EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Ms T Brilha		**Young & Co's Brewery Plc**

PRELIMINARY HEARING

HELD AT **London South** **ON** **14th December 2018**

EMPLOYMENT JUDGE G Phillips

APPEARANCES:

For the Claimant: In person
For the Respondent: Mr R Hignett, counsel

JUDGMENT

1. The Claimant's application to amend her complaint to add a complaint of constructive unfair dismissal is dismissed;
2. Having regard to the statutory time limits, the Tribunal has jurisdiction to consider the Claimant's claim of race discrimination;
3. The case is to be listed for a Telephone Case Management Hearing as soon as practicable, to last 1 hour, in order to list the Claimant's claim of race discrimination (limited to the incident which took place on 28th February 2017) for a hearing and to give directions for the management of that case to a full hearing.

REASONS

Procedural background

1. The Claimant presented an ET1 Claim Form to the tribunal on 27th December 2017. In that claim, the Claimant ticked the box for race

discrimination and said she was also claiming harassment and bullying, (though she did not indicate that the harassment or bullying relate to her race). The details of claim at paragraph 8 of the ET1 claim form refer briefly to a list of incidents relating to a disciplinary process in 2015 and to a further incident on 28th February 2017. (Although her claim refers to a number of Exhibits, those exhibits did not appear on the tribunal file as part of the claim form.) The claim did not suggest that any claim for unfair dismissal was being made.

2. At a Preliminary Hearing on 27 March 2018, before Employment Judge Spencer, the Claimant was asked to clarify her position on race discrimination and in particular to clarify what matters she relied on as being acts of race discrimination or harassment related to race. As recorded in the Case Management Order dated 27 March, the Claimant referred to a number of incidents

    a. the Respondent's failure in 2015 to repair the dishwasher which led to injuries to her back and shoulder ;
    b. a disciplinary process that she went through in 2015;
    c. an incident on 28th February 2017 during which Erica shouted at her and used the "F word" multiple times; and
    d. that "Erica and Alan followed me to the toilet and shouted the F word at me all the time".

3. The Claimant is Portuguese and claims that she has been treated less well than others. She said that she did not know why she had been treated in this way but that she was "the only one at the time who was Portuguese."

4. Time issues arise in relation to the claim for race discrimination. The majority of the matters about which the Claimant complains in the claim form occurred in 2015. The last matter relied on for the purpose of the race discrimination complaint occurred on 28 February 2017, after which the Claimant was off work, signed off sick and did not return to work. She resigned on 27 September 2017, some 8 months after the February incident. The Claimant contacted ACAS on 15th October 2017, 2 weeks or so after her resignation. Her ET1 was submitted on 27 December 2017, 1 day over the 3-month period that would be relevant for an unfair dismissal claim, but many months late for a race discrimination claim which has a different starting point for time to run from: under s 123(1) Equality Act 2010, any complaints of discrimination must be brought within three months, starting with the date the act or actions complained of took place, or such other period as the tribunal considers just and equitable.

5. At the 27th March Preliminary Hearing, the Claimant also told EJ Spencer that she claimed unfair dismissal. The Claimant said she relied on the Respondent's conduct set out above, relating to the incidents in 2015 and the incident in 2017. EJ Spencer recorded that as the ET1 did not include a claim for unfair dismissal, this was in effect an application

to amend her claim, and that this new claim was out of time and in any event, appeared to be that she resigned because of conduct which occurred some 7 months before her resignation, on which basis the Claimant would need to explain the delay in bringing that claim.

6. Following the Preliminary Hearing on 27th March 2018, Employment Judge Spencer decided not to deal with these issues at that time but to give the Claimant additional time to formulate any unfair dismissal claim that she wished to bring and to explain the delay in bringing the claim, and as such she ordered that the case be listed for an open Preliminary Hearing for 3 hours to consider:

    a. the Claimant's application to amend her complaint to add a complaint of constructive unfair dismissal;
    b. whether, having regard to the statutory time limits, the Tribunal has jurisdiction to consider the Claimant's claim of race discrimination;
    c. whether the Claimant's claim(s) should be struck out as having no reasonable prospect of success;
    d. Whether the Claimant should be required to pay a deposit as a condition of being permitted to continue with her claim(s) or any specific allegation or argument in that claim; and
    e. If appropriate, to list the case for a hearing and to give directions for the management of the case to a hearing.

7. The Claimant was also ordered (1) on or before 2nd May 2018, to provide to the Respondent copies of any documents upon which she intended to rely at the open Preliminary Hearing including any document evidencing her health in the period from 28th February 2017 (her last day at work) to 27th December 2017 (the date of presentation of her claim), and (2) on or before 9th May 2018 prepare and send to the Respondent a written statement containing any evidence on which she intended to rely on at the Preliminary Hearing and including :-

    a. The reason why she did not lodge her claim for race discrimination until December 2017 and otherwise setting out why she says that the claim is in time and/ or the tribunal should exercise it discretion to hear the claim out of time.
    b. The basis of her contention that the Respondent's treatment of her amounted to less favourable treatment because of her race and/or unwanted conduct which related to her race.
    c. The conduct on the part of her employers relied on as being a fundamental breach of contract for the unfair dismissal claim.
    d. The trigger for her resignation (i.e. why she resigned on the date that she did).
    e. An explanation as to why her original claim did not include a claim for constructive unfair dismissal.

8. The Claimant complied with these orders and provided documents and a written statement dated 10 May 2018.

9. The case came before me on 14 December 2018, following a postponement of the original 23 May 2018 hearing date (in order to allow arrangements to be made for a Portuguese Interpreter to be provided to the Claimant, as her English language skills are very basic) in order to determine the various issues identified at the 27 March Preliminary Hearing, as set out in the Case Management Order.

Evidence

10. The tribunal had before it copies of documents provided by the Claimant to the Respondent pursuant to paragraph 2 of the 27 March Case Management Order, and a written statement via email dated 10 May, supplied pursuant to paragraph 3 of the Case Management Order. There were some additional documents provided by the Claimant in her bundle to the tribunal, which Mr Hignett said he has not seen but took no issue with. An interpreter was available to interpret for the Claimant. The interpreter took the interpreter's oath and the Claimant gave evidence on oath. Mr Hignett submitted that the statement of 10 May did not address items a, c, or e of the matters it was supposed to deal with, as set out at para 3 of the 27 March Case Management Order (see para 7 above). The Claimant said she has been depressed over this period and this was her reason for delay in doing certain actions. Mr Hignett sensibly and helpfully agreed that, despite this apparent failure to comply with the Order, it was best to ask the Claimant questions about this during his cross-examination. He asked questions of the Claimant during cross-examination, which were designed to understand why there had been delays in submitting the original ET1 and in making the constructive unfair dismissal claim.

11. During the course of this cross-examination process, the Claimant became extremely upset and was unable to continue giving her evidence. Although the tribunal adjourned for 20 minutes, the Claimant did not feel able to continue and said she needed more time. I spoke to Mr Hignett briefly, in the absence of the Claimant, with the Tribunal clerks present, and indicated that my view was it was not going to be possible to proceed with the hearing in the time available, as I considered it unlikely the Claimant was going to be well enough to continue. EJ Spencer had purposively given the Claimant time to consider her responses by deciding not to determine these matters at the 27 March Preliminary Hearing, and the Claimant had had the chance to provide documents and a written statement. On the basis of the oral testimony that had been provided, together with the written statement and documents furnished, I believed I had sufficient evidence on which to determine the matters listed and that in my view there was nothing to be gained, and a real risk to the Claimant's wellbeing, if the cross-examination and hearing were to continue.

12. Mr Hignett helpfully agreed with that approach and indicated he would not be seeking to ask any further questions of the Claimant. He made

brief submissions along the lines already set out in the 27 March Case Management Order, to the effect that the race discrimination claim was out of time and that the just and equitable jurisdiction should not be exercised and that the constructive unfair dismissal claim was also out of time and should not be allowed to be added; further and in any event these claims had no or little prospect of success and should be struck out or deposit orders should be made.

13. The Claimant was able to return briefly to the tribunal room, but was still in a very distressed state. It was clear to me that she was not going to be able to continue with the hearing or her oral evidence. I explained to her that Mr Hignett was not going to ask her any further questions and that I believed I had sufficient evidence on which to determine the matters listed, so that it would not be necessary for her to give any more evidence, and we could end the hearing. I explained that I did not think it was appropriate for me to give an immediate judgment, given her state of distress, and that I would retire to make a considered determination of the various matters listed, on the basis of her written and oral evidence and the documents, and that she and the Respondent would receive a written judgment recording what I had decided in due course.

14. On that basis, the hearing was concluded. This document reflects my considered decisions on the matters listed to be determined at today's hearing.

Brief findings of fact

15. In her ET1 the Claimant ticked the race discrimination box and also listed a number of specific incidents that she relied upon for bullying and harassment, dating between April 2015 and August 2015. She did not specify whether these were due to race discrimination. She also referred to an accident that she had suffered on 12 March 2015, for which she was off sick between 18 March and 6 April. The Claimant was signed off work twice for episodes of depression, on the first occasion from 2 July 2016 to 7 January 2017, and on the second occasion she was signed off work for work-related stress from 1st March 2017 until she resigned in an email of 27th September 2017.

16. Following an incident on 28 February, in which the Claimant's manager swore and shouted at her, she submitted a verbal grievance. She was signed off sick from this date. In a letter in response dated 8 March 2017, the Respondent suggested a meeting. The Claimant sent a detailed letter on 10 March, setting out her grievance and the problems with her manager. While the Claimant alleged unfair treatment in her grievance, she did not allege this was due to her race or nationality. After a number of attempts, a meeting took place on 24 May, to discuss the Claimant's grievance and to consider the incident on 28 February and other allegations. The Respondent also spoke to some of the witnesses suggested by the Claimant who remained in their employment. By a letter to the Claimant dated 16 June, the Respondent acknowledged that

the manager concerned had behaved as the Claimant had alleged (swearing and shouting) and that she had behaved in an unprofessional manner but found this was an exceptional incident and that the manager acted out of character. It said that the Company has taken steps to ensure that there was no repeat of this type of behaviour. It said that the manager concerned was "acutely aware that her behaviour towards [the Claimant] that day and the language used was unacceptable". The grievance noted however that nothing had been found to suggest that the Claimant was being singled out, or to suggest any unfavourable treatment and did not uphold her grievance with regard to the other matters. A "back to work" meeting with an independent manager as a mediator was suggested once the Claimant was fit to return to work. A right to appeal was stated. The Claimant emailed on 19 June to confirm receipt and say she did not want to appeal. No appeal was made.

17. On 27 September the Claimant wrote to the Respondent to inform them of her decision to resign, which she said was done with "sadness". She wrote that although she had had 7 years of enjoyable experiences and excellent performance, since 2015, her position had become untenable, due to a new manager's approach to her, that she had been bullied and humiliated and treated unfairly, verbally abused and threatened with losing her job. She said this had caused her stress. She concluded that "as a result of these difficulties, since 2015, I believe it is better for my mental well-being to change my career-path."

18. The Claimant in her written statement dated 10 May 2018, explained that she resigned in September because "my psychologist advised me to stop working there, but I still had my bills to pay and that was also my worries … until I realised after therapy and positivism provided by the psychologist and after several failed attempts to go work there, that I just couldn't and I needed to mentalise that and take a risk of quitting and getting a new job … that was when I had the decision to quit my job." Later on in the statement, she wrote " I was with hopes to be able to go to work because I have bills to pay and decided not to after six months of trying and with the help of my psychologist that told me basically to take the leap of faith and quit my job and reinforced me by saying that I would be able to get a new job, even though afraid because I have bills to pay and a son to feed, I took courage to quit, and finally I came to a realisation that I needed to quit since after several attempts I really wasn't able to work there anymore… So my only option was really to quit …". In response to a question titled "why I chose that moment to resign", the Claimant stated "I tried before and I was able to go to work as referred above but the second time I really couldn't take the step to work because the second depression did hit me on the physical level. I did work there for nine years almost 10 and seven years that I work there it was wonderful but when the new management started to bully me my life turned into hell, I achieved to the point of realisation that I needed to quit there with the help of my psychologist and medication. It was when I did quit. Plus the amount of bills that were growing and also my

responsibilities. I really needed to take a leap of faith and step up in my life and quit a job where I did worked for almost 10 years."

19. On 15 October 2017, the Claimant contacted ACAS and an early conciliation process was commenced, which lasted until 29 November 2017, a period of 1 month and 15 days, following which a Certificate of Early Conciliation was issued by ACAS. An ET 1, making only a race discrimination claim, was submitted on 27 December. (When determining whether a time limit has been complied with, the period beginning with the day after the early Conciliation request is received by ACAS up to and including the date when the EC Certificate is issued, is not counted. This can in some instances create an extension to the usual three-month period in which claims must be brought).

20. During her oral evidence, and in response to questions from Mr Hignett, the Claimant explained that during April, while off sick, she had managed with help from the CAB to locate and speak to a lawyer, but had been told that she needed witnesses and would need to pay. There was some further discussion about proceeding on a "no win no fee" basis. The contact with the lawyer did not continue as the Claimant was concerned about finding witnesses and about the cost. The Claimant also spoke to ACAS. In response to a question about the whether she understood the three month time limit, the Claimant said she only understood about the three month limit when she came to the hearing in March this year. She also explained that throughout the period from March until the end of the year she was depressed and on medication, including a period in late April when she was in hospital. She had a number of appointments with a psychiatrist and was taking medication. Throughout this period she was still taking medication and worrying about jobs. The psychiatrist helped her with her problems. Medical notes provided show a number of appointments with her GP and others related to stress, anxiety and depression between January 2017 and August 2017, and a diagnosis of "anxiety with depression" which is recorded as lasting from 02 August 2017 to 5 January 2018. Further incidents of ill-health are also recorded.

Conclusions

21. The purpose of this hearing was to determine a number of preliminary matters:

    a. the Claimant's application to amend her complaint to add a complaint of constructive unfair dismissal;
    b. whether, having regard to the statutory time limits, the Tribunal has jurisdiction to consider the Claimant's claim of race discrimination;
    c. whether the Claimant's claim(s) should be struck out as having no reasonable prospect of success;
    d. whether the Claimant should be required to pay a deposit as a condition of being permitted to continue with her claim(s) or any specific allegation or argument in that claim; and

e. If appropriate, to list the case for a hearing and to give directions for the management of the case to a hearing.

Medical state

22. I was satisfied, based on the medical notes and evidence provided, that throughout the period from 1 March 2017, until the end of the year at least, that the Claimant was suffering from a number of anxiety and depressive conditions, of varying intensity and impact, such that she found it hard to cope and at times to function. There were external issues relating to her ownership of property in Portugal and its impact on her receipt of benefits that were also causing her financial concern and adding to her stress levels and anxiety. Throughout this period she was on medication and was in regular contact with medical professionals. She said that in some instances, her son, who was 17 at the time, helped her with written material. Although over this period she did participate in a grievance hearing that should not be, in my judgment, determinative of her ability to function. She was clearly very unwell, by varying degrees, over this period and indeed continues to be vulnerable to external pressures.

The application to add a constructive unfair dismissal claim

23. Mr Hignett submitted that I should not permit this application. This was a new claim, which was submitted out of time and in any event, this claim was apparently centred around a resignation relying on conduct which occurred some 7 months before her resignation; the burden was on the Claimant to show that she had resigned due to a breach by the Respondent; further Mr H submitted this was a claim that had no reasonable prospect of success and should be struck out under Rule 37. For all those reasons, he submitted the claim should not be allowed. If I was minded to allow it, he said it should be subject to a deposit order under Rule 39 of the Tribunal Rules.

The law

24. The Tribunal has power to grant leave to amend under its general case management power in Rule 29 of the Employment Tribunal Rules of Procedure 2013. Some general principles as to how an employment tribunal should approach an application to amend and guidelines for exercising that power are set out in the decision of the EAT in *Selkent Bus Co Ltd v Moore* [1996] I.R.L.R. 661. In essence, the EAT said that whenever the discretion to grant an amendment was invoked, “a tribunal should take into account all the circumstances, [including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]”, before balancing “the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it”. This approach was approved by the Court of Appeal in *Ali v Office of National Statistics*, [2005] IRLR 201.

25. The EAT in *Selkent*, said it was impossible and undesirable to attempt to list the relevant circumstances exhaustively but the following circumstances are certainly relevant:
    a. *the nature of the amendment*: applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new course of action.
    b. *the applicability of time limits*: if a new complaint and cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.
    c. *the timing and manner of the application*: an application should not be refused solely because there has been a delay in making it. There are no time limits lay down in the rules for the making of amendments. The amendments may be made at anytime – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. Questions of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party, are also relevant in reaching a decision, but delay in itself should not be the sole reason for refusing an application. A tribunal should nevertheless consider why an application was not made earlier and why it is being made when it is, for example whether it was because of the discovery of new facts or information appearing from documents disclosed on discovery.

26. It was emphasised by the EAT in *Selkent* that whenever taking any factors into account, "the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment" and that "the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it". Further in *Evershed v New Star Asset Management Holdings Ltd* (UKEAT/0249/09) it was stated that "it is not the business of the tribunal to punish parties (or their advisers) for their errors. In very many, perhaps most, cases where permission is given to amend a pleading, the party could if he had been sufficiently careful have got it right first time round."

27. A distinction can be drawn between amendments which add or substitute a new claim arising out of the same facts as the original claim and those which add a new claim which is unconnected with the original claim and therefore would extend the issues and the evidence. In *TGWU v Safeway* (UKEAT/0092/07) it was stated that "… amendments that involve mere re-labelling of the facts already pleaded will in most

circumstances be very readily permitted." In deciding which category a proposed amendment falls, regard must be had to the whole ET1 (*Ali v Office of National Statistics).*

Conclusion on the application to add a constructive unfair dismissal claim

28. The nature of the amendment: Taking into account the matters referenced in *Selkent*, it is clear this amendment is a substantial alteration, and is pleading a new cause of action, albeit one that is said to arise from the same facts as the existing race discrimination claim. To that latter extent, little prejudice can be said to arise to the Respondent.

29. Time limits: One of the key matters I must determine is whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

30. The time limits for bringing an unfair dismissal claim are set out in s 111 Employment Rights Act 1996. Such a complaint must normally be brought within three months starting with the effective date of termination. The Tribunal Rules of Procedure provided that when a Claim is not made within the three months' time limit, it must be made within such further period as the tribunal considers reasonable, providing that it was not reasonably practicable to make the claim within the original three month period. The ET1 claim does here not include any claim for unfair dismissal. This claim was as I understand it first mentioned at the Preliminary Hearing on 27 March 2018. On any basis, such a claim is out of time: the effective date of termination was 27 September 2017. The relevant three month time period for an unfair dismissal claim would have expired on 26 December 2017. An ET1 was submitted on 27 December, but did not mention unfair dismissal. The unfair dismissal claim was not raised until 27 March 2018, some three months outside that date and six months after the date of termination.

31. s 111 ERA imposes a two part test. I must first consider whether it was "reasonably practicable" for the Claimant to have made the unfair dismissal claim within the normal three-month period, ie on or before 26 December. I have taken account of a number of matters here, including that:

    (1) EJ Spencer adjourned the 27 March Preliminary Hearing to allow the Claimant additional time to respond formulate her unfair dismiss claim and explain the delay, but as Mr Hignett has submitted, these points are not specifically dealt with in the 10 May statement. The Claimant has provided no written evidence about this. She did provide medical records that record her various health issues over this period. The Claimant said in oral evidence that all delays were due to her health issues;

(2) the Claimant's health and the medical notes which show a diagnosis of "anxiety with depression" lasting from 02 August 2017 to 5 January 2018;

(3) the Claimant had some contact with the CAB, a lawyer, and ACAS between March and the end of December 2017, albeit that when she consulted a lawyer she had not then resigned;

(4) in the ET1, the Claimant referred to the underlying matters that she wished to complain about;

(5) in the ET1 at paragraph 7, the Claimant indicated that she had obtained another job with effect from 25/11/2017;

(6) that on 15 October the Claimant contacted ACAS; and

(7) she was able to submit an ET1 Claim Form on 27 December.

32. Balancing all these factors, I have concluded that, despite her state of health, it would have been possible for the Claimant to have brought an unfair dismissal claim in time: in particular she had had some early legal input and advice, and had managed to put in the race discrimination claim by the end of December. Other than general ill health, no specific explanation for not doing so has been advanced, despite being given an opportunity to do so. On that basis, this claim is out of time and I have no discretion to waive the time limits.

33. Further, there was an additional delay of three further months before the possibility of such a claim was raised. The issues of time limits and delay are important ones but are not the only considerations where deciding whether to permit an application to amend. In *Selkent*, the EAT said it was impossible to list the relevant circumstances exhaustively and "the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment" and that "the Tribunal should take into and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".

34. I have therefore also considered, in part because of the submissions made by Mr Hignett on strike out and deposit, what the reasonable prospects of the Claimant succeeding in a constructive unfair dismissal claim are. Obviously, at this early stage of the proceedings that is not a perfect art, but I have in that regard read the ET1 and the ET3, as well as the documents submitted by the Claimant for this hearing, and in particular her letter of resignation, her written statement of 10 May and the Respondent's letter of 16 June in regard to her grievance about the way she was treated and the incident on 27 February 2017. I have also borne in mind the Claimant's assertion that since 2015 and a change of management she had been unhappy in her work and felt bullied and picked upon.

35. In the first instance, as this would be a constructive unfair dismissal claim based around the Claimant's resignation, it would be for the Claimant to show that she resigned in circumstances which amount, in law, to a dismissal i.e. that she resigned in response to a fundamental breach of contract by the Respondent. This adds an additional hurdle for those who resign. In addition to the considerations that arise around fairness, for such a claim to succeed, it would be necessary to look at the reason behind the resignation, and determine what triggered it and whether it occurred in response to conduct by the employer which amounted to a significant breach of the Claimant's contract of employment.

36. The Claimant says she had been suffering bullying and harassment since 2015, when a new manager arrived; in her ET1 she lists a number of matters from 2015 and one from 2017. There was a gap of almost 2 years between the 2015 incidents listed in the ET1, and the 28 February incident; no further specific incidents were listed in the 10 May statement. Even if those matters were proven, and found to amount to a breach by the employer, there has to be a causal link between them and the resignation. It seems to me, on their face, the 2105 events are too remote; no other specific incidents are relied upon until the 28 February 2017 incident, which would have to be the "trigger" or "last straw" event, not least because thereafter the Claimant was not at work. Helpfully, because of the findings from the grievance, most of the facts and circumstances of that incident are not in dispute, and, on the face of it, would amount to a fundamental breach of contact, however the Claimant's resignation did not occur for almost 7 months after it. Moreover, all the specific matters complained about were raised, considered and answered as part of the grievance.

37. Following the grievance hearing, the Respondent accepted that the Claimant's manager had behaved inappropriately: "[the manager concerned] is acutely aware that her behaviour towards you on the day as well as the language she used was unacceptable. While it is not appropriate to discuss what action, if any, will be taken against [the manager] I can assure [you] that the Company has taken steps to ensure that there is no repeat of this type of behaviour." It is also noteworthy that the grievance found the incident on 28 February to be "out of character". There was also a finding that the Claimant had not been singled out for unfair treatment. The Claimant did not appeal against these findings. The Respondent proposed a mediated return to work, once the Claimant was fit to return. The Claimant did not appear to pursue that. There was a three-month gap between the receipt of the grievance outcome and her resignation.

38. The Claimant's resignation letter, as explained by her written statement, makes clear that uncertainty about getting another job was a reason for not resigning, and that her relationship with her manager continued to haunt her, despite the grievance outcome. The Claimant said she resigned because she felt it was "better for my mental well-being to

change my career-path." In the written statement dated 10 May 2018, she says that she resigned in September because "my psychologist advised me to stop working there, but I still had my bills to pay and that was also my worries … until I realised after therapy and positivism provided by the psychologist and after several failed attempts to go work there, that I just couldn't and I needed to mentalise that and take a risk of quitting and getting a new job … that was when I had the decision to quit my job." In response to a question titled "why I chose that moment to resign", the Claimant stated "I tried before and I was able to go to work as referred above but the second time I really couldn't take the step to work because the second depression did hit me on the physical level. I did work there for nine years almost 10 and seven years that I work there it was wonderful but when the new management started to bully me my life turned into hell, I achieved to the point of realisation that I needed to quit there with the help of my psychologist and medication. It was when I did quit. Plus the amount of bills that were growing and also my responsibilities. I really needed to take a leap of faith and step up in my life and quit a job where I did worked for almost 10 years."

39. On the face of it, I believe that the Claimant would struggle on causation.

40. Further, founded as it is on the contractual concept of repudiatory breach, an employee must leave within a reasonable time following any breach to avoid being taken as having affirmed the contract and waived the breach. The Claimant brought a timely grievance after the February incident, which was heard in June 2017 and an outcome reached, but the Claimant did not appeal the outcome. It was a further three months after the grievance outcome that she resigned, and some seven months after the incident. On the face of it, I believe that the Claimant would also struggle on affirmation.

41. I was of the view that overall, the Claimant would have little or no prospect of succeeding in her claim of constructive unfair dismissal. If such a claim had been permitted to be made, it was highly likely that I would have struck it out as having no reasonable prospect of success or that, at the least, I would have ordered a deposit to be paid before allowing such a claim to proceed.

42. Taking account of all these various circumstances along with the initial delay and the out of time finding, and bearing in mind that whenever taking any factors into account, **"**the Tribunal should take into and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it" and bearing in mind it is not the business of the tribunal to punish parties for their errors, overall I was not willing to exercise my discretion to allow a constructive unfair dismissal claim to be added to the ET1. To allow the Claimant to add what I had found to be an out of time claim, that in my view had no or little chance of succeeding, would not only cause injustice to the Respondent, but would also I believe have given false hope and caused

unnecessary further stress to the Claimant, who remains in a fragile mental state.

The race discrimination claim

43. Mr Hignett also raised time issues in relation to the race discrimination complaint on the basis that the last pleaded act of race discrimination was the incident that had taken place on 28th February 2017, [which the Respondent in it's grievance hearing outcome letter did not dispute the facts of]; Mr Hignett also submitted the tribunal should (i) strike out or (ii) order the payment of a deposit in respect of this complaint.

Conclusion and discussion : race discrimination claim

44. Under s 123(1) Equality Act 2010, any complaints of discrimination must be brought within three months, starting with the date the act or actions complained of took place, or such other period as the tribunal considers just and equitable. The majority of the matters about which the Claimant complains in the ET1 Claim Form as far as her race claim is concerned occurred in 2015, they are a long way out of time. There is a big gap between the specific incidents pleaded. On any basis, any claim based on the 28 February 2018 incident, should have been brought on or before 27 May 2017. During this period the Claimant was off sick and suffering from depression. She attended her grievance hearing on 24 May, and received the outcome on 16 June. She resigned on 27 September and submitted her ET1 on 27 December 2017. This was 9 months after the February incident and 6 months after the grievance. On that basis, the ET1 is considerably out of time, and unless the Claimant can show that it would be "just and equitable" to allow the race discrimination claim to be presented within a longer period, this claim will be out of time.

45. The "just and equitable" test for allowing an out of time claim in a race discrimination case is different to its equivalent for an unfair dismissal claim: it is a "just and equitable" test, which is less prescriptive and allows consideration of wider circumstances. In this instance, while I do not regard the matters relating to 2015 as being within time, I do find that it would be just and equitable to allow the Claimant to continue to bring her race discrimination claim but based solely on the February 2017 incident. In my assessment it would be in the interests of justice to allow this claim to go forward because:

> (1) throughout the period up to her resignation in September, the Claimant was unwell, albeit to varying degrees and was on medication and very reliant on her 17 year old son;
> (2) she has submitted a timely grievance about the underlying facts;
> (3) she had, after her resignation, in a timely manner, gone to Acas and had submitted an ET1 setting out the barebones of the claim within what would have been the appropriate time limit for an unfair dismissal claim

(4) while the grievance had examined the February incident, it had not considered it through the lens or prism of a potential race discrimination claim.

46. In my judgment that is a single issue which should be considered by an employment tribunal. On this basis, I find that it is just and equitable to allow the Claimant to bring a claim of race discrimination, *based solely on the incident on 28 February 2017*. While the matters that occurred before then may form part of the background chronology, I do not find it to be just and equitable to allow a race claim based on those matters to proceed.

Summary

47. The Claimant's application to amend her complaint to add a complaint of constructive unfair dismissal is dismissed on the basis it is out of time and has no reasonable prospect of success. Having regard to the statutory time limits, I find the Tribunal has jurisdiction to consider the Claimant's claim of race discrimination based on the incident on 28 February 2107 only.

48. The case is to be listed for a Telephone Case Management Hearing as soon as practicable, to last 1 hour, in order to list the Claimant's claim of race discrimination (arising only out of the incident which took place on 28th February 2017) for a hearing, identify and factual or legal issues arising that will need to be determined and to give directions for the management of the case to a full hearing.

Employment Judge Phillips
Date and place of Order
14 December 2018
London South