

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 9 March 2018

**Before**

**THE HONOURABLE MR JUSTICE CHOUDHURY**

**(SITTING ALONE)**

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MISS K J ROY

APPELLANT

STEPHENSON HARWOOD SERVICES LIMITED

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## APPEARANCES

For the Appellant

No appearance or representation by  
or on behalf of the Appellant

For the Respondent

MS REHANA AZIB  
(of Counsel)  
Instructed by:  
Stephenson Harwood LLP  
1 Finsbury Circus  
London  
EC2M 7SH

## **SUMMARY**

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

The Tribunal erred in not taking the Claimant's case at its highest for the purposes of determining whether to strike it out. There were clear disputes of fact which went to key issues relating to the period when the alleged harassment commenced, the date on which the line manager was allegedly informed about the harassment and, consequently, when the alleged protected act was done. The decision to strike out would therefore be set aside. However, the Tribunal's alternative conclusion that the Claimant's claims had little reasonable prospect of success, which was not the subject of the appeal, was correct. The matter would be remitted to the Tribunal to make the appropriate deposit orders having regard to the Claimant's means.

**A**      **THE HONOURABLE MR JUSTICE CHOUDHURY**

**Application for Postponement**

**B**      1.      The Claimant does not appear today. She had previously sought an adjournment of the hearing on the basis that there was outstanding disclosure in the matter, and she had appealed against an earlier ruling in the Court of Appeal. That adjournment request is refused.

**C**      2.      She had also requested permission to rely on the bundle she used for the Rule 3(10) Hearing. She was not content with the bundle prepared by the Respondent for today's hearing. That application was granted and the bundle for that hearing is before the Court today.

**D**      3.      Her final application, made earlier this week or last week, was for further disclosure by the Respondent. That was refused. Accordingly, the matter remains listed for today, as the Claimant was well aware.

**E**      4.      She had indicated in correspondence with the Employment Appeal Tribunal ("EAT") earlier this week that she would not be attending, as she felt she would not get a fair hearing given her outstanding concerns about disclosure and the bundle prepared by the Respondent, which she considers to be incomplete. She does not consider having the Rule 3(10) bundle solves the problem, as it is based on inadequate disclosure. She has reiterated her application for postponement. She complains, amongst other things, that in the circumstances, she is unable to prepare properly for the hearing and needs to seek legal advice.

**F**      5.      I allowed the Claimant some additional time this morning until 10.50am to see if she changed her mind about non-attendance. No medical or other evidence has been adduced to

**G**

**H**

**A** explain non-attendance. She has not contacted the EAT this morning. Her failure to attend  
appears to be solely because of the matters set out already, and that it is a conscious choice on  
her part that the matter be dealt with after the Court of Appeal's determination and/or only after  
**B** there has been disclosure and the preparation of the bundle to her satisfaction.

**C** 6. As to the application for an adjournment, this is opposed by Ms Azib. She submits that  
this is indicative of a pattern of behaviour first exhibited at the Preliminary Hearing. She  
submits that it would be contrary to the interests of justice for the matter to be delayed further,  
and the Respondent has incurred costs. If the matter were adjourned, the subsequent delay  
would result, if her appeal were to succeed, in dealing with allegations which would date back  
**D** several years. She also submits that the Court has Ms Roy's submissions and documents and  
those can be fairly considered today.

**E** 7. I refuse the Claimant's application for an adjournment. No proper basis has been put  
forward for her non-attendance today. The Claimant's application for an adjournment has been  
refused once already. She is not incapacitated in any way from attending, as far as the Court is  
aware, and her reasons, as expressed in her emails, are entirely to do with her dissatisfaction  
**F** with what she considers to be inadequate disclosure and incomplete documentation. However,  
those matters have been ruled on already. Her remedy would be to appeal and not simply to  
refuse to engage in the ongoing proceedings which she has initiated.

**G** 8. The next question for me is whether this appeal should proceed in her absence. I  
unhesitatingly conclude that it should. The Claimant, as I have said, has not provided a good  
reason for non-attendance. The Respondent is here and ready to proceed and has incurred costs  
**H** in getting to this stage.

A 9. I have before me a skeleton argument submitted by the Claimant in support of her  
B appeal. Whilst this appears to be the same skeleton argument submitted for the Rule 3(10)  
C Hearing, it was clearly the Claimant's choice to submit that as her skeleton argument for this  
D substantive hearing too. It was clearly her intention that the Court should have regard to that  
E skeleton argument for this appeal. The skeleton argument is detailed, and although it covers  
F other grounds that were before the Judge on the Rule 3(10) Hearing, there is a considerable  
G amount of material relating to the specific ground of appeal before me today.

10. To the extent that there are other matters which the Claimant would have wished to  
submit, or specific items to which she would wish to draw my attention, she has consciously  
chosen not to use her opportunity to do so by her non-attendance. Accordingly, I consider that,  
in all the circumstances of this case, it is appropriate to proceed with the appeal,  
notwithstanding the Claimant's absence.

E **The Appeal**

11. The Claimant appeals against the striking out of her claims of discrimination and  
harassment on the grounds of sex and victimisation. The claims were struck out by the London  
(Central) Employment Tribunal ("ET") on the grounds that they have no reasonable prospect of  
success. Permission to appeal was granted by His Honour Judge Richardson following a Rule  
3(10) Hearing, at which a wide range of other grounds of appeal were dismissed.

G *The Factual Background*

12. The litigation in this case, which has now been ongoing for well over three years, arises  
out of a period of employment that lasted only three months. The Claimant is a paralegal. By a  
letter dated 15 August 2014, the Respondent firm offered her a position in its Marine Insurance

**A** Department. She was employed from 18 August 2014, on a fixed-term contract of three months' duration with an expiry date of 14 November 2014. Her line manager, it is accepted, was Mr Simon Moore, a Partner in the Marine Insurance Department.

**B** 13. After a period of induction and training, the Claimant commenced her work under the fixed-term contract on 1 September 2014. The day after starting work, the Claimant and other paralegals, including a male paralegal, Mr Victor Barrichina, had a disagreement about bundles  
**C** they were preparing for a case. The Claimant complained about that to Mr Moore.

**D** 14. The Claimant complains that, thereafter, Mr Barrichina has subjected her to “*a series of abuse, harassment, provocation, insults*”. Specifically, he called her “*stúpida*” (meaning stupid), “*puta de mierda*” (meaning a shitty prostitute), “*pedazo de mierda*” (meaning a piece of shit), “*asquerosa*” (meaning a disgusting person), “*plaga*” (meaning a plague), “*vomito*” (meaning a vomit), and whenever he could not insult her he would “*give me a dirty look as if he was having nausea*”. He once also took an elastic band, pretended it was a gun and that he was shooting her five times towards her head, making the sounds of a shot going off the gun (paragraph 50).  
**E**

**F** 15. There appears to be a dispute as to when these matters, if any of them, were reported to Mr Moore. Mr Moore's account is that on that day, 2 September, the Claimant merely told him that her colleagues were trying to sabotage the bundles. He checked the bundles and told her that they were in good order. His account is that he was not told on that occasion of any inappropriate language.  
**G**

**H**

**A** 16. On 22 September 2014, the Claimant made a verbal complaint to Mr Moore about Mr Barrichina's conduct. Mr Moore's account is that, on that occasion, the Claimant referred to the word "*stúpida*" but not the other words. He spoke to the two male paralegals and asked  
**B** Human Resources to view the CCTV footage, as the Claimant had requested. He concluded that this was simply a disagreement between the paralegals. Human Resources decided that the way forward would be to ensure that the Claimant did not have to work for or directly with Mr Barrichina.  
**C**

17. The Claimant's account, although difficult to discern, is quite different. Her grounds of complaint, it has to be said, are unstructured, repetitive and not in chronological order.  
**D** Furthermore, where specific allegations appear to be made, these are often not logically dated or in sequence. The Tribunal, no doubt doing the best it could, described the Claimant's account on 22 September matter as follows:

**E** "53. The Claimant's account, while she does not give dates in her detailed grounds of claim, of the sequence of events, suggests that the remarks "puta de mierda", "asquerosa", and "stúpida", were made *after* Simon Moore's initial investigation. She then (paragraph 118), said she emailed Simon Moore with a subject line "Sofiane" and identified this as the email of 5 November 2014 from the Claimant to Simon Moore. This tends to support Simon Moore's account of no report of foul remarks until nearly three weeks after the first complaint."

**F** 18. The paragraph 118 referred to by the Tribunal in that passage is from the Claimant's claim form. It perhaps makes slightly more sense to refer to both paragraphs 117 and 118 of the claim form:

**G** "117. During Lunch time Sofiane met with VB after I mentioned his mistakes to him, I saw them closed in VB's room, after that, during the afternoon, VB came to Sofiane's desk which is opposite me and insulted me again, looked at me and called me again a "puta de mierda" "asquerosa" "stúpida" and when I went to the kitchen he followed me there and said out of no where "preferizco los perros a las mujeres" meaning I prefer dogs over women.

**H** 118. I emailed SM on this as per exhibit 10 which email subject reads Sofiane. I also emailed Andrea and asked her if should could use me as much as possible because I wanted to avoid them and eventually I wanted to be transferred to Comm Lit because I felt let down, SM and HR VS were failing me."



**A** The “VS” there referred to is Mr Vincenzo Siragusa of the Respondent’s Human Resources Department.

**B** 19. As stated by the Tribunal, the email identified as exhibit 10 in that passage was an email of 5 November 2014 from the Claimant to Mr Moore. The Tribunal considered that this supported the account given by Mr Moore that the first occasion on which he had been told about any foul remarks was considerably later than 22 September.

**C** 20. The Tribunal also noted that, towards the end of October, there seemed to have been some difficulty between the Claimant and an associate, Mr Gosden. The Tribunal notes that the **D** Claimant had emailed Mr Gosden on 14 October 2014, asking for more briefing on a case where she was dealing with disclosure. The Tribunal describes the tone of that email as “*a little odd*” and suggesting aggression (paragraph 55).

**E** 21. On 22 October, the Claimant emailed Mr Sean Gibbons, another Partner, complaining that Mr Gosden had been unhelpful in relation to the disclosure task. The Tribunal correctly notes that there is nothing in that email that suggests any complaint connected to any protected **F** characteristic.

**G** 22. On around 3 or 4 November 2014, Mr Moore reviewed the current and ongoing needs of the Department for paralegal services. By an email dated 4 November 2014, sent to the Partners of the Department, Mr Moore set out his proposals for the paralegals as follows:

**H** “Dear All

Further to my meetings with Mike and Vincenzo I set out below my proposals for the MIT paralegals.

- Teodora Nan is working for Mary Dodwell on a specific case and this is working out well so my plan is not to interfere.

A

- Katia Roy's contract expires on 14 November 2014 and I propose that we do not renew it. Whilst Katia's translation skills are first rate her paralegal work is not of the standard required and whilst well-meaning she does not always follow instructions.

- Victor Barrachina's contract is due to expire in January 2015, however, I propose that we bring it to an end at the end of this month (or as soon as practical thereafter). The reason for proposing to bring it to an end sooner is that my experience of the B Atlantic trial has shown me that I cannot rely on his work and in the circumstances I cannot keep him busy.

B

- Sofiane Cherchall's contract is due to expire shortly but I propose that we extend it so that he can assist Ingolf on a large disclosure task involving Spanish language documents.

Please can you let me know by [close of business] tomorrow if you have any concerns/objections otherwise I will implement this."

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23. The Claimant's email of 5 November, to which she referred in paragraph 118 of her grounds of complaint, contains many complaints about Sofiane and his document review. The Tribunal correctly notes that none of these complaints refer to any matter which could be said to be discriminatory. The email continues about two-thirds of the way through as follows:

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"On a different note, I still have to put up with Victor every day, he carry on insulting me. Specifically he comes to the printer behind me and says unspeakable things. Not mention other things [sic]."

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24. Mr Moore forwarded this email from the Claimant to Human Resources and other Partners in the firm. He says as follows:

"Please see below from Katia. Ingolf - you need to be aware because it concerns your case.

By way of background there is longstanding tension between Victor/Sofiane and Katia. There have been past meetings of them and HR. They calmed down following the same but the trouble is bubbling up again. It is hard to know the cause and who is to blame.

F

Katia

My intention prior to receiving Katia's email was to tell Katia tomorrow that we will not be extending her contract. She then finishes very soon which will resolve the conflict between her, Victor and Sofiane. My intention has not changed.

Victor

G

In terms of Victor my plan had been to have Victor leave at the end of November. Due to feedback from MIT partners he will now not leave before his contract expires in early January. I have explained we will need a very significant improvement in his performance if we are to consider extending it beyond this date.

Sofiane

H

Katia's comments are concerning but he is not a trouble maker (just caught between two warring parties). My own view formed on the B Atlantic case is that he is not perfect but he is the brightest of the three which is why I recommended him to Ingolf and why I intend to offer him a 3 month contract (terminable at any time on two week's notice) - which is cheaper than paying via the agents.

A

If anyone has any concerns please can they speak with me today.”

25. Mr Moore did ask the Claimant to come and speak to him about the contents of her email as well.

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26. Mr Moore did tell Mr Siragusa in HR that the Claimant’s concerns should be investigated. He referred to the fact that “*We [meaning presumably the firm] do not tolerate bullying by anyone and I do not think we should overlook the allegations simply because Katia is due to leave us soon*”.

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27. On 6 November, the Claimant was told that her contract was coming to an end and was not going to be renewed. The Claimant then drafted a resignation letter. It is not clear whether this resignation letter was ever handed in. The Claimant’s last working day was 7 November because she had elected to take her remaining week under her three-month contract as a holiday.

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28. Also on 7 November, Mr Moore and Mr Siragusa interviewed Sofiane and Victor about the allegations raised in the Claimant’s email. Both denied hearing or saying anything inappropriate. The Claimant was also briefly spoken to on that day.

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29. On 24 November 2014, the Claimant wrote a 13-page letter to the Human Resources Department. The Claimant spends almost three pages of that letter describing the bundles incident in some detail. Halfway down the third page, she refers to the discussion with Mr Moore. This appears to be a reference to the discussion on 2 September, referred to above. The Claimant says that on the “*same day*” Mr Barrichina kept pestering her to finish her task. She refers to being given a dirty look. In the final paragraph on the third page, the Claimant says

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UKEAT/0145/17/JOJ

A that “*What followed was a series of abuse, harassment, provocation, insults, ...*”. This, so far as it can be discerned from this account, clearly indicates the alleged harassment involving abusive language commenced after the discussion with Mr Moore on 2 September.

B 30. On page 5 of her letter, the Claimant mentions that Mr Barrichina called her “*estupida*”. This allegation is not dated. However, she refers a few lines down to the discussion with Mr Moore, apparently the next day, where she told him of the insults, provocation, harassments, C and everything going on “*since the bundle episode*”. This would appear, therefore, to be reference to the discussion on 22 September. The Claimant’s account in this contemporaneous document appears to confirm that the behaviour complained of commenced after 2 September.

D 31. At page 12 there is the first direct reference to a claim of discrimination:

E “When I look at it all, I realize that there were 4 paralegals in that department including Sofiane the translator now doing Paralegal work, I was the only woman, the three of them are gays, and so is SM the partner and HR Vincenzo. I suspect this contributed to SM poor approach to the issues going on since I joined the Department as well as his decision not to renew me, he likes working with men. The Paralegal before Victor was also a man. There is a woman but was recruited by Mary Dodwell.”

#### *The Claimant’s Claims*

F 32. The Claimant lodged two claims in the Tribunal. The first claim was lodged on 23 February 2015. It contained grounds of complaint which, as I have already mentioned, are difficult to follow. The Claimant brought claims of discrimination on the grounds of gender G and sexual orientation. Her allegation was that discrimination led to the non-renewal of her fixed-term contract.

H 33. Having read through the claim, I agree with the Tribunal’s summary of the four main claims of discrimination being made by the Claimant as set out in paragraph 77 of the Reasons:

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“77. The discriminatory treatment alleged by the Claimant concerns (1) the disagreement between the Claimant and Victor Barrichina on 2 September 2014, (2) her subsequent verbal complaint to Simon Moore on 22 September 2014, (3) the non-renewal of her fixed term contract of employment, and (4) the complaint to Simon Moore about Victor Barrichina on 6 November after being told about termination of her fixed term [contract]. The Respondent argues that only the non-renewal of the fixed term contract is in time. I deal with the time point later in this decision.”

B

34. It would appear that the harassment complaint being made in respect of Mr Barrichina’s conduct is subsumed within points 1 and 2 of that summary. Insofar as there is a victimisation complaint, it would appear that the protected acts relied upon are the raising of her complaint on 22 September 2014 and 5 November 2014.

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35. The second complaint to the Tribunal was lodged on 14 August 2015. This contains the same details of complaint as submitted with the first complaint, the only difference being that the Claimant alleged age and race discrimination, and also arrears of pay. Those claims were dismissed and do not form the subject of this appeal.

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*The Tribunal’s Decision*

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36. A Preliminary Hearing was listed before the Tribunal on 21 and 22 December 2015. The issue to be determined was whether the Claimant’s claim should be struck out. The Claimant chose not to attend the hearing and applied for an adjournment. The application for an adjournment was refused and the Judge proceeded to hear the application.

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37. The Judge (Employment Judge Goodman) considered voluminous documentation, summarised in the Respondent’s skeleton argument as comprising the pleadings and orders made by the Tribunal, the Respondent’s core bundle prepared for the hearing, the Claimant’s lever arch file of 253 pages, the witness statement of Mr Moore, and the Respondent’s skeleton

H

**A** argument. The Tribunal reserved its Judgment and full Written Reasons were sent to the parties on 29 January 2016.

**B** 38. Having summarised the facts, the Tribunal then summarised the relevant law in relation to striking out and proceeded to consider the Claimant’s claims of discrimination on the grounds of sex and sexual orientation. Its conclusions were set out in paragraphs 77 to 90 of the Reasons. It is helpful to set these out in full:

**C** “77. The discriminatory treatment alleged by the Claimant concerns (1) the disagreement between the Claimant and Victor Barrichina on 2 September 2014, (2) her subsequent verbal complaint to Simon Moore on 22 September 2014, (3) the non-renewal of her fixed term contract of employment, and (4) the complaint to Simon Moore about Victor Barrichina on 6 November after being told about termination of her fixed term [contract]. The Respondent argues that only the non-renewal of the fixed term contract is in time. I deal with the time point later in this decision.

**D** 78. In respect of the disputes on 2 and 22 September, no complaint of sexual orientation was made at the time.

79. On 22 September the Claimant referred to the word “stupida”, not to being “puta de mierda”, which seems to be the only sex-specific abuse alleged. On the Claimant’s own narrative, that sex-specific remark did not occur until after she had made the report to Simon Moore, and it appears it was not complained of until 5 November.

**E** 80. The Respondent’s decision not to renew the Claimant’s contract seems to have been by Simon Moore at the latest on 4 November, when he emailed his recommendations to his colleagues. That email shows that he proposed terminating the Claimant and Victor Barrichina’s contracts, a man and a woman, while keeping two, a man and a woman. He provided the reasons for his decisions.

81. As of 4 November he was not aware of any matter relating to sex or sexual orientation, and the complaint about other paralegals, was limited to the use of the word “stupida”. Other material, such as the Claimant’s email to Simon Gibbons about Joe Gosden, shows other interpersonal difficulties, but unrelated to protected characteristics.

**F** 82. In the case of non-renewal, at its highest the Claimant says no more than there was a “possibility” of renewal of her fixed term contract; she has never said she was told that it would be renewed.

83. In the light of the email of 4 November there is no reasonable prospect of the Claimant establishing that non-renewal was an act of victimisation for having complained of another’s discriminatory conduct (a protected act).

**G** 84. As for the Claimant’s prospects of establishing that there was less favourable treatment because of sex or sexual orientation, the burden of proof is on the Claimant to establish facts from which a Tribunal could conclude, in the absence of explanation from the Respondent, that discrimination occurred.

85. The Claimant has not advanced any facts from which the Tribunal could conclude that the decision to renew her contract was based on sex. Another female paralegal had her contract renewed. Mr Moore recommended that Mr Barrichina’s contract was terminated, ahead of the expiry of the fixed term, though he was overruled by his partners on this.

**H** 86. As to sexual orientation, this is, it appears, inaccurate insofar as Simon Moore is concerned, and in any event was not mentioned by the claimant until 3 weeks later, when she wrote the 24 November letter. It appears fanciful.

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87. The Claimant's own emails from the end of October indicate that there was a lack of work, in connection with the B-Atlantic case. This supports there being some reduction (by non renewal of fixed term contracts) in the paralegal staff. Although she was not specifically assigned to it, the case would put pressure on the availability of paralegals for other tasks, and its conclusion would reduce their workload.

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88. The Respondent further argues that the Claimant did not wish to work for the Respondent, as evidenced by her draft resignation, her failure to apply for alternative work with the Respondent, or through the recruitment agency. In the 19 November email the claimant says she was happy that her contract had not been renewed. I discount this, on the basis that the Claimant was in fact very angry when told her contract would not be renewed, so she would not now wish to work for them in any event. If her contract had been renewed without question, her attitude may have been different.

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89. Put at its highest, the Claimant might establish that there was harassment by Victor Barrichina in the remark "puta de mierda". She would then have to establish that her complaint about it, or at least the friction with Victor Barrichina, influenced Simon Moore in his decision not to keep on either of them. However, the evidence of the date of her complaint about it [suggests it] was not made until after Mr Moore had decided not to renew her contract, and the evidence that friction was related to the claimant's sex is based on one remark among many. This is not in any event an argument which has been advanced by the Claimant, and to succeed the Claimant would have to prove that the downturn in work, and dissatisfaction with her ability to follow instructions, were not the reasons for the decision. Given the evidence of the Claimant's difficult relationships other than with ... Victor Barrichina - Gosden and Gibbons - where there is no allegation of abuse - this claim does not have a reasonable prospect of success.

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90. I conclude that there is no reasonable prospect of success in the Claimant establishing adverse treatment of her on grounds of sex or sexual orientation, the treatment being the verbal complaint on 2 September, the investigation following 22 September, non-renewal of the fixed term contract, and investigation (or lack of it) of her complaint of 7 November. The conclusion on her grievance was based on evidence, and the non renewal of her contract was a decision already made at that time."

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39. The Tribunal proceeded to decide in the alternative that if the claims had not been struck out, there would have been an order for a deposit to be paid on the basis that the claims disclosed little reasonable prospect of success.

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### *The Claimant's Appeal*

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40. The Claimant appealed on numerous grounds. Her Notice of Appeal extended to 25 pages of singled-spaced text. These grounds of appeal were dismissed on the sift. The Rule 3(10) Hearing before His Honour Judge Richardson resulted in the Claimant being permitted to proceed with a single ground of appeal, reformulated and contained in the order dated 25 May 2017 as follows:

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"The Employment Tribunal erred in law in striking out the claims of direct sex discrimination, sexual harassment and sex victimisation in the first claim on the grounds that they had no reasonable prospect of success, having regard to the principles in *Anyanwu [and Another v South Bank Students' Union]* [2001] IRLR 305] and *Ezsis [v North Glamorgan NHS*

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*Trust* [2007] IRLR 603]. The claims in these respects were fact sensitive and the Employment Judge did not take the Claimant's case at its highest."

*The Legal Principles*

B

41. Rule 37 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides that:

*"37. Striking out*

(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;

..."

D

42. The legal principles applicable in relation to the striking out of discrimination complaints pursuant to this Rule are well-established. They are set out in the two cases referred to in the reformulated ground of appeal. In Anyanwu, Lord Steyn said as follows:

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"24. ... 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. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university."

F

43. I was also referred to a passage at paragraph 39 in the judgment of Lord Hope of Craighead, where it was said as follows:

"39. Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail."

G

44. In Ezsias, the Court of Appeal was considering a case of public interest disclosure. It was held that a claim should not ordinarily be struck out where there was a:

H

"29. ... crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. ... It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. ..."



A 45. I was also referred to the case of Ahir v British Airways plc [2017] EWCA Civ 1392,  
in which Underhill LJ said as follows:

B “16. ... Employment tribunals should not be deterred from striking out claims, including  
discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed  
no reasonable prospect of the facts necessary to liability being established, and also provided  
they are keenly aware of the danger of reaching such a conclusion in circumstances where the  
full evidence has not been heard and explored, perhaps particularly in a discrimination  
context. Whether the necessary test is met in a particular case depends on an exercise of  
judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-  
understood language of the rule by reference to other phrases or adjectives or by debating the  
difference in the abstract between ‘exceptional’ and ‘most exceptional’ circumstances or other  
such phrases as may be found in the authorities. Nevertheless, it remains the case that the  
hurdle is high, and specifically that it is higher than the test for the making of a deposit order,  
which is that there should be ‘*little* reasonable prospect of success’.” (Original emphasis)

C  
*Submissions*

D 46. The Claimant did not submit a skeleton argument specifically tailored to this appeal.  
She relied upon her lengthy 46-page skeleton argument for the Rule 3(10) Hearing. Only some  
parts of that referred to the remaining ground of appeal. The submissions on that ground may  
be summarised as follows:

E (a) The Tribunal reached its conclusions without having a full picture of the facts. In  
particular, it is said that there has been selective disclosure by the Respondent and  
there are various other emails which, according to the Claimant, would show that  
there was further discussion about her complaints even prior to Mr Moore making  
F his decision on 4 November 2014.

G (b) She contends that the Tribunal failed to follow the guidance in Anyanwu and  
Ezsias in that the Tribunal tested the Appellant’s claim only by reference to the  
Respondent’s submissions and skeleton argument, which were themselves based on  
selective disclosure.

H (c) These are fact-sensitive claims involving crucial disputes of fact, which should not  
be subject to strike out at the Preliminary Hearing.

**A** 47. That summary is not intended to be a complete reflection of the numerous points made  
by the Claimant in support of her appeal. However, I am satisfied that it encompasses the main  
points relied upon. Insofar as there are any other specific points which the Claimant may have  
**B** wished to make in support of her appeal, she has lost her chance to do so by her unjustified  
non-attendance today. Ms Azib, who appears for the Respondent, has also very fairly  
highlighted certain points that may be made in favour of the Claimant's case.

**C** 48. Ms Azib submits that:

(a) The Tribunal properly cited and applied the guidance in the two leading authorities.

(b) The Tribunal clearly did take the Claimant's case at its highest. She points, in  
**D** particular, to the following matters:

(1) In respect of the harassment claim against Victor Barrichina, the Tribunal  
accepted her translation of his remark without question and proceeded on  
the basis that those remarks were made.  
**E**

(2) The Tribunal discounted the draft resignation letter and her comment in an  
email on 19 November 2014 that the Claimant, in her own words, was  
happy that her contract had not been renewed. The Tribunal regarded these  
remarks in this resignation letter as having been made whilst the Claimant  
was very angry upon being told that her contract would not be renewed.  
The Respondent submits that this is an example of the Tribunal giving the  
Appellant the benefit of the doubt even where her own evidence might be  
said to undermine her claim.  
**F**

(3) Although the Claimant had merely stated that there was possibility of her  
contract being renewed, the Tribunal analysed her case on the basis that  
there was a non-renewal.  
**G**  
**H**

- A** (c) Even if there are some disputes of fact, these do not go to the core of the claim and in any event should not preclude the Tribunal from the striking out of the claim, which clearly has no reasonable prospect of success. Reliance is placed upon the
- B** comments of Underhill LJ in the Ahir case.
- (d) Striking out is appropriate here, given the litigation resulting from the claim is wholly disproportionate to its merits.
- (e) The factual basis of the claim is too weak to establish a case of discrimination.
- C** (f) It is also said that the Claimant's claim is confused and unclear and contemporaneous evidence does not support it and that the claims are doomed to fail.

**D**

*Analysis and Conclusions*

**E** 49. The Claimant's first contention - which is that the Tribunal did not have a full picture of the facts due to failures in disclosure - must be rejected. The Claimant's application for disclosure was previously refused and, in any case, the Tribunal considered her bundle of documents, as did the EAT today and at the Rule 3(10) Hearing. The documents, which would be before the Tribunal at any final hearing had her claim not been struck out, are likely to be

**F** those that were before the Tribunal at the Preliminary Hearing. The question is whether the Tribunal erred in its approach to the facts as they emerged from those documents in determining that the Claimant's claim had no reasonable prospect of success.

**G**

50. The first claim, chronologically, is that the Claimant had been harassed on the grounds of sex and of sexual orientation by Mr Barrichina as a result of the incident on 2 September 2014. This had been referred to as the "bundles incident". The claim would presumably be that

**H** the conduct on the part of Mr Barrichina created a hostile environment for the Claimant on the

A grounds of her sex or sexual orientation, which was not addressed or dealt with appropriately by  
the Respondent prior to her termination. This allegation is in her pleaded case at paragraphs 65  
to 74. There is considerable detail about the bundles incident, but nowhere does one see any  
B allegation of anything said or done that could be related to a protected characteristic. As for  
what she reported to Mr Moore after this incident, taking her case at its highest, all she said is  
that she told him “*all of the above*”. However, none of “the above”, so mentioned, contains  
C anything about sex or sexual orientation. That would appear to be the entirety of the bundles  
incident. Notwithstanding the amount of her claim devoted to this matter, no discrimination or  
harassment claim can be discerned arising out of it. There is no dispute of fact that needs to be  
D considered, nor any contemporaneous documentation, to reach a clear conclusion on it. Simply  
taking the Claimant’s case at its highest and at face value reveals no case on either of the  
protected characteristics relied upon.

E 51. I should say at this stage that whilst the ground of appeal as reformulated makes no  
reference to sexual orientation, Ms Azib has dealt with it in her written submissions  
nonetheless. That is perhaps being overly cautious as to the scope of the Claimant’s case. I  
F have considered the transcript of the Rule 3(10) Hearing. At paragraph 32, His Honour Judge  
Richardson said:

G “32. ... In my judgment, so far as sexual orientation is concerned, there are no reasonable  
grounds for disputing the Employment Judge’s conclusion. Indeed, today, subject only to the  
production of a marriage certificate, the Claimant was prepared to withdraw the claims that  
related to sexual orientation. No marriage certificate is required. For the reasons that the  
Employment Judge gave, the claims insofar as they relate to sexual orientation had no  
reasonable prospect of success.”

H 52. Thus, there is no sexual orientation claim to be considered on this appeal as it has been  
dismissed. However, I say a little bit about the complaint because the way in which the matter  
emerged says something about the Claimant’s approach to the factual basis for her complaints.

**A** 53. This claim of sexual orientation discrimination was raised for the first time after the non-renewal of her contract. The highest that she puts her case is that she suspects that her treatment might have been on the grounds of sexual orientation. The Claimant's case is, as the  
**B** Tribunal found, based on some gossip after her termination as to Mr Moore's sexual orientation. From this flimsy piece of gossip, the Claimant has constructed a claim based on a theory that Mr Moore wished only to recruit or retain gay males. The Tribunal correctly described that as entirely fanciful. It is a claim with no reasonable prospect of success. The  
**C** fact that the Claimant felt it right to pursue an entirely speculative claim based on gossip and in the face of obviously contradictory facts - the Claimant knew that Mr Moore was married, for example - suggests that the Claimant is not as concerned about establishing a proper factual  
**D** basis for her allegations as she is with casting aspersions.

**E** 54. The next incident upon which the Claimant relies is on 22 September. The Claimant's pleaded case in respect of that is at paragraphs 87 to 105 of her complaint.

**F** 55. Before dealing with that, I should mention that paragraph 83 of her complaint states that what followed was a series of abuse etc. and that appears to be a reference to what followed the 2 September incident (the bundles incident). Paragraph 83 is a very general allegation; no particulars are provided as to when any of these remarks were said to have been made or in what context. However, it does perhaps conflict with the Tribunal's account that these remarks  
**G** or these allegations were only in respect of matters after 22 September. I return to the significance of that below.

**H** 56. Returning to the 22 September incident itself, one can infer that paragraphs 87 to 105 are dealing with that because of the reference at paragraph 91 of her complaint to these matters

A being in the “*third week of September*”. At paragraph 105 of her complaint, the Claimant refers  
to Victor Barrichina using the term “*estupida and more other words*”. That would appear to be  
the full extent of the Claimant’s allegations about the 22 September incident in terms of abusive  
B language. However, the word “*estupida*” does not of itself denote any connection with gender  
so as to suggest that this amounted to harassment on gender grounds.

C 57. The question then arises as to whether the Tribunal was correct to conclude, on the basis  
of this material, that there was no reasonable prospect of success in relation to harassment on  
the grounds of sex. The Claimant’s claim form clearly suggests, for example, at paragraph 107,  
that she told Mr Moore about all of Victor Barrichina’s “*insults, provocations harassments, the  
D gun shots everything*”, on or shortly after 22 September 2014. This then led to Human  
Resources’ involvement. Mr Moore’s case is that all he was told at this stage was the  
“*estupida*” remark. There does appear to be a conflict of fact on this issue.

E 58. The Tribunal relies upon what is said to be the Claimant’s own narrative in determining  
that Mr Moore was not told about the sexual remarks until after his decision of 4 November. In  
particular, it was said that these insults first emerged in the email of 5 November. The  
F difficulty with the Tribunal’s conclusion in this regard is the reference in paragraph 107 of her  
claim, which is similar in terms to an allegation contained in the grievance, that she told Mr  
Moore about “*the insults*” going on “*since the bundle episode*”.

G 59. Ms Azib submitted that although this is a dispute of fact, the Claimant does not identify  
any specific insults other than the “*estupida*” remark, and that reflects Mr Moore’s evidence,  
H which is that he was only told about the “*estupida*” remark and nothing else. She also submits  
that Mr Moore was available to be cross-examined on this discrete issue but the Claimant chose

**A** not to attend the hearing and that the only way the Claimant could succeed is to show that Mr Moore had a poor recollection or had not given credible evidence.

**B** 60. As attractively as those points were put by Ms Azib, I cannot accept that the end result is that there is no core dispute of fact on a key issue. It is a key issue because this evidence goes both to whether there was alleged harassment going on since 2 September, and because, if the Claimant is correct that she told Mr Moore all about it on 22 September, that would amount to a protected act for the purposes of her victimisation claim. Although the Claimant only referred to the insults without specifying what they were, a fair reading of her complaint suggests that she must have been intending to refer to the earlier matters set out at paragraph 83, where the “*puta de mierda*” remark is mentioned. Moreover, the fact that Mr Moore could have been cross-examined on this matter at the Preliminary Hearing does not assist. The Tribunal ought not to be embarking on a mini-trial to resolve disputed issues of fact best left for the Full Hearing.

**C**  
**D**  
**E**  
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**G** 61. The other difficulty is that the Tribunal appears, at least in this respect, not to have taken the Claimant’s case at its highest. At paragraph 79 of the Reasons, the Tribunal says that, “*On the Claimant’s own narrative, that sex-specific remark did not occur until after she had made the report to Simon Moore*”, and it appears that she had not complained about it until 5 November. In fact, the Claimant’s narrative, poorly set out though it is, does suggest that the sex-specific remark was made at some point since the bundles incident, and that it was complained about on or shortly after 22 September 2014.

**H**

**A** 62. These are issues of fact which it seems to me are not susceptible to summary determination. In the words of Morris LJ in Ezsias, there does appear here to be a crucial core of disputed facts which militate against striking out.

**B** 63. Ms Azib is right to remind me that the existence of a core disputed fact should not deter Tribunals from striking out cases which have no reasonable prospect of success. Bearing in mind the caution to be exercised in doing so, the statements of Underhill LJ in Ahir make that  
**C** abundantly clear.

64. In this case, however, the Tribunal based its conclusion that there was no reasonable  
**D** prospect of success on, it seems to me, an erroneous interpretation of the Claimant's pleaded case. In those circumstances, I conclude that the Tribunal has erred in law in striking out. The Tribunal's approach was, it seems to me, contrary to that set out in Ezsias and Anyanwu.

**E** 65. As for the non-renewal of contract claim, similar points may be made. The critical feature for the Tribunal was that Mr Moore's decision not to renew was made at a time when he was not aware of the sexual remarks made by Victor Barrichina. That, however, is disputed.  
**F** The Claimant's own narrative, as relied upon by the Tribunal, does not point to only one outcome. If her case, as set out at paragraphs 83 and 107 of her complaint and in her grievance letter, is taken at its highest, then Mr Moore did know. If that is established then the question  
**G** will then be whether those matters influenced Mr Moore in his decision.

66. The final matter is victimisation and, once again, the chronology is important. The  
**H** protected acts relied upon, in particular the Claimant's email of 5 November 2014, were found to fall after Mr Moore's decision of 4 November. As the Tribunal said at paragraph 81 of the



A Reasons, “As of 4 November he was not aware of any matter relating to sex or sexual  
orientation”. However, that is not taking the Claimant’s case at its highest. On her case, Mr  
Moore did know from about 22 September; i.e. before the decision on 4 November.  
B Accordingly, I find that in respect of the harassment claim, discrimination claim and  
victimisation claim - save for the incident on 2 September - the Tribunal did err in its approach  
in striking out the claims as having no reasonable prospect of success.

C *Deposit Orders and Little Reasonable Prospect of Success*

67. The Tribunal concluded at paragraph 127 as follows:

D “127. Had I decided that the discrimination claims in the first claim were not without any  
reasonable prospect of success, I would have decided that they disclosed little reasonable  
prospect of success and made deposit orders. In this respect, the Claimant has not given any  
information about her ability to pay, though I note that on filing the second claim in August  
2015 she obtained remission of fees.”

E 68. The only permitted ground of appeal does not challenge that finding. Ms Azib submits  
that even if I were to find, as I have done, that there was an error of law in the striking out of  
the Claimant’s complaint, this aspect of the decision on deposit orders continues to stand. I  
agree. In the absence of any extant ground of appeal addressing this aspect of the decision, it  
must stand as an alternative outcome to the striking out.  
F

G 69. However, lest it be said that the same criticisms as are made above could be made of the  
Tribunal’s decision that the Claimant’s claim had *little* reasonable prospect of success, I  
consider that the Tribunal was unarguably correct to determine that this was such a claim:

- H (a) The claim of gender discrimination revolves essentially around a single remark,  
namely the “*puta de mierda*” remark, and possibly also the remark that Victor  
Barrichina prefers dogs to women. Despite the many reams of paper devoted to her  
claim, the Claimant has singularly failed to identify any particulars in terms of dates

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and details in respect of these remarks. That, taken together with the Claimant’s somewhat cavalier approach to facts more generally and the Respondent’s consistent evidence to the contrary, makes it highly unlikely, in my view, that the claims would succeed.

(b) As to her contention that she told Mr Moore about these matters on or about 22 September, it is right to note that, of all the remarks she alleges as having been said by Mr Barrichina in relation to that incident, the only one expressly identified in her claim is the “*estupida*” remark. That correlates with the evidence by Mr Moore in this issue. It seems highly unlikely that she would establish at trial that Mr Moore is lying about this issue or recollecting incorrectly. Much more likely is that the Claimant, with her evidently tenuous grasp of the facts and chronology, has taken her allegations made *after* 5 November 2014 and merged them into one with earlier incidents.

(c) It is highly relevant that the first time that the Claimant sought to put anything in writing was 5 November 2014, and even then it was in an email complaining about Sofiane, not Victor. All that it says about Victor is that “*he carry on insulting me*” and “*says unspeakable things*”. Again, there is no reference to any protected characteristic and it is difficult to infer otherwise. This highlights the weakness of her claim that she told Mr Moore anything specific, other than being referred to as “*estupida*”.

(d) In a highly offensive and potentially discriminatory email sent by the Claimant on 19 November 2014, the Claimant reflects that when she thought about suing the firm for discrimination, she thought of age. She does not refer to gender-related discrimination at all. This might be said to give the lie to any credible gender-based claim.

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(e) In relation to the non-renewal of her contract, there is clear and apparently incontrovertible evidence that Mr Moore, as at 4 November 2014, sought to retain a woman, Ms Nan, and to terminate Mr Barrichina’s contract earlier than its expiry date. In other words, he was proposing to treat Mr Barrichina even less favourably than the Claimant, who was allowed to work to the end of her contract, and he was retaining a female. The likelihood, in those circumstances, of establishing that Mr Moore’s decision was based on gender, or that it was influenced by earlier complaints, seems to me to be remote.

70. The Tribunal did not, for obvious reasons, actually impose a deposit order.

71. It seems to me that the appropriate course to take at this stage is it to remit the matter to the Tribunal for it to consider the appropriate deposit order to be made, having heard from the Claimant as to her means.