# FAIR EMPLOYMENT TRIBUNAL

**CASE REFS: 1/19FET**
**786/19FET**
**12/19**
**7728/19**

**CLAIMANT:** **Cathy Averell**

**RESPONDENTS:**
1. **Tobermore Concrete Products Ltd**
2. **Marlene Sykes**
3. **Lois Kane**
4. **Glenn Robinson**
5. **William Kirkpatrick**
6. **Diane Williamson**
7. **Laura McGlade**

## DECISION ON A PRE-HEARING REVIEW

The decision of the tribunal is that

(i) The pleaded allegations of unlawful acts contrary to the Disability Discrimination Act 1995 in the period up to and including 2011 are out of time and time should not be extended. The first pleaded allegation of an act contrary to the 1995 Act which is within the jurisdiction of the tribunal is therefore July 2015.

(ii) The pleaded allegations of unlawful acts contrary to the Fair Employment Treatment (NI) Order 1998 are potentially within time. That is a matter for further argument after detailed evidence has been heard at the substantive hearing.

(iii) The applications for Deposit Orders in relation to two specific parts of the claims are refused.

**CONSTITUTION OF TRIBUNAL:**

**Vice President (sitting alone):** **Mr N Kelly**

**APPEARANCES:**

**The claimant was represented by Ms Nicola Leonard, Barrister-at-Law, instructed by MKB Law Solicitors.**

**The respondents were represented by Mr Neil Richards, Barrister-at-Law, instructed by MTB Solicitors.**

## BACKGROUND

1. The claimant was employed by the first-named respondent for approximately 17 years from 23 July 2001 to 29 March 2019 as a part-time office administrator.

2. The first-named respondent is a building products manufacturer. The named respondents were work colleagues of the claimant.

3. The claimant resigned from her employment on 29 March 2019.

4. The claimant has lodged two ET1s in this case; the first on 21 November 2018 and the second on 24 April 2019.

5. Those two ET1s and the interlocutory process have raised a variety of allegations over a significant time frame.

6. The first incident raised in these claims is an alleged protected act in 2005 and the last incident raised in these claims was her resignation on 29 March 2019, some 14 years later.

7. The claimant originally alleged unlawful discrimination, comprising direct discrimination, harassment and victimisation under a variety of headings including disability, sexual orientation, gender, religious belief, political opinion, race, and nationality. The claimant has also alleged constructive unfair dismissal.

8. The claimant originally named as respondents her employer and also six named individuals who at the relevant times had been work colleagues.

9. In the course of the Case Management process, the claimant has been encouraged to, if possible, refine her claim and to focus on matters which are within the jurisdiction of the tribunal, and on her best points. The length of the relevant period (14 years), the number and variety of the allegations and the number of respondents raise practical difficulties.

10. This Pre-Hearing Review was eventually listed to determine:

    (i) whether all or part of the claims were outside the statutory limitation period; and

    (ii) whether a Deposit Order should be made in respect of all or parts of the claims on the grounds that the claims or parts of the claims had little reasonable prospect of success.

11. At the start of the Pre-Hearing Review on 21 August 2019, some nine months after the first ET1 and some four months after the second ET1, the claimant formally withdrew all claims in relation to sexual orientation, race, nationality and gender.

12. At the start of the Pre-Hearing Review, the claimant also indicated that she was not proceeding with:

(i) the allegation of a protected act in 2005;

(ii) the allegation relating to the use of the words *"liaising with the enemy"* in or around October 2017;

(iii) any allegation at all in relation to the seventh named respondent.

13. The claim is therefore dismissed against the seventh named respondent. The claims of unlawful discrimination on the grounds of sexual orientation, race, nationality and gender are also dismissed.

14. The claimant further clarified that she was now alleging that her allegations of disability discrimination went back only to 2008.

15. It would of course had been helpful if the claimant had enabled these matters to be so clarified at a much earlier date.

16. That clarification nevertheless left significant matters to be determined in the course of this Pre-Hearing Review.

**PROCEDURE**

17. The first ET1 lodged on 21 November 2018 had been completed without the assistance of a legal representative. The claimant had however been represented at that stage by a trade union official.

18. The ET1 was difficult to understand. Of the various boxes indicating different types of discrimination, the claimant had ticked only the box relating to religious belief/ political opinion. She had included under the heading "other complaints":

    *"Dignity at work, bullying, discrimination, intimidation, harassment, bigotry."*

    She had attached an internal grievance to the claim. That grievance was incorporated into the claim and comprised 11 typed pages. It raised a number of allegations of different types.

19. The grievance referred to the claimant's mental health difficulties. It referred to the physical structure of the office and the use of screens. She alleged that she had been subject to harassment and discrimination. She alleged that she had been excluded from conversations and had been the brunt of jokes. She alleged that she had been left out of social arrangements.

    She stated that on 21 August 2018, after returning from holidays she had suffered from a severe panic attack. She stated she had been advised not to attend work.

20. In the internal grievance, the claimant set out various allegations of alleged harassment concerning the second-named respondent. She referred to family problems. She referred to alleged comments about mental health. She referred to comments about her relatives. She referred to alleged comments about sexual orientation, but not her own orientation.

21. The grievance also contained a list of alleged incidents concerning the third-named respondent. The claimant alleged that various remarks been made concerning religious belief and/or political opinion. She referred to alleged comments in relation to race or nationality but did not allege that those comments had anything to do with her own race or nationality. She referred at various stages to personal disputes which do not seem to come within any of the prohibited forms of discrimination. For example, she referred to an alleged discussion about her hair colour and to an alleged discussion about someone else who had a drug problem.

22. A further ET1 was lodged on 24 April 2019. That claim form named the same seven respondents. At that stage, the claimant apparently had legal advice.

23. The second ET1 specifically alleged disability discrimination, discrimination on the grounds of religious belief and/or political opinion, and constructive unfair dismissal. It further alleged *"victimisation*".

24. That second ET1 incorporated and repeated the content of an amendment application which had been lodged with the tribunal on 2 April 2019.

25. The second ET1 alleged that in or about 2005 the claimant had been asked to get rid of an employee who had suffered from a disability and that she had refused to do so. She claimed that this had been a protected act. She alleged victimisation as a result.

26. She alleged that in 2008 she had complained about her bereavement leave in relation to the death of her grandmother and that this also was her protected act which led to victimisation. It is not clear on what grounds this alleged incident had been either unlawful discrimination or a protected act.

27. She further alleged that in 2009 she had made a complaint about disability discrimination which had also been a protected act. Again she alleged this had led to victimisation. In particular she alleged that this led to comments about her suitability for promotion.

28. She made further allegations in relation to 2010, 2011, 2016, 2017 and 2018.

29. The second ET1 alleged unlawful discrimination on the grounds of the claimant's disability and on the grounds of her religious belief and/or political opinion. It did not seek to withdraw or even to comment at this stage on the other allegations which the claimant had made in relation to sexual orientation, gender and race or nationality.

30. The first Case Management Discussion was on 3 May 2019. At that Case Management Discussion, the claimant was represented by MKB Law. The claimant disclosed the existence of the second ET1 which had not yet been processed and served on the respondent. The tribunal administration was directed to expedite the official service of that claim form on the respondent's representative who agreed to accept service on behalf of the respondents on that day.

31. The Vice President stated at the Case Management Discussion that the first ET1 was diffuse and difficult to understand. The record of the Case Management Discussion also referred to the application to amend the initial claim to include

matters going back as far as 2005. The parties were reminded that this was a tribunal jurisdiction at first instance and that parties should attempt to narrow the issues as far as possible and, so far as possible to focus on their best points. The record stated:

> *"Alleging a range of matters over a long period of time carries the risk of unnecessarily complicating and lengthening the hearing and of losing the necessary focus on the important parts of the claim."*

32. The parties were directed to exchange Notices in an attempt to clarify and narrow the issues. A further Case Management Discussion was directed for 28 June 2019.

33. A Pre-Hearing Review was listed for 21 August 2019 to deal with the amendment application dated 2 April 2019, if the parties determined that application to amend was still extant given the second ET1.

34. The parties were advised that as the matters then stood, this would be a lengthy and complicated hearing. On that basis, the substantive hearing was provisionally listed ***for three weeks from 18 November 2019 to 6 December 2019.*** Three week hearings are almost unheard of in this jurisdiction.

35. The further Case Management Discussion was held as directed on 28 June 2019.

36. It was determined that the amendment application was no longer required. It was withdrawn as a result of the second ET1.

37. It was however directed the Pre-Hearing Review would proceed on 21 August 2019 to deal with:

    (i) whether the claims or parts of the claims were outside the statutory time limit and if so whether time should be extended accordingly;

    (ii) whether a deposit should be ordered to be paid by the claimant before that claimant is permitted to proceed with those claims or parts of those claims.

    The respondents' representative was directed to provide a skeleton argument setting out in detail the points that the respondents wished to raise in that PHR no later than 2 August 2019.

38. On 20 July 2019 the tribunal directed that both ET1s should be considered and heard together.

39. At the Pre-Hearing Review on 21 August 2019, existing directions for the substantive hearing were amended as follows:

    (i) The parties shall complete the interlocutory process ***by 5.00 pm on 20 September 2019.***

    (ii) The claimant shall provide to the respondent **signed and dated** witness statements, together with the claimant's schedule of loss ***by 5.00 pm on 11 October 2019.***

(iii) The respondent should provide to the claimant **signed and dated** witness statements ***by 5.00 pm on 1 November 2019.***

(iv) The parties, following receipt of the Pre-Hearing Review decision, shall consider whether three weeks are still required for the substantive hearing and, if not, shall notify the tribunal of agreed dates for a similar hearing between ***18 November 2019 and 6 December 2019*** as soon as possible.

**RELEVANT LAW**

**Deposit Orders**

40. Rules 17 and 19 of the Rules of Procedure in Schedule 1 to the Fair Employment Tribunal (Rules of Procedure) Regulations (NI) 2005 provide in relevant part;

*"Rule 17:-*

*(2) At a pre-hearing review a Chairman may carry out a preliminary consideration and he may –*

*...*

*(c) order that a deposit be paid in accordance with Rule 19 without hearing evidence.*

*Rule 19:-*

*(1) At a pre-hearing review if a Chairman considers that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have little reasonable prospect of success, the Chairman may make an order against that party requiring the party to pay a deposit of an amount not exceeding £500.00 as a condition of being permitted to continue to take part in the proceedings relating to that matter.*

*(2) No order shall be made under this rule unless the Chairman has taken reasonable steps to ascertain the ability of the party against whom it is proposed to make the order to comply with such an order, and has taken account of any information so ascertained in determining the amount of the deposit.*

*(3) An order made under this rule, and the Chairman's grounds for making such an order, shall be recorded in a document signed by the Chairman. A copy of that document shall be sent to each of the parties and shall be accompanied by a note explaining that if the party against whom the order is made persists in making those contentions relating to the matter to which the order relates, he may have an award of costs or preparation time made against him and could lose his deposit.*

*(4) If a party against whom an order under this rule has been made does not pay the amount specified in that order to the Secretary either:-*

(a) *within the period of 21 days of the day on which the document recording the making of the order is sent to him; or*

(b) *within such further period, not exceeding 14 days, as the Chairman may allow in the light of representations made by that party within 21 days, ...*

*a Chairman shall strike-out the claim or response of that party, or as the case may be, the part of it to which the order relates.*

41. When determining whether to make a Deposit Order under Rule 19 of the Rules of Procedure, useful guidance has been given in the case of ***Van Rensburg v Royal Borough of Kingston-upon-Thames & Others [UKEAT/0096/07]***, approved in this jurisdiction in ***Stadnik-Borowiec v Southern Health & Social Care Trust [2014] NICA 53***, when Elias P, considered the language of Rule 20(1) of the Rules of Procedure to be clear. He saw no reason to limit the words '*the matter to be determined*' to legal matters only. If that had been the draughtsman's intention, the Rule would, he suggested, surely have been differently formulated so as to render the intention clear. Elias P continued *at Paragraphs 24 – 27* of his judgment, when he stated:-

*"24 I am reinforced in this view by the fact that there is a more draconian Rule under Rule 18(7)(b) which empowers a tribunal to strike-out a claim or any part of it on the grounds that it is scandalous or vexatious or it has no reasonable prospect of success. In the recent decision in the Court of Appeal,* ***North Glamorgan NHS Trust v Ezsias [2007] IRLR 603****, Maurice Kay LJ, with whose judgment Ward and Moore-Bick LJJ concurred, recognised that in principle – albeit that the cases will be very exceptional – it would be possible for a claim to be struck-out pursuant to this Rule, even where the facts were in dispute.*

*25 Maurice Kay LJ gave as an example a case where the facts as ascertained by the applicant were totally inconsistent with the undisputed contemporaneous documentation. It is also to be noted that in that case the Employment Tribunal had, prior to making the Strike-out Order, indicated that subject to the question of means, the case would be an appropriate one for a deposit to be made. No such Order was made in the event because the Strike-out Order disposed of the case altogether. However, the Court of Appeal noted that the possibility of a deposit under Rule 20 remained open and they made it plain that that would have be considered afresh by a tribunal, but they were not 'indicating any view of the ultimate merits of this case one way or other'. The Court was clearly acting on the assumption that the power to order a deposit could in principle be exercised where the tribunal had doubts about the inherent likelihood of the claim succeeding.*

*26* ***Ezsias*** *then demonstrates that disputes over matters of fact, including provisional assessment of credibility, can in an exceptional case be*

*taken into consideration even when a strike-out is considered pursuant to Rule 18(7). It would be very surprising that the power of the tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal will be assessing the prospect of success, albeit to different standards.*

*27 Moreover, the test of little prospect of success in Rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success founded in Rule 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of a party being able to establish the facts as central to the claim or response."*

42. See further the decision of the Employment Appeal Tribunal in the case of ***Spring v First Capital East Ltd [2012] UKEAT/0567/11***, where the approach of Elias P in ***Van Rensburg*** was followed. In ***First Capital East Ltd***, Mr Justice Supperstone, when following the approach of Elias P in ***Von Rensburg*** stated at *Paragraph 17* of his judgment:-

> *"Mr Bailey has drawn to my attention a recent decision of this Tribunal in **Sharma v New College Nottingham** UKEAT/0287/11, which, he submits, has been interpreted as adopting a different approach to that adopted in **Van Rensburg**. In **Sharma** Wilkie J concluded that the approach to be adopted on disputed facts is the same for a striking out as for an order for a deposit. The decision in **Van Rensburg** does not appear to have been brought to the attention of the Tribunal in **Sharma**. In any event, the decision in **Sharma** provides, in my view, no support for the submission that the test in a strike out claim is the same as that in an application for an order for a deposit. The test on a deposit application is as set out in Rule 20(1)."*

The decision in ***Sharma*** is plainly incorrect and should not be followed in this jurisdiction. In any event, the Court of Appeal (NI) in ***Stadnik – Borowiec***, followed ***Van Rensburg***.

43. In the decision of ***Vaughan v London Borough of Lewisham & Others [UKEAT/053/12]***, Mr Justice Underhill, as he then was, has emphasised the importance of the use of Deposit Orders, properly used, as a tool for averting weak claims. He also acknowledged that a reliable assessment of the prospect of success can be made at an earlier stage of the proceedings and does not have to await a final determination and substantive hearing.

44. In the decision of the Employment Appeal Tribunal, in the case of ***Labinjo v University of Salford [2012] UKEAT/0618/11***, HH Judge Richardson commented:-

> *"The purpose of considering whether there is 'little reasonable prospect of success' at an interlocutory stage is to expose weak cases before the expense of a final hearing is incurred. This is to the advantage of both parties; and it is in accordance with the overriding objective ... . If the claimant has not acquired the evidence to support his case before he begins it, he cannot complain if this is pointed out to him, when he still has time to*

*do something about it. The deposit of £500 is a small price to pay for learning that a key element of his case requires attention."*

45. In a recent decision, ***Millbank Financial Services Ltd v Crawford [UKEAT/0290/13]***, the Employment Appeal Tribunal has confirmed that a tribunal must give reasons, albeit not at any great length, why the case had or had not satisfied the 'little reasonable prospect of success' test, referred to above.

46. In the case of ***Gloucestershire Primary Care Trust v Sesay [2013] UKEAT/004/13***, HH Judge McMullen QC has commented that decisions by Employment Judges on Deposit Orders have to be made robustly and a long period of time is not allowed for this 'summary exercise'

[*Tribunal's emphasis*]

47. In the case of ***Short v Birmingham City Council and Others [2013] UKEAT/0038***; the Employment Appeal Tribunal emphasised that the powers of the tribunal to strike-out a claim, pursuant to Rule 18(7)(b) of the Rules of Procedure, on the grounds that it has 'no reasonable prospect of success', is a draconian step with the consequence, particularly in discrimination cases but also in unfair dismissal cases where appropriate:-

> *"The higher courts have cautioned against tribunals striking-out cases on the Rule 18(7)(b) ground – that is no reasonable prospect of success – where there is a public interest in such cases being fully ventilated at a full merits hearing (see* **Anyanu v South Bank Students' Union [2001] IRLR 305** *applied by the Court of Appeal in* **North Glamorgan NHS Trust v Ezias [2007] IRLR 603** *and by the Court of Session in* **Tayside v Reilly [2012] IRLR 755***). As Lady Smith observed in this tribunal; 'no reasonable prospect of success' means that the claim has no reasonable prospect of success, nothing less will do (see* **Balls v Downham Market High School [2011] IRLR 217 Paragraph 6***)."*

HH Judge Clark, after setting aside the Strike-out Order, then made a Deposit Order on the grounds the claims had little reasonable prospect of success which was 'a lower test for the respondent than the strike-out test under Rule 18(7)(b)'.

48. In a recent decision of the Employment Appeal Tribunal, in the case of ***Bensted v A Star Education [2014] UKEAT/0211/13***, HH Judge Birtles made clear that a tribunal must refer to the material it considered, how it engaged with key material and how it arrived at the figures for the amount to be the subject of the Deposit Order (see further ***Simpson v Chief Constable of Strathclyde Police Authority [2012] UKEATS/0030*** and ***Russell v Fox Print Services LLP [2012] UKEAT/0544/12***). Indeed the ***Simpson*** case is of further relevance where Lady Smith gave helpful guidance when she said:-

> *"The issuing of a Deposit Order should, accordingly, make a claimant stop and think carefully before proceeding with an evidentially weak case and only do so if, notwithstanding the Employment Tribunal's assessment of its prospects, there is good reason to believe the case may, nonetheless succeed. It is not an unreasonable requirement to impose given a claimant's responsibility to assist the tribunal to further the overriding objective, which*

*includes dealing with cases so as to save expense and ensure expeditious disposal."*

49. In interpreting the Rules of Procedure, it has to be remembered that Regulation 3 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 provides, inter alia, that a tribunal or Chairman shall seek to give effect to the overriding objective when it or he exercises any power given to it or him by them.

    The terms of the overriding objective in Regulation 3 includes:-

    > *"Dealing with the case in ways which are proportionate to the complexity or importance of the issues; ensuring it is dealt with expeditiously and fairly; and saving expense."*

    See further the judgment of Girvan LJ in ***Peifer v Castlederg High School and Another [2008] NICA 49*** and, in particular, where he stated:-

    > *"These overriding objectives should inform the court and tribunal in the proper conduct of proceedings."*

50. In a recent decision, Mrs Justice Simler (President) of the Employment Appeal Tribunal, in the case of ***Hemdan v Ms Ishmail & Another [2016] UKEAT0021/16*** considered the issue of the making of Deposit Orders, pursuant to Rule 39 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 2013, which do not apply in this jurisdiction and are wider, as set out previously, than the terms of Rules 18 and 20 of the Rules of Procedure which apply in this jurisdiction; albeit the test of 'little prospect of success' and the basic premise behind such orders remains the same in both jurisdictions, despite the different wording, as referred to above.

    Simler J, when considering the applicable legal principles relating to a Deposit Order stated as follows:-

    > *"10. A Deposit Order has two consequences. First a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, the cost might be ordered against that paying party (with the presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a Deposit Order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claims fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both waste of time and resource, and unnecessary anxiety. They also occupy the limited time, the resource of courts and tribunals which would be available to other litigants and do so for a limited purpose or benefit.*

*11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or effect a strike-out through the back door. The requirement to consider a party's means in determining the amount of a Deposit Order is inconsistent with that being the purpose … . Likewise the cap of £1,000 (in Northern Ireland £500) is also inconsistent with any view that the object of a Deposit Order is to make it difficult for a party to pursue a claim to full hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a Deposit Order in our collective experience.*

*12. The approach to making a Deposit Order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a Deposit Order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike-out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons reaching such a conclusion serves to emphasis the fact that there must be such a proper basis."*

*"13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid costs and delay. Having regard to the purpose of a Deposit Order, namely to avoid the opposing party incurring costs, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini trial of the facts is to be avoided, just as it is to be avoided on a strike-out application, because it defeats the object of the exercise. Where, for example, as in this case, the preliminary hearing to consider whether a Deposit Order should be made was listed for three days, would question how that consistent that is with the overriding objective. If there is a core factor conflict it should properly be resolved at the full merits hearing where evidence is heard and tested."*

*[Tribunal's emphasis]*

*14. We also consider that in evaluating the prospects of particular allegation, the tribunal should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim For example, where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed translated expressions. …"*

She also confirmed that once the tribunal is satisfied that the test of little reasonable prospect of success has been found that the making of a Deposit Order is a matter of discretion and it does not follow automatically. She held it is a power to be exercised in accordance with the overriding objective, having regard to all the circumstances of the particular case.

Also Simler J further stated in her review of the legal principles relating to Deposit Orders:-

> *"16. If a tribunal decides that a Deposit Order should be made in exercise of the discretion [under the Rules of Procedure] tribunals are required to make reasonable enquiries into the paying party's ability to pay any Deposit Order and further requires tribunals to have regard to that information when deciding the amount of the Deposit Order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a Costs Order. The difference is significant and explained, in our view, by timing. Deposit Orders are necessarily made before the claim is being considered on its merits and in most cases at a relatively early stage of proceedings. Such Orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little reasonable prospect of success, it may nevertheless succeed at trial, and the mere fact that a Deposit Order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential for when such an Order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a Deposit Order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionately between the means used and the aims pursued. ...*
>
> *17. An Order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to able to raise. The proportionately exercise must be carried out in relation to a single Deposit Order or where such is imposed, a series of Deposit Orders. If a Deposit Order is set at a level at which the paying party cannot afford to pay it, the Order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck-out because it has no reasonable prospect of success, when the parties had access to a fair trial and the tribunal was engaged in determining whether costs should be ordered."*

**Statutory Limitation/Just and Equitable Extension of Time**

51. The issue in relation to statutory time limitation and the discretion to extend time in this case relates to the claims of unlawful discrimination. There is no such dispute in relation to the claim of constructive unfair dismissal which was contained within the second EI1.

52. In relation to claims of discrimination on the grounds of disability or religious belief, the statutory time limit for a claim is generally three months from the alleged incident or, where there has been a series of such incidents (a single act) three months from the date of the last such incident.

53. If a claim has been lodged after the expiry of the statutory time limit, a tribunal may extend the time limit "if, in all the circumstances of the case, it considers that it is just and equitable to do so".

54. Paragraph 3 of Schedule 3 to the Disability Discrimination Act 1995 states:

> *"(i) An employment tribunal shall not consider a complaint – unless it is presented before the end of the period of three months beginning when the act complained of was done.*
>
> *(ii) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so –*
>
> *(iii) For the purposes of sub-paragraph (i) –*
>
> > *(b) any act extending over a period shall be treated as done at the end of the period.*

55. Article 46 of the Fair Employment and Treatment (NI) Order 1998 provides:

(1) The tribunal shall not consider a complaint – unless it is brought before whichever is the earlier of –

> (a) the end of the period of 3 months beginning with the day in which the complainant first had knowledge, or might reasonably be expected first to have knowledge, of the act complained of; or
>
> (b) the end of the period of 6 months beginning with the day on which the act was done –

(5) The tribunal may nevertheless consider any such complaint – which is out of time, if, in all the circumstances of the case, it considers that it is just and equitable to do so;

(6) For the purposes of this Article –

> (b) any act extending over a period shall be treated as done at the end of the period.

56. The onus is on the claimant in each case to establish that it would be appropriate for the tribunal to exercise its discretion to extend time on the just and equitable ground. Langstaff J stated in ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** that a claimant could not hope to satisfy that burden unless he provided an answer to the following two questions:

> *"The first question in deciding whether to extend time is why the primary time limit has not been met; and insofar as it is distinct, the second is the reason why after the expiry of the primary time limit, the claim was not brought sooner than it was".*

57. In ***British Coal Corporation v Keeble [1997] IRLR 336,*** the EAT stated that the tribunal in considering the exercise of its discretion to extend time on the 'just and equitable' ground, should have regard to the prejudice which each party would suffer as a result of either granting or refusing an extension and to have regard to all the other circumstances of the case, in particular:

(a) the length of and the reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the parties sued had co-operated with any requests for information;

(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

58. When the claimant is alleging that separate incidents amounted to a single act "extending over a period", the Court of Appeal (GB) in ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*** concluded that the burden of proof is on the claimant to prove that the separate alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminating state of affairs, covered by the concept of "an act extending over a period". In determining whether there was an act extending over a period as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each act was committed, the focus of the tribunal should be on the substance of the complaints and whether this constituted an ongoing situation or a continuing state of affairs.

**RELEVANT FINDINGS OF FACT AND DECISION FOR THE PURPOSES OF THE PRE-HEARING REVIEW**

**<u>Disability Discrimination – Time Limitation</u>**

59. The claimant in her two ET1s and in her interlocutory replies has made various allegations. Mr Richards has helpfully set those out in a spreadsheet. The accuracy of that spreadsheet was not challenged by or on behalf of the claimant in the course of the Pre-Hearing Review.

60. The first issue to be determined in this Pre-Hearing Review is the question of time limitation in relation to the allegations of disability discrimination which comprise allegations of direct discrimination, harassment and victimisation. The claimant has made only one allegation under this heading of an incident in 2008. That was an allegation that the fourth named respondent had made a remark which the claimant alleges was direct discrimination, harassment and victimisation contrary to the 1995 Act. Since the claimant is no longer now relying on an alleged protected act in 2005, the claim of victimisation in this respect must fail. No other protected act is now alleged by the claimant before 2008. The only extant allegations in relation to 2008 are therefore allegations of direct discrimination and of harassment.

61. The claimant alleges that the fourth-named respondent had commented that "depression and mental health was bullshit". She further alleges that she had been removed from the People Management Team, apparently in 2009, and she further alleged that comments had been made at that stage about her mental health by others including the fourth-named respondent.

62. The claimant also alleges that in May/June 2009 she had been the subject of remarks made by the second and fifth respondents in relation to mental health.

63. She further alleges that in 2010, other staff had discussed her father and a related, possibly disciplinary, investigation that concerned him. It seems unlikely that those comments could reasonably amount to unlawful discrimination, contrary to the 1995 Act. It was not argued by or on behalf of the claimant in the course of the Pre-Hearing Review that the allegation in 2010 fell to be considered further in the substantive hearing of this matter or that it comprised unlawful discrimination of any sort. There therefore appears to be no allegation of unlawful discrimination contrary to the 1995 Act in 2010.

64. The claimant raises one allegation only in 2011, concerning alleged remarks made by the second-named respondent. The claimant was unable to remember a precise, or even an approximate date, for this alleged remark. She has simply stated that that occurred in 2011.

65. Importantly, for the purposes of this Pre-Hearing Review, the claimant has made no specific allegations at all in relation to 2012, 2013, 2014 and for the first half of 2015. The next allegation made by the claimant refers to an alleged incident in July 2015.

66. There is therefore a gap of at least 3.5 years between alleged incidents. The claimant has been given every opportunity to particularise her claims. She has lodged two separate and detailed ET1s. The claimant had been represented, and presumably assisted, by a trade union official in relation to her first ET1 and has had the benefit of legal representation in relation to the second ET1. The claimant has also replied on 27 June 2019 (on 18 typed pages) to a Notice for Additional Information.

67. The claimant sought to argue in the course of the Pre-Hearing Review that harassment had continued throughout the gap of 3.5 years in the pleaded allegations in 2012, 2013, 2014 and the first six months of 2015. That, with respect, is not the issue. It is not for the claimant to expand her claim or to seek to belatedly particularise a claim in the course of a Pre Hearing Review. On the claims as pleaded, there is a gap of at least 3.5 years in the allegations before July 2015. It is simply not credible that the unlawful discrimination had continued between the start of 2012 and July 2015 but the claimant, for some reason, had been unable to remember any of it when compiling two ET1s and in answering a detailed Notice for Additional Information.

68. The concept of "any act extending over a period" necessities a degree of continuity and consistency. It implies that the continuing act is discernible, that it subsists throughout the alleged period, and that it is pleaded as such. The onus is on the claimant to establish at least a prima facie case that the allegations pleaded are capable of forming "any act extending over a period".

69. The tribunal concludes that a gap of 3.5 years, with no pleaded allegation in that gap, must break the necessary continuity for the purposes of the 1995 Act. The pleaded allegations of disability discrimination up to and including 2011 are therefore out of time. The first pleaded allegation which is within time, and therefore within the jurisdiction of the tribunal, is that in July 2015.

70. The claimant has submitted that, if parts of the claims are outside the statutory time limit, that time limit should be extended on just and equitable grounds.

71. The claimant accepted in the course of the Pre-Hearing Review that she could have sought advice long before she did in 2018. There had been no impediment to her doing so during the previous ten years. She stated that in this period she had been "in a very bad place" but that assertion was not supported before the Pre-Hearing Review by any medical evidence. It is in any event inconsistent with her work record throughout this period. During that period of employment, she had been able according to her own evidence, to work normally and to raise internal complaints. The tribunal concludes that there are no grounds upon which it could properly extend the time limit to cover allegations before July 2015.

72. The tribunal therefore concludes that the pleaded allegations of unfair discrimination/harassment contrary to the 1995 Act before July 2015 are manifestly out of time and that time should not be extended in that regard. The allegations are dismissed.

**RELIGIOUS BELIEF/POLITICAL OPINION – TIME LIMITATION**

73. It is unclear whether the claimant is pursuing claims on the ground of religious belief alone or whether she is also pursuing claims on the ground of political opinion. The argument presented at the Pre-Hearing Review appeared to centre on religious belief alone. However, for the purposes of time limitation, that issue does not matter.

74. The pleaded allegations in relation to religious belief/political opinion/discrimination are

    (i) Sectarian comments in 2016 by the third-named respondent.

    (ii) Comments about a planning decision in June or July 2017 by the second and third-named respondents.

    (iii) The removal of items from the claimant's desk in or around late 2017.

    (iv) Sectarian comments in 2018 by third-named respondent.

    (v) The behaviour of the second-named respondent during a meeting on 2 November 2018.

    (vi) The behaviour of the second-named respondent during a chance encounter on 26 February 2019.

(vii) The grievance outcome on 8 March 2019.

(viii) The claimant's resignation on 29 March 2019.

75. The respondent argues that the allegations as pleaded are sporadic and isolated. On that basis, the respondents argue that the earlier allegations in the list above are out of time. The claimant argued that there had been a pattern of sectarian discrimination which had subsisted through the period covered by those allegations listed above.

76. It would appear that the claimant has an arguable, prima facie, case that the alleged incidents, if true, form part of a single act or a pattern of discrimination extending over a period of time. That argument may or may not succeed at the substantive hearing. That will depend on the detailed evidence presented at the substantive hearing by the claimant and by the respondents' witnesses. However for the purposes of the present Pre-Hearing Review, I have concluded that it would not be appropriate at this stage to strike out any of the pleaded allegations on unlawful discrimination on the grounds religious belief/political opinion. At this stage all the claimant has to put forward a prima facie case and she had (just about) done so.

77. The application to strike out the earlier claims of unlawful discrimination on the grounds of religious belief/political belief is therefore refused at this stage.

## DEPOSIT ORDERS

78. Deposit Orders are a useful part of case management, as indicated by the case law referred to above.

79. Much of the potential scope for Deposit Orders in the present case has been removed by the belated clarification provided by the claimant.

80. The respondents applied for Deposit Orders in respect of two parts of the claimant's claims. Ordinarily, those remaining applications would be dealt with in a separate document, which would be an order rather than a decision of the tribunal. Such orders would not be published on the internet and would only be retained in the tribunal file in a sealed envelope to minimise the possibility of the tribunal hearing the substantive hearing being prejudiced. However, as I have decided not to issue a Deposit Order in respect of either of the two remaining applications, those precautions are not necessary and the tribunal's findings can be contained within one document.

81. The first application relates to the allegation that screens had been put in place in the credit control office in 2015 as an act of unlawful discrimination/harassment. However, the allegation appears to be that the screens were removed in early 2018 in respect of other staff but that screens (possibly two screens) were retained thereafter and that those two screens had affected the claimant, until her resignation.

82. This is an allegation which will require detailed evidence from the claimant and from the respondents' witnesses. It is not possible at this stage to say that the claim in this respect has little reasonable prospect of success.

83. If, however, the relevant allegation had been in respect of the original erection of the screens for all staff in 2015, rather than in relation to the alleged retention of one or two screens in 2018 which had allegedly directly affected the claimant, a Deposit Order may well have been issued.

84. The first application for a Deposit Order is therefore refused.

85. The second application for a Deposit Order relates to the claimant's allegation of unlawful discrimination on the ground of religious belief/political opinion against the individual who had conducted the grievance procedure.

86. The evidence in relation to the conduct of the grievance procedure will have to be heard anyway in relation to the constructive unfair dismissal claim. The alleged discriminatory motivation will require very little additional evidence. It will depend solely on whether, on the basis the accumulated evidence before the tribunal, the tribunal could reasonably infer unlawful discrimination in this respect and, if so, whether any such inference is rebutted by the respondent.

87. On balance, and after some consideration, I have concluded that the second application for a Deposit Order is therefore refused.

88. I will emphasise that, if there had not been significant "clarification" of these claims at the commencement of the Pre-Hearing Review, it is probable that several Deposit Orders would have issued. As the case law summarised above makes clear, applications for Deposit Orders are a useful and perhaps an under used part of case management.

**SUMMARY**

89. This is a case where a great deal of time and effort has been expended by the tribunal and indeed by the respondent in case management.

90. Even after significant allegations had been formally withdrawn, a great deal remains to be determined.

91. It is important that this matter should be concluded within the dates allocated for hearing. The claim was provisionally listed for three weeks on the basis of all the original allocations. The parties should liaise and confirm a much shorter listing to determine the remainder of the claim within the dates currently set out for hearing.

**Vice President:**

**Date and place of hearing:** **21 August 2019, Belfast**

**Date decision recorded in register and issued to parties:**