Appeal No. UKEAT/0135/17/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 1 December 2017

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

MR A JAVED APPELLANT

BLACKPOOL TEACHING HOSPITALS NHS FOUNDATION TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR EMMANUEL SHEPPARD (of Counsel) Bar Pro Bono Scheme
For the Respondent	MR SIMON GORTON (One of Her Majesty's Counsel) Instructed by: Weightmans LLP 100 Old Hall Street Liverpool L3 9QJ

SUMMARY

RACE DISCRIMINATION

PRACTICE AND PROCEDURE - Striking-out/dismissal

The Employment Appeal Tribunal ("the EAT") allowed the appeal of the Appellant, who was the Claimant before the Employment Tribunal ("the ET"). The ET had struck out, or ordered the Claimant to pay deposits in relation to, his allegations that the Respondent had discriminated against him because of his race. The EAT held, for the reasons given in its Judgment, that the ET had erred in law in five principal respects in making the strike-out and Deposit Orders.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from Manchester Employment Tribunal ("the ET"). The ET consisted of Employment Judge Sherratt ("the EJ"). After a hearing on 5 September 2016, in a Judgment sent to the parties on 29 September 2016, the ET struck out 33 of the Claimant's numbered claims of discrimination on the grounds of race (that is allegations 1, 2, 4 to 9 inclusive, 11 to 25 inclusive, 27 to 32 inclusive, 35, 36, 38, and 40) and ordered him to pay a deposit in relation to a further 12 claims (allegations 3, 26, 33, 37, 39, and 42 to 47 inclusive). Those numbered allegations were made in further and better particulars of his claim which were served by the Claimant. The ET also dealt with the Claimant's allegation concerning his dismissal which was not pleaded in the further and better particulars and ordered him to pay a deposit in relation to that claim.

2. The Claimant acted in person at the ET hearing and the Respondent was represented by a solicitor. I will refer to the parties as they were below. Paragraph references are to the ET's Judgment unless I say otherwise.

3. The Claimant was represented on the appeal by Mr Emmanuel Sheppard acting under the auspices of the Bar Pro Bono Unit and I am particularly grateful to him for representing the Claimant pro bono. The Respondent was represented by Mr Simon Gorton QC and I am grateful to both counsel for their very comprehensive and helpful written and oral submissions.

4. The facts were briefly summarised by the ET in paragraphs 13 to 14 of the Judgment:

> ***"Factual Background***
>
> **13. The claimant describes himself as a British person of Pakistani origin. He was employed as the Directorate Manager of General Surgery by the respondent Trust from 7 October 2013 until his dismissal with effect from 29 May 2015. He had been in NHS employment elsewhere since July 2009. Performance concerns were raised by his line manager, Mr Kent, in**

February 2014 which the claimant regarded as not genuine. He pursued a grievance about this matter in February 2014 and went off sick with stress on 11 March. He had not returned to work by the time of his dismissal. In the course of the grievance process he raised allegations of race discrimination. His grievance was rejected at the end of October 2014 and an appeal against that decision was rejected in February 2015. The respondent then followed its capability procedure which resulted in the dismissal of the claimant.

14. The claimant brought proceedings in the Employment Tribunal and in due course set out further particulars of his direct race discrimination claims in a schedule. The respondent's additional response responded to the claimant's 47 particularised allegations."

The Law

5. Rule 37(1) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** gives an ET a power to strike out all or part of the claim on various grounds which include where the claim has no reasonable prospect of success. Rule 39(1) gives the ET power where it considers that an allegation has "*little reasonable prospect of success*" to order a party to pay a deposit as a condition of proceeding with that allegation.

6. In short, the cases to which the ET referred in paragraphs 10 to 11 of its Judgment give ETs a strong steer not to strike out claims where there are central disputes of fact which can only be decided after hearing and evaluating evidence. It is only in an exceptional case that an ET will do so, for example, where "*the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation*" (per Maurice Kay LJ in **North Glamorgan NHS Trust v Ezsias** [2007] ICR 1126, paragraph 29). This approach applies for special force in discrimination claims, it is a matter of "high public interest" that discrimination claims are decided on their merits.

7. I was referred to two other cases which were not referred to in the Judgment of the ET. The first was a decision of the Court of Appeal in **Ahir v British Airways plc** (for which I do not seem to have any actual citation; it is unreported). The judgment was given on 18 July 2017. That was a case in which the Claimant was suspended and later dismissed, in short,

because an anonymous letter that was sent to his employer said that the Claimant had lied in his CV. The Respondent investigated the contents of the letter, discovered that the Claimant had lied - and indeed the Claimant did not dispute that - and suspended and then dismissed the Claimant. The Claimant's claim in relation to this aspect of the case was that this was an elaborate ploy or conspiracy by the Respondent to find a pretext for dismissing him and that the Respondent had fabricated the anonymous letter and sent it to itself in order to enable it to act on facts which it was already aware of. In paragraph 5 of the decision, Underhill LJ, giving the judgment of the Court, adopted the reasoning of HHJ Eady QC when she summarised the case at paragraph 10 of her judgment:

> **"5. …**
>
> > **'The ET reminded itself that, as a general principle, discrimination cases should not be struck out, save in the very clearest circumstances. It concluded, however, that there was no prospect of the Claimant's case succeeding in respect of his dismissal because (I summarise) it was dependent upon assertions rather than facts and his contention that the Respondent was already aware of the false information in his CVs would not detract from the fact that it was false information and would establish cause for dismissal: on any case there were clear grounds for his dismissal and the facts on which the decision was taken were not contested. The Claimant's case rested substantially upon his unlikely assertion that the Respondent sent itself the anonymous letter to trigger an investigation that would reveal true information, of which it was already aware, as a justification for dismissal. That unlikely case could not be proved by the Claimant, and no evidence was identified that might put in doubt the Respondent's case. The dismissal claims had no reasonable prospects of succeeding and would be struck out.'**
>
> **…**
>
> **19. I have, of course, twice used the phrase 'on the face of it'. That invites the obvious riposte that the whole problem with a strike-out is that the appellant has no chance to explore what may lie beneath the surface, in particular, by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.**
>
> **20. The appellant picked up that gauntlet. It was his case, advanced in his particulars of claim and also in correspondence with the Tribunal prior to the strike-out hearing seeking disclosure of documents and telephone records, that a BA employee in the legal department, Mr Navdeep Deol, was already aware of the circumstances of the appellant's departure from Continental Tyres and had a copy of the Employment Tribunal judgments; that he had in that knowledge sent the anonymous letter to the HR department; and that he was motivated by one or more of the protected acts. There was, as he put it, 'a well-laid plan' to get rid of him as a troublemaker. All this was summarised by the employment judge at paragraph 16 of the reasons and to some extent also in paragraph 21.**
>
> **21. That "case theory" is not only speculative but highly implausible. The appellant says that it is supported by the coincidence of timing - that is, that the letter was received so soon after the two incidents of January 2014 - and that the speed with which it was responded to was also suspicious. It was 'as if they were expecting it'. These are not in the least cogent points. It is possible there was indeed some connection between the incident on 18 January and the**

> **sending of the letter - that is, it may well have been sent by someone involved in that incident or associated with them - but that is very different from saying that there was reason to believe it was Mr Deol who had sent it. There is nothing in the least surprising in BA treating seriously an allegation that an employee, especially one with airside clearance, has been dishonest in the account given of the circumstances in which they left their previous employment."**

8. In those paragraphs the Court of Appeal in essence was explaining that the Claimant's case theory in that case was speculative and highly implausible and it was a case in which it was appropriate for the ET to strike out even though there were disputed facts.

9. I accept Mr Sheppard's submission that that case is a very different case from this case; essentially, there are three reasons why. In **Ahir** the Claimant was relying on one incident only (the fabrication of the letter), the Claimant was effectively alleging fraud and forgery on the part of the employer, and, finally, the allegations taken overall were highly implausible. But I also accept Mr Gorton's submission that **Ahir** shows that the type of facts in **Ezsias** are only an example of the kind of case in which an ET may strike out a claim, even though there are disputed facts.

10. The only case to which I was referred on Deposit Orders is a decision of this Tribunal by the then President, Elias J (as he then was), in the case of **Van Rensburg v The Royal Borough of Kingston-Upon-Thames** UKEAT/0095/07. The critical reasoning of Elias P is in paragraphs 25 to 27 of the decision, paragraphs which occur after reference to **Ezsias**; the facts of which and the decision in which he summarises in paragraph 24. Paragraphs 25 to 27 are as follows:

> **"25. Maurice Kay LJ gave as an example a case where the facts as asserted by the applicant were totally inconsistent with the undisputed contemporaneous documentation. It is also to be noted that in that case the Employment Tribunal had, prior to making the strike out order, indicated that subject to the question of means, the case would be an appropriate one for a deposit to be made. No such order was in the event made because the strike out order disposed of the case altogether. However, the Court of Appeal noted that the possibility of a deposit under rule 20 remained open and they made it plain that that would have to be considered afresh by a tribunal, but that they were not "indicating any view of the ultimate merits of this case one way or the other". The Court was clearly acting on the assumption**

that the power to order a deposit could in principle be exercised where the Tribunal had doubts about the inherent likelihood of the claim succeeding.

26. *Ezsias* then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike out is considered pursuant to rule 18(7). It would be very surprising if the power of the Tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal is assessing the prospects of success, albeit to different standards.

27. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in rule 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

11. Mr Gorton relied on this decision in the context of paragraph 4 of the judgment, which sets out the ET's reasons for striking out the claims in that case. The ET's reasons were as follows:

"4. The Chairman found that the various claims had little prospect of success and ordered a deposit of £100 as a condition of the Appellant being permitted to continue to take part in the proceedings. That was an order made on 15 June 2006. When giving reasons, the Chairman noted that the Appellant was working part time as a psychotherapist. She also indicated that she had had regard to the submissions of the Council which were as follows:

> **"The Respondent submitted that the claims are weak and unclear. The Claimant demonstrated her difficulty in articulating them at the hearing. The equal pay claims were hopeless and her allegations of sex and race discrimination were not made during the course of her employment. The Claimant is seeking re-engagement which undermines her claim of constructive dismissal. The Claimant herself put forward the first Respondent for a diversity award on the ground that it was a leader in this field."**

12. I accept Mr Gorton's submissions that three propositions can be deduced from **Van Rensburg**. The first is that the decision of the Court of Appeal in **Ezsias** is not an authority which deals with the correct approach to be taken when an ET considers whether or not to make a Deposit Order. Second, that a provisional assessment of credibility can be made on an application for a Deposit Order. Third, an ET is not required to find exceptional circumstances before it makes a Deposit Order of the type described in **Ezsias**, but is entitled to make a provisional assessment of credibility but it must have "*a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response*" (**Van Rensburg**, paragraph 27).

13. For what it is worth, in the paragraphs of the decision in which the EJ referred to the law, he appears to have directed himself correctly. The paragraphs in which he summarised the law are paragraphs 8 to 12 inclusive and he summarised the law again in paragraph 160. As Mr Sheppard rightly pointed out in his skeleton argument, the EJ recognised in paragraph 160 that this was a case where the facts were disputed.

The ET's Decision

14. After summarising the background of the law, the ET described the Respondent's submissions in paragraphs 15 to 84 of the Judgment, the Claimant's submissions in paragraphs 85 to 138, the Respondent's response in paragraphs 139 to 157, and then the Claimant's response. Paragraphs 160 to 195 are headed "*Discussion and Conclusion*".

The Respondent's Case

15. The Respondent did not invite the ET to look at each allegation individually. Instead it invited the ET to consider the allegations in groups. The Respondent's case (see paragraph 20) was that there is "*a world of difference between allegations of bullying and harassment and allegations of discrimination. This is not a situation where the claimant alleged discrimination until much later*".

16. One of the Respondent's main arguments seems to have been that the fact that the Claimant did not complain of discrimination at the time was highly, if not decisively, significant and that there was nothing to connect the Claimant's complaint about the Respondent's conduct with the Claimant's race. I will say a little bit more about the Respondent's submissions below.

The Claims which the Employment Judge Struck Out

17. The EJ adopted the Respondent's way of classifying the Claimant's allegations. The first group of allegations consisted of allegations 1 to 9 and 11 to 25. The EJ summarised the Respondent's case on these at paragraphs 17 to 20. The EJ said it was right that the Claimant had raised these allegations in grievances on 21 and 28 February 2014 but, the EJ said, he had not then suggested that his complaints were complaints of discrimination on grounds of race. "*The complaints were grievances of a type often seen in [the ET] where an employee is not happy with the way in which their manager is dealing with them*" (paragraph 169). The EJ accepted that in allegation 3, as he said, the Claimant had later suggested that "*there was the possibility of an element of race in respect of this complaint*" (paragraph 170). The EJ then said in paragraph 171 that the contemporaneous documents were totally consistent with the Claimant raising grievances but "*totally inconsistent with them being complaints or allegations of discrimination on the basis of race*".

18. The Claimant did not refer at the time to the Respondent's bullying and harassment procedure:

> **"172. … In my judgment the claimant has, some considerable time after submitting the grievances, taken the view that he was not treated in the same way as, or less favourably than, his white colleagues and so his treatment amounted to discrimination because of race. There does not appear to me to be anything to connect the matters complained of with the protected characteristic of race."**

19. This reasoning led the EJ to conclude (paragraph 173) that allegations 1, 2, 4 to 9, and 11 to 25 inclusive had no reasonable prospect of success as allegations of direct race discrimination.

20. At paragraphs 32 to 57 the EJ summarised the Respondent's case about allegations 27 to 32 inclusive. Those were raised at a grievance meeting on 14 May 2014. There was no

reference in the Respondent's (disputed) notes of that meeting to race or in the Claimant's notes (paragraph 33). The ET only considered allegation 29 in any detail. That was an allegation that the Respondent had refused to allow the Claimant to take leave (paragraphs 35 to 47).

21. At paragraphs 48 to 52 the EJ considered the Respondent's argument about allegations 34 and 35 which the Claimant raised at a grievance meeting on 27 June 2014. Allegation 34 was that the Claimant was prevented from making an allegation of race discrimination at a meeting and allegation 35 was that he had asked for a toilet break which was refused. The EJ looked at the notes for the meeting on 27 June (paragraph 50) and the ET3 (paragraphs 51 and 52).

22. The EJ said in paragraph 53 that allegation 36 which the Claimant said he had raised at a grievance meeting in August 2014 was not described as an allegation of race discrimination. Allegation 36 was that, in breach of its policy, the Respondent had shared the Claimant's complaint with Mr Kent, giving Mr Kent an unfair opportunity to prepare answers to it. The ET then considered the Respondent's notes of that meeting (paragraph 55). The Claimant is recorded in those notes as mentioning a racial element. The Respondent's case on this allegation appears to be that the notes do not mention allegation 36 and that the Claimant did not make it until his particulars of his claim, "*therefore*" the Respondent denied this allegation (paragraph 57).

23. At paragraphs 58 to 61 the ET considered the Respondent's arguments about allegations 37 to 38 which were said to have been raised at the grievance meeting on 13 October 2014. These were that the Claimant was not allowed to explain his race complaint fully and that the

Respondent had promised mediation with Mr Kent but had not arranged it. The EJ recorded the Respondent's response in paragraph 59 and considered the Respondent's notes of the meetings of 13 October at paragraph 60. The Respondent submitted that "*the contemporaneous documents should be looked at in deciding whether or not to give any credence to the allegation by reference to race discrimination*" (paragraph 61).

24. At paragraphs 65 to 71 the ET recorded the Respondent's submissions about credibility based on the facts that another ET had dismissed one claim by reference to the Claimant's unsatisfactory evidence and another claim because it had no reasonable prospect of success. The Respondent submitted that the Claimant's "*credibility needed to be considered*" and "*the claimant was … an unreliable narrator and this should be taken into account*" by the ET (paragraphs 65 and 66). The Respondent also submitted that one out of 47 allegations was "*raised in connection with race. Looking back the claimant points to everything as racial discrimination but this is not the case. The contemporaneous documents show otherwise*" (paragraph 71).

25. Further submissions along these lines are recorded at paragraph 142. The ET recorded a further submission that an allegation of race had to be described as such when it was raised (paragraphs 146 and 154). The ET decided to strike out allegations 27 to 32 (paragraphs 180 to 182). These were allegations "*allegedly*" made at a grievance meeting on 14 May 2014. The "*allegedly*" is odd since in the next sentence the EJ acknowledges that the Respondent's notes set out the Claimant's complaints about the way he had been managed albeit "*without reference to race*" (paragraph 180). The Claimant's notes did not refer to race either said the ET (paragraph 180). These were further examples, said the ET, of allegations brought by the Claimant that made no reference to race and involved the Claimant taking the view that

because he believed he was being treated differently from real or hypothetical comparators then it amounted to discrimination because of his race. The Respondent's response set out "*what appears to be a reasonable response to the claimant's complaints*" (paragraph 181).

26. In the case of allegation 29, "*the contemporaneous documents show that leave was refused only where there was, in the view of the respondent, a proper management reason with the claimant being encouraged to find alternative dates which were in the main allowed*" (paragraph 181). The EJ concluded that "*the contemporaneous documentation relating to allegations 27-32 satisfies me that the allegations have no reasonable prospect of success*" (paragraph 182).

27. Allegation 35 arose from the grievance meeting on 27 June 2014. At paragraph 183 the EJ noted that the Claimant disputed the accuracy of the Respondent's notes, yet concluded that the contemporaneous documents (i.e. the disputed notes) did not support the Claimant's account that he had asked for a break (allegation 35). In any event, said the ET, there was nothing to relate that to race and the allegation had no reasonable prospect of success.

28. The EJ struck out allegation 36 because it was not raised at the grievance meeting of 8 August according to the Respondent's disputed notes "*making this another allegation with no reasonable prospect of success*" (paragraph 186).

29. The EJ also struck out allegation 38 which concerned a mediation programme with Mr Kent. No factors had been put forward by the Claimant to suggest that the failure to provide it was because of his race. There did not "*appear*" to have been a promise of mediation and Mr

Kent left before any arrangements had been made. *"On the contemporaneous documentation*" the EJ concluded that allegation 38 had no reasonable prospect of success (paragraph 190).

30. Allegation 40 was pleaded as an allegation that it took over three months to investigate and respond to the Claimant's grievance appeal. The time-frame given in the pleading was 18 November to 5 February 2015. This period was shorter than three months so, said the EJ, that allegation had no reasonable prospect of success (paragraph 191).

The Claims in Relation to which the Claimant was Ordered to pay a Deposit

31. The EJ considered allegation 3 at paragraphs 21 to 28, paragraph 70, and at paragraphs 174 to 175. This was an allegation made on 27 June that two white colleagues were given offices of their own while the Claimant was made to share. The EJ acknowledged that this was a claim of direct discrimination. The EJ looked at "*the basic facts as they appear in the papers before me*" (paragraph 174). These were that the Claimant occupied his predecessor's office. The Claimant's predecessor had shared the office with his deputy. The Respondent moved the deputy out of the office but left the deputy's desk in the office and then decided to allocate the desk to a consultant. The EJ said, "*The office allocation and subsequent moves do not seem to have been done because of the claimant's race*" (paragraph 174).

32. In paragraph 175 the ET said that "*These factors lead me to the conclusion that allegation 3 … has little reasonable prospect of success*" and he ordered the Claimant to pay a deposit as a condition of pursuing it.

33. The EJ considered the Respondent's case about allegations 26, 33, and 39 to 47 inclusive in paragraphs 29 to 31; taking allegation 39 as an example in paragraphs 30 to 31.

A The EJ's reasoning about these allegations is at paragraphs 176 to 178. The EJ rejected the Respondent's contentions about these and did not strike them out (paragraph 176). The EJ observed cryptically that "*A submission that the claimant is misconceived in making these allegations does not come within rule 37*" (paragraph 177). In paragraph 178 the EJ said he had looked in detail at one of them (allegation 39), that was an allegation that not having a meeting with the Claimant was an act of direct discrimination. The Respondent explained why there was no meeting, with the exception of allegation 41, the Claimant:

> **"178. … seems to be complaining generally of the way in which he was treated by the respondent without reference to race. Looking at the complaints and the responses they seem to be allegations where the claimant believes he was treated differently from others but with nothing to suggest that the treatment was because of the protected characteristic of race. …"**

D The EJ held that allegations 26, 33, 39, 40, and 42 to 47 had "*little reasonable prospect of success*". He decided that the Claimant should pay a deposit as a condition of pursuing them.

34. As respects allegation 40, that conclusion is inconsistent with paragraph 1 of the Judgment, which records that allegation 40 was struck out, and with paragraph 191 which gives the ET's reasons for striking out allegation 40. I conclude that the EJ's inclusion of allegation 40 in the language of paragraphs 176 and 178 is a typographical error given the clear effect of paragraph 1 of the Judgment when read with paragraph 191 of the Reasons.

35. The EJ allowed allegation 49 to proceed (paragraph 179). His limited explanation for this was that it was a complaint of a religious/racial harassment (paragraph 178).

36. The EJ made a Deposit Order in relation to allegation 34. The EJ recognised that the Claimant had brought up the question of race for the first time at the meeting of 27 June 2014 and the meeting "*immediately closed*". It was 5.45pm and the Respondent wanted to take

advice "*given the nature of the allegation which does concern race, it seems to me that this is a claim that has little reasonable prospect of success*" (paragraph 185).

37. The EJ also made a Deposit Order in relation to allegation 37 concerning a meeting on 13 October 2014 (paragraphs 188 to 189). His reasons based on the documents (again apparently the Respondent's disputed notes) were that the Claimant did mention race but that "*in the meeting he does not appear to provide any more information. He does not appear to be prevented from giving the information but the meeting finishes*" (paragraph 188). Because the Claimant mentioned race at the time, the allegation should not be struck out but "*given that the claimant does not appear to have been actively prevented from speaking and he is not recorded as saying anything*" the claim had little reasonable prospect of success.

38. The EJ dealt last with the Claimant's dismissal. He said that the Claimant's dismissal had followed a period of absence. The Claimant had been absent for so long that he had gone down to half pay. The decision to dismiss was not dealt with by the Respondent's solicitor in his submissions to the ET. The dismissal letter was not in the bundle. The EJ said that he had no evidence on which he could conclude that this allegation had no reasonable prospect of success, but given the length of the Claimant's absence he concluded it had little reasonable prospect of success and should be the subject of a Deposit Order (paragraph 193).

Discussion

39. In order to succeed in his claims the Claimant had to show that because of his race the Respondent treated him less favourably than it did or would have treated others. In his particulars, in a table, he set out 47 examples of such treatment and gave an actual, or described

a hypothetical, comparator. He also complained about his dismissal, as I have already mentioned.

40. The Claimant's claim depended on his establishing the primary facts of his allegations first and, second, persuading the ET to draw an inference that the treatment disclosed by the primary facts which he alleged was because of his race. An undisputed document could, I have no doubt, provide evidence wholly inconsistent with, or contradicting, a primary factual allegation made by a Claimant, so, for example, if a Claimant sought to establish that he was in Bristol on a particular date and not in Hull and there were several documents signed by him or photographs of him in Hull on that particular date, contemporaneous documents could show that the primary fact which he sought to establish was not capable of being established. It is considerably less easy to see, however, how a document could contradict the inference which the Claimant seeks to persuade an ET to draw when he makes an allegation of race discrimination.

41. Much reliance was placed by Mr Gorton in his submissions on the fact that the Respondent's internal investigations had concluded that there was no substance in the Claimant's various allegations. Firstly, from my limited review of those documents, it is apparent that in some cases the Respondent's conclusions, while not upholding the Claimant's grievances, were conclusions from which an inference could have been drawn by a Tribunal but, secondly and more significantly, it seems to me that if Mr Gorton's submission is right there would be very many claims of race discrimination which would not survive a strike-out application where a Respondent employer had investigated, and had not upheld, the Claimant's allegations.

42. The Respondent, it seems to me, made three broad submissions to the ET:

(i) Previous ETs had dismissed the Claimant's claims. The Claimant's evidence had been found to be unsatisfactory, he had exaggerated, and his claims had been found to have no reasonable prospect of success. The ET should consider his credibility and that material assisted in that assessment.

(ii) Second, the fact that the Claimant had not, at the time when his complaints arose or at the time when he first made his complaints, described them as complaints of discrimination was significant if not decisive. It meant that the contemporaneous documents "*showed otherwise*" (see paragraph 71).

(iii) An allegation of discrimination should be raised as such at the time (paragraph 146).

43. The Respondent's submissions ran together the questions whether contemporaneous documents showed that the Claimant had contemporaneously described his complaints as race complaints with the question whether the contemporaneous documents showed that complaints were not well-founded (paragraph 71). They also implied that the ET was able to make a decision about the merits of the Claimant's complaints by reference to the documents alone.

44. The Respondent's submissions also suggested that if the contemporaneous documents did not support an allegation, it followed that the documents, per **Ezsias**, were "*totally and inexplicably inconsistent with the undisputed contemporaneous documentation*" and therefore showed that the allegation had no reasonable prospect of success. That, in my judgment, is a non sequitur.

45. The fact that the Claimant did not complain at the time that his treatment was based on his race cannot disprove a discrimination allegation, or show that it has no reasonable, or little reasonable, prospect of success. At best, it is only relevant to weight. It might suggest that if the Claimant did not ascribe the treatment to his race when it happened, the treatment is less likely to have been caused by his race. Depending on the facts, this might not provide any more than weak support for the Respondent's defence because there can be many reasons - ranging from embarrassment, to fear of victimisation - why at the time an employee may be reluctant to make such a complaint. Further, in some cases it may not be until quite late in a sequence of events that an employee puts two and two together and comes to the conclusion that the explanations which his employer has been giving him for his adverse treatment do not stack up, and that, at that stage, he infers, for the first time, that he has been the subject of discrimination.

46. Mr Gorton submitted that the ET engaged in a highly fact-specific analysis of the claims and the documents and on the basis of that highly fact-specific analysis was entitled to conclude, as the case may be, in relation to the allegations, that either, they had no reasonable prospect of success, or little reasonable prospect of success. I asked Mr Gorton in the course of his submissions about the ET's frequent use of phrases such as "There is nothing to connect this with race" or "There is nothing to suggest that this was related to race". I asked him what material in the documents would be capable of suggesting the treatment was connected with or related to race. It seemed to me, with respect to Mr Gorton, that he avoided answering that question. His submission instead was that merely to make an allegation of discrimination was not enough. In deciding whether or not to strike out or make a Deposit Order, the ET was entitled to look at all the documents and was entitled to come to a conclusion that it could not see that there was any connection between the treatment and the Claimant's race. Mr Gorton

submitted that the EJ was entitled to take into account when the Claimant raised the race allegations and that the EJ was also entitled to take into account, when making his fact-specific assessment, the explanations which are advanced for the Claimant's treatment which could be deduced from the documents. Mr Gorton submitted that the EJ stated the test in **Ezsias** correctly and that he did not misapply it to the facts.

47. He relied in particular on paragraphs 166, 169, 171 and 172 as being the key findings of the ET in support of the making of the Deposit Orders. He referred in paragraph 166 to the Claimant's apparent misunderstanding of the legal position, he said that was not decisive but relevant; in paragraph 169 to the fact there had been no contemporaneous complaints of discrimination; a similar point arose from paragraph 171; Mr Gorton referred to paragraph 172 where the ET referred to the availability of a specific procedure in which to raise such allegations, a course that was not adopted by the Claimant at the time who only later on "raised the flag". All of these were matters, Mr Gorton submitted, which the ET was entitled to take account of in its broad assessment of the merits in relation to the making of a Deposit Order.

48. Overall he submitted that what the decision showed was an intense engagement with the facts by the ET. He accepted that parts of grievance outcome of 31 October 2014 were critical of the Respondent - for example, of Mr Kent and contained the Respondent's assessment of what had happened and, in particular, whether an allegation of bullying was made out or not. He submitted that there was a burden on the Claimant to provide evidence to the ET at the strike-out stage, so in other words before trial, and before there had been any Order for exchange of witness statements, to show that his treatment was on the grounds of race, and if the Claimant did not come up with that evidence the ET was entitled to decide the strike-out and deposit applications on the basis of the Respondent's documents. That assessment, he

submitted, was a primary assessment of fact and short of perversity given the correct direction in law in relation to **Ezsias**; it was not open to this Tribunal to interfere.

49. In my judgment the ET has adopted the Respondent's erroneous analysis. There are five broad problems with the ET's approach. I will state the first four now. I refer to the fifth in paragraph 56 below.

(i) First, the ET recorded in paragraphs 23, 33, 95, 98, and 183 that the Claimant disputed the accuracy of the Respondent's notes of meetings. It determined that aspect of the dispute by accepting the account in the Respondent's notes, for example, in relation to allegation 34, even though at that stage it had not heard evidence from anyone.

(ii) Second, it decided that some claims had no or little reasonable prospect of success by accepting the Respondent's explanations for its actions as set out in its documents without having tested those explanations in any way.

(iii) Third, it repeatedly said that the documents did not seem to show that the treatment given to the Claimant was connected with his race or that there was nothing to relate it to his race. For the reasons that I have already explained, the cases in which documents will suggest or show that treatment is based on race will be very rare indeed.

(iv) Fourth, all that the contemporaneous documents could show without a hearing was that (1) the Claimant had not with, I think, two exceptions described his complaints as complaints of race discrimination when he first made them to the Respondent, and (2) the Respondent had put forward apparently plausible explanations on paper for the treatment which was the subject-matter of the Claimant's complaints of race discrimination.

A

50. In my judgment the ET erred in law in adopting the Respondent's flawed analysis in its approach to the strike-out application. This is starkly obvious in two passages.

B

51. The first is in paragraph 171, which Mr Sheppard rightly refers to in his skeleton argument. The EJ said in paragraph 171 that the contemporaneous documentation was "*totally inconsistent*" with the Claimant's grievances being "*complaints or allegations of discrimination on the basis of race*". This is to confuse the content of an allegation with its merits. It does not

C

follow from the fact that an allegation is not, when a grievance is first raised, labelled as an allegation of race discrimination as it cannot be the basis for (a) an allegation of discrimination on the grounds of race or (b) that it has no reasonable or little reasonable prospect of success.

D

52. It is true that the reasoning in paragraph 171 is followed by paragraph 172 which might be said distinctly to address the merits of the Claimant's claims. In that paragraph, the EJ said

E

that in his "*judgment*", the Claimant had formed the view some time later that he had been treated less favourably than his white colleagues and that that treatment was discrimination based on race. The EJ then said, "*There does not appear to me to be anything to connect the matters complained of with the protected characteristic of race*". He then concluded

F

"*therefore*", in paragraph 173, that allegations 1, 2, 4 to 9, and 11 to 25 had no reasonable prospect of success. That was a judgment based merely on reading documents and on listening to submissions. It has the flaws that I have already described. Further, it is not at all clear

G

what, on the documents, could have "*connected the matters complained of with … race*" - a formula that recurs with variations in the EJ's reasoning, other than a contemporaneous allegation that the treatment was based on race. As I have already said, very rarely will documents show a connection with race. It is very unlikely that a Respondent or an employee

H

of the Respondent will say in a document "I took the Claimant's race into account when I did X".

53. I do not consider that it was open to the EJ to reach the conclusions he did on the basis of the materials which he had. I accept Mr Sheppard's submission that the EJ impermissibly conducted a mini-trial on inadequate material.

54. The second passage is paragraphs 180 to 183. The ET said there that neither the Respondent's nor the Claimant's notes of a grievance meeting refer to race and it follows that, "*these are further … allegations … that made no reference to race … The respondent's response … appears to be … reasonable*" (paragraph 181), "*the contemporaneous documentation relating to allegations 27-32 satisfies me that the allegations have no reasonable prospect of success*" (paragraph 182). The ET again there purported to resolve all the disputes that inhered in this claim on the papers.

55. ETs have been discouraged from striking out race claims. One of the reasons for this is the obvious one that there will rarely be direct evidence of discrimination. Discrimination in many cases can only be inferred from the evidence; that is, all the evidence tested in cross-examination. The key dispute on the pleadings in this case was whether the Respondent had done what it did because of the Claimant's race. The ET could not resolve that dispute without hearing evidence, unless the Claimant's allegations were clearly frivolous or vexatious or they had no reasonable prospects of success. In my judgment, the ET could not conclude that the Claimant's complaints had no reasonable or little prospect of success because he did not complain when he first raised his various grievances that the Respondent had treated him as it had because of his race. At best, that could only potentially be relevant to weight, if and when

A the ET considered all the evidence in the round. Nor was the EJ in a position to conclude on the basis of the papers alone that there was no merit in the Claimant's complaints of discrimination because the Respondent's paper explanations appeared plausible.

B

56. The fifth broad problem with the ET's analysis is that he did not clearly explain by what criterion he decided that some claims had no reasonable prospect of success but some had a reasonable prospect of success. I deduce from the claims that he did allow through (claims 10 C and 41) that the distinction between them and the other claims was that the Claimant raised the issue of race at the time and possibly that there were no contemporaneous documents giving the Respondent's explanation. This reinforces my view that the EJ treated the absence of D contemporaneous references to race and/or the presence of explanations from the Respondent in the documents as decisive in relation both to strike-out and to deposit.

57. E He allowed allegation 10 without making a Deposit Order. He said:

> **"192. … In the view of Mr Williams this was the second allegation that related to race in the 47. It seems to me that as the allegation is related to race and in the absence of the complaint from the bundle I have no basis upon which to reach any conclusion other than to allow the allegation to proceed to a final hearing."**

F

58. Although the EJ directed himself correctly about the test for striking out a claim, he did not apply the law correctly to the facts. The central fact sought to be established by the Claimant was that his treatment by the Respondent in the various ways set out in the particulars G was because of his race. That fact was not, in any way, "totally and inexplicably inconsistent with the undisputed, contemporaneous documentation". This was not a case in which the contemporaneous documents could disprove an allegation of discrimination. All the documents could do was (1) to show that, with two exceptions, the Claimant had not complained when he H raised his various grievances that those grievances related to discrimination on the grounds of

race, and (2) not to provide support for the Claimant's race claims, claims which are intrinsically rarely proved or disproved by direct evidence.

Conclusions

59. The reasoning for striking out allegations 1, 2, 4 to 9, and 11 to 25 is, as I have already said, in paragraphs 168 to 173. I consider that this reasoning is wrong in law for the reasons I have already given. I therefore allow the appeal as respects to the striking out of allegations 1, 2, 4 to 9, and 11 to 25.

60. The reasoning for striking out allegations 27 to 32 is in paragraphs 180 to 181. I have already considered that reasoning above. I consider that this reasoning is also wrong in law for the reasons I have given. I therefore allow the appeal as respects to the striking out of allegations 27 to 32.

61. The EJ explained the striking out of allegation 35 in paragraphs 183 to 184. The contemporaneous documents (the Respondent's notes, which, the ET recognised, were disputed) did not support the Claimant's allegation, it was said, and in any event, there was nothing to "*relate this allegation to race*". I accept Mr Sheppard's submission that the ET erred in law by striking out this allegation in part because it was not supported by a disputed note. That dispute could only be resolved at trial. I also consider that the EJ erred in law in striking out this allegation for the second reason Mr Sheppard gave; whether the Claimant was denied a break because of his race was a further disputed issue which could only be resolved at trial and could not be resolved on the documents.

62. The EJ struck out allegation 36 because the disputed notes did not show that the Claimant had raised it at a grievance on 8 August. The EJ again erred in law in concluding that that meant that this allegation had no reasonable prospects of success. I allow the appeal against the striking out of allegation 36.

63. The final allegation which the EJ struck out is allegation 40. I consider that the EJ was entitled to strike out that allegation for the reasons which he gave. On its face, the allegation was internally contradictory. Mr Sheppard, having taken instructions, told me that there was a slip in the pleading. The word "nearly" should have been used instead of the word "over". That may or may not be so, but any application to amend the claim would have to be made to the ET. I have no power to consider it and it does not affect my decision that the EJ was entitled to strike out allegation 40.

64. The next question is whether the ET erred in law in ordering the Claimant to pay a deposit as a condition of proceeding with allegations 3, 26, 33, 34, 37, 39, 42, 43, 44, 45, 46 and 47 and the allegation relating to his dismissal. In other words, did the EJ err in law in holding these allegations had little reasonable prospect of success?

65. I accept Mr Sheppard's submission that the EJ's words in paragraph 174 - "*The office allocation and the subsequent moves do not seem to have been done because of the claimant's race*" - show again that the EJ purported to conduct a mini-trial on the papers. He realised that he could not make a firm finding and so used the word "*seem*". I do not consider that a paper review leading to such a conclusion is an adequate foundation for a decision that the claim has little reasonable prospect of success. I also allow the appeal in respect of allegation 3.

66. The EJ considered allegations 26, 33 and 39 to 47 together. The ET only considered one allegation 39 - about a failure to have a wellbeing meeting with the Claimant - in any detail. The EJ took the complaints and the response "*at face value*". Apart from allegation 41, these were all allegations of treatment at work "*without reference to race. Looking at the complaints and the responses [these were allegations of unfavourable treatment] but with nothing to suggest that the treatment was because of … race*". In the EJ's views, these allegations had "*little reasonable prospect of success*" (paragraph 178).

67. It is not clear on what basis the ET distinguished these complaints from the complaints which the EJ held had no reasonable prospect of success. In any event I do not consider that the EJ was entitled to reach this view as a result of a paper exercise. The same reasoning applies to the EJ's approach to allegation 37, as to which the EJ conducted a similar paper trial based on inferences his drew from a disputed note. That exercise did not entitle the EJ to conclude that allegation 37 had little prospect of success.

68. The EJ's conclusion that allegation 34 had little reasonable prospect of success (paragraph 185) is unexplained. The EJ said that the note showed that the meeting closed as soon as the Claimant raised the question of race. The EJ said it was 5.45pm and the Respondent said it wanted to take advice "*in the circumstances and given the nature of the allegation which does concern race, it seems to me that this is a claim that has little reasonable prospect of success*" (paragraph 185). In my judgment, this conclusion is not supported by, and indeed is contradicted by, the material in paragraph 185, as the note did not disprove the Claimant's claim, and provided some support for it. Whether the Respondent's explanation was right was a matter for trial, not for evaluation on the papers.

69. The EJ's reason for allowing claim 37 was because the Claimant referred to race at the time (paragraph 189). The EJ made a judgment however that the claim had little prospect of success from what "*appears*" from the disputed notes. In my judgment, there is the same flaw in the EJ's reasoning in relation to allegation 37.

70. The EJ's reasoning in relation to the dismissal is in paragraph 193. The EJ did not strike out this allegation because there was no evidence about it but concluded it had little reasonable prospect of success because the Claimant had been absent for so long that he was down to half pay. In my judgment, this stands or falls with the other allegations. There is unlawful discrimination if race plays any part in a decision. Just because the Claimant was absent for a long time, it does not follow, on the documents, that race could have played no part in the decision. In my judgment the merits should be considered in the round with the other allegations, and the reasoning given by the EJ for ordering a deposit in relation to this is insufficient to support the conclusion that this allegation had little reasonable prospect of success. I therefore allow the appeal against the Deposit Order in relation to the dismissal allegation.

71. Overall I allow the appeal as a whole except in relation to allegation 40, which I conclude the ET was entitled, and right, to strike out as having no reasonable prospect of success.

Disposal

72. I heard submissions both from Mr Gorton and from Mr Sheppard on the way in which I should deal with the claim if I were to allow the appeal to any extent. Mr Gorton argued that if I decided that any of the claims had been wrongly struck out, the Respondent's application for

a Deposit Order, which has not been the subject of any adjudication by the ET, should be remitted to the same ET. He did not suggest that if I were against him in relation to the Deposit Orders, any of those claims should be remitted to the ET if the basis on which I was against him was that no reasonable ET could have held that a Deposit Order should be ordered on these facts.

73. With the exception of allegation 40, I do not consider that on the materials which the ET had it was open to the ET either to strike out the Claimant's claims or to order deposits for the reasons I have already given. I do not consider that it would be open to a properly instructed ET on these facts to order deposits in respect of the wrongly struck out claims. It follows that there is no basis for remitting any of the claims to the ET for it to consider them afresh.