Appeal No. UKEAT/0225/15/JOJ
UKEAT/0067/16/JOJ
UKEAT/0068/16/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 & 6 July 2018

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MISS A BOVELL — APPELLANT

READING BOROUGH COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS ANGELA BOVELL (The Appellant in Person)
For the Respondent	MS AKUA REINDORF (of Counsel) Instructed by: Reading Borough Council Civic Offices Bridge Street Reading Berkshire RG1 2LU

SUMMARY

PRACTICE AND PROCEDURE - Imposition of deposit

RACE DISCRIMINATION

AGE DISCRIMINATION

VICTIMISATION DISCRIMINATION

HARASSMENT

In 2013 the Claimant brought claims against the Respondent employer including race and age discrimination, harassment and victimisation. In March 2014, the ET made an Unless Order for particulars of the claims, warning that this was the last chance to present a coherent case. Following receipt of those particulars, the Respondent applied under Rules 37 and 39 for the claims to be struck out as having no reasonable prospects of success, alternatively for Deposit Orders.

There was a history of delays and adjournments. The day before the hearing of the application the Claimant and her representative applied for an adjournment on the grounds of her ill-health. This was refused. The application proceeded in her absence and without representation on her behalf. In February 2015 the ET struck out all the claims, save the claim of direct race discrimination in respect of her dismissal for which it made a Deposit Order of £250 within 21 days. As to Rule 39(2) and the ability to pay, the ET had evidence that the Claimant had been on state benefit for part of the previous year but no information as to her current financial position. The Claimant failed to pay and the claim was struck out.

The Claimant appealed against the refusal of the adjournment application/decision to proceed with the hearing in her absence, the Rule 37 strike out and the Deposit Order. As to the latter,

she submitted there was no evidence to show ability to pay: cf. Rule 39(2). In any event the copy Order served on her did not contain the second page with its notice of the potential consequence that in default the claim would be struck out: cf. Rule 39(3).

At the Rule 3(10) Hearing, the EAT dismissed the ground of appeal in respect of the decision to proceed with the hearing but allowed the other grounds to proceed to a Full Hearing. The Judge ordered service of affidavits as to the disputed factual issue concerning the notice.

The EAT dismissed the appeal against the Rule 37 Strike Out Orders; but allowed the appeal in respect of the Deposit Order and subsequent strike out, holding that on the financial information available the only appropriate Order was a deposit of a nominal sum. It was therefore unnecessary to determine the ground of appeal under Rule 39(3), which would have required remission of the question of fact to the ET.

THE HONOURABLE MR JUSTICE SOOLE

1. These are the combined appeals of the Claimant against three Decisions of the Employment Tribunal ("ET") at Reading - Employment Judge Gumbiti-Zimuto - whose effect was to strike out her claims of age discrimination, race discrimination, harassment and victimisation.

2. By Order sent to the parties on 27 February 2015, pursuant to Rule 37, the Employment Judge struck out all but one of those claims on the grounds that they had no reasonable prospects of success. In respect of one claim - namely direct race discrimination relating to her dismissal - pursuant to Rule 39, the Tribunal held that the claim had little reasonable prospect of success and made a Deposit Order requiring the Claimant to pay a deposit of £250 within 21 days of the Order being sent, as a condition of continuing to advance that contention. The Claimant failed to pay any part of that sum. By further Order dated 25 March 2015, the Tribunal struck out that claim pursuant to Rule 39(4).

3. Following the Rule 3(10) Hearing on 27 January 2016, His Honour Judge Hand QC ordered a Full Hearing on the grounds of appeal relating to:

(1) the striking out of the claims apart from indirect race discrimination;

(2) the Deposit Order;

(3) the striking out of the claim which was the subject of the Deposit Order.

4. In respect of the latter appeal, he ordered the parties each to lodge an affidavit relating it to a disputed issue as to whether or not the Claimant had been served with a full copy of the

Deposit Order, and in particular, the second page which included notice of the consequence of a failure to pay the deposit by the due date.

5. This is a claim with a very long history. The Claimant issued her ET1 on 24 July 2013, and amended it on 9 September 2013. This present appeal hearing was due to take place on 28 June 2017, but it had to be adjourned on the day because of the Claimant's ill health. The following is a much-abridged chronology, considered sufficient for the purpose of the appeal. A fuller narrative is contained in the Judgment of 27 February 2015.

6. The Claimant was employed by the Respondent Council as a Youth and Community Worker for some 30 years; first in a part-time role from 1983 until 1998, and then full-time from 1998 until her dismissal on grounds of capability, by notice dated 3 May 2013 expiring 25 July 2013. Following the amendment of the ET1, the claim was understood to have comprised unfair dismissal, disability discrimination, age discrimination, race discrimination, harassment, whistleblowing, and victimisation. On 19 December 2013 the Claimant served particulars of claims. On 26 February 2014, a case management hearing took place before Employment Judge Salter. The Respondent was represented by counsel and the Claimant by representative Mr Ogbonmwan. By his Order, sent to the parties on 3 March 2014, the Employment Judge struck out the whistleblowing claim as having no reasonable prospects of success. As to the other claims, he stated this:

> **"1. …**
>
> **Despite attempts by the Claimant to particularise her various complaints (with the exception of the unfair dismissal complaint) it was not possible from the extensive documentation (a) to identify clearly each complaint for disability discrimination, race discrimination, age discrimination and victimisation and (b) prepare a list of issues. Rather than strike out the claims at this stage on the basis that it was not possible to have a fair trial where the Claimant has failed to articulate her complaints, the Claimant was to be given a final chance to do so and the orders set out below were made. …"**

7. The Judge made Orders for the Claimant to provide by 4pm on 19 March 2014 further particulars, including:

> **"3. …**
>
> **b. A schedule in tabular form in chronological order (under the headings shown in Appendix 1) setting out particulars of her claims of direct race discrimination, direct disability discrimination, direct age discrimination and harassment.**
>
> **c. Further particulars of any claim which the Claimant makes for victimisation, stating the protected act and the detriments alleged to have followed from it."**

He also ordered particulars in respect of the claim of failure to make reasonable adjustments.

8. By paragraph 5 of the Order, he ordered that unless the Claimant complied with paragraph 3 of the Order - namely that which I have just cited - the relevant parts of the claim may be struck out under Rule 37. Giving his reasons, he stated:

> **"5. The Claimant's case in relation to discrimination was not at all clear from the documents and it was not possible for the Respondent to prepare its defence unless it was. The Tribunal warned the Claimant that if it was not possible to have a fair hearing of the complaints because they were unfathomable there was a risk that they would be struck out. The Respondent was asked to prepare a draft order. The Tribunal made certain amendments to it as it was the Claimant's final opportunity to set out her case to enable a list of factual and legal issues to be prepared and agreed.**
>
> **6. The Tribunal warned the Claimant that her complaint of age discrimination as it currently appears on the documents was unclear. In relation to her complaint of race discrimination it was impossible to say whether it had a prospect of success at this stage but the Claimant was made aware that it would be unusual for a dismissal to be on the grounds of three protected characteristics."**

9. On the day before the due date for supply of particulars - namely 18 March - the Claimant applied for an extension of time which was refused. On 19 March at 15.57 she served a purported response to that Order, which the Respondent considered to be unsatisfactory.

10. On 25 March 2014, the Respondent sent an email to the Tribunal and the Claimant which amongst other things contended that the particulars served pursuant to paragraph 3(b) of the Order of 3 March 2014 did not comply with its requirement. In particular, the email stated:

> **"(b) The table contains no particulars at all of the Claimant's age discrimination claim. The Claimant was clearly warned at the PH that the age discrimination claim was unclear …**
>
> **(c) The particulars of the race discrimination claim in the final table are wholly unsatisfactory. They do no specify individual incidents of alleged discrimination in the manner required, rather the table constitutes a narrative of the events complained of. This takes the matter no further than the existing pleadings, and the Respondent is unable meaningfully to respond to the claim as it is now presented."**

The email continued by submitting that, in view of the breaches of that Unless Order, the claim should be struck out pursuant to paragraph 6 of the Order.

11. On 2 May 2014, the Respondent sent an email which renewed the application for a strike out of the disability discrimination claims, and also stated for the avoidance of doubt that it continued to rely on the full contents of its email of 25 March.

12. On 5 June 2014, Employment Judge Salter made an Order striking out the claims of disability discrimination for non-compliance with his previous Order.

13. On 18 June 2014 the Tribunal sent the parties a "*Notice of Preliminary Hearing*", which included the statement that:

> **"… there will be a preliminary hearing to consider the Respondent's letter of 2 May 2014 and determine whether to strike out the claim because it has no reasonable prospect of success, whether to order the claimant to pay a deposit (not exceeding £1000) as a condition of continuing to advance any specific allegation or argument in the claim if the Tribunal considers that allegation or argument has little reasonable prospect of success."**

14. On 4 August 2014, the Tribunal sent a letter to the parties stating that a hearing listed to take place on 3 September would consider these applications. The hearing was subsequently adjourned until 6 November 2014.

15. On 5 November, the Claimant applied for a stay of the claim on the ground of her ill-health. The application was granted and the claim was stayed until 28 February 2015. By Notice to the parties dated 27 January 2015, the Tribunal notified them that the case was to be relisted to hear the matters referred to in the Notice of 18 June 2014. It was then listed for a hearing on 24 February 2015, i.e. four days before the end of the stay period. The Claimant and her then representative were duly notified of the hearing. In the meantime, the claim was listed for a Full Hearing commencing 6 July 2015.

16. By email to the Claimant dated 17 February 2015 the Respondent reiterated that it was pursuing its strike out application. On 20 February 2015 the Claimant's GP provided a letter to the Tribunal which stated that the Claimant was unwell and unable to attend the hearing on 24 February. On 23 February Mr Ogbonmwan applied for an adjournment of the next day's hearing, which was refused. There was no attendance on that date by the Claimant or her representative. The hearing proceeded. In his subsequent Rule 3(10) Decision, HHJ Hand QC refused the application to pursue a ground of appeal in respect of the Judge's exercise of discretion to proceed with the hearing of 24 February.

17. I turn to the Judgment of 27 February 2015. As to the age discrimination claim, the Judge referred to its limited terms in the amended ET1, namely:

> **"19. The claimant's age discrimination claim first surfaces in the amended claim form (the second ET1 form):**
>
> > **"3. My most recent manager has seen it as her job to change how the service was provided but has been prejudiced in favour of younger people to fit with the new ways subjecting me to unfair discrimination by not recognising my age and not supporting me to change. She set out to dismiss me as an easy solution." "**

18. The Judge referred to the subsequent Order of Employment Judge Salter for further particulars. Then, turning to the particulars provided by the Claimant on 19 March 2014, he stated:

> **"21. … The claimant purported to comply with that order on 19 March 2014 at 15.57 by sending an email providing further particulars. That document makes no reference to age discrimination. The claimant's complaint of age discrimination, which was unparticularised, appears to have been abandoned by the claimant. Whether or not the age discrimination claim has been abandoned, it appears to me that such a complaint has no reasonable prospect of success and should therefore be struck out."**

19. As to the victimisation claim:

> **"22. In the further particulars of 19 March in a section headed 'Victimisation', the particulars state:**
>
> > **"2.1. Angela has on many occasions complained of mistreatment by Tina Heaford, her line manager, to her, management, human resources and occupational health. The nature and behaviour of this reported treatment constitutes bullying and harassment. It is acknowledged that Angela used the term 'discrimination' on only one occasion. However, AB's management would reasonably have seen the alleged behaviour as either at risk of being considered to be discriminatory nature [sic] or to have led to a definitive allegation of disability discrimination at a later stage."**
>
> **23. The claimant refers in the victimisation schedule to an occasion on 12 November 2012. Under the heading "Details of protected act", she states:**
>
> > **"In a set of typed notes headed "Capability meeting Monday 12 November 2012" in note 9, Angela says: "There is a huge element of bullying in this area as well as discrimination." This complaint of discrimination in the light of Angela's disability is a protected act."**
>
> **24. The information provided by the claimant does not provide me with a clearly presented claim of victimisation that can be understood easily. It is not clear what type of discrimination is being alluded to when it is mentioned as set out above, and it is not clear that this is a protected act within the meaning of section 27(2) Equality Act 2010. Even if it was a protected act, there is no explanation as to what the detriment was which occurred as a result. The claimant's schedule contains various incidents dated between 12 November 2012 (the latest) and 31 August 2011 (the earliest) which are referred to as "protected acts" but no mention is made of any specific detriment. On the assumption that the detriment relied upon is the claimant's dismissal, I note that the claimant was dismissed on 25 April 2013 and the last protected act appears to have been on 12 November 2012. There is no explanation provided as to how the supposed protected act (or acts) can be shown to have been linked to the dismissal."**

He concluded that the claim had no reasonable prospect of success.

20. As to harassment, he stated:

> **"27. The claimant's schedule sets out a series of events on diverse dates between 8 March 2013 and 18 April 2011. Some of the matters set out are undated. The claimant's complaint does**

> **not set out a clearly understood case of unwanted conduct related to a relevant protected characteristic. The claimant's document just sets out a list of events. On the material before me, I am satisfied that the claimant's complaint of harassment has no reasonable prospect of success."**

21. As to race discrimination - direct and indirect - the Employment Judge stated:

> **"28. The claimant's schedule lists a variety of incidents between 22 March 2011 and April 2013. It is not clear from the schedule or from the schedule and the various documents produced by the claimant's representative in support of her case of race discrimination exactly what case the respondent has to meet in respect of direct race discrimination and indirect discrimination. The indirect discrimination is simply unclear. The matters referred to appear to be mainly out of time in any event. It may be the case that the claimant will rely on these matters as background to her claim about the dismissal. However, I am of the view that on the basis of the incoherent information before me, the claimant's complaints about direct and indirect discrimination on the grounds of race have no reasonable prospect of success. I do not include in this the claimant's complaint about the dismissal. While the claimant's complaint that the dismissal is on the grounds of her race has not been articulated clearly so that the strength or weakness of the arguments in support of the case can be assessed, I can understand the complaint. That distinguishes it from much of claimant's other complaints about discrimination. It would not be appropriate to strike out that claim. However, the claimant's failure to articulate a case which is understood leads me to conclude that it has little reasonable prospect of success.**
>
> **29. My decision is to strike out the claimant's complaints of race discrimination (direct and indirect) other than in respect of the claimant's complaint of direct race discrimination in respect of the dismissal. Having considered the information that I have available which appears to show that the claimant was - during part of 2014 - in receipt of state benefits but I have no information as to the claimant's current financial position, I came to the conclusion that there should be a deposit order made in the sum of £250."**

22. The Deposit Order consequent upon that Judgment included the following in respect of the sum of £250:

> **"The Employment Judge considers that the claimant's contention that her dismissal was an act of direct race discrimination has little reasonable prospect of success. The claimant is ordered to pay a deposit of £250.00 no later than 21 days from the date this order is sent as a condition of being permitted to continue to advance that contention. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit."**

23. The second page of the Order which is on the reverse of the first page contained the usual note headed "*Note Accompanying Deposit Order*". Its first four paragraphs provide:

> **"1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.**
>
> **2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.**

When to pay the deposit?

3. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

4. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out."

The third page provided a cut-off slip for payment of the deposit. The Claimant contends that she did not receive the second page.

24. By application dated 13 March 2015 the Claimant applied for reconsideration of the Tribunal's Decision of 27 February 2015. This referred to the Decision to strike out the claims as having no reasonable prospect of success but made no reference to the Deposit Order. The application was refused.

25. By Order dated 25 March 2015, and following the failure to pay the requisite deposit of £250, Employment Judge Gumbiti-Zimuto struck out the complaint of race discrimination relating to dismissal.

26. By her affidavit dated 5 May 2016, the Claimant states that she received the Deposit Order in "*around March 2015*" by hard copy in the post, and, in effect, that it did not include the second page.

27. By her affidavit dated 1 June 2016, Ms Khimji - the Respondent's then in-house employment solicitor - states that she emailed the Tribunal's Order and Judgment following the hearing. She exhibits an email to Mr Ogbonmwan dated 4 March 2015, timed at 11.53am and sent to both his email addresses. The message states: "*I attach a copy of the Tribunal's*

Judgment at the recent hearing, in case you have not received it". She almost immediately received a rejection message from one of the two addresses as "*quota exceeded (mailbox for user is full)*", but not from the other address. She then exhibits an email from the Claimant dated 13 March which includes a forwarding message from Mr Ogbonmwan to the Claimant on 4 March at 15.04, stating: "*Dear Angela, Please see decision*".

28. In her skeleton argument the Claimant says that the second page was missing from the hard copy Order received in the post. She accepts that she received the 4 March email from Mr Ogbonmwan, but says that:

> **"30. … I recall that I could not open the document and simply relied on the one sent by the court, and I have not been negligent in doing so, as the court copy is the primary and original copy. …"**

29. The Claimant has two grounds of appeal in respect of the Deposit Order. First, that the Judge had no basis for his conclusion that a deposit of £250 should be paid. Secondly, that the Order was defective in the form received by her because of the absence of the second page with its note of advice that failure to pay would result in the claim being struck out. In allowing both grounds to go forward to a Full Hearing, HHJ Hand QC recognised that the latter could involve questions of credibility more suitable for consideration by the ET, but concluded that given the other grounds that course need not be taken, at least at that stage.

30. I start with the first ground. The Claimant points first to Rule 39(2) which provides that:

> **"(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."**

She then points to paragraph 29 of the Decision, where the Judge has stated:

> **"29. … Having considered the information that I have available which appears to show that the claimant was - during part of 2014 - in receipt of state benefits but I have no information as to the claimant's current financial position, I came to the conclusion that there should be a deposit order made in the sum of £250."**

31. She submits that the Judge made no reasonable enquiries into her ability to pay, but in any event, the only information which she had was that she had received benefits during part of 2014. The Claimant then seeks to contrast the Deposit Order, where it is stated that:

> **"… The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit."**

All in all, she submits that there was no basis for the Judge to reach the implicit conclusion that she was in a position to pay £250 within 21 days.

32. In response, counsel for the Respondent, Ms Reindorf submits that Rule 39(2) does not prevent a Tribunal from making a Deposit Order in circumstances where reasonable enquiries disclose no or limited information as to the means of the paying party. In any event, the Judge made such enquiries as were reasonable in the circumstances and had sufficient regard to her ability to pay the deposit. The Claimant was fully on notice of the possibility of a Deposit Order and could have supplied evidence as to her means. If it was reasonable to proceed with the hearing in her absence, it was equally reasonable to proceed to determine the listed matters on the basis of the information available on the papers. The Judge properly reviewed the documents on the file in order to ascertain as far as possible the extent of the Claimant's means. There was no inconsistency between the terms of his Judgment and the Order. Furthermore, in exercising her entitlement to seek a reconsideration of the Decisions made by the Judge, the

Claimant did not challenge the amount of the Deposit Order or suggest that she was unable to pay such a sum.

33. I do not accept that there is any inconsistency between paragraph 29 of the Judge's Decision and his observations in the Deposit Order. The former states that he has no information as to the Claimant's current financial position. The latter, in stating that the Judge "*has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit*", simply reflects the reference in Rule 39(2) to "*any information*". In this case, there was no such information. I accept that having been given due notice of the alternative application for a Deposit Order, the Claimant had the opportunity to put forward evidence as to her means. She did not take that opportunity.

34. Rule 39(2) requires the Tribunal to make reasonable enquiries into the paying party's ability to pay a proposed deposit. The underlying purpose is, of course, to ensure that the Tribunal does not, by requiring a deposit which the Claimant cannot pay within the stated period, make an Order which amounts to a strike out of the claim. The Tribunal's reasonable enquiries and subsequent decision involve the exercise of a discretion, with which this Appeal Tribunal will only interfere on the well-established and limited grounds.

35. I have great sympathy for the position in which the Tribunal found itself. However, I have concluded that the decision fell outside the generous ambit of the Judge's discretion. Faced with no appearance or representation by the Claimant, the Judge did the best he could to ascertain the Claimant's ability to pay from the case papers. The result was that the only information he had about the Claimant was that she had been in receipt of state benefits for part

of the previous year, but he had no information as to her current position. True it is that the Claimant knew of the application and could have provided information as to her ability or inability to pay any deposit, however, there is nothing in the notification of the application which advised that she should do so.

36. One option would have been for the Judge to adjourn the matter for a short period to allow her to put in such evidence. Given all the delays that had occurred it is entirely understandable that the Judge did not take that possible course. Thus, I do not accept the submission that he failed in his obligation to make reasonable enquiries. The steps he took fell within the generous ambit of the discretion.

37. However, on the basis of the information he did have, I do not consider that the Judge was in a position to conclude that the Claimant was able to pay the sum of £250 within 21 days. The only evidence was of state benefits, albeit in the preceding year. There is no suggestion in the Decision of an inference, for example, from some aspect of the circumstances, that the Claimant was in employment or had means which she was not disclosing or that she was otherwise in a position to pay that sum within that period.

38. In my judgment, on the information available, the only deposit which the Judge could have ordered was a truly nominal sum. In reaching this conclusion, I recognise that the Claimant did not suggest in her application for reconsideration that she was unable to pay that sum. However, the question is whether the Judge was entitled to make the Order on the basis of the information before him. Furthermore, one of the Notices of Appeal states that if the application for reconsideration had been granted:

> **"35. … she could have had the opportunity to show her means having lost her job over a year [sic] and have been accessed [sic] by the tribunal's fee remission to the extent that her tribunal application were [sic] made by way of fee remission and the deposit amount could have been reduced if she had attended the hearing."**

39. I conclude that the Deposit Order must be set aside. If so, as is common ground, it must follow that the subsequent Striking Out Order for failure to pay must also be set aside. On the basis of my conclusion that the only answer was to order a nominal deposit there is no need for the matter to be remitted to the Tribunal. I will hear the parties on the amount of the nominal sum. In reaching this conclusion I should emphasise that it is a decision purely on the facts of this particular case. It should not be cited as raising any general proposition as to the exercise of discretion in the making of Deposit Orders.

40. In consequence of my decision, I need only deal briefly with the second ground of appeal relating to the Deposit Order. This arises from Rule 39(3) which provides that:

> **"(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order."**

The standard notice served with the Deposit Order includes the statement that: "*If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out*". The Claimant contends that she did not receive the second page of the Order which contains that notice; that Rule 39(3) was thus breached; and that in consequence the claim of direct race discrimination by dismissal should not have been struck out.

41. The Respondent contends that there is no reason to believe that the Order sent to Claimant by the Tribunal did not contain the second page, and that, in any event, the affidavit evidence of Ms Khimji demonstrates that she received a full copy. The Respondent submits

that the Claimant's account is dishonest. In any event, Ms Reindorf submits that the requirement under Rule 39(3) to notify the paying party about the potential consequences of the Order was satisfied with the words on the first page of the Order, which states that the payment is "*a condition of being permitted to continue to advance that contention*". She submits that the use of those words made clear, at least by necessary implication, the consequence that in default the claim would be struck out.

42. I do not agree with that construction. In my judgment, Rule 39(3) requires the consequence of strike out to be expressly notified to the paying party, and the second page duly contains such a notice. Indeed, paragraphs 1 and 4 on that page distinguish between the condition and the consequence of a breach. However, the question of whether the Claimant received such requisite notice is a question of fact which would be for the ET, not this Tribunal, to determine. In the light of my conclusion on the first ground, it is not necessary for that question of fact to be decided.

43. The final ground of appeal concerns the decision to strike out the remaining claims on the grounds that they had no reasonable prospects of success. Rule 37 provides as material:

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

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

44. The application to strike out as contained in the Respondent's email of 25 March 2014 was on the basis that the Claimant had failed to comply with the Unless Order of Employment Judge Salter dated 3 March 2014. However, by the notice of 18 June 2014 it had extended to an application on the grounds that the claim had no reasonable prospect of success.

45. The settled law is that, at least when the central facts are in dispute, it is only in an exceptional case that a discrimination claim will be struck out as having no reasonable prospects of success: see the authorities most recently discussed by the Court of Appeal in **Ahir v British Airways Plc** [2017] EWCA Civ 1392. However, as Underhill LJ observed in that decision, it is no error of law for the Tribunal not to refer to the leading authorities by name, nor is it necessary to repeat particular phrases from those authorities. As he stated: "*The only essential phrase is that in Rule 37(1)(a) of the* ***Employment Tribunal Rules***" (paragraph 14). He added:

> **"16. … 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'."**

46. Furthermore, in deciding whether the claim has reasonable prospects of success, the Tribunal is fully entitled to take account of the Claimant's response to Orders for the claim to be particularised. If the claim cannot be properly understood or its key elements sufficiently identified, that may well be relevant to whether it has reasonable prospects of success.

47. Of particular importance in the background of this application was the Unless Order of Employment Judge Salter dated 3 March 2014. As his Reasons make clear, the Claimant was given a final opportunity to set out her case in a way which could go forward to trial. The Claimant's particulars served on 19 March 2014 were headed:

> **"Response to Tribunal Order of 26th February 2014**
>
> **Contents:**
>
> **Disability Discrimination Particulars**
>
> **Disability Discrimination Schedule**
>
> **Victimisation Particulars**
>
> **Victimisation Schedule**
>
> **Harassment Particulars**
>
> **Harassment Schedule Race Discrimination"**

These run to 19 pages and must be read together with this Judgment.

48. As to age discrimination, the Claimant acknowledges that the only reference to such a claim was in the cited paragraph of her amended ET1, and that the particulars of 19 March make no reference to that claim.

49. In her written submissions, the Claimant seeks to supplement that case by reference to two paragraphs in a witness statement of the Respondent's witness Sarah Gee. These state:

> **"38. I suspect that the role changed over the years and Ms Bovell didn't have the ability to adapt to changing expectations even with considerable support. The youth work role has changed over many years and is still changing - becoming increasingly targeted at work with the most vulnerable - thus increasing the level of risk involved in the work.**
>
> **…**
>
> **40. I did also consider the workloads and standards of performance of others in the team as above and found that generally less experienced workers were performing satisfactorily and to a higher standard than Ms Bovell. …"**

50. This material is of no assistance. The obligation of the Claimant, as emphasised in the Order of Employment Judge Salter, is to set out her case in a way that is coherent and can lead to an identifiable list of issues for trial. This material from the Respondent's witness statement adds nothing to the picture and leaves the case as unclear as before. It follows that the challenge to the Tribunal's conclusion that this claim has no reasonable prospects of success must fail.

51. As to the victimisation claim, this is particularised in "*Victimisation Particulars*" and a "*Victimisation Schedule*". The latter has three columns headed "Date", "Details of protected act", and "Detriments following". The only date entry with a possibly discernible protected act arises from typed notes of a meeting on 12 November 2012, recording the Claimant stated that: "*There is a huge element of bullying in this area as well as discrimination*". The type of discrimination is not identified. The column of "Detriments following" is, in each case, blank.

52. The Claimant submitted in her written argument that:

> **"63. … the judge completely missed the point and committed an error of law, when he said that I did not mention detriment. What detriment could be harsher than dismissal after over 30 years of service? There also was the refusal to hear my grievance and to redeploy me to mention. The judge also missed the point on the causal link between my protected acts and eventual dismissal."**

53. Giving all weight to the case law on strike out of such claims, I see no basis to challenge the Judge's conclusion, for the reasons cited in paragraph 23 of his Judgment, that it has no reasonable prospects of success. As Ms Reindorf correctly submits in respect of all the claims, it is not reasonably possible to discern what the claim consists of, nor therefore to identify a coherent list of issues for trial.

54. As to harassment, the Claimant's response to the Order of 3 March 2014 has a page of "*Harassment Particulars*" relating to the alleged bullying by her line manager, Tina Heaford, between 2011 and 2013. The contact is alleged to be a response to her disability and to constitute disability discrimination. There follows a list of seven types of bullying, and its alleged effects. There follows a "*Harassment Schedule*" setting out a list of events with a column headed "Person(s) responsible" which, when completed, states "TH", i.e. Ms Heaford.

55. The Claimant submits that the Judge dismissed her claim with a wave of the hands without considering the various matters she had brought before the Court (see written submissions, paragraph 64). In oral argument, she said that the conduct was on the grounds both of disability and of race. She acknowledged that there was no reference to the latter in her particulars. I again see no basis to challenge the Judge's conclusion that the complaint does not set out a clearly understandable case of unwanted conduct related to a relevant protected characteristic. All in all, there is no coherent claim to go forward to trial.

56. As to race discrimination, the particulars set out a four-page schedule with columns for date, detail, perpetrators, form of discrimination, comparators and date of grievance. Following the Order of HHJ Hand QC, the claims of indirect discrimination do not proceed. In the light of my conclusion on the first ground, the claim of direct discrimination in respect of dismissal does proceed. As to the others, the Claimant submits that the Judge was wrong to give any weight to the question of whether the claims were out of time. Those were matters for distinct determination, including any possible extension of time, and in any event the Judge was going no further than stating that "the matters referred to appear to be mainly out of time in any event".

57. As to the Judge's conclusion that the schedule listed a variety of incidents between 22 March 2011 and April 2013 and failed to articulate any coherent case of race discrimination in respect of the non-dismissal matters, the Claimant's written submission includes as follows:

> **"66. In totality, I supplied information (see [pages] 62-131 of bundle) that were sufficient for the judge to determine the general trend of my case, but the Judge simply ignored them in agreement with the respondent that they did not make sense. As the various emails and witness statements contained in the bundle shows, I would have been able to substantiate my claim during hearing. The gravamen of my case is however that had the judge been patient enough to allow me to attend a hearing or at least grant one in reconsideration, I would have been able to lay out my case clearly to him. …"**

58. The Claimant again reminds me of the law on the limited circumstances in which such claims should be struck out.

59. In my judgment, the passage which I have just cited in paragraph 66 of the Claimant's written submissions epitomises the problem with her case on all the claims that were struck out. Even if a "general trend" could be discerned, that is not sufficient for the presentation of the case to go forward to trial. Nor is it a matter that can be left until the hearing. At least in circumstances where the Judge was not reaching a definitive conclusion as to whether the claims were out of time and/or whether time should be extended, I agree that this was not a factor to be taken into account in the decision. However, I am not persuaded that this was a material factor in the Judge's decision to strike out the claims. His reference to the time issue was no more than an observation made "in any event". The core ground of all his strike out decisions was that the Claimant had in each case failed to articulate a coherent case which could be taken forward to trial, and that accordingly it had no reasonable prospects of success. In my judgment, that conclusion was clearly right.

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60. In the results, I allow the appeal in respect of the Deposit Order dated 27 February 2015 and the subsequent Strike Out Order dated 25 March 2015. I dismiss the appeal in respect of the Strike Out Orders dated 27 February 2015.

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