Appeal No. UKEAT/0285/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 25 October 2017

Before

THE HONOURABLE MR JUSTICE CHOUDHURY

(SITTING ALONE)

MS Z SILAPE APPELLANT

CAMBRIDGE UNIVERSITY HOSPITALS NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS ZENZO SILAPE (The Appellant in Person)
For the Respondent	The Respondent not resisting the appeal and being neither present nor represented

SUMMARY

PRACTICE AND PROCEDURE - Striking-out/dismissal

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

In striking out claims of discrimination, the Tribunal failed to apply the relevant principles as summarised recently in **Mechkarov v Citibank NV** [2016] ICR 1121, failed to take the Claimant's case at its highest and failed to give adequate reasons for its decision.

THE HONOURABLE MR JUSTICE CHOUDHURY

1. The Claimant in this appeal is a nurse; she was employed by the Respondent from January 2000 until her resignation in May 2015. Following her resignation, she brought complaints of unfair dismissal, race and disability discrimination, age discrimination, and harassment. Her claims of discrimination on the grounds of race and disability were the subject of a Preliminary Hearing in the Employment Tribunal on 21 April 2016.

2. That hearing had been listed in order to determine whether or not the Claimant's claims of discrimination should be struck out or should be subject to a Deposit Order. In a Reserved Judgment sent to the parties in July 2016, the Employment Tribunal found that nine out of eleven of the claims of race discrimination and the claim of harassment on the grounds of race were all out of time; that it was not just or equitable to extend time; and these claims were dismissed.

3. The remaining two claims of race discrimination and the claim of disability discrimination, although brought in time, were held to have no reasonable prospect of success and were struck out. It is against that decision to strike out that the Claimant brings this appeal.

Factual Background

4. The following summary of the facts is taken from the Claimant's pleadings and should not be treated as findings of fact; neither the Tribunal below nor this Court has heard any evidence which could lead to such findings at this stage.

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5. The Claimant's employment appears to have been free of incident until about March 2012, when she was, she claimed, singled-out for a move to a different ward from the one in which she had been working. The Claimant, who is Black African, asserts that three other Staff Nurses on her band were of a different ethnic origin and were not subject to a similar move.

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6. Thereafter, there was a series of incidents between September 2012 and March 2015, which the Claimant alleges were incidents of discriminatory treatment. Some of these concerned an increasingly difficult relationship between the Claimant and her Line Manager, Miss Louise Hutt. This had led to complaints being made by each against the other under the Respondent's Dignity at Work policy.

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7. The Claimant complains that she was a victim of unjustified complaints, unfair appraisals, and harsher treatment than her colleagues. By July 2013, these matters were beginning to affect the Claimant's health with episodes of stress and anxiety-related absences.

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8. The Claimant also refers to an incident in February 2014, during which she says Miss Hutt shouted at her in a public area; this left the Claimant feeling breathless, light-headed, and unable to focus. In March 2014, the Claimant was subject to a disciplinary investigation relating to an alleged refusal to help a colleague.

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9. The Claimant says she began to feel that she was under constant surveillance and felt very unsafe professionally. Her concern for her own wellbeing led to her seeing her GP, and she was diagnosed as suffering from stress and depression due to bullying at work. The Claimant commenced a period of sickness absence in May 2014, and she remained absent until her resignation a year later.

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10. During the absence the Claimant saw Occupational Health doctors who reported that she was unfit to return to work and that it was currently unclear as to when she may be fit to consider a return to work. There was a recommendation that, when she had recovered, she should be considered for an alternative role. The Claimant complains that, during this period, she was banned from attending the hospital, and she contrasts this treatment with that of other nurses, who were also on long-term sick leave, but who were not denied access to the premises.

11. Matters seem to have come to a head in April 2015, after the Respondent's Divisional Head of Nursing, Miss Holly Sutherland, wrote to the Claimant stating as follows:

> **"We discussed the way forward and I stated that I was concerned that you had been absent from work since 31 May 2014 and that it still appeared that it may be some considerable time before you would be able to consider a return to work. …**
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> **I stated that as there was no foreseeable return to work despite on-going review and support offered, and based on the information received from [Occupational Health] I explained that I had no option but to refer your situation forward to consider discontinuation of employment on the grounds of incapability due to ill health."**

The Claimant was concerned by this turn of events and decided she had no option but to resign and she did so on 6 May 2015.

The Claims

12. The Claimant's claim was received by the Employment Tribunal in Huntingdon on 27 July 2015. As stated above, she complained not only that the termination of her employment amounted to constructive dismissal, but also that she had suffered discrimination on the grounds of race since 2012, age discrimination and discrimination because of disability. The disability relied upon was depression.

13. The grounds of the complaint were very brief. Unsurprisingly the Respondent requested further particulars of the complaint and, following a Preliminary Hearing on 23 October 2015,

the Employment Tribunal ordered the Claimant, amongst other things, to file a reply to the Respondent's request for further information. That further information was provided by the Claimant in a lengthy document dated 19 November 2015. These further and better particulars set out the details of the Claimant's complaint.

14. At a further Preliminary Hearing on 8 January 2016, Employment Judge Postle noted that "it was difficult to clearly identify the less favourable treatment relied upon" and that "it appeared that some of her claims appeared to be that she was treated unfairly, but not less favourably on the grounds of her race".

15. Employment Judge Postle listed a further Preliminary Hearing to consider whether the claims as set out in the Claimant's response to the request for further and better information should be struck out as having no reasonable prospect of success, or should be the subject of a Deposit Order on the grounds that the claims have little reasonable prospect of success; and in the case of claims that were pleaded out of time, whether it would be just and equitable to extend time. The claim of age discrimination was withdrawn by the Claimant at that hearing before Employment Judge Postle.

16. At the Preliminary Hearing on 21 April 2016, the Respondent was represented by counsel and the Claimant represented herself. Employment Judge Laidler set out an overview of the case, in doing so largely adopting the Respondent's submissions, summarising the Claimant's claims. That overview identified eleven separate claims of race discrimination dating from 2012 up to 2015; seven claims of race-related harassment, the last of which was said to have occurred in May 2014; and three claims of direct disability discrimination.

17. The only two claims of race discrimination, which were found to be within time, were claims numbered 8 and 9 in the Tribunal's Reasons. These were described by the Tribunal as follows (see paragraphs 6.3.8, 6.3.9, 12.8 and 12.9 of Tribunal's Reasons):

> **"6.3.8. That the Claimant was banned from going to the ward and the Respondent's hospital and was prevented from accessing the Respondent's computers when she was off sick (which was from 30th May 2014 to 6th May 2015). Other staff were not similarly prevented when off sick (paragraphs 5.7 - 5.7.3 P&BPs) ("Race Discrimination Claim 8");**
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> **6.3.9. That the Respondent did not deal with the Claimant's grievance against Louise Hutt fairly and did not uphold her grievance. In contrast, the Respondent upheld Louise Hutt's grievance against the Claimant and the Claimant alleges she was to face a Disciplinary Hearing and alleges that she was to be given a Final Written Warning (paragraphs 5.8.1 - 5.8.5 F&BPs) ("Race Discrimination Claim 9");**
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> **…**
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> **12.8. Race Discrimination Claim 8**
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> **At 5.7 of her further information the Claimant alleges she was banned from going into the hospital whilst off sick. She refers to a document R in her bundle. This is a letter of 28th October 2014 from the Divisional Head of Nursing to the Claimant confirming that the Claimant is currently on long-term sick leave due to stress but that she had been informed the Claimant was regularly visiting Ward G6 unannounced. The letter went on:-**
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> > ***"In view of your current health situation I am writing to request that you do not visit G6 or any other Ward or department at Addenbrooke's Hospital without prior arrangement with Kirsty Jones, Senior Clinical Nurse. I would also request that you submit your GP Fit Notes by post to Kirsty.***
> >
> > ***I am also aware that you have been using the RMIS to retrospectively to enter alleged incidents. In view of the fact that you are currently off sick you should not be accessing of using any hospital systems including the RMIS and would therefore request that you cease from doing so until your return to work…"***
> >
> > **This is nine months before the claim was issued.**
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> **12.9. Race Discrimination Claim 9**
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> **This relates to the Claimant's grievance against Louise Hutt and the Claimant alleges that she herself faced a disciplinary hearing when she acted in line with the Dignity at Work Policy yet when Louise Hutt submitted a claim against the Claimant her submissions were upheld and the Claimant faced a disciplinary and sanction with a Final Written Warning. She refers to document Q2 in her bundle. This was a letter of 29th April 2015 inviting the Claimant to a disciplinary hearing on 13th May 2015 to discuss the allegation that her behaviour towards her line manager made her feel undermined, intimidated and uncomfortable and that she had spoken to Louise Hutt in a derogatory manner and challenged her decisions inappropriately."**

18. At paragraph 5.7 of her further information, the Claimant alleges she was banned from going into hospital whilst off sick. As to the claim of direct race discrimination, the Tribunal said as follows (see paragraphs 29 and 30 of the Tribunal's Reasons):

> **"29. The Respondent submits that the only claim pleaded on 1st April 2015 is that the Claimant was told the Respondent would proceed to consider whether to terminate the Claimant's employment on the grounds of capability due to ill-health. The Respondent submits that has no reasonable prospect and should be dismissed. The further information it is argued does not disclose a claim with reasonable prospects. It is argued that the reason for**

informing the Claimant that they would proceed to consider whether to terminate her employment is clearly not because of her alleged disability and for less favourable treatment to occur it must be "because of" disability.

30. In response to these arguments that the claims in relation to harassment had no reasonable prospects the Claimant stated that she had felt very intimidated and it was a very hostile environment."

19. After setting out the relevant legal provisions, the Tribunal concluded that all but claims 8 and 9 of the Claimant's claims of race discrimination were out of time and that it would not be just or equitable to extend time. The Tribunal then went on to consider the prospects of success. In relation to this the Tribunal said as follows (see paragraphs 44 to 51 of the Tribunal's Reasons):

"44. The Tribunal is further satisfied that if it did not strike out the majority of the race discrimination complaints on the basis of them being out of time it would strike them out on the basis they have no reasonable prospect of success. That includes claims 8 and 9 as set out above which are therefore and hereby dismissed.

45. Applying the statutory provisions of firstly section 13 in relation to direct discrimination the Tribunal accepts the submissions made on behalf of the Respondent that the Claimant has not identified the less favourable treatment relied upon. It is of note that Employment Judge Postle pointed this out to the Claimant in the summary he sent following his case management discussion on 19th January 2016. He stated at paragraph 9:

> ***"On occasions when listening to the Claimant it appeared that some of her claims appeared to be that she was treated unfairly but not less favourably on the grounds of her race …"***

46. Of most importance, however, the Claimant has not advanced any detail in any of her further information to show that the reason for her treatment was because of the protected characteristic, namely race. She has not identified an appropriate comparator to each act of less favourable treatment.

47. In relation to harassment it is difficult to see how any of the matters relied upon by the Claimant could fall within the statutory definition contained in section 26 and crucially that it was related to a protected characteristic.

48. With regard to the disability discrimination claim the Tribunal made it clear at the outset of these reasons it was only going to consider claims in the claim form. That means the only claim of disability discrimination in that on 1st April 2015 when the Claimant was told the Respondent would proceed to consider whether to terminate her employment on the grounds of capability due to ill-health. The Tribunal accepts the submissions made on behalf of the Respondent that this was clearly not because of the protected characteristic of disability (which is not established). The less favourable treatment must be "because of" disability and the reason for the treatment was not because of the existence of the disability itself.

49. The alternative conclusion therefore is that all claims would have been dismissed as having no reasonable prospects of success.

Deposit order

50. As a further alternative the Tribunal would have found that each of the claims advanced had 'little reasonable prospect of success' such as to give rise to the discretion to order a deposit to be paid as a condition of the Claimant continuing to advance each of the claims brought. There have been identified 11 claims of direct race discrimination, seven claims of race related harassment and one claim of disability discrimination, making 19 claims in total.

> **The tribunal would have ordered that the Claimant pay £50 as a deposit in relation to each of those claims that she chose to pursue.**
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> **51. It follows from those conclusions that the Respondent's application for strike out has been successful; the claims are all now dismissed."**

20. The unfair dismissal claim was in time and was allowed to proceed. The Claimant appealed against the striking out of the claims. She relied on three grounds of appeal: ground 1 was that the Tribunal erred in law in finding that the claims were out of time and that they were not acts extending over a period within the meaning of the **Equality Act 2010**; ground 2 was that the Tribunal erred in concluding that the race discrimination claim had no reasonable prospects of success; and ground 3 was that the Tribunal erred in finding that the disability discrimination claim had no reasonable prospect of success.

21. At a Preliminary Hearing of the Employment Appeal Tribunal before Kerr J on 29 March 2017, it was held that ground 1 was unarguable and should not proceed. Therefore, those claims that were held to be out of time remained dismissed. However, permission was granted in respect of grounds 2 and 3. In granting permission, Kerr J said as follows (see paragraphs 12 to 19 of the EAT Judgment of Kerr J on 29 March 2017):

> **"12. In ground 2, the Claimant asserts that the Tribunal imposed too high a hurdle on the Claimant in relation to her pursuit of the race discrimination and race-related harassment claims, when holding that they had no reasonable prospect of success. It is said by Ms Darwin, relying on *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646, that the Employment Judge should have allowed for the possibility of a hypothetical comparator being invoked or emerging from the evidence.**
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> **13. It is said by Ms Darwin that the Judge should not have required the Claimant to identify an appropriate comparator at the hearing and that she made that error at paragraph 46. It is said that the Judge did not take the Claimant's claim at its highest, that she effectively conducted an impromptu mini-trial and that the reasoning at paragraphs 44 to 47 is not *Meek v City of Birmingham District Council* [1987] IRLR 250 compliant.**
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> **14. It seems to me that ground is arguable and I need, therefore, say no more about it. It will be for the full Appeal Tribunal to consider whether it is well founded or not.**
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> **15. Turning to ground 3, that is not a subject of a Rule 3(10) Hearing but is the subject of a Preliminary Hearing with both parties present; the Respondent being ably represented by Ms Farris. Ground 3 is not very clearly formulated in the Claimant's homemade grounds of appeal, which is no criticism of her at all. It merely says that the appeal is against the Judgment that the disability discrimination claim has no prospect of success**
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> **16. Ms Darwin, on her behalf, focused on paragraph 48 of the Tribunal's Decision. That paragraph begins:**

> **"48. With regard to the disability discrimination claim the Tribunal made it clear at the outset of these reasons it was only going to consider claims in the claim form. That means the only claim of disability discrimination is that on 1st April 2015 when the Claimant was told the Respondent would proceed to consider whether to terminate their employment on the grounds of capability due to ill-health. The Tribunal accepts the submissions made on behalf of the Respondent that this was clearly not because of the protected characteristic of disability (which is not established). The less favourable treatment must be "because of" disability and the reason for the treatment was not because of the existence of the disability itself."**
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> **17. Ms Farris submitted that the disability discrimination claim was manifestly ill-founded. She took me to passages in the Claimant's pleading of that claim and submitted that the comparators were either not properly identified or, insofar as they were - as, for example, in the case of Sarah Whitby, Naomi Okoe and Rowena - the basis of the comparison was hopeless because those employees were themselves disabled, albeit not all in the same way as the Claimant is or claims to be disabled.**
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> **18. Ms Darwin pointed out that the wording of section 23 of the 2010 Act does not preclude reliance on a comparator who is also disabled, albeit in a different way from the Claimant. It seems to me arguable that the Judge ought not, without hearing evidence, have taken it on herself to determine the disability discrimination claim as in the way that she did as set out in paragraph 48, on the basis that it had no prospect of success.**
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> **19. Even putting paragraph 48 in its context, as Ms Farris was anxious to ensure I was able to do, I think it is arguable that it was not open to the Judge to decide the "reason why" issue, without hearing evidence. For that reason, I will allow ground 3 to proceed to appeal; so the overall consequence is that grounds 2 and 3 can proceed, but ground 1 will go no further. I invite the parties to consider reformulating the grounds for the approval of the Appeal Tribunal."**

22. The question, therefore, is whether the Tribunal erred in law in concluding the race and disability claims had no reasonable prospect of success, and whether the Tribunal had failed to give adequate reasons for its decisions.

The Law

23. Rule 37 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides 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 -**
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> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
> >
> > **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
> >
> > **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
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> > **(d) that it has not been actively pursued;**
> >
> > **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

24. The proper approach to an application to strike out a discrimination case was summarised by Mitting J in **Mechkarov v Citibank NA** [2016] ICR 1121:

> **"11. The approach to striking out applications in discrimination cases is not, with one reservation, controversial. The starting point is the observation of Lord Steyn in *Anyanwu v South Bank Student Union (Commission for Racial Equality intervening)* [2001] ICR 391, para 24:**
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> > **"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the 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 a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."**
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> **12. Maurice Kay LJ emphasised the point in *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, para 29:**
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> > **"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. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words 'no reasonable prospect of success'. 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 claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."**
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> **13. To these statements of principle must be added the observations of the Lord Justice Clerk in the Court of Session in *Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly* [2012] IRLR 755, para, 30:**
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> > **"Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls v Downham Market High School and College* [2011] IRLR 217, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (*ED & F Man Liquid Products Ltd v Patel* [2003] CP Rep 51, Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Man* …; *Ezsias* …). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias* …, Maurice Kay LJ, at para 29)."**
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> **14. On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts. I would treat the approval of the course taken by an employment judge in *Eastman v Tesco Stores Ltd* (unreported) 5 October 2012, by Judge Peter Clark, sitting in this tribunal, of hearing oral evidence on critical disputed questions of fact with reserve, because *Tayside Public Transport***

> ***Co Ltd v Reilly,*** **which was decided before *Eastman,* was not cited to him or by him in his judgment. In any event, it cannot determine the approach that the employment tribunal should take in a case such as this, in which an analysis of contemporaneous documents is required to permit a secure conclusion to be reached."**

The Claimant's Submissions

25. The Claimant adopted the submissions prepared on her behalf by Ms Claire Darwin, who appeared for the Claimant before Kerr J under the ELAAS Scheme. She also explained to me today, in very clear and concise submissions, why the Tribunal, in her view, had erred and that it failed to take into account various aspects of her claim, such as the identification of comparators and the less favourable treatment relied upon.

26. She relied on the summary of the proper approach set out in **Mechkarov** above, and submitted that there was nothing exceptional about this case that warranted it being struck out; that there were core issues of fact that could not be decided without an oral hearing; that the Tribunal had erred in not taking the Claimant's case at its highest and, instead, had relied upon the Respondent's submissions in relation to key issues of fact and had held, in effect, an impromptu mini trial for which the Claimant was not prepared.

27. The same points were made in respect of the striking out of the discrimination claim, with the added complaint that the Tribunal erred in concluding that the Claimant had not identified a proper comparator. In a disability discrimination case, the comparator could also have a disability, albeit not the same disability as the Claimant.

28. The Respondent did not appear today and has not been represented. By a letter dated 1 June 2017, from the Respondent's solicitor, it was confirmed the Respondent did not wish to

contest the matter to a Final Hearing. It was accepted that the grounds of appeal permitted by Kerr J were arguable and the Respondent confirmed that it did not wish to resist them.

Discussion and Analysis

29. It is clear that the Tribunal in this case did fall into error in striking out these claims. The first point to note is that the Tribunal makes no reference to the authorities governing the exercise of the discretion to strike out. In particular, none of the principles summarised in the **Mechkarov** case above were referred to, and there is no indication that the Tribunal had borne in mind the caution which should be exercised by a Tribunal before taking the step of striking out in a discrimination case.

30. In paragraph 46 of the Reasons, the Tribunal accepted the Respondent's submission, that the Claimant had not identified the less favourable treatment relied upon. That may have been correct in respect of some of the claims which were found to be out of time; however, in respect of claims 8 and 9, which were in time, it was not correct, in my judgment, to reach that conclusion.

31. The Tribunal's own description of those claims clearly identifies the less favourable treatment relied upon. Thus, in respect of claim 8, the less favourable treatment was that the Claimant was, allegedly, banned from going to the ward and accessing the premises and computers, whereas other staff were not similarly prevented from attending the ward, when off sick.

32. In respect of claim 9, the less favourable treatment alleged was that the Respondent did not deal with the Claimant's grievance against Miss Hutt in a fair or proper manner, whereas

Miss Hutt's grievance against the Claimant resulted in a disciplinary investigation. It seems to me that the Tribunal has incorrectly attributed the deficiencies in those parts of the Claimant's pleaded case that were out of time to claims 8 and 9 of the race discrimination complaint.

33. The Tribunal went on to say, at paragraph 46 of the Reasons, that the Claimant has not advanced any detail in her further information to show that the reason for treatment was because of the protected characteristics and that she has not identified an appropriate comparator in respect of these claims.

34. Once again, it seems to me that this conclusion fails to have regard to the specifics of claims 8 and 9, as pleaded. The comparators in respect of those claims are clearly identified in the Claimant's further information, as is evident from the Tribunal's summary of those claims in its own Judgment. As Ms Silape has reminded me this morning, the comparators in respect of claim 8 included other members of staff who were of a different ethnic identity to herself; and in respect of claim 9, the comparator was clearly Miss Hutt.

35. The upshot of this is, in my judgment, that the Tribunal has failed to take the Claimant's claims at their highest. No further reasons were given by the Tribunal for concluding that the Claimant had no reasonable prospect of success; in particular, there is no suggestion that the Claimant's pleaded case was inexplicably inconsistent with any contemporaneous documents, such as would warrant taking the exceptional course of striking out.

36. Aspects of the claim brought by the Claimant were, undoubtedly, weak and those have been dealt with in being struck out for being out of time. However, it is incumbent upon a Tribunal to examine each of the claims carefully and not to group claims together, when only

some are so deficient as to warrant striking out, and thereby strike all of them out. That seems to me to be unfair to the Claimant, does not take the Claimant's claim at its highest and results, potentially, in a claim with some prospect of success being struck out unfairly.

37. In relation to disability discrimination, the Tribunal's reasoning was equally brief. The Tribunal accepted the Respondent's submission that the act complained of was "clearly not because of the protected characteristic of disability … The less favourable treatment must be "because of" disability and the reason for the treatment was not because of the existence of the disability itself".

38. However, the Tribunal has, here, accepted the Respondent's submission as to the reason for the treatment. The Claimant, however, has a different contention which is that her treatment was by reason of her disability. She claims that the Respondent did not explore the possibility of alternative employment, as recommended by the Occupational Health Doctor, and further asserts that there are examples of other staff who were in long-term illness but who were given alternative employment.

39. It seems to me that if the Tribunal had approached the matter correctly, it would have taken those aspects of the Claimant's case at their highest and would have found that the comparator or comparators had been identified and that the less favourable treatment being alleged was clear. It would also mean that, at the very least, there would be an important issue of fact to determine, namely the reason for the alleged treatment. That is not a question that can be determined in the circumstances of this case, in the absence of hearing the evidence.

A 40. For these reasons, it is my judgment that the Tribunal's strike out decisions in respect of the remaining race discrimination and disability discrimination claims cannot stand and fall to be set aside.

B 41. The same applies in respect of the Tribunal's alternative decision to make Deposit Orders in respect of these claims. That leaves the question of disposal. The Claimant invites me to direct that her claims of discrimination should proceed immediately without having to be C reconsidered at a further Preliminary Hearing to consider the question of strike out and/or a Deposit Order.

D 42. The Respondent, in its letter which I referred to earlier, suggested a different course. It said that in the circumstances of not contesting the appeal, the Respondent would be willing to reach an agreement by consent that the matter be remitted to determine whether, taking the E Claimant's case at its highest, the claims ought to be struck out and/or made the subject of a Deposit Order.

43. It seems to me that, in the circumstances of this case, a further remitted hearing would F not be appropriate. I am persuaded, on the basis of the pleaded case that claims 8 and 9, identified by the Tribunal, and the disability discrimination claim which remains live, are such that they have some prospect of success. (Indeed, it is fair to say that is really the only possible G conclusion on a fair assessment of the Claimant's case at its highest.) I say no more about prospects than that.

H 44. I also note that there have already been three Preliminary Hearings in this matter; that Ms Silape resigned over two years ago; and, of course, the claim of unfair dismissal is going to

proceed, in any event. In those circumstances, it seems to me that it would be proportionate to proceed to decide the matter today, which is what I have done, and I, therefore, do not order that the matter be remitted to the Tribunal to consider the question of strike out and/or Deposit Order.

45. It will be a matter for the Tribunal to make further directions as to the progress of the claims below, in particular, in terms of identifying a proper list of issues of claims to be determined at the Full Hearing.

46. For these reasons, this appeal is allowed.