EMPLOYMENT TRIBUNALS

Claimant: Ms S Samrai

Respondent: Choices Care Ltd

Heard at: **Leicester (via CVP)** **On: 2 December 2021**

Before: **Employment Judge Varnam**

Representation
Claimant: Mr K McNerney, counsel
Respondent: Ms P Hall, consultant

RESERVED JUDGMENT

1. The effective date of termination of the Claimant's employment was 12 April 2021.

2. The Claimant's claims of unfair and wrongful dismissal were accordingly brought in time.

3. The Claimant's application to amend her claim to include a claim of discrimination arising from disability contrary to section 15 of the Equality Act 2010 is allowed.

4. The Claimant's solicitor's e-mail sent to the Tribunal and the Respondent's representatives at 16:01 on 30 November 2021 shall stand as particulars of her section 15 claim.

CASE MANAGEMENT ORDERS

1. By no later than the twenty-eighth day after the date on which this judgment is sent to the parties, the Respondent must file with the Tribunal and serve on the Claimant's solicitors amended Grounds of Resistance. These amended Grounds of Resistance must at the least set out (i) the Respondent's response to the section 15 claim, and (ii) the position which the Respondent now adopts in response to the unfair and wrongful dismissal claims, given my finding that the effective date of termination

was 12 April 2021, and my rejection of the Respondent's pleaded case that the Claimant resigned on 17 December 2020.

2. The matter shall be listed for a closed preliminary hearing, with a time estimate of two hours, to identify the issues in the case and consider further directions. The parties will be notified separately of the date, time, and venue of this hearing.

3. By no later than 48 hours prior to the preliminary hearing, both parties must file with the Tribunal and serve upon each other completed case management agendas and lists of issues. If possible, the agendas and lists of issues should be agreed between the parties.

REASONS

Introduction

1. By an ET1 issued on 8 August 2021, the Claimant brought claims of unfair dismissal and wrongful dismissal. This followed her commencement of ACAS early conciliation on 7 July 2021, and the subsequent issuing by ACAS of an early conciliation certificate dated 19 July 2021.

2. The ET1 alleges that on 12 April 2021 the Claimant was summarily dismissed from her job as a support worker at a care home operated by the Respondent in Leicester. It is alleged that this dismissal occurred during a telephone conversation with Ms Edelyn Hyde, the registered manager of the Respondent's Leicester branch.

3. On 6 September 2021 the Respondent filed an ET3. In its ET3, the Respondent asserted that the Claimant had resigned from her employment on 17 December 2020, during a telephone call with Ms Nusrat Fatema, an administrator employed by the Respondent at its Leicester branch. The Respondent argued that the Claimant's claims were accordingly out of time.

4. A final hearing of the Claimant's claims was initially listed on 2 December 2021. On 21 September 2021, Employment Judge Ahmed directed that the 2 December hearing be converted to a one-day preliminary hearing, to determine whether the Claimant had resigned on 17 December 2020, and thus whether the claim had been presented out of time. He also directed that if the claim was out of time, the question of whether it was reasonably practicable for the claim to be presented in time should be considered.

5. On 22 September 2021, the Claimant, who at that time was acting in person, e-mailed the Tribunal, seeking to amend her claim to add a claim of disability discrimination. By an e-mail dated 30 September 2021, the Respondent opposed the application. On 16 October 2021 Employment Judge Adkinson directed that the amendment application should be heard at the preliminary hearing on 2 December.

6. Employment Judge Adkinson also directed that by no later than 7 days before the 2 December hearing (i.e. by 25 November 2021) the Claimant should send details of the proposed disability discrimination claim to the Tribunal and the Respondent.

7. By an e-mail from her solicitor, sent at 16:01 on 30 November 2021, the Claimant clarified that her proposed disability discrimination claim was one of discrimination arising from disability, contrary to section 15 of the Equality Act 2010. She alleged, in summary, that she was asthmatic, that that amounted to a disability within the meaning of section 6 of the Equality Act, that in consequence of her asthma she was required to shield during the Covid-19 pandemic and that this caused her to be off work for a prolonged period, and that the Respondent dismissed her because of that absence. At the outset of the preliminary hearing, the Claimant's counsel, Mr McNerney, confirmed that, in respect of her proposed disability discrimination claim, the Claimant did not seek to rely on any matters beyond those set out in her solicitor's e-mail (and the evidence necessary to prove those matters). Although the Claimant's solicitor's e-mail was provided five days later than had been directed by the Tribunal, Ms Hall on behalf of the Respondent did not object to me considering it as part of the Claimant's application. This was a sensible approach, since there was no practical prejudice to the Respondent arising from the delay.

The Hearing

8. The core issues before me, as agreed with the parties at the beginning of the hearing, were as follows:

    (1) On what date did the Claimant's employment come to an end? In particular, did it end by resignation on 17 December 2020?

    (2) Having regard to my conclusions on issue (1), had the claim been brought in time? In closing submissions Mr McNerney realistically accepted that if the Claimant's employment had ended on 17 December 2020, then her claim would be out of time, and it would have been reasonably practicable for the claim to be brought in time. I accordingly was not required to consider questions of reasonable practicability.

    (3) Should I exercise my powers under rule 29 of the Employment Tribunal Rules of Procedure 2013 to permit the amendment of the claim to include the claim of discrimination arising from disability, as formulated in the Claimant's solicitor's e-mail of 30 November 2020?

9. At the hearing, I heard evidence from the Claimant on her own behalf. I heard evidence from the following witnesses on behalf of the Respondent:

    (1) Ms Adeirah Garcia, care coordinator.
    (2) Ms Mayesha Ibrahim, the manager of the Respondent's Birmingham branch.
    (3) Ms Edelyn Hyde, the manager of the Respondent's Leicester branch and the Claimant's line manager.

(4) Ms Shemu Nessa, the Respondent's operations manager.

10. I was also referred by the Respondent to a witness statement from Ms Nusrat Fatema, administrator. Ms Fatema did not attend the Tribunal to give evidence. I was informed that she was abroad due to a family emergency, and that she would accordingly be unable to attend owing to a six-hour time difference. I agreed to consider Ms Fatema's statement, but indicated that in assessing the weight to be given to it I would have regard to the fact that she gave evidence on a highly contentious factual issue, but had not been tendered for cross-examination.

11. I was provided with a bundle of 159 pages. Both parties took issue with the admissibility of some documents in the bundle. Mr McNerney objected to the inclusion of a press release relating to a previous criminal conviction that the Claimant had received. It was said by Mr McNerney that this was irrelevant to the matters in issue. On behalf of the Respondent, Ms Hall contended that it was relevant to credibility. I admitted this evidence, on the basis that if I found it to be irrelevant I would disregard it, but that it could potentially be relevant to credibility, and I would not be able to assess its relevance until I had heard the evidence. In the event, the Claimant's conviction was not heavily relied upon by Ms Hall, and I have not placed any weight upon it.

12. Ms Hall in turn objected to the inclusion of the Claimant's telephone records, on the grounds that they might have been doctored. I admitted these records, on the basis that I could only determine whether they had been doctored once I had heard evidence.

13. A further seven pages of documents, consisting of extracts from the Respondent's telephone records, were disclosed by the Respondent early on the morning of the hearing. I gave Mr McNerney time to consider these with the Claimant, and he did not ultimately oppose their admission. They were added to the bundle as pages 160 to 166.

14. The evidence of the five witnesses was heard during the morning. After lunch, I heard closing submissions from Mr McNerney and Ms Hall. I am grateful to both representatives for their assistance. I hope that I do them no disservice by not setting out in detail the various arguments that they each advanced, but I have taken into account all the matters that were put before me during the course of the hearing.

Relevant Law: Time Limits

15. A complaint in respect of an alleged unfair dismissal must be presented to the Tribunal within three months beginning with the effective date of termination of employment: Employment Rights Act 1996, section 111.

16. A complaint of breach of contract (such as the Claimant's wrongful dismissal claim) must also be presented to the Tribunal within three months beginning with the effective date of termination: Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, Article 7.

17. In both of these claims, time may be extended if the Tribunal concludes that it was not reasonably practicable for the Claimant to bring the claim within the primary time limit. In such circumstances, time will be extended so that the claim may be brought within such further time as the Tribunal considers reasonable.

18. In respect of either claim, time will not run while a Claimant is engaging in the ACAS early conciliation process, so long as that process was commenced within the primary time limit. Where early conciliation has been commenced within the primary time limit, time will be extended by the length of the early conciliation process, unless early conciliation is commenced less than one month from the expiry of the primary time limit, in which case time will run to the end of one month from the date of issue of the early conciliation certificate: Employment Rights Act 1996, section 207B.

19. In this case, the effect of these provisions is that if the Claimant's employment ended, as the Respondent alleges, on 17 December 2020, then she should have commenced ACAS early conciliation by 16 March 2021. As she did not do so until 7 July 2021, she was out-of-time. By contrast, if the Claimant's employment ended on 12 April 2021, as she alleges, then she had until 11 July 2021 to approach ACAS, and was accordingly within time.

Relevant Law: Amendment

20. In considering the application to amend I had regard to **Selkent Bus Co Ltd v Moore** [1996] ICR 836. At 843F, Mummery J, as he then was, held that when the Tribunal is asked to exercise its discretion to permit an amendment, the Tribunal should consider all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Mummery J identified relevant factors including the nature of the amendment, the applicability of any time limits, and the timing and manner of the application. These factors are also set out in the Employment Tribunals (England & Wales) Presidential Guidance – General Case Management (2018).

21. In considering an application to amend, the Tribunal must distinguish between amendments which merely seek to add or substitute a new claim arising out of the same facts as the original claim (sometimes termed 're-labelling') and amendments which seek to add a new claim unconnected with the original claim. In the latter case, the Tribunal must also consider time limits.

22. Here, the proposed new claim was one of discrimination arising from disability, contrary to section 15 of the Equality Act 2010. The time limit for such claims is three months beginning with the date of the allegedly discriminatory act (subject to the extension of time for early conciliation): Equality Act, section 123. As the allegedly discriminatory act relied upon was the alleged dismissal, this means that the primary time limit was the same for the proposed discrimination claim as for the unfair dismissal and wrongful dismissal claims. Time may be extended in respect of a discrimination claim where it would be just and equitable to do so. The Tribunal has a broad discretion as to the extension of time in such a case,

but the burden of establishing that time should be extended rests with the Claimant: **Robertson v Bexley Community Centre** [2003] IRLR 434.

23. The fact that a proposed claim to be introduced by way of amendment would be out of time if brought as a wholly new claim does not necessarily pose an insuperable bar to the amendment being allowed. Rather, the time limit is 'a relevant factor, but it [is] by no means the only factor to be taken into account in the exercise of the discretion vested in the Employment Tribunal' and time limit points 'may or may not have greater or lesser weight depending on all the circumstances': see paragraphs 25 and 26 of the judgment of Singh J (as he then was) in **Conteh v First Security Guards Ltd** (2017) UKEAT/0144/16.

24. I also considered the recent judgment of His Honour Judge Tayler, sitting in the Employment Appeal Tribunal, in **Vaughan v Modality Partnership** [2021] IRLR 97, in which he emphasised that the *Selkent* factors that I have identified above are not the only factors that may be relevant, and that the focus of a Tribunal considering an amendment application should be on the balance of prejudice between the parties, depending on whether or not the amendment is allowed.

Findings of Fact

25. The Respondent is an operator of care homes. It has three branches, in Birmingham, Leicester, and Peterborough. Peterborough is the head office.

26. The Claimant was employed by the Respondent as a support worker at its Leicester branch from 24 February 2017. Her manager throughout her employment was Ms Edelyn Hyde.

27. In the early months of 2020, the United Kingdom was affected by the Covid-19 pandemic, which in March 2020 led to the UK being placed under 'lockdown'. The Claimant's children began to display symptoms of Covid-19, and the Claimant was advised that she should self-isolate. With effect from around 23 March 2020, the Claimant accordingly did not attend work, but instead provided the Respondent's Jackie Markham with self-isolation notes which she had generated from the gov.uk website.

28. The Claimant says that she was subsequently advised to 'shield'. It is said that this was because she had been diagnosed with asthma, but in the absence of a full exploration of the evidence on this point I make no findings about the reason why the Claimant was advised to shield (or, indeed, whether she was so advised). What is clear is that the Claimant did not return to work, and her GP issued her with a series of fit notes, recording that she was unfit for work. These were provided to Ms Markham by the Claimant.

29. The Respondent initially paid the Claimant statutory sick pay ('SSP') while she was absent. The Claimant's entitlement to SSP was exhausted on around 14 September 2020. On 12 October 2020 the Respondent's operations manager, Ms Nessa, wrote to the Claimant to confirm that her SSP entitlement had expired. This letter was sent by recorded delivery, and was received by the Claimant. In her evidence, Ms Hyde confirmed

that it was the Respondent's practice to send important letters such as this by recorded delivery. Ms Hyde also stated in her witness statement that both when deciding to terminate payment of SSP and (previously) when considering how to respond to the Claimant's decision to self-isolate/shield, she had taken advice from the Respondent's HR advisors, Peninsula.

30. The last fit note in the bundle (other than that provided on 12 April 2021, to which I refer below) is dated 5 October 2020 and signs the Claimant off until 4 November 2020. The Claimant appears to have stopped providing fit notes on a regular basis once she stopped receiving SSP.

31. I now turn to the main factual dispute that I must resolve. This is the events (or non-events) of 17 December 2020. According to the Respondent, early that afternoon the Claimant telephoned Ms Fatema, who was working at the Respondent's Leicester branch. Ms Ibrahim, the manager of the Birmingham branch, was with Ms Fatema that day, because she was training Ms Fatema. According to Ms Fatema's witness statement, when she answered the Claimant's call, the Claimant asked to speak to Ms Hyde. When told that Ms Hyde was not available, Ms Fatema alleges that the Claimant said 'can you please tell [Ms Hyde], I won't be coming back to work'. Ms Fatema goes on to say that she asked the Claimant to record this in writing, to which the Claimant agreed.

32. Ms Ibrahim's evidence was that she heard half of a conversation, although only the half spoken by Ms Fatema, not that spoken by the Claimant. After the call had ended, Ms Ibrahim said that Ms Fatema told her 'that was a lady called Sukhi. She said she will not be coming back to work and to let [Ms Hyde] know'. In her oral evidence, Ms Ibrahim said that she saw Ms Fatema make a note of the telephone call in the Leicester branch's handover book, and that she herself also made a note of what had transpired. No notes have been produced in evidence; Ms Ibrahim said that she did not know whether she had retained her own note, and she did not know what had happened to Ms Fatema's note.

33. The Claimant's account of what happened on 17 December is in stark contrast to that of the Respondent. The Claimant denies that she made any telephone call to the Respondent that day, and particularly denies that she has ever told the Respondent that she would not return to work.

34. In support of her account, the Claimant adduced her mobile telephone records. These show that the Claimant made three telephone calls on 17 December 2020, but that none of them were to the Respondent. The Claimant in her evidence confirmed that she only had access to one telephone.

35. The Respondent also adduced its telephone records. These also do not show a telephone call from the Claimant to the Respondent's Leicester branch on 17 December 2020. They do, however, show a telephone call from a withheld number to the Respondent's Peterborough head office at 14:29 on 17 December. It was put to the Claimant that this was a call from her. On its face, this seemed a surprising suggestion, given that the 17 December telephone call was allegedly received by Ms Fatema while working at the Leicester branch. According to Ms Nessa's evidence,

however, a telephone call placed to one of the Respondent's branches will be transferred to a different branch if the telephone has rung more than three times without being answered. Thus, Ms Nessa suggested, the explanation as to why the call alleged to come from the Claimant might have been made to the Peterborough branch but picked up in Leicester was that the Claimant had initially telephoned Peterborough, but that no one had picked up the call there, with the result that the call was transferred to Leicester. It was not, however, clear why the Claimant would have telephoned Peterborough, given that she had always worked at Leicester, and that, on the Respondent's case, she wished to speak to Ms Hyde, who was the manager of the Leicester branch.

36. None of the telephone records produced by the Respondent show any telephone calls to the Leicester branch. So far as I can see, this must mean either that the records do not in fact show calls that were made to Leicester, or that while numerous calls were made to both Birmingham and Peterborough during the period covered by the records, no one at all telephoned Leicester during that period.

37. The question of what happened on 17 December is at the heart of the issues that I have to resolve. I will return to it below, and will set out the conclusions that I have reached, which are to some extent informed by my findings about events postdating 17 December, to which I now turn.

38. There is in the bundle a letter dated 21 December 2020, from Ms Nessa on behalf of the Respondent to the Claimant. The salient part of this reads as follows:

> *It is with regret that I acknowledge the receipt of your verbal resignation on the 17th December 2020 from your position as care assistant. Your resignation has been approved and, per your request, your contract has been terminated immediately.*

39. I was shown a properties file for a Word document headed 'Resignation Acceptance'. This seemed to indicate that the document in question had been created at 10:43 on 21 December 2020.

40. Ms Hyde's evidence was that she asked Ms Nessa to write the letter, and that she saw it before it was sent out. Ms Nessa's evidence was that the letter was posted on 21 December 2020.

41. The Respondent accepted that this letter was not sent by recorded delivery. It was Ms Hyde's evidence that such an important document would normally be sent by recorded delivery, as the letters of 12 October 2020 (see above) and 2 July 2021 (see below) were. Ms Hyde explained the failure to send the 21 December letter recorded delivery on the basis that the Respondent was short-staffed at the time.

42. The Respondent did not take advice from its HR advisor, Peninsula, prior to sending this letter.

43. The Claimant denied that she had received any such letter, and I accept that denial. There was no correspondence from the Claimant in response to the letter, which I would have expected to see had it been received.

Such communications as the Claimant did have with the Respondent after 21 December 2020 were also inconsistent with the Claimant having received this letter, because (as described below) they were predicated on the idea that the Claimant remained employed.

44. Notwithstanding the fact that Ms Fatema was alleged to have told the Claimant to put her resignation in writing, this was not done, nor was it pursued by the Respondent.

45. The Claimant's telephone records show that on 23 December 2020 she telephoned the Respondent's Leicester branch. The Claimant's evidence was that during these calls, she spoke to Ms Markham, to request that a risk assessment take place before she returned to work. Ms Markham did not say anything to the Claimant to the effect that the Claimant had resigned or no longer worked for the Respondent.

46. It was suggested by Ms Hall that the Claimant had not telephoned the Respondent on 23 December. This was on the basis that no calls from the Claimant can be seen in the Respondent's telephone records for 23 December. However, as I have already noted, the records provided do not show any calls whatsoever to the Leicester branch, and I consider it more likely that the records produced by the Respondent do not, for whatever reason, include calls made to Leicester, than that the Claimant has doctored her own records to add two telephone calls that were not made. Given that, on the Claimant's case, the 23 December telephone calls were of peripheral relevance, it would be surprising and unnecessary for her to fabricate a story of making these calls, and still more surprising for her to doctor her telephone records in order to support such an unessential fabrication. I accept that the 23 December telephone calls were made, and having heard the Claimant's evidence, which was not directly contradicted, I accept that the content of these calls was as the Claimant described.

47. After 23 December, there was no contact between the parties until the Claimant made further telephone calls to Ms Markham at the Leicester branch on 30 and 31 March 2021. It surprised me that the Claimant made such infrequent contact with the Respondent which, on her case, was still her employer at the time. The Claimant's evidence as to the reason for the lack of communication was somewhat confused. However, I accept that she was off work and receiving no pay, and that until she was able to return to work she would realistically have had little reason for regular contact with the Respondent. I also note that long periods without contact were not unusual at that time: the Claimant's telephone records show that the last time she had been in contact with the Respondent prior to her telephone calls on 23 December 2020 was 3 November 2020.

48. On 12 April 2021 the Claimant attended her GP's surgery, and was signed fit to return to work from 20 April. The Claimant hand-delivered her fit note to the Respondent's Leicester branch the same day.

49. The Claimant's fit note came to Ms Hyde's attention shortly after it was delivered. Ms Hyde immediately telephoned the Claimant. While there is some difference between Ms Hyde and the Claimant as to the words that were used, it is common ground that Ms Hyde told the Claimant that she no longer worked for the Respondent, and could not come back to work.

50. On 13 April 2021 the Claimant e-mailed the Respondent, marked for Ms Hyde's attention. The e-mail began as follows:

> *After your call yesterday I am shocked to hear from you that my contract with the company has been terminated, I have not received any letter stating this…*

51. This e-mail was not responded to. The Claimant subsequently telephoned the Respondent and left a message with Ms Markham asking that a manager ring her as soon as possible. The Claimant's call was not returned.

52. On 16 April 2021 the Claimant e-mailed again, for the attention of the Respondent's managing director. This e-mail also questioned the termination of her employment, and stated that she had only become aware of this on 12 April. The Claimant's e-mail was not responded to.

53. During April and May 2021 the Claimant made further efforts to contact the Respondent by telephone at its Leicester and Peterborough branches, and by a text message to Ms Hyde. I accept that the reason for these communications was that the Claimant wanted to challenge the fact that her employment had come to an end. The Claimant received no substantive response to these communications.

54. On 30 June 2021 the Claimant's trade union, Unison, wrote to Ms Hyde, asking for details of her alleged resignation. In response to this, on 2 July 2021 Ms Hyde wrote to the Claimant. The salient parts of this letter are as follows:

> *You called the office and spoke to one of the administrators on the 17th December 2020 and stated that you will not be coming back to work anymore.*
>
> *I enclose a copy of a letter dated 21st December 2020, in which we wrote to you to accept your resignation. I have also attached a copy of your P45 which has also been sent to you previously.*

55. This letter was sent by recorded delivery. It was only when the Claimant received the 2 July letter that she saw, for the first time, the letter dated 21 December 2020.

56. I have seen a copy of the P45 which was enclosed with the 2 July letter. This P45 is itself dated 2 July 2021, so it is difficult to see how it could have been provided to the Claimant previously. There was no evidence of an earlier P45 having been produced. It was surprising that the P45 was not produced until some 6.5 months after the Claimant had, on the Respondent's case, resigned. My surprise at this apparent delay was increased by the evidence of Ms Ibrahim and Ms Hyde. Ms Ibrahim said that at her Birmingham branch, a P45 would be issued following the payroll run immediately following the termination of employment. Ms Hyde said that if an employee had resigned on 17 December 2020, she would not expect a P45 to go out in December 2020, but that one would

ordinarily go out in January 2021. There was no explanation for the considerable delay in producing the Claimant's P45.

57. The Claimant subsequently contacted Her Majesty's Revenue & Customs to ask about her employment history. HMRC wrote to the Claimant on 8 July 2021. The letter from HMRC records that the end date of the Claimant's employment by the Respondent was 18 November 2020, a date which neither party puts forward as the effective date of termination in this case. I have heard no explanation from anyone for this obvious error.

58. The Claimant meanwhile commenced ACAS early conciliation, and thereafter issued her claim.

Effective Date of Termination: Conclusion

59. I now turn to set out my decision as to the Claimant's effective date of termination. As will be clear from the foregoing paragraphs, the key issue is whether the Claimant resigned on 17 December 2020.

60. I have little hesitation in finding that the Claimant did not resign on 17 December 2020. I reach this view based on an assessment of the totality of the evidence, but I have relied on the following points in particular:

    (1) In order for the Claimant to have resigned by telephone on 17 December 2020, there would have to have been a telephone call on 17 December 2020. However, the Claimant's telephone records show that no such telephone call has been made. In order for me not to place weight on those records I would need to conclude that they had been doctored or redacted in some way. But there was no evidence before me to substantiate such an allegation.

    (2) It is of course possible that the Claimant might have used a different telephone number. However, there would have been no reason for the Claimant to use a different telephone, and I accept that she does not generally have access to multiple telephones. In cross-examination it was put to the Claimant that she had used a different telephone number as part of a 'master plan' to bring an unfair dismissal claim. But such a case is not plausible. If the Claimant had been planning from December 2020 to bring an unfair dismissal claim, it is unlikely that she would have waited until July 2021 to commence early conciliation.

    (3) I do not consider that the Respondent's telephone records assist me. The suggestion that the telephone call to Peterborough from a withheld number at 14:29 on 17 December 2020 was in fact made by the Claimant is unsupported by any evidence, and is in my view groundless. Among other things, there is no apparent reason why the Claimant would call Peterborough, given that she was based at Leicester and (according to the Respondent) wished to speak to Ms Hyde who was also based at Leicester. I note that the Claimant's telephone records indicate that all telephone calls made by her prior to April 2021 were made to Leicester, not Peterborough.

(4) For these reasons, I find that the documentary evidence points strongly towards a conclusion that there was no telephone call of the kind alleged by the Respondent on 17 December 2020.

(5) Moreover, the Claimant's actions after 17 December are not those that I would expect to see from someone who had resigned on 17 December. Inconsistent actions from the Claimant include the telephone calls on 23 December and the delivery of a fit note on 12 April 2021, each of which was predicated on the notion that the Claimant would at some point return to work. Moreover, the Claimant's reaction to being told, on 12 April 2021, that she was no longer employed by the Respondent is not at all consistent with someone who had resigned four months before. I refer in particular to the Claimant's repeated attempts by e-mail, text message, and telephone call to question what she had been told.

(6) There are a variety of surprising failures by the Respondent to do things in the aftermath of 17 December which I would have expected to see done if the Claimant had indeed resigned. These include:

- The failure to chase the provision of a written resignation from the Claimant.
- The failure to produce to the Tribunal any notes or internal records concerning the alleged resignation. This was particularly surprising, given Ms Ibrahim's evidence that both she and Ms Fatema took contemporaneous notes of the 17 December telephone call. If such notes had been taken (which I do not accept, given my view that the alleged telephone call did not take place), I would expect them to have been produced.
- The failure to take advice from Peninsula as to the appropriate response to the resignation, even though Ms Hyde's evidence shows that Peninsula were generally consulted on HR matters.
- The apparent failure to send the resignation acceptance letter by recorded delivery, even though this was done with other important correspondence, and was, Ms Hyde said, usual practice. I do note that Ms Hyde said that the Respondent was short-staffed at the time that the letter is said to have been sent, but Ms Nessa's evidence was that she had personally arranged the sending of the letter, and I can see no reason why short-staffing would have prevented Ms Nessa from ensuring compliance with the Respondent's usual practice. Overall, I do not accept that the letter was in fact sent in December 2020, or prior to its inclusion with the 2 July 2021 letter.
- The failure to issue a P45 until 2 July 2021, even though both Ms Hyde and Ms Ibrahim indicated that the Respondent would ordinarily have been in a position to issue this by January 2021 at the latest if the Claimant had resigned on 17 December 2020.

(7) I found the Claimant's own evidence to be credible. While she was at times more vociferous in advancing her account than was necessary, her denial that she resigned was emphatic and consistent with the account that she has maintained since at least her e-mail of 13 April 2021. It is true that she has a previous conviction for an offence of

dishonesty, but this does not mean that everything that she says is dishonest, and I did not find her evidence on this matter to be dishonest or otherwise unreliable.

(8) The Respondent's key witness was Ms Fatema, since she was the only person who could give direct evidence that the Claimant had used words of resignation on 17 December 2020. However, Ms Fatema did not attend the hearing and was not tendered for cross-examination. While I took into account her evidence as set out in her witness statement, I gave it less weight because of her non-attendance and the fact that her account could not, therefore, be challenged. The mere fact that the Claimant's evidence was not directly opposed by Ms Fatema's live evidence does not mean that I must accept the Claimant's account, but in the absence of Ms Fatema there was little to counterbalance the Claimant's credible evidence, which was consistent with the various other factors that I have set out above. While Ms Fatema's account was to some extent supported by Ms Ibrahim, Ms Ibrahim did not claim to have heard the Claimant's half of the alleged conversation, and, moreover, I do not consider that Ms Ibrahim's account can outweigh the strong evidence from the telephone records that the alleged 17 December 2020 conversation did not take place at all.

61. The document that gave me some pause for thought as to my conclusion was the properties document showing that a Word document entitled 'Resignation Acceptance' had been created on 21 December 2020. Such a document tended to suggest that the Respondent had drafted the letter dated 21 December 2020 on that date, notwithstanding the fact that it was not seen by the Claimant until July 2021. If the letter had been drafted in December 2020 that would support the argument that the Claimant had indeed resigned at that time. However, I was given little evidence about the properties document, and indeed had no direct evidence from any of the Respondent's witnesses to confirm that it related to the letter allegedly sent to the Claimant on 21 December, rather than to a different document. In any event, a factual finding in a case like this must necessarily be drawn from a smorgasbord of evidence, not all of which will always point towards the same conclusion. Given the abundance of evidence indicating that the Claimant had not resigned on 17 December 2020, I would not in any event conclude that the properties document was strong enough evidence to persuade me that the Claimant had, in fact, resigned on that date.

62. For the reasons set out above, I prefer the evidence of the Claimant to that of the Respondent, and I find that the 17 December 2020 telephone conversation did not take place. As such, the Claimant cannot have resigned during this alleged conversation. I also find that the Claimant did not resign at any other point.

63. I therefore find that the Claimant's employment did not end on 17 December 2020. Given that I have also accepted that the Claimant did not receive the letter dated 21 December 2020, it follows that the only possible date of termination of the Claimant's employment was 12 April 2021, and I find that that was the effective date of termination.

64. As such, the Claimant's unfair and wrongful dismissal claims have been brought in time.

65. I add that, while I have heard some evidence about the events of 12 April 2021, it is not necessary, in order for me to reach a conclusion on the question of what was the effective date of termination, to make positive findings as to exactly what was said between the Claimant and Ms Hyde on 12 April, or as to whether or not the termination on 12 April was a dismissal, and I do not do so. In light of my findings above, it will be a matter for the Respondent as to whether it wishes to continue to dispute that the Claimant's employment was terminated by dismissal, and if that matter is disputed it will need to be dealt with at the final hearing. The effect of the findings that are essential to my conclusion is, however, that the Respondent cannot now argue that the Claimant's employment ended on 17 December 2020, or at any point prior to 12 April 2021.

Amendment application: Conclusion

66. While I acknowledge that they are not the sole factors to be considered, the *Selkent* factors form a useful starting point in analysing this application, albeit that they do not necessarily form an end point. I will therefore consider the *Selkent* factors at the outset, before moving to consider the overall question of the balance of hardship.

67. The nature of the amendment: Mr McNerney sought to persuade me that the proposed amendment was no more than a re-labelling of existing factual averments. I reject this argument. In my view, the proposed new claim, as articulated in the Claimant's solicitor's e-mail of 30 November 2021, asserts at least three factual matters which were not advanced in the ET1. First, it is said that the Claimant is asthmatic. Second, it is said that this amounts to a disability within the meaning of section 6 of the Equality Act. Third, it is said that the Claimant's absence from work from March 2020 was something that arose in consequence of her alleged disability. These are all new matters, which are neither explicitly nor implicitly set out in the Claimant's ET1. Mr McNerney placed reliance on the fact that the Claimant had said in her ET1 that she was shielding. However, I do not consider that this pleaded fact can be unpacked so as to include the three matters that I have set out above. It does not, for example, necessarily follow from the fact that someone is shielding that they are disabled within the meaning of section 6 (for example, a person could be shielding because of a condition that is likely to last less than twelve months). I approach this application, therefore, on the basis that what is proposed is a relatively substantial expansion of the existing case.

68. The applicability of time limits: Given that I consider that this is not a mere re-labelling exercise, time limits are relevant. On the face of it, the proposed section 15 claim would be out of time if brought as a new claim. The Claimant was issued with her early conciliation certificate on 19 July 2021, and accordingly had until 19 August 2021 to issue her ET1. She did not seek to add a discrimination claim until 22 September 2021, by which time she would have been 34 days out of time.

69. I must therefore consider whether it would be just and equitable to extend time by 34 days. I have on balance come to the view that it would. In forming this view I have considered the following matters in particular:

(1) The Claimant has advanced a reason for the failure to originally include the proposed section 15 claim in her claim. In her evidence, she said that she did not initially realise that she could bring a disability discrimination claim, and that she only became aware of this after speaking to ACAS on or around 22 September 2021. In essence, she relied on ignorance and her status as a litigant-in-person.
Viewed by itself, I would not have regarded this reason as sufficient to justify an extension of time. It is a reason, but not, in my view, a particularly good one: time limits exist for a reason, and the Tribunal is entitled to expect all parties, represented or not, to adhere to them. Nonetheless, it can be said that this is not a case in which the Claimant has advanced a reason which positively undermines her case for an extension. I therefore consider that if other factors militate in favour of an extension, then it would be just and equitable to grant one.

(2) The factor that really persuades me that a just and equitable extension should be granted is the balance of hardship. I refer to this below, and in my analysis of an extension of time I have relied upon the same matters that I address below on this question.

(3) I also consider that the relatively minor nature of the extension of time sought is a factor which supports the case for an extension.

70. The timing and manner of the application: This is an application made relatively promptly, and at an early stage of proceedings. Dealing with the application has not caused delay or disruption to the proceedings, as it has been possible to deal with the matter at an already-listed preliminary hearing.

71. Overall, it seems to me that the *Selkent* factors would, albeit by a narrow margin, favour permitting the amendment. While this is a substantial amendment, and one which is *prima facie* out of time, this is a case where it would in my view be just and equitable to extend time, and where the application has been made at an early stage and has not caused delay or disruption which might militate against granting it.

72. However, I again remind myself that the key test is the balance of hardship. Viewed in that light, even if I took a different view of the *Selkent* factors, I would permit the amendment. This is because an overall view of the balance of hardship favours the Claimant.

73. On the one hand, clear and irremediable prejudice will result to the Claimant if she is not permitted to pursue her section 15 claim. She would thereby be permanently prevented from pursuing a claim which has a relatively substantial monetary value beyond that of the unfair and wrongful dismissal claims, in the form of the *Vento* award which would follow were it to succeed. Moreover, the section 15 claim has a non-monetary consequence which the unfair and wrongful dismissal claims do not have, in that if it succeeds it will entail a finding that the Claimant has been subjected to unlawful discrimination, something which parliament

has deemed sufficiently serious to proscribe by law. If I refuse permission to amend, both the monetary and the non-monetary consequences of the section 15 claim will be denied to the Claimant without her having any opportunity to seek to prove her claim. This prejudice would not be lessened by the fact that she would still be able to pursue her unfair and wrongful dismissal claims: those claims are different in nature and give rise to more limited financial and other remedies than a section 15 claim.

74. On the other hand, I consider that there will be little prejudice to the Respondent if the application is allowed. In closing submissions, Ms Hall argued that the Respondent would be prejudiced by bad publicity as a result of having a discrimination claim brought against it, and also that the Respondent would need to disclose the fact that it was subject to a discrimination claim if bidding for local authority contracts. However, there was no evidence put before me to substantiate these assertions. In any event, I consider that any prejudice of this nature is likely to be minimal: certainly, it was not suggested that, for example, any bids for local authority contracts would be materially adversely affected by a mere allegation of discrimination.

75. Moreover, in my view the Tribunal's focus when assessing prejudice should ordinarily be on matters within the Tribunal's purview and control, namely the litigation process. Ms Hall rightly conceded that the Respondent would not face any real forensic prejudice in resisting a section 15 claim, if permission to amend were granted. While some limited additional evidence (as to matters such as whether the Claimant's condition amounted to a disability, or as to the state of the Respondent's knowledge) may now be required, there was nothing to suggest that the Respondent's witnesses would not be able to address these matters. The Claimant's new claim is of modest scope, with the sole alleged act of discrimination being the termination of employment, about which the Respondent would have had to call evidence in any event. It is unlikely, albeit not impossible, that the Respondent will have to call any more witnesses to resist this claim than to resist the unfair and wrongful dismissal claims.

76. It is likely that the addition of a section 15 claim will to some extent lengthen proceedings. There will at the least be a further preliminary hearing, and the length of the final hearing may be increased (although probably not, in my view, by more than one day) to deal with the additional issues that arise. It is possible, depending on the stance that the Respondent adopts, that there will be another open preliminary hearing to deal with questions of disability. So there is some prejudice to the Respondent in that it may now face slightly more time-consuming proceedings, but I consider this to be limited in extent and outweighed by the prejudice to the Claimant of being denied the opportunity to pursue her claim at all. The position might have been different had the Claimant sought to bring in, say, twenty new allegations, entailing a vast widening of the scope of the proceedings, but such is not the case.

77. For all these reasons, I have come to the view that the balance of prejudice favours permitting the amendment. I emphasise that the permitted scope of the amendment is limited to the wording of the

Claimant's solicitor's e-mail of 30 November 2021, which will now stand as particulars of her section 15 claim.

78. I add that I have considered whether the section 15 claim, as formulated in the 30 November e-mail, is adequately particularised. In my view, while brief, the e-mail contains sufficient information to enable to Respondent to understand the case that it has to meet under section 15. Ms Hall did not suggest otherwise.

Conclusion

79. For the reasons set out above, I find that the Claimant's claim was brought in time, with her effective date of termination being 12 April 2021. I give permission to amend the claim to add a section 15 claim.

Case management going forward

80. At the conclusion of submissions, I indicated that I would reserve judgment. I thereafter spent some time discussing further case management orders with Mr McNerney and Ms Hall. Naturally, the likely orders were contingent upon the conclusions that I reached on the matters before me.

81. In the event, I have found that the unfair and wrongful dismissal claims were brought in time, and have allowed the amendment application. It was agreed that if this were the result, then the Respondent would need to file amended Grounds of Resistance. I indicated that in my view there should then be a closed preliminary hearing to identify the issues and consider further directions, and neither party demurred. I asked the parties to file any dates to avoid for a further hearing by 9 December 2021.

82. Ms Hall suggested that I order that the Claimant disclose her medical records prior to the Respondent filing amended Grounds of Resistance. I did not accede to this, because I considered that the Tribunal would need to know what parts of the Claimant's section 15 claim were in issue before it could decide whether disclosure of medical records was reasonable or proportionate. The Respondent is at liberty to renew its application for disclosure of the Claimant's medical records at the next preliminary hearing, and equally the Claimant may consider voluntary disclosure before then, if it will help to narrow the issues between the parties.

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Employment Judge **Varnam**

13 December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON