



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Lores  
**Represented by:** Herself

**Respondent:** Selfridges Retail Limited

**Represented by:** Mr J French-Williams - Solicitor

**Heard by Employment Judge:** Ms H Clark

**Open Preliminary Hearing by Cloud Video Platform held on 26 August 2020 at the London Central Employment Tribunals**

## JUDGMENT

1. The Tribunal does not have jurisdiction to hear the Claimant's claims for sex and race discrimination, which were presented out of time.
2. The Respondent's application to strike out the Claimant's unfair dismissal claim is refused.

And it is ordered:

3. The full merits hearing is reduced in length from 3 days to 2 days.
4. The standard Tribunal directions are amended such that the Respondent should provide to the Claimant a copy of the joint bundle of documents on or before **30 October 2020**. Witness statements should be exchanged on **20 November 2020**.

Employment Judge Clark

Date: 4 September 2020

SENT TO THE PARTIES ON

07/09/2020.....

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FOR THE TRIBUNAL OFFICE

## IMPORTANT NOTES

- (1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.
- (2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.
- (3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

## REASONS

1. By a Claim Form presented on the 23 December 2019, the Claimant made claims for unfair dismissal and sex and race discrimination against the Respondent. All claims were denied in a Response Form dated 5 February 2020. Following a case management hearing by Telephone on 24 April 2020 this Open Preliminary Hearing was arranged on the first day of what was otherwise the listing for a three day full merits hearing. The issues to be determined at the hearing were set out by Employment Judge Khan to be:
  - 1.1 whether the discrimination claims were submitted in time;
  - 1.2 whether the unfair dismissal claim has no reasonable prospect of success and should be struck out;
  - 1.3 whether the unfair dismissal claim has little reasonable prospect of success and a deposit order should be made.
2. Directions were made for the preparation of this hearing, to include the Claimant's filing a written witness statement by 5 August 2020. When the Claimant failed to do this, the Respondent applied for an unless order. That application was refused on Thursday 20 August 2020, but it was explained to the Claimant that if she did not serve a witness statement by close of business on Friday 21 August, she might not be permitted to give evidence at this hearing or, if the hearing had to be adjourned, might risk a costs award. In the event the Claimant did file a written witness statement on 21 August 2020 and provided an extract of her medical evidence and other documents she had sent to the Tribunal outlining her case (her discrimination comments and schedule of loss).
3. In addition to this, the Respondent provided a joint bundle of documents running to 298 pages and an agreed chronology and cast list. The Claimant confirmed that she felt fit enough to give oral evidence and was cross examined on that evidence. The Tribunal

explained that the Claimant would be regarded as a vulnerable witness as a result of her mental health condition and that cross examination should take place with this in mind. The Claimant was reassured that she could take a break at any time and to indicate if at any point during the hearing she felt uncomfortable or wanted her brother to take over from her. In the event the Claimant represented herself throughout the hearing.

4. This hearing was conducted by remote public hearing via Cloud Video Platform, albeit no members of the public attended the hearing. Apart from occasional bandwidth issues, when the hearing was paused, the hearing ran smoothly.

### **The Law**

5. The Tribunal's power to strike out a claim or part of it is derived from rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 where a claim has "*no reasonable prospects of success*". It is a draconian power, since it deprives a party of the opportunity to have certain issues fully aired in the Tribunal. If that threshold is passed, there remains a discretion as to whether to strike out a claim. Such discretion is subject to the overriding objective in the 2013 Rules to do justice between the parties.

6. The Tribunal also has the power to order a deposit be paid not exceeding £1,000 under rule 39 of the 2013 Rules as a condition for a party advancing an allegation or argument, which has "*little reasonable prospect of success*". Before the Tribunal makes a deposit order it is obliged to make a reasonable enquiry into a Claimant's means or ability to pay an order when deciding on the amount of the deposit. Deposit orders should not be set at such a high rate that it is a barrier to a Claimant seeking justice but enough that a Claimant reflects on whether to pursue a particular allegation.

7. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provides that:

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- (1) "*Subject to sections 140(A) and 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
  - (a) *the period of three months starting with the date of the act to which the complaint relates, or*
  - (b) *such other period as the employment tribunal thinks just and equitable.*
- (2) ....
- (3) *For the purposes of this section –*
  - (a) *conduct extending over a period is to be treated as done at the end of the period;*"

8. The “just and equitable” provision in section 123(1)(b) gives the Tribunal a broad discretion to extend time, albeit there is no presumption in favour of granting an extension. It falls to the Claimant to prove that there are grounds to extend. The factors set out in section 33 of the Limitation Act 1980 are likely to be relevant to the exercise of the Tribunal’s discretion, but there may be other factors. The length and reason for the delay will clearly be relevant, as may be whether the Claimant has had access to legal advice and what prejudice might be caused to either party by the grant or refusal of an extension. The fact that a Claimant was pursuing an internal grievance could be material, but is not necessarily so.

9. Dismissing someone due to their capability related to long-term ill health is a potentially fair reason for dismissal under the Employment Rights Act 1996. Where there is a potentially fair reason for dismissal the Tribunal must go on to consider whether dismissal for that reason was reasonable in accordance with section 98(4) of the 1996 Act namely, “*Whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.*” In applying that test the Tribunal must be careful not simply to substitute its own view of the reasonableness of the Respondent’s actions but to determine whether the Respondent’s decision to dismiss the Claimant (looking at both the procedural and substantive aspects of the dismissal) fell within the range of reasonable responses of a reasonable employer.

10. There are generally two aspects to a fair dismissal: procedural and substantive. In relation to the former, an employer should consult with the employee concerned, be appropriately informed as to the medical position (diagnosis and prognosis) and consider whether any temporary or permanent changes to the employee’s role might be made to assist their return to work. If an employee is disabled, there is a statutory duty to make reasonable adjustment to an employee’s role, but there is no disability discrimination claim in this case.

11. An employer cannot be expected to employ a member of staff indefinitely if they are unfit to perform their role. In the case of long term sickness absence, the central question which the Tribunal must ask itself is “*whether the employer can be expected to wait longer for the employee to return*” (*Spencer v Paragraph Wallpapers Ltd* [1977] ICR 301). This is a fact specific exercise, which includes the length of the absence, the size of the employer and the cost of the absence to them, the availability of cover for the employee, whether the employee is entitled to ill-health benefits and when or if the employee is likely to be fit to return to their role or an alternative role. The fact that the ill-health concerned has been caused by or contributed to by the employer is a relevant but not conclusive factor.

## **Factual Background**

12. The Claimant was employed by the Respondent as a sales associate with effect from 5 December 2016 working in Men's accessories department. At the start of her employment the Claimant made it clear that she had difficulty lifting heavy loads due to an existing back injury and that she was allergic to wool.

13. The Claimant worked for 2 months and was then absent from work with back/shoulder pain and stress/depression until the termination of her employment on the grounds of capability on 23 October 2019.

14. In light of her absence, on 15 May 2017 the Claimant's line manager wrote to her to confirm that her probation would be extended for four weeks on her return to work and inviting her to a welfare meeting. When communications from the Claimant stopped, she was sent a letter dated 13 June 2017 inviting her to a disciplinary hearing on 21 June 2017. The Claimant did not attend the hearing or make contact with the Respondent so the disciplinary hearing was rearranged for 27 June 2017. On that date the Claimant's brother contacted the Respondent on behalf of the Claimant explaining that she was feeling harassed by her line manager.

15. On 28 June 2017 a member of the Respondents HR team confirmed to the Claimant that the disciplinary hearing would be postponed provided up-to-date Fit Notes were provided by the Claimant. In emails dated 6 July 2017 and 31 August 2017, with the assistance of her brother, the Claimant raised concerns about her treatment, in particular by her line manager, which she believes led to her physical and mental ill-health. The Claimant outlined that she was required to lift weights which were too heavy for her, that she had no training and was often left to cope on her own. This was treated as a grievance under the Respondent's grievance procedure.

16. Whilst the Respondent tried to arrange a grievance meeting for the Claimant either whilst she was absent from work or on her return to work (on the basis that the Claimant's brother could attend such a meeting to support her), the Claimant's brother confirmed in February 2018 that the Claimant's doctor had advised her against meeting the Respondent.

17. In January 2018 the Claimant visited a Citizen's Advice Bureau and subsequently a solicitor at Lawnsbury Worthington, to discuss her situation at work. The Claimant says she did not discuss a potential discrimination claim with either the CAB or her solicitor.

18. In February 2018 the Respondent confirmed to the Claimant's brother that the Claimant's grievance would be investigated without the need for a meeting, inviting the Claimant to provide any further details she wished to add to the information already provided. The Claimant's line manager was interviewed concerning the allegations the Claimant had made against him.

19. On 14 May 2018 the Respondent explored with the Claimant whether it would be possible to have some direct contact with her to better understand the Claimant's current health situation. The grievance outcome was sent to the Claimant on 18 June 2018, which she appealed by letter dated 9 July 2018. The Respondent invited her to attend an appeal hearing on 11 September 2018 and to agree to a referral to the Respondent's Occupational Health provider.

20. On 26 October 2018 the Claimant's brother confirmed that the Claimant no longer wished to continue with her appeal against the grievance outcome, given that her line manager was no longer employed by the Respondent. On 26 November 2018 the Respondent wrote to the Claimant's brother requesting updated sick notes, asking if some direct contact with the Claimant might be possible and for a progress report on the proposed Occupational Health referral. On 10 December 2018 Universal Credit confirmed that the Claimant was deemed to have limited capability for work following a capability assessment.

21. The Claimant gave her consent to a referral to Occupational Health on 27 December 2018, however, on 18 January 2019 the Claimant's brother emailed the Respondent stating that the Claimant's treating physician had advised that it was not a "good idea" for the Claimant to undergo an Occupational Health assessment. On 21 March 2019 the Respondent's Occupational Health Dr Rehman wrote to the Claimant's specialist in Spain asking for information, however, the latter indicated that a fee of 1000 Euro's would be charged for this. Occupational Health suggested this was unreasonable and therefore invited the Claimant to speak to the UK Doctor or Occupational Health. On 27 June 2019 Dr Rehman confirmed that the Claimant declined to engage in a confidential medical assessment with Occupational Health.

22. A telephone call between Ms Davis of the Respondent and the Claimant and her brother was arranged for 22 July 2019. This call in fact took place on 19<sup>th</sup> August 2019 with Ms Davis explaining that the Respondent might have to explore other options, including the possibility of a different role. The discussions were recorded in a letter from the Respondent to the Claimant dated 12 September 2019. The Claimant's position is that the offer of an office based position would have been welcomed by her and the prospect of it would have hastened her recovery.

23. An Occupational Health report was prepared by Dr Rehman on 17 September 2019, in which it was noted that despite more than 30 months of work under the care of a specialist, the Claimant's brother had confirmed on a number of occasions that the Claimant remained too unwell to engage with the Respondent directly.

24. On 2 October 2019 the Respondent invited the Claimant to a formal long-term sickness absence meeting on 8 October 2019. The Claimant's brother attended the meeting to represent the Claimant. On 15 October 2019 a medical report was provided to the Respondent by the Claimant's brother from the Claimant's Spanish Doctor, Dr Gomez. The Occupational Health report was accordingly updated on 21 October 2019. In light of the contents of the latter, the Claimant's employment was terminated on the grounds of her long-term sickness absence, albeit she received pay in lieu of notice. With the assistance of her brother, the Claimant appealed against the termination of her employment and, by agreement, this was dealt with in writing. An updated Occupational Health report was provided to the Respondent in light of the Claimant's brother's comments on the previous report of 21 October 2020. An appeal hearing took place on 28 January 2020 and on 4 February 2020 the appeal was not upheld.

### Medical Evidence

25. The Respondent's Occupational Health provider, Dr Rehman (an Occupational Physician) provided a report dated 17 September 2019 explaining that Occupational Health considered the request for payment of 1,000 Euros by the Claimant's Spanish psychiatrist was unreasonable in circumstances where the Claimant could request a copy of her records free of charge. The first Occupational Health report was, therefore, produced without the benefit of medical input from the Claimant's treating doctors, apart from the Fit Notes which had been provided by her GP. At the time of the report, although the Claimant had been absent from work for over 30 months and had been receiving treatment for her condition, the Claimant maintained she was not sufficiently fit to engage with the Respondent or their Occupational health provider. From this Dr Rehman inferred that there had been no significant improvement in the Claimant's mental health. Dr Rehman concluded that the Claimant was suffering from a treatment resistant condition and was, therefore, *"unlikely to recover a sufficient level of fitness to be capable of returning to work in any capacity, for the foreseeable future."* Dr Rehman advised that it was likely that the Claimant was disabled for the purposes of the Equality Act 2010, but if the Claimant was too unwell to engage with either management or OH, that there were no adjustments or redeployment options that would support a return to work.

26. The Claimant's treating Psychiatrist in Spain, Dr Angel Gomez Calle confirmed in a letter dated 20 June 2017 that the Claimant was suffering from symptoms of depression and severe anxiety, which *"incapacitates her for the development of a normal work activity"*. In by letter dated 4 September 2017 Dr Aideen O'Halloran, a Consultant Psychiatrist West London Mental Health NHS Trust noted that the Claimant was more anxious than depressed and that she would benefit from CBT.

27. In the report translated from the Spanish from Dr Gomez, the Claimant was initially diagnosed with mixed anxiety and depressed mood, but the diagnosis was revised to adjustment disorder and latterly to prolonged depressive reaction. In conclusion, Dr Gomez Calle stated: *"a more proactive attitude by the Human Resource Department in her company is advisable, in order to introduce changes in her activity and workplace environment that contribute to the patient's recovery."*

28. Dr Rehman wrote a second OH report dated 21 October 2019 taking account of Dr Gomez's report, which confirmed his conclusion in his first report that the Claimant was suffering from a chronic mental health disorder and would, therefore be unlikely to be capable of returning to work in any capacity for the foreseeable future. He concluded that *"her symptoms are of such severity and duration that there are in my opinion, no redeployment options or adjustments that would support a return to work. I therefore suggest that you consider a definitive employment decision on the grounds of ill-health."* He also responded in writing to the Claimant's brother's comments on his report.

## **Conclusion**

### **Time Limits**

29. The only allegations of sex and race discrimination concern the conduct of the Claimant's line manager whilst the Claimant was present in the workplace. Whilst I make no findings about the Claimant's allegations against

her line manager, I will assume for the purposes of this hearing, that they formed part of series of conduct. It is not suggested that the operation of the grievance or disciplinary procedures was discriminatory. Although the precise dates of the Claimant's allegations are unclear, 8 February 2017 is the latest date on which an act of discrimination from the Claimant's line manager could have occurred because that was the last time she was in work. As set out in the Case Management Discussion, any act of discrimination which took place before 23 August 2017 is out of time. The Claimant's discrimination claims were, therefore, presented some 34 months outside the time limit.

30. The Claimant explained in her witness statement and oral evidence that her immediate focus whilst still employed was to resolve her difficulties with her employer and return to work. She was not planning to bring a Tribunal claim and was unaware that she could bring a discrimination claim until she presented her unfair dismissal claim. Whilst the Claimant did have access to legal advice (both from the CAB and a Solicitor in January 2018), this related to the management of her absence and the provision of medical evidence rather than a prospective discrimination claim.

31. From the autumn of 2017 the Claimant was clearly very unwell (as set out in the medical report she provided from the West London Mental Health NHS Trust). This report refers to advice from the Claimant's Psychiatrist in Spain that she should not see or respond to her line manager (albeit this information is likely to have been reported by Claimant). Whilst the Claimant's ill-health is not a complete answer to her delay in presenting a discrimination claim and, from June 2017, the Claimant's brother communicated with the Respondent on her behalf, the Tribunal takes account of the Claimant's ill health as a contributory factor to the delay.

32. The Claimant raised two grievances about her line manager's conduct on 6 July 2017 and 31 August 2017, in particular about a lack of assistance and training, a requirement to carry boxes which were too heavy for her and a disregard of her wool allergy. In neither grievance did she raise complaints of race or sex discrimination. That is no criticism of the Claimant. There are a number of legitimate reasons why employees might not bring make allegations of discrimination in the currency of their employment, particularly against their immediate line manager. However, the consequence of no such allegations having been made, is that the Respondent was unable to investigate them at a time close to when the events were alleged to have occurred when memories were fresh. As the Claimant sets out in her witness statement she cannot now recall the precise dates of the allegedly discriminatory remarks or who might have witnessed them "*due to the time passed since the comments took place*". This illustrates the difficulty which would face the Respondent in conducting an investigation of discrimination allegations now, with a view to admitting or defending them. This is compounded by the fact that the alleged perpetrator ceased their employment with the Respondent in 2018.

33. The Claimant referred in her submissions to the disadvantage she has faced as a litigant in person challenging decisions of a large organisation, which can afford legal representation. Whilst this imbalance of resources is clear, the Claimant did have access to legal advice in January 2018 from two sources. Further, a simple "Google" search would have revealed that discrimination claims can be made in the Employment Tribunal. However, the



Respondent remains evidentially prejudiced given the historic nature of the Claimant's claims. This is particularly so as the allegations concern spoken remarks which would not have been reduced into writing and the alleged perpetrator has not worked for the Respondent for two years. It is unclear whether any other potential witnesses are still employed by the Respondent. The fact that the Respondent is professionally represented does not mitigate the evidential difficulties they would face in defending a discrimination claim which relates to events which took place over three years ago on uncertain dates.

34. Whilst there is an obvious prejudice to the Claimant in the Tribunal's failing to extend time, in that she will be deprived of the opportunity to bring her discrimination claim, given the very long delay in presenting her claim and the consequent prejudice which this causes the Respondent, the Tribunal is not satisfied that it would be just and equitable to extend time.

#### Strike Out of Unfair Dismissal Claim

35. There is no suggestion that the Claimant's dismissal was for any reason other than her long-term sickness absence/capability. At the time of her dismissal she had been absent for more than two and half years. For most of that time, the Claimant had been unable to have any direct communication with the Respondent.

36. At the time of the Long Term Absence meeting on 9 October 2019, the Respondent had the benefit of two reports from their Occupational Health provider, the second of which took account of a medical report from Dr Gomez, the Claimant's treating Psychiatrist in Spain (which was funded by her). The Claimant suggested in evidence that she had to persuade Dr Gomez to provide this report as he considered that the questions posed by the Respondent were "illegal". Whether this was based on a misunderstanding of the legal process in England or reflects a difference in Spanish law is unclear.

37. The Claimant challenges the conclusions of the Occupational Health report in a number of respects, including the lack of comment on the causation of the Claimant's condition (which Dr Gomez suggested was related to her workplace) and that there was likely to be a link between the Claimant's recovery and the approach taken by the Respondent's HR department. The Claimant's brother attended the formal Long Term Absence meeting on her behalf and explained that the Claimant was starting to feel better, but remained too unwell to attend work and that Dr Gomez had recommended that the Claimant return to work in an office based position rather than a customer facing role.

38. In evidence to the Tribunal the Claimant indicated that there was a positive change in her health when discussions started with the Respondent's HR in the summer of 2017 around a change of role for her, in particular a non-customer facing role. Her own assessment was that she might have been fit to return to such a role within three or four months (albeit this was not set out in Dr Gomez' report). Any Tribunal hearing this unfair dismissal claim would judge the fairness of this dismissal based on the information which was before the Respondent when the decision was taken, rather than with the benefit of hindsight. The only exception to this would be if the Tribunal were to conclude

that a reasonable employer would have made further medical or other inquiries.

39. Whilst an employer does have a duty to make reasonable adjustments to an employee's role to accommodate disability, the employer's obligations are more limited in the context of an unfair dismissal claim. That is not to say there is no obligation to consider measures to assist an employee's return to work, however, and that is particularly the case where an employer is aware that an employee is likely to be regarded as disabled for the purposes of the Equality Act 2010.

40. Cases of long-term sickness absence are challenging for both parties. The Tribunal does not under-estimate the difficulties faced by an employer where an employee is unable to communicate directly with them. Sometimes decisions have to be made on the information available, even if that information is incomplete. The medical advice the Claimant appears to have received is that she should not engage with the Respondent or undergo a separate Occupational Health assessment. This had consequences for the Respondent's ability to understand the medical position.

41. If the Tribunal's focus was purely on the length of the Claimant's absence (particularly in the context of her short period of service), the Tribunal might well have concluded that the Claimant's claim had no reasonable prospects of success. However, the legal test is a more nuanced one and includes consideration of the nature and cause of the Claimant's on-going ill health, the ability of the Respondent to cover her absence and any consequent costs of doing so. In this summary consideration of the Claimant's claim, some of that information is missing.

42. The Claimant's case appears to be that her treating physician considered that the way her absence was managed was contributing to her ill-health and that a change of approach would have hastened her recovery. The fact that a Claimant's ill health might have been caused by or contributed to by her employment or her employer is one of the factors which a Tribunal can take into account in determining the fairness of dismissal along with the steps which are taken to explore alternative employment. At this stage of the proceedings and in the absence of all the oral evidence, the Tribunal cannot make any findings in relation to these issues. For this reason, the Tribunal cannot be satisfied that the Claimant's unfair dismissal claim has no reasonable prospects of success.