Appeal No. UKEAT/0113/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 September 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR J WRIGHT APPELLANT

NIPPONKOA INSURANCE (EUROPE) LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellan	MR JOE SYKES (Representative) 107 Fleet Street London EC4A 2AB
For the Respondent	MISS HILARY WINSTONE (of Counsel) 10-11 Bedford Row London WC1R 4BU

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

(1) Strike-out

The EJ had been entitled to have regard to the case of the person (who shared the relevant protected characteristic with the Claimant) appointed to the position in issue. Whilst not the Claimant's actual comparator, this was an appropriate evidential comparison and the EJ was entitled to have regard to this case when testing the possible construction of a hypothetical comparator.

This was all the more so given the difficulty in understanding the Claimant's case. Allowing that "race" can be defined broadly and can take into account cultural/ethnic traits, there was no basis (other than racial stereotype) for the Claimant's assertion that he suffered detriment as a result of Japanese cultural deference.

The EJ had been entitled to conclude that claims 2 and 3 had no reasonable prospect of success and should be struck out.

(2) Deposit Orders

Save in respect of claim 6, the EJ had applied the correct test and was entitled to reach the conclusion that the allegations had little reasonable prospect of success and should therefore be made subject to deposit orders.

In relation to claim 6, the EJ had not taken account of the way in which the Claimant put his case in terms of the copying him into an email in Japanese, which might be construed as insulting about him. His case was that he had been copied in on the basis of an assumption that, as an English member of staff, he could not understand Japanese and so this was mocking him. The failure to take that argument (which was rather more readily comprehensible as a complaint of race discrimination than the others) into account could amount to a failure to have regard to a relevant factor and on that basis the deposit order of this claim could not safely stand.

(3) The Quantum of the Deposit Orders

The 2013 Rules permitted the making of separate deposit orders in respect of individual arguments or allegations and the EJ had been entitled to make a number of such orders. If making a number of deposit orders, how ever, an EJ (or ET) should have regard to the question of proportionality in terms of the total award made. Here the EJ did so. He had reached decisions in respect of the amount of each deposit order that were entirely open to him and had had proper regard to the total sum awarded. There was no error of law.

HER HONOUR JUDGE EADY QC

1. In giving Judgment I refer to the parties as the Claimant and the Respondent as they were below. This is the hearing of the Claimant's appeal against the Judgment of the London (Central) Employment Tribunal (Employment Judge Professor Neal, sitting alone, on 20 November 2013), sent to the parties on 2 December 2013.

2. The Claimant was represented before the ET and before me by Mr Sykes. Before the ET the Respondent was represented by Ms Smith of Counsel; before me by Ms Winstone of Counsel.

3. The Claimant's claims were of race discrimination and of unlawful detriment by reason of his having made a protected disclosure. At the outset of the Preliminary Hearing before the ET, there was an amendment of the Claimant's claims to include further allegations. The complete list of the allegations was then set out by the Employment Judge, numbering 11 in total. Each was said to either constitute a claim of race discrimination (claims 1-6) or of detriment by reason of the Claimant having made a protected disclosure (claims 7-11). The Employment Judge ruled that claims 2, 3 and 8 should be struck out as having no reasonable prospect of success (within the meaning of Rule 37 of the **Employment Tribunal Rules 2013**). There is no appeal against that ruling in respect of claim 8.

4. The Employment Judge further ruled that claims 1, 4, 5, 6, 7, 10 and 11 should be made subject to the condition that the Claimant pay a deposit, by reason that the claims in question had little reasonable prospects of success (within the meaning of Rule 39 of the **2013 Rules**).

5. Save, in respect of claim 8, the Claimant now seeks to challenge the ET's strike-out and deposit orders. Permission was given for this appeal to proceed, on the basis of an amended

Notice of Appeal by Singh J, at a Preliminary Hearing on 6 June 2014. There is no cross-appeal in respect of claim 9, which was permitted to proceed without condition.

6. As well as the ET claims with which I am concerned, I understand that the Claimant has brought other proceedings, and his claims have been consolidated for hearing due to commence on 20 October 2014. With a view to assisting the parties in that listing, this appeal was listed for an expedited hearing and I have made sure that I was in a position to give Judgment today.

The Background Facts

7. Given that the Full Merits Hearing in this matter is yet to take place, I take the facts shortly, largely adopting the outline provided by the Claimant in his claim.

8. The Claimant is a Marine Underwriter, who was employed by the Respondent, a Japanese insurance company. He describes himself (relevantly, for his race case) as "English Caucasian". In his ET1 he states that he compares himself with a hypothetical, non-English, non-Caucasian, Marine Underwriter. In his Further Particulars he complains of "the principal discriminators who were yellow, Japanese, Asian". He there suggests that:

> **"The Respondent...harassed and/or mistreated the Claimant causing him detriment at all material times because he was not Japanese and therefore regarded as racially inferior."**

9. On 1 October 2013, the Respondent underwent a merger with another Japanese insurer ("Sompo"). The Claimant contends that, in advance of that merger, the Respondent subjected him to a series of acts of unlawful discrimination and detriment. Essentially he alleges that prior to the merger he suffered a number of detriments because Sompo effectively dictated to the Respondent what was to happen. To the extent that he thereby suffered detriments, he says that it was because of race in that there was a cultural attitude of deference towards the Japanese

Sompo managers. Alternatively, those detriments were meted out to him due to his having made a protected disclosure, that being his oral grievance of 17 May 2013.

The ET Decision and Reasons

10. As stated, this appeal relates to orders made at Preliminary Hearing before the ET, which had been listed, relevantly, to consider the Respondent's applications for a strike-out of the Claimant's claims. At the hearing the Employment Judge went through each of the 11 claims he had identified with the parties at the outset of the hearing considering each in turn, alongside the ET1, the Further Particulars that the Claimant had provided, the documentation before him and the submissions of each of the parties.

11. Claims 1-6 were of race discrimination. The first claim was that there was an unlawfully discriminatory failure to consult on the merger of the Respondent with Sompo. It was common ground that there had been a suspension of TUPE-related consultation. There was an issue about the precise dates. The Employment Judge accepted that this had required some explanation but concluded that, on the documentation before him, an explanation might be found "in instructions given to the Claimant by his newly-appointed legal representative that there was to be no further engagement in consultations or consultation-related meetings". If so, the Employment Judge ruled that this would probably be a complete explanation, untainted by discrimination, and the claim would thus have little prospect of success. He therefore ordered that the continuation of this claim should be conditional on the payment of a deposit subject to enquiry as to the Claimant's means.

12. Claim 2 was that there was an allegedly unlawfully discriminatory failure to offer the Claimant an opportunity to apply for the position of Senior Marine Underwriter. It was common ground that ultimately the person who got the job in question was a Mr Knight, who

had the same profile (in terms of the relevant protected characteristic) as the Claimant. The Employment Judge could not see how the Claimant could maintain that this was discrimination on the basis of race, however that was put. He concluded that the claim had no reasonable prospect of success and ordered that it should be struck out.

13. Claim 3 was understood to be related to Claim 2. The Claimant was saying that the Respondent had permitted Sompo to dictate who should take the position, as he put it, "on the racially influenced basis that Japanese management have superior rights and powers to English management". The Employment Judge concluded that, for the reasons as he had given in relation to claim 2, this claim should also be struck out.

14. Claim 4 related to the instruction by Sompo of a particular firm of solicitors and an allegedly racially unlawfully discriminatory failure to provide the Claimant with individual legal advice. The Employment Judge allowed that this called for some explanation but stated "..there is some indication on the face of the documents... that there could be an explanation of this which is not tainted by unlawful race discrimination". On that basis he considered the allegation had little prospect of success and made a deposit order.

15. Claim 5 was comprised of an allegation in two parts: the first relating to seating plans and arrangements for the staff on moving; the second, to the physical proximity to the Claimant on that move of secretarial and administrative staff. There was no dispute about the physical arrangements themselves, and the Employment Judge understood the Claimant's complaint to be that the arrangements were such that he was being particularly observed by HR and that they reflected a hierarchical disposition with unlawfully discriminatory connotations. Whilst allowing that the arrangements might call for an explanation by the Respondent, the Employment Judge concluded that it was "extremely hard to see that there is much prospect of

establishing that this has been tainted by unlawful race discrimination". He again ordered the Claimant to pay a deposit as a condition of his continuing with this claim.

16. Claim 6 related to the allegedly unlawfully racially discriminatory coping in of the Claimant to an e-mail in Japanese, which he said was defamatory of him. There was no dispute that there had been an e-mail in Japanese that had been copied in to the Claimant. A translation of that e-mail was available to the Employment Judge. It could be seen to make a reference to retirement, although on the Respondent's case that might have a different meaning in Japanese to how it might be understood in English, and the Respondent maintained that it had been copied into the Claimant in error. The Employment Judge again could see that this might require explanation, but he was "hard-pressed to see how the 'unlawful race discrimination' tainting is going to be attached to this". Again, he found that the Claimant had little prospect of succeeding with this claim and again ordered a deposit.

17. Claims 7-11 were of unlawful detriment due to the Claimant having made a protected disclosure. Essentially the same matters were relied on as detriments as in respect of the race discrimination complaint. Under claims 7-11, however, it was said that the reason for the detriments was the Claimant's grievance, which was relied on as the protected disclosure, rather than race. Although the Respondent raised an issue as to whether grievance was, in fact, such as to amount to a protected disclosure, the Employment Judge did not consider that was a matter he could determine at the preliminary stage and proceeded, in the Claimant's favour, to consider the claims on the assumption that the Claimant could make good his case on protected disclosure.

18. Claim 7 was concerned, as was Claim 1, with the complaint relating to consultation. For similar reasons to the order made in respect of Claim 1, the Employment Judge made a deposit order.

19. Claim 8 was struck out. There is no appeal against that. I need consider it no further.

20. Claim 9 concerned the allegation relating to the e-mail in Japanese. Whilst he had considered that the Claimant had little prospect of establishing that that was an act of unlawful race discrimination, the Employment Judge did consider that it was a matter that required explanation and was not prepared to strike it out, and did not take the view that it had little reasonable prospect of success as a protected disclosure claim. He was therefore not prepared to make a deposit order in respect of this claim. There is no cross-appeal against that ruling.

21. Claim 10 concerns the allegation relating to the failure to provide independent employment law advice. That is an allegation which relates to that at claim 4. It was accepted that there had been a decision not to give individual advice, and the Employment Judge considered that there was a lack of clarity as to what had happened. That said, he did not consider that further explanation was actually likely to take the claim forward. He considered that the claim had little reasonable prospect of success and therefore made a deposit order.

22. Claim 11 was reflective of Claim 5; that is the two-part claim in respect of the logistical arrangements on the TUPE transfer move. The Employment Judge allowed that it might call for an explanation but had difficulty in seeing any real prospect of establishing that it was due to the Claimant's grievance as lodged on 17 May 2013. Whilst not finding that it was a complete non-starter, he again made a deposit order.

23. Having thus ruled that claims 1, 4, 5, 6, 7, 10 and 11 could only be pursued subject to the Claimant paying a deposit, the Employment Judge went on - as he was required to do by Rule 39(2) of the **2013 Rules** - to consider the Claimant's means. Doing his best with the information before him, the Employment Judge concluded that the Claimant was on a salary of £58,000 a year and that, although he was absent on sick leave at that time, he was only two months into a period of six months on full pay entitlement. The representatives for the two parties did not dissent from the view that the Claimant's monthly net income would be in the region of £3,000. Whilst he had a mortgage on his home, the sum of the payments he had to make had not been disclosed. He lived with a partner who did not make contributions to the mortgage or other household outgoings. The Employment Judge further found that the Claimant would also be paid a 5% bonus sometime towards the end of December 2013. On the evidence he concluded that the Claimant was not a man without means.

24. The Employment Judge directed himself as to the maximum amount of deposit that could be ordered in respect of each allegation. He took into account that he had made seven deposit orders, in respect of which each could be for a maximum of £1,000. He considered that making orders totalling £7,000 would not be appropriate and in accordance with the overriding objective. He considered that the appropriate level of deposit for each claim would be £300, totalling £2,100, and he so ordered the sum to be paid, no later than 3 January 2014.

The Appeal

25. The Amended Grounds of Appeal are summarised in what follows. First, on the strike-out of claims 2 and 3. In respect of claim 2, the Claimant contends that the Employment Judge erred materially in law in (1) substituting his own actual comparator instead of considering the Claimant's hypothetical comparator; (2) relying on a person who not at the time an employee of the Respondent and who therefore could not be a legal comparator; and (3) in too narrowly

construing the jurisdictional base of the claim in terms of the specific type of protected characteristic which was not colour or racial background *per simpliciter* but the Respondent's Japanese cultural/ethnic favouritism towards third-party Japanese employment choices (see **Mandla v Dowell Lee** [1983] ICR 385).

26. In respect of claim 3, repeating the third of the points made in respect of claim 2, the Claimant further contended that the Employment Judge failed to correctly apply the burden of proof or give adequate reasons for concluding that the burden did not shift to the Respondent.

27. The second Ground relates to the deposit orders. Observing that there is little guidance as to the approach to be adopted to the test to be applied under the 2013 Rules, the Claimant contended that the Employment Judge had erred in failing to identify the criteria he had applied in finding the allegations to have little reasonable prospect of success.

28. The third Ground relates to the quantum of the deposit orders. The Claimant contends the Employment Judge erred in failing to consider the proportionality of the total award made in respect of each deposit order and/or in failing to give adequate reasons for the sums ordered.

The Relevant Legislation and Legal Principles

29. The relevant legislative provisions are to be found in the Employment Tribunal Rules set out in Schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013**. The power to strike out a claim, or part thereof, is provided by Rule 37 as follows:

> **"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds --**
>
> **(a) that it has no reasonable prospect of success..."**

That is a more natural way of saying that the claim was misconceived, the term used previously in the Rules.

30. A claim should not normally be struck out when material facts are still in issue (see **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 CA and **Tayside Public Transport Company (t/a Travel Dundee) v Reilly** [2012] IRLR 755 CSIH). As HHJ Serota QC summarised the position in the case of **Qdos Consulting Ltd & Ors v Swanson** UKEAT/0495/11/RN:

> **"Applications to strike out on the basis that there is no reasonable prospect of success should only be made in the most obvious and plain cases in which there is no factual dispute and which the applicant can clearly cross the high threshold of showing that there are *no* reasonable prospects of success. Applications that involve prolonged or extensive study of documents and the assessment of disputed evidence that may depend on the credibility of the witnesses should not be brought... but must be determined at a full hearing. Applications... that involve issues of discrimination must be approached with particular caution. In cases where there are real factual disputes the parties should prepare for a full hearing rather than dissipate their energy and resources, and those, of Employment Tribunals, on deceptively attractive shortcuts."**

31. Such orders are draconian. It is right, therefore, that the requirement is that the claim must have *no* reasonable prospects of success, not just that that success is thought unlikely (see **Balls v Downham Market High School and College** [2011] IRLR 217 EAT). Particular caution must be exercised in the use of the power to strike out in discrimination cases (and see the cautionary warning of Lord Steyn in **Anyanwu & Anr v South Bank Students Union** [2001] ICR 391), although as Underhill P (as he then was) noted in **ABN Amro Management Services Ltd & RBS v Hogben** UKEAT/0266/09/DM, the force of those observations will inevitably vary depending on the nature of the particular issues and (as Lord Hope also made clear in **Anyanwu**), in an appropriate case, a claim of discrimination can and should be struck out if the Tribunal can be satisfied that it has no reasonable prospect of success.

32. Deposit orders are addressed at Rule 39 of the **2013 Rules** as follows:

> **"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**
>
> **(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.**
>
> **(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.**
>
> **(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21."**

33. The test for the ordering of a deposit is that the party has *little* reasonable prospect of success; as opposed to the test under Rule 37 for a strike-out (*no* reasonable prospect of success). Although that is a less rigorous test, the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim. There is little guidance in the authorities as to what is meant by little reasonable prospect of success, although it was considered by Bean J (as he then was) in **Community Law Clinic Solicitors & Ors v Methuen** UKEAT/0024/11/LA, who doubted whether there was any real difference between little reasonable prospect of success and little prospect of success. In that case the ET had made a deposit order but had refused to strike out the claims. There was no appeal against the deposit orders. The EAT was concerned only with the strike-out issue and ruled that the Employment Judge should indeed have struck out the claims of sex and race discrimination.

34. When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order made was one which no reasonable Employment Judge could make or that it failed to take into account relevant matters or took into account irrelevant matters.

Submissions

The Claimant's Case

35. Addressing first the strike out of claims 2 and 3, Mr Sykes characterised the Employment Judge's strike-out as having been on the basis that the Claimant had a direct comparator, Mr Knight, of the same racial background but Mr Knight was not a pleaded comparator and, he submitted, could not be as a matter of law because he was not employed by the Respondent at the material time. The Claimant had not been complaining of the appointment of Mr Knight or the outcome of the appointment process but of the failure to afford him the opportunity to apply for that position. On that case he had relied on a hypothetical comparator. It was an error of law for the Employment Judge to fail to consider his hypothetical comparator and to substitute an actual comparator.

36. The complaint was not that the Claimant had lost out to Mr Knight but that he, as one of the Respondent's members of staff, had suffered a restriction under section 39(2)(b) of the **Equality Act** in not being able to compete for the post of Senior Marine Underwriter as a result of the dominance of Japanese cultural values in the selection of staff for posts in the prospective combined insurer. It was that which required the Respondent to allow the future senior partner in the relationship, Sompo, to make the choice and to choose its own staff member for the position. The Employment Judge erred in failing to adopt a broad approach to the characterisation of the complaint of race discrimination, as laid down by the House of Lords in **Mandla v Dowell Lee** [1983] ICR 385 HL.

37. Although **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting** [2002] IRLR 288 allowed that an Employment Tribunal could have regard to the case of a non-comparator in constructing a hypothetical comparator, that did not provide authority for ignoring the pleaded hypothetical comparator in favour of a real individual

selected as a matter of judicial preference. Had the Employment Judge applied the approach suggested in **Shamoon v Chief Constable of the RUC** [2003] ICR 337, and asked the reason why, that would have given rise to the relevant question, which was: why did the Respondent accept Sompo's preference for the Sompo member of staff, Mr Knight, in the prospective merger?

38. The triable question was the effect of Japanese management culture on personnel appointments. That required evidence, and there was no shortcut to determining the question posed. Moreover it was not an answer to say, as the Respondent sought to do, that the Employment Judge had merely relied on Mr Knight as an evidential comparator. It was not open to the Employment Judge to simply take one case as providing an evidential comparator when he had not considered all the other possible evidential comparators.

39. Although there was an overlap between claims 2 and 3, there was an additional point in respect of claim 3 in that the Employment Judge erred in failing to apply the burden of proof rules or in providing his reasons for apparently concluding that the burden of proof could not shift to the Respondent. His reasoning was not **Meek**-compliant (**Meek v City of Birmingham DC** [1987] IRLR 250).

40. Turning to the deposit orders, in respect of claim 1 Mr Sykes submitted that the Employment Judge had here made a preliminary determination of fact on incomplete evidence contrary to the requirement to send a disputed factual issue to trial (see **North Glamorgan NHS Trust v Ezsias**). Had the Employment Judge properly considered the Claimant's case as detailed in the Further Particulars, he could have appreciated that there were two periods in dispute. He only referred to the period 24 May to 29 May, which was post the suspension of the consultation. The Claimant had also complained of the preceding period.

Moreover the Employment Judge decided this issue merely on the reading of the Respondent's case as set out in the grievance report. He did so while noting the matter was disputed.

41. There was more difficulty with the Respondent's case. It was unlikely that the Claimant had been instructed by his representatives not to participate in consultation. It was the Claimant's case he had not refused to do so but had demanded assurances before engaging in a further round of consultation. Further, the Employment Judge's reference to the Appellant's new representatives was entirely misconceived as they first wrote to the Respondent only on 22 July 2013. All this showed that the issue could not be resolved by treating the Respondent's grievance report as a definitive answer.

42. Having found that the allegation gave rise to a need for explanation, the Employment Judge had effectively found that the burden of proof had shifted to the Respondent. He then fell into error in seeking to decide the evidential conflict on a preliminary basis with incomplete evidence. His decision amounted to an impermissible application of the burden of proof rules. Further, he failed to identify the criteria he applied in finding the allegations to have little reasonable prospect of success.

43. As for claim 4, the Claimant's case was that the Employment Judge had erred in (1) confusing the offer of advice (which must come before any decision) with the sending of decisions to staff; (2) in further misunderstanding the nature of the documents sent to staff; they were not decisions but further promises of staff consultation. The Employment Judge also ignored the pleaded issues: i.e. that the Respondent had promised advice on the new structure but then went ahead and decided the appointments without giving the advice and also that the Respondent again proceeded on the basis that it had to adopt the personnel preferences of its Japanese senior partner, Sompo. There was a substantial dispute of fact to be tried. It was the

Claimant's case that consultation was not given to him because the Respondent was driven by racial preferences favouring Japanese over Caucasian choices. That was not a weak or merely fanciful argument, but one that had to be tested in the examination of witnesses and decided by a full Employment Tribunal, having heard all the evidence.

44. As for claim 5, the Employment Judge had applied the wrong legal test to the issues; he had applied the test for a strike-out. Secondly, he had erred in holding that the facts called for an explanation by the Respondent but then failing to consider or explain why the issue was not triable. He had again conducted a preliminary examination of some of the evidence without considering what other evidence, on a preliminary basis, he had to consider. The reason why he found it extremely hard to see how the allegations could be said to amount to discrimination was because he had not considered enough evidence.

45. On claim 6, again, the Claimant considered the Employment Judge had applied the wrong test. Further, the Employment Judge had again found that the allegedly racist e-mail required explanation but he had not engaged with the Claimant's case that the Japanese e-mailers did not know that he could read Japanese. He had been copied into an e-mail that was abusive about him on the assumption that he, as an English person, would not be able to understand it. The Employment Judge erred in not finding that that matter was triable, i.e. that the Respondent's explanation had to be scrutinised.

46. Turning to the Protected Disclosure claims, by way of general observation the Claimant contended the Employment Judge had not determined the basic question whether or not the disclosures relied on were qualifying and protected. In respect of claims 7, 10 and 11 he relied on his arguments as presented in respect of the race discrimination claims. Additionally, the

Employment Judge had failed to consider whether the disclosure at issue had a material influence on the act or acts relied on. His reasoning was therefore not **Meek**-compliant.

47. As to the quantum of the deposits, the Claimant sought to challenge the award of a deposit of £300 per allegation. The orders being made in respect of separate allegations reflected the change in the rules for deposits in the **2013 Regulations**. A consequence of that change not considered by the Employment Judge was that multiple allegations might result in a prohibitively high level of collective deposit; the Employment Judge had thereby failed to consider proportionality as a requirement for doing justice. He should have considered not just means but also the risk of setting too high a sum in case of multiple allegations. The Employment Judge further ordered the same level of deposit for each of the seven allegations without considering or explaining his reasons. It was unclear why he thought each different allegation merited the same level of deposit. It was equally unclear as to why £300 was chosen. His reasons were thus inadequate.

The Respondent's Submissions

48. In response to the Claimant's arguments on appeal, the Respondent made the general observation that the claim of race discrimination was engaging in racial stereotyping, in seeking to predicate the claim on the assertion that Japanese managers were displaying a cultural characteristic of subservience when they acquiesced to Sompo's preferences in the merger. There simply could not be any proper evidential basis for that case. The reality was that the Claimant was relying on a power balance between two businesses in a merger, in which race had no relevance.

49. Turning to the specific claims, and first addressing the strike-out of claims 2 and 3. Ms Winstone submitted that there was no error in the Employment Judge's reference to

Mr Knight. Even allowing for the Claimant's case having been postulated on the basis of a hypothetical comparator, Mr Knight could be an evidential comparator, as recognised in **Shamoon**. The Claimant's case was misconceived. Even if he could make good the assertion as to the relevant cultural trait being inherently part of what it is to be Japanese, he would still not be able to demonstrate that the ground of preference, as exercised in terms of this appointment, was to do with his race. The appointment of Mr Knight simply rebutted that.

50. The Employment Judge did not need to give yet more detailed reasons in respect of his decision regarding claim 3. The claims were interlinked and the reasons given adequate. The argument as to the application of the burden of proof was a red herring. The Employment Judge's conclusion was that neither claim had any reasonable prospect of success. That did not require him to carry out a detailed examination of the application of the burden of proof. Even on the Claimant's own case, the allegations could not be made out.

51. On the deposit orders, generally the Respondent submitted that the Employment Judge had applied the correct test and given adequate reasons. The Claimant's argument seemed to suggest that the Employment Judge had been wrong not to let these matters go to trial but the making of deposit orders did not prevent a trial; it was simply made subject to the payment of the deposits.

52. In respect of claim 1, the Respondent engaged with the issue as to the dates actually relied on by the Claimant. In any event, however, it was apparent that the Employment Judge understood the way in which the claim had been put in the ET1 and the Further Particulars. He was entitled to look at the documentation and reach a view as to whether the Claimant had little reasonable prospect of succeeding at trial. The conclusion reached was one open to him.

53. On claim 4 the Claimant's case in this respect had shifted during the proceedings. In any event the Employment Judge considered the consultation documentation and reached a view that was open to him, particularly given the fact that the matters complained of did not simply impact on the Claimant and there was no basis for suggesting any link with his race.

54. As for claim 5, the Respondent contended that the Employment Judge had applied the correct test, and it was appropriate for him to consider the deposit order at a Preliminary Hearing. There was no dispute about the seating arrangements. All the employees were moved, and a practical explanation had been provided, which the Employment Judge found persuasive. He was entitled to take the view that the Claimant had little reasonable prospect of success.

55. As regards claim 6, which related to the e-mail, the suggestion that the Claimant could speak Japanese had only been made late in the proceedings and begged the question why he relied on a translation from Google Translate before the ET. Simply because the e-mail was in Japanese did not make it tainted by race. There was an issue as to whether its content was abusive, but the Employment Judge was entitled to take the view that the claim had little reasonable prospect of succeeding. The application of the burden of proof did not change that. The Judge was entitled to look at all relevant points in the round.

56. In respect of claims 7, 10 and 11 (the Protected Disclosure claims), Ms Winstone essentially repeated and relied on the points she had already made, adding that the application of the material influence test laid down in **Fecitt and Others v NHS Manchester** 2012 ICR 372 took matters no further: if the Employment Judge could not see the relevant link with the protected disclosure relied on, then that went to the question of material influence and he was entitled to take the view that the Claimant's claims had little reasonable prospect of success.

57. On the quantum of the deposits, the Claimant had known prior to the hearing that the issue of possible deposit orders was live and deposits might be ordered. It was for him to ensure evidence of his means was available to the ET. If the information before the Employment Judge was limited, then that was the Claimant's responsibility. The Employment Judge did have evidence as to the Claimant's earnings and largely gave him the benefit of the doubt in respect of his outgoings and his partner's contributions. Having been told that the Claimant was shortly due to receive a bonus of around £2,000, on top of his normal monthly earnings, the Employment Judge was entitled to take the view that the sum of £2,100 was within the Claimant's ability to pay.

58. The Employment Judge had regard to all the relevant considerations as to means and also the cumulative effect of the separate orders. The clarification that had been provided by the **2013 Rules** as to a Tribunal's ability to make deposit orders for different allegations was to permit robust case management in relation to unmeritorious claims, and that was what had been done here. The sums were in the discretion of the Employment Judge and the Claimant could not demonstrate any perversity.

Discussion and Conclusions

59. The arguments on this appeal can sensibly be addressed under the following headings: (1) the claims that were ordered to be struck out (claims 2 and 3, which were both of direct race discrimination); (2) the claims for which a deposit was required whether claims of direct race discrimination or of detriment due to a protected disclosure; and (3) matters relating to the fixing of the quantum of the deposits.

Strike-out (Claims 2 and 3)

60. Much of the Claimant's argument centred on the Employment Judge's reference to Mr Knight as a comparator. The Claimant strongly contends that he never relied on Mr Knight as a comparator and it was wholly misrepresenting his case to suggest that he did. Effectively he is saying that Mr Knight has been raised as a kind of Aunt Sally by the Employment Judge: the Employment Judge has thus selected a comparator and set up the case on that basis. Then, looking at that case - which was not the Claimant's case - found that it had no reasonable prospect of success.

61. It was that point which persuaded Singh J to let this matter through to Full Hearing. The Claimant's case was one of a hypothetical comparator and therefore, arguably, it was no answer to look at the case of Mr Knight as an actual comparator. I can see how that might constitute an error but I do not read the Employment Judge to have set Mr Knight up as a direct comparator in this case. Rather, the Employment Judge referred to Mr Knight's case as evidentially relevant, and it is hard to see why it would not be. This was a person with the same relevant protected characteristic as the Claimant who had been appointed to the position for which the Claimant complained he had been denied the opportunity to apply, because of race. Given that another "English Caucasian" had been appointed to the post in question, one can see why the Employment Judge struggled to understand the Claimant's case. That might indeed seem particularly apposite given the Claimant's Further Particulars, in which he had complained of being harassed and/or mistreated because "he was not Japanese and therefore regarded as racially inferior". That suggestion would certainly seem hard to pursue in respect of the opportunity to apply for a position that was given to someone else who was not Japanese.

62. The Claimant's broader case, as it has developed, is that race can include cultural traits, and this is how the discrimination has worked against him. Whilst of course accepting that cultural traits can be relevant to understanding what race is (per the House of Lords in

Mandla), here the complaint being made is not that the Claimant has suffered detriment because he was English Caucasian or displayed any cultural traits relating thereto but because he was employed in the weaker entity in the merger between two Japanese companies. The reason he gives for his detriment is because managerial deference allowed the dominant party in the merger to say what happened. The Claimant's case is that that managerial deference is a cultural characteristic of the Japanese. It is, to put it neutrally, not entirely easy to understand how that works as a complaint of direct race discrimination. At best, it requires an acceptance of an assertion as to the cultural trait in question. Apart from asserting a racial stereotype, it is difficult to see what evidential basis could be relied on in this regard.

63. The difficulty in understanding the Claimant's case is why the Employment Judge looked at the position of Mr Knight. He was entitled to do so. If an Employment Tribunal is charged with constructing a hypothetical comparator, it is entitled to look at the situation of a real person, albeit that they might not be a direct comparator. Thus Mr Knight comes in. He is not irrelevant. Given his appointment to the position in question, it is relevant to see the effect of the culture the Claimant asserts on this other "English Caucasian".

64. Moreover, the Employment Judge was not obliged to move to the question of "the reason why" - the **Shamoon** approach. He was entitled to test whether the Claimant would be able to establish facts on which an Employment Tribunal could conclude that there was less favourable treatment because of race. The view he took was that that the Claimant would not be able to do so; that he had no reasonable prospect of succeeding in this claim. This seems to me to be a conclusion which the Employment Judge was entitled to reach. I dismiss the appeal in respect of claims 2 and 3.

The Deposit Orders

65. Under this heading, there first seemed to be a criticism of the Employment Judge for not making a finding that the Claimant had made a protected disclosure. The criticism is unfounded. The Employment Judge explained his reason for not reaching a final conclusion on that question and made it clear that he was assuming in the Claimant's favour that a protected disclosure had been made out. The Claimant can have no complaint in that regard. That was obviously a sensible way of proceeding at a Preliminary Hearing.

66. Mr Sykes also sought to argue in general terms that, in respect of the deposit orders, the Employment Judge had misdirected himself as to the correct test by applying the test appropriate to the question of strike-out. That, however, would be to set a higher test for the Respondent to meet than that which was actually required. I do not find that the Employment Judge did in fact apply the wrong test. Even if he had so erred, however, it would go nowhere on his appeal. It would simply suggest that there had been a basis for a cross-appeal on the part of the Respondent.

67. The second part of the Claimant's appeal that had held particular sway with Singh J was that there was little appellate authority on the relevant test to be applied. That, of itself, does not present a good ground of appeal. Mr Sykes contended that the Employment Judge had failed to identify the criteria he applied in finding the allegations to have little reasonable prospect of success and, in the light of the lack of precision as to what was required for that finding and the lack of authority, the Employment Judge's failure made his findings **Meek**-deficient.

68. In this regard, however, the Employment Judge's Reasons have to be considered in the round and then the approach taken in respect of each individual claim considered. When one does that, I consider it apparent that he applied the correct test in each case.

69. Turning to those individual claims, in respect of claim 1, in argument the parties became embroiled in the detail of the dates relevant to this claim. What is clear, however, is that the Employment Judge had regard to a more general explanation, which seemed to provide a clear and non-discriminatory answer. The Claimant's complaint was that this was a preliminary determination of a factual issue which should have been allowed to go to trial. In a sense that is right, but then of course the Employment Judge has permitted this matter to go to trial, simply subject to the payment of a deposit. Even allowing for how the Claimant puts his case in this regard - and absent the Respondent's explanation - it is hard to understand any link with race. Taking all the matters in the round, I consider the Employment Judge was entitled to take the view that there seemed to be little reasonable prospect of the Claimant succeeding with this claim and it should only be permitted to proceed subject to a deposit order.

70. On claim 4, the Claimant's case was that the Respondent had promised advice on the new structure but had then gone ahead and decided the appointments without giving that advice, and it had then proceeded on the basis that it had to adopt the personnel preferences of its Japanese senior partner, Sompo. Mr Sykes contended that there was a substantial dispute of fact to be tried here: consultation was not given to the Claimant because the Respondent was driven by racial preferences, favouring Japanese over Caucasian choices, that being a reference to the appointment of Sompo's preferred solicitors and the adoption of their advice.

71. I have some sympathy for the Employment Judge here. The problem is with the characterisation of the Claimant's case as one of race discrimination. There might be, as the Employment Judge allowed, a case for explanation in general terms. There is nothing to suggest, however, that there is any basis for saying that the matters complained were because of race. I accept that the Employment Judge's reasons are brief, but one can see how he was seeking to understand any possible basis for the Claimant's case that the failure in this regard was because he was English Caucasian. Even if one accepts that, in this context, "because of

race" can extend to what the Claimant asserts to be cultural characteristics of those of Japanese ethnicity, one struggles to understand how his case can be made out given the application of the approach to all staff, regardless of race. The Employment Judge was not erring in his application of the burden of proof but was simply asking why the entirely non-discriminatory explanation that can be discerned from the documentation would not be a complete answer to the race discrimination claim as put by the Claimant. He did not strike out the claim on the basis that the Claimant had no reasonable prospect of succeeding but formed the view that there was little reasonable prospect of success. That was the correct approach, and, on the case as the Claimant presents it, that seems to me a conclusion well within the Employment Judge's discretion and one he was entitled to reach. I dismiss this ground of appeal.

72. As for claim 5, Mr Sykes again argued that the Employment Judge had applied the wrong test, that relating to strike-out rather than deposit orders. For the reasons I have already given, that argument does not assist the Claimant.

73. As for the argument that the Employment Judge had effectively concluded that the burden of proof had shifted and should thus have allowed that this was something that could only be determined at trial. First, of course, he was not preventing the matter going to trial; he was simply ordering that a deposit should be paid as a condition. More substantively, however, I do not read the Employment Judge's reasoning as demonstrating a formal finding that the legal burden of proof had shifted. I cannot see how it could be read that way, given the lack of any finding that the Claimant had demonstrated any link with race. It seems to me that the Employment Judge was speaking of the need for explanation in far more general terms. Thus, even allowing that there might be some such need for an explanation as to what had happened, the Employment Judge was still unable to see any possibility of racial taint. I consider that the Employment Judge was entitled to take the view that this had little reasonable prospect of

success and that it should therefore be made subject to a deposit order. Again, I would not allow the appeal in this regard.

74. On claim 6, for completeness, I note that in his written Skeleton Argument the Claimant spoke of this claim having been struck out. That was not correct. It had been made subject to a deposit order.

75. To the extent that the Claimant again complains that the Employment Judge had applied the wrong test - that of strike-out rather than little reasonable prospect of success - that does not assist the Claimant. In any event, the Employment Judge expressly referred to the little reasonable prospect of success test, and I see no indication that he erred in law in that regard. On this case, however, I do have a difficulty with the conclusion reached by the Employment Judge. On its face - as the Employment Judge allowed when considering his allegation as a protected disclosure detriment - there was a potentially insulting e-mail copied in to the Claimant. As the Claimant complains, there was then an apparent failure on the Employment Judge's part to engage with the Claimant's case that the e-mailers did not know that he could not read Japanese; so, he had been copied into an e-mail that was potentially abusive about him, apparently on the assumption that he, as an English person, would not be able to understand it. I can see the argument that that could be a deliberate mocking of the Claimant, with reference to an assumption about him as someone of English nationality being unable to understand the e-mail that might have been insulting to him. That is an argument on the Claimant's behalf that I find rather more readily comprehensible than any others. Here, I consider that the Employment Judge failed to take account of a potentially relevant matter - the particular way that the Claimant put his case - and that might well have been material to his conclusion. I therefore allow the appeal on this ground in respect of this claim.

76. On the protected disclosure claims (claims 7, 10 and 11), the Claimant primarily relied on his arguments as I have already set out under the claims under the heading of race discrimination. He also complained, however, that the Employment Judge had failed to consider whether the disclosure had a material influence on the acts relied on and that he had given reasoning that was not **Meek**-compliant. I do not see that the "material influence" point adds to the argument. The Employment Judge was entitled to consider in more general terms whether there was any likelihood of a finding of a link between the act or acts in question and the protected disclosure relied on. He was entitled to look at the documentation before him and form the view that he did. For this and the reasons I have already given, I would not allow this ground of appeal in respect of these claims.

The Quantum of the Deposits

77. The main point in the appeal that was permitted to proceed under this heading was that the Employment Judge had failed to have regard to the question of proportionality and that he was particularly required to do so, given that the new rules allowed for a deposit in respect of separate allegations rather than the whole claim.

78. It is right that the clarification provided by the **Employment Tribunal Rules 2013** may well result in separate awards being made in relation to different allegations and that this might give rise to a total level of award of some significantly higher value than the individual orders. When making such deposit orders Employment Tribunals should indeed stand back and look at the total sum awarded and consider the question of proportionality before finalising the orders made. In this case, however, I am satisfied that the Employment Judge did. He expressly had regard to what he described as "appropriate". In this case, it is clear that this was a reference to what was proportionate. The Employment Judge expressly had regard to the totality of the award made as comprised of each deposit order, allowing for the maximum that could be

awarded under the Rules. He did not make the maximum awards that he could have done but made orders which gave rise to a total sum that seemed to be proportionate – "appropriate" - when taking into account the number of allegations to which the orders related and the Claimant's means. That was a proportionate view on the totality of the award and a conclusion that was entirely open to the Employment Judge as an exercise of his discretion.

79. As to the amount of each individual deposit order, that was entirely for the Employment Judge. He expressly had regard to the Claimant's means. It cannot be said that the amount in each case was a sum he was not entitled to award. As for his reasons for doing so, those seem entirely clear. The Employment Judge had appropriate regard to the Claimant's means and to the level of the award Parliament considered could be made and made deposit awards at a level that was appropriate to the case. Those were all matters for the Employment Judge. They are not matters for the EAT. It cannot that he reached a perverse conclusion. There is no error of law in this respect and I duly dismiss this ground of appeal.

Applications for Review and Permission to Appeal

80. Having given my Judgment in this matter, Mr Sykes has applied for a review of my Judgment on one basis and for permission to appeal to the Court of Appeal on three bases.

81. The review application takes issue with my Judgment to the extent I have suggested that the Claimant was submitting that the claims made subject to deposit orders should have been permitted to proceed to trial when his submission was that they should have been permitted to proceed to trial without deposit orders being made.

82. I am not sure where such an application in fact goes. In any event, however, my reasoning was reflective of how the Claimant's arguments were presented. The Claimant took

issue with the Employment Judge having determined factual matters, which he (the Claimant) contended were in dispute. The Claimant considered that to be wrong because those were matters which should have been determined at trial. My Judgment referred to that particular argument. It being the case that, of course, the Judge had not stopped these issues being determined at trial; he had simply made them subject to a deposit order. I was under no misapprehension as to the Claimant's case and obviously understood him to be seeking to overturn the deposit orders but I also stand by my reading of the Claimant's arguments as set out in his Skeleton Argument and orally before me.

83. In respect of the application for permission to appeal to the Court of Appeal, the first error of law Mr Sykes seeks to identify relates to his reliance on the case of **Mandla v Dowell Lee**. He submits that ethnic and cultural values were put into play by the Claimant's case, and it was an error of law not to understand that therefore gave rise to a good case in terms of the race discrimination complaint.

84. I do not accept any error of law has been displayed. The way in which the Claimant's case was put is, in my judgement, based on a misconceived understanding of **Mandla v Dowell Lee**. I do not accept that case assists the Claimant, and I see no arguable error of law identified or any other compelling reason for this matter to trouble the Court of Appeal.

85. On the deposit orders Mr Sykes says there is an error in my failing to find that the Employment Judge erred in not moving from the first stage of the burden of proof to the second stage. I do not find that the Employment Judge did conclude that the first stage of the burden of proof had been met or that the burden of proof had shifted to the Respondent. If I had not made that clear in respect of each of the deposit order claims, I do so now. The Employment Judge's comments were far more general in their terms and contained no finding that the Claimant had

shown sufficient to establish facts on which any Employment Tribunal could conclude there had been discrimination because of race. There was no basis for suggesting that he had found that the burden of proof had shifted.

86. On the quantum ground of appeal, the Claimant seeks permission to appeal to the Court of Appeal on the basis that my Judgment failed to consider that part of the Claimant's case that suggested the Employment Judge had erred in having regard to separate arguments or allegations, thus giving rise to separate awards which led to a higher global total.

87. I had understood the appeal to have proceeded on the basis of the Amended Grounds of Appeal as characterised by Singh J at the Preliminary Hearing and I have addressed those grounds in my Judgment. I do not consider I thereby failed to address grounds of appeal that had been permitted to proceed to this Full Hearing. In any event, the Employment Judge was plainly entitled to make orders in respect of separate arguments or allegations and no perversity is demonstrated by his decision to do so. He also stood back and took a view as to the appropriateness and the proportionality of the total sum. For the reasons I have already given, I do not see that that discloses any error of law. That being so, again, I see no reason to grant permission to the Court of Appeal in that respect.

88. I do not grant the application for permission.