Appeal No. UKEAT/0312/14/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 21 May 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR S T UKEGHESON — APPELLANT

LONDON BOROUGH OF HARINGEY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SAAMAN POURGHADIRI (of Counsel)
For the Respondent	MR JAKE DAVIES (of Counsel) Instructed by: Legal Services London Borough of Haringey 7th Floor Alexandra House 10 Station Road Wood Green London N22 7TR

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

RACE DISCRIMINATION

VICTIMISATION DISCRIMINATION

HARASSMENT

UNFAIR DISMISSAL - Constructive dismissal

The Claimant resigned. In a discursive ET1 he complained of the conduct of his senior manager toward him as her deputy, generally asserting that she had undermined and overruled him, taken actions adverse to him, declined to involve him in decisions and queried things such as his claim for time off in lieu. He said that though she had agreed that he could work on one Sunday a month, she drew up a rota providing he should work for 3 in every month even though she knew he was a Christian who placed a value on churchgoing. Finally, she sent him an email which though it appeared anodyne to an uninformed reader, was being used by her to belittle him: and this was the last straw which justified him in resigning. She had asked him to take over a shift from another employee who began at 10am, but insisted that he started at 9 without good reason. These were acts of harassment, or victimisation, or sex/race discrimination as well as being a breach of the implied term, justifying resignation. At a Preliminary Hearing an Employment Judge, in the Claimant's absence, without hearing evidence, relying in part on what she was told by the senior manager (who was at the hearing), and on 40-50 documents out of a bundle of some 800 pages, not all of which she had read though they were presented as relevant, focussing upon individual events in isolation and relying also in part on what was said in the Respondent's ET3, struck-out the whole claim as not being reasonably arguable. This was held the wrong approach: moreover, she had not directed herself as to that which is the correct approach, namely to take the allegations in the claim at their reasonable highest, unless conclusively disproved by a relevant document. The

appeal was allowed, save in those respects in which notwithstanding the error of approach the Judge was plainly and obviously right to reach the conclusions to which she had come.

Remitted for further hearing to a different Tribunal.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For Reasons which were sent to the parties on 21 October 2013 Employment Judge Manley, at Watford Employment Tribunal, struck-out the entirety of the claim which the Claimant had made. This claim comprehended a very great number of separate claims, 21 in total, as set out in the opening words of what was described as an interim Statement of Claim, which was part of his originating application.

The Approach to Striking Out a Claim

2. I will set out the general effect of the authorities as to strike-out on the grounds that there is no reasonable prospect of success, pursuant to what is now Rule 37 of the **Employment Tribunal Rules**, Rule 37(1)(a) being that:

> **"… either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on [the ground] -**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
>
> **…"**

3. The power was formally contained in the same words in Rule 18(7)(b) under what were then the **2004 Rules of Procedure**. The overview of the proper legal approach to an application to strike-out emerges from **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session, which has become such familiar territory in this Tribunal that it is case number 24 in the Familiar Authorities bundle. There, in paragraph 30 of the Opinion of the Inner House:

> **"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls* v *Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd* v *Patel* [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd* v *Patel*, supra; *Ezsias* v *North Glamorgan NHS Trust***

> **[[2007] ICR 1126]). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias* v *North Glamorgan NHS Trust,* supra, Maurice Kay LJ, at para 29)."**

4. Counsel before me are agreed that the approach is to take the allegations made by the Claimant in his claim at their highest, on their own, unless they may be conclusively disproved in the sense meant by **Tayside v Reilly**. I do not think, either, that there is any issue between them that the very existence of the power to strike-out means that it may be used. There is no blanket ban against there being a strike-out, for instance in particular classes of cases such as discrimination, although as Mr Davies who appears for the Respondent suggested to me by reference to the case of **Lockey v East North East Homes Leeds** UKEAT/0511/10/DM, a decision of 14 June 2011 of this Tribunal before HHJ Richardson sitting alone, at paragraph 19:

> **"… there is an aspect of the reasoning in *Ezsias* which does not apply to an ordinary claim of unfair and wrongful dismissal. In cases of discrimination and whistleblowing there is a particular public interest in examining claims on their merits which should cause a Tribunal to consider with special care whether a claim is truly one where there are no reasonable prospects of success: see *Ezsias* at paragraph 32, applying *Anyanwu v South Bank Student's Union* [2001] IRLR 305. That particular public interest does not apply to claims of unfair or wrongful dismissal."**

He nonetheless went on to say in the next breath, in paragraph 20, that nonetheless there remained:

> **"… a fundamental difference between a striking out application and a hearing on the merits. The reasoning in *Ed&F Mann Liquid Products* should be kept in mind. The Tribunal is in no position to conduct a mini-trial; issues which depend on disputed facts will not be capable of resolution unless it is clear that there is no real substance in factual assertions made, as it may be if they are contradicted by contemporaneous documents."**

5. Mr Davies asserted that the question of striking out on the grounds of there being no reasonable prospect of success is whether the prospects were realistic as opposed to merely fanciful (**Eszias v North Glamorgan NHS Trust** [2011] IRLR 550, paragraph 25). What was important was the particular nature and scope of the factual dispute in question (**Ezsias**, paragraph 27). He noted that in **Chandhok v Tirkey** [2015] IRLR 195, at paragraph 20 the Appeal Tribunal observed that there were occasions when a claim could properly be struck-out

where, for instance, there was a time bar to jurisdiction and no evidence advanced that it would be just and equitable to extend time or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic, which according to Mummery LJ, at paragraph 56 of his Judgment in **Madarassy v Nomura International plc** [2007] ICR 867:

> **"… only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."**

6. The paragraph went on to add that there might be cases in which there was plainly an abuse, but the general approach was nonetheless that the exercise of a discretion to strike-out should be sparing and cautious, adding:

> **"… Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."**

7. What is less well travelled by the authorities but also clear is the basis upon which a Tribunal Judge must assess a case if she considers that there may be appropriate grounds upon which it should be struck-out. They were addressed *obiter* in **Chandhok v Tirkey** itself from paragraphs 16 to 19. In that it was emphasised that, in order to determine what a claim is, it is defined for the purposes of the **Tribunal Rules of 2013** at Rule 1 as meaning "any proceedings before an Employment Tribunal making a complaint", a definition which is developed in the rules which relate to presenting a claim using a completed claim form, which may be rejected on certain grounds (see Rule 10) and which may call for a response (see Rules 15 and following), to which plainly the power in Rule 37 relates. As said, therefore, in **Chandhok v Tirkey** the claim is something which has an element of formality about it. There at paragraph 16 this was said:

> **"… The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by**

whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made - meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

The Essential Facts of the Present Case

8. The claim, as made in the ET1, was advanced in a slightly unusual fashion. It set out at some length what was described as a interim Statement of Claim, to which was attached as an appendix an eight-page email, which the Claimant had sent to his former line manager some ten days after he resigned. That was supplemented in a further originating application, therefore a separate claim but heard together with the former, in what was described as a complaint of continuing acts of discrimination, harassment and victimisation pursuant to relevant sections of the **Equality Act 2010**.

9. From that material, as set out in the claim, it was shown that the Claimant asserted he had been employed as the Deputy Manager of the Hazlemere Family Support Centre from 22 January 2010 until 18 January 2013. He resigned in December with effect from the date of 18 January.

10. In his ET1, he complained in several of the paragraphs of the interim Statement of Claim, in matters which were repeated and augmented in the attached email, of a series of incidents that had happened between, essentially, him and his manager, a Ms Osho, during the course of his employment at the Centre. It reads to me, and I think would read to any fair reader, that this is a series of complaints about the way in which she related to him in relation to his work. He claimed that she had not done, in respect of him, that which she should have done such as carrying out appraisals, which he asserted (see paragraph 19) was a breach of contract; that she had not taken the elementary steps of giving him appropriate advice and instruction

when, for instance, (see paragraph 65) his job classification changed from one, RH7, to another, PO3; that she had failed to keep promises in respect of his training and development. But more critically the underlying flavour is that throughout, from these unpromising beginnings, she treated him in a way which was, essentially, demeaning of his status, his expertise, his qualifications and ability. Essentially he was complaining about the relationship between the two. Thus, he argued (see paragraphs 32 to 33) that, in effect, she froze him out of making management decisions, which were supposed to be joint, complained (paragraph 34) that she often undermined him; (paragraph 35) that she raised concerns which were inappropriate in respect of some of his behaviour including his taking time off in lieu, a matter of which she disapproved, when he thought that he had secured the approval of higher management for that, particularly when she was absent off at the time; that he had taken the difficult decision of disciplining three members of staff for their inadequate care, using a formal process at a time when she was not present, but upon her return to work she had overruled him and issued a verbal warning instead, thereby undermining his authority in the workplace; that, although she was supposed to have regular meetings with him, had a meeting only on one occasion to discuss what was called standard setting when this was, in effect, demeaning of him; that she had not adopted a policy which he had taken some time and care to discuss in relation to children's clothing, again at a time when she was absent from the workplace; had ignored concerns that he had expressed about the poor management of an aspect of the work called "Breathing Space"; that she had adopted an abrasive style, on one occasion saying to him "Just do as you're told, period" and in this process had asked him to do that which she knew it would be difficult for him to do given his particular background. She knew he was a church-attending Christian. Although he was not unhappy to work one Sunday in a month, she asked him, without he thought good and proper reason, to work three Sundays. She knew that for his family reasons he wished to start work at 10am (indeed part of his claim says she had agreed to that) when he

took over the task of another woman, Jasmine Wong, she having worked from 10am. He found that Ms Osho insisted that he began at 9am.

11. It is frequently the experience of life that, where parties fall out, they may see in that which the other does toward them a real or, it may be, imagined slight in circumstances in which others, not being aware of the background, nor feeling as keenly as the parties to the personality dispute do, would regard as unexceptional and anodyne.

12. In mid-December, just before he issued his letter of resignation, the Claimant says that Ms Osho sent him an email requiring him to complete a leaver's form for an employee. The terms of the email were set out in the Judge's Judgment. Without knowledge of the context between the two individuals, the words would seem unexceptional. So indeed they did to the Judge. They read:

> **"Please action.**
>
> **If you are unfamiliar with the form let me know and I will show you how to complete it.**
>
> **Regards."**

If, however, the evidence established that in fact the recipient of the email was fully familiar with such a form and did not, given his experience and ability, need to be told how to complete what was a simple form, one which he had done before, then the email might take on a very different force and meaning. It might then be seen as belittling or sarcastic. It may very well be that the proper interpretation is the former. But the Claimant's interpretation, taking the view that he did of the history between the two, was the latter, as he suggests in his ET1, and accordingly he thought this meant that he should at that stage resign and thought himself entitled to do so, he maintains.

13. In the course of this hearing, as it happens, I have been shown a number of emails which from time to time appear to record his complaints to her about her management style and her behaviour towards him, which are consistent with the view he expressed in his ET1.

14. He not only, however, complained that he had been subject to constructive unfair dismissal by reason of what amounted to conduct, which taken as a whole was a breach of the implied term of trust and confidence or could be seen that way, but to the 20 other claims to which I have referred. Those which have featured before the Judge and here centrally were claims that in what happened he had been discriminated against on the ground of his race, that he had been discriminated against on the ground of his gender, that since he suffered, to the knowledge of his employer, with a thyroid cancer and was therefore disabled, there had been a breach of the **Equality Act** in failing to make reasonable adjustments for him, that there had been discrimination against him on the grounds of his religion and belief, that what Ms Osho did towards him constituted harassment on the ground of one or other of his protected characteristics, they being race, sex, disability and religion, and that he had been victimised for making a protected disclosure.

15. It is fair to say that the claims are not very clearly set out, though as I have indicated, the essential underlying theme is that of the relationship between himself and Ms Osho, which was (perhaps an understatement) "uncomfortable", at least.

16. The claims were considered by Employment Judge Smail at a case management discussion, held on 24 June 2013. The Claimant appeared. He was in person. The Judge ordered a Pre-Hearing Review to consider whether any of the claims should be struck-out as having no reasonable prospect of success and whether a deposit should be paid in respect of any

claim which had only little reasonable prospects of success. It analysed, as best it could, what the core factual allegations were which it derived from the statement in the ET1. Having done so, it then attempted to analyse those factual allegations under the most appropriate heading of legal cause of action. It set those out at paragraph 10, in ten subparagraphs of the case management discussion and then turned to the heads of claim, which it identified as constructive unfair dismissal, race discrimination, sex discrimination, religious discrimination, disability discrimination, and victimisation.

17. The claim based on disability was described as a reasonable adjustments claim. That was a reference back to paragraph 10.8, a "failure to consider" reasonable adjustments. There were four of them: not allowing flexi-hours (that being a reference to the requirement to work at 9am rather than start at 10am); denying the Claimant leave from 8 January during his notice period; a failure to consider redeployment towards the end of his time at the Centre; and a failure to facilitate church attendance on at least three Sundays a month.

18. The Pre-Hearing Review which the Judge had ordered came before Judge Manley. The Claimant had earlier sought, with the acquiescence of the Respondent, that that should be adjourned for a short while in respect of treatment which he was undergoing in respect of the cancer of the thyroid which had disseminated to his lymph glands. That was refused. Accordingly the hearing proceeded without his attendance. A Mr Komolafe represented him, but not in the sense of a representative. He was only there to deal with issues of case management and not to respond substantively or at all to the application to strike-out. Ms Osho was present.

19. The Judge described her approach. She first set out the issues as they had been defined at the case management discussion ("CMD"). Mr Davies attaches considerable importance to this. Then, in paragraph 6, she set out what may be thought unusual material in a strike-out claim under the heading "The Facts". This is unusual because it is not normally the function of a strike-out hearing to decide facts unless they are undoubtedly undisputed and, further, unless there are no further facts which could qualify relevant apparent fact which is undisputed. She began:

> **"These are the facts that I have found which, in large part, are not disputed …"**

The words "in large part" imply that in some part they were disputed. She continued:

> **"… because they arise from the documentary evidence provided to me. Some of them I have been able to ascertain from either the claim form or the response form, or from written submissions presented to me by the claimant as he was not in attendance. The bundle of documents was extensive; more than 800 pages and, of course, I could not possibly consider all of those pages to determine this preliminary issue. I need to contain my deliberation to those which will assist me with deciding there are no or little reasonable prospects of success and I estimate that I looked at about 40 or 50 documents over the course of this preliminary hearing. …"**

Then she turned to say, "These then are the relevant facts".

20. Then, in paragraph 7, she turned to the law. In applying the law which she set out to the facts which she had found by the process I have described, she said this, at paragraph 7.7:

> **"In determining these issues I obviously have to concentrate on the facts as presented to me. At a preliminary hearing of course, I did not hear, or I have not in this case, heard live evidence. Ms Osho has from time-to-time assisted me in part but by far the largest part of my deliberations have relied upon documents brought to my attention. The claimant, of course, had the opportunity to be present here but he decided to submit a statement which I have read and two separate submissions which I have also read. …"**

21. There is no reference that I can see in the Judge's self-direction, apart from a recognition that it is unusual to strike-out a claim at a Preliminary Hearing, using the words: "This is an unusual case but I do take the view that I have had enough information before me to be able to form the view that this is a matter which should be struck out at this stage"

(paragraph 8.18) , to the general principle, which is that a Claimant's case should be taken at the highest, as revealed by the claim, unless contradicted by plainly inconsistent documents.

22. The fourth ground of appeal, covering the entirety of the claims struck-out, was that this approach was flawed. Mr Pourghadiri, who appears for the Claimant on the appeal, argues at the outset that the Judge simply failed to approach the exercise of her discretion in an appropriate manner. In **Ezsias v North Glamorgan** the Judgment of Maurice Kay LJ, from paragraphs 25 to 32 set out the central point that, if there is any dispute as to central facts, a case cannot be dismissed by way of strike-out on the grounds of no reasonable prospect of success. He is plainly right in that. The general approach of the courts, and the Tribunals in the employment field too, is adversarial. The system of open justice involves a public hearing. In our system that generally requires evidence on matters of fact which may be critical or disputed. As has been pointed out in **Anyanwu**, that cannot simply be reduced to a paper exercise nor should it be.

23. The purpose, as it seems to me, of the provision of the strike-out rule is twofold. In an appropriate case it serves to avoid the exposure of a Respondent to unnecessary expense. A Respondent may not be able to recover its costs of defending a labyrinthine, detailed, lengthy claim, which may be ill-formulated and which may take several days of hearing brought by a party who, if they lose, will have no substantial assets with which to pay any award of costs to which the Respondent might otherwise be entitled under the costs provisions in the **Rules**. However, its other and central purpose is to provide for straightforward and obvious cases where, on any showing, there is no prospect in reality of success (other than perhaps a fanciful one) to be removed from consideration and in that way preserve the resources of the court and the parties and ensure that other cases have a better chance of being heard promptly before the

Tribunal. It can thus serve a very important function, but it is important to keep it in its proper place. There is no room, as indeed was observed in **ED & F Man Liquid Products Ltd v Patel** [2003] CP Rep 51, for the proceedings to become something of a mini-trial, as the suggestion of finding facts begins to imply.

24. Here, as recognised by Mr Davies, the reference to Ms Osho having assisted the Judge is problematic and would give rise to the appeal having to be allowed, though he would seek to resist that upon the basis that there was no specific incident referred to by the Judge in which she related that Ms Osho's observations had been of critical importance. I accept the latter point, but it seems to me I have to take those words as meaning what they say at face value: that the decision was in part influenced by what Ms Osho had to say, whatever it was, to the Judge at the time. Given that, upon what I regard as a fair reading of the ET1, the central problem may have been between her on the one hand and the Claimant on the other, this could not, it seems to me, fairly resolve the issues arising between the parties.

25. Secondly, the Judge, by the use of the words "she adopted" in paragraph 6.1, suggests that she found some facts which were disputed. A Judge on a strike-out has no right to do that unless the facts are simply unimportant, in which case the question arises why the facts needed to be found at all. The Judge indicated that she was having regard to the bundle of documents, but it is plain that she looked at 40 to 50 documents and there are 800 pages. Moreover it looks as though she was determining the decision on the documents rather than upon taking the pleadings at their reasonable highest. This is not in line with the approach established by the cases. Accordingly, it seems to me that the Judge erred in her approach. She should not have adopted the approach of conducting what appears to be something of a mini-trial, however much she may have hoped to avoid the Respondents facing a number of allegations which, in

the interim claim, were shadowy and might very well be, and realistically seemed to have been, of little value.

26. I have no hesitation in, therefore, allowing the appeal. That does not, however, resolve the issues which arise before me. That is because I would allow the appeal in every respect unless the Judge were plainly and obviously right in the conclusion to which she came. She was entitled to come to conclusions separately in respect of each of the matters claimed. That is what the Rule means. Mr Davies sought to persuade me that in many cases she was entirely right to strike-out the claim.

27. In dealing with this I should say simply that, so far as the claim for constructive unfair dismissal is concerned, the way in which Mr Davies put his response was to say that the law requires more simply than that there is, taken overall, what might be or might have been at some stage a repudiatory breach by the employer. In a case in which, as here, the pleading was alleging effectively a last straw, one had to see whether the last straw did indeed justify that title. If not, then there was no incident which had arisen within a short period of the resignation, and that court would effectively be bound to reject the claim for constructive dismissal.

28. The Judge, as to that, dealt with the email of 20 December, beginning "Please action", which I have cited above. She commented (paragraph 8.2) that at the time the Claimant actually resigned he gave no reasons at all for the resignation. That is correct. What he said on 21 December was simply, "I reserve my comment on the reasons but shall confirm with HR in due course". It was in an email some 17 days later on 8 January that he set out his full complaints as annexed to his ET1.

29. She went on to say that there were concerns about Ms Osho's management style "but none of those, it seems to me, can be said to be breaches of contract." Then she said this:

> **"… The difficulty is, of course, that that email of 8 January came to the respondent's attention after his resignation. What he says in that is that the breach that he relies upon is the 'last straw' being asked to respond to an email about a leavers form set out above … His response to that seems to me to be completely unreasonable. There is absolutely nothing wrong with what Ms Osho asked him to do and his response is, what might be said to be, "over the top", but there is no breach by the respondent at that point."**

30. I cannot accept the reasons that she gives for being so dismissive of the Claimant's case in this respect. The meaning that correspondence or observations have when they are directed by one person to another may often depend very much upon the context of the relationship between the two. As I have indicated already, this email might be entirely innocuous. But it might be read, realistically, by a Tribunal as meaning precisely what the Claimant complains about. Without putting it in proper context, a court would simply be unable to determine which it was.

31. The second problem with it is that the Judge appears to be looking to see whether taken in isolation this is a breach of contract or not. That, together with what else she says about Ms Osho's management style, is perhaps to fail to see the eloquence of the story painted by the whole of the series of events and to focus instead upon events taken individually as though they were in silos. In a constructive dismissal case arising out of a poisoned relationship between parties, what matters is the totality of the picture rather than any individual point along the way. It is therefore possible that there could be a perfectly reasonable claim here for constructive dismissal. For my part, I would not even have thought it necessarily weak. It will all depend upon the way in which the parties come across in the evidence given before a Tribunal.

32. Accordingly I do not accept Mr Davies' primary response on this ground. In my view the Judge's decision in respect of constructive dismissal cannot be said to be plainly and obviously correct.

33. I turn to the central heads, as identified in the CMD. I should add that part of the purpose within the system for there being a case management discussion is to refine and define the issues, particularly in a case in which the facts may not be well-focussed or carefully categorised by the Claimant concerned or, for that matter, by the Respondent involved. An issues list would cease to provide a useful function if it were not generally to be taken as the template from which a later Tribunal was fully entitled to proceed. I therefore entirely accept Mr Davies' opening remarks to me in submission that here the Tribunal was entitled to begin with the issues as they had appeared to the Tribunal at the CMD. It would not preclude it from accepting an alteration or an amendment to that if that had been suggested, but although the Claimant here made a reference to his desire to amend the list of issues, he never said in what respect, and a completely unspecific suggestion that there might be some amendment cannot now give him carte blanche to say that it should have been this or that specific matter. The Judge had to treat the case as it appeared to be his case at the time on the basis of the issues as set out in the CMD.

34. Taking, then, those issues which the Judge herself set out at the start of her decision, she examined the cases first of race and sex discrimination. Here the Claimant would have to show (see the references to **Madarassy** made in **Chandhok v Tirkey** to which I have already referred) that there was more than just a difference of race or sex and a difference of treatment. To show those would be to show only a possibility of discrimination. On that basis the burden of proof would not reverse. On that basis it was for him to assert facts from which the Tribunal

could conclude that there was indeed here race operating as a reason, or sex operating as a reason, for the mistreatment of which he complained.

35. The way in which the Judge dealt with this is best approached by what she said at paragraph 8.13:

> **"As far as sex discrimination is concerned the claimant refers only to one matter. He seeks to compare himself with a female worker with respect to flexible times. Quite simply put, that worker is one who is of Chinese decent, so that might go to his race claim and it certainly goes to his sex discrimination claim. Ms Wong was simply engaged on a different contractual arrangement and what is more, the respondent says, there is a particular reason why she needed to start at 10.00am which is very different to his reason."**

36. The Claimant's case is that this was more than simply a difference of sex or race and treatment. There was in addition a reason advanced for the treatment by the Respondent, which was flawed. He does not accept that the different contractual arrangement is relevant. Parties need to be in materially the same circumstances if they are to be compared (see the **Equality Act**, section 23). The word is "materially". He does not accept that the contractual arrangement is material. He points to the fact that he was seconded to fulfil Ms Wong's role in October 2012. Therefore, since he was doing her job, there was, as he would put it, no very good reason why he should be required to work different hours to do the same job. He disputes the reason proferred. If a reason can be shown to be a false or bad reason, then that may provide the something extra to which **Madarassy** gave reference. It is possible, as decisions of the EAT have shown, that a false reason (if it is) may be enough.

37. This seems to me to be something of a long shot. But I cannot say that it is completely out of the question and therefore I cannot say that, on the basis upon which the Judge approached it, or in any event, the decision is plainly and unarguably right. It might be, but it may not be. It needs the evidence to be heard to evaluate the facts.

38. As to the other allegations of racial discrimination, essentially they rely upon the way in which Ms Osho dealt with the Claimant throughout. There is nothing specific which the Claimant says in his ET1 which would lead anyone to suppose, naturally, that her treatment towards him was influenced by his race as opposed to her relationship with him. But I would hesitate to say that the decision to which the Judge came was plainly and unarguably right, given experience that very often in discrimination cases the initial conclusion to which a Tribunal comes may be rather like a pack of cards, assembled into a tower, which collapses when any one is removed. A decision in one respect may have an influence in a decision in others just as a decision in respect of credibility might do. It may not. But it is capable of doing. Although with some hesitation, I do not therefore think that I can say with the required certainty that the Judge is plainly and unarguably right in her conclusion in respect of the race and sex conclusions generally.

39. I turn then to the conclusion which she reached in respect of the claim of religious discrimination. Underneath the heading "Race Discrimination & Religious Discrimination", in the ET1, from paragraphs 68 to 73, there is no obvious connection between the Claimant's complaints and his manifestation of religion and belief. What is not said in terms, under this heading, is that the Claimant was rostered to work for three Sundays a month whereas previously it had only been one Sunday a month because of his religion.

40. If one took the facts at their highest, as I have to do, it might be possible to suggest that the reasoning of Ms Osho in rotaing the Claimant in that way, if it was an act of hostility by her to him, was because she knew that that would particularly affect him. It would be highly questionable, as it seems to me, that if so that that would be because of his religion rather than because of her relationship and her approach to him generally.

41. I am left here with the conclusion that, as the matters stand (and stood as they were before the Judge, which is the time at which I have to approach them), the Judge was right to conclude that there was here no reasonable prospect of success. There was some, but not a reasonable, prospect of success because of the way in which the claim was originally put. The attack, if there was an attack on him, does not appear to be because of his religion even though it may have taken account of his religion in what was done, which is a different matter. Accordingly, as it seems to me, the decision in respect of the strike-out of the claim for religious discrimination stands.

42. I turn to the question of disability discrimination. The claim here, as identified at the CMD, was a failure to consider reasonable adjustments. It is not put that the requirement to work as from 9am rather than 10am actually subjected the Claimant to a substantial disadvantage. The duty to make adjustments, as set out by section 20 of the **Equality Act 2010**, comprises three requirements. The first, in section 20(3), is that which is relevant to the present claim. That is a requirement:

> **"… where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

43. Allowing that the word "avoid" does not necessarily mean avoid entirely, nonetheless this looks to outcome and not to process. That point has been well established at Appeal Tribunal level and above (see the cases of **Environment Agency v Rowan** [2008] ICR 218 and **Royal Bank of Scotland v Ashton** [2011] ICR 632). The complaint that it is a breach of that duty to fail to consider making an adjustment is not in itself and could not in itself be a failure to make an adjustment. What is not in terms complained of is an actual failure to take a step which it would be reasonable to take to avoid the disadvantage, emphasising those last four

words. It might have been reasonable to talk about what steps might be taken, but that is not what the section requires.

44. That is a narrow basis upon which to rule out a claim for a failure to make reasonable adjustments at this stage. I have considered whether, in adopting it, I am entitled to conclude that the Judge is plainly and obviously right. It seems to me I am. There is a second ground for my conclusion too. This would not, on its own, have justified me, I think, in concluding that the Judge was necessarily correct. But it is simply that the case in respect of the failure to facilitate church attendance was a case which involved a number of links in a logical chain which might be thought to be a little tenuous. The case was that it was necessary for the Claimant to attend church, that he placed great value on faith, that faith assisted him in dealing with his cancer and its effects and to fail to have the support which faith and prayer would give him would expose him to greater stress which worsened his condition. To facilitate church attendance alleviated it. Therefore it was or would have been a substantial disadvantage to him in coping with his cancer and its effects for him to have been denied the opportunity of the spiritual refreshment which the church would give him.

45. I asked during the course of submissions from Mr Pourghadiri whether there was any medical evidence in support of this. I am told that there is. Mr Pourghadiri rightly reminded me in his reply that, on a strike-out, it is not for the Claimant to produce the whole of the evidence upon which he might ultimately rely since the question is whether, if taken at his highest and assuming that he is able to make out the allegations he does, he can succeed. But regard must be had to the nature of those allegations and their correspondence with common experience. I would have thought that if the matter had rested on that alone, it would not have been a strong claim. It lends me a degree of confidence in thinking that, on the earlier ground

on which I did base my decision, the Judge was right to eliminate at this stage the claim in respect of a failure to make reasonable adjustments.

46. I turn, then, to the question of victimisation. This was item number 10.1 in the list of CMD issues. Victimisation requires a protected disclosure to have been made. A protected disclosure must fit the description in section 27 of the **Equality Act 2010**. Section 27(2) reads:

> **"Each of the following is a protected act—**
>
> **(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."**

It is only 27(2)(d) that could be applicable in the present case.

47. The claim that an employer has acted because of a protected act or in response to a protected act necessarily assumes that that person knows that there has been such a protected act. Otherwise they could not act in response to it. Here, the protected act is said to have been a series of emails which were sent by the Claimant to his employer. They were summarised in paragraphs 25 and 26 of the supplementary claim. In paragraph 25 the Claimant identified a complaint of 20 June 2012 and subsequently raised concerns in emails from September to December 2012. Those were identified to me by Mr Pourghadiri in his opening submissions. He complained, further, that on 21 December he was compelled to resign for health and safety reasons, of constructive unfair dismissal and discrimination in everything he had complained about and referred to his emails dated from January 2013 to 11 March 2013. What he says he suffered by way of detriment was that his employer, having been approached after his resignation to see if it would re-employ him in another post with the Borough, not where he had

been working with Ms Osho, declined to do so. That, it is said, is a detriment to him. It assumes that his qualifications were such that he was otherwise the appropriate person to take up whatever appointment it was, which has not been identified to me, nor it is identified in the pleadings.

48. I have read the emails from September to December 2012 carefully. I cannot see that in any one of them there is any (either express or implied) reference to discrimination to which the **Equality Act** might be relevant. On a fair reading, there simply is no protected act that I can see, nor do I think that any reasonable Judge could see. Accordingly what is said in paragraph 25 of the supplementary claim is no basis for a victimisation case.

49. In the email of 17 January, by contrast, addressed to Phil DiLeo, the Claimant talked about how a proposed meeting could resolve:

> **"… the pending claim of Unfair Constructive dismissal, Breach of Contract and Discrimination claim that will follow this termination of my employment with Haringey Council. …"**

50. That is the only matter to which I have been referred to show what could be a protected act. It does not identify any claim as such. It says a claim may be made. The identification of the post has not been provided. It is speculative to think that the Claimant could, on the material available, demonstrate that the Respondent should have appointed him since there was in law no duty that I can see which rested upon it to do so. It infers that he would otherwise have been appointed but was not.

51. The test which I have to apply was one which excludes fanciful prospects of success. I think there would be such prospects of success on this claim, but as the material stood in front of the Judge it would be fanciful and not realistic. Taking the claim at its highest as put, I

cannot see that it would cross the necessary threshold, and therefore I have concluded that the Judge was plainly and obviously right in respect of this aspect of the case too.

52. As to harassment, however, I take a different view. What a Claimant needs to prove in respect of harassment is set out by section 26 of the **Equality Act 2010**. The harassment has to be related to a relevant protected characteristic. Earlier in this Judgment, I have accepted that there might be a case here for showing that the way in which Ms Osho related to the Claimant was influenced to a sufficient extent by his race or gender to permit those claims to continue. If that is so, then any hostile act which she took, of which he makes complaint of several, would be capable of being seen as having been related to those protected characteristics. His whole complaint as it seems to me is that, whether the conduct had the purpose or not he thought it did (but it certainly had the effect), it violated his dignity and created the proscribed environment. Accordingly I have concluded that, on that basis, the harassment claims could succeed. I cannot see that the Judge was plainly and unarguably right to strike those claims out.

53. The one matter that then remains is a matter about which there was a degree of uncertainty before me. The Claimant asserts that there was unlawful deduction of wages. This occurred during his resignation and his notice period thereafter. He tells me through counsel that the ET1 at paragraphs 57 to 61, headed "Grievance procedures, Unlawful Deduction of Wages and Constructive Dismissal", described at paragraph 58 a threat by his boss to deprive him of his salary for the relevant period; that (paragraph 60) he was able to confirm that his salary had been withheld or deducted; and (paragraph 61) that he was not given any proper reason for that at the time. He argues, less convincingly, that he was deprived of seven days' sick pay in respect of, I think, the same period. Taking his case at its highest, it seems to me there is a claim there, which he is entitled to make out on the evidence if he can make it out,

that indeed he was not paid all that he was entitled to. It would be for him to make that claim out in due course subject to any subsequent order which the Tribunal might make, but I cannot say that the Judge was plainly and obviously right to strike it out since it could be sustained on the basis in which it was put, and taken at its highest, assuming that evidence is given in support of it which the Tribunal regards as sufficiently convincing.

54. Accordingly, the conclusion to which I have come is that the appeal is allowed save in respect of the decisions by the Judge to strike-out the claims in respect of religious discrimination, disability discrimination and victimisation.

55. Finally I would like to thank both counsel for the quality and focus of their respective submissions, which has been of considerable assistance in this particular case.