



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Gill

Respondent: The Bridge (East Midlands)

HELD at Nottingham

ON: 7 July 2021

BEFORE: Employment Judge Broughton

REPRESENTATION:

Claimant: In person

Respondent: Mr Lawrence of Counsel

RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. The claim of 'ordinary' unfair dismissal pursuant to section 98 Employment Rights Act 1996 is struck out on the grounds that the claimant does not have the qualifying service required pursuant to section 108.
2. The claim for holiday pay and other payments is struck out on the grounds that the claim was presented out of time.
3. The claim for discrimination based on having children or a family is struck out on the basis that the claim was presented out of time and has no reasonable prospects of success.

Deposit Orders:

4. The Employment Judge considers that the claimant's allegations or arguments that
 - 4.1 That she was not given two days TOIL in February or March 2020 and that this was an act of race discrimination

4.2 That Miss Fillingham sent two emails to staff informing them that the claimant's son was sick on 24 March 2020 and 19 May 2020 was an act of race discrimination;

have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of **£50** in respect of **each** complaint/allegation not later than **14 days** from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

Background

1. The claimant was dismissed on 2 June 2020 from her role as Food Poverty Development Officer. A time limit of within 3 months from the date of termination would expire on **1 September 2020**. The period of ACAS early conciliation ran from 1 September to 1 October 2020. The ACAS conciliation period would have extended the 1 September 2020 date (where the 3 months from termination date is the appropriate time limit) to **1 November 2020**. The claimant did not issue her claim however until **23 November 2020**.
2. The claimant is unrepresented. Her claim form indicated that she was bringing claims of unfair dismissal, race discrimination, holiday pay and other payments.
3. Within the body of the claim form however the claimant referred to discrimination "*due to having a family*" and being treated unfairly with reference to having children and to arrangements during the Covid-19 pandemic.
4. A notice of claim issued on 30 November 2020 has listed the case for hearing on 3 days from **16 to 18 May 2022** and made case management orders, none of which have been complied with as of the date of this hearing, including the last Order which was for exchange of witness statements on 28 June 2021.
5. The case was listed for a preliminary hearing by Judge Adkinson in his letter of 23 January 2021 (page 32 of the bundle) to determine the following:-
 - (1) *If the claimant has sufficient qualifying service to claim unfair dismissal.*
 - (2) *If the claims are in time and if not whether time should be extended.*
6. Orders were made for the preparation of the preliminary hearing including exchange of witness statements.
7. Subsequent to the making of that Order and listing a preliminary hearing, an application was made by the respondent on 27 January 2022 (page 35 of the bundle) under Rule 37 of the Tribunal Rules that should the Tribunal determine that the claims are either in time or that time should be extended, the claims of race discrimination, holiday pay and discrimination for having a family, should be struck out on the basis they have no reasonable prospects of success for the reasons set out in the respondent's ET3. In the alternative pursuant to Rule 39, that the

Tribunal make a Deposit Order requiring the claimant to pay a deposit of £1,000 in respect of each claim.

8. Employment Judge Hutchinson on 5 February 2021 made an Order that the applications for strike out or deposit would be decided alongside the other issues at the preliminary hearing. No further directions were made in terms of preparation for the hearing.

Preliminary Hearing: 7 July 2021

9. The matter then came before me on 7 July 2021 to determine those issues. The claimant was unrepresented and the respondent was represented by counsel.
10. The parties submitted a bundle which numbered 137 pages. The claimant had produced a witness statement which in effect amounted to further particulars of the claim, with only one sentence addressing time limits.
11. The respondent had also produced a witness statement from Claire Fillingham who had been the claimant's line manager. That statement did not deal with the issue of time limits but essentially was a factual statement regarding the allegations.
12. The statements addressed the issue of qualifying service.
13. At the start of the hearing the claimant expressed concern that documents that she had produced to the respondent and the Tribunal had not been included within the joint bundle. Mr Lawrence was not in a position he said, to explain their omission. I located documents sent to the Tribunal by email of 31 March 2021 timed at 19:17 and took account of those documents during the hearing and Mr Lawrence provided his email address (he confirmed he had not received the documents from his instructing solicitors) to enable the claimant to send those across to him during the course of the hearing.
14. Before we could consider the issue of time limits and of course the applications for Strike Out and Deposit Orders, it was necessary to clarify the claims with the claimant which took up a substantial portion of today's hearing, leaving insufficient time for deliberation and my decision, hence reserving the judgment. After discussing the claims with the parties, I then summarised the claims and read back my summary of the claims to both the claimant and Mr Lawrence for their comments. The claimant confirmed that those were the claims that she is pursuing as described by her during the morning of the hearing and Mr Lawrence similarly confirmed that they accorded with his understanding of how the claimant had described her complaints.
15. I have set out below the summary of the acts which the claimant confirmed she is complaining about.
16. The claimant had not identified within her claim form the type of discrimination, in terms of whether it was direct discrimination or otherwise. However, when describing the complaints she had been clear today that she considered that the treatment (set out below) was because of her race or more specifically the claimant's colour (she described herself as brown Asian) and because she has a family/child. She was very clear that she believed that this was the reason why she had been treated as alleged and attempted with respect to some of the allegations, to identify actual comparators.
17. I Being unrepresented and it appeared unfamiliar with discrimination law, I took the opportunity to explain to the claimant the differences between the different types of discrimination. A couple of the allegations, appeared to be more properly

characterised as indirect discrimination. However, although I explained in quite some detail the difference between direct and indirect discrimination claims to the claimant and allowed an adjournment for the claimant to consider further how she was identifying the claim, the claimant returned after the adjournment and informed me that she felt that the conduct was; “**deliberate because I had children –to make my life difficult**” and because of her colour. That is consistent with how the claims are at face value pleaded in the claim form and of course is not consistent with a claim of indirect discrimination.

18. The claimant alleges that all the acts were carried out by her direct line manager Miss Fillingham on the direction of the business manager, Mr Snape.
19. Mindful that the claimant was unrepresented and became quite emotional during the course of this hearing, I explained that she may wish to take some further advice. Given how the claim is pleaded and her clarification today, if it is not pursued as a direct discrimination claim, it will require an application to amend. I explained that time limits will be very important should it be determined that it is a new clause of action and therefore the sooner she makes that application the better. I directed the claimant to the provisions of section 19 of the Equality Act 2010 and in particular the requirement to identify the provision, criterion or practice (PCP). If she were to seek to include such a claim, she would need to identify the PCP which it is alleged put her at a particular disadvantage because of the protected characteristic (whether that protected characteristic is her sex, if it is a claim of indirect discrimination because of childcare commitments and/or because of her colour, if pursued as a claim of race discrimination or ethnicity). I mentioned ethnicity because one of the allegations is specifically that there was a failure to make risk assessments and the claimant alleges that she was more vulnerable to Covid because she is BAME. The claimant confirmed during the hearing today, however that her colour is the protected characteristic for the purposes of the race discrimination claim as currently pleaded.

Claims as clarified at the hearing: less favourable on the grounds of her colour and/or having children/a family:

- (1) *Allegation 1: February/March 2020*

The claimant was not given two days TOIL for days worked in February and March 2020.

She claims that this was because of her colour and/or because she had a family/child.
- (2) *Allegation 2: March 2020:*
 - (i) *Everyone other than the claimant was allowed to work from home due to the Covid-19 pandemic. She cites a specific comparator of a senior manager in the Housing and Moneywise department. (At present she is unable to identify the individual's named but believes that from this description, the individual should be identifiable by the respondent).*
 - (ii) *Other colleagues were given new roles so that they could carry out work from home rather than in the community. The claimant identifies actual comparators; Moneywise Advisors (white) and one learning co-ordinator (white). Again she was unable to identify their names today.*
- (3) *Allegation 3: 24 March to 6 April:*

- (i) *When the claimant's son was sick during this period, the claimant was forced to use her annual leave to look after him. She compares the treatment she receives to a white comparator however, she was unable to name the comparator but she believes the person would be identifiable from the following details namely; that this was someone who worked in Voluntary Action and took time off to look after their sick child in October 2019 and was not required to use their annual leave.*
 - (ii) *She was told by Miss Fillingham that she would be dismissed if she did not use her annual leave.*
 - (iii) *Miss Fillingham sent two emails to staff informing them that the claimant's son was sick. She relies on a hypothetical comparator for these purposes. The emails were contained in the bundle at pages 71 and 107 and are dated 24 March 2020 and 19 May 2020.*
- (4) *Allegations 4:18 to 16 April:*
 - (i) *The claimant's child was at home because school could not accommodate him. The claimant was required to use her annual leave to care for her children (she used two days' annual leave per week and worked from home on the other two days. A normal working week being four days per week).*
- (5) *Allegation 5:April 2020:*
 - (i) *PPE was not delivered to her house. The claimant alleges that all other employees of the respondent 30 or 40 of them in total, were treated differently in that the business manager Mr Snape, delivered PPE to all their homes. The claimant was the only one for whom PPE was not delivered.*
 - (ii) *The claimant was told that PPE would be available at the new premises where they were relocating or otherwise, she may wish to purchase her own.*
- (6) *Allegation 6: April 2020:*

The claimant complains that the respondent refused to allow her to go on furlough because she was the only one that had not been found an alternative role to enable her to work during the pandemic at home and as she was the only one in this position, she believes the respondent in those circumstances chose not to take advantage of the government furlough scheme.
- (7) *Allegation 7: 19 May 2020:*

She received a phone call from Miss Fillingham in which she informed the claimant "if you are unable to do your job due to having children you will lose your job".
- (8) *Allegation 8: 19 May 2020:*

The claimant complains that she was required by Miss Fillingham to complete a worksheet. She compares her treatment to everyone else who was working from home. She alleges that no one else was required to complete a worksheet.
- (9) *Allegation 9: 1 June 2020:*

She complains that she received a WhatsApp message from Claire Fillingham. She complains that this was sent to a private device, she complains that it was sent outside working hours and she complains about the content of the WhatsApp message in that it was requiring her to attend the office for a meeting rather than have the meeting conducted by Zoom in circumstances where other colleagues were allowed to participate in meetings by Zoom.

(10) *Allegation 10: 1 June 2020:*

She also complains of the following:

(i) *That there was a failure to carry out a risk assessment on a return to work despite the fact that she was more at risk being BAME and on medication.*

(ii) *That there was a failure to provide her with PPE.*

(11) *Allegation 11: 2 June 2020:*

She complains of the following:

(i) *That she was not paid her full holiday entitlement in that she was not given TOIL for February and March and not given the additional 44 days discretionary holiday.*

(ii) *She also complains about the act of dismissal and complains that the reason was “discrimination because of my colour and having a family.”*

Time limits

Findings of fact

Unfair dismissal : qualifying service

20. It is not in dispute between the parties that the claimant’s employment terminated on 2 June 2020. It is not in dispute between the parties that the claimant’s employment started in February 2019. There is a dispute regarding the date in February 2020 when the claimant started in employment. Miss Fillingham in her witness statement provides the date that the claimant started as 5 February 2019. The claimant alleges it was 7 February although when taken to a copy of her contract of employment (page 39) which refers to 5 February 2019, the claimant conceded that that may in fact be the correct day.
21. As her employment started on 5 (or 7) February 2019 and terminated on 2 June 2020, it is not in dispute between the parties as clarified today, that the claimant did **not** have the required two years’ qualifying service to bring a claim of ordinary unfair dismissal under section 98 of the **Employment Rights Act 1996** (which is concerned with broader issues of *fairness*). This does not of course, prevent her pursuing a claim that the dismissal was an act of discrimination under the **Equality Act 2010** (which does not require any particular length of service).
22. The claimant confirmed that in terms of her claim of dismissal she alleges that the real reason was “*discrimination because of my colour and having a family.*” She also alleged that the respondent had been put under pressure by its funder

to terminate her employment. She refers to being told that there were issues with her performance following the complaint by the funder but she refers to those issues with her performance not being supported by the appraisal documents (she alleges further documents were added to that appraisal which she had not seen at the time).

23. The claimant therefore alleges that there were multiple reasons for her dismissal and we went over this issue a number of times during this hearing, following which the claimant confirmed that her case is that her dismissal was because of her colour ie brown Asian, that she has a family/children and because of pressure from the funder (Mountsorrel United Charities).
24. The claimant confirmed that it is her belief that the respondent had received a complaint from the funder and felt under pressure to dismiss. She also then went on to say she also thought it was because of her health, because she had an ankle injury and rheumatoid arthritis however, her claim does not indicate any reference to disability discrimination and she did not indicate that she wanted to amend her claim to include such a complaint, during the course of today's hearing.
25. I explained to the claimant that it was important that I clarify with her what she was saying the genuine reason for dismissal was because she had in her claim form referred to PPE and I wanted to check that there was no allegation that the dismissals were for health and safety reasons or because of any alleged *whistle blowing*. The claimant confirmed that the four reasons relied upon are;
 - (a) colour;
 - (b) family/caring responsibilities;
 - (c) third party pressure;
 - (d) health.
26. I therefore explained to the claimant that she had not indicated any reason for unfair dismissal which would disapply the requirement to have two years' qualifying service to bring a claim of ordinary unfair dismissal under the Employment Rights Act 1996.

Discrimination and Holiday and other pay

27. Having accepted that the claims of discrimination, holiday and other pay and (indeed the unfair dismissal claim if she had the required qualifying service) have all been brought out of time, the claimant gave evidence under oath about the reasons why she has not brought the claims in time.
28. It was not in dispute between the parties that the primary time limit expired on 1 November 2020 and that her claim was brought just over three weeks later on 23 November 2020.
29. The claimant had not inserted paragraph numbers into her witness statement and therefore we added manuscript numbering for ease of reference.
30. The claimant had merely stated in her witness statement (paragraph 23) that the reason "*for the late submission is a family member tested Covid-19 and I had to care for them*".
31. Under oath the claimant gave evidence that her father-in-law had contracted Covid and that she had had to care for him. She also gave evidence that; "*I was*

really scared, other things took priority over the claim, I was not in the right frame of mind".

32. She refers to having to care for not only her father-in-law but her children and that this had been a stressful period.
33. In terms of her father-in-law's illness, under cross-examination her evidence is that her father-in-law contracted Covid in July or August 2020 and he was initially very sick and that he recovered probably at the end of October or November 2020 although he had ongoing symptoms and has not fully recovered. She gave evidence that the symptoms were at their worst in July/August 2020 and in terms of the care that she needed to provide, this included; provision of his food, sorting out his medication and his clothes.
34. The claimant accepted that her father-in-law's condition did not prevent her from contacting ACAS on 1 September 2020 because when she contracted Covid; *"he received medication which gets you better so the caring duties were not as much as it was the start"*. She conceded that by 1 September her caring duties for her father-in-law were not as onerous as they had been at the start of his illness and thus did not prevent her from engaging with ACAS.
35. The claimant had not produced any evidence with regard to her father-in-law's medical condition.
36. The claimant also gave evidence about her own medical condition. She referred to taking Naproxen tablets which is an anti-inflammatory medication for her ankle injury. The claimant also referred to taking Hydroxychloroquine which is another anti-inflammatory medication which she takes for rheumatoid arthritis. The claimant produced a screenshot of the label on a packet of Naproxen tablets with her name on it however, there was no evidence in the bundle in relation Hydroxychloroquine and there was no medical evidence which dealt with either of her conditions or set out the nature of the symptoms or impact on her.
37. The claimant gave evidence that the rheumatoid arthritis affects her hands, legs and ankles. She suffers fatigue and has flare ups of the condition which started in July 2020 and is continuing. The claimant stated under cross-examination that it is not every day she has a flare up, the flare ups vary in their severity to the extent that sometimes she cannot get out of bed but she accepted that the medication and the condition did not stop her contacting ACAS on 1 September 2020 and that she had the same condition when she submitted the form on 23 November 2020 and it was not a barrier to making a claim at that point.
38. The claimant had also in her evidence mention suffering anxiety since the dismissal but again conceded that this had not prevented her contacting ACAS or submitting the claim on 23 November.
39. The claimant gave evidence that she had not known how to bring a claim however when I asked how she had ultimately found out, she explained that she had spoken with ACAS and that the person there *"told me what to do"*. She had spoken to ACAS she said a few times and she gave evidence that ACAS had explained the time limits to her. The claimant could not recall when the time limits had been explained but went on to say it was *"when I got through to them, they told me to fill out some questions and they sent out the certificate"*. The claimant clarified that ACAS had told her about the time limits when she had first spoken to them on 1 September.; *"Yes it was when I got the certificate and had to complete the form on-line"*.

40. I asked the claimant whether ACAS had also informed her how to make the Employment Tribunal claim when she had first contacted them in September to which she confirmed “yes”.
41. I therefore asked the claimant why she had waited until 23 November and her response was **not** that she had not understood how to do so or that she had not understood the time limits but that; *“I was scared, did not know if I was doing it right. I was hoping my employer would contact me but I didn’t think they would”*. The claimant also gave evidence under oath with regards to her financial means and Mr Lawrence elected not to cross-examine her on the evidence that she gave in that regard.
42. Her evidence was that she is without employment at the moment. The family income is her husband’s job of £25,000 per year. She has a mortgage and three children and she estimates her outgoings to be approximately £700 to £800 per month and her disposable income to be approximately £200 to £300 per month. They have a small amount of savings of approximately £2000.

The law

Unfair dismissal

43. Pursuant to section 111 the Employment Rights Act 1996 the primary time limit for bringing a complaint of unfair dismissal is as follows:
 - (2) ... *an Employment Tribunal should not consider a complaint under this section 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 a 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.*

Holiday and other payments claim

44. Pursuant to the Working Time Regulations 1998 Reg 30 provides that in terms of pursuing a claim of compensation related to entitlement to leave under Regulation 14 the time limit is as follows:
 - (2) ... *An Employment Tribunal should not consider a complaint under this regulation unless it is presented –*
 - (a) *before the end of the period of three months ... beginning with the date on which it is alleged that the exercise of the right should have been permitted ... or, as the case may be, the payment should have been made;*
 - (b) *within such further period as the Tribunal considers reasonable in a case which it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.*
45. With regards to claim of accrued but unpaid annual leave on termination as a breach of contract claim the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides at Article 7 as follows:

Subject to Articles 8A and 8B an Employment Tribunal should 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, ...*
- (b) *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 further period as the Tribunal considers reasonable.*

Unlawful Deductions from wages

46. Pursuant to 23 of the Employment Rights Act 1996, the time limit to bring a claim for unlawful deduction of wages is;

(1) *A worker may present a complaint to an employment tribunal—*

(a) *that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),*

...

(2) *Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a) *in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*

(b) *in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*

...

(4) *Where the employment tribunal is satisfied that it was **not reasonably practicable** for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

[Tribunal Stress]

Reasonably Practicable Test

- 47. What is reasonably practicable is a question of fact and thus a matter for the Tribunal to decide.
- 48. *“The test is empirical and involves no legal concept. Practical common sense is the key-note and legalistic footnotes may have no better result than a lawyer’s complications into what should be a layman’s pristine province”. Lord Justice Shaw in **Walls Meat Co Ltd v Khan** [1979] ICR 52 CA.*
- 49. **Porter v Banbridge Ltd** [1978] ICR 943 CA confirmed that the onus of proving that presentation in time was not reasonably practicable rests on the claimant.

“That imposes a duty upon him to show precisely why it was that he did not present his claim”.

50. In **Palmer and ANOR v Southend on Sea Borough Council** [1984] ICR 372 CA. A Court of Appeal held that reasonably practicable does not mean reasonable which would be too favourable to the employees, and does not mean physically possible, which would be too favourable to employers but mean something like reasonable foreseeable **“Asda Stores Ltd v Kauser** EAT 0165/07 Lady Smith explained it in the following words: *“the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done.”*

Discrimination

51. In discrimination complaints the applicable time limit is dealt with under section 123 of the Equality Act 2010 which provides as follows:
- (1) ... proceedings on a complaint within section 120 may not be brought before the end of –
- (a) the period of three months starting with the date of the act to which the complaint relates, or
- (b) such other period as the Tribunal thinks **just and equitable**
- (3) for the purposes of this section –
- (a) conduct extending over a period is to be treated as done at the end of that period,
- (b) failure to do something is to be treated as occurring when the person in question decided on it.
52. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 CA. The Court of Appeal stated that when Tribunals are considering exercising the discretion there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. The Tribunal cannot hear a claim unless a claimant convinces it that it is just and equitable to extend time but this does not mean that exceptional circumstances are required.
53. **Adedeji v University of Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 CA. In that case the Court of Appeal had upheld a Judge’s decision to refuse to extend time in a claim for race discrimination where the claim form had been presented three days outside the primary limitation period. In that case the judge had referred to the factors which are set out in section 33(3) of the Limitation Act 1980 (ie the prejudice that each party would suffer as a result of the decision reached and having regard to the circumstances of the case including the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has co-operated with any request for information, the promptness with which the plaintive acted once he or she knew the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he or she knew the possibility of taking action). In that case the court warned against too rigid adherence to the section 33 factors as a checklist in that it could lead to a *“mechanistic approach”* to what is meant to be a very broad general discretion and that the best approach is to consider the exercise of the

discretion to assess all the factors in the particular case and in particular the length of and reasons for the delay.

54. The Tribunal must weigh up the relative prejudice that extending time would cause to the respondent on the one hand, the claimant on the other.
55. **Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT**, the Appeal Tribunal held that it is not always necessary to determine time points as part of the amendment application. In its view, a tribunal can decide to allow an amendment subject to limitation points. This might be the most appropriate route in cases where, for instance, the new claims are said to form part of a continuing act with the original, in-time, claim, given the fact sensitive nature of determining whether there is a continuing act.

Claimant's submissions on the time limit point

56. The claimant submits that time should be extended because her father-in-law was unwell and she herself was on medication. The claimant went on to submit that when asked about advice from ACAS she thought that she was being asked by the Tribunal about the certificate. Her submissions on this point were confusing and she was asked to clarify her submissions in response to which she stated that she had thought that the ACAS certificate was a certificate that she needed to issue in the Tribunal and she had not actually understood there was another form. However this was wholly inconsistent with the evidence that she had given under oath and she had been specifically asked about the advice from ACAS. The claimant accepted this was inconsistent with her evidence under oath and it was only after giving her evidence that she had thought back over it and thought she was being asked about the conciliation period.
57. Her submissions were confusing on what she understood about filing a claim, and her submissions were not consistent with her oral evidence which was clear and indeed I read back to her my notes of her oral evidence and she did not dispute that they were an accurate record of what she had said.
58. She went on in her submissions to argue that she did not understand the importance of sending the Tribunal form but also referred to her health and caring responsibilities being a reason for the delay.
59. I directed her specifically to the factors that a Tribunal may take into account and asked her whether she wanted to address me on any hardship points. The claimant submitted that she feels that a job has been taken from her, that she needs to support her family and that she had done nothing wrong and that she feels that she had been discriminated against and what they have said about her performance and reason for dismissing contradicts what was said and documented in the appraisal documents which are in the bundle.

Respondent's submission on time limits

60. The respondent submits that the claimant has made many allegations which pre-date the dismissal on 2 June. The respondent submits that the acts complained of do not form a continuing act, they stretch over many months and therefore taking each act in turn they are significantly out of time.
61. Counsel submits in any event even if the last act is taken as the date of dismissal. It is out of time and it was reasonably practicable for the claims to be brought in time. In terms of the broader test of just and equitable, the burden remains on

the claimant to show that it is just and equitable to extend time. The presumption is still in favour of a refusal and any extension should be the exception.

62. During cross-examination counsel argues that it revealed that the reason the claimant put forward in terms of caring for her father and her medical condition did not stop her presenting the claim on 23 November and was not, he argues an impediment for bringing the claim earlier. The claimant clarified in response to questions from the Tribunal that on or before 1 September ACAS had explained to her the applicable time limits and how to fill in the Tribunal form. When asked why she waited to present the claim, she had no good answer and any reason she put forward 'collapsed under scrutiny'.
63. Counsel referred to the proceedings which will be subject to a long hearing and that the respondent will have to invest a lot of time and resources in responding to the allegations.
64. Counsel was asked to address however, the hardship or prejudice arising from the 3 week delay. Counsel spoke in general terms about the delay; that the evidence will be less reliable however he did not explain what particular evidence and accepted that a fair summary of his submissions was that there would be no specific hardship to the respondent arising from the delay but that the thrust of his submission is that there is no good reason for the delay.

Conclusion and analysis on extension of time

Unfair dismissal claim

65. The claimant made no submissions although specifically invited to do so, on why the claim for unfair dismissal in the circumstances should not be struck out on the basis that the Tribunal has no jurisdiction to deal with the claim because the claimant does not have the required two years' qualifying service under section 108 of the Employment Rights Act 1996. The reasons that she gave today for the do not appear to engage any of the reasons which would disapply that requirement.
66. The claimant's own evidence is that it had been explained to her by ACAS what the time limits were when she first contacted them and how to make an application. Although in her submissions the claimant had attempted to change the evidence she gave under oath, I find based on her oral evidence under oath that she had been given advice from ACAS on 1 September about how to bring a claim and the applicable time limits. When asked directly why she had waited until 23 November to file the claim, she did not refer to a lack of understanding about putting in a claim or time limits; the claimant had explained that she was concerned that she was not completing the claim correctly but also she explained that she had been waiting in case her employer contacted her.
67. I do not find on a balance of probabilities, that her medical conditions prevented her from bringing the claim in time. The respondent did not seek for the purposes of this hearing, to challenge the claimant over whether she has an ankle injury or has rheumatoid arthritis, however I do not consider it necessary to make a finding on whether or not she had those conditions because her evidence under cross-examination was that these conditions did not prevent her from contacting ACAS and did not prevent her from submitting her claim on 23 November. Further, the claimant does not allege that there was any material change in her condition as between 1 September when she contacted ACAS and 23 November

when she submitted the claim. No medical evidence has been submitted. However on the claimant's own oral evidence her condition did not make it impracticable for her to submit her claim.

68. Further, in relation to her father-in-law, although on a balance of probabilities, despite the absence of medical evidence, I find that her father – in – law was unwell, her evidence under cross-examination is that his symptoms improved such that this did not prevent her contacting ACAS on 1 September or submitting her claim on 23 November. No medical evidence has been disclosed by the claimant to evidence how unwell her father-in-law and over what period, however on her evidence I find that it was reasonably practicable for her to submit her claim in time.
69. I find that it was reasonably practicable for the claimant to have presented her claim in time and therefore the claim for unfair dismissal, would have been struck out in any event on the ground that it had been brought out of time and the Tribunal therefore has no jurisdiction pursuant to section 111 ERA to consider it.

Holiday pay

70. The same test of whether it was reasonably practicable to submit the claim in time, applies to the claim for holiday whether brought under the Working Time Regulations 1998 and/or as a breach of contract claim or as an unlawful deduction claim.
71. For the same reasons set out in respect of the unfair dismissal claim, I find that it was reasonably practicable to submit the claim for holiday and other pay in time and therefore this claim is struck out.

Discrimination

72. We return then to the various claims of discrimination that the claimant has brought.
73. The claimant submits that it would cause her hardship to deny the extension in that she has lost a job which she needed in order to help support her family and that there was nothing that she did wrong. The claimant was clearly very emotional throughout today's hearing and refers in her statement to the anxiety and the impact of the dismissal. She refers it to being a stressful period and a lot of things were happening and although she accepts that she never raised race discrimination with the respondent prior to or on dismissal, she refers to the fact that Miss Fillingham was the one who dismissed and there was no one else she could have raised this with.
74. The claimant contends that in terms of the merits of her claim, she has identified specific white comparators (albeit not by name at this stage), that have been treated differently to her and she argues that there would be no prejudice to the respondent and no impact on the cogency of the evidence of the delay.
75. The respondent talked in broad terms about the difficulty of responding to the claim rather than any impact the delay may itself have on the evidence. No specific hardship was identified despite the fact that I mentioned to the parties on more than one occasion, that what the Tribunal is concerned with is a forensic analysis of hardship rather than a general allegation of possible hardship.

76. Mr Lawrence argues that the claimant had never raised race discrimination during her employment and there is nothing within the bundle before the Tribunal that supports a claim of discrimination.
77. Mr Lawrence argues that although the just and equitable extension is a broader test the burden remains on the claimant to convince the Tribunal it is just and equitable to extend time. The reason for the delay is he argues salient.
78. There is no specific pleaded hardship or prejudice to the respondent as conceded by Mr Lawrence.
79. The delay is not insubstantial although of itself it is not argued by the respondent it would have any impact on the cogency or availability of the evidence.
80. The claimant has not put forward a satisfactory explanation for the delaying in presenting her claim. She was concerned she may have not been completing the form accurately but did not take any advice and did submit the claim herself ultimately (albeit it did require further particularisation). The claimant gave evidence that she had been hoping that her employer would get in touch, although clearly from her evidence she had no reason to anticipate that they would do so.
81. In the circumstances despite the absence of any compelling explanation for the delay, taking into account the length of the delay, the absence of any specific prejudice to the respondent, the hardship to the claimant of being deprived of having the matters of which she complains properly ventilated before the Tribunal, I consider that it would be just and equitable to exercise the discretion to extend time to 23 November to allow the claims of **race discrimination** to proceed **however**, I make no determination on the issue of whether there was a continuing act and therefore whether any acts which took place prior to the termination date are within time, that will be a matter reserved for determination at the final hearing: **Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT** . With regards to the merits of each of the allegations/complaints, I address that separately below.
82. With respect to the claim of discrimination on the grounds that the claimant has a **family or children**, there is no such protected characteristic under section 4 of the Equality Act 2010. Such a claim could be pursued potentially on the grounds of the claimant's sex, the most obvious claim being that of indirect discrimination, however despite discussing the types of complaint, as presented it is a claim of direct discrimination (a deliberate act to make her life difficult) and no application to amend was made during the course of this hearing. Given the obvious lack of merit in the case, I do not consider that it is just and equitable to extend time to allow this claim to be determined, it is therefore struck out on the grounds that there is no jurisdiction to determine it and under rule 37 on the grounds that it has no reasonable prospect of success.

Application to strike out and a Deposit Order

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

83. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

84. Rule 37 provides as follows:

“At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

- (a) That it is scandalous or vexatious or has no reasonable prospect of success.*
- (b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (b) For non-compliance with any of these Rules or with an order of the Tribunal;*
- (c) That it has not been actively pursued;*
- (d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)”*

85. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success.

86. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is “no reasonable prospect” of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

“The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words “no” because it shows the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects...”

87. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested.

88. Particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as fanciful and thus enjoys no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

89. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

“(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

“(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.”

90. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.
91. The Tribunal must be satisfied that there is little reasonable prospect of the particular allegation or argument succeeding. Rule 39 (1) allows a Tribunal to use a deposit order as a less Draconian alternative to strikeout where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success.
92. Where the claimant cannot establish a clear case of discrimination, the claimant may still succeed in the claim by establishing a prima facie case ie where claimant can prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. That is called a prima facie case. Once a prima facie case is established, the burden of proof passes to the respondent.
93. Lord Justice Mummery in ***Madarassy v Nomura International plc 2007 ICR 867, CA***: ‘*The bare facts of a difference in status and a difference in treatment 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.*’
94. In deciding at this stage whether the case has no or little reasonable prospect of success, the Tribunal is concerned with whether there is a prima facie case.

Submissions

95. The respondent was invited to make submissions on the application to strike out the claims under Rule 37 and/or for a Deposit Order under Rule 39.
96. Counsel argues that in determining the application the Tribunal must have regard to the documents in the bundle (although counsel did not take the Tribunal to any specific documents). Counsel submits that the claimant did not raise racism during her employment, that her evidence on it is vague and confused and that although she has referred to comparators, she has not been able to identify them by name. Counsel argues that the claimant has never been in possession of evidence that her race is a reason for the treatment complained of.
97. The alleged reason that the treatment was due to family or childcare is not a protected characteristic and even if it were, those reasons were accommodated by the respondent.
98. The claimant may make an application to amend however it is not clear whether she will and if she does, whether that will succeed.
99. Counsel argues that in the alternative to a strike out a Deposit Order should be made in respect of each allegation of £1000.
100. Counsel did not deal with each specific claim or allegation and identify in respect of each, why he alleges it has either no reasonable prospect or little reasonable prospect of success.

Claimant's submissions

101. The claimant alleges that whilst she accepts that she never raised race discrimination, Miss Fillingham who she accuses of discrimination was her only point of contact and there was no one else she could speak to. The claimant relies upon the comparators that she has identified as supporting her claim of less favourable treatment.
102. Her submissions were brief.
103. In terms of the allegations I deal with each briefly in turn and these relate to the claims based on discrimination on the **grounds of race**. In respect of each complaint I have reminded myself that particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence.

Allegation Number 1

104. The claimant complains that she was not given two days TOIL in February or March 2020 and that this was an act of race discrimination. She does not identify any comparator for these purposes.
105. I take into account however, that in respect of the other complaints of race discrimination, the claimant has been able to provide details of comparators (although not at this stage by name) and that she complains that these other acts were carried out by the same individuals and form, she alleges, a pattern of behaviour (from which inferences may be drawn). I am therefore not persuaded at this stage to strike out the claim, mindful that discrimination cases are fact sensitive. However, the claimant will be required to pay a financial deposit to proceed with this complaint on the basis that there is little reasonable prospect of success, the claimant is not able to provide a comparator in respect of this specific complaint.

106. **Taking into account her means, the claimant is required to pay a financial deposit of £50 to continue with this complaint, pursuant to rule 39.**

Allegation Number 2

107. I have considered that the claimant alleges that there are white comparators that she can point to who were treated differently and that the claimant refers to a pattern of such differences in treatment. Taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation Number 3

108. In relation to the complaints that the claimant was forced to use annual leave to look after her sick child at home in circumstances where she alleges she can point to a white comparator, and alleges that she was told she would be sacked if she did not use annual leave, I have considered that her case is that she can identify a white comparator and that there is a pattern of such differences in treatment by the same individual/s (from which inferences may be drawn). Taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

109. In relation to the two emails that the claimant alleges were sent to staff telling them about the claimant's sick child; the claimant does not identify an actual comparator. I take into account that the claimant alleges that there was a pattern of less favourable treatment however, in the absence of any comparator and taking into consideration the less obviously serious nature of this particular treatment complained of, I consider that there is little reasonable prospect of the claimant showing that this particular act was on the grounds of her race. The claimant is required to pay a deposit of £50 to continue with this specific allegation.

110. **Taking into account her financial means, the claimant is required to pay a financial deposit of £50 to continue with this complaint, pursuant to rule 39.**

Allegation Number 4

111. In relation to the allegation that between 16 and 18 April the claimant was again required to use annual leave in order to care for her children who could not be accommodated because of a school closure, I have considered that the claimant alleges previous similar treatment for which she says she can identify a white comparator. Further, the claimant alleges a pattern of such differences in treatment (from which inferences may be drawn). Taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation number 5

112. In relation to the allegation that in April 2020 Mr Snape personally delivered PPE to everyone's home other than the claimant; given the alleged comparators and alleged pattern of differences in treatment (from which inferences may be drawn), taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation Number 6

113. In relation to the allegation that in April 2020 the respondent decided not to implement the furlough scheme; given the alleged comparators in respect of the earlier acts and alleged pattern of differences in treatment (from which inferences may be drawn), taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation Number 7

114. In relation to the complaint that on 19 May 2020 Miss Fillingham told her during a phone call that if she is unable to do the job due to children, she will lose her job; given the alleged comparators in respect of previous treatment and alleged pattern of differences in treatment by Ms Fillingham including around her childcare needs; taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation Number 8

115. With regards to the allegation that on 19 May 2020 she was required to complete a worksheet and she compares herself to actual comparators ie all other members of staff working from home and given the alleged pattern of differences in treatment by Ms Fillingham (from which inference may be drawn) ; taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation Number 9

116. With regards to the allegation that on 1 June 2020 the claimant was sent a WhatsApp message and ordered to attend a physical meeting in circumstances where others were allowed to participate in Zoom call; given the alleged comparators and alleged pattern of differences in treatment by Ms Fillingham (from which inference may be drawn) taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation Number 10

117. We turn to the allegation of 1 June that there was a failure to carry out a risk assessment for her and a failure to provide her with PPE; given the existence of alleged comparators in respect of how she was treated previously in respect of PPE provision and given the alleged pattern of differences in treatment (from which inference may be drawn), taking the claim at its highest, I do not find that this complaint has no or little reasonable prospects of success. I have decided not to make an order under rule 37 or 39 at this stage.

Allegation number 11

118. This allegation is that her employment was terminated on 2 June on the grounds of race; within the bundle is an appraisal document dated only circa 4 weeks before she was dismissed [83 – 88] . Out of possible ratings of; *Effective, Partially Effective or Not Effective*, the claimant was been scored Effective in all areas by Ms Fillingham. The appraisal also includes the following comments;

“Sweta has a genuine care and understanding as the reality of those who are experiencing hardship...”

“ Sweta works hard to meet the demand of circulating food to support members of the CFPG.”

“ Sweta takes a pro-active approach in reaching out to other organisations in order to achieve positive outcomes for clients”

“Sweta has demonstrated empowering others ..”

“ Sweta is energetic , self-motivated and able to work on her own initiative”.

“

119. A few weeks later, the letter of termination states;

“...we have received negative feedback from key stakeholders in terms of your commitment and work performance”.

“ you have missed key deadlines...”

120. The respondent informed the claimant that due to having less than 2 years' service, there would be no formal process and thus she was unable to challenge these allegations about her performance.

121. The negative comments in the dismissal letter appear on the face of it difficult to reconcile with the extremely positive comments about her performance only a few weeks prior to that in the appraisal document.

122. I have taken into consideration the other allegations of less favourable treatment by Miss Fillingham where the claimant alleges that there are actual white comparators. That said, I do have concerns over the merits of this claim. The claimant alleges a number of reasons behind the decision to dismiss ie not only her race. If Ms Fillingham was treating the claimant less favourably then it is legitimate for a Tribunal to consider why she would make such positive comments in the appraisal document. There appear to have been concerns about the claimant's work during May 2020, which may explain the change in the respondent's opinion about her performance, however, that gives rise to disputes of fact which can only be resolved on hearing all the evidence at a final hearing. I have taken into account the alleged pattern of previous less favourable treatment, that the claimant alleges she can identify white comparators, the inconsistency with the appraisal document and failure to allow the claimant the chance to challenge the criticisms of her performances . Taking all these factors into account, I do not find that that there are grounds to strike out this allegation or to make a Deposit Order at this stage, taking the claimant's case at its highest.

Case management : race discrimination claims only

123. In terms of further case management orders in readiness for the Tribunal hearing, the case will be listed for a 90 minute telephone case management hearing, after the date when the claimant is required to pay the financial deposits.

124. The respondent is required within **14 days** from the date of this order, to provide to the Tribunal and the claimant, the names of the actual comparators the claimant identified, to the extent that it is able to confirm the names from the descriptions provided by the claimant.

Employment Judge Broughton
28/09/2021

JUDGMENT SENT TO THE PARTIES ON

5 October 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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

**NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013**

1. The Tribunal has made an order (a “deposit order”) requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.
2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.
5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.
8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.
9. Payment must be made to the address on the tear-off slip below.
10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.
12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3096. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

**To: HMCTS Finance Centre
 The Law Library
 Law Courts
 Small Street
 Bristol
 BS1 1DA**

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order