EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs S Bi	v	**Bradford Management Services LLP**

PUBLIC HEARING

Heard: In Leeds **On: 1- 3 June 2021**

Before:

Employment Judge JM Wade

Mr G Harker

Mr K Lannaman

Representation:

Claimant:	**Ms S Messum (lay representative)**
Respondent:	**Miss Hashmi (counsel)**
Interpreter:	**1 June: Mr Z Saleem**
	2/3 June: Mr S Mujahid

Note: A summary of the written reasons below were provided orally in an extempore Judgment delivered on 3 June 2021, the written record of which was sent to the parties on 9 June 2021. A written request for written reasons was received from the claimant on 10 June 2021. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 3 June 2021 are repeated below:

JUDGMENT

1 The claimant was dismissed on or around 12 June 2019.

2 The claimant's complaints of unfair dismissal, wrongful dismissal, unpaid holiday pay and Equality Act harassment are dismissed because the complaints were presented outside the primary time limits and the Tribunal has not permitted longer time limits to apply.

3 The complaint in respect of statutory sick pay is dismissed because the Tribunal does not have jurisdiction to decide such a complaint.

REASONS

Introduction, hearing and evidence

1. The claimant previously worked for the respondent, part of a family business which supplies food to the retail sector and in which Dr Akbar plays a major part. Her employment ended. She presented this claim on 28 May 2020, which included complaints of constructive unfair dismissal, notice pay, holiday pay, and other payments. She said in the attachment to her claim form that she does not speak English. This hearing has been conducted with interpreters throughout. Permission was given at a subsequent case management hearing for the claimant to amend her claim to include allegations of harassment related to sex.

2. Ms Hashmi sought to waste a good deal of time asking questions about the claimant's language ability when this hearing was already pressed for time with a hearing file of some 500 pages. The Tribunal curtailed Ms Hashmi's questioning of the claimant having given clear warnings about the progress which needed to be made on the issues and timescales. We also refused an early application to strike out the harassment claim, both for merits and limitation reasons. It was not in the interests of justice to do so without establishing at least a summary chain of events.

3. Ms Messum, who also worked for the respondent as an HR assistant, wrote the claimant's claim form details and those in a previous claim. She has also provided all the written material sent to the Tribunal and the respondent on behalf of the claimant (of which there has been a great deal). Ms Messum has good English, both written and spoken, and has done her best to represent the interests of her former colleague, filing documents and presenting evidence with great diligence. She has acquired some knowledge of the Tribunal's rules, but is not reasonably to know what is likely to be regarded as fair or proportionate in the run up to a hearing. We also heard Ms Messum as a witness for the claimant, and Ms Shabbir a further former colleague. We found them both to be witnesses of truth, albeit Ms Shabbir was not herself present for an event in June 2019, which she described in her statement having heard of it from colleagues. The Tribunal also had written statements from Ms Marwaha and Ms Dotkova, also former colleagues, but they did not attend to give evidence for personal reasons, we were told.

4. Apart from Dr Akbar we also heard witness evidence from two employees of the respondent, Ms Kanwal and Ms Khatoon. We have rejected some of their evidence about the June incident, for reasons we explain below.

5. It became apparent that the parties had not exchanged witness evidence until late in the day (22 to 24 May 2021). The claimant wrote on 24 May 2021 referring to publicly sourced evidence seeking to demonstrate Dr Akbar's bad character/unreliability. That material was not in the Tribunal's bundle nor were copies available. The Tribunal directed that it was not proportionate or in the interests of justice at the start of an already time pressed hearing to source that material, but questions could be asked of Dr Akbar as appropriate. The Tribunal also refused an application to admit a recording and transcript in which Dr Akbar allegedly swore at a colleague, first notified to the respondent's solicitor at 11.59 pm on 29 May 2021 for the same reasons – and including that a Tribunal is not about unfairly ambushing a party; case management orders are there to enable orderly preparation.

6. On the morning of the second day, the respondent reported to the Tribunal allegations that its witnesses had been approached and threatened by a friend of the claimant, without making any application in respect of that alleged conduct. Ms Hashmi was without sufficient information initially, but even after instructions did not make an application to strike out the claim on that basis. The Tribunal declined to hear from the claimant (or admit further evidence from the friend) in rebuttal. That would only be necessary if an application was made by the respondent on the basis of the allegation, for example, a costs application. If an application was made, the Tribunal would hear it and determine it, and give the claimant an opportunity to adduce whatever evidence was appropriate at that time. For the purposes of determining the issues, the Tribunal could put those allegations from its mind in assessing the witness evidence, much as it would put from its mind the excluded evidence about Dr Akbar.

7. It was clear there would not be an agreed bundle. Both parties were, until May, litigants in person and the claimant has remained so. Our file has, in essence, been a file composed of the claimant's documents and the respondent's documents, with the claimant asserting that many documents in the respondent's section were fabrications.

<u>Issues</u>

8. The claimant did not take part in the first case management hearing for childcare reasons. A constructive unfair dismissal complaint was clarified by the Employment Judge on the papers and orders made for clarification of further complaints. She then took part in a subsequent telephone hearing with an interpreter, following which the complaints and issues were further clarified and an amendment to add sexual harassment allegations was permitted (but subject to the Tribunal determining limitation).

9. The September 2020 Orders included preliminary issues about whether the harassment claims were in time, and whether the claimant was an employee of the respondent (the respondent was not then legally represented). At the start of this hearing it was apparent that the respondent's case was that the claimant was an employee (she had an employment contract), but it was a "zero hours" contract. The real issue was whether that was, in fact, the nature of the contract, or was it a contract of employment for specific hours.

10. The issue of whether the constructive unfair dismissal claim was in time was not identified at any previous case management hearing. There is also nothing to suggest that the Employment Judges previously conducting that management were aware of a previous claim in 2019 ("the 2019 claim"), albeit the file shows that the claimant sent to the Tribunal and the respondent all of the 2019 claim documentation in November 2020.The significance of that material was not then understood or directly referred to an Employment Judge.

11. The 2019 claim asserted:

    11.1. Gul Nawaz Akbar as the respondent employer – the ACAS conciliation certificate recorded conciliation with Bradford Management Services LLP and the claim was rejected for that reason (the name of the respondent differing between the claim form and the ACAS conciliation certificate);

    11.2. The dates of employment were: 21 March 2016 to 12 June 2019;

    11.3. 18 Hours a week were worked;

11.4. The claimant did not have another job;

11.5. The claimant's hours were reduced for unknown reasons in October/November 2018;

11.6. An incident took place on 12 June. This was described in narrative detail including the claimant telling Dr Akbar his lunch was ready and him responding he was busy and becoming angry, shouting by Dr Akbar, swearing whilst saying, "get out from here", the claimant telling him not to use abusive language and Dr Akbar raising his hand to her, her replying with "don't you dare touch me" and Dr Akbar then yelling at her, and telling her to leave several times, and repeating that as she went to get her things from her locker; the claimant went to report to HR (Ms Marwaha), who would not take a statement of complaint on Dr Akbar's instructions, him then chasing the claimant from the locker room to the office and the claimant then reporting the matter to the police. The claimant alleged she was told by HR on Dr Akbar's instructions that she was on call and she would never be rung for work again;

11.7. The claimant was to be represented by solicitors.

12. The claimant with Ms Messum's assistance had approached ACAS on 28 August 2019; a certificate was issued on 30 August 2019; and the claim was presented on 27 September 2019; the claimant had signed a retainer with solicitors on 20 September, but in fact Ms Messum with the claimant had completed the details on line indicating contact by post (and although the solicitors details were entered in the claim, there was no indication as to how they were to be contacted by the Tribunal).

13. There was no application to reconsider the rejection of the 2019 claim.

14. The claimant's 2020 claim were as follows: – references to "Mr Akbar/Mr Nawaz are to read as references only to Dr Akbar).

15. The claimant relies upon the implied duty of trust and confidence, and the express terms as to hours of work and pay. The claimant contends that the above terms were broken by the Respondent as follows:-

15.1. On or about 22 March 2019 been wrongly accused of theft by Mr Nawaz

15.2. Placing the Claimant "on call" for a week following 04 June 2019 (and not paying her) as punishment for the fact the Claimant did not attend work on the religious festival of Eid-ul-fitar

15.3. On 12 June 2019 the Claimant was subjected to shouting from Mr Akbar /Mr Nawaz when she sought to serve him lunch at what she says was the agreed time of 1.30.

15.4. On the same day the Claimant contends Mr Akbar /Mr Nawaz followed her to the kitchen swore at her and told to leave.

15.5. When the Claimant protested as to Mr Akbar /Mr Nawaz language she was sworn at again and told to "get out from here".

15.6. On the same day Mr Akbar /Mr Nawaz threatened her by raising his hand.

15.7. Thereafter Mr Akbar /Mr Nawaz chased the Claimant from kitchen to locker room.

15.8. A failure by the Respondent to deal adequately or at all with a grievance raised against Mr Nawaz on 09 July 2019.

15.9. A failure by the Respondent to deal adequately or at all with a reminder that her grievance of 09 July 2019 was outstanding, in her reminder letter of 12 August 2019

15.10. The Respondent thereafter refused to honour the Claimant's contractual hours of work and said she was "on call". The Claimant was not paid whilst on call. This was an express breach of the Claimants contract of employment and continued until she resigned.

15.11. The Claimant relies upon the Respondent's failure to pay her sick pay having provided doctors notes as a breach of contract and this continued up to her resignation.

16. The sexual harassment allegations in the 2020 claim (provided in narrative details sent on or shortly before 24 August 2020) were, in summary:

    16.1. Dr Akbar was kind and generous to the claimant and paid her compliments from January 2017 when she started in the canteen;

    16.2. In 2017 when Dr Akbar visited Pakistan he went to see the claimant's parents;

    16.3. The claimant was not given holidays but allowed to bring her children to work;

    16.4. Dr Akbar gave the claimant's children a ride in his car and asked to visit her house (which she refused);

    16.5. When he realised the claimant would not have a relationship with him, Dr Akbar's behaviour changed and he became unkind and shouted at her, or commented on her attire or her footwear;

    16.6. In May 2018 when the claimant refused a lift with Dr Akbar's wife, Dr Akbar threw mint tea in the air and shouted at the claimant;

    16.7. In November 2018 Dr Akbar criticised the claimant's Pakora curry;

    16.8. Dr Akbar shouted at the claimant during monthly audits, criticising her cleanliness;

    16.9. In late 2018 the claimant's hours were reduced;

    16.10. *In late 2018/January 2019* the claimant's Wednesday hours were further reduced and she was criticised by Dr Akbar for not completing all the canteen work in the reduced time.

17. The facts asserted about hours being reduced (above in italics) are the only facts which were also included in the attachment to the 2020 claim form – the remaining allegations were new.

<u>Determination of the preliminary issue: whether the Tribunal thinks shortly before 24 August 2020 or July 2020 is the just and equitable period in which the claimant may present her allegations of sexual harassment?</u>

18. <u>Relevant facts.</u>

19. The claimant had a good general education in Pakistan. From 2004 to 2012 she was raising her children. She did not have indefinite leave to remain status in this country in her own right. In 2012 she completed the entry level English skills ESOL qualification, working from 2012 to 2014 only in a clothes shop.. By 2016 when she

applied to the respondent for work her written and spoken English was poor, but she could complete basic entries on forms (she relied on Ms Messum to translate their content). She signed a contract and training documentation written in English, which provided as to hours that : “the Employer will offer you work as and when it is available but cannot guarantee that any minimum amount of work will be offered in any given week or month of the year and you will only get paid for the hours worked….It is a condition of your contract you are available for work on benig given at least one week’s notice….In the event that you find you are being offered regular shifts, this does not imply and agreed contractual change. Any agreed contractual change to your hours of work will be put in writing”.

20. The claimant signed that contract on 19 May 2016 and it recorded the claimant’s start date as 21 March 2016. By that time her husband had left her and her children and returned to Pakistan. At the end of that year the claimant developed a health condition which meant she could not work in the factory and she sought to resign; there was only good will between her and the respondent at that time. In early 2017 Dr Aktar offered her work in the canteen and her rotas recorded that she worked over 30 hours typically.

21. In 2017 the claimant’s brother died in Pakistan and her husband re-married. These were very upsetting times for her. She had no access to state funds to support herself and her children. She had to work. Her language difficulties, emotional state and financial state made her vulnerable.

22. The factory did not operate on a Wednesday, and only a handful of management staff including HR had employment contracts which were not zero hours, out of fifty to sixty employees. Retailers could cut or increase orders at any time and food production work could never be guaranteed – that was the gist of Dr Akbar’s explanation of those arrangements.

23. The dates and circumstances of the presentation of the claimant’s claims, recorded above, are also facts found by the Tribunal.

24. After 12 June 2019, the claimant sent a grievance to the respondent using a template letter with Ms Messum’s help – this was on 28 June 2019. It mirrored the description of the 12 June incident above. It added the alleged swearing by Dr Akbar in the claimant’s native language in italics, that she had spoken to Dr Akbar’s son, and named ten witnesses who had seen or heard or were present when the events took place – she referred to two of them as “two new operatives from high risk department – I’m unaware of their names too”. She also said “This was not the first time that Gul Nawaz has shouted at me. There have been many incidents in the past that he yelled at me for no reason and never missed a change to humiliate me in front of my colleagues. He used rough language for my parents in the past and accused me of stealing food from the kitchen”.

25. The claimant chased her grievance on 12 August 2019, having not received a reply. She was then sent a copy of a response letter from the respondent said to have been sent on 18 July 2019. That letter recorded that the claimant had been sent an invitation to a meeting on 17 June but had not attended and had attended work to drop off her keys between 13 -17 June and was told the canteen had been suspended. HR had assumed she had no intention of returning to work.

26. Over the summer of 2019 the claimant continued her work for a wedding/catering company casually, which she had started on the reduction of her hours in late

18/early 19. In November 2019, she commenced a forty hour per week engagement with another food producer

27. The claimant wrote a letter to the respondent dated 16 March 2020 giving one month's notice of resignation saying she had been placed on call since 12 June 2019 and had received no reply to her grievance. She sought her week in hand, sick pay (10 June to 23 June) and her holiday pay. The claimant had sent a fit note to the respondent in the post on 12 July 2019 with her grievance (certifying her unfit for work from 10 June to 23 June); she then provided a further note with her resignation letter in March 2020 which certified her unfit from 26 June to 23 July 2019, again as a result of acute stress reaction.

28. The respondent did not pay the claimant any of the monies she sought at that time, asserting that allegations into misconduct were continuing and payment would be made when they were concluded. Payments were made in respect of a week in hand, holiday pay and some part of the June ill health only, by electronic transfer received by the claimant before the end of July 2020 and the first case management hearing, and before the claimant presented discrimination/harassment allegations.

The relevant law, discussion and conclusion on the first preliminary issue.

29. The last date of the harassment allegations is January 2019 (the reduction in Wednesday hours). This is alleged as the last in a series of conduct which is said by the claimant to be encouraging her to have a relationship with Dr Aktar or retaliating against her for not doing so. These allegations span a period January 2017 to January 2019.

30. A claim needed to have been presented to the employment tribunal by the end of April 2019 at the latest applying Section 123 (1)(a) of the Equality Act 2010. There is no ACAS conciliation extension because the first certificate was not notified until 28 August 2019. Applying Section 123 (1)(b), the Tribunal needs to consider whether it thinks just and equitable a time limit of a further 16 months, until the end of August 2020. Treating the first mention of discrimination in a case management agenda of July 2020 would require a slightly lesser time limit.

31. The Tribunal accepts the claimant has, and had, vulnerabilities as a result of the language barriers and financial circumstances she faces. Nevertheless, she was able to present her first claim with the help of a friend and find a lawyer. She did not proceed with that retainer because she says she was put off by the risk of paying the respondent's costs contained within the retainer letter. Generally though, her circumstances were such that she had more difficulty than others in accessing justice.

32. The other reason the claimant argues for a longer time limit is that, in short, justice requires Dr Akbar to be stopped from conduct at work which affected her and has, she alleges, affected others. Ms Messum makes allegations that Dr Akbar treats all staff badly, hires vulnerable people, and that the respondent is always short staffed. In the round we assessed Ms Messum a witness of truth and indeed her description of how those who present fit notes, or claim other payments, and are not paid, has been born out by the substantially delayed payments to the claimant in this case.

33. Against those matters, we weigh the other circumstances: the claimant did not raise sexual harassment allegations in her grievance; she did not raise them in the 2019

claim; she did not mention them at all (save for the cut in hours as background) in her 2020 claim details. On all these matters she had the help of Ms Messum, who fulfilled an HR role at the respondent but had started maternity leave by the time of the June incident and was not present. The claimant did not allege the June incident as an allegation of harassment related to sex.

34. Justice involves justice to both sides. Time limits are there because memories fade, and the more evidentially difficult the allegation (as harassment allegations often are), the more important it is that they are brought promptly. A fair hearing of such allegations over two years or so would usually involve the opportunity to hear from potentially corroborating witnesses (on either side), rather than allegations and denials. When there are no contemporaneous records kept at the time of allegations that are made the Tribunal is in real difficulties making safe findings of fact. There is overwhelming prejudice to everybody, the claimant, the respondent, and justice as a whole.

35. This is not a case where the claimant has not had the opportunity to bring these things to the Tribunal or her employer in a timely way – she could have done; as the other claims and grievances demonstrate. Instead she brought them much later reflecting on matters, gaining new knowledge, feeling that there are others who may have been affected, and after some limited payments had been made to her. No doubt because she began to see things in a particular light after the event and as her sense of injustice increased. That is no doubt genuinely felt, but it is equally not just for such stigmatising allegations as these in the employment arena, which could have been brought sooner, to be heard so late. In the round, the Tribunal's unanimous decision is that it is not in the interests of justice in all these circumstances to fix a much longer time limit on just and equitable grounds. The sexual harassment claim is dismissed.

<u>Further findings of fact</u>

36. Dr Akbar makes all the major decisions in connection with staff at the respondent and he is responsible for resolving many operational issues. The cutting of the claimant's hours in late 2018/2019 had nothing to do with her seeking such a reduction due to seeking benefits – Dr Akbar, and the response presented by his colleague, are mistaken in this respect (ET3 para 14/statement part 12). The claimant had no access to state funds. The explanation for Dr Akbar reducing hours includes that with staff on zero hours, he could reduce or increase hours as he saw fit for any reason. The rotas show that when the claimant was switched to the canteen in 2017, another colleague was displaced largely to "on call". We know the reason was the claimant's health condition. Similarly when the claimant's hours were cut in later 2018, other colleagues took up the capacity, although their hours were equally subject to change at times.

37. The respondent's work canteen is a smart environment which provides a place where supermarket buyers may be taken for a coffee, before a meeting, and where the salaried management staff (a handful including Dr Akbar and his son) take lunch – the cost of their meals is included as a benefit in their remuneration.

38. Zero hours staff have to pay a fixed sum for a lunch, as a deduction from their wages. The claimant's role in the canteen involved noting those who took meals, and then their wages would be deducted sums for meals taken on a weekly basis. It was comparatively rare for those staff, therefore, to take lunch.

39. In late 2018 and in 2019 Dr Akbar was also managing the costs of the canteen by reducing staffed hours to 2pm rather than 3pm generally.

40. The claimant met Ms Messum on 1 March 2019 on Dr Akbar's instructions. Two matters were raised; the wearing of safety shoes and the need to record properly all staff taking food in the canteen. Ms Messum was directed to give the claimant a recorded warning about the recording of staff meals; the claimant signed that letter that day. On 21 March an anonymous complaint was left in the suggestion box that the salaried staff (Ms Messum and the accounts manager) were taking food from the canteen for their families. A further investigation was then launched with Dr Akbar meeting with the claimant the next day (22 March). A note he wrote later suggested that allowing staff to take food was a serious criminal offence. He then instructed the accounts manager (who was alleged to have taken food) to issue a warning letter to the claimant on 28 March 2019. Dr Akbar did not then interview the accounts manager in connection with the anonymous complaint until 2 April and he did not interview Ms Messum at all at that time as she was on maternity leave.

41. The interview with the claimant on 22 March is fairly characterised as Dr Akbar wrongly accusing her of theft. It is conduct without reasonable and proper cause which is likely to damage trust and confidence; the anonymous note gave no grounds to accuse the claimant without first having spoken to those alleged to have taken food, namely Ms Messum and the accounts manager.

42. On or around Thursday 6 June 2019 there was a misunderstanding about the claimant's holidays and because she had not attended that day she was told by HR (Ms Marwaha by text that she was "on call" – that is her shifts were cancelled until further notice). A note to that effect is recorded on the respondent's calendar/rota. The claimant attended her GP on 10 June and was signed unfit to work due to acute stress reaction. When she attended work to present that fit note she was was told by Ms Marwaha to withdraw it on Dr Akbar's instructions that if she wanted more hours she should not present fit notes. This is conduct by the respondent without reasonable and proper cause likely to damage or destroy trust and confidence.

43. As to events on 12 June about which there was much conflict, Miss Hashmi has made sensible submissions about the approach we should take as to whether to believe witnesses or not. In weighing up those submissions we consider that what was able to be documented within this working environment, was very much subject to the control of the senior management – Dr Akbar's statement is an example training documents and warning letters are others – in circumstances where English literacy is poor. We have preferred the claimant's account because it is corroborated by a very prompt letter of grievance, to be weighed against an account given by Dr Akbar, on his case, on the same day.

44. The control exercised by Dr Akbar of staff and the treatment of fit notes which we have found, and the treatment of the anonymous complaint about food in the canteen, leads us to treat Dr Akbar's statement with caution. Similarly the presentation to the BRC of minimum hours roles, while staff are on zero hours contracts (to which we refer below). We also weigh that the employer had the opportunity to carry out a full investigation of all those said to have been present by the claimant in her grievance, and to have their accounts at the time. Of all those said to be present by the claimant, we have only heard from one person orally who the claimant did not identify by name, but as a new operative in the high risk production. We weigh her evidence which was strongly against the claimant of course, but in questioning she accepted the claimant was not a person who swore.

Otherwise she corroborated Dr Akbar, that it was the claimant who swore on 10 June, was rude and was shouting. We weigh that in the mix, of course, but on balance it is outweighed by the claimant's detailed corroboration in her grievance letter, which we consider is simply highly unlikely to have been made up as a pack of lies - that is effectively the respondent's case. If she had caused a scene by her behaviour, there was no need for her to do so. We have also assessed the likelihood of the claimant making up allegations against "the boss", when other allegations are corroborated by Ms Messum and independently have the ring of truth about them. There was nothing in the claimant's demeanour and conduct, or the way in which she gave her evidence, to suggest that she would engage in the degree of fabrication required to accept the respondent's case.

45. We do consider the circumstances at the time were a highly pressured situation for Dr Akbar, (a broken machine) and an understandable frustration with being distracted when he was trying to work and a degree of anger over spilling into his conduct. We weigh all that in the mix and consider it simply unlikely that the claimant, to use a colloquialism, simply lost her temper and control unprovoked in front of everybody in the canteen, simply because she had been told he was not ready for the serving of lunch at a particular time. It's simply not credible as an explanation of that chain of events.

46. We therefore broadly accept the claimant's account of events with limited exceptions. There was shouting by Dr Akbar when the claimant wished to serve him lunch at the usual time because he was busy. We do not find that Dr Akbar followed the claimant, but he did later go to the canteen. When there, we accept the claimant's evidence (as corroborated by Ms Marwaha's written statement, albeit she did not attend to have her evidence tested). The claimant was called "sister fucker" in her first or second language, and told to get out. That day Dr Akbar was attending to a serious matter interrupting production, he was under some strain and in all likelihood did raise his hand because his temper was up when the claimant told him not to use fowl language. We do not find that it was in any way reasonably to be taken as a threat of violence towards the claimant, but was expressing physically his need for her to leave. She reacted to that, understandably. She is a proud person, who was not prepared to be so ill treated. We do not find that she was chased to the locker, albeit that may have been her perception. Dr Akbar was going in that direction to access the factory to resolve the production matter. Nevertheless, his conduct, as we have found it, is conduct without reasonable and proper cause, speaking to a member of staff and behaving towards her in a very high handed and mercurial fashion; it was likely to damage trust and confidence.

47. As to the subsequent grievance and failure to deal with it, in the claimant's grievance she identifies ten members of staff who were said by her to be present on the occasion of the event in question. There was no attempt to interview those members of staff and document their accounts. The only account written down was Dr Akbar's, which we find to be entirely self serving, in suggesting that he had behaved entirely reasonably and it was the claimant who had been rude and shouted and sworn at him. He wrote that statement in the context that he knew the claimant wished to report the matter to the police. There was clearly a substantial scene that day. There was clearly a failure to deal adequately with the grievance, and similarly when that was raised again in the second letter of 12 August. No other employee statements were taken even though many were present.

48. These are failings which, in the context of an allegation of the kind that was made, given the detail that was provided in the claimant's grievance, were without reasonable and proper cause and were likely to damage trust and confidence.

49. Being sent away that day and then not offered any work. We accept the claimant's account that when she rang after 12 June she was told by Ms Marwaha that she would never be given any more work.

50. Taking this conduct together, Dr Akbar's conduct towards the claimant on 12 June and his instructions to HR in the immediate aftermath amounted to a dismissal by conduct of the claimant, on or around 12 June. While the description of "on call" might be ambiguous in the context of the claimant's written contract, being told she would never be called for work again, is a dismissal and termination of that contract in all the circumstances of this case. One cannot imagine a clearer termination of an employment contract, even one for zero hours.

51. There is little in the documents that is inconsistent with the employment ending in June 2019. The claimant's conduct in raising her first claim and identifying a termination date is entirely consistent with it. The fact that the employer later acknowledged a resignation and then decided after the second proceedings had been commenced (and in ignorance of the first) to pay the statutory sick pay and make the other payments, is consistent only with a recognition that the money claims were valid. In particular that statutory sick pay/PAYE rules may require payment of sums which should have been paid even if an employment has ended. The claimant's resignation was, in truth, a device to secure payment of sums owing to her, her employment having terminated in June 2019.

52. To complete the findings, we do not accept that the claimant was invited to attend an investigatory meeting (as suggested in the respondent's subsequent investigation) – there is no note by Mr Marwaha in the rota/calendar to that effect (whereas her other notes are very detailed). It simply says on 13 June – "called no response" or words to that effect. Thereafter there was no attempt to return the claimant to work in circumstances where the respondent had rejected her fit note.

Discussion and further conclusions

53. These findings are entirely consistent with the claimant's first claim details. We find that there was a dismissal at that time. The fact that the claim was properly rejected by the Tribunal because of the application of Rule 12(1)(f) is a matter which this Tribunal regrets. It is regrettable that Bradford Management Services LLP was not identified as the respondent. Ms Messum has been very frank in accepting that she was the friend who assisted the claimant in submitting that claim and we accept her position on that. We deploy our industrial knowledge and consider it overwhelmingly unlikely that a solicitor experienced in these type of claims would make the error that is identified in the claim form, and causes the rejection, and moreover would not immediately have applied for a reconsideration (as usually happens whether the claimant is represented, or a litigant in person) but we may have misunderstood the position. The fact is neither Ms Messum, the claimant, nor the solicitor sought to challenge that rejection and the claim came to an end. The claimant then took up her 40 hour a week new post and got on with her life, albeit feeling scarred and upset about these events.

54. Had the first claim proceeded, and the rejection reconsidered within the relevant time limits, it would have been determined by a Tribunal as an unfair dismissal complaint

alone. It is highly likely it would have succeeded given the findings this Tribunal has made about the conduct of Dr Akbar in March and in June 2019.

55. On our unanimous findings the second constructive unfair dismissal complaint is also out of time. It has been presented outside the Employment Rights Act 1996 time limit that applies in unfair dismissal complaints (and unlawful deductions from wages complaints). A claim must be presented within three months (subject to ACAS conciliation) of the effective date of termination (or deduction) unless it was not reasonably practicable to do so. We know it was reasonably practicable because the claimant presented the first claim. The 2020 constructive unfair dismissal complaint is dismissed.

56. It is settled law that this Tribunal does not have jurisdiction to decide statutory sick pay entitlement. That is a matter to raise with HMRC. Even if we had made different findings, we could not have upheld that complaint.

57. The holiday pay complaint is also dismissed because it is out of time. Entitlement to holiday pay on the termination of employment is also regulated by Regulation 14 of the Working Time Regulations 1998 and those Regulations also require presentation of claims on the same (or very similar) limitation basis as the Employment Rights Act. We note the claimant received some payment and did not pursue that complaint.

58. Given our findings above, it is unnecessary to make a finding as to the contracted hours within the claimant's contract of employment, if any. It is perhaps instructive that she did not seek payment for 20 hours or other hours from August when she was fit for work but not allocated work, in her resignation letter, but rather referred to being placed on call.

59. For completeness and with some misgivings we find that the claimant's contract was genuinely a zero hours contract. The respondent, as an employer, was presenting one face to its employees, and another face to those who audit the business, the British Retail Consortium. In the claimant's and others' job descriptions (presented to the BRC for audit), it specifies minimum hours for posts (in the claimant's case, 20 hours). In the claimant's and others' contracts it was expressly said to be the reverse – no minimum hours and no guarantee of work.

60. Notwithstanding the job descriptions, it was clear that holiday pay was being paid at intervals during employment, calculated on the hours that were in fact worked. It was also clear that staff were put on call and given no hours for a variety of reasons including sickness, refusing shifts, holiday disagreement and other matters. This treatment was consistent with the parties' understanding that the written contract meant what it said, there were no fixed hours, and the claimant worked at the will of Dr Akbar, in effect. This was the understanding and intention of the parties at the time, however unpleasant an employment experience that was latterly found to be for the claimant. The parties' unequal bargaining power and the vulnerability of employees with limited English and without settled immigration status is not a matter which precludes a contract meaning what it says, while such terms remain lawful. The Tribunal cannot but have sympathy for the claimant's circumstances but these claims are dismissed for the reasons above, but in summary because they have not been presented within the relevant time limits or are outside our jurisdiction.

Employment Judge JM Wade

14 July 2021