Case Number: 3303903/2019

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Emma Curtis **v** **Quantum Care Ltd**

Heard at: Bury St Edmunds **On**: 11 February 2021

Before: Employment Judge Shastri-Hurst

Appearances

For the Claimant: In person
For the Respondent: Mr McHugh (counsel)

This has been a remote hearing not objected to by the parties. The form of remote hearing was V (video whether partly (someone physically in a hearing centre) or fully (all remote)). The documents that I was referred to are in several bundles, in total amounting to around 2,750 pages. The order and reasons for it are below."

RESERVED JUDGMENT

1. All claims against Quantum Care (Developments) Ltd are dismissed;
2. Quantum Care Ltd is substituted to be the sole Respondent to the claims brought by the Claimant consolidated under the claim number 3303903/2019;
3. The Respondent's application that the Claimant's claims be struck out because they have no reasonable prospect of success is in part successful, regarding Allegations 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22;
4. The Allegations listed at paragraph 3 above stand struck out;
5. The Respondent's application that the Claimant should pay a deposit as a condition of pursuing her allegations succeeds in part, in relation to Allegation 8;
6. The Employment Judge considers that the Claimant's Allegation 8 has little reasonable prospects of success. The Claimant is ordered to pay a deposit of £300 not later than 21 days from the date this Order is sent to the parties as a condition of being permitted to continue to advance that allegation. The Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit. See accompanying Deposit Order for further information.

7. Allegations 9 and 10 have more than little reasonable prospects, and so continue with no deposit order attached.
8. The Tribunal makes further case management direction of its own motion which are sent under separate cover.

REASONS

INTRODUCTION

1. The Claimant has presented a total of four ET1 claim forms in this matter so far, and I have heard today that a fifth one has been filed at Watford ET recently. The claim forms currently before the Tribunal are as follows:

    1.1. 16 February 2019 (case no. 3303903/2019) – brought against Quantum Care Ltd, claiming unlawful deductions of wages. ACAS Early Conciliation period 17 December 2018 to 17 January 2019;
    1.2. 1 April 2019 (case no. 3313477/2019) – brought against Quantum Care (Developments) Ltd, claiming disability discrimination and victimisation under the **Equality Act 2010**, and breach of contract, citing also various other Acts. ACAS Early Conciliation period 28 February 2019 to 1 March 2019;
    1.3. 4 October 2019 (case no. 3324255/2019) – brought against both Quantum Care Ltd and Quantum Care (Developments) Ltd, claiming disability discrimination and victimisation, whistleblowing, constructive unfair dismissal under the **Employment Rights Act 1996** and pay claims, again citing various other Acts. ACAS Early Conciliation period 4 September 2019 to 4 September 2019;
    1.4. 25 November 2019 (case no. 3326392/2019) – this is an exact copy of the third ET1, and I am told there is no corresponding ACAS Early Conciliation certificate.

2. By application dated 28 September 2020 the Respondent made an application to strike out the Claimant's claims in their entirety or, in the alternative, seeking a deposit order – A/1351-1358. By Notice of Hearing of 8 November 2020, this matter was listed for a one day open preliminary hearing to consider the following issues – A/1480:

    2.1. What claims, if any, have no reasonable prospect of success and may be struck out; and,
    2.2. What allegations/arguments have little reasonable prospect of success? A deposit may be ordered as a condition of those allegations or arguments proceeding.

3. In order to assist me in my decision, I had a voluminous number of documents. From the Respondent I had:

    3.1. A bundle named "consolidated RRL (recommended reading list) paginated OCR EC v QC Ltd Section A-D" of 452 pages, plus index (I

refer to this as "the Consolidated Bundle" – where I refer to page numbers in the body of these reasons, they are to pages within this bundle unless otherwise stated);

3.2. A bundle named "paginated application papers for PHR" of 66 pages, plus index (I refer to this as "the Application Bundle");

3.3. Mr McHugh's written submissions dated 28 January 2021;

3.4. Four additional pdf bundles, named Section A, B, C and D respectively, totalling 2221 pages in total (I will refer to these documents as A/X where A is the section and X is the page number).

4. From the Claimant I had the following documents:

4.1. A document entitled "The Claimant's Objection to the Respondent's Application to Strike Out This Case" of 28 pages;

4.2. Two appendices dated 28 February 2020 and 3 March 2020;

4.3. A draft list of directions and an agenda.

5. I made it clear to both parties that I had by no means read all the papers, and that they would need to take me to any particular pages that they wished me to take into account in my decision making. I had read some of the documents in advance, namely all the pleadings (up to p158 of the Consolidated Bundle) and the Application Bundle. I had also briefly considered the Respondent's skeleton and the Claimant's objection. I took an hour of reading time on the morning of the hearing to more thoroughly read the Respondent's skeleton and the Claimant's Objection, as well as their respective attachments.

The scope of the Claimant's claims

6. This is the first time that this matter has come before the Tribunal, and therefore there has been no distillation of the issues at play within the Claimant's various claims. The Respondent has attempted to distil down the Claimant's claims into a schedule found at Appendix B of the Application Bundle ("the Schedule"). This Schedule helpfully sets out where in the various claim forms the claims/allegations may be found. Each allegation is numbered and I will use these numbers in the body of this Judgment, referring to "Allegation 1" and so on. I have attached to this Judgment a copy of the Allegations listed within the Schedule, for ease of reference.

7. The Schedule lists 22 allegations in total. I asked the Claimant whether she agreed that this Schedule accurately reflected the headlines of all her claims. She stated that there was detail missing. I explained that, when it came to her submissions, she could tell me about any additional claims that she thought were missing from the Schedule.

8. On the commencement of the Claimant's submissions, I asked her whether everything I needed to know about her claim was in her claim forms and Further and Better Particulars: her answer was that she was not sure. I have now read all of the claim forms, and all documents tagged within the index of Sections A-D as "Further and Better Particulars" in considering the allegations

within the Schedule. In that way, I consider that I have seen everything that can be said to equate to pleadings within the Claimant's case.

9. The Claimant, during her submissions, stated that the Schedule left out her claims of "negligence" and "bullying and harassment". In fact, negligence (duty of care) and harassment do appear in the Schedule. It is correct that bullying as an allegation does not appear in the Schedule. I explained to the Claimant that the Tribunal does not have jurisdiction to deal with claims of negligence and bullying.

10. The Claimant did not raise any other specific claims other than those in the Schedule, with the detail appearing in her pleadings. I have therefore taken the Schedule as a framework covering the headline allegations, and have sought where possible the particulars of those claims in the Claimants pleadings (i.e. the four claim forms and Further and Better Particulars).

HEARING

11. This hearing was listed for one day. The hearing was entirely remote. On one occasion, the Claimant connection failed, and so we halted proceedings and Mr McHugh and his instructing solicitor disconnected so that they were not left alone with me in the remote hearing room. Everyone managed to reconnect and proceedings continued without further technical difficulty. I am satisfied that the hearing was fair.

12. The Claimant represented herself. The Respondent was represented by Mr McHugh, with occasional assistance from his instructing solicitor, Mr Donaldson. I allowed Mr Donaldson to speak directly to me rather than via Mr McHugh on a couple of occasions, as I recognise that, in a remote setting, it is not a straight forward matter for counsel to obtain instructions from their instructing solicitor quickly, and the solicitor may well be able to answer the Tribunal's enquiry directly.

13. I heard submissions from Mr McHugh and the Claimant. I also heard oral evidence from the Claimant regarding her financial means, should I need to consider them for the purposes of a deposit order.

PRELIMINARY ISSUES

Identity of Respondent

14. As set out above, the Claimant's four different claim forms have been issued against a combination of two respondents, Quantum Care Ltd and Quantum Care (Developments) Ltd.

15. It was agreed between the parties that the Claimant's employer was Quantum Care Ltd, and that this entity is the correct respondent for all four of the Claimant's claims.

16. I have therefore made an order to dismiss the claims against Quantum Care (Developments) Ltd and, where necessary, substitute Quantum Care Ltd, to ensure that Quantum Care Ltd is the Respondent for all of the Claimant's claims, all consolidated under case number 3303903/2019.

Documents

17. The Claimant raised with me that, as she had only found out a couple of days ago that the bundles needed to be in electronic form, she had hard copy papers that she had not been able to convert, and was concerned that I needed to see them. The Claimant had not done an index to these documents.

18. As opposed to holding up proceedings, or adjourning, and bearing in mind the copious and disproportionate amount of documents already before the Tribunal, I explained to the Claimant that, as and when she considered that she had a document that was relevant that was not already before the Tribunal, she could tell me what it was and, if necessary, show me on screen or read out the document to me.

19. Both parties were content that this was a satisfactory approach to these documents.

ISSUES

20. As set out above, and as can be seen at A/1480, the two issues to be determined today were:

    20.1. What claims, if any, have no reasonable prospect of success and may be struck out; and,
    20.2. What allegations/arguments have little reasonable prospect of success? A deposit may be ordered as a condition of those allegations or arguments proceeding.

LAW

Strike out

21. The Respondent applies to strike out the Claimant's claims under two grounds found within r37(1) of Sch 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules"). R37 provides as follows:

> 37(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim on any of the following grounds –
>
> (a) That it is scandalous or vexatious or has no reasonable prospect of success;
> (b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant has been scandalous, unreasonable or vexatious.

22. The Tribunal has the power to make deposit orders against any specific allegations or arguments that it considers has little reasonable prospect of success under r39 of the Rules:

> 39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim…has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> 39(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

23. For discrimination claims, the starting point regarding case-law is **Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL**. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing.

24. I am also assisted by the case of **Balls v Downham Market High School and College [2011] IRLR 217**, in which Lady Smith held:

> When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether there written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects.

25. Mitting J in **Mecharov v Citibank NA [2016] ICR 1121 EAT** provided the following guidance at paragraph 14:

> …the approach that should be taken in a strike out application in a discrimination case is as follows:
>
> (1) Only in the clearest case should a discrimination claim be struck out;
> (2) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> (3) The claimant's case must ordinarily be taken at its highest;
> (4) If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,
> (5) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

26. However, there are some caveats to the general approach of caution towards strike out applications. In **Ahir v British Airways plc [2017] EWCA Civ 1392 CA**, it was held that, when a tribunal is satisfied that there are no reasonable prospects of the facts needed to find liability being established, strike out may be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

Deposit order

27. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making a deposit order.

28. The purpose of such an order is not to restrict disproportionately access to justice, hence any order made must be for an amount that is affordable by a party, and can be realistically complied with – **Hemdan v Ishmail and anor [2017] IRLR 228**.

29. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – **Adams v Kingdon Services Group Ltd EAT/0235/18**.

FINDINGS OF FACT

Employment

30. I have only made findings of fact so far as they are relevant to the applications before me. Where I have not covered certain facts, it is because they are not relevant to the issues I have set out above.

31. I have not heard any oral evidence on these matters from either party (other than from the Claimant on the limited issue of her means). The facts that follow are therefore based solely on the documents I have seen. These findings will therefore, inevitably, be incomplete. It will be for the Tribunal of the final merits hearing to make full findings on what actually occurred between the two parties throughout the relevant chronology. Any findings set out below are therefore not binding on that Tribunal.

32. The Claimant began working for the Respondent on 12 August 2013 as a carer. Her Statement of Particulars is at p1517. Of those terms, the following are of potential relevance:

> Clause 5: "Under your contract of employment, you may be required or permitted to work at or from any of Quantum Care's Homes. …"
>
> Clause 7: "… The Staff Handbook and all the sections of the HR Manual referred to in the Staff Handbook form part of your contract of employment."
>
> Clause 16: "… Your entitlement to sick pay is subject to compliance with Quantum Care's rules for reporting absence and for observing the other requirements of the Sick Pay Scheme as set out in the Staff Handbook and HR Manual."
>
> Clause 19: "… Quantum Care reserves the right to suspend you for no longer than reasonably necessary for the purposes of investigating any allegation of misconduct or neglect against you."

33. I have also had sight of parts of the HR Manual, including the sick pay policy, at p1604/1606, which provides as follows:

> Statutory Sick Pay (SSP)
>
> All employees have a right to SSP as long as they earn more than the lower earnings level (Payroll can confirm the current rate). SSP is not, however, payable for the first three qualifying days of absence. A qualifying day is a day on which you are normally expected to work under your contract of employment. …
>
> Occupational Sick Pay (OSP)
>
> OSP is sick pay over and above the statutory amount paid by Quantum Care. This is entirely at the discretion of management but will not be unreasonably withheld as long as you have conformed to the notification requirements and have produced any necessary medical certificates, including self-certificates. …
>
> …
>
> If you take sickness absence after a disciplinary investigation or formal disciplinary process involving you has been started by Quantum Care, then you will not usually receive any occupational sick pay. In exceptional circumstances, the Director of Human Resources and Training or the Director of Operations may at their discretion agree to pay occupational sick pay.

34. The last paragraph cited above (starting "If you take sickness absence") was confirmed on 16 January 2019 by Margaret Lillie, a Unison Convenor, to be a variation regarding company sick pay ("CSP") that was agreed as part of a consultation with the union in 2014 – p1562.

35. On 8 October 2013, the Claimant signed to show that she understood the terms and conditions of her employment, and that she had received a copy of the Staff Handbook – p1521. Her signature also appears on a document confirming receipt of the Staff Handbook on 14 September 2016 – p1522. The Claimant today told me that she did not sign this; she could not however explain how her signature appeared on the document. I note that the signature and handwriting on pp1521 and 1522 are extremely similar. I therefore find that the Claimant signed both these documents to confirm receipt of a Staff Handbook in both 2013 and 2016.

Disciplinary process leading to sickness absence

36. On 3 August 2018, the Claimant sent a text message to Ms Karen Parker, the Regional Manager, complaining about Mrs Sharon Howe (Home Manager) and her treatment of some carp in a fish pond for which the Respondent was responsible. On 4 August 2018, a disciplinary process was commenced against the Claimant due to the alleged inappropriate nature of that message.

37. Mrs Howe suspended the Claimant on 4 August 2018: this was confirmed by the Respondent in a letter dated 13 August 2018 – p 1636. The allegation was recorded as being that the Claimant had "allegedly [sent] an inappropriate message about your Home Manager, Sharon Howe to the Regional Manager, Karen Parker".

38. On 13 August 2018, the Claimant raised a grievance which is at p1637. On 8 November 2018, the Respondent sent the Claimant a letter informing her that, as of 12 November 2018, her suspension would be lifted and, although there

was a disciplinary case to answer, any sanction would be short of dismissal (i.e. the conduct did not reach the level of gross misconduct) – p1643-1645.

39. That letter also provided that, as of 12 November 2018, the Claimant was required to return to work; however, she was required to work at another of the Respondent's care homes. The letter pointed out the mobility clause within the Claimant's contract of employment (cited above). On 12 November 2018, the Claimant sent the Respondent a fit note stating that she was unfit to work: the fit note is dated as being issued on 12 November 2018, but is backdated from 1 November to 30 December 2018 – email at C/1646, fit note at D/2218.

40. Due to the Claimant being suspended up to and including 11 November, and the Claimant only notifying the Respondent of her fit note on 12 November, I find that the Claimant was on sickness absence leave from 12 November 2018, not from 1 November 2018. The Claimant did not return to work but remained on sick leave.

41. Upon receipt of the Claimant's fit note, the Respondent replied by letter of 21 November 2018 – p1647. In that letter, the Respondent records some of the terms within the Staff Handbook regarding sick pay:

> If you take sickness absence after a disciplinary investigation or formal disciplinary process involving you has been started by Quantum Care, then you will not usually receive any occupational sick pay.

42. The Claimant submitted two claim forms, dated 16 February and 1 April 2019. Upon acceptance of the second claim form (3313477/2019), EJ McNeil QC directed that (A/47):

> Only the claims for disability discrimination and breach of contract are accepted.

43. On 25 April 2019, the first and second claims were consolidated – A/52.

44. On 17 July 2019, the Claimant resigned by letter at pp1851-1875, having not returned to work since being signed as unfit to work on 12 November 2018.

45. On 26 July 2019, EJ Lewis directed that the Claimant clarify if she has a disability and, if so, what it is – A/72. No answer was ever received to this request.

46. On 4 October 2019, the Claimant submitted her third ET1, followed on 25 November 2019 by her fourth ET1. It is noted that there is no ACAS Early Conciliation certificate for this fourth claim. It appears however that this fourth claim is a carbon copy of the third claim and so adds nothing further.

47. Throughout this chronology, the Respondent had submitted the requisite ET3 forms with Grounds of Resistance in time. The final Consolidated Grounds of Resistance, covering all claim forms was filed on 6 January 2020 – A/136-154.

48. On 3 March 2020, Regional Employment Judge Foxwell ordered that all four of the Claimant's claims be consolidated under claim number 3303903/2019 – A/188.

49. Over the life of this litigation thus far, the Claimant has provided several documents containing Further and Better Particulars of her claims as follows:

    49.1. 28 February 2020 – A/173-187;
    49.2. 24 July 2020 – A/997-1009;
    49.3. 24 July 2020 – A/1010-1018;
    49.4. 21 August 2020 – A/1019-1336
    49.5. 26 September 2020 – A/1341-1348.

50. I have read the above Further and Better Particulars.

The Claimant's means

51. The Claimant has not found employment since she left the Respondent, however she does receive Universal Credit of roughly £880 per month. This is her only source of income. The Claimant has around £2000 in savings. Her home rental payments come out of her Universal Credit, leaving roughly £320 each month for all other bills.

52. The Claimant owes £1,700 on her credit card and £1,250 in her overdraft: she is currently not paying back her credit card debt, and pays £1 per day as overdraft fees.

53. Taking into account all of the Claimant's other monthly outgoings (food, mobile phone, broadband, TV and so on) she estimates she has around £150 left as disposable income at the end of each month. Some of that money is spent on items to help her advance this case, such as a printer.

54. She owns no property. She has an old-style motorcycle that only carries the value of the engine, as she bought it to work on it with a friend. The Claimant estimates that the engine is worth around £600.

Disability

55. The Claimant brings allegations of disability discrimination at Allegations 3, 4, 5, 6 and 7.

56. In order to claim disability discrimination under the **Equality Act 2010**, the Claimant must satisfy the test within s6 of that Act. S6 provides as follows:

> A person (P) has a disability if –
> (a) P has a physical or mental impairment, and
> (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

57. The definition of "long-term" is set out at s2 of Schedule 1 to the **Equality Act 2010**, and provides:

(1) The effect of an impairment is long-term if –
   a. It has lasted for at least 12 months,
   b. It is likely to last for at least 12 months, or
   c. It is likely to last for the rest of the life of the person affected.

58. The definition of "substantial" is set out at s212 **Equality Act 2010**, and means "more than minor or trivial".

59. Given that the Claimant had not replied to EJ Lewis' request to clarify her disability, I invited her to do so towards to beginning of the hearing. The Claimant explained she had a road traffic accident on 13 January 2017 and had recovered by January 2018. She relied upon her injuries as a physical impairment.

60. She also stated that, from some of the Respondent's correspondence, it appeared that they perceived her to have a mental impairment.

Physical impairment

61. I therefore turn to the Claimant's medical evidence to consider whether the Claimant has no or little prospect of proving that she is disabled as defined above. The Claimant's medical evidence is found in Section D – D2067-2221. I have reviewed these documents, which show the following:

61.1. D/2069 – C had a motorcycle accident on 13 January 2017;

61.2. D/2069 – she was examined on 16 February 2017, which led to a medical report that detailed the following injuries:

Chest wall;
Left side thigh;
Left foot;
Left lower leg;
Right foot;
Right toe nail;
Left shoulder;
Left side hand;
Left side foot; and,
Psychological symptoms of travel anxiety/discomfort and nausea.

61.3. The report's prognosis was that the Claimant would heal within 7 months of the accident.

61.4. D/2112 – Occupational Health Physician's ("OHP") report of 19 June 2017 – regarding her daily living, the Claimant could do housework by herself, could carry shopping (using right arm for heavier items) and could walk 3-4 miles without issue. She was by this stage riding her motorbike again. She shifted her weight from one side to the other when standing for any lengthy period. The physical examination reported normal range of movement for the Claimant's back and neck and upper limbs. The only point of note was a minimal weakness of the left ring finger. The OHP determined that she was medically fit to return to work. Various reasonable adjustments and a phased return to work were recommended (avoiding heavy lifting for example).

61.5. D/2130 – OHP report dated 4 August 2017. This related to a muscle strain that the Claimant had suffered to her chest when handling a resident in July 2017. The Claimant's fit note expired on 14 August 2017, but the OHP advised a phased return to work;

61.6. D2141 – OHP report 5 October 2017. The Claimant was still reporting chest pain. It was anticipated that the Claimant would be back to her normal hours within 2 months. She was medically fit to return to work, but with a phased return & reasonable adjustments.

61.7. D/2144 – Medical report of 12 October 2017. This report gives a prognosis of full recovery by 13 months from the accident. The residual pain to left thigh and chest wall at this point was moderate on an intermittent basis. All other symptoms had resolved. Examination was normal other than some tenderness.

61.8. D/2180 – OHP report 26 February 2018. This report actually relates to a back injury the Claimant says she suffered in January 2018 at work. This report does however state that "with respect to the pain she was getting in the left chest wall and left shoulder area, this has now resolved. The only symptoms she still gets, as a result of the road traffic accident she was in, is a slight feeling of stiffness in the left thigh which lasts for a few minutes once a week."

61.9. D/2202 – Medical report (Orthopaedic Surgeon) dated 20 June 2018 records that the Claimant had 7 months off work and that the Claimant suffered a soft tissue injury to her left leg and left shoulder and chest. The majority of symptoms settled down in 12 months. The physical examination reported normal outcomes, other than some subjective pain in the left hip and clavicle. At the time of the report, the surgeon recorded that the Claimant had recovered well and suffered ongoing symptoms which gave intermittent discomfort. The prognosis was that the Claimant would be back to pre-injury status within 3 months from the date of the examination.

62. On the medical evidence, I find that, from at the latest October 2017, ten months after the accident, any residual pain was intermittent and minor.

63. The Claimant told me that she had recovered from the accident by January 2018. This ties in with the OH report from February 2018.

<u>Mental impairment</u>

64. It is the Claimant's case (and indeed the Respondent's case) that the Claimant does not suffer from a mental impairment.

65. The Claimant's claim regarding her mental health is that the Respondent (Mrs Howe particularly) believed that the Claimant suffered a mental impairment amounting to a disability. A perceived disability discrimination claim can only be run in the form of a direct discrimination claim pursuant to s13 of the **Equality Act 2010**.

66. I note in her second claim form, the Claimant comments as follows – A/45:

> Emailed email which included Home Manager in Black and White stating my mental status without evidence I have been to a specialist Psychologist in which has cleared any mental health issues, I had to go as I had a motorbike accident January 2017 …[*sic*]

67. The Claimant relies upon an email of 8 October 2018 (C/1635), in which Mrs Howe writes:

> It's been posted what is up with this person? I truly believe she is in need of mental health support if she stays with the company god knows what it will be next.

68. The Claimant also reports that Ms Howe (Home Manager) said to the Claimant on one occasion "maybe you are not right in the head" – referenced in the Claimant's grievance of 13 August 2018 at C/1638.

69. This is the evidence that the Claimant relies upon to suggest that the Respondent perceived her to have a mental impairment capable of amounting to a disability under s6 of the **Equality Act 2010**.

CONCLUSIONS

Unreasonable/vexatious conduct

70. As stated at the start of this Judgment, the Respondent seeks to pursue an application to strike out the Claimant's claims, not only on the basis of lack of prospects, but also on the Claimant's conduct in pursuing the claim has been unreasonable/vexatious – r37(1)(b) of the Rules.

71. I do not accept that the Claimant has acted in a way that is vexatious or unreasonable. She is a litigant in person, and although it could be said that she has not assisted the smooth progress of this litigation by the copious paperwork and lack of clarity, I note that there has been relatively little involvement from the Tribunal to date and so she has had little guidance (to the extent permissible by the Tribunal) as to how to better and more clearly formulate her claims.

72. I therefore reject the application to strike out based on the assertion that the Claimant's behaviour was vexatious or that she has conducted this litigation in a manner that is unreasonable or vexatious.

73. I am therefore left to consider whether all or part of her claims have no or little reasonable prospects of success.

No reasonable prospects for lack of jurisdiction

74. Several of the Claimant's allegations do not fall within the jurisdiction of this Tribunal. I therefore find that those claims have no reasonable prospect of succeeding and are struck out on that basis. I refer to:

    74.1. Allegation 11 – **Health and Social Care Act 2012**;
    74.2. Allegation 12 – **Human Rights Act 1998**;
    74.3. Allegation 13 – **Defamation Act 2013**;

74.4. Allegation 14 – Duty of care (personal injury claim);
74.5. Allegation 15 – **Care Act 2014**;
74.6. Allegation 16 – **Protection from Harassment Act 1997**;
74.7. Allegation 17 – **Health and Safety at Work Act 1974**;
74.8. Allegation 18 – **Management of Health and Safety at Work Act 1999**;
74.9. Allegation 19 – Breach of data protection legislation.

Allegation 2

75. I note also, under this subsection regarding jurisdiction, Allegation 2. This claim is said to be for a breach of the **Trade Union and Labour Relations Act 1992**, specifically a failure to disclose information under ss183-184. The detail of this claim can be found at p80 (repeated at p122). Although the **1992 Act** does confer some rights on individual employees who then can pursue complaints in the Tribunal, ss183 and 184 do not confer such rights.

76. Those two sections refer to a right of a trade union to present a complaint to the Central Arbitration Committee. They do not confer on an individual employee a right to bring a claim. Therefore, in relation to Allegation 2, I find that the Claimant has no right of action under those sections, and therefore has no reasonable prospects of succeeding in this claim.

77. There are then several of the Claimant's allegations that appear to be aimed at third parties, not the Respondent. Those claims therefore have no reasonable prospect of succeeding against the Respondent. I refer to the following allegations:

Allegation 20

78. This allegation is aimed at Unison and is found in the third ET1 at p80. The allegation reads as follows:

> Unison not allowing me as a member to have representation from outside the Hertfordshire region when on their advertising states members can and two of the representatives would of [*sic]* had a conflict of interest. One works in QC head office the other is a *[sic]* ex Home Manager for Quantum Care. Maggie Lillie the Unison Representative gave me false information then said she would not represent me. I said I did not need her help as I could not trust her nothing personal to Maggie Lillie.

79. It is the Claimant's case that Maggie Lillie works for the Respondent. However, Mr Donaldson informed me that Ms Lillie in fact works part time for the Respondent and part time for Unison; she is employed part time by the two separate entities, and paid by them both for the days she does with them respectively. This was not challenged by the Claimant. I therefore find that, in line with such authorities as **Kemeh v Ministry of Defence [2014] EWCA Civ 91**, the Claimant has no reasonable prospects of demonstrating that the Respondent was liable for Ms Lillie's actions (as a putative agent or something of the sort), when she was acting within her Unison role. When she was so acting, she was acting as an employee of the union, not the Respondent.

80. Even if I am wrong on the above agency point, Allegation 20 demonstrates no claim against Unison for which the Tribunal has jurisdiction in any event.

Allegation 21

81. This allegation is brought against the CQC. From p80, the allegation reads as follows:

> CQC have from me in 2015 a serious neglect to a resident never lodged that report or deleted documents lots of complaints go into CQC they are not interested, CQC have stated QC have their own inspectors but cannot answer why. *[sic]* …
>
> CQC advertise on their website the wrong email address so would not receive any email, could not answer that either.

82. This allegation, although somewhat confused, is clearly an allegation against the CQC, for which the Respondent cannot be liable. The CQC and the Respondent are two entirely separate legal entities: it is not arguable that there is any form of agency relationship between those two entities. There is therefore no reasonable prospect of this claim succeeding against the Respondent.

Allegation 22

83. Allegation 22 is set out at p80-81 and reads as follows:

> Hertfordshire County Council (HCC) are no [sic] very responsible asked for a FOI many excuses from them worst one was they have no involvement with QC they are their Local Authorities and on their QC complaints procedure, HSE sent a Health and Safety issue towards employees to HCC and they have not even acknowledged that. Iain Macbeath has been to open Anson Court in Welwyn Garden City and at Belmont View care home so that is a contradiction as Iain Macbeath is a director at HCC.

84. This allegation is squarely placed as being against "HCC". As with the CQC, the HCC and the Respondent are two entirely separate legal entities. The Claimant has no reasonable prospects of demonstrating that the Respondent is liable for HCC's actions, and therefore has no prospects of succeeding with this allegation.

85. Allegations 2, and 11 to 22 therefore are struck out for lack of prospects.

Allegations 1 & 3 – 10

86. Having struck out Allegations 2 and 11 to 22 as having no reasonable prospects of success, I am left with Allegations 1 and 3 to 10 to consider.

Allegation 1

87. This is a claim for breach of contract and/or unlawful deductions from wages regarding sick pay. This is pleaded in the first ET1, in which the Claimant complains of receiving only statutory sick pay ("SSP"), as opposed to company sick pay ("CSP") for 12 weeks. The Claimant alleges that CSP is

provided for in the Staff Handbook. The Claimant's claim is further particularised at A/23-A/27. It also appears in some Further and Better Particulars provided by the Claimant on 28 February 2020 (A/173). This claim, although not entirely clear, appears to be predicated on the argument that the Claimant was entitled to CSP for the period she was off sick from 12 November 2018.

88. I have set out above the contractual terms relating to sick pay (SSP & CSP). The payment of CSP is discretionary, and so is not a contractual right. The Claimant therefore has no reasonable prospects of succeeding on a breach of contract claim.

89. Regarding the unlawful deduction of wages claim, under s13 of the **Employment Rights Act**, the key issue is what sum is properly payable to the Claimant. Again, I note that CSP is discretionary. The only argument that could possibly be pursued is that the Respondent exercised its discretion not to pay CSP in a manner that no reasonable employer would exercise that discretion. I remind myself of the provision within the Staff Handbook, set out above, stating that, when an employee goes off on sick leave following the commencement of a disciplinary process, then the default position is that the Respondent's discretion is exercised so as not to pay CSP, except for in exceptional circumstances.

90. At the time of going off on sick leave, the Claimant was still subject to a disciplinary process (although no longer suspended). Therefore, there are no prospects of her demonstrating that the Respondent exercised its discretion not to pay her CSP in a perverse manner.

91. Therefore, I find that the Claimant's claim of unlawful deductions of wages also has no reasonable prospects of succeeding.

<u>Allegation 3</u>

92. This allegation is one of perceived direct disability discrimination regarding Ms Howe. The Claimant alleges that Ms Howe, on several occasions made accusations around the Claimant's mental health without medical proof – see A/45, A/80, A/177.

93. Taking the Claimant's case at its highest, as I must for the purposes of these applications, I cannot say, based on my findings above and the words said to have been used by Mrs Howe, that the Claimant has any prospects of proving that the Respondent perceived her to be disabled.

94. I accept Mr McHugh's submission that what was said by Mrs Howe (however ill-advisedly) is a country mile from suggesting that the Claimant is so mentally impaired so as to reach the definition within s6 of the **Equality Act 2010**.

95. I therefore find that any claim based on a perceived disability has no reasonable prospects of succeeding.

Allegation 4

96. This allegation is said to be one of direct disability discrimination arising from the Claimant's injuries following her motorbike accident.

97. In light of my findings of fact above, I find that, whatever the effects of the Claimant's injuries had been in the early months following the accident, from around October 2017 the Claimant suffered only intermittent and minor pain. She had fully healed by January 2018. I have based this on the undisputed medical evidence provided within Section D.

98. The Claimant has no prospects of proving that the effects on her day to day activities were substantial and adverse from October 2017 onwards. She therefore has no prospects of proving that any physical impairment the Claimant did suffer produced substantial adverse effects that were "long-term".

99. It follows that the Claimant has no reasonable prospect of succeeding in proving that she was at the relevant time of any discrimination disabled by way of physical impairment.

100. Therefore, her claim under Allegation 4 cannot overcome the first hurdle of proving that she was disabled.

101. In any event, it is incredibly difficult to decipher within any of the four claim forms what the Claimant stipulates was less favourable treatment she suffered as a result of her motorcycle injuries. From my reading of her various pleadings, I can see at A/1031 (Further and Better Particulars dated 21 August 2020) that the Claimant claims:

> My sickness was mentioned as a misconduct by Mrs Howe and then Mrs Parker just after my RTA injuries in the grievance meeting in Mrs Howe's office … 15 August 2017.

102. It therefore appears that any less favourable treatment complained of occurred in 2017. Under s123 of the **Equality Act 2010**, claims for discrimination must be presented within three months of the act complained of, or within such period as the Tribunal considers just and equitable.

103. The first ACAS Early Conciliation process in which disability discrimination was mentioned was 28 February 2019, meaning that any discrimination arising before 29 November 2018 is on the fact of it out of time. Therefore Allegation 4 is significantly outside of the primary three-month time limit.

104. I find that the Claimant has no prospects of demonstrating that the claim was brought in such time as a Tribunal would consider just and equitable. This is particularly given that the Claimant had already entered one claim, by which time the alleged discrimination is said to have occurred. There can be no reasonable prospects of the Claimant demonstrating any good reason why she did not mention this allegation of discrimination at least in her first claim form, but instead waited to enter her second claim form.

Allegation 5

105. This is an allegation of victimisation pursuant to s27 of the **Equality Act 2010,** for which it is not necessary for the Claimant to prove she was disabled.

106. The first requirement under s27 is that the Claimant must be able to show she did one or more protected acts. S27(2) describes a protected act as follows:

a. Bringing proceedings under this Act;
b. Giving evidence or information in connection with proceedings under this Act;
c. Doing any other thing for the purposes of or in connection with this Act;
d. Making an allegation (whether or not express) that A or another person has contravened this Act.

107. Towards the beginning of the hearing, I asked the Claimant if I had correctly understood what she relied upon as protected acts for the purposes of her victimisation claim, as set out in her Objection document at p21-22. She informed me I had correctly recorded them as being her three grievances as follows:

107.1. Protected Act 1 – 30 November 2015 – first grievance "of victimisation as a result of externally whistleblowing to CQC regarding care home negligence and neglect of a Resident Irene Davis";
107.2. Protected Act 2 – 5 July 2017 – second grievance "of physical disability discrimination by Mrs Sharon Howe, no reasonable adjustments. No recommendations documented from the nominated receiver Mrs Wanda Spooner having apply the Claimant own safety as Mrs Sharon Howe" *[sic]*;
107.3. Protected Act 3 – 13 August 2018 – third grievance "was raised of Mrs Sharon Howe negligence and cruelty to the ornamental Kio Carp not having any oxygen in the pond and in large numbers carp were dying and were rotten floating on the top of the pond for days without Mrs Sharon Howe getting a vet to eradicate the deaths of the carp Mrs Sharon How and Mrs Karen Parker are both liable and in breach of the Animal Welfare Act 2006 the environmental officer of HCC should of *[sic]* been notified as to dispose of the dead carp as this is HCC grounds".

108. I have searched the index of Sections A-D, and cannot find that I have a copy of Protected Act 1 and/or 2 (I have snippets of the 5 July grievance, but not the complete document).

109. The disclosure at Protected Act 1 seems in fact to be an allegation of treatment arising from whistleblowing, rather than an allegation of a breach of the **Equality Act 2010**. There is nothing in Protected Act 1 that could in fact amount to a protected act under s27.

110. Regarding Protected Act 2, there is an assertion within that statement of a breach of the **Equality Act**, namely a failure to make reasonable adjustments and of disability discrimination. Taking the Claimant's claim at its highest, this is capable of being a protected act.

111. I have a copy of Protected Act 3, the Claimant's grievance of 13 August 2018 at p1637-1641. There is nothing in that grievance that falls within the definition of a protected act as set out in s27(2) of the **Equality Act 2010**. It is fair to say that there are allegations of "harassment", however there is no mention of that conduct being linked to a protected characteristic, and it appears to me that the Claimant uses the words "bullying" and "harassment" interchangeably, without giving the latter word its legal meaning.

112. I therefore conclude that the only potentially viable protected act is Protected Act 2 that occurred on 5 July 2017.

113. The question then is whether there are prospects of the Claimant showing that any detriment arose because of that protected act.

114. As a preliminary point under this allegation, Mr McHugh argued that EJ McNeil's direction that only disability discrimination and breach of contract claims proceed (p47), meant that any victimisation claim should not proceed.

115. I highlighted to Mr McHugh that, sometimes, people refer generically to discrimination, believing it to encompass victimisation. Mr McHugh did not accept this point, given that EJ McNeil would have been fully aware of what his chosen words meant.

116. I do not accept Mr McHugh's submission that, purely on the basis of EJ McNeil's direction, the victimisation claim does not survive. EJ McNeil's direction was written in the face of a claim form containing many complaints for which the Tribunal does not have jurisdiction. My reading of this direction is to limit the claims moving forward to those for which the Tribunal does (at least in theory) have jurisdiction. Clearly, the Tribunal has jurisdiction to consider victimisation claims. I will therefore consider whether this claim has prospects of success.

117. Victimisation as a head of claim appears in the second ET1 at p37 and in the third ET1 at p79 (repeated in the fourth claim) but there is no particularisation at all there as to the facts of that claim.

118. Considering the Claimant's Further and Better Particulars, at A/1046, the Claimant states:

> Mrs Howe breached the Respondent's own policies by using "sickness" as no "trigger points" where *[sic]* introduced that is in the HR Manual 10.9 page 9, 10, and 11 if Mrs Howe having issues with my "sickness" Mrs Howe and Mrs Parker were using this after returning from a RTA and myself raising to Mrs Parker of Mrs Howe being unreasonable unfair among a lot of procedures Mrs Howe breached "The Employment Contract" this all started after the grievance I was forced to place on the 5 July 2017 and "Mrs Parker" was not allowing me any witnesses on the 15 August 2017 meeting, not even a Union Representative as to also witness Mrs Howe "discriminating mental impairment disability bold statements" Mrs Parker did not "act" or prevent "harassment" or "discrimination" or applying monitoring "acts" to of safeguarding myself from Mrs Howe…*[sic]*. – my emphasis.

119. There is arguably a causative link pleaded between the protected act and a detriment here.

120. However, the sickness absence that appears to be the factual matrix to any such detriment must be the sickness absence taken in 2017, looking at the chronology.

121. The first claim to mention victimisation is the second claim dated 1 April 2019, with the Claimant having contacted ACAS in relation to this claim on 28 February 2019. This claim is therefore also significantly out of time. For the same reasons as set out in relation to Allegation 4, I find that the Claimant has no reasonable prospects of demonstrating that this allegation was presented in such time frame as was just and equitable within s123(1)(b) of the **Equality Act 2010**.

Allegation 6

122. This is a failure to make reasonable adjustments claim under sss20/21 of the **Equality Act 2010**.

123. It is necessary for a Claimant to be disabled in order to run a reasonable adjustments claim. Given my findings above, that the Claimant has no prospects of demonstrating that she is disabled for the purposes of s6 of the **Equality Act 2010**, it follows that she can enjoy no reasonable prospects of a reasonable adjustments claim succeeding.

124. I note the following point, for completeness: that the Respondent in the Schedule states that this is not a claim that is pleaded in any of the Claimant's claims. I disagree. In the Claimant's second claim she states – A/45:

> Home Manager put no health risk assessments in place for me or a meeting before coming back no support HM said we are not insured for you and you have to be 100%.

125. This is expanded upon in some of the Claimant's further and better particulars – A/1021:

> April 2017 Mrs Howe placing myself on Manual Handling physical training first day back from a RTA being hit by a car and being thrown across a roundabout this training was set up without any risk assessments or OH referrals is a breach of the Health and Safety at Work Act 1774.

126. Another issue arises in other Further and Better Particulars – A/1024

> April 2017 tried returning to work as the Respondent or the "registered manager" Mrs Howe did not apply the reasonable adjustments to the contractual policies on "contractual sick pay" to pay the sick pay as a "reasonable adjustment" which is a breach of the "reasonable adjustments"…

127. There is a further mention at A/1111:

> The Respondent failed to take reasonable steps in relation to my RTA return to work starting April 2017 and then 20 June 2017…

128. These claims relate to matters that occurred in 2017. As with Allegations 4 and 5, these claims are significantly out of time. For the same reasons as I have stated in relation to Allegations 4 and 5, the Claimant has no reasonable prospects of proving that these claims were brought in such time that was just and equitable.

Allegation 7

129. This is a claim under the **Equality Act 2010**, however it is not clear at p79 (repeated at p121)) what the factual allegations (or in fact the specific legal allegations) are surrounding this issue.

130. Without anything more, and considering what is set out in all the pleadings, this must be a reiteration of Allegations 3, 4, 5 and 6, which are all claims that would fall within the **Equality Act 2010** umbrella.

131. This basic assertion of a breach of the **Equality Act 2010** at p79 takes those allegations no further, and I therefore need not consider Allegation 7 separately to my findings on Allegations 3, 4, 5 and 6.

Allegation 8

132. This claim is one of whistleblowing detriment, under s47B of the **Employment Rights Act 1996**. This allegation appears in the third ET1, at p79, and states:

> Employment Rights Act 1996 (not allowing whistleblowing)
> …
> Detriment to a lot of acts and for numbers of times me whistleblowing.

133. There is another allegation within the Claimant's Further and Better Particulars of 28 February 2020 (A/178-179):

> The Respondent put me in an invidious position after whistleblowing about Mrs Howe and Mrs Parker.
> …
> Where an employee has made a "protected disclosure" and has resigned as a result because they made that disclosure they can claim for wrongful constructive dismissal or unfair constructive dismissal.
> …
> Health and safety was not conducted by Mrs K Parker or Mrs S Howe as I was suspended for whistleblowing about neglect to ornamental Koi Carp a text sent to Mrs K Parker that the respondent has not provided any correspondence between myself and Mrs K Parker.

134. At A/1070 (in the Further and Better Particulars of 21 August 2020, the Claimant writes:

> 3 August 2018 at 21.22pm I sent a text to Mrs Parker (Regional Manager) about "negligent acts to the Ornamental Koi Carp inhumanely dying as they could not breathe". And that Mrs Howe was "scapegoating with excuses to avoid responsibility to save the Carp" …

135. The Claimant also mentions prosecution by the RSPCA.

136. I also note that, in the Claimant's resignation letter (C/1854), she states:

> Whistleblowing is what I was doing about the Fish and in first grievance in 2015 but it is in your policies a whistle blower should not be treated unfairly for whistleblowing but that has happened to me for whistleblowing about the HM *[home manager]* and the Carp. Detriment as for whistleblowing. A Company should safeguard a whistleblower.

137. In order to bring a detriment claim, the Claimant must demonstrate that she made a protected disclosure, the definition of which is set out at s43B of the **Employment Rights Act 1996**:

> (1) In this part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:
>
> a. That a criminal offence has been committed, is being committed or is likely to be committed,
> b. That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> c. That a miscarriage of justice has occurred, is occurring or is likely to occur,
> d. That the health or safety of any individual has been, is being or is likely to be endangered,
> e. That the environment has been, is being or is likely to be damaged, or
> f. That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

138. Having read through the Claimant's claim forms and Further and Better Particulars, it appears to me that the Claimant's case regarding a protected disclosure is that she blew the whistle by texting Ms Parker about Ms Howe's treatment of the carp in the fish pond in August 2018. I understand that she alleges that it was this protected disclosure that led to her suspension and disciplinary process. The words of this text are found within the disciplinary report produced at C/1760:

> Need an air filter in pond at Belmont view fish are dying they can't breathe I've taken 6 fishes out dead cruelty has been reported to home manager sorry your friend, big mistake I made. I will report it as it's not right she leaves them in the pond to rot. But she aggressively said to me you grassed me up There [sic] MY FISH MY POND well I said well look after them then she's done nothing. But you have her back oh my brother died, split up with my partner, drinking, oh my dog died. What next. You are losing good staff your [*sic*] a regional manager and letting all this go on why? Ok pond needs sorting hose on rspca has said that's what they need she said it costs money. Really, professional person to help them. Spend the money or let them go sort it out.

139. It also seems that the Claimant relies on her grievance from 2015 as a protected disclosure. I note the Claimant's report of that 30 November 2015 grievance in her Objection note:

> of victimisation as result of externally whistleblowing to CQC regarding care home negligence and neglect of a Resident Irene Davis.

140. From my reading of the Claimant's pleadings, it seems that she only raises issues of detriment caused by the text regarding the fish pond, and does not complain of any detriment arising in consequence of the 30 November 2015 grievance. I will therefore focus on the text.

141. From the Claimant's quote of the text referenced above, there are little, prospects of this being found to equate to a protected disclosure. It is just arguable that this text could potentially fall within s43B(1)(a) or (b) of the **Employment Rights Act 1996**.

*Detriment claim – s47B **Employment Rights Act 1996***

142. Turning then to the detriment. I understand from the sections I have quoted above that the Claimant states that she was suspended because of the text. This is also what she told me during the hearing. She also indicates that she resigned in part in response to the way she was treated following making the alleged protected disclosure.

143. The Claimant also suggested to me that the grievance and disciplinary process stemmed from Ms Parker showing Mrs Howe the text, and that their treatment of her was the reason the Claimant was off work with work related stress. I can see from the fit notes that the Claimant was off work for work related stress from 12 November 2018 (D/2218): it may have been earlier, but a couple of the fit notes are illegible. The grievance and disciplinary combined process was concluded by way of outcome letter dated 29 March 2019. The consolidated appeal outcome was sent to the Claimant on 4 June 2019, sent by post and email – C/1803.

144. Looking at the disciplinary process that arose from the text sent in August 2018, the Claimant through the course of that process recognised that she should not have commented on Mrs Howe's personal matters and in fact apologised for the words she used – C/1764 & 1766. It therefore appears on the face of it that the Claimant accepted some fault for the content text.

145. Although different people are involved in the disciplinary process other than Mrs Parker and Mrs Howe, I bear in mind the case of **Royal Mail v Jhuti [2019] UKSC 55**, in which the Supreme Court held at paragraph 62:

> …if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

146. It is therefore at least theoretically possible for the Claimant to argue that the ongoing grievance & disciplinary processes provided the requisite causative link to the protected disclosure.

147. However, given that the Claimant accepted some inappropriateness in her text, I find that there is little reasonable prospect of the Claimant showing that the disciplinary process was anything other than genuine. I therefore find that there is little reasonable prospect of it being found that the disciplinary process was due to the Claimant having made a protected disclosure, rather than being due to the inappropriate choice of wording within the text.

148. Regarding the grievance of 13 August 2018 (C/1637), this focuses on Mrs Howe's alleged bullying of the Claimant. There is a brief passing reference to the text message and although the issue with the fish pond is mentioned, it is

one small part of a much greater grievance. I also note that the grievance process was dealt with by people other than Mrs Parker and Mrs Howe. I consider that there are no reasonable prospects of a Tribunal finding that the manner in which the grievance process was conducted was caused by the Claimant's text to Ms Parker.

149. Being as generous to the Claimant as possible, the detriment must have come to an end on receipt of the appeal outcome letter on 4 June 2019: the claim for whistleblowing was raised in the third claim, the ACAS Early Conciliation period for which started on 4 September 2019.

150. Claims for whistleblowing detriment must be brought within three months of the detriment suffered, or, if a claimant can show it was not reasonably practicable to have brought it within that time frame, a reasonable period thereafter – s48(3) of the **Employment Rights Act 1996**. This claim is (taking the Claimant's case at its highest) one day out of time.

151. Taking all of the above into consideration, I conclude that the Claimant has little reasonable prospect of succeeding on her detriment claim regarding the disciplinary process. I find that there are no reasonable prospects of succeeding on her detriment claim regarding the grievance process.

Automatic dismissal claim – s103A ***Employment Rights Act 1996***

152. Turning to the claim connected with the Claimant's resignation, this is in fact a claim for constructive automatic unfair dismissal under s103A of the **Employment Rights Act 1996**.

153. Such a claim requires the Tribunal to be satisfied that the Claimant suffered a detriment under s47B that led (at least in part) to her resignation.

154. I have read the Claimant's resignation letter, and have referenced the relevant section above at C/1854.

155. I have concluded that the detriment claim (relating to the disciplinary process) has little reasonable prospects. The automatic constructive unfair dismissal claim must be based on the assertion that this detriment was at least in part why the Claimant chose to resign. It follows that the dismissal claim also has little reasonable prospects. I accept that the Claimant mentions the alleged detriment within her resignation, however there will be various obstacles for her to overcome in succeeding in this claim, the first being to succeed on her detriment claim.

<u>Allegation 9 & 10</u>

156. I take these two claims together because, as Mr McHugh conceded, if the constructive unfair dismissal claim has some prospects of succeeding, the same must be said of the wrongful dismissal claim.

157. The wrongful dismissal claim is for the Claimant's notice pay, as she resigned without notice. The constructive unfair dismissal claim amounts to the Claimant saying that the Respondent acted in such a way as to entitle the Claimant to terminate her contract of employment without notice pursuant to s95(1)(c) of the **Employment Rights Act 1998**. Should this be proven to be the case, then the Claimant would succeed, not only on her constructive unfair dismissal claim, but also on her wrongful dismissal claim.

158. These two claims appear in the third ET1 (repeated in the fourth) – p79/80. I accept the Respondent's point that the constructive dismissal claim is not clear and is more in narrative format. However, within that narrative there are allegations that are capable of amounting to a fundamental breach of contract, if made out on the facts. I have also had the benefit of having seen and read the Claimant's resignation letter at pp1851-1875.

159. I can see the following (amongst other matters) asserted within the narrative of the ET1:

159.1. Karen Parker (Regional Manager) allowed Sharon Howe to "breach the Hate Crime legislation could of *[sic]* been investigated by the police for common assault but I was out of time and was not aware of hate crime RM did not investigate or guide me what to do, what I told the RM [*Regional Manager*] in her notes on her laptop that the RM has deleted from my personal file";

159.2. The Respondent failed to comply with its own grievance and disciplinary procedures, and did not listen to the Claimant's grievances by not reasonably meeting its own time frames.

160. Both of these issues, if proven, could in theory amount to a fundamental breach of contract. If the Claimant can demonstrate that Ms Parker stood by why Ms Howe committed some form of bullying act against the Claimant, this could (at least theoretically) amount to a breach of the implied term of trust and confidence.

161. Regarding policies and procedures, in **W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516**, the EAT held that there was an implied term in the contract of employment "that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have". Further, the Claimant also raises that her grievances weren't listened to (p79): the EAT in **Waltons and Morse v Dorrington [1997] IRLR 488** held (following **McConnell**) that a fundamental breach could arise from an employer being dismissive of an employee's grievance.

162. Mr McHugh argued that, even if there was a fundamental breach, the Claimant affirmed her contract as the disciplinary and grievance appeal outcome was five weeks prior to her resignation.

163. An employee must make up his/her mind "soon" after the conduct that he/she alleges amount to a fundamental breach – **Western Excavating**

(ECC) Ltd v Sharp [1978] IRLR 27. There is however no specific time window within which an aggrieved employee must resign; rather it is a question of fact in each case, and a reasonable period will be allowed. It is therefore perfectly possible that a gap of five weeks is not too long as to mean that the Claimant affirmed her contract.

164. I find that Allegation 10 has more than "little" reasonable prospects; it therefore follows that the same is true of Allegation 9.

165. I therefore find that Allegations 9 and 10 can continue unfettered.

Recap

166. To be clear, I set out here a summary of my findings:

166.1. Allegations 1, 2, 3, 4, 5, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 have no reasonable prospects of success and are struck out;
166.2. Allegation 8 has little reasonable prospects of success;
166.3. Allegations 9 & 10 continue unfettered.

Amount of deposit order

167. In relation to Allegation 8, which relates to both a detriment claim and an automatic unfair dismissal claim, I attach a deposit order to the Allegation as a whole, rather than attaching an order to the detriment claim and dismissal claim separately. I do this as to two claims are so interwoven, that the dismissal claim can only have a chance of success if the detriment claim succeeds.

168. I remind myself that, from the Claimant's evidence on means, she has roughly £150 available at the end of each month, and savings of £2000.

169. I therefore order that a deposit of £300 will attach to Allegation 8. In light of the Claimant's means, and the purpose (as set out above) of deposit orders, I am content that this figure represents a sum that is proportionate and reasonable. I am satisfied that this figure will not impede the Claimant's access to justice, whilst encouraging her to think carefully as to whether she wishes to pursue this particular Allegation.

170. I note that I will exclude myself from hearing the final hearing in this matter, having given the above opinion on prospects.

171. Below are recorded (word for word, including typographical errors) the Allegations as listed in the Respondent's Appendix B, which distilled the Claimant's claims down into a list of the overarching complaints. These are the Allegations as I refer to them in my Judgment.

172. I have also included a column to the right, to state whether the Allegations survive and, if so, whether they require a deposit to be paid.

Allegation	Detail	Status
1	Breach of contract and unauthorised deductions claim in respect of non-payment of sick pay.	Struck out
2	Disclosure of information to trade unions for collective bargaining purposes/breached Trade Union and Labour Relations (Consolidation) Act 1992. Failure to disclose information section 183-184 TULRCA 1992. "Unison has no power over negotiating inforcement on QC's as the policy is only non-binding collective bargaining agreement so it is a detriment to employees policies for new employees sick is a drastic cut and Unison are powerless no point in having a Union just to make QC look good (for show) CQC have from me in 2015 a serious neglect to a resident never lodged that report or deleted documents lots of complaints go into."	Struck out
3	Direct discrimination of a prognosis from the HM without any specialist expertise or OCH referrals to support to HM direct discrimination. A Direct Disability Discrimination claim on the basis of an alleged perceived mental health disability. The Claimant denied that she suffered from any actual mental health disability within her pleadings.	Struck out
4	A Direct Disability Discrimination claim on the basis of an historic motor bike injury.	Struck out
5	A Disability Victimisation claim notwithstanding the fact that the Claimant has not pleaded or carried out a Protected Act.	Struck out
6	Failure to implement reasonable adjustments regarding the Claimant's return to work in 2017.	Struck out
7	Equality Act 2010. Assumed to be Disability claims referred to above.	Struck out
8	Employment Rights Act 1996 (not allowing whistleblowing). And Detriment to a lot of acts and for numbers of times me whistleblowing. And	Survives with a deposit order - £300

	Protection of the Public Interest Disclosure Act 1998.	
9	Wrongful dismissal (constructive).	Survives
10	Unfair dismissal (constructive).	Survives
11	Health and Social Care Act 2012.	Struck out
12	Human Rights Act 1998.	Struck out
13	Defamation Act 2013.	Struck out
14	Duty of care. Assumed to be a personal injury claim by the Claimant against the Respondent.	Struck out
15	Care Act 2014.	Struck out
16	The Protection from Harassment Act 1997.	Struck out
17	Health and Safety at Work Act 1974.	Struck out
18	Management of Health and Safety at Work Act 1999.	Struck out
19	Disclosure to my personal file data being withheld. Breach of Data Protection Legislation.	Struck out
20	Unison not allowing me as a member to have representation from outside the Hertfordshire region when on their advertising states members can and two of the representatives would have had a conflict of interest. One works in QC head office the other is a ex Home Manager for Quantum Care. Maggie Lille the Unison representative gave me false information then said she would not represent me I said I did not need her help as I could not trust her nothing personal to Maggie Lillie.	Struck out
21	CQC they are not interested, CQC have stated QC have their own inspectors but cannot answer why.	Struck out
22	Hertfordshire County Council (HCC) are no very responsive asked for a FOI many excuses from them worst one was they have no involvement with QC they are their Local Authorities and on their WC complaints procedure. HSE sent a Health and Safety issue towards. Employees to HCC and they have not even acknowledged that. Iain Macbeath has been to open Anson Court in Welwyn Garden City and at Belmont View care home so that is a contradiction as Iain Macbeath is a director at HCC.	Struck out

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Employment Judge Shastri-Hurst

Dated : 6.3.21

Sent to the parties on: 22/03/2021

THY
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For the Tribunal Office