Case Number: 3303045/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms S Roachford v The Royal Bank of Scotland Group Plc

Heard at: Watford **On**: 6 August 2019

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: In person
For the Respondent: Mr Kieran Wilson, of counsel

RESERVED JUDGMENT

(1) The tribunal does not have jurisdiction to hear the claimant's claims of disability discrimination, race discrimination and/or sex discrimination, contrary to section 39 of the Equality Act 2010.

(2) The claimant's claim that the respondent has made an unlawful deduction from her wages proceeds. A deposit order in respect of that claim is not appropriate.

REASONS

Introduction; the procedural history and the issues listed to be determined at the hearing of 6 August 2019

1 The hearing which took place before me on 6 August 2019 had originally been listed by Employment Judge Manley on 20 July 2018 to take place on 1 March

2019. The first issue for determination at that hearing was going to be whether or not the claimant was disabled within the meaning of section 6 of the Equality Act 2010 ("EqA 2010") at the material time, i.e. between August 2015 and January 2018. However, the respondent had conceded that issue before the start of the hearing before me on 6 August 2019. The second issue was whether or not any of the claimant's complaints of disability discrimination were out of time and, if so, whether it was just and equitable to extend time to allow any or all of those complaints to proceed. Given the way that the claim was subsequently advanced by the claimant (i.e. by stating in the manner which I describe below her claim, originally stated in the ET1 claim form only briefly, of race and/or sex discrimination), that question needed to be asked also in relation to the claim of race and/or sex discrimination. Only if I concluded those limitation issues in the claimant's favour would the tribunal have jurisdiction to hear any part of the claimant's claims of discrimination contrary to section 39 of the EqA 2010.

2 If I concluded that the tribunal had jurisdiction to consider any part of the claimant's claims of breaches of the EqA 2010, then (1) if applicable I would need, as a result of Employment Judge Manley's orders of 20 July 2018, to consider whether any of the claims of disability discrimination had no reasonable prospect of success, and therefore should be struck out under rule 37 of the Employment Tribunals Rules of Procedure 2013, and (2) if applicable I was prepared also to consider (at the respondent's request) that issue in relation to the claimant's claims of race and sex discrimination. As a result of Employment Judge Manley's orders, I was going to need in any event to consider whether the claim of an unlawful deduction from the claimant's wages had no reasonable prospect of success. If I did not come to the conclusion that all aspects of the claimant's claims which the tribunal had jurisdiction to consider had no reasonable prospect of success, then I would need to consider whether any of the claimant's (surviving) allegations or arguments had little reasonable prospect of success, and, if so, whether a deposit order should be made under rule 39.

3 The claimant's evidence and the other things that she said to me were not as focused as they might have been if she had had more experience of litigation. In addition, the claimant's concentration and attention flagged at times, so she needed several breaks. There was as a result not enough time on 6 August 2019 for me to come to a conclusion on any of the issues on which a decision was required, and I therefore had to reserve my judgment on them.

A discussion about the claim: what it is now apparent it is about

4 My discussions with the claimant about the claim and what its focus was, led to me to the view, as I said at the hearing, that the reason why the claim was made initially was that the claimant had not been paid the full amount of the money which she should have had as a result of her entitlement to be paid under the respondent's arrangements with Aviva by way of long-term sickness insurance.

5 I expressed the view at the hearing that that issue was probably not one which it

was within the jurisdiction of the tribunal to consider, since it appeared to me that, as described by the claimant to me, it was a claim for a sum due under a contract with Aviva and not the respondent.

6 However, it subsequently became clear to me from considering the claimant's pay statements at pages 111-116 of the hearing bundle (any reference to a page below being to a page of that bundle) that the respondent treated the contract with Aviva and the respondent's contract of employment (or some other contract between the claimant and the respondent) as being interlinked so that if Aviva concluded that the claimant was entitled to pay under the terms of Aviva's contract with the respondent, then the respondent would be contractually obliged to pay the claimant that pay. That meant that if there had been a shortfall in the amount of the money which the respondent had paid the claimant as a result of Aviva's contract for the payment of sick pay, so that the respondent had not paid the claimant the amount of money to which the claimant was entitled under either her contract of employment or some other contract with the respondent, then that was a matter which was within the jurisdiction of the tribunal, given the definition of "wages" in section 27 of the Employment Rights Act 1996 ("ERA 1996").

7 Mr Wilson had written in advance of the hearing (in his helpful skeleton argument) that since the claimant's "claims suffer from a lack of particularity generally", it was "likely to be beneficial for some time to be spent particularising [her] claims". I agreed with Mr Wilson in that regard, and I spent a great deal of time on 6 August 2019 discussing and exploring that question with the parties. As a result of that discussion, it is now clear that the claimant's claim is advanced on the following bases.

Unpaid wages

8 The claimant claims that the respondent failed to pay her her full entitlement to sick pay in 2017. The respondent says that she was paid her full entitlement, as could be seen from page 116, which was a statement of the claimant's pay for 18 January 2018, stating that the claimant had been paid a "sal[ar]y adv[ance]" of £6721, and which Mr Wilson said showed that the claimant had in fact been paid all of her entitlements to sick pay as paid by Aviva to the respondent. It was the claimant's case that that alleged salary advance had not in fact been paid to her.

Discrimination contrary to the EqA 2010

9 The first part of the details of the claim, in box 8.2 of the ET1 claim form (at page 17), stated (and stated only this) as a claim of discrimination contrary to the EqA 2010:

> "I am making a claim against my employer, for not supporting or making reasonable adjustments during a time of ill health that was deteriorating due

to the failure to recognize a disabled black woman, in a predominantly white male department of the organization. I followed the procedure to raise my concerns and as a resolution I was disciplined, and given a written warning."

10 That is a claim which is, it is now clear as a result of my discussions with the claimant and by reference to her further particulars, at pages 41-42, of

10.1 a failure to make a reasonable adjustment within the meaning of section 20 of the EqA 2010, or unfavourable treatment for a reason arising in consequence of the claimant's disability/disabilities, which was not a proportionate means of achieving a legitimate aim, i.e. a breach of section 15 of that Act, in relation to the disciplining of the claimant as evidenced by (1) a detailed letter to the claimant dated 16 May 2016 (pages 47-50), which recorded the giving of a written warning in respect of the claimant's performance and (2) detailed notes of the meeting after which that letter was written (pages 43-46);

10.2 sex discrimination through the claimant being told by one person that she was "too emotional to do the job role", and by either the same or another person, on either the same or another occasion, that she should "walk the streets to bring in more business"; those things were, according to the claimant, said during the summer of 2016, at some point after 16 May 2016 (since she recalled it being hot at the time that the thing about walking the streets was said), and, said the claimant in oral evidence, probably in June 2016; the claimant recalled that the suggestion that she should "walk the streets" was made by Mr Mark Hunter; and

10.3 race discrimination by being told to "walk the streets to bring in more business" and that she was "too emotional to do the job role".

11 Mr Wilson argued that the claim set out in paragraphs 10.2 and 10.3 above was not foreshadowed to any extent in the claim form, and that it should therefore be the subject of an application to amend the claim. The claim set out in paragraphs 10.2 and 10.3 above was first stated in the further particulars document at pages 41-42, which, I was told, was sent to the respondent on 27 October 2018. Thus, the respondent first came to know about that claim well over 2 years after the things that the claimant alleged were said were allegedly said.

The applicable time limits

12 The claimant initiated early conciliation with ACAS on 5 December 2017 and she ended it on 22 December 2017. Mr Wilson submitted, and I agree, that

12.1 a claim in respect of any act or omission before 6 September 2017 was out of time unless time was extended on the basis that it was just and equitable to do so, or there was conduct extending over a period which

ended after 6 September 2017; and

12.2 the time limit for a claim in respect of the written warning of 16 May 2016 expired on 15 August 2016.

The law concerning extensions of time in this context

13 The test for determining whether or not to permit a claim of discrimination contrary to the EqA 2010 to proceed in this context despite the fact that it was made outside the primary time limit is, as indicated above, whether or not it is just and equitable to do so. That is the effect of section 123(1)(b) of that Act.

14 There is much case law concerning the application of the test that is now in that provision. *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 contains, in the headnote, a helpful comment of Sedley LJ:

> "There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing employment tribunal proceedings, and Auld LJ is not to be read as having said in *Robertson* [i.e. *Robertson v Bexley Community Centre* [2003] IRLR 434] that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it."

15 Mr Wilson submitted that if a medical condition is claimed to have affected a claimant's ability to initiate a claim, then the claimant will need to put before the tribunal some medical evidence to support that proposition. In saying that, he relied on the following paragraphs from the unreported case of *Midland Bank v Samuels* (28 June 1993, EAT/672/92):

> "First of all if a person asserts that they were unwell, then it is up to them to produce medical evidence of the extent and effect of the illness and secondly, if a party is represented by a trade union, it is perfectly obvious that they must keep in touch with their representative. The same applies if they are represented by a solicitor or another type of expert, it may be a surveyor, or an accountant on a tax appeal or anything of that sort: it is fatal not to keep in touch with your representative because your representative is expected to take steps at various times on your behalf and needs your instructions on how to deal with these matters. If you do not reply to letters, if you move without giving your address to your representative, then that is

not something that can count in your favour. It is not a matter which you can rely on if you fail to take steps in time. The whole situation alters if it is alleged that you were unable to take these steps; that you were so affected by illness that you were not able to address your mind to your business affairs and were quite unable to take the steps which commonsense suggests. I am very glad to hear, I am sure we all are, that the trade union in this case always makes it perfectly plain to people it is representing that they must keep in touch. That normally of course would be fatal to any suggestion by Miss Samuels that it was not reasonably practicable for her to proceed in time. But what was alleged on her behalf went far beyond what is said in this medical report.

It is said that she was suffering from illness and depression following her dismissal and indeed it was added today by Ms Hollywood that she is still suffering from illness to some extent. What Mr Wishart said on her behalf was not supported by any evidence apart from this letter and therefore it was on the face of it incumbent on him to call the evidence. It may be that he would have asked for an adjournment, we do not know. It may be that he could have called evidence. The Applicant's evidence in particular would have been very important on this and it may be that what she had to say about her mental state at the various times and her reasons for behaving as she did would have thrown a flood of light on it. It might have completely destroyed her case or it might have supported it to the hilt. We do not know."

16 I did not read those paragraphs as giving rise to a rule of law to the effect that a claimant will need to put before a tribunal some medical evidence to support a claim that the claimant was too unwell to make a claim in time, but I did accept that a claimant will be greatly assisted by having such evidence about the effect(s) of one or more claimed medical conditions on the claimant's ability to do whatever was necessary in order to make a claim to an employment tribunal.

17 Mr Wilson's skeleton argument referred me to some relevant passages in the case law. I referred myself to the helpful discussion in *Harvey on Industrial Relations and Employment Law* at paragraphs PI[277[-[280]. Most of that passage was relevant, but the following one was of particular relevance here, in addition to the matters to which Mr Wilson referred in his skeleton argument:

"**[279.02]**

Where a claimant asserts ignorance of the right to make a claim, the same principles that are relevant to the 'not reasonably practicable' escape clause (see paras [206]–[206.01] above) apply when considering a just and equitable extension (see *Bowden v Ministry of Justice* UKEAT/0018/17 (25 August 2017, unreported), para 38; *Averns v Stagecoach in Warwickshire* UKEAT/0065/08 (16 July 2008, unreported)). Accordingly, the assertion must be genuine and the ignorance – whether of the right to make a claim at

> all, or the procedure for making it, or the time within which it must be made – must be reasonable. It is not enough, in a case where ignorance is relied upon, for a tribunal to conclude that a claimant has not acted reasonably and promptly without specifically addressing the alleged lack of knowledge (*see Averns* at para 23). Nor is it correct to say that the only knowledge that is relevant when considering an extension of time is knowledge of the facts that could potentially give rise to a claim, not knowledge of the existence of a legal right to pursue compensation in respect of those facts; as a matter of law both kinds of knowledge are relevant and should be taken into account (*Bowden* at para 44; ...)."

18 Paragraphs 38 and 44 of *Bowden* and paragraphs 20-23 of *Averns* fully supported that analysis. In paragraph 20 of Elias P's judgment of the Employment Appeal Tribunal ("EAT") in *Averns,* the EAT referred to "the penultimate sentence from Lord Justice Brandon's judgment" in "*Wall's Meat Co Ltd v Khan* [1978] IRLR 499, at p.503", as being "highly material" in *Averns.* The relevant passage of Brandon LJ's judgment was set out in paragraph 19 of *Averns*. I saw the final sentence from that passage of Brandon LJ's judgment in *Khan* as being also highly material here. Those two sentences are:

> "Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial tribunal that he behaved reasonably in not making such inquiries."

The claimant's evidence as to why she did not make her claim about the events of 2016 until early 2018; relevant extracts from the medical evidence in the hearing bundle

19 I heard the claimant give oral evidence about the reasons why she did not make a claim about for example the giving to her of a written warning in 2016 until January 2018. She said that the fact that she did not make a claim before she did was that she was so hampered by her disabilities that she was unable to think clearly about (1) the possibility of making a claim, and (2) how to take appropriate steps to start a claim.

20 The conditions on which the claimant relied in that regard were (1) Type 1 Diabetes, and (2) Fibromyalgia. She relied on them both individually and in combination. There was in fact in the hearing bundle a series of reports from occupational health specialists (who might or might not have been medical doctors) about the claimant's conditions.

21 At pages 73-74 there was a report dated 27 June 2016 from Ms Charlotte Lee, an Occupational Health Adviser, to Mr Colin George of the respondent. I took its contents into account fully. I note here only that in it, Ms Lee wrote this:

'In Miss Roachford's referral it states "Sabrina has been under performing for the past 2 years and on 6/5/2016 was issued with a written warning". Miss Roachford as you are aware is an insulin dependent diabetic. She was absent from work from November 2014 until August 2015 due to various different symptoms which required further investigation and impacted on her well being. Miss Roachford was diagnosed as having fibromyalgla in 2015. Fibromyalgia syndrome (FMS), is a long-term condition that causes pain all over the body.
As well as widespread pain, people with fibromyalgia may also have:
increased sensitivity to pain
fatigue
muscle stiffness
difficulty sleeping
cognitive issues (known as "fibro-fog") such as problems with memory and concentration
Miss Roachford reports experiencing each of these symptoms to varying degrees. Miss Roachford remains under the care and review of her GP; she is prescribed medication to help reduce the intensity of her pain symptoms which is proving to be effective. There is no cure for fibromyalgia; only management of symptoms. Miss Roachford's diabetes is controlled with diet and insulin and is not causing her any issues at this time.'

22 On 25 August 2016, Ms Beverly Bussey, another Occupational Health Adviser, wrote to Mr George the letter at pages 75-76. In that letter, among other things Ms Bussey wrote this:

"Miss Roachford made me aware she had experienced a range of symptoms long term which were diagnosed last year as Fibromyalgia, this presents as fatigue, poor memory and concentration and widespread aches and pains, these symptoms impact upon mobility and Miss Roachford made me aware she is under the review of the GP and has recently commenced some treatment 2 weeks ago to see if this assists with symptom management.

...

We discussed the workplace and Miss Roachford attributes symptoms of stress to the workplace and she is aware of the Employee Assistance programme for support. Miss Roachford made me aware she also attributes some stress to the impact of the ongoing improvement plan.

<u>The decision on whether the definition of disability applies is ultimately one for a tribunal. However, my interpretation of the relevant UK legislation</u>, is that Miss Roachford's conditions of Fibromyalgia and Diabetes are likely to be considered a disabilities [sic] because they

- Lasted longer than 12 months.
- Would have a significant impact on normal daily activities without the

benefit of treatment

I recommend that a stress risk assessment be carried out as soon as possible and I suggest that this be carried out by the line manager. The aim is to facilitate active dialogue about the issues, identify workplace stressors and develop an action plan to try, where possible to mitigate them. This should be reviewed on a regular basis and the action plan adjusted accordingly. This process should continue for as long as both parties feel it would be beneficial.

...

I advise management discuss the improvement plan and discuss what flexibility is available regarding this to assist with reducing stress."

(Emphasis by underlining added.)

23 There was a series of statements of fitness for work in the bundle. At page 80 there was one dated 5 October 2016, i.e. the day after the start of the claimant's period of absence from work because of sickness which has not yet ended. It stated as the reasons for the claimant's unfitness for work: "Assault, bruising, stress at home." The next one in the bundle was at page 81. It was dated 28 October 2016 and the reason for the claimant's stated unfitness for work was "stress". The next one was dated 11 November 2016. It was at page 82 and also stated that "stress" was the reason for the claimant's unfitness for work.

24 There was a certificate at page 83 dated 29 November 2016 and it stated "anxiety" as the reason for the claimant's unfitness for work. So did the certificates dated 19 December 2016 and 3 February 2017 at pages 84 and 85 respectively. There was in the bundle at page 87 a note of a meeting between Mr Mark Saunders and the claimant at the claimant's home which took place on 14 March 2017. At the end of the note, the claimant is recorded by Mr Saunders to have "asked what other options [I believe it is those words; they were obscured in the copy that I had in the bundle] were available and open to her" and to have "sited" (i.e. cited)

"1. Retirement on medical grounds
2. Potential for a Like for Like redundancy [I believe is the word used]
3. Possible job share"

25 At pages 97-100 there was a letter from a Dr Hasan Tahir, a Consultant Physician in Rheumatology & Acute Medicine at Bart's Health NHS Trust, London, dated 31 October 2017 and sent to Ms Liz Anson, Senior Claims Case Manager at Aviva. In that letter, Dr Tahir wrote this:

"[The claimant] first saw me back in September 2016 when I diagnosed her with Fibromyalgia. At the time she was complaining of a two year history of

symptoms which includes joint pains, lethargy, poor sleep pattern, poor concentration, headaches feeling bloated and a significant brain fog.

...

Miss Roachford is currently a Relationship Manager. I believe that she will struggle to return to work. She has previously tried a phased return to work, which was unsuccessful. Her work involved visiting a number of clients which would not be possible in her current state. Her work involved a lot of stress and anxiety which would clearly cause a deterioration in her current condition. This will result in her not being able to manage her workload. She also suffers from quite significant brain fog and inability to focus and concentrate and lapse of memory all of which will cause problems in her current position. She is also on medication which can also affect her focus, concentration and memory.

I did contemplate suggesting a retry to a phased return to work but I genuinely believe that this will be unsuccessful. She is currently struggling with certain activities of daily living including at times difficulty with washing. She complained of quite significant lethargy and pain in multiple parts of her body."

(Emphasis by underlining added.)

26 The claimant's evidence about the manner in which she came to make her claim to the tribunal and why she had not made it before she did, was as follows.

27 She said that the first time that the proposition of making a claim to an employment tribunal arose was when she went to the respondent's in-house employee assistance team. That team was called "Turn to Us". That team mentioned the possibility of making a claim to an employment tribunal. The claimant first went to see them in late October 2017. The team recommended that the claimant went to ACAS first, as she had to do so before making a claim. The team advised the claimant initially about her financial situation and how to deal with it, for example by seeking Jobseekers' Allowance, and how to do so.

28 The claimant said that she had not before then thought about going to an employment tribunal, i.e. making a claim to an employment tribunal about any aspect of her work-related difficulties. It was clear from her evidence that the only thing in her mind when she first thought about making a claim to an employment tribunal was making the respondent pay what the claimant thought the respondent had promised to pay her.

29 The claimant said too that she was aware about the possibility of making a claim to an employment tribunal. She said that she was aware that the law had changed in relation to the payment of fees for the making of a claim: it had changed from a situation in which fees were required to a situation in which they

were no longer required for the making of a claim.

30 While she said that she had previously read a newspaper, while off sick she had struggled with reading: her eyesight had been erratic, and her concentration was not what it had been previously. She said that her brain could not cope with reading, so she stopped reading. She said that she also stopped watching television for the same reason. She said that she had, however, long known about the possibility of making a claim to a tribunal. She said: "People go to tribunal all the time." She had taken banking examinations, and obtained a professional certificate in banking.

31 She said that she was aware ("I guess that I was aware") that there are time limits for claims, but not in relation to her specific case.

32 The thing that made her make a claim to an employment tribunal was, she said, that she had just wanted the respondent to pay her what it said it would pay her, but that then "so many things went wrong that I said enough is enough." The thing that precipitated the making of a claim was that, as she put it, six days before Christmas she was left destitute with no money for her children, which she thought was "disgusting".

33 During cross-examination, the claimant said that her "main claim" was "about the non-payment of the money" but that "also" the respondent had "disregarded a health condition that they have not helped me with, and I have said that this is what I am suffering from, and I need help."

34 She said, however, that the pain-relieving medication that she was taking had affected her ability to think clearly.

35 As for the written warning given to her on 16 May 2016, she had not appealed it. She was represented at the disciplinary meeting which preceded that warning by a representative of Unite, the union. She had sought further help from the union's regional organiser and had called him or her but there had been a difficulty about the involvement of that organiser which had meant that she (the claimant) had given up seeking the organiser's help. It was clear to me that the claimant might well have given up the attempt to enlist the union's help at that point as a result of the effects on her of her Fibromyalgia.

A discussion about the relevant factors

36 It was clear to me that the claimant suffered from what was referred to as "fibro-fog" in the extract set out in paragraph 21 above, during the material period. However, it was a very long period, and the claimant was made well aware of the fact that the question of whether or not she had a disability within the meaning of the EqA 2010 was one which fell within the jurisdiction of a tribunal: that was clear from the extract set out in paragraph 22 above. The claimant was, as I note in paragraph 30 above, well aware that people "go to tribunal all the time".

37 In addition, the real reason why the claimant made her claim to this tribunal was that she was concerned that she had not been paid the benefits that the respondent said that it had paid her. The claim of a failure to make a reasonable adjustment, or of a breach of section 15 of the EqA 2010, was clearly an after-thought. In addition, the claimant had after 16 May 2016 and up to 4 October 2016 continued to work, so she was (I concluded on the balance of probabilities) not so cognitively impaired that she could not have made a claim during that period (i.e. the period of the primary time limit of three months) if she had been minded to do so. The same was true of the possibility of making a claim in respect of the reference to the claimant being "too emotional" and to the suggestion that she should "walk the streets".

38 Those were factors which weighed strongly against the conclusion that it would be just and equitable to extend time for the making of the claims of disability, sex and race discrimination. There was in addition a further factor in regard to the claim of sex and race discrimination, and that was that the claim in those regards was articulated by the claimant only on 27 October 2018, which was well over two years after the alleged comments were made. The fact that memories fade very quickly, and that the persons who had allegedly made those comments can first have been asked about them only after that date, meant that there would be considerable hardship caused to the respondent if the claim of sex and race discrimination was permitted to proceed.

39 As against those factors there was the fact (to which I refer in the first sentence of paragraph 36 above) that the claimant had evidently been struggling markedly during the whole of the period from 16 May 2016 onwards. However, the suggestions made by the claimant on 14 March 2017, as recorded in paragraph 24 above, were concrete and sensible. Plainly, she had had some ability at that time to think practically about the way forward.

My conclusion on the question whether it was just and equitable to extend time

40 As I say below, I concluded that the claim of a failure to pay wages within the meaning of section 27 of the ERA 1996 should proceed to trial. I considered whether the fact that there would be a trial of that one claim justified the conclusion that it would be just and equitable to extend time for the making of the claimant's other claims. I concluded that it did not do so, not least because there was no overlap between the claim of a failure to pay wages and the subject matter of the claims of a breach of the EqA 2010.

41 Taking into account all of the circumstances and case law to which I refer above, and having considered the matter with great care, I concluded that it was not just and equitable to extend time for any of the claimant's claims made under the EqA 2010.

The chances of success of the claim of a failure to pay the claimant her full entitlement to wages

42 It was clear that the claim of a failure to pay wages was in time. While the respondent denied the claim on the facts, it is a matter which in my view clearly can and should go to trial. It is not a claim which I could on the papers before me conclude had little reasonable prospect of success. Accordingly I did not see it as appropriate to make a deposit order in respect of that claim.

43 The hearing of the claim is likely to take half a day (rather than 1-2 hours at most), if only because of the claimant's condition of Fibromyalgia. If the respondent is able to show the claimant by documentary evidence that she is mistaken in thinking that wages that should have been paid were not paid to her, then there will be no need for a trial.

44 In the meantime, the parties should liaise with the tribunal staff with a view to the case being listed for a half-day hearing to determine the claimant's claim of a failure to pay wages to her. The hearing will depend entirely on documentary evidence, and in that circumstance I see no need to give formal directions at this stage. Once the hearing has been listed, the parties should co-operate with a view to preparing the case for trial, and only if there is a difficulty in that regard should they ask the tribunal for directions. However, if there is such a difficulty then the parties can ask for a short telephone hearing to be held by me.

A postscript

45 On (probably) 8 August 2019, the claimant brought to the tribunal building and gave to the staff to put before me a small folder with copies of the documents that she said she had given to the solicitors whom she had instructed to attend the hearing of 6 August 2019 but who had, she said during the hearing, not attended. The claimant had put with that folder a copy of Mr Wilson's skeleton argument on which she had written by hand her responses to the points made in it. There was no evidence that the claimant had given a copy of those documents to the respondent.

46 I concluded that it was too late (in that it was contrary to the interests of justice) for either party to put new evidence before me on the issues about which I had heard evidence and submissions on 6 August 2019, and I therefore concluded that I had to ignore the contents of the file. If I had not come to that conclusion then there would have been an additional difficulty arising from the fact that the file was covered by legal professional privilege and the claimant would have had to consider whether she was implicitly waiving that privilege.

47 In any event, I concluded in contrast that it would be in the interests of justice to look carefully at the claimant's handwritten responses to the points made in Mr Wilson's skeleton argument, but it did not seem to me that I could fairly take any of those responses into account against the interests of the respondent without

giving the respondent an opportunity to respond to the relevant response. In fact, there was nothing in the claimant's handwritten comments on Mr Wilson's skeleton argument which affected my views on the issues to which I have come to the conclusions stated above. Accordingly, I was able to come to the final conclusions stated above without giving the respondent an opportunity to respond to the claimant's handwritten comments on Mr Wilson's skeleton argument.

In conclusion

48 In conclusion the tribunal does not have jurisdiction to hear the claimant's claims of discrimination contrary to section 39 of the EqA 2010, but it does have jurisdiction to, and should, hear the claim of an unlawful deduction from wages, in respect of which no deposit order should be made.

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Employment Judge Hyams

Date: 22 August 2019

Sent to the parties on:

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For the Tribunal Office