EMPLOYMENT TRIBUNALS

Claimant: AA

Respondents: 1. R Limited
2. AB
3. BB
4. AC
5. AD

HELD AT: Manchester **ON:** 24 February 2017

BEFORE: Regional Employment Judge Robertson
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondents: Ms S Hubbard, solicitor

JUDGMENT

1. The claimant's complaint of unlawful direct discrimination because of the protected characteristic of marriage within sections 8, 13 and 39 of the Equality Act 2010 is dismissed on withdrawal by the claimant.

2. The claimant's complaints of unlawful direct discrimination because of the protected characteristic of sex, unlawful harassment related to the protected characteristic of sex and unlawful victimisation, contrary to sections 13, 26, 27, 39 and 40 of the Equality Act 2010, are struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 on the ground that they have no reasonable prospect of success.

3. In consequence of paragraphs 1 and 2 above, the second, third, fourth and fifth respondents, identified above as AB, BB, AC and AD, are dismissed as respondents from the proceedings.

4. The claimant's complaint of breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1993 is struck out under rule 37(1)(a) on the ground that it has no reasonable prospect of success.

5. The claimant is ordered under rule 39 of the Employment Tribunals Rules of Procedure 2013, as a condition of being permitted to proceed with her complaint of unfair dismissal within the Employment Rights Act 1996, to pay a deposit in the sum of £250.00 on the ground that the complaint has little reasonable prospect of success.

6. Payment of the deposit ordered under paragraph 5 above shall be made within 21 days of when this deposit order is sent to the parties and instructions as to how to pay appear in the accompanying document.

REASONS

Introduction and this hearing

1. The identities of the parties in this case are anonymised, as set out above, pursuant to separate Case Management Orders which I have made under the provisions of rule 50 of the Employment Tribunals Rules of Procedure 2013.

2. This has been the hearing of the respondents' application for orders (a) under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, striking out all or part of the claimant's claim on the ground that it has no reasonable prospect of success or alternatively (b) requiring the claimant under rule 39 to pay a deposit not exceeding £1,000 as a condition of continuing to advance all or part of the claim on the ground that it has little reasonable prospect of success.

3. The claimant has appeared in person, assisted by her father, and the respondents have been represented by Ms S Hubbard, solicitor. Ms Hubbard and the claimant have each provided me with modest Bundles of Documents and have made oral submissions. References to page numbers in these reasons are to the respondents' Bundle of Documents. I have not heard any evidence.

4. I gave my decision and brief reasons at the conclusion of the hearing and I informed the parties that I would provide my formal written judgment with full reasons later. This is the written judgment with full reasons.

Claims and issues in the proceedings

5. Employment Judge Franey set out the complaints and issues at Annex B to his Case Management Orders made on 20 January 2017. The claimant, however, has informed me today that she no longer pursues the complaint of unlawful direct discrimination because of the protected characteristic of marriage, which appears at paragraphs 5 and 6 in Annex B, and she has consented to that complaint being dismissed on withdrawal.

6. The remaining complaints are, therefore, unfair dismissal within the Employment Rights Act 1996, breach of contract in relation to the notice period, unlawful direct discrimination because of the protected characteristic of sex contrary to section 13 of the Equality Act 2010, unlawful harassment related to the protected characteristic of sex within section 26 of the 2010 Act and unlawful victimisation under section 27 of the 2010 Act.

7. It may be helpful, for ease of reference, to set out the complaints and issues, as identified by Employment Judge Franey. Neither party has suggested they require revision or expansion, and I have set them out exactly as they appear in Annex B:

Unfair Dismissal – Employment Rights Act 1996

1. Can the first respondent show a potentially fair reason for dismissing the claimant, namely a reason relating to her conduct?

2. If so, was the dismissal fair or unfair?

Breach of Contract – Notice Pay

3. Can the first respondent establish that the claimant was guilty of gross misconduct which entitled the first respondent to terminate her employment without the notice period to which her contract entitled her?

Equality Act 2010

Factual Issues

4. What are the facts in relation to the following allegations:

a) On 24 May 2016 the fourth respondent became extremely aggressive, jumped up out of his seat and came towards the claimant with fists clenched and eyes wild, shouting at the claimant to "get the fuck out and never fucking come back again… take your fucking money and never fucking come back." (See particulars of claim page 2).

b) On 31 May 2016 the fourth respondent told the claimant that he had spoken to the second respondent and that they had decided the best way forward would be for the third respondent to take the claimant's job as she was better than the claimant. (See particulars of claim page 3).

c) On 2 June 2016 the claimant was placed on garden leave without her consent by the second respondent. (See particulars of claim page 3).

d) On or before 1 August 2016 the second, third, fourth and fifth respondents decided that the claimant would be issued with written notice that she was at risk of redundancy. (See particulars of claim page 5).

e) On or before 4 August 2016 the second respondent decided to dismiss the claimant. (See particulars of claim page 6).

f) The day after she was released from hospital the claimant sent the fourth respondent a text but he ignored it and told her sister that the claimant was lucky she had not been arrested for blackmail. (See paragraph 7 of the particulars of claim).

g) On or before 5 January 2017, the second respondent made a false complaint to the police that the claimant had been using social media to leak information regarding his identity.

Marital Status Discrimination

(Issues 5 and 6, now withdrawn)

Direct Sex Discrimination

7. In relation to allegations 4a) – g), can the claimant prove facts from which the Tribunal could conclude that because of her sex the respondents treated her less favourably than they would have treated a man?

8. If so, can the respondents nevertheless show that they did not contravene section 13?

Harassment related to sex

9. In relation to allegations 4a) and b), can the claimant prove facts from which the Tribunal could conclude that:

a) the first, second and fourth respondents subjected her to unwanted conduct,

b) which was related to sex, and

c) which had the purpose of effect of violating the claimant's dignity, or creating an intimidating hostile, degrading, humiliating or offensive environment for her?

10. If so, can the respondents nevertheless show that they did not contravene section 26?

Victimisation

11. Can the claimant establish that she did a protected act in:

a) her written grievance of 1 June 2016,

b) her Employment Tribunal Claim Form of 7 November 2016, and/or

c) on other occasions to be identified in Further Particulars?

12. If so, in relation to allegations 4a) – g), did the respondents subject her to a detriment because of a protected act?

Time limits

13. Insofar as any of the matters for which the claimant seeks a remedy occurred more than 3 months before the date upon which the claimant initiated early conciliation against the respondent in question, can the claimant show that those acts formed part of conduct extending over a period ending on or after the date 3 months before any conciliation began?

14. If not, can the claimant nevertheless show that it would be just and equitable for the Tribunal to allow a longer time limit for such matters?

Remedy

15. If any of the above complaints succeed, what is the appropriate remedy?

Strike-out and deposit orders – relevant law

8. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides that at any stage in the proceedings, on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim (or response) on the ground that, amongst others, it has no reasonable prospect of success. In this case the application for strike-out is made by the respondents.

9. I have clearly in mind that given the draconian nature of any decision to strike out a claim without a hearing, it has been made clear in a number of cases that the power is to be exercised sparingly and only in the most obvious cases (see, for instance, per Lady Smith in **Balls v Downham Market High School & College [2011] IRLR 217**). That is particularly so in cases involving claims of unlawful discrimination, for the reasons summarised by the Employment Appeal Tribunal in **Chandhok v Tirkey [2015] IRLR 195**, in which it was observed at paragraphs 19-20:

> **"19. … those occasions on which a strike out should succeed before the full facts of the case … had been established in evidence were rare. This is particularly so where the claim is one of discrimination. Such a claim will centrally require a tribunal to establish why an employer acted as it did. That will usually require an evaluation of the reasons which the relevant decision-maker(s) or alleged discriminators had for acting as they did. Such an evaluation depends, often critically, upon what may be inferred as well as proved directly from all the surrounding circumstances, including evidence of the behaviour (whether by word, deed, or inaction) of such individuals not only contemporaneously to the events complained of but also in the past and, sometimes, even since the events on which the claim was founded; and it may include an assessment, in the light of the evidence that was called, of whether the failure to call other evidence was of significance. These can often be challenging assessments, all the more so where there are complications of language and culture. Considerations such as these led Lord Steyn in *Anyanwu* … to express the view at paragraph 24 (echoed by Lord Hope in his paragraph 37) as follows:**
>
> > **'In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.'**
>
> **20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out - where, for instance, there is a time bar to jurisdiction, and no evidence is 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 (per Mummery LJ at paragraph 56 of his judgment in *Madarassy v Nomura International plc* [2007] IRLR 246 CA):**
>
> > **'… 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.'**
>
> **Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. 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."**

10. Rule 39 provides that where the Tribunal considers that any specific allegation or argument has little reasonable prospect of success, it may order the party advancing the allegation or argument to pay a deposit not exceeding £1,000.00 as a condition of continuing to advance that allegation or argument. If the party does not pay the deposit, the allegation or argument is struck out.

11. This provides a route where the allegation or argument is very weak but it cannot be said it is doomed to fail. Under rule 39(5), if the party pays the deposit, but the Tribunal decides the allegation or argument against the party for substantially the same reasons given in the deposit order, the party will be treated as having behaved unreasonably in pursuing the argument or allegation, unless the contrary is shown. In such circumstances, not only may the deposit be ordered to be paid to the other party, but the party against whom the deposit order has been made is at increased risk of a costs order.

The background to the claim

12. I have not heard any evidence and I do not make any findings of fact in this hearing. Nonetheless, it may be helpful to set out some background, which I derive largely from the claim and response forms. I indicate where there is apparent dispute of relevant fact between the parties.

13. The first respondent, R Limited, is a communications and IT services company which was set up by two married couples: first: the claimant, AA, and her husband, the fourth respondent, AC, and second, the second and third respondents, AB and BB. The shareholders were the second and fourth respondents (the husbands in each married couple) and the fifth respondent, AD, who is not related to the others. The claimant and the third respondent were employed by the business, the claimant as Operations Manager. The company has six employees.

14. The claimant describes in her claim form that she did not feel well-treated by the second and third respondents during her employment. In January 2016, she and her husband, the fourth respondent, split up. They remained married but separated. The claimant continued to work in the company. She left the matrimonial home in May 2016. She describes the split as initially amicable. It plainly ceased to be so.

15. In the period that followed the separation, the claimant alleges, she was pushed out of her job, with her duties being taken over by the third respondent. However, she was repeatedly told by her husband, the fourth respondent, that her job was safe. On 24 May 2016, as she describes it in the claim form (19), the claimant "pushed it further" due to "false promises to sort the situation" and the fourth respondent responded by violently and aggressively swearing at her. In the course of this incident, the claimant has told me today, although it does not appear in the claim form, she told the fourth respondent that he would not have behaved like this to a man as he "would have got a good hiding" and if he did it again, she would "sue the company".

16. On 1 June 2016 she was told that it would be best if her duties were assumed by the third respondent as she was better at the job than her.

17. In their response form (34, para 7) the respondents describe the position at this time as "a tense and difficult situation" but do not directly challenge these factual allegations.

18. The claimant was upset and lodged a grievance by way of emails dated 1 and 2 June 2016. She was sent home pending a grievance hearing on 10 June 2016 when she was reinstated on terms that she would no longer work from the fourth respondent's home, as she had previously done, but instead from her own home. However, she still felt under threat and in a fragile mental state.

19. After a two-month pause in events, on 1 August 2016 the claimant was notified by letter that she was at risk of redundancy. The respondents say that this was a consequence of a decision to move the company's servers to its offices in Lincolnshire. The claimant disputes this and says the redundancy was "a malicious act" and part of "an ongoing campaign to rid themselves of me because I am no longer in a relationship" with the fourth respondent.

20. The claimant says that the at risk letter caused her to have a mental breakdown, in the course of which on 2 August 2016 she twice went to the former matrimonial home and on each occasion physically attacked and struck the fourth respondent. The police were called. The claimant received urgent psychiatric treatment.

21. The claimant says that on 4 August 2016, she spoke to the second respondent and told him that she would accept a year's pay plus redundancy to leave the company. He said he would think about it but the next day, she received a letter from him dismissing her for gross misconduct in respect of the attacks on the fourth respondent (135). There was no disciplinary hearing; the respondents saying that they feared the claimant would become violent if one were arranged. Her appeal against dismissal was rejected by the fifth respondent.

22. The claimant entered into ACAS early conciliation between 28 September and 28 October 2016 and presented the claim to the Tribunal on 7 November 2016. Following receipt of the respondents' response form, there was a case management hearing before Employment Judge Franey on 20 January 2017 at which he identified with the parties the complaints and issues as I have recited them above, and made Case Management Orders including the arrangements for this hearing.

Submissions for the respondents

23. Ms Hubbard says that none of the claimant's complaints have any reasonable prospect of success and all should be dismissed under rule 37.

24. In regard to direct sex discrimination within section 13 of the 2010 Act, Ms Hubbard contends that the claimant has not set out in the claim form any grounds on which she will seek to prove that the treatment identified at allegations 4a) to g) was because of her sex. Except for allegation 4b), she has not identified a comparator and for allegation 4b), the comparator is also female.

25. Ms Hubbard reminds me that the only allegations of unlawful harassment under section 26 of the 2010 Act are allegations 4a) and b). She says that the claimant has not related these to her sex. In any event, she says, the allegations are out of time.

26. Ms Hubbard says that although the claimant was ordered by Employment Judge Franey at paragraph 2 of Annex C (57) to identify the protected acts for the purposes of her victimisation complaint under section 27 of the 2010 Act, she has simply not done so in her purported Further Particulars (82-96). Ms Hubbard says that there were no protected acts except for the Employment Tribunal claim in November 2016, which was after the treatment relied on by the claimant at paragraphs 4a) to f) had occurred, and the claimant has not put forward any reasons suggesting that the reason for the treatment at allegation 4g) was her Employment Tribunal claim.

27. In respect of unfair dismissal within the 1996 Act, Ms Hubbard says that the claimant was dismissed for attacking the fourth respondent on 2 August 2016. That was the reason given in the dismissal letter. The prompt for the attacks was the issue of the letter putting the claimant at risk of redundancy. Ms Hubbard says that the claimant has not disputed that she assaulted the fourth respondent. She contends that dismissal for attacking a Director of the company after receiving a redundancy warning letter must be within the range of reasonable responses open to an employer. Ms Hubbard accepts, however, that the first respondent did not follow a formal disciplinary procedure and in particular, there was no disciplinary hearing, but she says that a disciplinary process would not have produced a different outcome and the claimant must inevitably face a 100% deduction for contributory fault

28. Finally, as to breach of contract, Ms Hubbard says that the Tribunal will inevitably find that the first respondent was entitled to dismiss the claimant without notice in response to her conduct in attacking the fourth respondent.

29. Alternatively, and for the same reasons, Ms Hubbard contends that the claimant's complaints have little reasonable prospect of success and should be the subject of a deposit order.

Submissions for the claimant

30. The claimant says that she believes she has a strong case in respect of her complaints of unlawful direct sex discrimination, harassment and victimisation.

31. As to allegation 4a), she says that she has been a victim of violence from a man in the past. The fourth respondent knew that and how she might be affected by his behaviour on 24 May 2016. She says that the fourth respondent avoids confrontation with male colleagues, but he "will run at a female with his fists clenched". The fourth respondent did not treat any male work colleagues in the way he treated her. She says that "he only seems to pick on girls", and does not like females standing up to him. She says that he did not dismiss the second respondent when he was found to have been stealing from the company. (I interpose that I have no particulars whatever of this assertion, which does not appear in the claim form.)

32. The claimant contends in respect of allegation 4b) that the fourth respondent wanted to remove her from the company because on 24 May 2016 she threatened to sue him for sexual harassment. On 24 May 2016, after he had sworn at her, she told him he would not have behaved like that towards a man because if he had, he would have "got a good hiding", and if he ever did it again, she would "sue the company".

33. The claimant attributes the decision to send her home on garden leave (allegation 4c)) to the fact that she had made an allegation of sex discrimination in her grievance.

34. In regard to allegations 4d) and e), the claimant says that the decision was made to put her at risk of redundancy, and to dismiss her, because of what she had said on 24 May 2016 and in the grievance, and it did not go down well. She accepts, however, that she may have given the respondents reasons to dismiss her. She concedes that she did not behave well on 2 August 2016, and she returned to attack the fourth respondent a second time. She accepts that she refused to leave the fourth respondent's house when asked to do so. She says that on 24 May 2016, she "wanted to be an arse" and was not responsible for her actions.

35. The claimant describes the respondents' conduct at allegation 4f) as "just one of their games" and designed to scare her away, and the complaint to the police referred to at allegation 4g) was designed to "muddy the waters".

36. I took the claimant through the particulars which she had provided, as ordered by Employment Judge Franey, which purported to identify her protected acts for the purposes of her complaint of unlawful victimisation under section 27 of the 2010 Act (82-96). She accepted that almost all of the matters she set out in the particulars were not in fact protected acts. Rather, they described the treatment which she alleges she suffered for doing the protected acts. She identifies her protected acts as (1) the words she spoke on 24 May 2016, (2) her grievance letters on 1 and 2 June 2016 (116,118) and (3) her Tribunal claim.

37. As to unfair dismissal, the claimant says that the incident on 2 August 2016 was not the real reason for her dismissal. She had already been told that she was at risk of redundancy which she believes was to get rid of her following the break-up of her relationship and because of what she had said on 24 May 2016 and in her grievance. The last straw was when she said on 4 August 2016 that she would leave if paid a year's salary and redundancy, and her dismissal immediately followed that conversation. She believes that her demand for a year's pay was the reason the second respondent decided to dismiss her.

The respondents in reply

38. Ms Hubbard accepts that there may be an arguable issue as to the procedure followed by the first respondent in dismissing the claimant. She also accepts that there appears to be a dispute about the reason for dismissal.

Discussion and conclusions

Sex discrimination: section 13 Equality Act 2010

39. Section 13 of the 2010 Act provides as follows:

> "**13 Direct Discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

40. Section 23 of the 2010 Act provides as follows:

> **"23 Comparison by reference to circumstances**
>
> (1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case."

41. Section 39 of the 2010 Act is in the following terms:

> "**39 Employees and applicants**
>
> …
>
> (2) An employer (A) must not discriminate against an employee of A's (B) –
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training, or for receiving any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment."

42. In a complaint alleging unlawful direct discrimination under section 13, the Tribunal has to decide:

(a) whether the claimant was treated less favourably than others were or would have been treated, which requires consideration of the appropriate comparator(s),

(b) what detriment or disadvantage the claimant suffered, and

(c) whether the treatment was because of the relevant protected characteristic, in this case sex.

43. "Detriment" is not defined in the 2010 Act but has a wide meaning and means anything which an employee might reasonably consider unfavourable or disadvantageous in all the circumstances.

44. As to the time limit for a complaint (under section 120 of the 2010 Act) alleging breach of the employment provisions of the 2010 Act, section 123 of the Equality Act 2010 provides, as far as is relevant, as follows:

> "**123 Time limits**
>
> (1) Proceedings on a complaint within section 120 [complaints to an employment tribunal] may not be brought after the end of –
>
> (a) the period of three months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it."

45. Ms Hubbard contends that allegations 4a), 4b) and 4c) are out of time. This hearing has not been to decide time-limit issues, and I indicated during the hearing that whether the treatment formed part of an act extending over a period ending within the period of three months before presentation of the claim was a question to be determined at the full merits hearing. However, in my judgment, if a complaint appears clearly out of time, this may properly be a factor forming part of the overall assessment of prospects of success within rules 37 or 39.

46. Section 136 of the 2010 Act sets out the burden of proof in claims to the Tribunal under section 120. By section 136(2), if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the employer contravened the provision concerned, the Tribunal must hold that the contravention occurred. But this does not apply if the employer shows it did not contravene the provision.

47. Under section 136, first, the claimant must prove facts from which the Tribunal could decide, in the absence of any other satisfactory explanation from the respondents, that the respondents contravened the provision (**Madarassy v Nomura International Plc [2007] ICR 867** at 55). Unfavourable or unwanted treatment and a difference in sex will not suffice; facts must be proved from which the Tribunal could conclude the treatment was because of the claimant's sex.

48. The Tribunal must consider all the evidence, including that advanced by the respondents, in order to decide what inferences could properly be drawn from it (**Laing v Manchester City Council [2006] ICR 1519**).

49. Although unreasonable or unwanted treatment may justify the drawing of inferences, the Tribunal should be cautious in doing so, because unreasonable treatment does not necessarily denote that the prohibited reason was the reason for the treatment and parties may act unreasonably for many reasons (**Bahl v The Law Society [2003] IRLR 640**).

50. The respondents may adduce evidence which is relevant to the first stage of the test, such as whether the alleged treatment happened at all, or as to the reason for it, and the Tribunal must take all such evidence into account in deciding whether the claimant has discharged the burden of proof (**Madarassy** at 71).

51. The absence of an explanation from the respondents is not relevant at this stage. The claimant must still prove facts from which the Tribunal could decide there was unfavourable or unwanted treatment for the proscribed reason, even if the respondents have no explanation for it.

52. Only if the claimant establishes this does the burden of proof pass to the respondents to prove that the treatment was in no significant respect at all for the proscribed reason, and it is still open to the respondents to show that they acted unreasonably for reasons other than the proscribed one **(Madarassy** at 58).

53. The Tribunal must consider the totality of the evidence and must be careful not to take a piecemeal or fragmented approach to the relevant events. Once the Tribunal has found the relevant facts, it must stand back and decide, having regard to the burden of proof, what inferences or conclusions can be reached as to the respondents' reasons for acting, having regard also to the possibility of unacknowledged or subconscious motivation (**Anya v University of Oxford [2001] IRLR 377**). The issue for the Tribunal is this: on the evidence, including any appropriate inferences was the claimant subjected to unwanted treatment or detriment for the proscribed reason? What was the reason why the claimant was treated as she was: **Nagarajan [1999] ICR 877** and **Shamoon [2003] ICR 337**?

54. In some cases the Tribunal may be able to identify the reason for the treatment without utilising the two-stage burden of proof and the Tribunal should be prepared to do so if it is appropriate (**Amnesty International v Ahmed [2009] IRLR 844**).

55. I have sought to apply these principles in assessing the claimant's prospects of success. I am mindful of the warnings in **Balls** and **Chandhok**. Discrimination claims are particularly fact-sensitive. Inferences may be drawn about the reasons for treatment, allowing the possibility of subconscious or unacknowledged discrimination. Such claims should only be struck out in obvious cases. I have concluded, however, that this is such a case. The claimant's complaint of unlawful direct sex discrimination has no reasonable prospect of success.

56. My reasons are as follows. I begin with some general observations.

57. If the claimant's factual allegations are true, which I will assume at this stage, she was badly treated. But bad treatment is not enough, and the question is whether her complaint that the treatment was because of her sex has any reasonable prospect of success.

58. I have carefully read the claimant's lengthy Particulars of Claim (18-26)[1]. Whilst the claimant reputedly asserts in the Particulars of Claim that the respondents "wanted her out" after and because of the break-up of her relationship, I can find no mention of her sex or gender at all, and nothing which even begins to suggest that her sex was the reason for any of her treatment. When explaining to me in submissions why she had decided not to pursue her complaint of unlawful marriage discrimination, the claimant told me she had realised that the treatment was not because she was married but who she was married to, which plainly relates it to the break-up of the relationship. As I discuss further below when dealing with the victimisation complaint, the claimant asserted in submissions that her treatment after 1 June 2016 was because of what she told the fourth respondent on 24 June 2016 or alleged in her grievance on 1 June 2016, or alternatively was because of what she told the second respondent about the price for her to leave the company on 4 August 2016. None of this suggests that the reason was her sex. Despite Employment Judge Franey's careful explanation of the principles on 20 January 2017, I felt that the claimant did not fully understand the distinction between direct sex discrimination and victimisation.

59. Allegation 4a) concerns the fourth respondent's behaviour on 24 May 2016. This must have been a frightening and distressing incident for her. It perhaps stands apart from the claimant's other allegations and the claimant says it precipitated the events leading to her dismissal.

60. I refer back to what the claimant told me at paragraph 31 above. But it seems to me that these are generalised assertions by the claimant, and she has put forward no facts and matters whatever as to the specific allegation, alone or taken with the other matters on which she relies, from which a Tribunal might conclude that the fourth respondent's behaviour on 24 May 2016 was done because she is a woman. I have in mind that the claimant admits that she "pushed matters" with the fourth respondent, her estranged husband, that day as to her future with the company, and the overall context was the break-up of their marriage. I accept that the reason for treatment is fact-sensitive, but I have concluded that in the circumstances of this case, the claimant's contention that the fourth respondent acted as he did towards her on 24 May 2016 in some significant way because of her sex has no reasonable prospect of success.

61. Allegations 4b) to d) concern the claimant's role with the company. The claimant told me in submissions, although it does not appear in the Particulars of Claim, that the second respondent does not treat women with respect and had been seen behaving aggressively towards his wife, the third respondent, and had objected to her, the claimant, seeing the company accounts because, in her view, he did not like a woman knowing about his financial affairs. But neither in the claim form nor in submissions has the claimant attributed this treatment to her sex. She says the respondents wanted her out following the break-up of her marriage. If that is right, it is not because of her sex. Insofar as she attributes it to her allegations of sex

[1] I have in the bundle a lengthy document lodged by the claimant on 3 February 2017 (62-75), which appears to provide further particulars of her claim. But on 7 February 2017 Employment Judge Franey directed that the document would not be accepted as an amendment to the claim, because it was not the document she had been ordered to provide which was to give particulars only of her protected acts. I have therefore disregarded the document, but I did give the claimant full opportunity in submissions to explain why she believes her treatment was because of her sex.

harassment on 24 May 2016 and in the grievance of 1 June 2016, I address it when addressing the claimant's complaint of unlawful victimisation, below, but these are not allegations of direct sex discrimination. The claimant's complaint of direct sex discrimination in respect of these allegations has no reasonable prospect of success.

62. The claimant says that she believes the decision to dismiss was made either as part of the plot to remove her from the company or because of her financial demands to the second respondent. Even if true, this is not treatment because of sex and the claimant's complaint in respect of allegation 4e) has no reasonable prospect of success.

63. The claimant has not begun to explain to me how she attributes the behaviour at allegations 3f) and g) to her sex. If made, it seems reasonable to attribute the "blackmail" comment to the claimant's remarks to the second respondent about her price to leave the company. The second respondent had reason to be concerned about his identity, but whether it was true or not, the claimant has not put forward any facts or matters to suggest that her sex was the reason for making the allegation.

64. For all of these reasons, and looking at the claimant's allegations separately and as a whole, I have concluded that her complaint of unlawful direct sex discrimination has no reasonable prospect of success and should be struck out under rule 37.

Sex harassment: sections 26 and 40 Equality Act 2010

65. Section 26 of the 2010 Act provides as follows:

> "**26 Harassment**
>
> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) The conduct has the purpose or effect of –
>
> (i) violating B's dignity; or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) The perception of B;
>
> (b) The other circumstances of the case;
>
> (c) Whether it is reasonable for the conduct to have that effect."

66. Section 40 of the 2010 Act provides as follows:

> **"40 Employees and applicants: harassment**
>
> (1) An employer (A) must not, in relation to employment by A, harass a person (B) -
>
> (a) who is an employee of A's;

67. In a complaint of unlawful harassment within section 26, the Tribunal has to identify: (a) the conduct engaged in by the employer which was unwanted; (b) whether, and if so how, it was related to the relevant protected characteristic, in this case sex; and (c) whether such conduct had the purpose or effect set out in section 26(1)(b), having regard to section 26(4).

68. The claimant relies only on allegations 4a) and b) as unlawful harassment within section 26. These occurred on 24 May and 1 June 2016, which raises an obvious time limit issue.

69. In my judgment it is just arguable that the treatment of the claimant by the fourth respondent on 24 May 2016, which was plainly unwanted and had the effect set out in section 26(1)(b), was in the broader sense "related to" her sex within section 26, in the sense that the treatment would not have been meted out to a woman. I am concerned that the claimant relies on assertions about the fourth respondent's attitude to women, rather than on actual evidence, but I would not be prepared to strike out the allegation as having no reasonable prospect of success on this ground only. But when I turn to allegation 4b), I see no basis on which the claimant can properly argue that the proposal that she should make way for the third respondent, also a woman, was related to her sex. This contention has no reasonable prospect of success.

70. The difficulty then facing the claimant is that the single remaining allegation of harassment within section 26 on 24 May 2016 is considerably out of time. A claim relating to this incident should have been presented by 23 August 2016, but the claimant did not present her claim to the Tribunal until 7 November 2016, and the extension of time for early conciliation does not avail her as she did not begin early conciliation until after the time limit had already expired.

71. This hearing, as I have already said, is not to address time limit issues, but I see no possibility that the claimant will be able to persuade a Tribunal that that it would be just and equitable to allow this single allegation of harassment to proceed out of time, and accordingly I conclude that the claimant's complaint of unlawful harassment under section 26 has no reasonable prospect of success and should be dismissed.

Victimisation: section 27 Equality Act 2010

72. Section 27 of the 2010 Act provides as follows:

> "**27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or

(b) A believes that B has done, or may do a protected act.

(2) 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 or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

…"

73. Section 39(4) of the 2010 Act is in the following terms, as far as relevant:

"…

(4) An employer (A) must not victimise an employee of A's (B) –

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

…….

(d) by subjecting B to any other detriment."

74. Section 27 requires the Tribunal to identify: (a) the protected act or acts done by the employee; (b) the detriment to which the employer subjected the employee, and (c) whether the reason why the employer subjected the employee to the particular detriment was because she did the protected acts.

75. I described at paragraph 36 above the alleged protected acts on which the claimant relies. These are (1) the words she used to the fourth respondent on 24 May 2016, (2) her grievance dated 1 June 2016 and (3) her Employment Tribunal claim.

76. I am prepared to accept that the claimant has an arguable case that the words she spoke to the fourth respondent on 24 May 2016, as I have set them out at paragraph 15 above, were a protected act within section 27(2)(d). Informal they may have been, and in the course of a heated exchange, but the claimant asserted that the fourth respondent would not have behaved in that way to a man, and threatened to sue the company if it was repeated, and this in my judgment is arguably just sufficient to satisfy section 27(2)(d).

77. I also accept that the claimant's Employment Tribunal claim presented on 7 November 2016 was capable of being a protected act within section 27(2)(a). Although she did not give any particulars of the complaint, she included in the claim form a complaint of unlawful sex discrimination (11). However, only allegation 4g) occurred after presentation of the claim.

78. I have carefully considered the terms of the claimant's grievance. The grievance is set out in two emails from her to the fourth respondent and the second respondent dated, respectively, 1 June 2016 (116) and 2 June 2016 (118).

79. In the email of 1 June 2016, the claimant complained about her job role being changed. She said that despite assurances that her job is safe, she was being "*phased out*" of the company. She asserted that over the six years she had worked for the company, she had been subjected to "*severe workplace bullying*" which had affected her health.

80. In the email of 2 June 2016, the claimant asserted that she had been subjected to "*workplace bullying*", culminating the previous week when the fourth respondent swore at her that she should "*fuck off and get out never fucking come back again… and I would be paid my fucking money and never have to return to work."* She complained about her new duties and expressed that she felt pushed out and had been told she was not needed. She said that as she was still married to the fourth respondent, she was entitled to half his shares and still had an interest in the company. She accused the fourth respondent of "*emotional blackmail and bullying*".

81. These are serious and wide-ranging allegations, but I can find in neither document any matter which could be interpreted as an allegation that there had been a contravention of the 2010 Act, as section 27(2)(d) requires. In submissions, the claimant relied on the words "*I have been subjected to severe workplace bullying*" in the email of 1 June 2016, and "*workplace bullying*" in the email of 2 June 2016, but neither of these make any allegation, express or implied, of breach of the 2010 Act. Neither of them reference her sex in any way. Whilst I accept that there is no requirement to mention the 2010 Act in terms, there must be something which amounts to an allegation of a contravention of it. Here there is none. I conclude, therefore, that the claimant has no reasonable prospect of establishing that her grievance amounted to a protected act within section 27(2).

82. The issue, therefore, is whether the claimant's case that the treatment set out at allegations 4b) to g) was because of the particular words she used to the fourth respondent on 24 May 2016 has any reasonable prospect of success.

83. I have clearly in mind that the claimant says that the respondents wanted her out of the company following the break-up of her marriage to the fourth respondent. She also says that the reason for her treatment was the grievance which, as I have described, raised a complaint about a number of matters but without amounting to a protected act. Finally the claimant says that she was dismissed because of what she told the second respondent about the price for her to leave the company.

84. Given how the claimant puts her case, and the surrounding circumstances around the break-up of her marriage and her behaviour on 2 August 2016, it seems to me to be inconceivable that the Tribunal will find that her treatment was in some material way because she told the fourth respondent, during the incident between them on 24 May 2016, that he would not have behaved like that towards a man and if he did it again, she would sue the company. It is so unlikely that I conclude that the claimant's contention that her treatment was in some significant way because of the words she used on 24 May 2016 has no reasonable prospect of success and should be struck out.

85. Finally, as to allegation 4g), I have to consider whether the claimant's contention that the second respondent's complaint to the police, that the claimant was using social media to reveal his identity, was motivated by her Employment Tribunal claim has any reasonable prospect of success.

86. There are issues about the second respondent's identity which I need not describe and which have led me to make orders under rule 50. The claimant briefly alludes to the second respondent's identity in her claim form but his identity appears irrelevant to any issues in the case. I do not know why the second respondent complained to the police or whether there was any truth in the complaint. But the claimant has not explained to me any grounds on which she believes that her Employment Tribunal claim was the reason that he made his complaint and the claim form does not disclose any. I have concluded that this allegation also has no reasonable prospect of success and should be struck out.

Unfair dismissal

87. It is not in dispute that the claimant was dismissed. It is not in dispute that the reason for the dismissal given by the company, as set out in the dismissal letter, was the incident on 2 August 2016. It is not in dispute that on 2 August 2016, the claimant twice attacked the fourth respondent in his own home.

88. It might be thought, on this basis, that the first respondent would have little difficulty in showing a conduct reason for the dismissal within section 98(2). The claimant accepted in submissions that she may have given the first respondent reason to dismiss her by behaving as she did on 2 August 2016.

89. The claimant, however, says that the real reason for her dismissal on 5 August 2016 was that she had told the second respondent the previous day that she would leave the company for a year's pay and her redundancy payment. She says that she was not dismissed until immediately after she had the conversation with the second respondent.

90. Given how the claimant had behaved on 2 August 2016, it seems to me very likely that the first respondent will be able to establish a conduct reason for dismissal. Whilst I accept that the claimant was not dismissed until after her conversation with the second respondent on 4 August 2016, the lapse of time since 2 August 2016 was very short.

91. There are issues about the fairness of the dismissal within section 98(4). There was no disciplinary hearing, and I am not persuaded that a Tribunal will accept that the first respondent had fears about the claimant's likely conduct at a disciplinary hearing such as to render it within the range of reasonable responses to dismiss without a disciplinary hearing.

92. But I have in mind that the claimant was given the right of appeal against her dismissal which may have cured the earlier unfairness. I am sceptical about the prospects of success of the claimant's argument that her behaviour on 2 August 2016 was insufficiently connected with her employment to merit dismissal. Further, there are real remedy issues as to what difference a fair procedure would have made in the circumstances of this case, and as to contributory conduct.

93. Given all these factors, I have concluded that the claimant's complaint of unfair dismissal has little reasonable prospect of success as to liability or effective remedy and she should be required under rule 39 to pay a deposit as a condition of proceeding with it.

Breach of contract

94. The Tribunal will have to decide whether the first respondent has established that the claimant was guilty of gross misconduct which entitled the first respondent to terminate her employment without the notice period to which her contract entitled her.

95. It seems to me inevitable that the Tribunal will find that the claimant's conduct on 2 August 2016 entitled the first respondent tom dismiss without notice. The claimant's complaint of breach of contract has no reasonable prospect of success and should be struck out under rule 37.

Deposit order

96. I have concluded that a deposit order should be made in respect of the claimant's complaint of unfair dismissal, for the reasons given at paragraphs 87-93 above. The claimant has told me about her means. She is unemployed and in receipt of Employment Support Allowance. She has no savings but she has about £25,000 equity in her home. She is dependent on her family for support with her mortgage and living expenses.

97. In light of the claimant's financial circumstances, any deposit must be modest. In my view, however, the claimant can expect to continue to receive support from her family including payment of the deposit. I have decided that the deposit should be £250.00, to be paid within 14 days f when this document is sent to the parties.

Regional Employment Judge Robertson

16 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 March 2017

FOR THE TRIBUNAL OFFICE