EMPLOYMENT TRIBUNALS

Claimant: Miss Invana Jurcevic

Respondent: (1) Countrywide Plc
(2) Countrywide Surveyors Limited
(3) Countrywide Plc (Countrywide Surveying Services)

HEARD AT: Cambridge: 9 & 10 January 2020

BEFORE: Employment Judge Michell (sitting alone)

REPRESENTATION: For the Claimant: In person
For the Respondent: Mr J Platts-Mills (Counsel)

RESERVED JUDGMENT

1. The claims against the first and third respondents are all dismissed as having no reasonable protect of success.

2. The claimant is ordered to pay a deposit of £500 within 21 days of the date this order is sent to the parties as a condition of being allowed to continue with her unlawful deduction of wages claim against the second respondent. If she fails to make that payment to the tribunal within that period, the said unlawful deduction of wages claim will be struck out without further order.

3. The claimant is ordered to pay a deposit of £500 within 42 days of the date this order is sent to the parties as a condition of being allowed to continue with her unfair (constructive) dismissal claim under s.93 of the Employment Rights Act 1996 ("ERA") against the second respondent. If she fails to made that payment to the tribunal within that period, the said unfair dismissal claim will be struck out without further order.

4. The claimant's application to amend her claim to introduce new allegations of race, sex, disability and age discrimination is dismissed. Her discrimination claims are all dismissed (i) as being out of time; alternatively, (ii) as having no reasonable prospect of success under r.37(1)(a) of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

5. The claim will be listed for a 1 hour preliminary hearing for the purposes of giving directions in respect of the remainder of the claim, namely (a) the claimant's holiday pay claim, and (in so far as she pays the said deposit/s) her (b) unfair (constructive) dismissal claim under s.93 of ERA, and (c) unlawful deduction of wages claim. To that end, the parties are to provide the tribunal in writing with any dates to avoid in April-October 2020 within 7 days of the date of this order.

REASONS

BACKGROUND

The claim

6. The claimant worked for the second respondent ("R2") -and before then, for a smaller company which was acquired by the group of which R2 forms part- from September 2014 until her resignation without notice on 3 November 2017 ("EDT"). The claimant approached ACAS for early conciliation ("EC") purposes on 19 November 2017. She received her EC certificate from ACAS on 6 December 2017. Thereafter, by an ET1 presented to the tribunal on 22 January 2018, the claimant brought claims alleging unfair constructive dismissal, 'breach of contract', failure to pay holiday/notice pay, arrears of pay, and sex, race, age and disability discrimination against the three respondents. She indicated in her particulars of claim ("POC") that she sought compensation of £600,000. This, despite the fact that on 6 November 2017 the claimant obtained a job elsewhere -where she is still employed, on a gross salary of £45,000- i.e. a higher wage than she received at the respondent.

7. Liability was denied in the grounds of resistance, albeit in broad terms because of the lack of detail provided by the claimant in the ET1 and POC. By way of small example, although she ticked the box at para 8 of the ET1 alleging sex discrimination, it was not possible to work out from the POC any sex discrimination claim she wanted to pursue.

21.11.18 Preliminary hearing

8. On 21 November 2018, the matter came before EJ Foxwell at a preliminary hearing ("PH"). At that hearing, EJ Foxwell went with care through the POC, to try and understand the claim. He established that the claimant sought to advance the following allegations, several of which were not mentioned in the POC (and he observed that all the claims of discrimination set out at (c)-(f) below appeared to have been presented out of time):

    a. **Unlawful deduction of wages/breach of contract**. As to this:
        i. The claimant asserted that she was contractually entitled to various pay rises upon qualification in 2015 as a surveyor, which entitlements had not been honoured despite a promise in 2015 that they would be carried into effect in various quarterly tranches ending in about November 2016 ("the unlawful deductions claim"). Specifically, she said she ought to have been paid £29,000 p.a. on qualification, then £32,000 p.a. within 3 months, then £36,000 p.a. 3 months later, then £42,000 p.a. 3 months after that.
        ii. (Those assertions are not consistent with para 2 of the POC, where she asserts she was told in October 2015 that qualification ought to take 6 to 9 months, and that her salary then "will be increased in three month intervals and within a year… I should be on £36,000 plus a further possibility of getting commission and achieving circa £42,000 within just over a year".)
    b. **Holiday pay**. The claimant contended that she had not been paid accrued holiday for the holiday year commencing 1 January 2017. She asserted she ought to have been paid at a rate based on 24 days p.a. (which she alleged had been her old contractual entitlement before moving to her training role), rather than the 20 days in her post-training contract, but that even if 20 days was the appropriate annual figure, she was still due (8 days) holiday pay.
    c. **Age discrimination**. The claimant asserted:
        i. She had been made to work long hours (a requirement to work long hours being the material PCP), which allegedly had a disproportionate impacted on her ability -as a woman in her late thirties- to establish a relationship and start a family ("the long hours allegation"). She clarified to me that the long hours allegation related to the period up to about October/November 2016 when she moved on secondment to the auctions department. EJ Foxwell observed that this allegation did not appear to form part of the POC.
        ii. She had been given more work than other trainee surveyors (some of whom she accepted were of a "similar age", but none older), up to about April 2016. Specifically, she alleged had been asked to do a building

survey test which (she said) others were not obliged to do ("the extra work allegation").

iii. The respondent unduly delayed in submitting her work to RICS. She clarified to me that her work was submitted to RICS in July 2016, but alleged that, along with others' work, it ought to have been submitted in April 2016 ("the RICS delay allegation").

iv. The respondent regarded her as unsuitable for an analytics team role for which she applied in February 2017. Specifically, the respondent thought she was too junior for it because of her age ("the analytics job allegation").

d. **Sex discrimination**. The claimant asserted:

i. The long hours allegation also constituted indirect sex discrimination.

ii. She was asked to work answering telephones when the respondent's auction division closed, whereas her male colleague, 'Jamie', was not ("the telephone allegation"). The request was made in February 2017. She refused to comply with it. She said it constituted direct sex discrimination.

e. **Race discrimination**. The claimant is Croatian. She told EJ Foxwell she based her race claim on nationality. The POC refer to her being treated differently as a "foreigner". (Before me, though, she clarified that her protected characteristic was "non-British".) She:

i. Relied (as acts of direct race discrimination) on the extra work allegation; the RICS delay allegation, and the telephone allegation.

ii. Alleged she was told by a supervisor in June 2016 that she was not expected to pass her training course. (As EJ Foxwell observed, this was not mentioned in the POC.)

f. **Disability discrimination**. The claimant relied on anxiety and depression and suspected PTSD as her alleged disability. She asserted:

i. In about April/May 2017, she was told by the respondent that an insurance policy it had taken out (which, she said, would or might otherwise cover her for PTSD) had been cancelled or was no longer in place; and/or the respondent was incompetent in its handling of queries from her at about that time about coverage ("the insurance allegation").

ii. She was asked to work long hours whilst off sick in 2017 and until the EDT. (She was unclear as to how this complaint was to be put under the Equality Act 2010.)

g. **Constructive dismissal**: EJ Foxwell ran out of time in trying to get the claimant to articulate how she framed her unfair constructive dismissal claim. The claimant suggested to him that asking her to work (in 2017) despite her ill

health, and (in 2016) to train for a role "to which there was no job" and to work with an inadequate salary, had been inapt.

9. EJ Foxwell explained to the claimant (and I agree) that the POC appeared to be "vague and hard to discern". He said she ought to consider whether or not the POC required amendment, and if so, in what terms. He urged her to take legal advice, if possible.

10. He also listed a 2 day open PH ("OPH") to determine:

    a. Whether and to what extent the claimant ought to be given permission to amend her ET1 and POC.
    b. Whether any of the claims should be dismissed as being out of time (or whether there were grounds to extend time).
    c. Whether any of the claims ought to be struck out as having no reasonable prospect of success.
    d. Whether a deposit order ought to be made in respect of any claims having little reasonable prospect of success.
    e. Whether the claimant was disabled for s.6 Equality Act 2010 ("EqA") purposes at the material time.

    That OPH was listed to take place in June 2018. However, it was later adjourned to 9 and 10 January 2020.

11. It follows that the claimant had over a year to consider EJ Foxwell's helpful Case Management Summary, to take legal advice, and consider what (if any) amendments she would seek to make to her claim.

HEARING

12. This OPH was listed by the tribunal on 3 August 2019. I was given a 195 page bundle for use at the hearing, to which the claimant added a couple of pages during the hearing.

13. The claimant said that she had only been given a paginated copy of the bundle on 7 January 2020. She also said (on the second day of the OPH) that she had had trouble reading the some of the bundle because of difficulty reading small text caused when using contract lenses on the first day of the OPH. (She wore glasses on the second day of the OPH, rather than contact lenses.) Most if not all of the documents were either created by her or would have been familiar to her. But I offered her the opportunity and time to read with care the documents to which she was taken. She

also had the opportunity after the close of the hearing on 9 January and before resumption on 10 January to consider the paperwork again and come back with any matter which arose from her re-reading. However, she confirmed that she did not seek an adjournment, or extra time, to read through the papers.

14. The respondent produced a written witness statement from Mr Geoffrey Garfooot (who could not attend today). Unhelpfully, several of the documents to which the statement refers do not appear in the bundle.

15. The claimant had produced a witness statement which in large measure was simply a 'cut and paste' of the content of the POC. This did very little to address the "vague and hard to discern" nature of the POC, or the matters at para 7 above. As a consequence, almost all of the first day of the hearing was taken up in trying (again) to work out what the claimant's claim actually was, and what amendments she sought. This was not the best use of time.

16. The claimant did not at any point prior to the hearing provide any other document setting out the amendments she wanted to make to the POC. She told me this was because she thought she was supposed to wait until today's hearing. It was not obvious how she came by that impression.

17. The claimant provided the tribunal with an email at 9.24am on 10 January 2020, which set out her requested amendments[1]. These were useful, but not wholly consistent with the way she described her case to me on 9 January 2020. However, I referred to that document as well as the claimant's 9 January description when clarifying the claimant's case with her, and the amendments she sought, as set out below.

THE CLAIMANT'S CASE

Allegations

18. The claims advanced by the claimant and the amendments she sought at this OPH were as follows:
    a. **Unlawful deduction of wages/breach of contract**. The unlawful deductions claim remained as per para 7(a) above.
    b. **Holiday pay**. The claimant accepted on reflection –and having further considered the content of the respondent's handbook which she had initially thought entitled her to extra days- that her claim for unpaid holiday pay in relation to the period 1 January 2017 to the EDT ought to based on a 20 (rather

[1] She clarified that reference to "indirect" under the heading "Race Discrimination" in the email should be changed to "direct".

than 24) day holiday year. The respondent, despite the point having been flagged up at the 2018 PH, was unable to say whether or not any holiday pay was outstanding.

c. **Age discrimination**. As to this:
    i. The claimant pursued the long hours allegation as an indirect discrimination claim. She accepted it was not put as an age discrimination claim in the ET1 or POC. She sought permission to amend to include it as such.
    ii. She did not pursue the extra work allegation as an age discrimination claim.
    iii. She did not pursue the RICS delay allegation as an age discrimination claim.
    iv. She pursued the analytics job allegation as direct age discrimination. She relied on a hypothetical comparator (i.e. someone younger, but with the same skills sets), as she did not know how old the person who actually got the job was. She accepted it was not put as an age discrimination claim in the ET1 or POC. She sought permission to amend to include it as such.
d. **Sex discrimination**. As to this:
    i. The claimant pursued the long hours allegation as an indirect discrimination claim. She accepted it was not put as a sex discrimination claim in the ET1. She sought permission to amend the POC to include it as such.
    ii. The claimant pursued the telephone allegation. She accepted it was not put as a sex discrimination claim in the ET1. She sought permission to amend the POC to include it as such.
e. **Race discrimination**. As to this:
    i. The claimant pursued the telephone allegation and the extra work allegation, which (as Mr Platts-Mills agreed) are already in the POC as allegations of direct race discrimination.
    ii. The claimant pursued the RICS delay allegation as direct race discrimination. She asserted that this was already in the POC, at para 6. Mr Platts-Mills disputed that assertion, but (though it is not very clear) I give her the benefit of the doubt on this point.
    iii. The claimant did not seek to pursue the allegation she described to EJ Foxwell as set out at para 8(e)(ii) above. Though she complained to me that she was told by Mr Woodbine of the respondent that he was "shocked" she had attained her qualification (rather than given her his congratulations), she said she did not seek to advance this as a discrete allegation of race discrimination.

iv. She alleged she was told by a supervisor in June 2016 that she was not expected to pass her training course. She said this was direct discrimination, and relied on a hypothetical British comparator. She sought permission to amend her POC to include this entirely new allegation.

f. **Disability discrimination**. As to this:
   i. The claimant did not seek to advance the insurance allegation as a disability discrimination claim.
   ii. The claimant sought to advance, as a variant on the long hours allegation, the contention that she had been required (as part of a PCP imposed by the respondent) to work long hours in June/July 2017. She asserted that, by way of a reasonable adjustment, the respondent ought to have reduced her hours as at June 2017 for s20 & 21 EqA purposes. Again, this allegation does not appear in the POC and she sought permission to amend the POC to include it.

g. (It follows from the above that the only discrimination allegations which are already in the POC and on which the claimant now relies are the telephone and extra work allegations, in (just) the context of direct race discrimination.)

h. **Constructive dismissal**: The claimant relied on breach of the implied term of trust and confidence ("the T&C term"). She sought to rely on the various matters set out above, and said the 'last straw' was Danielle West of R2's HR department's 6 October 2017 email, which (the claimant said) "unduly pressured" her into returning to work, for excessive hours and to a job which was underpaid. (In fact, the material part of the email states: "… should you wish to return to work then you would remain on the same package and in the same role with Surveying as you were prior to your absence. I would of course be more than happy to discuss this with you should this be your intention".)

Appropriate respondent/s

19. The claimant accepted that at all material times her employer had been R2, rather than the first or third respondent (the third respondent being a duplication of the first respondent), and that all the things about which she complained had been done by R2's employees. When asked why she wanted to include parties other than the R2, she merely said that the other respondents were "part of the picture". That does not seem to me to be any basis to continue to include them as parties.

THE EVIDENCE

20. The claimant was lucid and articulate, However, her recollection was poor in general by reason of the passage of time since the material events. She did her best, but several of the dates she gave were inconsistent, and many details (still) vague.

Disability

21. The claimant had did not seek to assert that her alleged PTSD constituted a disability discrete from anxiety/depression. (She would have had insurmountable difficulties in making such an assertion, as she had no real evidence to support it.)

22. She produced a letter dated 25 March 2019, which had been supplied in compliance with EJ Foxwell's November 2018 order, and in which she explained she had been "unwell for many months since February 2017" with stress, anxiety "and even depression". She said it took her "months to recover", and that was "only once I was given tablets to relax my anxiety and dark mood".

23. The medical records she provided in support of her disability claim pursuant to EJ Foxwell's November 2018 order show that:
    a. She had had a few issues in the past- a grief reaction in July 2015 to the loss of a close family member (which meant she was signed off work for 2 weeks), and difficulties due to work stress and some other unpleasant personal issues in July 2016.
    b. She experienced stress/anxiety in February-November 2017 (in part, at least, because of those personal issues.)
    c. She told her GP (for the first time) that she thought she had PTSD in March 2017, when she was "applying for other jobs, finding it very difficult".
    d. She had resolved to sell her flat and leave her job in June 2017, at which point she was "feeling better" and "seems more cheerful".
    e. She was offered but did not take SSRIs, and she received one prescription for propranolol (a beta blocker) on 10 October 2017.

24. She has not adduced any medical records suggesting that she had a repeat prescription for beta blockers etc after October 2017. She asserted in her evidence to me that she had continued -for an unspecified time- to receive, and could not cope without, that medication. However, nothing in the medical records or her GP's 8 March 2019 letter supports that assertion. This, notwithstanding the fact that, as she accepted, EJ Foxwell gave careful guidance at the November 2018 PH on what she needed to prove as regards disability.

25. She told me she had been bed-ridden for much of March-October 2017. I have no doubt there may have been days or weeks when this was the case. But the GP

records suggest this was sporadic. She also told me her stress caused her other problems such as diarrhoea. Again, I accept this may well have been true on various isolated occasions in early/mid 2017. But the claimant did not herself suggest that, post-October 2017, such symptoms continued.

26. Her Fit Notes commence on 22 February 2017. Almost all of them are for 2 week periods. The longest period of sign-off, for 1-30 September 2017, is backdated from 5 December 2017 for reasons which were not fully explained. (There also appears to be a gap in the Fit Notes between 25 June and 1 September 2017, though the claimant remained off work during this period.) The last Fit Note, for 24-31 October 2017, is backdated from 6 November 2017. So, the Fit Notes I have seen do not suggest that, at the material time (i.e. in late February- early November 2017), it was considered "likely" (i.e. it could well be the case) that the claimant would be unfit for work for an appreciable period of time. (Of course, 'not fit for work' is not the same thing as having, or not having, an impairment with a long term material impact for Sch 1 EqA purposes. But the content of the Fit Notes is still of relevance, in my view.)

27. In total, she was signed off for a little over 8 months.

28. There are no medical records showing any material continued symptoms after November 2017. The GP letter dated 8 March 2019 which she submitted with her 25 March letter makes no mention of any relevant consultations, prescriptions or symptomology post-October 2017. It says nothing about deduced effects, either. Hence I think it likely the Claimant was substantially symptom-free by the end of 2017. Any residual issues (such as those she had pre-March 2017) did not, in my judgment, thereafter have a substantial or long term adverse impact on her ability to carry out day to day activities.

Just and Equitable extension

29. The claimant said that her illness meant she was not in a fit state to bring a claim at an earlier time in 2017 or 2018. She did, however, accept that she began a new personal relationship in about May/June 2017; that she had been interviewed for her new job in October 2017, and that she had commenced the new job -in which she has not had any or any significant time off sick- over 2 months before she presented the ET1. She also told me she had instructed lawyers (on whom she said she spent over £900) in trying to negotiate a settlement during June-October 2017. All these factors suggest that she was capable of some administrative and other tasks during much if not all of June-November 2017, and ought to have been capable of issuing - or getting advice/help on issuing- proceedings at an earlier point.

30. She did not suggest that she had asked her lawyers for advice about issuing proceedings/time limits/causes of action etc (or that she had somehow been unable to do so). She gave no explanation as to why she had not done so.

31. When I asked the claimant if she raised with the respondent any of the many alleged discrimination issues which had occurred *prior* to her 2017 sick leave – i.e. in 2016 or in early 2017- she claimed she had done so. I do not accept this. She said she "could not remember" if she had brought a formal grievance (of which there was no sign, and which I think she would surely have recalled if it had been brought), and she was unable to produce or specify any paperwork which evidenced any prior complaint on her part that she had been *discriminated* against.

32. She told me (and I accept) she had complained that it was not appropriate for offer her the telephonist role. She asserted to me "I believe I said [to Anna Fitzsimmonds] that [it was offered to me] because I was a woman or foreign". If that is correct, it is curious that the 26 January 2018 email to her from Ms Fitzimmonds -which the claimant told me was written shortly after the claimant had complained about "another upsetting comment" made at the same time- makes no mention of any prior allegation of sex/race discrimination. I reject any assertion that she raised sex or race as a reason for her unhappiness with the telephone role offer. Rather, she declined it as a menial task.

33. She told me she found out, from internet research, about time limits under EqA in June 2019. But she then said she might have known about the time limits before the November 2018 PH, though she "could not recall". She did not satisfactorily explain why, if she had been able to do internet research in 2019, she could not have done so in 2016 or 2017, or in early 2018.

34. She said in answer to Mr Platts-Mills' questions that her reference to "employment rights" in her email dated 29 March 2017 (which complains of 'breach of my contract', but not of discrimination) was "probably from looking at information online". She did not explain why she did not look up/identify time limits under EqA at about the same time. This was not satisfactory.

35. She asserted in cross examination that she had alleged in 2016 she had been badly treated because she was a woman. However, she produced no paperwork to support that assertion. Again, I think it unlikely any such allegation of sex discrimination was made. (If it had been, it is surprising that the allegation did not appear in the original iteration of the POC.)

Constructive dismissal

36. Obviously, many of the allegations set out above occurred long before the EDT. Hence -leaving aside what I say about her amendment application- waiver/affirmation issues might well arise.

37. The claimant also said that she continued not to be paid the salary due (i.e. the unlawful deductions allegation). She also asserted, as set out above, that the 'last straw' was Danielle West of HR's 6 October 2017 email, which I have set out above and which the claimant said "unduly pressured" her into returning to work, for excessive hours and to a job which was underpaid.

38. As I see it, the email does not on any objective analysis amount to 'undue pressure'.

Analytics job allegation

39. The claimant was questioned regarding the analytics job allegation. She could not explain why she made no complaint at the time about her rejection from the analytics role being anything to do with any protected characteristic. Indeed, she could not explain why her email of 23 February 2017 makes no allegation of unfairness -still less, of discrimination- in relation to the interview process. Instead, it says the interview "went really well", and indicates -*as does para 14 of the POC*- that she thought the role *was* in fact too junior for her given her experience and qualifications (as opposed to, was wrongly perceived by the respondent to be too junior for her). So, the claimant's case is fundamentally contradictory (even leaving aside the comparator problem alluded to above.).

40. The claimant also said that even if she had been offered the analytics role, the salary was not enough to be acceptable in any event. So, she would not have taken it.

41. The claimant did not really dispute the content of the email to which Mr Garfoot refers at para 38 of his witness statement, which gives a non-age related explanation as to why another candidate got the job.

The unlawful deductions claim

42. The claimant's salary reduced considerably upon her accepting the role of trainee surveyor- from £36,000 inc commission to £24,500. She told me (and I accept) that she would not have taken the trainee role without being confident that her salary would rise again in due course. The key issue is, when, and by how much, and *as a matter of contractual entitlement*, would any rise take effect?

43. As I have already noted, para 2 of the POC is not consistent with how the unlawful deductions allegation was described to EJ Foxwell or to me, as set out at para 7(a) above (i.e. a promise of £42,000 p.a. within 9 months of qualification).

44. It seems on the paperwork I have seen that a salary increase was to be put into effect following the claimant's receipt of her RICS qualification (i.e. in September 2016). That salary increase, to £29,000, was duly (if belatedly) articulated under cover of the respondent's 27 October 2016 letter.

45. However, the respondent's letter dated 30 September 2015 does not specify what that "immediate" salary increase would be. Instead, it says "a salary increase will be payable immediately on award of AssocRICS qualification from RICS with further salary reviews at three months and six months points following and thereafter to be reviewed annually in line with current CSS business practises… [commencing] 12 October 2015 [and] conditional upon you successfully completing the AssocRICSS pathway and gaining RICS Valuer Registration within 9 months".

46. The terms and conditions which that letter encloses do not make any reference to any salary reviews; still less, to any specific salary increases thereafter.

47. The claimant in her 17 September 2015 email understandably asked the respondent for "a breakdown of the earning level once the training is completed".

48. It seems, on the paperwork provided so far at least, that nothing was given by the respondent in writing in response to that email. However, the claimant referred me to some undated hand written notes she made in the course of a meeting- which she thinks took place in September or October 2015- which record that the claimant would get an initial pay rise to £29,000; then, that there would be a "review after 3 months £34,000" and another "review after a further 3 months £36,000", with a "commission scheme after". No mention is made there of the £42,000 figure.

49. Mr Garfoot in his witness statement explains that salaries are increased to £29,000 "on RICS approving [trainees'] case study, and then "by reference to specific competency targets". He states that salary increases "will vary from time to time [and]… are certainly not fixed to specific dates, that would be hopelessly uncommercial". Without finally deciding the point, that evidence sounds to me very much like common sense.

50. He also explains (and the claimant did not dispute) that within 3 months of the first increase -and in fact, prior to implementation of that increase- the claimant had by October 2016 already agreed to move on secondment to an asset manager role in the auctions department.

51. He makes reference at his paras 28 and 29 to various notes and emails, which might well have assisted in definitively establishing at this interim stage what the salary position was expected by both parties to be post-October 2016. Unhelpfully, however, those documents are not included in the bundle.

52. In so far as it might be relevant, Mr Garfoot does not give any indication of the kind of salary increases which other RICS-approved individuals might have got from time to time.

53. So, Mr Garfoot's evidence suggests to me the Claimant's case on point may very well prove to be wholly misplaced. But he did not attend to give evidence.

Claimant's means

54. The claimant told me she has received a salary of £45,000 p.a. gross (£3750 gross pcm) since 6 November 2017. This yields about £34,000 net (about £2,800 pcm) after tax and NICs.

55. She said her expenditure (other than food etc) was about £650 pcm on her mortgage; £300-£400 pcm on credit card interest payments; bills in Croatia of about £150-£200 pcm, council tax of about £95 pcm, helping her mother occasionally (varying amounts); household insurance of about £35 pcm; utility bills of about £60 pcm (plus a small amount for water and TV licence), travel costs of about £200 pcm, and telephone costs of about £40 pcm. This totals about £1,700 pcm. So, she has a disposable income of roughly about £1,000-£1,100 pcm, minus food for herself.

MATERIAL LAW

Role of Pleadings

56. See **Chandhok v. Tirkey**[2] *per* Langstaff J at §16 *et seq*:

"… The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say

[2] [2015] IRLR 195.

so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but … the claim as set out in the ET1."

Time Limits

57. Subject to the extension of time for ACAS early notification under s.140B, s.123(1) of EqA provides for a primary time limit of 3-months and a fall-back exception where it is just and equitable for the claim to be brought within a longer period of time.

58. EqA s.123(3)(a) provides that an act extending over a period is treated as being done at the end of that period. So, it may be necessary to consider whether distinct acts in fact form part of the same continuing act. See also **Hendricks v. MPC**[3], where it was held that the correct test is whether the acts complained of are linked, and are evidence of a continuing discriminatory state of affairs -as distinct from "a succession of unconnected or isolated specific acts[4]".

59. At a preliminary hearing stage, a claimant needs only to prove a prima facie case that an act that would otherwise fall out of time is part of a continuing act that ends within time[5]: **Lyfar v Brighton and Sussex University Hospitals Trust**[6].

60. A relevant (though not conclusive) factor is whether the same individuals or different individuals were involved in the incidents complained of. See §33 of **Aziz v. FDA**[7].

61. In **Abertawe Bro Morgannwg University Local Health Board v. Morgan**[8] the Court of Appeal explained the unfettered nature of the ET's 'just and equitable' discretion. Although there is no prescriptive list of factors that needs to be considered, the Court made clear it will almost always be relevant to consider:
    a. the length of delay;
    b. reasons for the delay, including the lack of proffered reasons; and

[3] [2002] EWCA Civ 1686.
[4] *Per* Mummery LJ, ibid, §52.
[5] For present purposes, the respondent does not seek to argue that the decision given on 21.12.17 was not the last of a series of continuing acts.
[6] [2006] EWCA Civ 1548 per Hooper LJ at [para 10].
[7] [2010] EWCA Civ 304, §34.
[8] [2018] ICR 1194.

c. whether the delay prejudiced the respondent, including inhibiting investigation of the claim while matters were fresh: see **Morgan** at [para 17 and 22].

62. The Court of Appeal in **Morgan** did not disturb the guidance given in **Robertson v Bexley Community Centre**[9] that:
    a. there is no presumption in favour of exercising the discretion;
    b. it is for the applicant to convince the ET to exercise the discretion to extend time; and
    c. extensions of time are the exception rather than the rule.

Amendment

63. **Selkent Bus Co v Moore**[10] provides that there needs to be consideration of all the relevant circumstances, balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Mummery J (P) highlighted as being among the relevant circumstances:
    d. the nature of the amendment - whether it is the addition of factual details to existing allegations on the one hand, or to the making of entirely new factual allegations on the other;
    e. the applicability of time limits - considering whether the complaint is out of time and, if so, whether the time limit should be extended; and
    f. the timing and manner of the application - including consideration of why the application was not made earlier and why it is being made now.

64. There is discretion to allow an amendment even where a claim presented at that point would be out of time. However, where the claim would be out of time (including after consideration of whether to exercise the discretion to extend time on grounds of justice and equity), then unless the new claim is closely connected with that originally pleaded (i.e. because it is a mere relabelling and/or arising out of the same facts or substantially the same facts as are already in issue), the application to amend should only be allowed in special circumstances: **Abercrombie v Aga Rangemaster Ltd**[11].

65. Merits can be relevant. See **Gillett v Bridge 86 Ltd**[12], where it was accepted by Soole J (at paras 26-28) that it would be "difficult to concede a case where a pessimistic view on merits falling short of "no reasonable prospect of success" could provide support for the refusal of an amendment application that has been brought in time".

[9] [2003] IRLR 434 [para 25].
[10] [1996] IRLR 661, [paras 21-24].
[11] [2013] IRLR 953, per Underhill LJ at [para 50].
[12] UKEAT/0051/17/DM.

He contrasted this with the situation where an out of time application is made. In such instance, he held:

> "… it is not the case that an Employment Judge considering an application to amend can only take account of the merits if [he or] she considers that the proposed new claim is bound to fail as a matter of law… the Employment Tribunal must be entitled to consider whether the proposed claim has reasonable prospects of success … Nor do I accept that as a matter of principle the Employment Tribunal must never take account of its assessment of the merits of the claim. **Selkent** refers to "all the circumstances", and **Olayemi** is an example where the prospects of success "did not appear good" and were taken into account".

66. See also **Galilee v. Commissioner of the Metropolitan Police**[13]. There, amongst other things, it was held that a claim sought to be introduced by amendment is deemed to be made at the time at which permission is granted for the amendment. So, the question of whether or not an allegation is brought in time is to be judged by the temporal distance between the event of which complaint is made, and the date on which the application to amend is made.

Reasonable adjustments

67. Where an employee is on sick leave, questions may arise as to when the duty arises to make reasonable adjustments that may be required on their return. In **NCH Scotland v McHugh EATS**[14] HHJ McMullen QC held (at para 41) that the 'trigger point' will be when the claimant is able and willing to return to work within a specified period: "a managed programme of rehabilitation depends on all the circumstances of the case, but it does include a return to work date".

'Last straw'

68. A 'last straw' need not of itself be a breach of contact. For useful further clarity on what can constitute a 'last straw' in the context of alleged breach of the T&C term, see **Omilaju v Waltham Forest London Borough Council**[15] (per Dyson LJ):
"… If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in

[13] [2018] ICR 634 at [para 109(a)].
[14] 0010/06.
[15] [2005] EWCA Civ 1493.

fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

Strike out for no reasonable prospect of success

69. The test of 'no reasonable prospect of success' is a high hurdle to pass, with the stress on 'no'. It is not enough to show that a claim will possibly fail or is likely to fail: **Balls v Downham Market High School and College**[16]. However, it is a lower threshold than being utterly hopeless or bound to fail: **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting**[17].

70. The above principles apply a fortiori in discrimination cases. The striking out of discrimination claims is exceptional for the policy reasons set out in **Anyanwu v South Bank Students' Union**[18]. However, where there are no reasonable prospects of success, it remains appropriate for a discrimination claim to be struck out and inappropriate for it to continue to take up the tribunal's resources [para 39, per Lord Hope].

71. Even if the tribunal determines a claim has no reasonable prospect of success, it retains a discretion not to strike out the claim.

Deposit orders

72. The test to be applied –"little reasonable prospect of success"- is similar to the above, albeit somewhat a less stringent standard is used. When making a deposit order, an employment tribunal must have regard to the party's means and give its "reasons for making the deposit order". See rule 39(2) and (3) of the Employment Tribunal Rules 2013. This must include reasons for setting the deposit at a particular amount. **Adams v Kingdom Services Group Ltd**[19].

[16] [2011] IRLR 217, at [para 6]
[17] [2002] IRLR 288, at [para 46].
[18] [2001] IRLR 305 [para 24, per Lord Steyn; para 37, per Lord Hope].
[19] UKEAT/0235/18.

APPLICATION TO FACTS

73. I do not think it is appropriate to give the claimant permission to amend her claim to introduce new discrimination allegations in any of the ways sought.

74. I bear in mind:
    a. The staleness of the allegations she seeks to add.
    b. The lack of explanation as to why those allegations were not contained within the original POC (or, as I find, even made the subject of previous complaint).
    c. The fact that the amendment application was made a long time after the presentation of the claim (albeit very little has happened to progress the claim since then, and albeit I acknowledge the claimant was not responsible for the adjournment of the June 2019 OPH.)
    d. The fact that several of the allegations appear to have no reasonable prospect of success. The analytics job allegation, in particular, seems to be hopeless. So, too, does the contention that the claimant was required to work long hours in June/July 2017. In fact, she was off sick at that time. Any discussion about the hours she would work would have been dealt with as part of return to work discussions. That point had not yet been reached. See further para 67 above.

75. I also do not consider that, at the material time, the claimant was disabled within the meaning of EqA. I fully accept that she had anxiety/low mood in varying degrees during much of February-November 2017. But that does not of itself satisfy the requirement of "long-term effects" as set out in para 2(a) of Schedule 1 to EqA ("has lasted for at last 12 months"). Nor do I think that, at the time, such impairment (in so far as it had "substantial adverse effects" on her day to day activities) was "likely to last at least 12 months" at the time.

76. Even if I am wrong as regards the claimant's disability status at the relevant time, and even if I were to allow the amendments, all the allegations of discrimination (pleaded and otherwise) are long out of time. The claimant has not persuaded me that it would be just and equitable to extend time in her case, even making due allowance for her ill health in 2017. I bear in mind:
    a. The matters set out at para 29-35 above.
    b. The fact that in several cases, the material events occurred before the onset of her time off from work in February-November 2017.

The tribunal would therefore not have jurisdiction to hear the discrimination claims (whether as presently pleaded or otherwise).

Unlawful deductions and unfair dismissal claims

77. As regards the unlawful deductions claim, the handwritten notes to which I refer at para 48 above do not support the claim to an increase up to £42,000, and the claimant's case in that respect is contradictory and muddled. But the notes may *possibly* support a claim based on the (contractual) promise of an incremental increase up to £36,000 after six months. As Mr Platts-Mills observed, reference to "review" does not suggest an obligation (contractual or otherwise) on the part of the respondent to increase the salary at all. But mention of specific figures is *possibly* helpful to the claimant -even though, as noted above, within 3 months of the first increase (and in fact, prior to implementation of that increase) the claimant had by October 2016 already agreed to move on secondment to an asset manager role.

78. The claim that the claimant was somehow contractually entitled to a salary of more than £29,000 at any material time thus looks very weak to me. I think it has little reasonable prospect of success, but it is (just) arguable, at least on the limited evidence so far.

79. As regards the unfair dismissal claim, *if* the claimant can show that the respondent continued to make unlawful deductions to her salary by not paying the appropriate amount, that might well assist her in so far as she could show resignation in response (even though she told me she relied on breach of the T&C term, rather than specific breach of a contractual obligation to pay the correct salary).

80. However, the claim has (at best) little reasonable prospect of success. (I also think it is highly unlikely that the claimant will be able to convince the tribunal that the 'last straw' on which she focuses can properly be said to be a viable 'last straw'. The October 2017 email looks, to me at least, to be "entirely innocuous". But I can see how a continuing failure to pay salary due could, if proven, suffice.)

81. If the claimant wants to pursue the unlawful deductions allegation, I think it appropriate that she pays a deposit as a condition of doing so. I assess that deposit at £500. She must pay it within 21 days of the date this order is sent to her. If she fails to pay the deposit by that date, the unlawful deductions allegation shall be struck out. If the tribunal at any stage following the making of this deposit order decides the unlawful deductions allegation against her substantively for the reasons given above, the claimant shall be treated as having acted unreasonably in pursuing that allegation

for the purposes of r.76 of Sch 1 to the Employment Tribunals Regulations 2013, unless the contrary is shown, and the deposit shall be paid to the second respondent. Otherwise, the deposit shall be refunded.

82. I make a similar order in respect of the allegation of unfair constructive dismissal. If the claimant wishes to pursue the allegation, she must pay within 42 days of the date of this order being sent to her the sum of £500. (So, the two deposits would total £1,000.) The same consequences will follow if she loses that allegation for substantively the reasons set out above. Otherwise, the deposit shall be refunded.

Holiday pay

83. The holiday pay claim can proceed, based (as the claimant now accepts) on a 20 day holiday period p.a. Obviously, if she has in fact been paid the correct amount, it would be of benefit to all concerned if the second respondent could explain that fact to the claimant, as soon as possible.

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Employment Judge Michell, Cambridge

27/02/2020

JUDGMENT SENT TO THE PARTIES ON

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.....27/02/2020

FOR THE SECRETARY TO THE TRIBUNALS