(c) *it is likely to last for the rest of the life of the person affected.*
(2) *If an impairment ceases to have an adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing if that effect is likely to recur".*
25. The burden of proof is on the claimant to show that he or she satisfies this definition and the standard of proof is the balance of probabilities.

26. The Tribunal must take into account any aspect of
- **Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)** (“the Guidance”) and
 - **The Equality and Human Rights Commission: Code of Practice on Employment 2011** (“the Code”)
- which appears to be relevant
27. ***Goodwin v Patent Office*** [1999] IRLR 4(EAT): a Tribunal considering the question of disability should ensure that each of the following four steps is considered separately and sequentially:
- (i) does the person have a physical or mental impairment?
 - (ii) does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - (iii) is that effect substantial?
 - (iv) is that effect long-term
28. Whether there is an impairment which has a substantial effect on normal day-to-day activities is to be assessed at the date of the alleged discriminatory act (***Cruickshanks v VAW Motorcrest Limited [2002] ICR 729 EAT***).
29. Para. 5 Sch. 1 EqA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to correct the effect and, but for the measures, the impairment would have a substantial adverse effect. This is so even where the measures taken result in the effects of the impairment being completely under control or not at all apparent (para. B13 Guidance).
30. There is no list of capacities of which normal day to day activities are to be judged under EqA. Section D of the Guidance gives guidance on adverse effects on normal day-to-day activities. Section B of the Guidance: the Tribunal should focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she is able to do.
31. A substantial effect is one which is more than minor or trivial (s212(1) EqA). Section B of the Guidance addresses “substantial” adverse effect.
32. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months. Where an impairment ceases to have an effect, but that effect is likely to recur, it is to be treated as continuing, (Sch 1 para 2 EqA). “Likely” means “could well happen”. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood

Findings of Fact relevant to the disability issue

33. The Claimant relies on a number of impairments and I will deal with each in turn. The relevant period is 26 October 2017 to 23 June 2018 (“the Relevant Period”).

Migraines

34. The Respondent accepts that the Claimant was disabled during the Relevant Period by reason of her migraines. There is therefore no need to make any further findings of fact with regard to this particular impairment.

Vertigo

35. The Claimant accepted at the PH before me that vertigo is a symptom of the migraines and not a stand-alone condition. There is therefore no need to make any further findings of fact on this point.

Stress and Depression

36. I have considered the following:

36.1 Expert report of Dr Pranveer Singh [376-398]

- (i) Dr. Singh was instructed by the Respondent’s solicitors on a joint basis [367-370] and met with the Claimant on 24 February 2019 for two hours and prepared his report the same day.
- (ii) Dr. Singh is a Consultant Psychiatrist in General Adult Psychiatry working in the Essex Partnership University NHS Foundation University Trust. He has “*extensive experience in diagnosing and treating mental illness, as well as experience of preparing medicolegal reports for civil and criminal cases*”. His qualifications are set out in para. 1.1 [377] and I fully accept that he is appropriately qualified and experienced to produce this report.

36.2 The other medical evidence.

36.3 The Claimant’s Disability Impact Statement [235-246].

36.4 The Claimant’s verbal evidence.

37. I accept that the Claimant suffered from stress and depression during the Relevant Period having been first diagnosed with depression in March 2011 and then again in 2013 and in November 2017. This is supported by:

37.1 The Claimant’s evidence in her Disability Impact Statement [240].

She says she has had “*multiple long last episodes of depression which lasted for extended periods*” [239] and she says “*it has the tendency to recur*” [240].

37.2 In verbal evidence she said the symptoms fluctuate but were “*extremely severe*” from 26 October 2017.

37.3 Her GP notes show she experienced depression on 22 March 2011, 2013 and in November 2017 .

37.4 The following Statements of Fitness to Work/Self-Certificates mention stress and/or depression:

- 30.11.2017 – 14.12.2017: stress [357]
 - 15.11.2017 – 3.1.2018: stress [361]
 - 8.1.2018 – 15.1.2018: stress [359]
 - 28.1.2018 to 27.2.2018: stress [363]
 - 28.2.2018 – 27.3.2018: stress [364]
 - 27.3.2018 – 26.4.2018: Depression [365]
 - 16.4.2018 – 15.6.2018: [366]
- 37.5 Dr Singh's report:
- (i) Dr Singh summarises the Claimant's psychiatric history and notes:
 - 23.2.11: She saw her GP and was diagnosed with neurotic depression and referred for counseling.
 - March 2011: Her GP noted that she was suffering from reactive depression.
 - 2011: she underwent counseling.
 - 30.11.2017: Her GP prescribed antidepressants.
 - 20 March 2018: Her GP prescribed antidepressants.
 - 6 July 2018: Her GP noted she was suffering from "Depressive Disorder" and prescribed antidepressants.
 - She has attended approximately 32 counselling sessions.
 - (ii) Under the heading "Opinion" Dr. Singh concludes she was suffering from stress and depression between November 2017 and June 2018 .
38. I accept that the Claimant's depression had the following substantial adverse effects:
- 38.1 Disturbance of sleep pattern
- (i) Claimant's Disability Impact Statement:
She says it causes difficulty sleeping and confused and disturbing dreams.
 - (ii) Dr Singh:
"14.18 On balance of probabilities, in my view such regular disturbance of sleep pattern is more than trivial and can be regarded as a substantial impairment. It is associated with her depression and continues to be present until this date from the period of October 2017". [394]
- 38.2 Irritability adversely affecting her ability to socialise
- (i) Claimant's Disability Impact Statement:
She says her depression causes her to be short-tempered which damages her relationships with friends and family.
 - (ii) Dr Singh:
"14.24 In my opinion on balance of probabilities, [the Claimant] has experienced a substantial impairment with regard to her ability to socialise with her relatives It appears that the symptom of irritability has lasted for more than 12 months since October 2017." [395]
- 38.3 Impairment of motivation
- (i) Claimant's Disability Impact Statement:
She says her lack of motivation results in her putting off things that need doing and potentially missing study deadlines.
 - (ii) Dr. Singh:

“In my opinion, on balance of probability, impairment of motivation is consistent with diagnosis of moderate depression and can be regarded as substantial. This has also continued to persist for more than a year” [395].

39. I find that the Claimant’s depression has other adverse effects but that these are not substantial:
- 39.1 Low appetite and drinking 10-12 cups of tea a day with sugar
The Claimant says in her Disability Impact Statement that she suffers a loss of appetite and an addiction to tea with sugar as a comfort “food”; this adversely affects her weight which then puts pressure on her back and joints. However, whilst Dr. Singh notes that the Claimant describes low appetite and drinking 10-12 cups of tea a day with sugar which affect her health and weight, he does not comment on whether this is a “substantial impairment”. [394-395].
- 39.2 Thinking ability and focus
The Claimant says in her Disability Impact Statement that she suffers from loss of short term memory, has difficulty making decisions, and has difficulty focusing and concentrating. However, whilst Dr Singh notes that the Claimant reports that her thinking ability and focus were adversely impacted upon, he does not comment on whether this is a “substantial impairment” and says it *“is unclear if this impairment lasted in continuation for at least 12 months since October 2017”*. [395]
- 39.3 Cooking and cleaning:
The Claimant says in her Disability Impact Statement that she has lost interest in cooking and cleaning. However, Dr Singh comments than an assessment of any impairment in relation to cooking, shopping and ability to travel is outside his expertise [395].
- 39.4 The Claimant also mentions anxiety and loss of energy; unexplained aches and pain which affect her mobility; and hormonal changes. However none of these are mentioned by Dr Singh.

Sinusitis /rhinitis/allergies

40. I have considered the following:
- 40.1 Expert report of Professor Arya [399-405]
- (i) Professor Arya was instructed by the Respondent’s solicitors on a joint basis [317-375]. He consulted with the Claimant by telephone on 14 March 2019 and his report is dated 28 March 2019.
- (ii) Professor Arya is a Consultant ENT, Head & Neck & Thyroid Surgeon, and Visiting Professor, Wrexham Glyndwr University. I have no reason to doubt that he is appropriately qualified and experienced to produce this report. I have taken into account that Professor Arya and the Claimant did not meet in person.
- (iii) Questions put to Professor Arya by the Claimant [406–414] and Professor Arya’s response and the exchange of emails
- 40.2 The other medical evidence.
- 40.3 The Claimant’s Disability Impact Statement.
- 40.4 Her verbal evidence

41. Allergic rhinitis

41.1 Professor Arya explains:

“Allergic rhinitis is inflammation of the internal lining of the nose caused by allergy. The common allergies that cause rhinitis are house dust mite, pollen, aspergillus and pet hair” [415].

41.2 I accept that the Claimant suffered during the Relevant Period from allergic rhinitis. There is ample evidence of this in her medical records and Professor Arya states:

“The patient has long-standing allergic rhinitis ...” [402]

“She has a definite diagnosis of allergic rhinitis and is allergic to many known allergens such as cats, tree pollen and house dust mites.”

“The Claimant has both seasonal and perennial rhinitis as she positive skin prick tests to house dust mite as well as pollen” [415]

41.3 The Claimant takes regular medication:

Professor Arya: *“She is taking regular medications ... including antihistamines, and topical nasal steroids”* [402].

42. Sinusitis

42.1 I accept the Claimant has a history of sinus problems which persisted during the Relevant Period:

(i) There is ample evidence of this in her medical records, such as a letter from Dr Jeremy Tew, 4 April 2019 [447].

(ii) A Statement of Fitness for work dated 5 November 2017 [355] specified the conditions of “migraine and sinusitis symptoms”

A Statement of Fitness for work dated 17 November 2017 [356] specified the condition of “sinus problems”

A Statement of Fitness for work dated 28 January 2018 [363] specified a number of medical conditions including “chronic sinusitis”.

42.2 However, I do not accept she was suffering from chronic sinusitis during the Relevant Period:

(i) Professor Arya states:

“There is no diagnosis of sinusitis in this case. I am basing this on the observations from the ENT doctors that she has seen at the University College London and on the basis of a normal CT scan of the sinuses which is hugely diagnostic” [402].

“I would like to stress that ongoing pain in the face and head on the balance of probabilities in this case have not been caused by her sinuses. There are many causes of pain in the face and head and these are often misdiagnosed as sinusitis” [417]

(ii) There is no evidence of a diagnosis of chronic sinusitis in her medical records; other than the Statement of Fitness for Work dated 28 January 2018 (above) but evidentially this is outweighed by Professor Arya’s report.

43. I accept that the Claimant’s allergic rhinitis, allergies and sinus problems adversely affect her, and that this is made worse if she does not take prescribed medication. However, I am unable to conclude on the evidence before me that (separately or combined) these conditions substantially adversely affect her normal day-to- day activities:

43.1 Professor Arya states:

"I am of the impression that the claimant does have some allergies which may exacerbate allergic rhinitis. I am of the impression that this does not represent a substantial disability" [403]

"It is my view that symptoms of allergic rhinitis do not constitute a disability as the effects of such symptoms are not substantial. Any exacerbations would not last for a period of twelve months".

"In terms of exacerbations of allergic rhinitis, these are usually short lived. Although the claimant does have perennial rhinitis in addition to seasonal rhinitis, this does not imply that the disease is continuous throughout the year. Allergy to dust mite when it occurs, is usually short-lived and just because an individual has a susceptibility to house dust mite allergy, this does not imply they will always suffer from the condition, nor will they be suffering for a continuous length of time. I can find no supporting literature which would support a house dust allergy that only causes symptoms of allergic rhinitis to be a disability under the Equality Act 2010".[416]

"The effects of dust mite allergy can vary from person to person" [416].

The Claimant asked Professor Arya to rank on a scale of 1-10 the effect on her of dust mite allergies [420]. Professor Arya replied:

"... this is not a question I can answer; the symptoms of allergic rhinitis vary from patient to patient and are very subjective. There are no objective tests available that can measure the effects of the condition" [420].

- 43.2 In her Disability Impact Statement, the Claimant lists a number of symptoms, such as impaired breathing; impaired concentration; irritability; drowsiness from the medication; fatigue; unable to sleep properly; nausea; headaches; vomiting and pain. However she does not explain or give any examples of how these symptoms affect her day-to-day activities. She refers only in very general terms to the difficulties these symptoms present to her. In verbal evidence she mentioned that if she was on a bus and someone was smoking, this would affect her breathing but did not give any indication as to how often this occurs.

The decision on disability

44. Applying the law to the facts, I find that the Claimant at the relevant time, suffered from migraines, depression, rhinitis, sinus problems and allergies.
45. In accordance with the Respondent's concession, I accept that the Claimant was disabled by reason of her migraines.
46. I conclude that she was also disabled by reason of depression. This is a mental impairment which had a substantial and long term adverse effect on her ability to carry out normal day-to-day activities, specifically, her irritability adversely affected her ability to socialise. This mirrors one of the examples in the EqA Code which it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities:
"Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder"

47. I do not accept that her rhinitis, sinusitis and allergies (whether separately or combined) amount to a disability:
- 47.1 I accept that she has (and had at the relevant time) these physical impairments
- 47.2 I also accept that they have all had a long-term adverse effect on her.
- 47.3 However, there is insufficient evidence before me to support a finding that her normal day to day activities were *substantially* adversely affected by these conditions. The burden of proof is on the Claimant and she has failed to discharge this. She has focused on the symptoms of her conditions rather than the practical effects on her day to day activities despite EJ Clark's order (20 July 2018 47-50) that in the Disability Impact Statement the Claimant should set out details of how her impairments had an adverse effect on her ability to carry out normal day-to-day activities, details of how that effect is substantial (if at all) and the time period for which the impairment has had or will have that effect.

Respondent's strike out application

Law relevant to the Respondent's strike out application

48. Complaints of unlawful discrimination must be presented to an Employment Tribunal before the end of the three months beginning with the date of the act complained of (s123(1)(a) EqAct). Conduct extending over a period is to be treated as done at the end of the period (s123(3)(a) EqA).
49. Acas Early Conciliation
- 49.1 A claimant will not usually be allowed to bring an Employment Tribunal claim unless he or she has informed Acas of the complaint and given Acas the opportunity to resolve the case by early conciliation ("EC").
- 49.2 The EC) scheme is set out in ss 18A and 18B of the Employment Tribunals Act 1996 ("ETA") and in the Early Conciliation Rules of Procedure ("the EC Rules") contained in the Schedule to the Employment Tribunals (Early Conciliation: exemption and Rules of Procedure) Regulations 2014 SI 2014/254 ("the EC Regulations").
- 49.3 The claimant must send "prescribed information" to Acas including the name of the prospective respondent.
- 49.4 If conciliation is not reached, Acas will issue an EC certificate
- 49.5 A claimant institutes proceedings by presenting a completed claim form on a prescribed form (ET1) (Rule 8(1) Tribunal Rules):
- (i) The claim form must provide certain prescribed information including the name and address of each person against whom the claim is made (the respondent) (Rule 10(b)(iii)).
 - (ii) The claimant must also provide the EC number on the EC certificate (Rule 10(c)) to show that he or she has contacted Acas.
 - (iii) On receipt, the Tribunal will decide whether to accept or reject the claim. Once accepted, it will be sent to the respondent.

50. Acas EC extension to time limits

50.1 To ensure prospective Claimants do not miss the ordinary time limit because of the requirement to refer the matter to Acas, s207B ERA provides as follows:

(2) In this section –

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives ... the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

50.2 The EAT has clarified in **Luton Borough Council v Haque**, UKEAT/0180/17/JOJ, 12 April 2018, that the approach to extending time limits for EC Conciliation is cumulative not alternative; sub-section (3) is considered first and then sub-section (4).

51. The Tribunal has discretion to extend time if it is just and equitable to do so (s123(1)(b) EqA 2010). The onus is on the Claimant to convince the Tribunal that it is just and equitable to extend time.

Findings of fact

52. The Respondent's application is to strike out only allegations 54, 55 and 68 (Scott Schedule).

53. Allegations 54 and 55 on the Scott Schedule [208-209]:

53.1 These both relate to alleged incidents at the end of 2015.

53.2 The legal basis for both allegations is identified by the Claimant as "Direct race discrimination, Direct religion and belief Discrimination, Victimisation".

53.3 In the case of allegation 54, the relevant Respondent witness is named as Mr. Femi Orukton. Mr. Orukton does not appear in any of the other (allowed) allegations in the Scott Schedule and he is no longer employed by the Respondent [481].

53.4 In the case of allegation 55, the relevant Respondent witness is named as Mr. Franklin. Mr. Franklin does not appear in any of the other (allowed) allegations in the Scott Schedule. He remains employed by the Respondent.

53.5 I accept these two allegations may be linked. However, I do not accept that either are linked to allegation 68 [214] which is the only other allegation of race/religion/belief discrimination the Claimant relies on. Allegation 68 is dated October 2017 - almost two years later - and involves different Respondent witnesses.

53.6 These allegations/claims are therefore very significantly out of time.

53.7 The Claimant says she did not present a claim sooner because she did not realise these were acts of discrimination until she presented this claim on 22 March 2018. However, I do not accept this as she also told me she realised before October 2017 that there was, in her view, a continuing pattern, or course, of discriminatory conduct.

54. Allegation 68 on the Scott Schedule [214].

54.1 This relates to alleged incidents in October 2017.

54.2 The legal basis for this allegation is identified as “Direct race discrimination, Direct religion and belief Discrimination, Victimisation”.

54.3 The relevant Respondent witnesses are named as Mr. Grant Condor and Ms. Donna O’Connor:

(i) Ms. O’Connor is still employed by the Respondent [480]. She is also named in some of the Claimant’s disability discrimination allegations (75, 76,81,82 and 84.)

(ii) Mr. Condor is also still employed by the Respondent [480]. He is also named in one of the Claimant’s disability discrimination allegations (77).

54.4 This is not linked to any other subsequent allegations of discrimination on grounds of race/religion/belief.

54.5 Allegation 68 is also out of time:

(i) The Claimant presented this claim on 22 March 2018.

(ii) She named two Respondents in her application: “Primark” and “Primark Stores Ltd” .

(iii) She had obtained beforehand two ACAS Early Conciliation Certificates as follows:

a. In respect of “Primark”:

Certificate number R110838/18/09

1st Notification: 26 January 2018

Date of issue of Early Conciliation Certificate: 26 February 2018.

b. In respect of “Primark Stores Ltd”:

Certificate number R120826/18/36

1st Notification date: 21 February 2018.

Date of issue of Early Conciliation Certificate: 19 March 2019.

(iv) “Primark” was dismissed from these proceedings on 20 July 2018 by EJ Clark leaving “Primark Stores Ltd” as the sole Respondent.

(v) Therefore the only relevant EC Certificate is In respect of “Primark Stores Ltd”: i.e. EC Certificate number R120826/18/36.

(vi) On the assumption the date of allegation 68 is 31 October 2017, the ordinary 3 month time limit expired on 30 January 2018. However, the 1st Acas Notification Date was not until 21 February 2018 and was therefore outside this 3 month period and time is not extended by the EC process.

54.6 The Claimant says the reason for the delay is due to the following:

(i) she fell at work on 30 October 2017 and sustained a back injury; she was “shattered” by this and thought at one point she would be in a wheelchair;

(ii) she was signed off work for 6 weeks due to sickness from 15 November 2017 to January 2018;

- (iii) she did go to Acas on 26 January 2018 and therefore within the 3 month time limit but in error named “Primark” rather than “Primark Stores Ltd” and this error was due to her emotional and psychological state at that time.
55. Mr. Nicholls on behalf of the Respondent says the Respondent will suffer hardship if these claims are allowed:
- 55.1 Mr. Orukton has now left and as EJ Elliott observed, is likely to have no interest in giving evidence therefore the Respondent would be unable to defend themselves in respect of allegation 54.
- 55.2 With regard to allegation 55, Mr. Franklin is still employed by the Respondent but does not appear in any of the other allegations in the Scott Schedule and memories will have faded after 4 years.
- 55.3 With regard to allegation 68, he points out that the Claimant was sufficiently fit to contact Acas on 26 January 2018 in respect of the wrong respondent and therefore she was able to contact Acas in respect of the right respondent.

Decision on the Respondent’s strike out application

56. The Claimant has not convinced me it is just and equitable to extend time in respect of allegations 54 and 55. There is no course of conduct as they are nit linked to subsequent allegations. The Respondent would be unfairly prejudiced given the considerable time that has elapsed and would be at a significant disadvantage in preparing its case. I have not accepted her explanation for the delay.
57. I am persuaded however to extend time in respect of allegation 68. I cannot identify any real hardship to the Respondent in being required to meet this claim given that Mr. Grant Condor and Ms. Donna O’Connor are still employed by the Respondent and play a part in the other (disability discrimination) allegations. The Claimant has explained she was off sick for 6 weeks during the 3 month period following the date of this allegation and I accept that naming Primark” rather than “Primark Stores Ltd” when she contacted Acas on 26 January 2018, was a simple error at a time when she was unwell.

Employment Judge Mason
13th August 2019

Sent to the parties on:
15.08.2019

For the Tribunal Office