Case Number:1300335.17

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr Smith		The Carphone Warehouse Ltd

JUDGMENT
ON A PRELIMINARY HEARING

HELD AT Birmingham **ON** 23 May 2017

EMPLOYMENT JUDGE Harding

Representation:
For the claimant: Ms Lawrence-Russell, Union Representative
For the respondent: Mr Roberts, Counsel

REASONS

Oral reasons having been provided on the day of the preliminary hearing, these reasons are provided in writing following a request from the respondent at the conclusion of the hearing.

1 This was an application by the respondent, The Carphone Warehouse Ltd, to strike out the claimant's claims of direct disability discrimination, discrimination arising from disability, indirect discrimination in relation to the protected characteristic of disability and a failure to make reasonable adjustments, and in the alternative for a deposit to be ordered in respect of the same.

Relevant background

2 I set out here the relevant background in order to explain the context of the applications made by the respondent. For the avoidance of doubt I make no findings of fact but simply set out the parties respective cases, as they are asserted to be. The claimant worked as a sales consultant at the respondent's store in Oldbury. He was required to sell mobile phones to customers. As part of the sales process consultants are required to fill out an Insurance Needs Form (INF). This is an electronic form which contains a series of questions that the sales consultant must ask the customer. The questions are designed to establish if the customer needs insurance for their mobile phone. If the customer does need insurance the sales consultant will be expected to attempt to sell it to them. Completion of the INF by the consultant generates what is known as an INF Code (also referred to as a Fox code). The sales transaction itself is completed by the consultant on the respondent's PIE computer system. The INF Code must be entered on PIE by the sales consultant to complete the transaction. PIE then generates a transaction number which the sales consultant is required to input onto the INF. There is another number, known as the customer number, which is generated by another system known as Pinpoint. The customer number, the transaction number and the INF Code will all be recorded on PIE and all will also appear on the INF for the transaction.

3 The respondent's case is that 3 individuals, including the claimant, were identified as having potentially abused the verification code process. A disciplinary investigation was started and the respondent concluded that the claimant had on 5 occasions over 2 different days failed to fill in an INF for a sale. The respondent concluded that the claimant had then entered fictitious INF Codes onto PIE to enable these sales transactions to be completed. It is the respondent's case that the claimant was dismissed for inputting fictitious INF numbers onto the system.

4 The claimant disputes that the INF numbers entered by him were fictitious. His case is that he filled in INFs for the transactions in question and he then mistakenly entered INF Codes onto PIE that were inaccurate. His case is that his dyslexia sometimes causes him to make mistakes with numbers and this led to him making errors when he was transposing the INF Codes from the INF to PIE. He points to the fact that he made plenty of other sales transactions over the 2 days in question in respect of which, it was accepted, he had filled in an INF, generated an INF code and correctly entered it on PIE. The claimant asserts that this demonstrates that he made mistakes in relation to the 5 transactions in question rather than it being the case, as the respondent asserted, that he had deliberately sidestepped the INF process and entered fictitious Codes.

The respondent's application to hear evidence

5 The respondent's application to strike out the claims and/or order the claimant to pay a deposit was put on the basis that the respondent could prove, as a matter of fact, that the claimant did not fill out an INF for the 5 disputed transactions. The respondent's case was that it followed from this, because of the way the INF code was generated by completion of the INF, that the INF numbers for the 5 transactions were fictitious. Essentially there can be no INF Code without an INF.

6 The respondent bought a witness, Mr Dev Mandaliya, to the preliminary hearing. The opening paragraphs of Mr Mandaliya's witness statement explained that Mr Mandaliya was responsible for auditing various of the respondent's systems and procedures to ensure compliance with FCA requirements. It was explained that Mr Mandaliya had been asked by the respondent's solicitors to review certain data relating to the transactions carried out by the claimant and that this review was done in the context of the employment tribunal claim being brought by the claimant. It was explained that Mr Mandaliya had not been involved in the process which had resulted in the termination of the claimant's employment.

7 The witness statement was a detailed 8 page statement. Attached to it were several spreadsheets, referred to as exhibits. The respondent's position was that Mr Mandaliya's evidence would not only explain how the various systems (PIE, INF etc) worked and how they interlinked with each other but it would also establish the following. Firstly, that there were no missing INF's for the store over the relevant period and that none of the "suspect" INF Codes appeared on any of the INF forms generated by the store over the 2 days in question. Secondly that none of the 3 numbers on PIE (INF Code, transaction number and customer number) for each of the disputed transactions appeared on any INF data for the store. Thirdly by comparing the random INF numbers which were generated by the system with the INF numbers for the disputed transactions it could be seen that the INF Codes for the disputed transactions tended to be sequential. It could be inferred from the sequential nature of the numbering for the disputed INF Codes entered by the claimant versus the random computer generated INF Codes, that the claimant was "fiddling" or making up the INF number.

8 The claimant had provided a five page witness statement in which he asserted that he had completed an INF form for all transactions. He asserted that he did make errors with INF numbers and he said that he could not say how these errors had occurred. He queried how the INF form could be traced if he had also made errors transposing the transaction number or the customer number. He stated that he had always had a colleague check his work and that on the days in question there had been no one available to do so.

9 The respondent's position was that evidence from Mr Mandaliya should be heard and findings of fact made; it said on one factual matter alone - namely whether the claimant had filled out INFs for the transactions in question. If I were to find as a fact that the claimant had not filled in the INF's it would follow from this, the respondent asserted, that the claimant's INF numbers were fictitious. Whilst the respondent accepted that such findings would not determine the direct discrimination claim (and ultimately the respondent also agreed that such findings would not determine the claims of a failure to make reasonable adjustments and indirect discrimination), it was submitted that these findings would determine the section 15 claim because these findings would prove, the respondent submitted, that the claimant was dismissed not for making errors with the INF numbers but for entering fictitious INF Codes.

10 The claimant objected to the application being dealt with in this way. The claimant's position was that this would be tantamount to the tribunal conducting a mini-trial of the centrally disputed issue. It was his position that this would more appropriately be dealt with at a full hearing when all the relevant evidence would be heard.

11 Accordingly the first question for me to decide was whether I considered it appropriate for this application to be dealt with based on submissions alone, or whether I should take evidence and make findings of fact. I concluded that I should deal with the application based on submissions alone for the following reasons. Whether the claimant was making errors with the INF numbers and was dismissed for this, or whether he was deliberately bypassing the insurance part of the sales process and entering fictitious INF Codes and was dismissed for this, is a dispute of fact central to the section 15 claim. I did not agree with the respondent's submission that a single finding of fact could be made to resolve this dispute (namely whether or not the claimant had filled in the INF forms), not least because it in fact transpired that the respondent itself relied on three separate strands of argument to support its contention that the claimant had not filled in the INFs, see paragraph 7 for these. Moreover, in my view, detailed findings of fact would require to be made on the following: the way the INF process works, the way PIE works, how INF Codes, customer numbers and transaction numbers are generated, how each of these numbers is recorded on PIE and the INF, whether it is correct that there were no missing INF's for the store over the dates in question, whether it is correct that none of the "suspect" INF Codes appeared on any of the INF forms, whether it is correct that none of the 3 numbers on PIE (INF Code, transaction number and customer number) for any of the disputed transactions appeared on any INF data and whether by comparing the random INF numbers generated by the system with the INF numbers for the disputed transactions it could be inferred from the sequential nature of the numbering for the disputed INF Codes that the claimant was "fiddling" or making up the INF number. The fact finding exercise required was far more extensive therefore than the respondent suggested.

12 I considered, moreover, Mr Mandaliya's statement to be detailed evidence of a quasi-expert nature which would be best dealt with at a substantive hearing when the relevant factual matters could be considered in their full context. The respondent, it seemed to me, was asking me to take a snapshot of matters and a snapshot that was based not on the evidence that was before the respondent at the time, but on evidence compiled after the events in question.

13 The respondent's submission, I considered, failed to take account of the fact that much of the focus for the section 15 claim will be on what factors were operating on the decision maker's mind. The fundamental question will be was the claimant dismissed because he made errors with the codes, or was he dismissed because he made up the codes? The starting point is to identify the individual responsible for making the decision to dismiss. Then it is necessary to consider what their thought processes, conscious or subconscious were. The focus will be on whether the putative discriminator was consciously or subconsciously influenced by the "something" arising in consequence of the claimant's disability. As the burden of proof provisions apply it will be necessary to consider if there are facts from which the tribunal could conclude that the claimant was dismissed because he made errors and if so the tribunal will need to decide if the errors were in consequence of the claimant's disability. If so the burden will be on the employer to show that the treatment was not because of "the something" identified – i.e. to prove that the claimant was dismissed for making up INF Codes (or to prove justification). What the respondent can prove *now*, however, with evidence gathered after the dismissal is not necessarily the same as what the decision-makers concluded at the time, and on what information those conclusions were based. Consequently taking a snapshot of Mr Mandaliya's evidence alone would not provide an accurate context for the determination of the disputed facts, namely what factors were in the relevant decision maker's mind when the decision to dismiss was made.

14 The claimant, of course, contests the respondent's assertion that he was making up the INF numbers and contests that there were no missing INFs for the store over the dates in question. An assessment of the claimant's credibility will therefore be relevant. This I also considered to be a significant factor. It is well established that a tribunal is in no position to conduct a mini-trial at a preliminary hearing because assessments of conflicting evidence are generally best dealt with at a substantive hearing where credibility can more readily be assessed.

15 Moreover, as I have already indicated were I to adopt the respondent's approach detailed findings would have to be made by me about the respondent's systems, how they worked and what inferences could be drawn from the data about the claimant's conduct. These findings of fact would tie the hands of the tribunal dealing with the substantive hearing, when a fuller picture of the evidence (including most importantly of course the information that was before the respondent at the time) might otherwise have led to different findings.

16 I informed the parties that for these reasons I did not consider it appropriate to hear evidence and make findings of fact. We moved on, therefore, to deal with the application on the basis of submissions alone.

Submissions on strike out/deposit

17 The respondent did not address me on the law to be applied to applications of this nature. The respondent's submissions focused on why it said that it could prove, as a matter of fact, that the claimant did not complete the INF for the 5 disputed transactions and why it followed from this that the INF Codes that he entered into PIE were fictitious. In other words the approach that the respondent took was to address me in detail on what it said the evidence, had I heard it, would have proved and to ask me to deal with the application on the basis that the respondent would prove the facts that it asserts. I pointed out to Mr Roberts that in the absence of evidence I was required to take the claimant's case at its reasonable highest. Mr Roberts acknowledged this was so. He also acknowledged that even were I to determine this factual dispute in the respondent's favour this would not resolve the claims of a failure to make reasonable adjustments and indirect disability discrimination. The respondent submitted, however, that resolution of this factual dispute would limit the amount of compensation that could be awarded for these two claims to an injury to feelings award. It was submitted that the claimant would not be able to prove that any discriminatory act had caused the dismissal which had in turn had caused the loss of earnings. It was submitted that because of this I should strike out this part of these claims – i.e. strike out what the respondent termed the causation issue for the purposes of remedy. In relation to the direct discrimination claim Mr Roberts acknowledged that it was hard to strike out claims of this nature. He submitted, however, that the claimant's claim was, in essence, an "arising from" case not a case of direct discrimination. He reminded me that the claimant was on a final written warning for mis-selling insurance when he was dismissed. The respondent submitted that resolution of the factual dispute would be a complete answer to the section 15 claim and that this would fail on the facts and should be struck out.

18 Ms Russell-Lawrence, for the claimant, likewise did not address me on the relevant law. She submitted that this was a complex case and that it was the claimant's case that he had made errors when transcribing the numbers. She submitted that it was the claimant's case that the respondent had been unable to trace the relevant INFs not that, as the respondent asserted, the INFs had never been completed. She suggested that the detailed submissions made by the respondent before me today, based as they were on the spreadsheets exhibited by Mr Mandaliya's witness statement, were very different from the kind of detail which had been discussed at the disciplinary hearing. She submitted that at the disciplinary hearing an assumption had been made that the INFs did not exist. The detailed investigation, she submitted, had come after the claimant's

dismissal. She acknowledged that it was not disputed that the claimant was on a final written warning for mis-selling insurance.

19 The parties agreed that information on the claimant's means could be provided by way of submissions rather than oral evidence. I briefly record here what I was told, namely that the claimant is not working and lives with his mother, who is responsible for supporting him. All his outgoings are currently paid for by her. The claimant has chosen not to claim benefits. He is now in the process of producing a business plan as he wants to try to establish his own company. He does not own his own home and has no savings. It was not suggested to me that the claimant would be unable to find the funds to pay even a relatively small deposit.

The Law

20 Rule 37(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states that all or part of a claim or response may be struck out on the grounds that it is scandalous or vexatious or has no reasonable prospect of success.

21 Rule 39 states in so far as it is relevant that:
(1) Where … 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 ... 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.

22 The striking out of a claim is a summary determination of the merits without hearing evidence. It denies the claimant the opportunity for evidence to be heard and for it to be tested at a full hearing. It is a draconian measure. The leading case on the test to be applied when considering whether a discrimination claim has no reasonable prospect of success is that of **Anyanwu v South Bank University and South Bank Student Union [2001] ICR 391**. It was explained in this case that discrimination cases, involving as they do an investigation as to why an employer took a particular step, will generally (but allowing always for exceptional cases) dictate that the evidence needs to be heard and no summary decision taken as to the merits. Lord Steyn referred to "the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or demerits of its particular facts is a matter of high public interest." Lord Hope said: "discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law

that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

23 In **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126** general guidance was given to the approach to striking out in discrimination and whistleblowing cases. On the question of striking out Maurice LJ said;
"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."

24 In **Balls v Downham Market High School & College [2011] IRLR 217** Lady Smith explained the nature of the test to be applied when considering whether to strike out a claim on the ground of no reasonable prospects of success. She said;
"the tribunal must first consider whether on a careful consideration of all the available material it can properly conclude that the claim has *no* reasonable prospect of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

25 His Honour Judge Serota QC said this in the case of **QDOS Consulting Ltd & Others v Swanson UKEAT/0495/11** (in the context of an application to strike out claims for discrimination and victimisation on the grounds of race, sex, disability and age, unfair dismissal and public interest disclosure);
"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 of cases in which there is no factual dispute and in 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 bought under rule 18(7)(b) but must be determined at a full hearing. Applications under rule 18(7)(b) 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, I would add, of the employment tribunals, on deceptively attractive shortcuts. Such applications should rarely, if ever, involve oral evidence and should be measured in hours rather than days."

26 However in the case of **Eastman v Tesco Stores Ltd UKEAT/0143/12** His Honour Judge Peter Clark confirmed that it is possible to resolve factual disputes at PHR's (as they were then) and then strike out a claim on the basis that there is no prospect of success following resolution of the factual dispute. The approach in cases such as **Balls** is to be applied when no evidence is heard and therefore factual disputes remain unresolved. As was made clear in the case of **Patel v Lloyds Pharmacy Ltd UKEAT/0418/12** neither **Anyanwu** nor **Ezsias** require a tribunal to refrain from striking out a hopeless case merely because there are unresolved factual disputes. In such a case the correct approach is to take the claimant's case at its reasonable highest and then to decide whether it can succeed.

Conclusions

The claims of a failure to make reasonable adjustments and indirect disability discrimination

27 The way that these claims are put is that a PCP was applied that consultants were required to input certain numeric data (INF Code, customer number and transaction number) quickly and accurately onto the respondent's systems.

28 For the purposes of the indirect claim it is said that this caused or would cause group disadvantage in that people who have dyslexia would find it more difficult to input numeric data accurately and quickly and are at greater risk of dismissal if they cannot do so. It is said that the claimant likewise found it more difficult to do so and likewise was at greater risk of dismissal.

29 For the reasonable adjustments claim the substantial disadvantage is that it was more difficult for the claimant to input numeric data accurately and quickly. The claimant puts forward a list of reasonable adjustments which he says would have removed or reduced this disadvantage, such as being given more time to input data and provision of audio equipment.

30 As I have already set out the background to the respondent's application is that there is significant factual dispute between the parties as to the claimant's conduct and, closely linked to this, the reason for dismissal. Did the claimant deliberately sidestep the insurance part of the sales process and enter fictitious INF numbers on PIE or were the INF numbers wrong because the claimant made errors when transposing them from the INF to PIE?

31 The respondent was effectively inviting me to conclude, based on submissions alone, that this dispute of fact would be resolved in the respondent's favour. That did not seem, to me, to be the correct approach - I considered that the correct approach was to take the claimant's case at its reasonable highest.

But even if it were the correct approach then resolution of this factual dispute would not determine the success or otherwise of the reasonable adjustments claim. The respondent had initially submitted that the asserted PCP could not have caused the substantial disadvantage, namely dismissal, and this submission was based on how the claimant's case had originally been put. But this submission did not take account of the fact that the reasonable adjustments claim was now particularized (with the agreement of the respondent) in such a way that dismissal was not the substantial disadvantage relied upon. For this claim the substantial disadvantage was simply that it was harder for the claimant to input numbers quickly and accurately. The substantial disadvantage does not therefore rely on the claimant's dismissal at all - it is much more general than that. Likewise, for the indirect claim it is pleaded that there was a greater risk of dismissal not that dismissal itself is part of the group or individual disadvantage.

32 After some discussion Mr Roberts agreed that even if the factual dispute was resolved in the respondent's favour this would not determine liability for these claims. As set out above he took a different tack in submissions suggesting that it would be relevant to remedy. His submission was that the claimant would not be able to prove that the asserted discrimination caused any loss of earnings because he would not be able to show that any discriminatory act had caused the dismissal which in turn had caused the loss. He invited me to strike out and/or order a deposit in respect of this remedy issue for these two claims.

33 I did not consider it appropriate to do so because I am not assessing, for the purposes of striking out/ordering a deposit, what amount of compensation the claimant might achieve if he is successful. I am required to judge at this stage whether the claim, or part of it, has no reasonable prospect or little reasonable prospect of success. That is a merits point that is separate to any remedy consideration. The fact that compensation for these claims, if successful, might be limited to injury to feelings does not go to the prospects of success of the claims themselves. Having acknowledged that resolution of the disputed facts would not determine liability the respondent did not suggest that there was any other basis for striking these claims out or for ordering a deposit.

Section 15

34 During discussions with Ms Lawrence-Russell at the start of the hearing it had been confirmed that the section 15 claim comprised one complaint, namely the claimant's dismissal. Using the structure of section 15 it is asserted that the dismissal was the unfavourable treatment, that the claimant was dismissed "because" he was making errors in transposing numbers onto the system, and that these errors arose in consequence of the claimant's dyslexia.

35 As set out above Mr Roberts, in submissions, took me through an explanation of the evidence in Mr Mandaliya's witness statement and he took me through a detailed exercise of comparing and contrasting the data on the

spreadsheets attached to the statement, explaining what the respondent asserted this data showed. A (brief) summary of this is set out at paragraph 7 above. The purpose of this exercise was to set out why, the respondent asserted, the claimant will not be able to prove the facts on which he relies – i.e. that he was dismissed for making errors in transposing numbers – and likewise it explains why, it was submitted, the respondent will be able to prove that the claimant was dismissed for sidestepping the insurance part of the sales process completely and making up fictitious INF Codes.

36 Here, it seems to me, there is a crucial core of disputed facts - was the claimant making errors or did he deliberately sidestep the process and input fictitious numbers? What did the respondent conclude the claimant had done at the relevant time? What was the reason for his dismissal? If he was making errors was this in consequence of his disability? Of course, a case can be struck out and/or a deposit can be ordered where there are unresolved factual disputes. In such a case it is my task to take the claimant's case at its reasonable highest and decide whether it can succeed.

37 Unusually, however, for such an application I did not have put before me the relevant investigatory and disciplinary paperwork. When I raised this with the parties I was told that one set of disciplinary interview notes was in the bundle (but I was not asked to read these). There was none of the other investigatory or disciplinary paperwork before me. As set out above it was clear from Mr Mandaliya's witness statement that his evidence had been compiled after the claimant's dismissal specifically for the purpose of this tribunal hearing. It was less clear whether the spreadsheets exhibited with the statement had also been produced for this hearing or whether they had formed part of the information contained in the disciplinary case. When I asked about this the claimant told me the spreadsheets were not part of the evidence in the disciplinary case. Mr Roberts, for the respondent, told me that he was unable to say whether they were or not (despite having Mr Mandaliya sitting behind him). In these circumstances I saw no reason to doubt what the claimant had told me and accordingly it seemed that both Mr Mandaliya's witness statement and the exhibits attached to it were evidence gathered by the respondent after the events in question, and indeed after the commencement of the tribunal claim. Where there are disputes of fact which have yet to be resolved a discrimination case will usually only be struck out when it can be seen that undisputed contemporaneous documents clearly and explicitly contradict the claimant's factual assertions. Here I was not taken to a single contemporaneous document which contradicted his assertions.

38 To the contrary it would seem that the very detailed explanation which the respondent put before me, which in itself of course rests on disputed facts, did not form part of the respondent's decision making process at the relevant time. Indeed, one of the claimant's complaints is that at the time the respondent simply made assumptions about what had happened. Given that there are significant

disputes of fact between the parties and taking into account that I have not seen any of the contemporaneous documentation I do not conclude that, taking the claimant's case at its reasonable highest, it can be said that this claim has no reasonable prospects of success or little reasonable prospect.

The direct disability discrimination claim

39 The claimant makes a number of complaints of direct disability discrimination. These include that the investigating manager rejected the claimant's explanation without investigating it, that he was dismissed, that an offer of reinstatement was withdrawn and the rejection of the claimant's appeal. For the purposes of these complaints the claimant's case is not, of course, that this happened because he had made errors in transposing the numbers, it is that this happened because of his particular disability – i.e. because of his dyslexia. This claim is therefore analytically very different from the section 15 claim. Taking the dismissal complaint as an example the difference between the 2 claims is highlighted by the fact that if the claimant's primary case - that he was dismissed because of his propensity to make errors – succeeds then his direct discrimination complaint will fail.

40 Mrs Lawrence-Russell, for the claimant, told me that the claimant relies on an actual comparator for the direct claim, Mr Wazari, who he says also made errors with the INF codes and who was not dismissed. There is factual dispute between the parties as to whether he is an appropriate comparator. There is also, of course, factual dispute between the parties as to the reason for dismissal.

41 That said on a number of occasions during this preliminary hearing I asked Mrs Lawrence-Russell to explain what facts the claimant relied upon to move the burden of proof across to the respondent for the purposes of this claim. It is trite law that a difference in treatment and a difference in status is not enough, albeit the "something more" need not be very much, **Veolia Environmental Services UK v Gumbs UKEAT/0487/12**. Mrs Lawrence-Russell, however, was not able to identify any facts which the claimant relied upon to move the burden across. Her response when asked was that there was factual dispute - a response which does not address the particular question at all. It seemed to me that, in contrast to the section 15 claim where the claimant has pleaded facts which, if proved, could lead to the claimant succeeding in that claim, the direct discrimination claim comes closer to relying on no more than bare assertion, certainly if one takes Mrs Lawrence-Russell's submissions at face value. Moreover, it was not disputed by the claimant that he was on a final written warning at the time of his dismissal.

42 Weighing all of this up I conclude that it can properly be said that the direct discrimination complaints have little reasonable prospect of success. I decline to strike out because there is factual dispute between the parties. I take into account also that whilst Mrs Russell-Lawrence was not able, on her client's behalf, to identify any facts which might move the burden of proof across I

considered that there were some facts pleaded which, if proved, may do so; for example, it is asserted that the claimant had told his manager that he had dyslexia and had asked for extra time to fill in forms and this had been refused and that despite raising his dyslexia as an issue in the disciplinary case it was completely ignored.

Case No:1300335.17
Employment Judge Harding

Dated: 15 June 2017

15 June 2017