Appeal No. UKEAT/0311/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 July 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS B ROBINSON — APPELLANT

ROYAL SURREY COUNTY HOSPITAL NHS FOUNDATION TRUST & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ADAM OHRINGER (of Counsel) Bar Pro Bono Scheme
For the Respondents	MS BETSAN CRIDDLE (of Counsel) Instructed by: Hempsons Solicitors Hempsons House 40 Villiers Street London WC2N 6NJ

SUMMARY

JURISDICTIONAL POINTS - Claim in time and effective date of termination

PRACTICE AND PROCEDURE - Striking-out/dismissal

At a Preliminary Hearing, the ET rejected the Claimant's case that her various claims of disability discrimination (direct; failure to make reasonable adjustments; harassment) constituted continuing acts, or that any such continuing act ended with the Claimant's dismissal (the specific complaint about which, it was accepted, was in time). It also struck out her whistle-blowing claim, as having no reasonable prospects of success.

The Claimant appealed from these decisions on the bases that (1) the ET had, when determining the question whether there was a continuing act, erred in considering each head of complaint separately; (2) the ET had further erred in concluding that the decision to dismiss was not part of such a continuing act simply because it had been taken by somebody not involved in the earlier allegations; (3) in deciding that the whistle-blowing case had no reasonable prospect of success, the ET wrongly carried out a summary determination of the merits of the Claimant's case when there was plainly a factual dispute.

The Respondent cross-appealed in respect of the whistle-blowing complaint, arguing that the ET erred in dealing with the application to strike out on the basis of an oral argument put forward by the Claimant at the Preliminary Hearing, which was no part of her pleaded case.

Held: Dismissing the appeal but allowing the cross-appeal

Disability Discrimination - claim in time - continuing act

The ET not erred in reaching the conclusion that the decision to dismiss was no part of an earlier continuing act. Its decision was not solely based upon the fact that the dismissal

involved a decision-taker that had no involvement in the earlier matters complained of, although that was plainly a highly relevant factor (**CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562 CA). It had considered that factor in the context of there being no evidence to support an argument that the Claimant's dismissal was part of a series of acts and her dismissal having been due to capability (not because the Claimant would not work particular shifts or because she was asking for adjustments to her working arrangements or due to any of the other matters relied on by the Claimant as her pre-dismissal discrimination complaints). Considering how the Claimant had put her case before the ET, it was plain she was complaining about the dismissal decision not as a continuation of past discriminatory act but as arising from the consequences of such past discrimination (she was alleging that she could not attend work because of the consequences of the earlier discriminatory conduct; not that the dismissal decision was part of that conduct).

That being so, the first ground of appeal did not arise for determination: even taking all the different bases of claim together, if there was no link with the decision to dismiss, they remained out of time. If that were not so, the Claimant's argument - that the ET erred in failing to consider the claims together - might have some merit.

Even in that event, however, the Claimant would be faced with the difficulty that there had been a subsequent Full Merits Hearing of her complaints relating to the decision to dismiss (unfair dismissal and direct disability discrimination) before a different division of the ET, which had concluded they were unfounded. That rendered the appeal on this point academic. The Claimant was estopped from arguing that the decision to dismiss constituted the end of a discriminatory course of conduct. There was no injustice in this as it had been open to the Claimant to rely evidentially on all her pre-dismissal complaints as part of her case that her dismissal was unfair and/or an act of direct disability discrimination and she had done so.

Whistle-blowing - strike out of claim

Turning to the whistle-blowing claim and taking the cross-appeal first, it was common ground between the parties that the way in which the Claimant put this case at the Preliminary Hearing required an amendment and the ET's failure to adopt this approach amounted to an error of law. The Claimant had previously failed to particularise this case (in her ET1 or in response to a request on the part of the Respondent's solicitors) and had put it differently (albeit, again, without Particulars) at an earlier Preliminary Hearing. As the ET recognised, the way in which the Claimant argued she had a whistle-blowing complaint at the second Preliminary Hearing was a shift in position and she should have been required to formally amend her claim. Considering the case on the basis of the oral presentation without any requirement of amendment amounted to an error on the part of the ET. There was no dispute but that the claim as it had been pleaded (to the extent this was possible to discern) had no reasonable prospect of success and would have been struck out if only put on that basis.

Even assuming that the Claimant's oral presentation should have been treated as an implicit amendment of her claim, the ET's decision that it disclosed no reasonable prospect of success was one that it was entitled to reach.

Even if the ET had erred in this regard, the subsequent decision of the later ET at the Full Merits Hearing (that the dismissal was not a culmination of a plot to get rid of the Claimant) gave rise to an issue estoppel, alternatively meant that the claim was bound to be struck out in any event.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondents, as below. This is the hearing of the Claimant's appeal and the Respondents' cross-appeal in respect of the Reserved Judgment of the Reading Employment Tribunal (Employment Judge Salter, sitting alone on 12 February 2014; "the ET"), sent to the parties on 4 March 2014. The Claimant, who appeared in person before the ET, is today represented pro bono by Mr Ohringer, counsel. The Respondents' solicitor represented at the ET; they are now represented by Ms Criddle, counsel.

2. By its Judgment the ET ruled: (1) that the Claimant's claims of disability discrimination (save that of direct discrimination in her dismissal) had been presented out of time and the ET had no jurisdiction to hear them; and (2) that the Claimant's claim of detriment by reason of having made protected disclosures should be struck out as having no reasonable prospects of success. The substantive claim was thus permitted to proceed only on the Claimant's complaints of unfair dismissal and direct disability discrimination in relation to her dismissal.

The Procedural Background

3. The Claimant had presented her claim to the ET on 19 June 2013, having been dismissed from her employment on 25 March 2013. She complained of unfair dismissal, disability discrimination and "other complaints".

4. On 23 October 2013, the Respondents' solicitors wrote to the Claimant asking her to state what her "*other complaints*" might be, detailing "every fact and matter you intend to rely [on] in the bringing of these complaints". The Claimant did not respond to that invitation.

5. On 29 November 2013, there was a Preliminary Hearing before Employment Judge Gumbiti-Zimuto at which the "other complaints" were identified as a complaint of having suffered detriments on the grounds of having made a protected disclosure. At that stage the Claimant had not identified the protected disclosure on which she relied, save to say that she had first made a protected disclosure in about 2009 and that she had suffered detriment from then until around April 2012. That would make her ET claim, on its face, out of time.

6. A further Preliminary Hearing was listed to consider whether the disability discrimination and protected-disclosure claims should be dismissed as out of time, whether the case should be struck out as having no reasonable prospect of success and, alternatively, whether the Claimant should be ordered to pay a deposit as a condition of pursuing her complaints. Thus the matter came before Employment Judge Salter on 12 February 2014.

7. The Claimant produced witness statements for that hearing - her own and that of her witness, a Mr Morrison - and the ET had before it a bundle in excess of 1,000 pages. The ET noted the Claimant had been unable to identify her protected disclosures - albeit she was then saying that they had been made in 2011 - or the detriment she said she suffered as a result of making those disclosures. The ET further noted that the Claimant had not been working during the three months prior to the presentation of the ET1; the only event that occurred during that time was the capability hearing on 25 March 2013 (when the Claimant was dismissed), but the dismissal was not relied on as having been because of a protected disclosure. The detriment identified by the Claimant in her witness statement was:

> **"53. … the collusive arrangement made by her managers to remove her from her employment culminating in a capability hearing [on] the 25 March 2013. The "detriment" was alleged to be the collusion that continued up to the date of the capability hearing. It was not the way in which the case was pleaded. …"**

8. On the basis of the case put by the Claimant at that hearing, the Salter ET struck out the protected disclosure claim as having no reasonable prospect of success. It further considered that - with the exception of her claim that her dismissal was an act of direct disability discrimination - the Claimant's claims of disability discrimination (direct; breach of the duty to make adjustments; harassment) were out of time and it would not be just and equitable to extend time such as to give the ET jurisdiction to hear those matters.

9. The unfair dismissal claim and what remained of the disability discrimination claim then proceeded to a Full Hearing before the Employment Tribunal sitting at Reading, comprising EJ Herbert OBE and members ("the Herbert ET"). Taking place over two days, the hearing proceeded on the basis of what I am told was an extensive bundle of documentation, as well as the witness evidence (including that of the Claimant, who had submitted a statement of some 100 pages or so). By its Judgment of 30 June 2014 (with Reasons following on 18 August 2014), the Herbert ET held that the Claimant had suffered from a disability (chronic fatigue syndrome) but had been fairly dismissed by reason of capability. It rejected as "completely unfounded" her complaint that there had been "a general long-standing agreement that she should be got rid of using capability as an excuse". It was satisfied that there was no evidence of direct disability discrimination. The Claimant's claims were duly dismissed.

10. Meanwhile, the Claimant had lodged the current appeal against the Judgment of the Salter ET. Initially rejected on the papers by HHJ Peter Clark (that decision being sent to the Claimant by letter of 29 May 2014), the Claimant (represented by Mr Ohringer under ELAAS at her Rule 3(10) Hearing on 3 September 2014 before Lady Stacey) was given permission to appeal on amended grounds. The first two grounds related to the disability discrimination claim; the third was that the ET erred in striking out the protected disclosure claim.

11. The Respondents then presented their Answer and a cross-appeal; the latter relating to the striking-out of the protected disclosure claim. Considering the Respondents' cross-appeal on the papers, Langstaff P took the view that it disclosed no reasonable basis to proceed.

12. The Respondents applied for an oral hearing under Rule 6(16) of the **Employment Appeal Tribunal Rules**, which came before me on 26 May 2015.

13. By that time, the Claimant had lodged an appeal against the Herbert ET's Judgment. On the papers, that was considered (by Langstaff P) to disclose no reasonable basis to proceed. The Claimant's subsequent application under Rule 3(10) also came before me on 26 May 2015.

14. After hearing from each party separately on that occasion (the Claimant then being represented by different counsel acting under ELAAS), I allowed the Respondents' cross-appeal to proceed but dismissed the Claimant's Rule 3(10) application.

15. The appeal and cross-appeal before me thus both relate to the Judgment of the Salter ET. I am told that the Claimant is now pursuing an application for permission to appeal to the Court of Appeal against the ruling on her Rule 3(10) application in her second appeal.

The Facts

16. The First Respondent is an NHS Foundation Trust, which employs over 3,000 members of staff and provides a wide range of general and specialist medical services from its site in Guildford. The Claimant was employed by the First Respondent as a band 6 senior staff nurse in the neonatal unit of the Royal Surrey County Hospital.

17. During her period of permanent employment with the First Respondent (commencing June 2008), the Claimant had a number of long periods of absence due to ill-health. She had been absent from 14 December 2010 until May 2011 but disciplined on 26 April 2011 for working elsewhere whilst on sick leave and given a first written warning. Having returned to work in May 2011, she was again absent from December 2011 to January 2012. She then returned to work until 19 April 2012, when she was considered not to be well enough to work in the neonatal unit. She did not return to work again. On 1 May 2012, she presented a grievance complaining of bullying, harassment, victimisation and discrimination. The Claimant's grievance complaints were largely rejected as was her subsequent grievance appeal.

18. An Occupational Health report (following a referral on 3 December 2012) advised that the Claimant was unfit to work and no improvement in her symptoms was expected whilst her work-related issues remained unresolved. At a capability hearing on 25 March 2013, she was dismissed. On 19 June 2013, the Claimant presented her ET1.

The Grounds of Appeal and Cross-Appeal

19. The amended grounds of appeal permitted to proceed by Lady Stacey were threefold:

> (1) In rejecting the Claimant's case of a continuing act of disability discrimination, the ET erred in considering the complaints separately. It should have taken the different types of disability discrimination complained of - direct; failure to make reasonable adjustments; harassment - as a totality, when considering whether they were part of an ongoing situation or state of affairs.
>
> (2) Further, in stating that the Claimant's dismissal could not be said to be part of a continuing act, the only reason given by the ET was that the decision to dismiss was made by somebody not involved in the earlier allegations. The ET erred in

considering that to be the determinative factor; it failed to look at the full picture to identify whether the complaint was in substance an allegation against the Respondent that it allowed a discriminatory state of affairs to persist.

(3) As for the whistle-blowing complaint, the ET erred in concluding this had no reasonable prospect of success because the Claimant's case (that there was a plot to remove her) was without documentary evidence and "unlikely to be established". Having recognised there was a factual dispute, the ET wrongly attempted to summarily assess whether the Claimant's contentions were likely to be established.

20. The cross-appeal on the protected disclosure claim was pursued on the basis that the ET erred in dealing with the application to strike out on the basis of an oral argument put forward by the Claimant at the Preliminary Hearing that was not part of her pleaded case and in respect of which she did not apply to amend. In any event, the strike-out decision fell within the ET's discretion. Further, the Herbert ET's finding - that the allegation of a plot to dismiss the Claimant was completely unfounded - rendered the appeal academic.

The Relevant Legal Principles

21. I start with section 123 of the **Equality Act 2010** ("EqA"), which (relevantly) provides:

> **"(1) Proceedings on a complaint … [before the ET] may not be brought after the end of -**
>
> **(a) the period of 3 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;**
>
> **…"**

22. In the case of **Ali v Office of National Statistics** [2005] IRLR 201 it was held that claims of direct discrimination and claims of indirect discrimination are two distinct forms of claim. As to whether conduct has "extended over a period of time", however, the touchstone remains the guidance provided in the Judgment of Mummery LJ in the case of **Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530, in particular:

> **"52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

23. At a Preliminary Hearing on this question, the test to be applied is whether the Claimant has established that the complaints are capable of being part of an act extending over time, a *prima facie* case that that is so; see paragraph 10 of the Judgment of Hooper LJ in **Lyfar v Brighton & Sussex University Hospitals Trust** [2006] EWCA Civ 1548. In testing this question, in the case of **Aziz v FDA** [2010] EWCA Civ 304, Jackson LJ observed that:

> **"33. … one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents …"**

24. On the question of a strike-out of a claim the ET's power is derived from Rule 37(1)(a) of the **Employment Tribunal Rules 2013**. That enables it to strike out a claim that has "no reasonable prospect of success". The case law, however, cautions ETs against striking out a claim in all but the clearest of cases, particularly where that claim might involve allegations of discrimination or, by analogy, of whistle-blowing detriment; **Anyanwu v South Bank Student Union** [2001] ICR 391, **Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550. An ET should be particularly careful not to strike out a case where there is a dispute of fact, albeit that there may be cases where it is appropriate to do so because the case simply has no reasonable

prospect of success; see paragraph 27 of **Ezsias**. Strike-out should be recognised as a draconian act; see the guidance of Lady Smith in **Balls v Downham Market School** [2011] IRLR 217:

> **"6. Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects." (Lady Smith's emphasis)**

See, to similar effect, **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46.

25. The Claimant further relies on authority from the civil jurisdiction that a claim should not be struck out without giving the party concerned an opportunity to amend if that would save the claim; see **Soo Kim v Youg** [2011] EWHC 1781 QB:

> **"40. However, where the court holds that there is a defect in a pleading, it is normal for the court to refrain from striking out that pleading unless the court has given the party concerned an opportunity of putting right the defect, provided that there is reason to believe that he will be in a position to put the defect right. …"**

26. See also **Lambrou v Cyprus Airways Ltd** UKEAT/0417/05, applying **HM Prison Service v Dolby** [2003] IRLR 694; alternatives to striking out, such as ordering further Particulars, should be considered in the first instance. More specifically, in **Romanowska v Aspirations Care Ltd** UKEAT/0015/14 Langstaff P made clear it would be wrong to strike out a case where it was necessary for the ET to assess what was in the employer's mind; that could not be determined without hearing evidence from the employer.

Submissions

The Claimant's Case

27. There was too often a degree of scepticism in relation to claims of discrimination and protected disclosure; ETs too often seek to find shortcuts. All claims that may be able to succeed should be permitted to proceed. Although ETs have an obligation to case-manage, where parts of claims are hived off, difficulties can arise with appeals running alongside the continuing ET proceedings (albeit such problems may arise for many different reasons).

28. Turning to the first ground of appeal, in some cases the allegations will obviously relate to separate matters whereas in others it will be apparent that the complaint is one of a continuing act; this was one of the latter cases.

29. Conduct for the purposes of section 123(3)(a) of the **EqA** refers to prohibited conduct as provided by Chapter 2 of the **Act**. Chapter 2 defines the different types of conduct prohibited, all of which constitute discrimination actionable in the ET under section 39 and section 120(1). There was no reason to read in a requirement that for conduct to extend over a period it must involve the same type of discrimination. Indeed, if anything, section 25 of the **Act** suggests discrimination should be categorised according to strands. Under that provision all forms of disability discrimination are to be considered as a complaint of disability discrimination.

30. In the present case the ET considered the complaints (direct discrimination; failure to make reasonable adjustments; harassment) separately. In so doing, it erred in law. The case of **Ali** related to amendments not time limits and so was not determinative of the question whether different forms of discrimination could all constitute a continuing state of affairs. In any event that case pre-dated the **EqA**, which provides a different structure and specifically includes

section 25, which groups different forms of discrimination under different "strands". The Claimant relied on the guideline case of **Hendricks** (which gave rise to a far more unwieldy case in terms of the allegations made). See also **Edinburgh City Council v Kaur** [2013] CSIH 32, where it was held that the ET had erred in reaching its conclusion on time limitation without first hearing evidence; see also the Judgment of Langstaff P in **Betsi Cadwaladr University Health Board v Hughes and Ors** UKEAT/0179/13 at paragraphs 32 and 33.

31. On the second ground - related to the first ground and necessary if the Claimant's appeal could go further on her disability discrimination complaints - the ET erred in concluding that the fact that the decision-maker on the dismissal had not been involved in earlier events was determinative of the question whether the dismissal was part of a continuing act. The relevant question (per Jackson LJ in **Aziz**) was whether the complaint was, in substance, an allegation against the Respondent that it allowed a discriminatory state of affairs to persist.

32. These points were not undermined by the Herbert ET's finding that the dismissal was not discriminatory. That ET was adjudicating on the dismissal and not the discriminatory state of affairs extending over a period of time. In any event the Claimant was currently pursuing an application to the Court of Appeal for permission to appeal against the Herbert ET.

33. The Claimant's case was that she could not return to work because she could not fit in with the required shift pattern because of her disability; it was all part of one picture. Allowing that when considering whether a particular act constitutes discrimination one must look to the mind of the decision-maker (**CLFIS (UK) Ltd v Reynolds** [2015] IRLR 562), when looking at whether it is linked to previous acts (whether it is part of a state of affairs), one needed to look

at the matter more broadly. **Reynolds** did not answer that point. Here the ET elevated the different decision-maker point to be a determining - rather than merely relevant - factor.

34. Turning to the whistle-blowing case (the third ground of appeal and the cross-appeal), in considering whether to exercise its power to strike out, the ET should have had regard to the case law cautioning it against striking out a discrimination claim in all but the clearest of cases. It should further have had regard to the principle (per **Soo Kim**) that a claim should not be struck out without giving the party concerned an opportunity to amend if that would save it; an approach consistent with that adopted in cases in the ET jurisdiction.

35. The ET recorded the Claimant's whistle-blowing complaint as follows:

> **"53. The Claimant's case at the preliminary hearing was that the detriment was the collusive arrangement made by her managers to remove her from her employment culminating in a capability hearing [on] the 25 March 2013. The "detriment" was alleged to be the collusion that continued up to the date of the capability hearing. …"**

The ET needed to look at what was in the minds of the relevant managers; it could not do that on a strike-out hearing (per Langstaff P in **Romanowska)**.

36. The danger of the shortcut was demonstrated when it came to the Full Hearing when there was email evidence that the Claimant relied on as supporting her contention of a conspiracy.

37. In any event the ET had to approach the whistle-blowing claim on the basis of what the Claimant said at the hearing before it. If what she was saying was something new, it was right to say that would require an amendment but this should have been treated by the ET as an

implicit application to amend: if a claim might otherwise be struck out, the ET was obliged to consider whether it might be saved by other means.

38. As for the question whether the appeal was now academic, there were different considerations for the different claims. On disability discrimination, (accepting that there was also wider background and evidentiary material before it) the only claim before the Herbert ET was as regards the dismissal. Because the Salter ET had hived off the earlier matters, the focus was all on the dismissal; the other matters did not get the same degree of consideration as if separate causes of action. As for an issue estoppel argument, that could only bite on the findings necessary for the ET's conclusions; i.e. that the dismissal was by reason of capability and was not discriminatory. The Claimant was not estopped from relying on the prior allegations, because no determining findings of fact were made on those.

39. On the whistle-blowing case, the Claimant complained she had suffered detriment in the managers' collusion to pursue a capability process against her. That claim could not be issue-estopped because it was not before the Herbert ET. Allowing that the conclusions reached by the Herbert ET might mean that it would be legitimate for the ET to make a deposit order, that did not mean to say the appeal should not be allowed and the matter remitted.

The Respondents' Case

40. On the first ground, the starting point was to note that time limits apply to the bringing of "claims"; the ET was correct to treat the Claimant's distinct "claims" separately when deciding whether they had been presented in time. It was a novel argument to say it was permissible to aggregate different acts of discrimination to support a contention of a continuing act. Under the **EqA**, the continuing act still had to be one of a particular form of discrimination. The approach

adopted in **Ali** (see paragraphs 22 and 26) - that different acts of discrimination were separate - equally applied to time limits. In any event the decision in the **Reynolds** case authoritatively disposed of the argument that a different approach was required under the **EqA**. There, in considering a case under the **EqA**, the Court of Appeal had deprecated a composite approach to discrimination; the ET has to consider separate acts separately.

41. As for the various cases relied on by the Claimant, none had treated different forms of discrimination in a composite way. Allowing that a Claimant might not appreciate that different matters fell under different legal heads, that would go to a possible just and equitable extension of time but there was no appeal on that point.

42. In any event, the Claimant had to succeed on the second ground of her appeal if the disability discrimination complaints were to go any further. On that, the ET had been entitled to conclude the dismissal was not part of a continuing act of direct discrimination. Alternatively, the Herbert ET's subsequent decision - that the dismissal was not an act of direct disability discrimination - meant the Claimant could not rely on it as the last act in a continuing act of discrimination such as to bring the claim in time.

43. Returning to the way in which the Claimant had put her case, the ET1 had made general allegations about being bullied, treated badly and picked upon. It was only at the first Preliminary Hearing that the ET carried out the exercise of putting the acts complained of under different headings and identified the different causes of actions. What stood apart from the other allegations at all stages was, however, the act of dismissal (see the summary provided by EJ Salter at paragraph 10). The Claimant's complaint in that regard was that she was not considered well enough to return to work after 19 April 2012. The capability hearing did not

relate to the fact that she would not work particular shifts but simply to the fact that she could not return to work. 19 April 2012 was a line in the sand. The Claimant was not then being given shifts that she did not want; she was unable to work at all. The most the Claimant could argue was that she was kept off work because of the *consequences* of earlier acts of discrimination; because she was made ill by those earlier acts. Separate to that was the decision on what then followed: her inability to work. Paragraph 41 of the Salter ET Judgment had to be seen in that context. It was based on more than the different decision-maker point. Even if wrong about that, **Reynolds** showed that a different decision-maker might be sufficient of itself.

44. In any event, the appeal was entirely academic given the conclusion of the Herbert ET. This gave rise to a cause of action estoppel. Even if the EAT allowed the Claimant to revive all her earlier pre-dismissal discrimination claims, that would not get her anywhere given that the Herbert ET had already found that the last act - the dismissal - was not discriminatory. Whether the Herbert ET went about its task correctly was not before the EAT on this appeal. In any event it had been open to the Claimant to rely evidentially on all those matters before the Herbert ET, and she did. There was an extensive bundle and a very long witness statement put in by the Claimant, and reliance was placed on all those matters, but the ET still found against her. Even if the EAT was minded to allow the appeal in any way, it would need to remit the matter to the ET and should do so to the Herbert ET.

45. Turning to the cross-appeal, the ET should have dealt with the whistle-blowing detriment claim on the basis of the Claimant's pleaded case. It was not open to the Claimant to now characterise her conduct of the Preliminary Hearing as making an implicit application to amend. The Claimant had been given the opportunity to make clear her complaints. She had not responded to the Respondent's request of 23 October 2011, which specifically asked her to

identify what her other complaints were. She did not particularise her allegation of a protected disclosure detriment before the ET at the first Preliminary Hearing. When the matter then came before the Salter ET, there was a shifting of her position at that stage (see paragraph 53 of the Judgment). As the Claimant now rightly accepted, the way she then put the matter required an amendment, but - as was also common ground - she did not apply to amend. How could the ET consider whether to strike out something that was not part of the claim before it?

46. The Claimant had to argue that the ET was effectively treating an application to amend as having been implicitly made or was obliged to invite the Claimant to make an application to amend. There was no obligation on the ET to adopt such an inquisitorial role; **Muschett v HM Prison Service** [2010] IRLR 451. If the Claimant did not have permission to amend her claim - which it was common ground she did not - the cross-appeal had to be allowed. Moreover, the ET had not been obliged (contrary to the Claimant's submission), to invite the Claimant to apply to amend. **Soo Kim** related to the case where a party had not pleaded a necessary ingredient; it was not authority for saying that the court had to invite a party to amend to put a better case. Further, whilst **Soo Kim** allowed that a court should invite a party to amend where they might be able to remedy a defect, that was not this case. The Claimant had been given previous opportunities but had failed to state her case with proper particularity at any stage. On that basis the ET was obliged to treat the claim as pleaded, and was entitled to strike it out. It had proper regard to the guidance in **Ezsias**. The decision was for it. That it might have made a different order did not render its decision impermissible. It recognised the case had *no* reasonable prospect - applying the correct test - not simply that it had *little* prospect of success. Its reasoning was provided at paragraph 46, where the ET went through the various implausible aspects of the Claimant's case. Where a claim was so implausible it was open to the ET to strike it out: an ET was not obliged to let every matter proceed however improbable. (In any

event, the assertion of a plot would not of itself be sufficient: the Claimant would have to point to acts carried out as a result of that plot.)

47. Finally, the subsequent conclusion of the Herbert ET - that the Claimant's dismissal was not the culmination of a plot to get rid of her - gave rise to an issue estoppel; alternatively, to a finding that meant the claim would be bound to be struck out in any event. The Herbert ET had to decide what the reason for the dismissal was; the Claimant had put that in issue (see issue 5.1). In order to determine that question the ET had to engage with the Claimant's case that it was for an alternative reason. It was against that background that one had to see the Herbert ET's Decision at paragraph 46 and the rejection of the Claimant's alternative case (which was how she had put her whistle-blowing claim before the Salter ET). Even if not issue-estopped in a strict sense, how could the Claimant persuade any ET to find there was a plot to get rid of her when the Herbert ET - after a Full Merits Hearing - had found there was no such plot?

48. If the EAT was against the Respondents on all these points, the appropriate course would be remission to the Herbert ET.

The Claimant in Reply

49. The Herbert ET's Decision could not give rise to an issue-estoppel because the Claimant's whistle-blowing claim, as articulated before the Salter ET, was not of a protected disclosure dismissal but detriment.

50. As for the cross-appeal, the **Soo Kim** case was relevant. In that case the pleadings were defective, but that was also the case here; there had been no identifiable protected disclosure claim in the ET1. It was only before the Salter ET that the Claimant proposed a possible

formulation of the claim. The Claimant was not suggesting that an ET was obliged to undertake an inquisitorial role but, where a party has a claim and is then presenting a different claim or further Particulars, just because they did not formally apply for an amendment did not mean the ET could close its eyes to what it was being asked to do.

51. On the question of continuing act, as to whether it was appropriate to take a strict approach (on the basis that the ET could always permit an extension on just and equitable grounds), as had been recognised in **Hendricks**, the better course was permit matters to go forward and for the ET to then undertake proper case management at trial.

Discussion and Conclusions

52. I start with the two grounds of appeal relating to the Claimant's disability discrimination claims. Succeeding solely on the first ground would not be sufficient for the Claimant; she would also need to show that the ET was wrong not to find the act of dismissal was capable of being part of the conduct extending over a period (the subject of the second ground).

53. The Particulars of Claim attached to the Claimant's ET1 were dense and hard to disentangle. The issues for the ET to determine were, however, clarified and agreed at the first Preliminary Hearing on 29 November 2013. Under disability discrimination the ET identified three separate heads of claim: (1) direct discrimination (paragraph 6.3); (2) failure to make reasonable adjustments (paragraph 6.4); and (3) harassment (paragraph 6.5). The particular matters of which the Claimant complained were then set out separately under each head.

54. In some cases, a particular act might fall under more than one head of discrimination (it might, for example, be argued to constitute harassment and direct discrimination) but that was

not how the Claimant's complaints were characterised under the list of issues. That said, I can see that it might be argued that some of the matters complained of under different headings - such as some of the complaints relating to the assignment or non-assignment of the Claimant to particular shifts - were really different aspects of the same conduct.

55. When addressing the question of continuing act, the Salter ET first considered the matters complained of under the heading of direct discrimination, namely:

> **"40. … (a) that September 2001 [sic] the Respondent refused to allow the Claimant to work late shifts and night shifts only, (b) that in September 2001 [sic] and onwards the Respondent refused to allow the Claimant to off set annual leave against her required working time, (c) that between September 2011 and January 2012 the Respondent placed the Claimant on a rota without seeking her input beforehand, (d) that between November and December 2011 her shift pattern was changed at short notice, (e) that in September 2011 the Respondent refused to allow the Claimant to work night shifts only while consultations were taking place thereby going back on a promise made in or about May2011 (f) recording minutes and notes in a a [sic] confused manner and (g) removing the Claimant from night duty in September 2011. With the exception of the complaint of a refusal to allow the Claimant to use annual leave against required working time the acts of alleged direct discrimination took place during 2011. There was no evidence that the refusal to allow the Claimant to use annual leave was a continuing act of discrimination and, in any event, the Claimant was not working for the Respondent from 19 April 2012 as she was unfit to work and on sick leave."**

56. As the dates cited make clear, all the matters relied on by the Claimant were, on their face, out of time, save for the decision to dismiss. So, unless linked to the decision to dismiss, those matters would be out of time. For its part the ET found (paragraph 41):

> **"41. There was no evidence to support an argument that the Claimant's dismissal was part of a series of acts. She was dismissed on capability grounds. The decision to dismiss her was not taken by anybody whom she alleged had been involved in alleged acts of direct disability discrimination referred to above. The dismissal cannot be said to be the last in a series of acts."**

57. The ET similarly observed that the matters relied on in support of the claim of a failure to make reasonable adjustments were also out of time:

> **"43. … The Claimant alleges that the Respondent's failure to allow her to be exempt from working the early shift, a decision taken in June 2011, and the failure to place the Claimant on a rota so that she did not have to work with the individuals whom she alleged had bullied her were breaches of the Respondent's duty to make reasonable adjustments. The omission to do so took place in 2011. …"**

58. Similarly, for those matters relied on in support of the harassment claim:

> **"44. … The Claimant seeks to establish that (a) the events on a study day in August 2011 (b) the requirement to do a long day shift in March 2012 (c) placing her on medical suspension in July 2012 (d) the meeting on 17 April 2012, (e) the failure to follow OH advice and (f) the timing of the notification of the grievance amounted to harassment. The reference to a failure to follow OH advice refers to no particular advice given by OH. The last occasion that OH advised, the physician stated that the Claimant was unfit to work although there was a reference made to her unfitness being to some extent related to the resolution of workplace issues. In respect of each of the above complaints they are out of time …"**

59. As Mr Ohringer has accepted before me, the way in which the Claimant put her case before the ET - even taking the various allegations of disability discrimination as a whole - meant there was a clear gap between the various matters of which she complained when she was working up to April 2012 and her subsequent dismissal.

60. Whether, therefore, one considers the various complaints of discrimination under separate headings (as the ET did) or as being linked and forming one general complaint of discrimination (as the Claimant urges should have been done), the problem for the Claimant is there is a break between the pre-dismissal complaints and the complaint relating to the dismissal itself. Even if one includes the harassment allegation about the timing of the grievance outcome in February/March 2013 (albeit that Mr Ohringer has not placed any specific reliance on that), it remains something that relates to what went before - to the earlier matters about which the Claimant was grieving - not to the dismissal.

61. The second ground of appeal therefore seems to me to be crucial and I take it as my starting point: did the ET err in considering there was no link between the earlier discrimination alleged and the decision to dismiss? Did it err in concluding that the dismissal decision - taken, as it was, by somebody who was not alleged to have been involved in any earlier discriminatory acts - was separate and not part of a continuing act?

62. Mr Ohringer says the only reason provided by the ET was that the decision to dismiss was taken by someone else not involved in the earlier matters complained of. He says that was an error of law: that could only constitute a relevant, not a determining factor (**Aziz**).

63. I consider that to be an unfair reading of the ET's Judgment. An ET is entitled to expect its reasoning to be read as a whole, without individual sentences being scrutinised out of context. True it is that the ET considered that the different decision-taker point was highly relevant. It did so, however, in the context: (1) of there being no evidence to support an argument that the Claimant's dismissal was part of a series of acts, and (2) of her dismissal being on capability grounds and not because she would not work particular shifts or because she was asking for adjustments to her working arrangements (by the time of her dismissal the Claimant was simply unable to work) or in respect of any of the other matters relied on by the Claimant in her pre-dismissal discrimination complaints.

64. The context of the ET's reasoning can further be understood when one considers how the Claimant was putting her case. As her Particulars made clear, she understood that her dismissal was because she could not attend work, as advised by Occupational Health, because (on her case) of the consequences of the earlier discriminatory conduct. That was not the same as saying that the dismissal decision was part of the same conduct. That the ET was correct in its characterisation of the Claimant's case receives further support when that case is considered in the light of the Court of Appeal's decision in **Reynolds** (which makes clear that the final decision-maker is not automatically tainted by any discriminatory motive of those previously involved in the earlier conduct of which complaint is made). In the present case, however, at a more basic level, the Claimant's claim did not link the earlier acts of discrimination to the decision to dismiss. At most, she was complaining that the decision to dismiss related to the

consequences of the earlier acts of discrimination. She plainly saw that as unfair - she saw it as an act of direct disability discrimination - but her case did not characterise it as an extension (or continuation) of the same conduct. The ET permissibly had regard to the different decision-maker point as a relevant but not the only factor; it saw it, and considered it, in context.

65. In reaching my decision on the second ground of appeal, I have proceeded on the assumption that the Claimant is correct on the first. Given my conclusion, there is no need for me to adjudicate on that first ground but, if I had to do so, I would have sympathy for the Claimant's argument. Ms Criddle is, of course, correct to say that complaints are made about acts of discrimination; that ETs must therefore determine those complaints by reference to the specific acts rather than some amorphous state of affairs. When considering whether a Claimant has made out a *prima facie* case that that of which she complains amounts to conduct extending over a period, however, I can allow that it might be appropriate to consider that conduct as comprised of acts that, taken individually, fall under different headings. Such an assessment will inevitably be fact- and case-specific, but if the Claimant was, for example, complaining that putting her on particular shifts was a continuing act of direct discrimination and then, as the other side of that particular coin, that failing to put her on different shifts was a failure to make reasonable adjustments, I cannot see why she would not be entitled to say that those matters should be considered together as constituting conduct extending over a period.

66. Failing to consider the pre-dismissal complaints made in that way might well have constituted an error of law on the part of the ET in this case. Ultimately, however, as I have made clear, I do not consider that this can go anywhere. The ET was entitled to reach the view that it did that all was out of time save the complaint about the decision to dismiss, which was not part of any earlier continuing act.

67. Even if I were wrong in that conclusion, however, I would agree with the Respondents that, in any event, the appeal is academic given the conclusion of the Herbert ET. Even if the Claimant were permitted to revive her earlier pre-dismissal discrimination complaints, that would not get her anywhere. An ET specifically charged with determining whether or not the decision to dismiss was an act of direct disability discrimination has, after a Full Merits Hearing, determined that it was not. To the extent that the Claimant seeks to argue that the decision to dismiss constituted the end of a discriminatory course of conduct she would be estopped from doing so. And, for completeness, I note that it was open to the Claimant to rely evidentially on the background (pre-dismissal allegations of discrimination) matters before the Herbert ET. Ruling that a Claimant cannot rely on a particular matter as a cause of action to be determined by the ET does not prevent her relying on it as part of the relevant evidential background. That is, indeed, what the Claimant did here but the Herbert ET found against her.

68. I then turn to the protected disclosure claim and the ET's strike-out of that case. I consider first the cross-appeal.

69. On this point, the parties are agreed that the way in which the Claimant was putting her case at the hearing before the Salter ET required an amendment and the ET's failure to acknowledge that fact amounted to an error on its part. The Claimant argues that this is not fatal: the ET was effectively treating an application to amend as having been made or, in the alternative, was obliged to invite the Claimant to make such an application.

70. I am unable to agree. The latter suggestion would impose on the ET an obligation to act in an inquisitorial role, which it is not required to do (**Muschett**). This case was not the same as that facing the court in the **Soo Kim** libel matter, which allowed that a court might be

obliged to permit a party the opportunity to amend where it has previously failed to plead a basic part of its case but plainly had the evidence to support it. That does not require that the court should invite a party to amend to try to put a better case than that previously alleged. In any event, the decision in **Soo Kim** presupposes the possibility that the defect might be put right. Here, that was not apparent. The Claimant had previous opportunities to state her case. Initially she failed to state it at all. She then failed to respond to the Respondent's invitation to clarify her case. The first time she stated that she was bringing a protected-disclosure complaint (before the Gumbiti-Zimuto ET), the Claimant put forward a different case to that which she then argued before the Salter ET. Even before the Salter ET the case she outlined had no particularity. In those circumstances, I do not accept that the ET had any obligation to invite the Claimant to formally amend her claim or to assume on her behalf that she was making an application to do so. It should have treated the claim as pleaded. On that basis I do not understand Mr Ohringer to contest that the ET was entitled to strike it out.

71. Even if, contrary to the Respondent's cross-appeal, the ET was correct to consider the protected disclosure claim on the basis outlined by the Claimant during the course of the hearing, I agree that the ET was then entitled to conclude that it should be struck out. It expressly had regard to the test whether the claim had any reasonable prospect of success; it reached a view that it did not. The reasons it provides (see paragraph 56) go through the various layers of implausibility inherent in the Claimant's case. Having heard that case emerge from the Claimant during the course of the hearing, that was a permissible conclusion for the ET to reach. It is not for this court to interfere. Where a claim is so implausible, it can be right that it be struck out: an ET is not obliged to let every matter proceed however improbable.

72. In the further alternative, I agree with the Respondent that the subsequent conclusion of the Herbert ET, that the Claimant's dismissal was not the culmination of a plot to get rid of her, gives rise to an issue estoppel; alternatively, to a finding that means that the claim would be bound to be struck out in any event. The Claimant herself put the reason for dismissal in issue. In order to determine that issue, the Herbert ET had to engage with her alternative case that it was for a different reason. Thus the Herbert ET (paragraph 46) had to consider the allegation that there was "a general longstanding agreement that she should be got rid of using capability as an excuse". Mr Ohringer says the Herbert ET did not have to strictly engage with a finding on that point because it related to a detriment complaint not a dismissal complaint, but that is to fail to recognise what the Claimant was putting in issue. Even if not properly an issue estoppel, that finding must mean, as Mr Ohringer has acknowledged, that it would be extremely doubtful (I put it neutrally) that the Claimant's case could have any real prospect of success. As Mr Ohringer conceded, if nothing else, it would be likely that a deposit order would be made should the protected disclosure claim be permitted to proceed after this appeal. Indeed, had I been persuaded that the case should proceed, I would have been inclined to have made any order for remission conditional upon the payment of a deposit. In my judgment, however, it is clear that, an ET having properly engaged with the merit of the Claimant's argument on this point, a finding has been reached that provides either a full answer, on an issue estoppel basis, to the question or such a clear indication of what the result would be that it would be inevitable that the case would be struck out as having no reasonable prospect of success.

73. For all those reasons, the appeal is dismissed; to the extent that it still formally arises, I would allow the cross-appeal.