

REASONS

1. Claims and Issues

- 1.1. Unfair dismissal (constructive) – this was in the claim form and is now the subject of consideration for strike out/deposit order.
- 1.2. Sexual harassment – this was not in the claim form and is the subject of an application for leave to amend.
- 1.3. Victimisation – this was not in the claim form and is also the subject of an application for leave to amend.

2. Matters occurring at the outset of the hearing

Mr Wiltshire raised two matters, which is as far as the Tribunal can discern, had not been raised previously in these proceedings (and despite a previous preliminary hearing before Employment Judge Lancaster on 4 July 2019 at which the Claimant had been represented by the same counsel as in this hearing), namely:-

- 2.1. A need for an interpreter – this was very quickly abandoned by the Claimant on the grounds that she speaks good English.
- 2.2. The need for a screen between the Claimant and the Respondent's witness, because the Claimant was alleging sexual harassment and because there should be no line of sight between the Claimant and the Respondent's witness, Mrs C Hickling, head of HR at the Respondent. It should be understood that Mrs Hickling was not the alleged perpetrator of the alleged act or acts of sexual harassment. Argument was heard on this point for 28 minutes, after which there was a five minute break. Thereafter the Claimant withdrew her application for a screen and agreed instead that in the absence of a screen, when the Claimant was to give evidence, Mrs Hickling would leave the Tribunal, but otherwise Mrs Hickling could stay throughout.

3. The previous case management orders

- 3.1. Employment Judge Davies – 6 June 2019
 - 3.1.1. By 13 June 2019 the Claimant was ordered to write to the Tribunal and the Respondent providing proper particulars of her claim. She was ordered to:
 - (a) Confirm the basis on which she said she was dismissed and why that was an unfair dismissal;
 - (b) Confirm whether she sought to advance any other type of claim.
 - 3.1.2. At a hearing to take place on 4 July 2019:
 - (a) The Judge was to clarify the basis of the claim(s);
 - (b) The Judge was to consider whether the claim(s) should be struck out as having no reasonable prospect of success or

whether the Claimant should be ordered to pay a deposit as a condition of continuing with them;

3.2. Employment Judge Lancaster – 4 July 2019

- 3.2.1. The hearing was adjourned until 28 August 2019, because it was not “possible to clarify the issues ...”. The adjourned hearing was to consider any application to amend and whether time should be extended in respect of any claims to be added.
- 3.2.2. The Judge recorded that it was conceded, presumably at the hearing on 4 July 2019 and by the Claimant, that the particulars of unfair dismissal were inadequate. The claim of sexual harassment was raised for the first time at this hearing and that there was an intention by the Claimant to add claims of public interest disclosure – detriment (or victimisation) arising out of a grievance raised in respect of the alleged sexual harassment claim.
- 3.2.3. The Judge stated that leave to amend would be required for any claims of sexual harassment, whistleblowing and/or victimisation.
- 3.2.4. The Judge pointed out that the sexual harassment claim was significantly out of time, but that there was a factual dispute as to whether or not the Claimant received the outcome of the grievance on 22 May 2018, as alleged by the Respondent. The Judge stated that this could well have a bearing on whether it might be just and equitable to extend time. The Judge did observe that:
 - The Claimant was aware of the facts giving rise to the claim.
 - The Claimant did not realise what was happening with regard to the grievance.
 - The Claimant knew the alleged harasser, a Mr Christie, had left the Respondent’s employment on 6 April 2018, and
 - The Claimant did not present her claim promptly after she resigned on 21 November 2019 (on which date she gave one week’s notice).
- 3.2.5. The Judge stated that the whistleblowing/victimisation claims:
 - Appeared to be entirely new allegations rather than a mere re-labelling.
 - Were not intimated by 13 June 2019 as ordered by Employment Judge Davies, and
 - Appeared to be some four months out of time.
- 3.2.6. The Judge made a number of orders for further information.
- 3.2.7. The Judge stated the costs remained at large and were to be considered “on the next occasion”.
- 3.2.8. The whistleblowing case seems to have disappeared.

4. The law

The Tribunal has to have regard to the following provisions of the law:

4.1. In relation to strike out:

4.1.1. The Tribunal is bound by Rule 37(1)(a) Employment Tribunal Rules of Procedure (Rules) which empowers the Tribunal at any stage of proceedings to strike out all or part of a claim on the ground that it has no reasonable prospect of success.

4.1.2. Most unfair dismissal cases are fact sensitive. When the central facts are in dispute a claim should only be struck out in the most exceptional circumstances. In the normal run of cases, where there is a crucial core of disputed facts, it is an error of law for a Tribunal to pre-empt the determination of a full hearing by striking out a claim – see **Tayside Public Transport Co Limited v Reilly** [2012] IRLR 755 Ct. Sess (Inner House) (Tayside).

4.2. In relation to deposit orders:

4.2.1. The Tribunal is bound by Rule 39(1) of the Rules which empowers the Tribunal at a preliminary hearing where it considers that any specific allegation or argument in a claim has little reasonable prospect of success to make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance the allegation or payment.

4.2.2. However the Tribunal is required to make reasonable enquiries by Rule 39(2) of the Rules into a party's ability to pay the deposit and have regard to any such information when dealing with the amount of the deposit.

4.3. In relation to unfair dismissal (constructive):

4.3.1. The onus of proof is on the Claimant to prove that she was entitled to terminate the contract (with or without notice) under which she was employed without notice by reason of the Respondent's conduct - see Section 95(1)(c) Employment Rights Act 1996.

4.3.2. In a last straw case, the last straw does not of itself have to amount to a breach of contract – **Lewis v Motorworld Garages Limited** [1986] ICR 157 CA. In **Omilagu v Waltham Forest London Borough Council** [2005] ICR 481 CA (Omilagu) it was decided that to constitute a breach of trust and confidence based on a series of acts (or omissions) the act constituting the last straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. As always, the test of whether trust and confidence has been undermined is an objective one.

4.4. Leave to amend

4.4.1. Deciding whether or not to grant leave to amend the Tribunal has a discretion. It must have regard to all the circumstances and in particular any injustice or hardship which would result from the amendment or refusal to make it. It must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice – see **Selkent Bus Co Limited v Moore** [1996] ICR 836 EAT (Selkent).

4.4.2. Relevant factors include:

- The nature of the amendment – from corrective minor errors, addition of facts to existing allegations, re-labelling of facts already pleaded at one end to making entirely new factual allegations, which change the basis of an existing claim, whether minor or substantial.
- Time – which should be considered for new claims and if out of time whether time should be extended (of which more see below).
- Timing and the manner of application – delay should not decide the matter one way or the other, but consideration should be given to why a claim was not made earlier.
- The merits of the claim.
- Validity of the claim.

4.4.3. Further time issues:

4.4.3.1. Time is subject to section 123(1) Equality Act 2010, which states that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable.

4.4.3.2. The extension of time is a matter of discretion, but section 33(3) Limitation Act 1980 may be used as a useful guide, which includes:

- Length of delay and its explanation.
- Whether likely evidence is likely to be more or less cogent.
- Conduct of the Claimant post-claim.
- Extent to which the Claimant acted promptly and reasonably once she knew there might be a claim.
- Steps taken by the Claimant to take advice.

4.4.3.3. Also relevant are the balance of prejudice and ignorance of rights.

5. Facts

(In so far as these could be ascertained after careful review of oral evidence and from the bundle agreed for this hearing, the Tribunal records the following as being relevant to those matters and/or the applications before it):

5.1. Unfair dismissal – allegations by the Claimant and where applicable, comments by the Respondent (mainly post-termination).

- 5.1.1. In March 2018 the Claimant alleges conduct in the nature of sexual harassment by Mr Christie, which the Respondent investigated and then rejected the allegation.
- 5.1.2. In January 2018 the Claimant alleged that she was unreasonably rejected for a supervisor role. After termination the Respondent apologised in part in relation to this matter.
- 5.1.3. In February 2018 the Claimant alleges that she was unreasonably prevented from attending a health and safety course. The Respondent disagrees and alleges that the Claimant had to remain at the Respondent premises for operational reasons.
- 5.1.4. In February 2018 the Claimant alleged that she was caused stress by a supervisor, having a request to move department unreasonably refused and being prevented from having opportunities for progression. The Respondent states that it could find no evidence of such complaints at the time.
- 5.1.5. In March/May 2018 the Claimant alleges that she was apparently overlooked for an advance leadership course. The Respondent states that it could find no evidence of such a complaint at that time.
- 5.1.6. In April 2018 the Claimant was apparently overlooked for a career development programme. The Respondent states that it could find no evidence of such a complaint at the time.
- 5.1.7. In August 2018 the Claimant alleged that she was singled out for being late. The Respondent says that the Claimant had a poor punctuality record (of which more below).
- 5.1.8. In August 2018 the Claimant alleged that she was unreasonably accused of not doing her job properly. The Respondent denies making such an accusation.
- 5.1.9. In September 2018 the Claimant alleged that the Respondent accused the Claimant of taking and moving scanners. The Respondent denies making such an accusation.
- 5.1.10. In September 2018 the Claimant alleged that a manager showed her up in front of others. The Respondent states that this incident occurred as a result of the failure of the Claimant to complete tasks.
- 5.1.11. In September 2018 the Claimant alleged that the Respondent failed to provide the Claimant with a probation review.
- 5.1.12. In October 2018 the Claimant alleged that she had a lack of support whilst the Claimant was standing in for a team leader. The Respondent disagrees.
- 5.1.13. In October 2018 the Claimant alleged that she received no support following a shop floor accident. The Respondent disagrees.
- 5.1.14. In November 2018 the Claimant alleged that she received a lack of support when a team leader was away. The Respondent says that there was no complaint about this in the Claimant's

resignation letter which had no complaints in it at all. This alleged incident appears to be the “last straw”.

- 5.1.15. The Claimant alleged that the Respondent failed to change her contract when she moved to Bradford.
 - 5.1.16. The Claimant alleged that she was told that she was under surveillance and that this made her scared.
 - 5.1.17. The Claimant alleged that she had no-one to talk to over problems at work.
- 5.2. Unfair dismissal – the Claimant’s disciplinary record
- 5.2.1. In February 2018 the Claimant received a verbal warning for eight occasions of absence.
 - 5.2.2. In May 2018 the Respondent had a conversation with the Claimant over lateness.
 - 5.2.3. In May 2018 the Claimant received a written warning for absence and lateness. The Claimant did not appeal this warning.
 - 5.2.4. In August 2018 the Claimant received a final written warning for absence and lateness. The Claimant’s appeal was rejected. The warning was live at the termination of the Claimant’s employment.
- 5.3. Sexual harassment – allegations by the Claimant and where applicable comments by the Respondent
- 5.3.1. On 3 April 2018 the Claimant raised a grievance against Mr Christie, who the Claimant alleged approached her for sex on three separate occasions, made comments to the Claimant of a sexual nature and when alone with Mr Christie, he moved the Claimant’s hand to touch his genitals. The Respondent carried out an investigation and on 22 May 2018 held that the grievance was unfounded, with Mr Christie categorically denying all allegations.
 - 5.3.2. The Claimant felt her grievance was being ignored and that no investigation was carried out until 18 December 2018. By an email dated 1 February 2019 timed at 14:45 from Mrs Hickling to the Claimant, Mrs Hickling alleged that the outcome letter of the grievance dated 22 May 2018 was hand delivered by her to the Claimant. In the reply by email of the same date timed at 15:01 the Claimant did not deny the hand delivery, but instead asked for all relevant paperwork regarding this, which was provided.
 - 5.3.3. Nevertheless the Claimant denies seeing the grievance outcome letter until February 2019. Before the Tribunal the Claimant gave evidence. She denied that Mrs Hickling hand delivered the outcome letter dated 22 May 2018 which was clearly marked “hand delivered”. She said that Mrs Hickling was lying or “mixing it up” about the hand delivery on that date. The Claimant clearly knew the outcome (but on her version she had not seen the outcome letter) on receipt of the Respondent’s letter dated 13 December 2018 (see paragraph 8 of the Claimant’s statement), although the Claimant’s witness statement said the decision was handed down in February 2019 (see paragraph 12 of the Claimant’s witness

statement). Further in the Claimant's application to amend she says that she was unaware that the allegations she made were found to be false until she saw the letter concluding her grievance, on 13 February 2019 (see paragraph 7 of the application to amend). In the same paragraph the Claimant said that the matter had been appropriately dealt with until 13 February 2019.

- 5.3.4. On the other hand Mrs Hickling in her evidence said that she had delivered the final outcome letter to the Claimant on 22 May 2018 and in so doing said "this is the letter you've been waiting for".
- 5.3.5. In her evidence the Claimant refers to suffering with mental health problems from around September 2018, which prevented her discussing aspects of her harassment (see paragraph 14 of the Claimant's witness statement). The Claimant produced two letters to the Tribunal concerning her health. These were handed up in support of an application for a screen. Neither supports her September evidence and no other medical evidence in support was produced.
- 5.3.6. In March 2019 the Claimant instructed MHK Solicitors (see the Claimant's witness statement at paragraph 15) and despite a "further discussion" with them in which the Claimant explained the alleged sexual harassment no claim of sexual harassment appeared in the claim form which was lodged when MHK Solicitors were the Claimant's representatives and no application to amend the claim form for sexual harassment was apparent until 4 July 2019.
- 5.3.7. The alleged perpetrator of the sexual harassment, Mr Christie, left the employment of the Respondent as long ago as April 2018.
- 5.4. Victimisation – allegations by the Claimant and where applicable comments by the Respondent
 - 5.4.1. The Claimant makes the claim on the grounds that she made an allegation that the Respondent or another contravened the Equality Act 2010, namely by a grievance dated 3 April 2018 and that as a result the Respondent subjected the Claimant to the detriments set out at paragraphs 17 to 40 of the statement attached to the claim form, the contents of which are referred to above.
 - 5.4.2. The last alleged detriment it is alleged took place on 8 November 2018.
 - 5.4.3. There was no sign of a claim in the Claimant's claim form, which was lodged when the Claimant was legally represented, and the claim emerged as an alternative possibility on 4 July 2019 but was not confirmed until 22 July 2019.
 - 5.4.4. During the period of the alleged victimisation, in May 2018 the Claimant was selected for redundancy, but the Respondent found the Claimant suitable alternative employment, which the Claimant accepted and transferred to this employment in June 2018. Nevertheless, the Claimant alleges at paragraph 5 of the further

and better particulars that from April 2018 the Respondent was seeking to manage the Claimant out of the business.

5.4.5. The Claimant again pleads her health. The Tribunal finds as per paragraph 5.3.5 above.

5.4.6. The detriments to which the Claimant appears to refer are referred to at the following paragraphs above:

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5.1.8

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5.1.13

and 5.1.14,

5.2.3 and 5.2.4

5.4.7. Of those the Respondent finds some exception in the following:

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5.1.7

5.1.8

5.1.9

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5.1.12

5.1.13 and 5.1.14; in 5.2.3 the Claimant appears to make no complaint and in 5.2.4 the Claimant lost her appeal.

5.4.8. Before the Claimant issued her grievance and before the first pleaded detriment the Claimant received a verbal warning for eight occasions of absence (see paragraph 5.2.1) and was the subject of a conversation over lateness (see paragraph 5.2.2). These the Tribunal finds are matters to which the Claimant refers as in minor breach of company policy at paragraph 4 of the Claimant's further and better particulars.

6. Unfair dismissal – matters arising during the hearing and observations

6.1. The Claimant never specifically raised a grievance or grievances about alleged breaches of contract. The main grievance related to the sexual harassment lodged on 3 April 2018. A letter was sent to a Mr Danby on 31 May 2018 as to the Claimant's treatment, but no copy was before the Tribunal and a letter was also sent by the Claimant to the Respondent on 28 November 2018, only two days before the Claimant's contract was terminated and after notice had been given on 21 November 2018, which was substantially the same as the

attachment to the claim form. There was also an email dated 5 September 2018 from the Respondent to the Claimant which described the Claimant as a key member of the team, whose performance in her role had been excellent, which valued the Claimant as a key member of the team and that in everything else apart from time keeping and attendance the Claimant was doing great.

- 6.2. Save for the instances of sexual harassment in March 2018 the claim form does not mention any instances of bullying and harassment in the wider sense.
- 6.3. Are the matters referred to in paragraphs 1 to 40 of the statement attached to the claim form breaches? If so, to what extent have they been affirmed? By a reference to the paragraph numbers mentioned above are they or any of them breaches? In answer paragraph 5.1.1 if true would be a breach. Otherwise were the remainder? As to affirmation, paragraph 5.1.1 the Claimant waited eight months before resigning, albeit without reason and on the Claimant's version without the outcome of her grievance.
- 6.4. Less favourable treatment is not the test for constructive dismissal (see paragraph 4 of the further and better particulars).
- 6.5. The Claimant pleads her medical record but there is no direct evidence of such record up to and including September 2018.
- 6.6. So far as the Claimant's ability to pay a deposit order is concerned, at the hearing she stated that she was unemployed and in receipt of benefits and that her expenditure equalled her income. She had no savings.

7. Sexual harassment – matters arising during the hearing and observations

- 7.1. Time – Eatons solicitors do not appear to have advised the Claimant on limitations. In fact they do not seem to have given specific advice on the matter of sexual harassment at all. The advice from the trade union was wrong in that the limitation period was three years – see paragraph 12 of the Claimant's witness statement. MHK solicitors clearly did not issue claim for sexual harassment and the claim only surfaces as part of an application for leave to amend at this hearing. Of more importance than action (or inaction) by the Claimant's advisors is her inaction. Here on the Claimant's version was a very unpleasant experience and yet on her version she let it run on for months whilst continuing employment and went to two firms of solicitors and her union, obviously failing to communicate that unpleasantness in an untimely manner, only making her application for leave to amend on 22 July 2019, 16 months after the event. More could have been done earlier. In paragraph 16 of her witness statement the Claimant explained to her solicitors that she had suffered sexual harassment. The solicitors' advice was to contact the police. Information was clearly then available to lodge an Employment Tribunal claim.
- 7.2. There is no suggestion of a failure by the Respondent to investigate the sexual harassment complaint appropriately. The Claimant's

complaint seems to be that she did not receive the outcome of her grievance in time.

8. Victimisation – matters arising during the hearing and observations

8.1. Time – this claim starts to run on 8 November 2018. Eatons were certainly instructed after that date, but it is not clear whether their instructions included the matter of victimisation nor indeed were the union so instructed but MHK solicitors had been instructed since proceedings were issued. Leave was not applied for until 22 July 2019, seven and a half months after the claim arose (at the latest) and four to five months after MHK were instructed. There seems to be no explanation from the Claimant as to why it took so long to issue this claim.

9. Determination of the issues (after listening to the factual and legal submissions made by and on behalf of the respective parties)

9.1. Unfair dismissal – strike out/deposit order

9.1.1. Whether or not the claim has little reasonable prospect of success or not, the Claimant's ability to pay any consequent deposit order is in question having regard to the evidence as to her means. The Tribunal must therefore consider whether or not there is no reasonable prospect of success. If there is none it may strike out the claim. If there is more than no reasonable prospect of success the claim must go through to a full hearing.

9.1.2. At the hearing before Employment Judge Lancaster on 4 July 2019 the learned Judge recorded that it was conceded by the Claimant that the particulars of the unfair dismissal claim were inadequate. The Tribunal is unable to see that the further and better particulars added enhanced view which was put by the learned Judge.

9.1.3. The Tribunal takes into account the decision in **Tayside**, so that there have to be most exceptional circumstances to justify a strike out, but the Tribunal also takes into account that this is not a case where dismissal is admitted and the onus is clearly on the Claimant to prove that she was entitled to terminate her contract by reason of the Respondent's conduct.

9.1.4. The Tribunal has carefully set out the alleged facts which form the basis of the Claimant's claim. In nearly every case the Respondent disputes the allegations, including the allegation at the outset of sexual misconduct. It is clear that after that alleged incident the Claimant let matters run on, on her version, without an answer to her grievance and without her pressing for an answer for her grievance. Is there more than no reasonable prospect of success that the Claimant could prove such conduct by the Respondent?

9.1.5. If this case went to a full hearing it could be a case where the "last straw" doctrine would be applied. The alleged last straw is referred to at paragraph 5.1.14 above. It is an alleged incident, where the Respondent says that there was no complaint, but more importantly the Claimant's resignation letter was silent on the point. **Omilagu** says that the last straw does not have to be of the same character

as earlier acts and does not necessarily have to constitute unreasonably or blameworthy conduct, although in most cases it will do. However the last straw must contribute however slightly to the breach of the implied term of trust and confidence. Is there more than no reasonable prospect of success in considering whether the last straw satisfies **Omilagu**?

- 9.1.6. The allegation of sexual harassment is by far the most serious allegation of all those set out at paragraph 5.1 of this Judgment, but not only did the Respondent reject it, the Claimant does not in her claim attack the nature of the investigation once she had the decision, whenever that might have been.
 - 9.1.7. The Tribunal will not rehearse paragraphs 5.1.2 to 5.1.14 of this decision save to say that in most cases the Respondent takes issues. Just as importantly, in an unfair dismissal case there is the Claimant's disciplinary record, which the Claimant does not deny. It is set out at paragraph 5.2 of this decision. At the time of the termination of the Claimant's employment there was a live final written warning, which had been appealed and the appeal was turned down. This written warning and a poor disciplinary record in 2018 would no doubt be considered as against the Respondent's conduct. Would such a record not contribute when considering whether there was more than no reasonable prospect of success?
 - 9.1.8. The Tribunal has also considered in the context of the Respondent's conduct that it saved the Claimant from redundancy and that (barring her poor attendance record) in September 2018 she was described as a key member of the team and that her performance was excellent.
 - 9.1.9. The key allegation so far as the claim for unfair dismissal is concerned is the alleged (but disputed and investigated) claim of sexual harassment. It is true that the Claimant raised a grievance, but on her version she left it eight months before resigning, without giving in writing the reason for resignation and surprisingly on her version without pressing for the outcome of her grievance.
 - 9.1.10. Further the Claimant pleads her medical condition, there being no evidence of it to November 2018.
 - 9.1.11. In all the circumstances, which the Tribunal is of the view are sufficiently exceptional, the Claimant's claim of unfair dismissal has no reasonable prospect of success and is hereby struck out.
- 9.2. Sexual harassment – leave to amend
- 9.2.1. The Respondent refers to the guidance on leave to amend at paragraph 4.4 above and shall refer to it as appropriate, but it is also appropriate first of all to refer to the record by Employment Judge Lancaster of the proceedings at the preliminary hearing dated 4 July 2019. It was at this hearing that the claim of sexual harassment was raised for the first time. The Employment Judge pointed out that the claim was significantly out of time and that there was a factual dispute as to whether or not the Claimant received the outcome of her grievance on 22 May 2018, as alleged by the

Respondent. The learned Judge stated that the evidence could well have a bearing on whether it might be just and equitable to extend time (which is not the subject of this application but is relevant in deciding whether or not leave should be granted to amend). Further of the learned Judge's observations are relevant to this application and are contained in the bullet points of paragraph 3.2.4 of this decision, particularly the Claimant's failure to chase the grievance and the Claimant's failure to present the claim promptly after her resignation.

- 9.2.2. In exercising its discretion as to whether or not to grant leave in this case, having regard to the principles in **Selkent**, of particular relevance are time and delay, although the Tribunal have considered all the relevant elements and circumstances, including promptness, steps taken to take advice and prejudice.
- 9.2.3. The Claimant raised her grievance on 3 April 2018. The Respondent found against it on 22 May 2018. The main witness for the Respondent made clear that the Respondent denied the Claimant's allegations.
- 9.2.4. The Claimant believed that the investigation continued until 18 December 2018, by which time she had left the employment of the Respondent. By email dated 1 February 2019 Mrs Hickling, the Respondent's head of HR, who in common with the Claimant, gave evidence before us, emailed the Claimant to say that the grievance outcome letter (dated 22 May 2018) had been hand delivered to the Claimant on that date. In her reply of the same date the Claimant did not deny it. Before the Tribunal the Claimant did deny it and accused Mrs Hickling of lying or "mixing it up". On her best version the Claimant knew the outcome (but did not then have the letter) by 13 December 2018. The Claimant said she saw the outcome letter on 13 February 2019 and that the matter had been appropriately dealt with.
- 9.2.5. The Claimant said from around September 2018 she was suffering from mental health which prevented her from discussion on the aspect of her harassment, but there was no relevant evidence before the Tribunal of her health preventing such discussion.
- 9.2.6. The main witness (and alleged perpetrator) on behalf of the Respondent is no longer in the Respondent's employment.
- 9.2.7. As to time, the Tribunal's observations are set out in paragraph 7.1 of this decision. There is no evidence that the Claimant discussed sexual harassment with Eatons. The trade union advice was wrong. In March 2019 the Claimant instructed MHK solicitors and despite discussing sexual harassment with the Claimant no sexual harassment claim appeared in the claim form.
- 9.2.8. On this point the Tribunal was referred to the case of **Virdi v Commission of Police of the Metropolis** [2007] IRLR 24 (Virdi). Elias J confirms the Tribunal's discretion in these matters (paragraph 27) in a case that was one day out of time. He confirms that a claimant cannot be held responsible for the failings of his

solicitors (paragraph 35). As the Tribunal had indicated in **Virdi** the claim was a day late solely because of the fault of solicitors.

9.2.9. This case is different because of the Claimant's inaction over a long period, where she let things run on and on and no application for leave to amend until 16 months after the event.

9.2.10. To a lesser but nevertheless important degree the Claimant says in her witness statement when she explained the sexual harassment to her solicitors that their advice was to contact the police at a time when she could have lodged her claim.

9.2.11. Further the Claimant complains that she did not receive her grievance outcome letter in time. It is unusual to have witnesses of fact in a Tribunal at a preliminary hearing such as this representing both sides. The crucial point which affects time is whether the Claimant did receive the outcome letter by hand on 22 May 2019. First the letter is marked by hand. Second it was delivered by the head of PR. Third the Claimant never denied in her email of 1 February 2019 that the Claimant had not received the outcome letter previously. The Tribunal finds as a fact therefore that the Claimant did receive the outcome letter by hand on 22 May 2019. The consequence of this is that there was even more reason for the Claimant to have taken action earlier.

9.2.12. Leave to amend the claim form by adding a claim of sexual harassment is refused mainly on the grounds that much time has passed for leave to be granted to extend time, but also because there is no reasonable explanation for the delay, that the Claimant did not issue promptly and as a contributing factor but not a deciding one the Claimant did have advice and a claim could have been made quicker as a result. Leave to amend a claim form by adding a claim of sexual harassment is refused.

9.3. Victimisation – leave to amend

9.3.1. This claim surfaced as a possibility on 4 July 2019.

9.3.2. It is an entirely new allegation.

9.3.3. The claim should have been intimated by 13 June 2019 so as to comply with the order of Employment Judge Davies.

9.3.4. The claim appears to be four months out of time.

9.3.5. The law relating to leave to amend is the same as relates to sexual harassment and is again set out at paragraph 4.4 of this decision. Although out of time the real issue in this case is that this is not a mere re-labelling. Time is however relevant, as is the lack of explanation for a delay, failure to issue promptly, steps taken by the Claimant to take advice, noting the case of **Virdi**.

9.3.6. The Claimant says the protected act is her grievance of 3 April 2019 and cites 23 cases of detriment, to a large extent to coincide with the ones in the struck out unfair dismissal case and which have been set out in this decision.

- 9.3.7. The last detriment was alleged to be 8 November 2018 but there was no sign of a claim until 22 July 2019.
- 9.3.8. During the alleged detriments the Claimant was saved from redundancy and subsequently praised for her work (save timekeeping). The Claimant still alleges that the Respondent was seeking to manage her out of the business.
- 9.3.9. The Claimant again seeks to rely on poor health, which has been dealt with above.
- 9.3.10. The Respondent takes exception to a number of the alleged detriments (see paragraph 5.4.7 of this decision).
- 9.3.11. As to the warning in May 2018 the Claimant made no appeal.
- 9.3.12. Before the grievance the Claimant's timekeeping was still receiving attention.
- 9.3.13. As the Tribunal has said leave was applied for on 22 July 2019 which is seven and a half months after the claim arose at the latest and four to five months after MHK solicitors were instructed. There seems to be no reasonable explanation why.
- 9.3.14. There is no doubt of the fact that this is a new claim, it is late without reasonable explanation, the Claimant did not act promptly to issue and although not decisive but a contributing factor taking advice in relation to the claim was late.
- 9.3.15. In all the circumstances leave to amend the claim form to add a claim for victimisation is refused.

10. Costs

- 10.1. Employment Judge Lancaster made mention of the question of costs. I have not been addressed on the matter but in any case exercise of my discretion I do not propose to make any order as to costs.

Employment Judge Shulman

Date 22 October 2019