Appeal Nos. UKEAT/0133/14/LA
UKEAT/0134/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 August 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS M ONI — APPELLANT

NHS LEICESTER CITY (FORMERLY LEICESTER CITY PRIMARY CARE TRUST) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel) Direct Public Access
For the Respondent	MR DAVID MONK (of Counsel) Instructed by: Messrs Bevan Brittan LLP Interchange Place Edmund Street Birmingham B3 2TA

SUMMARY

PRACTICE AND PROCEDURE - Costs

ET Costs Award – ET (Constitution and Rules of Procedure) Regulations 2004 Schedule 1
Appeal from Judgment awarding costs against the Claimant upon the remitted hearing of the Respondent's application for costs (see previous EAT Judgment in this matter, under UKEAT/0144/12).

When deciding whether the threshold had been crossed for its costs jurisdiction to be engaged, the Employment Tribunal considered that it had been, on the basis that the claims were misconceived.

In determining whether or not bringing the race discrimination case had been misconceived from the outset, the Tribunal needed to understand what that case was. That understanding was not demonstrated by the Employment Tribunal's reasoning, which was rendered unsafe by the apparently erroneous characterisation of how the Claimant had put her case.

In respect of the unfair dismissal claim, whilst bound by the earlier findings on liability, the Tribunal was required to form its own judgment as to whether the claim had been misconceived. That independent engagement was not apparent from the Employment Tribunal's reasons.

Disposal
Having due regard to the guidance laid down by the EAT in **Sinclair Roche & Temperley and Ors v Heard and Anor** [2004] IRLR 763, the costs application was remitted to be considered by a freshly constituted Tribunal, purely looking at the question of whether or not the claims were misconceived (the Respondent not having pursued a cross-appeal against the refusal to find unreasonable conduct). The decision to remit to a freshly constituted Tribunal was for largely pragmatic reasons arising in this case.

HER HONOUR JUDGE EADY QC

Introduction

1. In giving this Judgment, I refer to the parties as the Claimant and the Respondent, as they were before the Tribunal below. Before this hearing there had been some correspondence regarding a possible application by the Claimant that had earlier been refused by the Registrar, against whose order it was suggested that the Claimant might be seeking to appeal. I had directed that any such matter should be dealt with at the outset of today's hearing if it was being pursued. Acting for the Claimant before me today, Mr Matovu of Counsel has confirmed that no appeal against the Registrar's order, or further application was being pursued.

2. The appeal is that of the Claimant against the Judgment of the Leicester Employment Tribunal under the chairmanship of Employment Judge Macmillan (sitting, with members, on 22 and 24 April 2013) – "the Macmillan Tribunal". The Judgment was sent to the parties on 10 May 2013. It allowed the Respondent's application for its costs of the Tribunal proceedings, the sum to be determined by way of detailed assessment in the County Court. It has been intimated to me that the sum in question is likely to be considerable, something over £100,000.

3. The Claimant had originally been represented in the ET proceedings by her husband, Dr Oni (heard by an ET under the chairmanship of Employment Judge Ahmed: "the Ahmed Tribunal"). There was an earlier EAT appeal against a previous costs Judgment in those proceedings, at which the Claimant was represented by Ms Platt of Counsel, who continued to represent her before the Macmillan Tribunal. At the Rule 3(10) hearing in the current appeal,

the Claimant was represented by Mr Matovu of Counsel, who has continues to represent her today. The Respondent has been represented throughout by Mr Monk of Counsel.

The Background

4. From 6 October 2006, the Claimant had been employed by the Respondent as a specialist nurse. Issues at work led the Claimant to present a first Employment Tribunal claim against the Respondent on 13 February 2009, seeking to claim unfair dismissal and race discrimination, albeit that at that point she was still employed by the Respondent. Matters at work were not resolved from the Claimant's perspective, and she resigned from her employment with the Respondent on 6 July 2009. On 14 August 2009, she presented a second Employment Tribunal claim claiming constructive unfair dismissal and race discrimination.

5. It is necessary to look at the first Tribunal claim, because it was subsequently characterised by the ET, at the full-merits hearing of the second claim, as having included allegations of race discrimination against the Claimant's former line manager, a Mrs Jivanji (see paragraph 8 of the Ahmed Tribunal liability Judgment). That, however, would be a misreading of the ET1 in the first proceedings. In that document the Claimant set out her case under two specific headings. First, using box 5.1 of the form ET1, under the heading "unfair dismissal or constructive dismissal, she set out allegations that would go to a complaint of the Respondent having acted in breach of the contract of employment such as to potentially give rise to a claim of constructive unfair dismissal. Those allegations included complaints of ill-treatment of the Claimant by Mrs Jivanji but not of race discrimination. Second, using box 6.2 of form ET1, under the heading "Discrimination", the Claimant made a complaint of race discrimination, which was levied against two senior managers, a Ms Ganatra and a Mr Kotecha

in respect of the way in which they had responded to the Claimant's complaints against Mrs Jivanji. As she put it: "The attitudes of Ms Ganatra and Mr Kotecha would have been less hostile had I been Asian".

6. In any event, there was a fundamental problem for the Claimant's first Tribunal claim: she was seeking to claim unfair dismissal when she had not left her employment; she had not actually brought the contract of employment to an end. When she did subsequently resign and commenced her second claim she then withdrew the first (on 17 August 2009), albeit that there was no application that it should then be dismissed. The second claim was slightly differently framed in terms of the unfair, constructive dismissal claim. By now the Claimant had resigned after the completion of further stages in her grievance process and the issuing of a report rejecting her complaints. The Particulars provided (again at box 5 of the form ET1, under the heading "Unfair dismissal or constructive dismissal") still included allegations against Mrs Jivanji - complaining of harassment and bullying by her - but, again, there was no reference in that section of the second ET complaint to race discrimination as such. The race discrimination claim was, again, separately pleaded in the separate box on the ET1 form for such purposes (box 6), making complaints against the more senior managers in respect of how they responded to the Claimant's complaints against her line manager, Mrs Jivanji:

> **"Smita Ganatra (Asian) and Kam Kotecha (Asian), the decision-makers in this matter, took sides with Vanita Jivanji (Asian) and treated me (AfroCaribbean) as if I was the one at fault.**
>
> **1. Smita Ganatra discriminated against me in her response to my grievance letter of 17 June 2008 and in her conduct of the meetings of 10 September 2009 and 6 January 2009 respectively.**
>
> **2. Kam Kotecha discriminated against me in his response to Dorothy Gillespie's letter of 18 December 2008, in his response to my letter to Tim Rideout (Chief Executive) dated 6 January 2009 and in the manner in which he dealt with my complaints at the grievance meeting of 19 May 2009 and his subsequent report of 22 June 2009.**
>
> **Designed to absolve Vanita Jivanji of fault, these acts are linked to one another."**

7. There were a number of case management discussion hearings in respect of the Claimant's second Tribunal claim. Relevantly, on 8 December 2009, there was a CMD before Employment Judge Solomons. The Employment Judge took the view that:

> **"[…] it was important in order to identify the claims and the issues to be determined […] for the claimant to respond to [the Respondent's request for further and better particulars of the claim]."**

8. The Employment Judge then summarised the Claimant's unfair dismissal complaint as follows (paragraph 2):

> **"In essence, the Claimant is complaining of unfair constructive dismissal relying upon her resignation on 6 July 2009 which it is alleged was brought about by conduct on the part of the respondent, which is alleged to amount to a breach of the implied term of trust and confidence, in the form of harassment and bullying by Mrs Jivanji and the way in which the respondent in particular through Smita Ganatra and Kam Kotecha dealt with the claimant's grievance in relation to the alleged harassment and bullying by Mrs Jivanji. In addition the claimant appears to contend in box 5 of the Claim Form that other conduct unspecified by the respondent between 2007 and 2009 undermined the relationship of trust and confidence. The respondent denies a breach of contract and dismissal."**

9. As for the race discrimination claim, the Employment Judge observed and directed as follows (paragraph 3):

> **"In relation to race discrimination, it was confirmed by the Claimant that the claim is one of direct discrimination and not indirect discrimination, but again the matter is briefly set out in box 6 of the Claim Form and further details are required."**

10. By letter of 9 January 2010, the Claimant duly provided the Further Particulars. The requests had been made under separate headings corresponding to the unfair dismissal claim (paragraph 5.1 of the claim form) and the race discrimination claim (paragraph 6.2 of the claim form). It is right to say that in answer to request 5, under paragraph 5.1 - the unfair dismissal claim - in identifying how the Respondent had undermined the relationship of trust and confidence, the Claimant stated:

> **"2) Failure to provide the Claimant between 2006 and 2008 with a work environment free of racial discrimination."**

11. That was item 2 of some 27 separate matters particularised by the Claimant under that request.

12. In the Particulars provided in respect of the race discrimination claim - under paragraph 6.2 of the claim form - the Claimant made clear that her complaints were against Ms Ganatra and Mr Kotecha, who she identified as the relevant decision-makers. Ms Jivanji was expressly identified as the relevant comparator.

13. As is customary in Tribunal proceedings, witness statements were exchanged before the full-merits hearing, and Mr Monk (for the Respondent) observes that the Claimant's statement included citations from her grievance documentation, which included a paragraph headed "Discrimination at work", in which the Claimant stated:

> **"The three Asian members of the Haemoglobinopathy team frequently lapsed into their language whilst at work deliberately to exclude me. Mrs Jivanji confirmed this in her 'interview' of 1 October 2008."**

14. I have only been provided with an extract from the Claimant's witness statement, and this passage is taken from page 100 of, I suspect, many more.

15. The full-merits hearing of the second Tribunal claim took place before the Leicester ET under the chairmanship of Employment Judge Ahmed, lasting over some 13 days over August and December 2010, with an additional day for the decision in chambers. The Tribunal's Judgment was that the Claimant's claims were to be dismissed. The Judgment and the Reasons for it were sent to the parties on 21 February 2011 ("the Ahmed liability Judgment").

16. Towards the end of the liability Judgment, the Ahmed Tribunal expressed itself in terms that not only invited an application for costs but seemed to have prejudged issues relevant to such an application that need not to have been determined at the liability stage. There was an appeal against the Tribunal's subsequent order for costs against the Claimant and the EAT (HHJ Richardson presiding) held that the Tribunal had expressed itself at the liability stage in such a way as to mean that the Claimant had not been given a fair hearing at the costs stage (see the Judgment in UKEAT/0144/12). The appeal was allowed and the costs application remitted to be considered afresh by a differently constituted Employment Tribunal. In making that order for remission, HHJ Richardson ruled (paragraph 47):

> **"This Tribunal will take as its point of departure the findings and reasons of the existing Tribunal as regards liability issues: these are not open to further argument. But the Tribunal will reach its own conclusions on all the questions relating to the application for costs itself – whether the threshold conditions for an order are met […]."**

17. Thus the costs application came before the Macmillan Tribunal, which concluded that the threshold to engage its costs jurisdiction had been crossed: the claims of race discrimination and constructive unfair dismissal were misconceived and should never have been brought.

The Tribunal's Reasoning

18. The Macmillan Tribunal correctly directed itself as to the legal test it was to apply. At paragraph 7 of the Judgment the Tribunal refers to Rule 40 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004**, applicable at the time, and at paragraph 8 correctly sets out the three-stage test it was to apply:

> **"In essence, the rule established is a three stage test. We cannot consider whether to make an order for costs unless we are satisfied that one of the threshold conditions is met. If we are so satisfied, we shall consider whether to make such an order, but we are not obliged to do so. There is a discretion to be exercised. If we are minded to award costs there is then a further discretion to be exercised as to the amount of the costs. The existence of this latter discretion is apparent from the concluding words of paragraph (2)."**

19. Whilst critical of how the Claimant had been represented by her husband, the Macmillan Tribunal did not conclude that her conduct of the proceedings had been unreasonable.

20. Turning to the question whether the claims had been misconceived - defined (see **Balamoody v UKCC Nursing** [2002] IRLR 288 EAT) as having no reasonable prospects of success where "reasonable" means "realistic" - the Macmillan Tribunal characterised the Claimant's complaint as follows (paragraph 15):

> **"In brief, Mrs Oni's complaint was that as the only Afro-Caribbean member of the […] team she had been bullied, belittled, harassed and undervalued by her Asian line manager Mrs Jivanji and the two other members of the team, one of whom was Mrs Jivanji's husband, who were also Asian, and more senior managers, some of whom were also Asian, had failed to support her either on the grounds of her race or as acts of victimisation."**

21. Expressly not relying on the Ahmed Tribunal's conclusions on costs, the Macmillan Tribunal observed that the findings at the liability stage had been adverse to the Claimant. On race discrimination (paragraph 16):

> **"[…] it is clear from the findings of fact of the Ahmed Tribunal […] that the Claimant's interpretation, her perception, that her treatment was because of the difference in race between her and the other members of her team, were wholly unsubstantiated and unsustainable. In short 'without foundation' (para 173). In paragraph 173 of the judgment the Tribunal records that:**
>
> > **'In evidence when Mrs Oni was repeatedly asked why she believed a particular act to have been done because of her race there was either no answer or no satisfactory answer.'"**

22. Descending, then, into the detail in respect of the race discrimination complaint, the Macmillan Tribunal observed (paragraph 17):

> **"*It was a matter of general astonishment that at the start of the hearing Dr Oni had announced that there was no allegation of race discrimination being made against Mrs Jivanji. If Mrs Jivanji was no longer accused of race discrimination, the race discrimination case as a whole was seriously weakened, almost irretrievably so, as Mrs Jivanji was the principal protagonist, the immediate cause of Mrs Oni's health problems and the apparent stumbling block to her returning to work as Mrs Oni had insisted all along that she could never return to work so long as Mrs Jivanji remained her line manager (although rather mysteriously when Mrs Jivanji left the team for an unconnected reason Mrs Oni still felt unable to return)."**

23. I will return to the latter part of that paragraph. On the question of the race discrimination complaint the Macmillan Tribunal then concluded (paragraph 19):

> **"It is abundantly clear from the findings of fact of the Ahmed Tribunal that the complaint of race discrimination never had the remotest prospect of success. Our perception from reading the judgment of the Ahmed is that Mrs Oni was struggling in her new role in the respondent's team and criticisms of her by Mrs Jivanji and attempts to manager [sic] her were, at least initially, categorised as being racially discriminatory as were many subsequent outcomes from several other individuals which Mrs Oni did not like. The threshold therefore in rule 40(3) of the race discrimination claim having been misconceived is crossed."**

24. In respect of the unfair dismissal claim the Tribunal concluded as follows (paragraph 20):

> **"[The costs threshold] … is also crossed in respect of the constructive unfair dismissal claim which was based on the last straw principle. Having rather tersely pointed out that there appeared to have been more than one 'last straw' the Ahmed Tribunal dismiss the final last straw thus (para 175)**
>
> > **'In our judgment there was in fact no last straw. The last straw relied upon was in fact nothing more than an innocuous act which has been artificially fashioned to create a claim. It is, as Mr Mink [sic] submits, something on which to hang a claim of constructive dismissal.'**
>
> **In other words it was a contrivance, necessitated by the realisation that an earlier constructive unfair dismissal claim which also cited the last straw, must be abandoned because at that stage Mrs Oni had not resigned."**

25. Having concluded that the costs threshold had been crossed, the Macmillan Tribunal went on to consider whether it was still appropriate to award costs against the Claimant and whether it should award the full costs of the proceedings. It answered both of those questions in the affirmative. I need not be so concerned with the Reasons given in those respects, as it is the first stage - the threshold question - that lies at the heart of this appeal.

The Appeal

26. The appeal was allowed to proceed to a Full Hearing after a Rule 3(10) application before Langstaff P, on the basis of the following amended Grounds of Appeal:

(1) The Tribunal misunderstood the basis and/or main thrust of the Claimant's claim of race discrimination by wrongly supposing that it was founded principally on an allegation

against Mrs Jivanji that was subsequently not pursued at the liability hearing. In fact the claim was directly solely against Mrs Ganatra and Mr Kotecha.

(2) Further/alternatively, the ET failed to evaluate properly the Claimant's complaint of constructive unfair dismissal on its full merits as it was presented and pursued rather than on the limited basis of an unidentified last-straw act.

The Relevant Legal Principles

27. There is no challenge to the self-direction given by the Macmillan Tribunal in its approach to the award of costs; the three-stage test there set out (see paragraph 18 above) was obviously correct.

28. Whether or not the threshold to award costs has been engaged and/or whether or not it is appropriate to make an award of costs are matters involving an exercise of broad discretion on the part of an Employment Tribunal and an appeal against a costs order will be doomed to failure unless it is established that the order is vitiated by an error of legal principle or was not based on the relevant circumstances, see the Judgment of Mummery LJ in the case of **Yerrakalva v Barnsley MBC** [2012] ICR 420. I note in particular paragraph 49 of that case, where Mummery LJ said as follows:

> **"[…] as orders for cots are based on and reflect broad brush first instance assessments, it is not the function of an appeal court to tinker with them. Legal microscopes and forensic toothpicks are not always the right tools for appellate judging."**

29. Where there is an error of law in the making of a costs order the question will arise as to how an appeal is to be disposed of. Following the Judgment of the Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 499 (per Laws LJ), if the EAT detects an error of law on

the part of the Tribunal, it is bound to send the case back unless it concludes (a) that the error cannot have affected the result – in such a case, the error will have been immaterial, and the result is as lawful as if that error had not been made – or (b), that without the error the result would have been different, but the EAT is able to conclude what it must have been in any event. Where there is more than one possible outcome, the case must be remitted.

Submissions: The Claimant's Case

30. Mr Matovu, representing the Claimant on this appeal, contends that the Macmillan Tribunal demonstrated in its reasoning that it had fundamentally misunderstood the main basis and thrust of the Claimant's claim of race discrimination. That claim had not been directed against Mrs Jivanji at any stage. He also submits that the Tribunal misjudged the Claimant's unfair dismissal complaint, failing to evaluate that claim properly on its merits. There was only a vague reference to an unspecified last straw - simply said to be a contrivance - without a detailed examination of the case as a whole.

31. In respect of the reasoning on the race discrimination claim, the Claimant submits that, at paragraph 17, it was apparent that the Tribunal understood the main thrust of her case to be against Mrs Jivanji and that formed the main basis of its reasoning for the costs order in respect of that complaint. In excavating down to the real bones of the case pursued by the Claimant, however, Mr Matovu took me first to the Claimant's ET1, where at paragraph 6.2 she had set out her case on race discrimination and the people involved, specifically referring to Smita Ganatra and Kam Kotecha but making no allegation against Mrs Jivanji.

32. Turning to the Further Particulars provided pursuant to the order of the case management discussion on 8 December 2009, the Claimant had, again, separated out her responses in respect of the unfair dismissal complaint and the race discrimination complaint. On the race discrimination claim, she again clarified that Ms Ganatra and Mr Kotecha were the key decision-makers; Mrs Jivanji was cited only as a comparator.

33. Following those Particulars, although there were two further CMD hearings, there were no further particulars given of the race discrimination complaint. Thus it was clear that the way in which the Claimant put her case involved no allegation of race discrimination against Mrs Jivanji. It was wrong therefore to say that at the outset of the hearing there had been a withdrawal of a claim which had never been made. It was possible that the Macmillan Tribunal was picking up on a confusion from the Ahmed Tribunal, which had apparently misunderstood the nature of the first Tribunal proceedings (see paragraph 8). When one looked at the Particulars provided in that first claim, however, the same point could be made. The complaints relating to Mrs Jivanji of bullying and harassment went to the Claimant's complaint of constructive unfair dismissal (albeit that she could not properly pursue such a claim in the first proceedings has she had not at that stage left her employment). Her race discrimination claim was all about how others - Ms Ganatra and Mr Kotecha - had then treated the Claimant when she complained about Mrs Jivanji.

34. As for the constructive, unfair dismissal claim, the Tribunal's reasons at paragraph 20 relied on conclusions reached by the Ahmed Tribunal that were themselves tainted. In any event, the Macmillan Tribunal had been obliged to reach its own views, not simply rubberstamp those already expressed. Looking at the reasoning given at paragraph 20, it could not be

understood what the Tribunal had actually meant by saying that the Claimant's constructive dismissal claim was a contrivance. It could not be said that the Claimant had withdrawn her first claim because she had no longer relied on the matters there complained of as entitling her to claim constructive dismissal. She had withdrawn her first claim not because she resiled from the substance of the complaint she made – she did not – but because she could not pursue the unfair dismissal claim when she had not left her employment. Subsequently, when she did leave her employment, she put in a second claim, which stood in the place of the first.

35. The Ahmed Tribunal had apparently misunderstood the background to the Claimant's constructive, unfair dismissal claim. She had abandoned the earlier claim because she had not at that stage resigned. When she did resign she was entitled to put in a new claim still relying on the matters previously referenced in the earlier claim. Abandonment of the earlier claim did not mean she was bound to rely only on new matters to claim constructive unfair dismissal.

36. As for the Respondent's argument that paragraphs 170-175 of the Ahmed liability Judgment were sufficient for the later Tribunal to conclude that it was appropriate to make an order for costs, that later Tribunal was engaged on a different exercise. The Ahmed Tribunal was concerned with the question of liability. The Macmillan Tribunal was concerned with whether bringing the claim was misconceived, and had to look at that question for itself. Paragraph 20 of the Judgment was so limited it did not show that the Macmillan Tribunal approached its task in the right way. It simply seized on the last-straw finding without distinguishing between what was relied on as a last straw for the first claim and what for the second; with no explanation as to what it was that was "artificially contrived" by the Claimant.

37. There was also an error in the Ahmed Judgment, referring to the last sentence of paragraph 161, where it seemed to think that the Claimant could not rely on the issuing of the report because that post-dated her first Tribunal claim. That was false logic, given that the Claimant resigned shortly after the issuing of that report. The Macmillan Tribunal had to engage with that and reach its own conclusion as to whether this was really behaviour that had crossed the costs threshold. Similarly, at paragraph 179 of the Ahmed liability Judgment the suggestion was made that the Claimant needed to construct a last straw because she had already relied on a last straw in the first ET1 and had then withdrawn that claim. Even if that was taken to have amounted to a waiver of a breach of contract, that could still form part of a series of acts ending with a subsequent last straw, later relied on as having a cumulative effect for constructive, unfair dismissal purposes.

38. Allowing that it might be unfair to criticise the Respondent for not having sought to strike out the claim at an earlier stage or to draw any conclusions from that failure in terms of whether the case was misconceived, the Claimant further submitted that the Respondent's offer of settlement was relevant to the question whether the claims were misconceived.

The Respondent's Case

39. On behalf of the Respondent, Mr Monk contended that the Claimant's second Tribunal claim did not abandon all allegations against Mrs Jivanji. Whilst it was right that the ET1 did not make allegations of race discrimination against Mrs Jivanji in terms, the matter did not end there. He sought to place reliance on the Claimant's closing submissions before the Ahmed costs Tribunal, although accepting that that did not contain any express allegations of race discrimination against Mrs Jivanji. He also looked at the Further Particulars provided in

response to the Tribunal case management order; the reply to request 5 referred back to a working environment free of racial discrimination for the period 2006 to 2008, which would necessarily reference the time the Claimant worked with Mrs Jivanji. The Respondent, it was submitted, would not have been able to avoid that reference being construed as the Claimant bringing a claim of race discrimination with Mrs Jivanji at its heart. Similarly, in her witness statement, the Claimant had specifically referred to her grievance compliant of suffering discrimination at work.

40. The Macmillan Tribunal had rightly taken the findings of the Ahmed Tribunal as its starting point. It could not go behind those findings on liability. The Ahmed Tribunal, for its part, had plainly had the sense that Mrs Jivanji was at the heart of the Claimant's complaints. The Macmillan Tribunal had, however, understood that there had been two separate strands to the race discrimination allegations: those at which Mrs Jivanji was at the heart, which had been withdrawn; and those against senior management, which were also sufficiently weak as to warrant a costs order. Ultimately, the Macmillan Tribunal had not stopped with the case relating to Mrs Jivanji and could not be criticised.

41. As for the constructive, unfair dismissal claim, the Respondent denied that the Macmillan Tribunal was bound to evaluate the claim; that function had been discharged by the original Ahmed Tribunal. The Claimant had put her case as one of a last-straw in her submissions for the earlier CMD, and so it was not wrong of the Tribunal to adopt the same approach. The Macmillan Tribunal was not sitting as a court of appeal against the Ahmed Judgment nor, in fairness, had Counsel then representing the Claimant so suggested. The way the argument was now being put was different to how it had been put below. Although short, the Macmillan

Tribunal did sufficient in paragraph 20, given the clear finding of the Ahmed Tribunal at paragraph 175.

42. On the question of the settlement offer, there may be many different reasons as to why a Respondent may make such an offer; it would be wrong of the EAT to speculate as to what the reason was here. It may not demonstrate any view as to the merit of the case. In any event, it would not be the Respondent's view that mattered; it would have to be that of the Tribunal. The settlement offer was irrelevant; the Macmillan Tribunal had been entitled to disregard it.

The Claimant in Reply

43. In responding to the Respondent's submissions, Mr Matovu noted that the Respondent's position had changed from initially saying that the allegation against Mrs Jivanji had been the foundation stone to saying that there was always an allegation of race discrimination against her, however weakly put. As for the response of the Claimant in the request for Further and Better Particulars, that was a response made in respect of the constructive, unfair dismissal claim, and the Tribunal could not have treated it as a complaint of race discrimination, **Chapman v Simon** [1994] IRLR 124 CA. Here, the ET1 had very carefully distinguished between the constructive, unfair dismissal and race discrimination complaints, and the Claimant had specifically identified those against whom she was complaining of race discrimination.

44. As for paragraph 130 of the Ahmed Judgment, that had to be seen in the light of the fact that that Tribunal had wrongly thought that the Claimant had made a complaint of race discrimination against Mrs Jivanji in the first claim; that was not the case. As for whether the Macmillan Tribunal's conclusion could stand notwithstanding the error made relating to

Mrs Jivanji, it should be noted that paragraph 17 referred to a Mrs Gillespie, against whom no allegation of race discrimination had been made, and wrongly suggested that there had been no finding of a protected act when the Ahmed Tribunal had found that there had been a protected act, in the form of the first Tribunal claim.

Discussion and Conclusions

45. Although appeals against costs orders by Employment Tribunals are not uncommon in this court, it is somewhat less than usual to have such a return visit. The Judgment with which I am concerned saw an Employment Tribunal having to engage in a difficult task. It had not made the original decision. It had to work on the basis of the liability findings of an earlier, differently constituted Tribunal but then reach its own conclusions on all questions relating to the costs application. That was not an easy exercise and it required a certain degree of care.

46. I am not concerned with the Tribunal's actual exercise of discretion as to whether it was appropriate to award costs but with the earlier stage in its Judgment when it was considering whether the threshold had been crossed for its costs jurisdiction to be engaged. The Tribunal considered that it had been, on the basis that the claims were misconceived. There has been no objection to the test that the Tribunal applied, which was to ask whether the Claimant's claims had had no reasonable prospects of success. It was the Tribunal's Judgment that that test had been met, i.e. that it should have been apparent to the Claimant that her claims had no reasonable or realistic prospect of success from the outset.

47. Before turning to the reasons given for the specific claims (of race discrimination and of constructive unfair dismissal), I should deal with the argument that the Respondent's failure to

apply for an earlier strike-out and/or its offer of a sum by way of settlement of the claims demonstrated that these claims should not be properly characterised as misconceived. For my part, I consider those to be bad points made on the Claimant's behalf. There may, as Mr Monk has said, be many reasons why a Respondent makes an offer, even of a significant sum, in an attempt to settle proceedings. There may, equally, be many reasons why a Respondent does not attempt to apply for an early strike-out, not least because that can lead to an arid form of satellite litigation before the merits of a claim can be dealt with. It seems to me that the Macmillan Tribunal considered the arguments made in respect of the settlement offer and reached a conclusion that it was entitled to reach in its Judgment, concluding (paragraph 22):

> **"[…] the episode over the failure to settle the claims on 6 August 2010 tells us rather more about Dr Oni's attitude to these proceeds [sic] than it does the respondent's."**

48. The short point is that I am concerned with the Employment Tribunal's assessment of the claims, not with any assessment - if that is what it was – on the part of the Respondent.

49. I then turn to the reasoning in respect of the race discrimination complaint. It seems that there are two questions that arise here. First, did the Macmillan Tribunal characterise the claim wrongly in respect of Mrs Jivanji? If it did, does that render its Judgment on the issue of costs unsafe?

50. On the first of those questions, the Macmillan Tribunal does seem to have been influenced by what it understood to have been the position regarding Mrs Jivanji. That is apparent from the bulk of paragraph 17 of its Judgment. That in turn refers to passages from the Ahmed liability Judgment (which could include both paragraph 8 in respect of the first claim and paragraphs 130-131 as regards the second claim).

51. It is, however, hard to understand how the Macmillan Tribunal can have formed the view that this was a crucial point in the weakening of the Claimant's claim given the way in which she had put her case. That made plain that, from the outset, she was distinguishing between complaints relating to Mrs Jivanji's conduct - which went to her constructive unfair dismissal complaint - and complaints of race discrimination in the way that more senior managers handled the grievances she made against Mrs Jivanji. I have some sympathy with the position of Employment Tribunals faced with complex allegations which can become intertwined, and I note the Respondent's position that there were references to Mrs Jivanji and race discrimination in the Claimant's internal grievances, which were then referred to in her Further and Better Particulars and her witness statement. That said, however, in all the documents before the Tribunal in which the Claimant set out her claim, a clear distinction was drawn between the race discrimination complaint and the constructive, unfair dismissal complaint. The fact that her internal grievances referred to what she saw as racially discriminatory conduct by Mrs Jivanji and that she cited from those grievances in her witness statement does not alter that position. She had chosen to put her case of race discrimination in the Tribunal purely on the basis of how her complaints against Mrs Jivanji were handled by more senior managers. The internal complaints therefore formed a necessary part of the background, but the race discrimination claims in the Tribunal did not rely on their subject matter.

52. That much was ultimately understood by the Ahmed Tribunal, as recorded at paragraphs 130-131, but paragraph 17 discloses a misunderstanding of the position on the part of the Macmillan Tribunal. That is not to say that the Macmillan Tribunal was meant to go behind the Ahmed Tribunal's conclusions on the question of liability. On the Ahmed Tribunal findings, the fact that the Claimant's race discrimination case related to how the complaints

against Mrs Jivanji were dealt with rather than her actual conduct, may well have been a relevant factor that undermined the substance of her case and made it harder for her to establish her race discrimination complaint. When determining whether or not bringing the case had been misconceived from the outset, however, the Tribunal did need to understand what that case was.

53. The question then arises as to whether that matters. It is right that the Macmillan Tribunal's consideration of the race discrimination case was not limited simply to the role of Mrs Jivanji. Paragraphs 16-19 contain more than that. There is the point made at paragraph 16 to which I have already referred (see paragraph 21 above), and then in the latter part of paragraph 17 the Tribunal says:

> **"It was of course possible that the complaint of race discrimination might succeed against more senior managers although one of them (Mrs Gillespie) was not Asian and her only offence was to have produced a report with which Mrs Oni did not agree; one (Mr Kotecha was said to have victimised Mrs Oni although it was not clear what the protected act relied on was (para 132) nor what he was alleged to have done as a result of it (para 162): the allegations against the third (Mrs Ganatra) were said to be 'even more opaque'."**

54. Putting to one side the reference to Mrs Gillespie - who was not identified by the Claimant as one of the discriminators - and allowing that the Ahmed Tribunal had found that the Claimant had performed a protected act, contrary to what the Macmillan Tribunal seems to have recorded, it is right that the Ahmed Tribunal made clear findings that the Claimant's case of race discrimination was not made out. That, however, is not the same as finding that the claims were always misconceived.

55. What really then remains in the Macmillan Judgment is set out at paragraph 19 (see paragraph 23 above). My concern, however, is here again the Tribunal refers to what it

understood to be earlier complaints of race discrimination against Mrs Jivanji. The Macmillan Tribunal might have intended to refer to the internal grievances, but it can be read as referring to what it had wrongly understood to be a change of position in the Tribunal proceedings.

56. Given the apparent error in the Macmillan Tribunal's understanding of how the Claimant had put her case throughout the proceedings – that goes for the first claim as well as the second – I cannot be satisfied that paragraph 19 is not also incorporating that error. I therefore conclude, somewhat reluctantly, that this part of the costs Judgment is unsafe. That is not to say that an Employment Tribunal could not form the view that - given the findings made by the Ahmed Tribunal on liability - the claim was misconceived. But if a Tribunal were to find that the claim of race discrimination never had a "reasonable" - in the sense of "realistic" - prospect of succeeding, it would need to demonstrate a proper understanding of what that claim was. That is lacking from the Macmillan Tribunal's Judgment.

57. I turn then to the reasoning in respect of the unfair dismissal claim. The Macmillan Tribunal was bound by the Ahmed findings on liability. Thus, when the Ahmed Tribunal had found there was no last straw, the Macmillan Tribunal was bound by that. The question for the Macmillan Tribunal was, however, whether the claim was simply misconceived from the outset. The only reasoning provided is that at paragraph 20. The crucial part of that seems to be the last sentence:

> **"In other words it was a contrivance, necessitated by the realisation that an earlier constructive unfair dismissal claim which also cited the last straw, must be abandoned because at that stage Mrs Oni had not resigned."**

58. The argument for the Claimant is that the withdrawal of the first claim did not mean that she had resiled from the earlier complaints, simply that she had accepted that she could not pursue an unfair dismissal claim when she had not left her employment, and it was plainly better for all complaints to be dealt with as part of the hearing of the second Tribunal claim when she had left. Moreover, the erroneous bringing of the first unfair dismissal complaint did not mean that the Claimant was stuck with relying on the same event as previously identified as the last straw. She was entitled to rely on a subsequent event, albeit whilst also maintaining her complaint in respect of the earlier incidents.

59. Of course, the Claimant lost the argument on that point at the liability stage. The question is, however, why that was apparently found to be wholly misconceived as an argument from the outset. The reference to paragraph 175 of the Ahmed Judgment does not address that concern. The Macmillan Tribunal had to decide this issue for itself. In order to do that, it needed to understand the basis on which the Claimant had lost and how that related to the claim she had brought. Concluding that the Claimant had contrived a last straw because she had abandoned her first claim, brought when she had not yet resigned, does not make sense. She had not abandoned the allegations, simply the claim (which was withdrawn but not dismissed); indeed, she repeated the substance of the allegations in her second claim.

60. Again, that is not to say that, on the basis of the findings of the Ahmed Tribunal, the Macmillan Tribunal could not have formed the view that this claim was misconceived. It did, however, need to itself engage with the point to demonstrate that it understood the finding made by the Ahmed Tribunal and to form a proper judgment as to whether that demonstrated that the claim had been misconceived. It is one thing to find that the last straw relied on was a

contrivance (and that may well justify a conclusion that the costs threshold had been crossed); it is another to say that it was because the earlier claim had been abandoned in circumstances that demonstrate no abandonment of the earlier complaints. That does not demonstrate an independent engagement with the issue the Tribunal had to determine. Again, I do not consider that the conclusion reached in this regard can be upheld as safe.

61. Given the long history of this matter, and the fact that an earlier judgment on the costs application has already come before the EAT and been remitted to a Tribunal to be considered afresh, I do not come to these conclusions lightly. I recognise the difficulties involved for both parties.

Disposal

62. Having given my Judgment in this matter, I invited the parties to make further representations on the question of disposal and gave a short period of time for instructions to be taken in that regard.

63. The Claimant accepts that the outcome of my Judgment means that this matter must be remitted, but submits that this should be only on the question of whether or not the claims were misconceived; not the question of unreasonable conduct. She further urges me to remit it to a Tribunal other than either the Ahmed Tribunal, for reasons that will be obvious from the previous appeal, or the Macmillan Tribunal. In respect of the latter, the point is made that it would be fairer to remit to an entirely new Tribunal.

64. The Respondent contends that, apart from the Ahmed Tribunal, it should not matter whether this goes back to a Tribunal that has previously dealt with it. The Macmillan Tribunal could properly deal with this matter again. It had already read into the case and had an understanding of it, and that would be proportionate. If the matter has to be remitted, then it should be remitted on all bases so that the Tribunal can consider all matters afresh, including the question of unreasonable conduct.

65. In reply, Mr Matovu makes the point that had the Respondent wished to challenge the Tribunal's refusal to make a costs order on the basis of unreasonable conduct, it should have cross-appealed that Judgment, and it did not.

66. In making my decision on disposal, I have had regard to the guidance laid down by the EAT in **Sinclair Roche & Temperley and Ors v Heard and Anor** [2004] IRLR 763. I make an order remitting the application for costs to be considered by a freshly constituted Tribunal, purely looking at the question of whether or not the claims were misconceived. I do that for these reasons. It was open to the Respondent to pursue a cross-appeal against the refusal of the Tribunal to find unreasonable conduct; it did not do so. There has to come a time when this litigation comes to an end, and allowing matters to be reopened at this late stage seems to me to be wrong. On the basis that there has been an unchallenged finding on unreasonable conduct, I remit this matter only on the question whether or not the claims were misconceived.

67. As for the constitution of the Employment Tribunal, given that this was a discrimination complaint being heard under the old Rules, I accept that it is appropriate for it to go back to a fully constituted Employment Tribunal. That leads me to the pragmatic conclusion that the

better course would be to remit to a freshly constituted Tribunal. The reason for so saying is I do not know whether it is practicable to sent it back to the same panel as constituted the Macmillan Tribunal, and, that being so, I consider it would be inappropriate to have one or two members of that Tribunal sitting with others where there may be a sense of disadvantage of some members having been involved in the proceedings before and others not. Although I do not doubt that the members of the Macmillan Tribunal could quite appropriately consider this matter afresh, and not allow the views that they had formed before to sway the view that they would form a second time, for purely practical and administrative reasons, I consider it to be more proportionate to remit this matter to a freshly constituted Tribunal.