Appeal No. UKEAT/0483/12/SM

# EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 April 2013

**Before**

**HIS HONOUR JUDGE DAVID RICHARDSON**

**(SITTING ALONE)**

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MRS D DOSSEN — APPELLANT

(1) HEADCOUNT RESOURCES LTD (IN LIQUIDATION)
(2) NEW IDEA
(3) NEW ID STUDIOS
(4) NEW CID COSMETICS
(5) BURLINGTONS
(6) CLIVE COLMAN
(7) KELLY COLMAN — RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

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| For the Appellant | MR JOSEPH NEVILLE<br>(of Counsel)<br>Instructed by:<br>Quality Solicitors<br>Alexanders<br>146 Midland Road<br>Luton<br>LU2 0BL |
| For the 3rd, 4th and 6th Respondents | MS LUCINDA HARRIS<br>(of Counsel)<br>Instructed by:<br>DAC Beachcroft LLP<br>100 Fetter Lane<br>London<br>EC4A 1BN |
| For the 1st, 2nd, 5th and 7th Respondents | No appearance or representation by or on behalf of the 1st, 2nd, 5th and 7th Respondents |

**SUMMARY**

**PRACTICE AND PROCEDURE – Striking-out/dismissal**

Striking out of two (of eight) allegations of sex and associative race discrimination not in accordance with **Anyanwu** and **Eszias** and in any event served no useful purpose – the allegations formed part of an alleged course of conduct which was disputed and which in the interests of justice all ought to be heard together.

**HIS HONOUR JUDGE DAVID RICHARDSON**

**Introduction**

1. This is an appeal by Mrs Deborah Dossen against one relatively small aspect of an order dated 15 March 2012 made by Employment Judge Gumbiti-Zimuto in the Reading Employment Tribunal – paragraph 5 of that order – whereby he struck out two paragraphs of her claim of sex and race discrimination.

**The procedural background**

2. Mrs Dossen was employed by Headcount Resources Ltd (hereafter "Headcount") as a human resources manager for a short period in 2011 between 24 May and 25 August. She is white British; her husband is black African of Liberian nationality. Mr Clive Colman was in day-to-day overall control of Headcount.

3. Following the termination of her employment Mrs Dossen instructed solicitors; they brought a claim to the ET alleging unfair dismissal, detriment and automatic unfair dismissal for whistleblowing, and sex and associative race discrimination. The claim was brought against no fewer than seven Respondents. A response was lodged on behalf of them all. This response, in addition to disputing the merits, took a variety of jurisdictional, procedural and time points and asserted that the claim had no reasonable prospects of success.

4. In order to deal with these preliminary points, a Pre-Hearing Review was convened for 9 March 2012. Mrs Dossen did not attend. She applied, unsuccessfully at the last minute, for an adjournment on the grounds that she had to travel to Paris on business. Although counsel attended the hearing on her behalf to renew the application for an adjournment, he left when it was refused, having no instructions to deal with the substantive points.

5. The Employment Judge made orders the effect of which was to strike out several Respondents altogether and to strike out certain causes of action. An order for costs was made against Mrs Dossen. Although these matters were originally the subject of appeal to the EAT, they have been disposed of at a hearing under rule 3(10) of the **Employment Appeal Tribunal Rules 1993**. Only the partial strike-out is left to be dealt with; a final hearing has been listed in June in anticipation of this appeal being resolved today.

**The partial strike-out**

6. The two paragraphs that the Employment Judge struck out were paragraphs 13(b) and (h) of the Particulars of Claim. These read as follows:

> **"(b) The Claimant received at least 30 to 40 calls a day from the Sixth Defendant who would shout, swear and be rude to her. The Sixth Defendant at times would demand that the Claimant dismiss members of staff and when the Claiamnt would explain the law, the Sixth Defendant would tell the Claimant that he did not care as it was his Company. The Sixth Defendant would call the Claimant at all hours, including during the weekend. The Claimant considers she would not have been treated this way if she had been a male employee. She considers this treatment is a breach of s.13(1) Equality Act 2010, s.26(1) Equality Act 2010, s.39(2)(d) Equality Act 2010 and s.40(1) Equality Act 2010. […]**
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> **(h) After the Awards ceremony, the Sixth Defendant called the Claimant and informed her that he had a surprise for her; that he had some clothes for the Claimant's daughters. The Sixth Defendant explained that the Seventh Defendant will be bringing the clothes to the office the following day and that the Claimant needed to take them off her in the car park as the Sixth Defendant did not want anyone seeing them giving the Claimant anything. The next day the Claimant was handed a black bag full of clothes by the Seventh Defendant which she took home and that is when she realised she was given used old clothes. The Claimant's daughter's [sic] have never used the clothes and they remain in the same black bag as the Claimant wished to return them but was too scared to do so. The Claimant considers she would not have been treated this way if she had been a male employee or married to a white man. She considers this treatment is a breach of s.13(1) Equality Act 2010, s.26(1) Equality Act 2010, s.39(2)(d) Equality Act 2010 and s.40(1) Equality Act 2010."**

7. These were two paragraphs out of eight alleging what was in reality said to be a course of conduct by Mr Colman of a racist and sexist nature over a substantial period of Mrs Dossen's short employment. I make it clear that the allegations are entirely denied by him and will be the subject of the hearing in June.

8. As regards paragraph 13(b), there were produced by the Respondents at the hearing what were said to be Mr Colman's telephone records. No statement was produced from Mr Colman confirming that these records recorded the only calls that he made to Mrs Dossen; but, on the face of it, the telephone records contradicted the assertion that there were "30 or 40 telephone calls per day" and that many were to her home. As regards paragraph 13(h), there was produced a contemporaneous email from Mrs Dossen thanking Mrs Colman for the clothes and stating that one of her children was actually wearing an item of the clothing.

9. On this question the Employment Judge said:

> **"20. In paragraph 13(b) and 13(h) of the Claimant's particulars of complaint, complaints are made by the Claimant that the Respondent was responsible for conduct which amounted to making an excessive number of telephone calls to the Claimant in the period specified. I have been shown a bundle of documents which contains made pages of itemised telephone bills which have come from the sixth Respondent. These telephone bills I am informed show the level and extent of calls which were made by Mr Colman to the Claimant during the relevant period. It is also stated on behalf of Mr Colman that a large number of these calls were of extremely short duration, indicating that there was no conversation between the Claimant and Mr Colman. In any event it is said that Mr Colman will state, notwithstanding the Claimant's allegations, the number of calls is not excessive and it is clearly not as alleged in the particulars of complaint at 13(b) and 13(h). It is said that it would have been entirely appropriate for Mr Colman to be contacting the Claimant during the currency of her employment when all these calls were made.**
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> **21. Having considered the pleaded case, taking note of the response and having considered the further documentation and submission that have been made to me, I am satisfied that in respect of the complaints made against the Respondent in paragraphs 13(b) and 13(h) that there is no reasonable prospect of success and the complaints identified in those paragraphs are therefore struck out. I bear in mind that complaints of discrimination are fact-sensitive but I note here that the Claimant will not be able to establish the conduct upon which she bases her allegation of discrimination."**

**Submissions**

10. On behalf of Mrs Dossen, Mr Neville argues that the Employment Judge's order was contrary to principle. He relies on well-known passages in **Anyanwu v South Bank Students Union** [2001] ICR 391 and in **Eszias v North Glamorgan NHS Trust** [2007] IRLR 603. He has taken me to more recent authority restating the same principle, including **Tayside Public**

**Transport Co Ltd t/a Travel Dundee v Reilly** [2012] CSIH 46, paragraph 30. He submits that the evidence that Headcount put forward came nowhere near the required level; there was nothing exceptional about the case, and, as a matter of common sense and discretion, the Employment Judge should in any event not have "cherry-picked" two allegations out of the Particulars that in reality had to be considered together.

11. On behalf of Mr Colman, Ms Harris submitted that the authorities made it plain that in an appropriate case a claim for discrimination can and should be struck out. Here, she submitted, the two allegations that the Employment Judge struck out fell squarely into that category. They were demonstrated to be untrue by reference to contemporaneous evidence: telephone calls and an email of Mrs Dossen herself. The Employment Judge, she submitted, was plainly alive to the principles derived from **Anyanwu** and **Eszias**; he referred in his Reasons to the fact that complaints of discrimination are generally "fact-sensitive".

## Discussion and conclusions

12. It is not necessary in order to resolve this case to cite at length from all the authorities concerning striking-out. In **Anyanwu** Lord Steyn said:

> **"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 merit, or de-merit, of its particular fact is a matter of high public interest."**

Lord Hope expressed opinions to similar effect at paragraph 37.

13. In **Eszias** Maurice Kay LJ said:

> **"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. […] 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 where the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably consistent with the undisputed contemporaneous documentation. The present case does not approach that level."**

14. In this case there was without doubt a "crucial core of disputed facts". Indeed, there was virtually no common ground between the case for Mrs Dossen and the case for Mr Colman on the question of sex and associative race discrimination. The two allegations that were struck out were part of that crucial core; they were not in any sense peripheral. It would therefore require an exceptional case before striking-out would be appropriate. The Employment Judge was alive to the point that discrimination cases are fact-sensitive. He struck these allegations out because he considered them incapable of proof as a matter of fact in the light of the documents.

15. As regards allegation 13(b), the telephone evidence certainly supports Mr Colman's case, but it does not dispose of the allegation as a whole, which includes assertions that he shouted, swore and was rude to Mrs Dossen on the telephone, required her to dismiss members of staff irrespective of the law and called her at all hours. Some of the calls are indeed at unusual times, and there appear to be repeat calls at very short intervals if the telephone calls are to be taken at face value. Nor was there any statement from Mr Colman confirming that the telephone records were evidence of totality of his calls to Mrs Dossen.

16. Mrs Dossen's case will certainly be damaged if, at a full hearing, it is established or accepted that Mr Colman's full records have been disclosed; but, with respect to the Employment Judge, I do not think that on a correct appreciation of the **Eszias** approach it was open to the Employment Judge to strike out allegation (b).

17. As regards allegation (h), the Employment Judge does not appear to have recognised in his Reasons that it concerned an email; he appears to have considered it to be another allegation relating to telephone records. The email is certainly strong support for Mr Colman's case, but to my mind it is not the kind of exceptional and conclusive matter that Maurice Kay LJ had in mind in **Eszias**.

18. I would add one further point. I have said that all Mrs Dossen's allegations concern Mr Colman and they are very much of a piece. If two allegations are struck out, they will not be issues at the final hearing; there will be no findings about them. Mr Colman will not, if his case is true, be vindicated by a judgment rejecting them; moreover, they are highly relevant to the balance of the allegations that are made against Mr Colman. If these two allegations are established at the final hearing to be untrue, they have obvious relevance to the balance of the allegations. There is therefore an obvious disadvantage to both sides in selecting them piecemeal and striking them out in advance. Accordingly, selecting these two issues, part of the disputed core for consideration at the Pre-Hearing Review, and striking them out separately served to my mind little if any useful purpose. They are so much part of the core of disputed case that they ought to be determined on the evidence. This is not a case of the kind that sometimes arises at an Employment Tribunal, where there are peripheral allegations that are unsustainable in the light of the documents and can usefully be cleared away.

19. For these reasons, the appeal on this very narrow issue will be allowed. The allegations will go forward to the full hearing to be considered with the other six allegations and for findings to be made after evidence has been heard. In all other respects the Employment Judge's order stands.