Appeal No. UKEAT/0027/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDING, FETTER LANE LONDON EC4A 1NL

At the Tribunal
On 21 May 2019

Before

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

(SITTING ALONE)

MR Z MALIK — APPELLANT

1) BIRMINGHAM CITY COUNCIL
2) CLLR L TRICKETT — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr Z Malik (The Appellant in Person)
For the Respondent	Mr Jonathan Meichen (of Counsel) Instructed by: Birmingham City Council Legal Services 10 Woodcock Street Aston Birmingham B7 4BL

SUMMARY

STRIKING-OUT/DISMISSAL

The Employment Tribunal was wrong to strike out these claims of discrimination and constructive dismissal. The decision was not **Meek** compliant (albeit that that was not a ground of appeal) in that it did not properly explain why the claims were being struck out. The Appellant was correct in contending that the ET had not taken his case at its highest and had not properly considered the material before it. Upon a proper analysis of that material, it was clear to the EAT that it could not be shown that there was no reasonable prospect of success and a decision to that effect would be substituted.

THE HONOURABLE MR JUSTICE CHOUDHURY (PRESIDENT)

1. This is an appeal against a Decision of the Employment Tribunal ("the Tribunal"), sitting in Birmingham, striking out a claim of discrimination on the grounds of race and a claim of constructive unfair dismissal.

Background

2. I shall refer to the parties as they were below. The following background is taken from the Claimant's witness statement. The Claimant was employed by the Respondent Council from 2005 until his resignation in November 2017. At the time of his resignation, he was employed as the manager of a Wellbeing centre in Handsworth.

3. The Claimant contends that from around 2015, he was the subject of less favourable treatment from colleagues and managers. He complained that, amongst other matters, following the arrival of a new manager, Ms Anne Goodall, he began to notice a marked change in the way he was treated by some colleagues and the way he was supported by his managers.

4. He specifically contends that he had problems managing two members of staff at Handsworth, Ms Eleanor Gordon and Ms Vivienne Lawrence. The Claimant contends that these two members of staff were abusive towards him and would not carry out his reasonable instructions. Ms Lawrence had issued a grievance against the Claimant which was subsequently found to be unsubstantiated. The Claimant contends that he was not given any support through this process by Ms Goodall and another manager, Ms Karen Creavin, and felt somewhat isolated.

5. In October 2015, he was transferred to another site at Nechells. The Claimant considered this to be strange since he had received an A rating at his most recent appraisal and believed that his manager simply wanted him out of the way.

6. When one of the Claimant's subordinates, Mr Younis, was off sick, Ms Goodall allegedly prevented the Claimant from managing Mr Younis. In early 2016, the Claimant experienced some alleged unfavourable treatment at the hands of two colleagues, Mr Dean Treasure and Ms Sandra Tonks. This treatment included alleged negative remarks regarding the Claimant's religion.

7. During this time, the Claimant was also responsible for managing a site at Calthorpe but felt that he was being excluded from taking relevant decisions in relation to that site. The Claimant complained about a particular incident whereby he was prevented from dealing with an application by an Asian woman to use the site for a regular meeting of disabled children. When he asked why he was being excluded, he was told by Ms Goodall, "Well, you are an Asian man and she is an Asian lady. Let's leave it at that."

8. The Claimant contends that he was generally isolated and "sent to Coventry" by his colleagues in 2016. He became so stressed about the matter that he moved himself to another office in Aston Pavilion rather than continue to work from the office at Nechells. The Claimant went off sick with work-related stress in May 2016. An attempt to mediate the difficulties was unsuccessful.

9. On 8 August 2016, the Claimant submitted a complaint under the Respondent's Dignity at Work procedures ("DAW"). In it, he complained that he had been bullied and complained of the treatment he received from the various individuals mentioned.

10. The Claimant returned to work on 19 September 2016 to a different site proposed by another manager, Mr John Carrigan. The Claimant alleges that he felt he had no choice but to agree and was aggrieved that he was being moved rather than those who had treated him badly. The Claimant also complains that his DAW complaint was not investigated in the same way that allegations against him had been investigated.

11. He alleges that in November 2016, he was suddenly "bombarded" with a number of allegations against him. The Claimant believes that these allegations were orchestrated as a direct result of the fact that he had made the DAW complaint. The first of the allegations against him was that he had been involved in a potentially fraudulent arrangement in undertaking and being paid for work for a local league cricket club called Ashiana. That allegation was investigated and subsequently found to be unsubstantiated.

12. A further allegation against him was raised on 24 November 2016 when the Claimant was told that he had made discriminatory and homophobic remarks in respect of certain colleagues. The Claimant denied making such remarks. He noted, with suspicion, that the remarks were allegedly made many months previously and had not been raised until after his DAW complaint came to light. The Claimant was suspended from employment.

13. During his suspension, the Claimant made an application for six weeks' annual leave to travel to Pakistan. This request was initially refused by Mr Carrigan, but after the Claimant's

trade union representative took up the matter, Mr Carrigan granted a maximum of two weeks' leave. The Claimant complained that he had been treated differently in this regard from other named employees of a different racial origin. In the circumstances, he decided to take a grievance out against Mr Carrigan alleging that he had been treated less favourably. This grievance was considered by Mr Steve Hollingsworth who suggested that the Claimant speak to Mr Carrigan to see if an informal resolution could be reached. The Claimant was concerned that complaints against him had led to an immediate suspension whereas his complaint against Mr Carrigan was met with the suggestion of an informal resolution.

14. Further allegations were made against the Claimant by Ms Josie Davis. Ms Davis alleged that the Claimant had regularly made homophobic marks – Ms Davis is bisexual – and had given her a B rating instead of an A rating because of her sexuality.

15. The final set of allegations against the Claimant comprised those made by Councillor Trickett who was previously the Second Respondent in this matter. These allegations were somewhat vague in that it was suggested to the Claimant that he may have made inappropriate remarks about gay people at a Labour Party meeting in or around October 2016.

16. In February 2017, the Claimant submitted a formal complaint to the effect that since his DAW complaint had been submitted, he had been victimised in various respects by the making of allegations against him. The Claimant was still suspended at this time and was concerned that he was not being regularly contacted by the Respondent during his suspension.

17. On 17 February 2017, the Claimant lodged his first ET1 complaining of victimisation and discrimination on the grounds of race and religion. That ET1 contained very little detail.

Unsurprisingly, the Respondent's response contended that the Claimant's claims had not been adequately particularised.

18. Following a Preliminary Hearing on 24 April 2017, the Claimant was ordered to provide further and better Particulars by 15 May. The Claimant provided what he claimed to be Further Particulars by a letter dated 12 May 2017. That letter contained some of the allegations mentioned above but no further details as such.

19. On 31 May 2017, the Respondent made its first application to strike out the Claimant's claim. That application was considered at a Preliminary Hearing on 8 September 2017. The Respondent's application was rejected. That decision appears to have been taken on the basis of the decision of the Employment Appeal Tribunal ("EAT") in **Efobi v Royal Mail Group** UKEAT/0203/16, in which it was held that there was no initial burden on the Claimant to establish a *prima facie* case of discrimination. (The Decision in **Efobi** was subsequently overruled by the Court of Appeal in **Ayodele v Citylink Ltd & Anor** [2017] EWCA Civ 1913.) The Judge at that Preliminary Hearing limited the number of claims that the Claimant was permitted to pursue. Part of the reason for limiting the claims in this way was that some of them were not included in the original ET1.

20. Meanwhile, the Claimant's suspension was continuing. The Claimant considered the period of suspension was becoming inordinately long and was contrary to the Council's own processes.

21. On 31 October 2017, the Claimant was signed off work with stress, anxiety and depression. He contends that he was having to take antidepressants prescribed by his GP and was

suffering panic attacks and staying awake all night. He complains that the Respondent made no attempt to contact him about his wellbeing at any point after the commencement of his sickness absence.

22. On 27 November 2017, the Claimant submitted a resignation letter. In it, he complained about the treatment he had received going back to 2014/15 and said that it amounted to a breach of trust and confidence fundamental to his contract. He complained that his DAW complaint had not been progressed promptly and considered that the various allegations made against him further undermined his confidence and trust in the Respondent. The Claimant continued as follows:

> **"Against this background I have been suspended now for over 12 months with no attempt by my employer to return me even to an alternative area of work. This period of suspension has continued for so long now and is so unusual with regard to the council's processes that I believe it is evidence that as my employer you have never intended and do not ever intend to give me a genuine opportunity to return to work. I believe that in the way you have dealt with all the issues you are telling me I have no chance of ever returning to work. In the light of these events, whereas for a period of time I lived in hope of a fair and genuine effort on your part to resolve the issues, my confidence and trust is now completely broken. I have been on sick notes since 31 October 2017 with stress at work suffering with anxiety and depression. I was on antidepressants and my GP has increased my dosage due to the panic attacks and staying awake at night. Birmingham City Council has made no attempt to contact me about my wellbeing, even though this is my fifth week of absence. I believe that your actions and omissions as my employer amount to a fundamental breach on the trust and confidence implied in our contract and I believe that in the circumstances I have no genuine or realistic choice but to resign, the final act being of your refusal to contact me while I am off sick."**

23. Shortly thereafter on 8 December 2017, the Claimant lodged his second ET1, this time complaining of constructive unfair dismissal and discrimination on the grounds of race. The Respondent renewed its application for the claims to be struck out. This application appears to have been directed principally to the Claimant's first complaint.

24. On 15 February 2018, the ET ordered that the Claimant's two claims be heard together. On 31 May 2018, the Respondent's strike out application was considered at a Preliminary Hearing presided over by EJ Perry.

The Employment Tribunal's Decision

25. The Claimant was represented by a lay representative, Mr Lynch, whilst the Respondent was represented by counsel, Mr Wilson. At paragraph 9 of the Reasons, the Tribunal noted that in relation to the claim against Councillor Trickett, the Claimant has helpfully confirmed that he no longer pursues the complaints against her personally and it was agreed that the Tribunal would therefore treat that claim against her as dismissed on withdrawal. The Tribunal also recorded that the Claimant withdrew his claim of direct discrimination based on religion and belief.

26. The Tribunal proceed to set out the law in relation to strike out applications before setting out its findings and conclusions from paragraph 21 onwards. At paragraph 22, the Tribunal noted that the Claimant had provided a witness statement; that being the one to which I have referred above. The Tribunal noted that Mr Lynch accepted that the witness statement set out the Claimant's case at its highest.

27. The Tribunal concluded that the Claimant's claim of victimisation did have a reasonable prospect of success. However, in relation to direct discrimination on the grounds of race, the Tribunal decided that there were no reasonable prospects of success. The Tribunal's reasoning is brief and it is as well to set it out in full:

> **"26. Direct discrimination and victimisation both require a causal link in terms of the statutory words "because of". For direct discrimination it is not enough for there merely to be less favourable treatment and a protective characteristic, there has to be something more; the less favourable treatment has to be "because of" the protected characteristic. In contrast whilst victimisation also requires a causal link, an act of victimisation has to be done "because of" the protect act.**
>
> **27. In my judgment the Claimant needs to give very careful thought to the way these complaints are pursued. Had the issue of a deposit been raised, which it was not, the deposit question would have required considerable thought by me on that point. That casts doubt on the merits in relation to this issue. A deposit was however not sought and I have heard no representation in that regard. However, what the Claimant is essentially arguing is that there was a conspiracy and collusion between different levels of employees about him, such that they lied. The Claimant as I speak nods, those are very, very serious allegations. As such if the Claimant does not prove them at Tribunal they will have serious credibility consequences for him. He was selected to stand as a Labour Candidate at the last set of local elections. There has been some Press interest today. If adverse credibility findings are made, they could have very serious repercussions for him.**

> **28. I say that, because those assertions are based upon assumptions he makes. I asked on several occasions throughout this Hearing to be taken to the basis for his belief in those assertions, seeking to be referred to the facts from which inferences could be drawn that those matters arose because of his race. I was not taken to such matters. He thus does not advance a basis other than that assertion how the direct discrimination claim, which requires the treatment complained of to be done because of in this case race (in contrast to being done because he made a protect act) can succeed.**
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> …
>
> **32. Whilst I acknowledge there is also dispute over whether the alleged protected act was a protected act for the purposes of the legislation and as to credibility, placing the Claimant's case at its highest I consider that there are reasonable prospects for the victimisation complaints.**
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> **33. That is not so in relation to the direct discrimination complaints for the reasons I have elaborated above."**

28. That essentially concludes the Tribunal's reasoning for striking out the Claimant's claim of discrimination. The Tribunal then proceeded to deal with the constructive unfair dismissal complaint. It set out the law regarding the last straw doctrine and then stated as follows:

> **"37. I need to record I have had to illicit from the Claimant what the final straw was, I do not have a witness statement in relation this issue because the witness statement was lodged prior to the bringing of the complaint. Therefore, the best record that I have is the Claimant's resignation letter which was appended to his claim form. However, that was not included within the bundle before me.**
>
> **38. The last act complained that as pleaded to was that the Respondent made no attempt to contact the claimant about his wellbeing even though this was his fifth week of absence.**
>
> **39. The Claimant does not say who his Manager was. Whilst he refers to a number of incidents over the period, following his suspension, the investigation and the earlier acts that he refers to, it is for him to show that they form part of the 'series at trial.**
>
> **40. The claimant is essentially asserting collusion on behalf of the managers. In the absence of him alleging the manager that he now reports to, is one of the managers that he previously complained about, and I have not been taken to where that is so alleged, it will be difficult to see how that could form a final straw and part of a 'series' unless there was collusion between them. Collusion is a very serious allegation and needs to be specifically asserted. Despite that that has not been specifically alleged.**
>
> **41. I acknowledge the Claimant is a lay person but he has made that allegation elsewhere. This is a second set of proceedings, he had already drafted his witness statement in relation to the first set of proceedings stating alleging collusion. The omission in his resignation and his pleading of that allegation is also noteworthy.**
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> **42. I also note that the Claimant was off work. He had been for some time, firstly suspended and then on sick leave. His sickness related to stress at work suffering with anxiety and depression. He does not address in his resignation, whether he had sought that he be contacted by his employer, he merely refers to their procedures. The point is, that many employers have a difficult task when it comes to depression and anxiety when deciding whether to contact their employees or not. Many are warned not to contact employees. I say that because of the number of cases I have dealt with where that has been so. The reverse may also be true, but it is difficult for me to see how bearing in mind the Claimant's failure to refer me to any document saying that he was seeking those matters be pursued; how that could be anything other than innocuous.**
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> …

44. Accordingly, for those reasons,

44.1 the constructive unfair dismissal and direct discrimination claims shall be struck out,

44.2 the victimisation complaint shall proceed in relation to the issues from the letter of the 12 May that remain, namely items 8, 9, 10 and 11."

Legal framework

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

"Striking out

37.— (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..."

30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see **Anyanwu & Another v South Bank University and South Bank Student Union** [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of **Mechkarov v Citibank N.A** [2016] ICR 1121, which is referred to in one of the cases before me, **HMRC v Mabaso** UKEAT/0143/17.

31. In **Mechkarov,** it was said that the proper approach to be taken in a strike out application in a discrimination case is that:

(1) only in the clearest case should a discrimination claim be struck out;

(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

(3) the Claimant's case must ordinarily be taken at its highest;

(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and

(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In **Community Law Clinics Solicitors Ltd & Ors v Methuen** UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "*the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."*

33. A similar point was made in the case of **ABN Amro Management Services Ltd & Anor v Hogben** UKEAT/0266/09, where it was stated that, "*If a case has indeed no reasonable prospect of success, it ought to be struck out."* It should not be necessary to add that any decision to strike out needs to be compliant with the principles in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.

34. I should also refer here to the Decision of the Court of Appeal in **Madarassy v Nomura International Plc** [2007] EWCA Civ 33 because much has been submitted about the need for a discrimination complaint to contain "something more" than just a difference in status and a difference in treatment. Mummery LJ said as follows at paragraphs 54 to 57:

> **"54.I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by *Igen v. Wong* nor by any of the later cases in this court and in the Employment Appeal Tribunal. It was not accepted by the Employment Appeal Tribunal in the above mentioned cases of *Network Rail Infrastructure* ...paragraph 15) and Fernandez (paragraphs 23 and 24) and by the Court of Appeal in *Fox* (paragraphs 9-18 see above).**
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> **55.In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in *Igen v. Wong*.**
>
> > **'28. …..The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an**

> **adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could have committed" such act.**
>
> **29. The relevant act is, in a race discrimination case …., that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example, in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities. [The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.]'**
>
> **56. The court in *Igen v. Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
>
> **57."Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."**

35. In relation to constructive dismissal where the employee relies upon the "last straw" in a series of acts, that last straw must not be an innocuous act, but must be something which contributes to the breach of the implied term of trust and confidence; see **London Borough of Waltham Forest v Omilaju** [2005] ICR 481. In that decision Dyson LJ said as follows in paragraphs 19 through to 22:

> **"19. The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in *Woods* at p 671F-G where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.**
>
> **20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to**

a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above)."

The Grounds of Appeal

36. The Claimant's grounds of appeal are lengthy and cover a wide range of issues. Permission was granted to proceed to a Full Hearing on the sift by HHJ Auerbach essentially in respect of two matters, although the other matters were not expressly dismissed. The Claimant has not sought to rely on all other matters in his lengthy Notice of Appeal and has commendably focused his attack on the core matters identified by HHJ Auerbach.

37. The grounds of appeal may accordingly be summarised as follows:

(a) Did the Tribunal err in law in concluding that the claim of race discrimination had no reasonable prospect of success?

(b) Did the Tribunal err in law in concluding that the failure to contact the Claimant during his period of sickness absence was not capable of amounting to a 'last straw' within the meaning of the Decision in **Omilaju**?

(c) Did the Tribunal err in law in assuming that for the claim to succeed there needed to be collusion between managers said to have engaged in various prior conduct contributing to a cumulative breach.

38. The third of these matters was not resisted by the Respondent and the Respondent focused its attention on the last straw in relation to constructive dismissal contending that that in itself was sufficient to render the claim as having no reasonable prospect of success.

Submissions

39. The Claimant, who represented himself, submits that the Tribunal failed to take his claim at its highest in that no reference is made to the contents of his written statement or other documents upon which he relied before the Tribunal; and that the Tribunal failed to apply the caselaw properly in that there was sufficient material here from which one could draw an inference of discrimination on the grounds of the protected characteristics of race. Insofar as the Tribunal was looking for "something more", the Claimant submits that there was ample material meeting that criterion which does not present a high threshold.

40. His skeleton argument refers to the case of **Deman v The Commission for Equality & Human Rights** [2010] EWCA Civ 1279 in which it was held in paragraphs 18 and 19:

> **"18. In *Madarassy v Nomura International Ltd* [2007] EWCA Civ 33, §56, this court, per Mummery LJ, held:**
>
> > **'The bare facts of a difference in status [e.g. race] and a difference in treatment only indicate a possibility of discrimination only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'**
>
> **19. We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances, it may be furnished by the context in which the act has allegedly occurred. But this is neither of those cases."**

41. The Claimant submits that the Tribunal appears to have relied upon the reasonableness of the Respondent's explanations for the alleged conduct and that it erred in doing so because such explanation was not tested and was simply being taken at face value. He says, in effect, that it was the Respondent's case that was taken at its highest rather than his.

42. As for the claim of constructive dismissal, the Claimant submits that the Tribunal failed to have regard to the fact that the Respondent had failed to comply with its own policy of contacting those absent on sick leave every second or third week and that as such the Respondent's failure to contact the Claimant could not necessarily be regarded as wholly innocuous as the Tribunal found.

43. The Respondent, ably represented here by Mr Meichen of Counsel, acknowledged that the legal principles are not in dispute, but submits that this is one of those rare cases where a strike out is appropriate. He submits that the Tribunal's Judgment was adequately reasoned, notwithstanding its brevity and that in relation to each of the eight allegations of race discrimination, which had been identified at the Preliminary Hearing, the Claimant had not established a *prima facia* case.

44. Mr Meichen took me through the Claimant's witness statement in some detail in respect of each of the eight allegations and submitted that it was plain there was little more than mere assertion or belief that there was discriminatory treatment. He submits that even if the court was not satisfied that the decision was adequately reasoned, this Tribunal could readily conclude that the Decision was unarguably correct.

45. As to the claim of constructive dismissal, Mr Meichen submits that there was no evidence of collusion and that there was nothing to suggest that the alleged last straw formed part of a series of acts. In those circumstances, he submits it was appropriate to strike out. The critical point relied upon by the Judge was that the alleged last straw was in fact wholly innocuous.

46. Mr Meichen submits that the Judge is correct to identify that employers are frequently criticised for contacting employees who are signed off for reasons connected with stress or anxiety and that absent any indication from the Claimant that he wished to be contacted, the Respondent's failure to contact the Claimant in the short period prior to his resignation was indeed innocuous.

Discussion and Conclusions

47. The Tribunal was required to take the Claimant's case at its highest. However, whilst the Tribunal did state that it was doing so by reference to the Claimant's witness statement, it thereafter failed to make any reference to any part of the witness statement at all. That, in my Judgment, was a significant failure because even a cursory analysis of the witness statement demonstrates that there were some matters relied upon which might, at least arguably, give rise to an inference that the conduct complained of was on the grounds of race. Any conclusion that they did not do so ought to have been properly explained.

48. The witness statement is lengthy and extends to some 390 paragraphs over 32 pages. However, the following points are noted:

(a) The Claimant draws a contrast between the way Ms Lawrence's grievance against him was investigated, whereas his complaints against others were not treated in the same way. This left him feeling shaken, disappointed and isolated: see [69] and [70];

(b) At [74], he states that he believes that the allegation as to him making homophobic remarks was a case of stereotyping him as a Muslim male perceived to have negative views in relation to homosexuality;

(c) He complains that there was no reason for his transfer to another site in 2015, given that he had just received an A rating.;

(d) He was prevented from managing the concerns that Mr Younis, an Asian Muslim, had raised, for apparently no good reason;

(e) At [133] and [134], it is alleged that Mr Treasure "*was inclined to make negative remarks about the Muslim members of the community using the site, for example, they should not pray at the site. The bad smell in one of the rooms is caused by Muslims*." Mr Meichen properly drew my attention to the fact that this particular allegation was not one that the Claimant was permitted to pursue. However, he also acknowledged that if there was anything in the other claims then this might be relied upon as background, although he submitted that the Claimant still faced the difficulty that these remarks were not linked to the alleged discriminator in any way. I shall return to this point below.

(f) At [142] and [143], the Claimant describes an incident during which Ms Goodall excluded him from decision-making in relation to an application by an Asian woman to use the site for regular meetings of disabled children and relies upon the remarks made by Ms Goodall at the time which he suggested indicates stereotyping by her of him. The Claimant further suggests that such an attitude would never have been displayed towards a white manager in similar circumstances. In doing so, the Claimant appears to be relying upon a hypothetical comparator.

(g) At [147], the Claimant contrasts the treatment he received by being 'sent to Coventry' with the welcoming way in which other members of staff were treated by managers. The Claimant contrasts the way in which his complaint about Mr Carrigan was

responded to with the suggestion of informal resolution, whereas complaints against him were thoroughly investigated.

(h) At [182], the Claimant summarises the various matters upon which he relies as follows:

> **"When I reflected on all that has happened since I joined Wellbeing Services under Anne Goodall and Karen Creavin in contrast to my experience in the previous 10 years; the comments from Dean Treasure about Muslims using the centre; the decisions by Anne Goodall to stop me managing Younis; her comments to me about being an Asian man and the customer an Asian lady; the way I had been abused by Eleanor Gordon and Vivienne Lawrence; the behaviours of Dean Treasure; his refusals to carry out my reasonable instructions; his refusal even to meet with me; being sent to Coventry by Dean Treasure and Sandra Tonks; inaction of Anne Goodall and Karen Creavin when I reported abusive behaviour; the inaction of BCC Managers in HR to act on abusive behaviour directed at me; their inaction with regard to conduct by Dean Treasure, which could have amounted to fraud; decisions to remove me from my work location rather than deal with the behaviour that I complained of; the absence of meaningful support throughout etc. I concluded the only reason was my race and in part my sexual orientation as a male Asian Muslim."**

(i) At [183], the Claimant refers to the following:

> **"Meaningful support would have been to properly investigate my complaints and take disciplinary action, moving those who abused me and refused to obey my instructions rather than tolerating those behaviours and then moving me instead."**

(j) The Claimant then continues:

> **"188. I'm not aware that any Grade 5 or 6 Manager of a different racial origin was subject to the behaviours that I was subjected to.**
>
> **189. I believe that a manager of a different racial origin would have been supported if he or she had been subject to those behaviours. I felt that the underlying reason for my treatment was my race – and in part the stereotyping of my sexual orientation as a heterosexual male Muslim.**
>
> **…**
>
> **191. I was aware that the other Asian Grade 5 manager – Jagdish Gill – had also experienced problems and had registered a complaint.**
>
> **192. There were no Asian managers at Grade 6 or above in the Wellbeing Service."**

(k) Following his DAW complaint, the Claimant contrasted the treatment that he had received when asking for an extension of leave compared to that of others making similar requests; see [239].

(l) The Claimant also states that the procedure which the Respondents applied in dealing with matters against him were so far from what would be the norm in such cases that it is further evidence of discrimination and victimisation.

A

49. None of these matters were referred to by the Tribunal. It is difficult even to say that the Tribunal had referred to them by implication. Instead, the Tribunal relies on the fact that, having invited the Claimant to identify the basis for his belief that he had been discriminated against, the Tribunal was not taken to any such matters: see paragraph 28 of the Reasons. That, in my judgment, is neither a fair nor an adequate assessment of the prospects of success of the Claimant's claim.

B

C

50. The Claimant was not professionally represented. He had, however, produced a detailed witness statement which, as I set out above, contained some material which might support an allegation of race discrimination. He also placed before the Tribunal other documents in which he attempted to set out his case. These included documents entitled "Additional information", which are appended to the claim form and which contained some of the matters referred to in his witness statement.

D

E

51. In my judgment, the obligation to take the Claimant's case at its highest for the purposes of the strike-out application, particularly where a litigant in person is involved, requires the Tribunal to do more than simply ask the Claimant to be taken to the relevant material. The Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it. Insofar as it concludes that there is nothing of substance behind it, it should, in accordance with the obligation to adequately explain its reasoning, set out why it concludes that there is nothing in the claim.

F

G

52. In my judgment, having considered the witness statement, it is clear that the Claimant provides more than mere assertion that his treatment was on the grounds of race and/or religion. Amongst other matters:

H

(a) He compares his treatment with the more favourable treatment meted out in certain instances to other colleagues;

(b) He relies upon contextual and background matters suggesting that one or more of his colleagues had or had displayed negative attitudes towards Asians and/or Muslims;

(c) He contrasts the trouble-free history prior to Ms Goodall's appointment with a series of incidents that occurred after her appointment;

(d) He notes that he was the only Asian manager at his level in that part of the Respondent's organisation;

(e) He contends that the procedures applied to him deviated from the norm to such an extent that an explanation is called for.

53. Whilst it is obviously correct, as Mr Meichen submits, that none of these matters would, of themselves, give rise to an inference of discriminatory conduct, it is possible that upon analysis, if the Tribunal were to find in the Claimant's favour in respect of some or all of his allegations, the cumulative picture that emerges is one which could give rise to such an inference. It might be said that the Claimant's claim remains weak, but that is quite different from saying that it has no reasonable prospect of success.

54. The Claimant's claim does not contain any obvious defect such as an inherently illogical proposition or a key allegation of fact which is inexplicably inconsistent with contemporaneous documentation. Instead, it is what might be described as a rather 'run-of-the-mill' discrimination allegation involving differential treatment, a difference in status and some contextual background matters such as allegations of negative attitudes, stereotyping, failures in respect of procedures and of similar treatment of other individuals with the same protected characteristics. Whether or not any of these matters are established at the hearing will depend on the evidence, the findings

of primary fact made by the Tribunal and any inferences that it is able to draw from those primary facts.

55. Mr Meichen's submissions involved a careful deconstruction of some of the assertions made by the Claimant. He focuses in particular on the five points relied upon by the Claimant at paragraph 41 of his Notice of Appeal. However, those matters are not the only ones relied upon by the Claimant. The five points are prefaced by the comment, "the context includes the following": The Claimant was not intending that list of points to be exhaustive. The remainder of that document, in particular, the bullet points at the end of that page, contained several of the points expanded upon in the witness statement.

56. Mr Meichen's skeleton argument stated that he continued to rely upon the submissions made below in support of this contention that the eight specific allegations of discrimination, which had been identified at the previous Preliminary Hearing, had no reasonable prospect of success. The difficulty with those matters is that in some of those cases, the Respondent relies upon the fact that the Respondent's witnesses had provided a non-discriminatory explanation for the treatment alleged.

57. However, when assessing whether there is a *prima facie* case of discrimination, the Respondent's explanation is at that stage to be left out of account. Furthermore, the Respondent's evidence has not been subject to cross-examination. For the Tribunal to have accepted the Respondent's explanation in order to strike out the claims, it would effectively be taking the Respondent's case at its highest rather than the Claimant's. That is not to say that the Respondent's explanations cannot be taken into account at all, but care must be exercised as to the extent to which weight is given to that evidence at this preliminary stage.

58. A more fundamental difficulty, one to which I have already alluded, is that none of the submissions made below were in fact referred to by the Tribunal. Had it analysed the matters in the way that Mr Meichen sought to do today and which Mr Wilson sought to do below, it might have been possible to say that the Tribunal properly explained the Decision to strike out. As it is, the Tribunal barely provides any explanation at all for its decision. The Decision, in my Judgment, is not **Meek**-compliant.

59. Part of the submission today was that in accordance with the **Madarassy** case, there needs to be "something more" than the mere difference in treatment and a difference in status for there to be a *prima facie* case of discrimination. One needs to take some care when multiple allegations are made not to treat each one in isolation and to say that for that allegation, there is nothing more than a difference in status and a difference in treatment. The fact that there are multiple instances of alleged differential treatment might (depending on circumstances), when taken together, amount to the 'something more' that could establish a *prima facie* case.

60. If an employee with a protected characteristic is repeatedly treated in a different way from his colleagues without that protected characteristic, that might give rise to a *prima facie* case. Whether or not it does so will depend on the particular circumstances.

61. In the present case, I was taken through the eight allegations and the evidence relating to them by Mr Meichen.:

1. The first of the allegations is that in November 2015, Anne Goodall and Karen Creavin took the decision to move the Claimant from Handsworth Wellbeing Central to another location in Nechells. Mr Meichen submits that there was nothing in the relevant paragraphs of the witness statement that could possibly support the inference that it was

due to race. I do not agree. The Claimant points out that he had received an A rating for his work in relation to the centre and noted that his concerns and complaints in respect of his colleagues had been dismissed in an informal offhand way, whereas complaints against him were dealt with more formally. He also notes that soon after he was moved to Nechells, Ms Lawrence, who had been the subject of his complaint, had been moved back. The decision to move the Claimant was taken by Ms Goodall and Ms Creavin. In another part of the statement, the Claimant specifically alleges that certain treatment by Ms Goodall was directed at him because he was Asian. Taking together these matters could potentially give rise to an inference of differential treatment because of race. There was at least some reasonable prospect that it would do so. Insofar as the Tribunal might have thought otherwise, its decision was simply not explained.

2. The second allegation is that also in November 2015, Ms Goodall and Ms Creavin failed to support the Claimant in relation to the behaviour of Mr Treasure and Ms Tonks who were alleged to have been rude and dismissive towards the Claimant and to have sent him to Coventry. Mr Meichen submits that there is no evidence in the witness statement to suggest that this treatment was because of race and that there could be any number of explanations as to why his complaints were not treated as seriously. The difficulty with that submission is that the specific reason that the Claimant sought support was that he had been the subject of abusive remarks by Mr Treasure and Ms Tonks who are alleged to have made discriminatory remarks. It might be possible to draw the inference that this was connected with race depending on the evidence and that the lack of support was due to the nature of the complaint being made. At any rate, it does not seem to me to be possible to say that the claim of direct discrimination has no reasonable prospect of success.

3. The third allegation is that Ms Goodall refused to allow the Claimant to manage the absence of another colleague, Mr Younis, or his complaints about the behaviour of Mr Treasure. Once again, it is submitted that there is simply not enough material here to give rise to anything more than an assertion of discriminatory treatment. However, the Claimant does suggest that this particular episode was not properly explained by the reason given by his managers at the time. Furthermore, the allegation goes beyond simply asserting that he was treated differently because he was Asian; instead, the Claimant says that there was an attitude on the part of his managers that he would not be able to manage Mr Younis because both he and Mr Younis were Asian. It might be said that there was some support for that alleged attitude in the remarks made by Ms Goodall, set out at paragraph 142 of the statement.

4. The fourth allegation is that in June and July of 2016, Mr Carrigan had decided to reject the Claimant's proposal of a return to work following an absence due to stress. The details in relation to this complaint are certainly limited, but the general thrust of the allegation is of a piece with those made against Ms Goodall, which is that his manager's attitude to the Claimant was different from and less supportive than that displayed towards other colleagues. The Claimant did not wish to return to the Nechells site because of the issues there with Mr Treasure and Ms Tonks which remained unresolved.

5. The fifth and sixth allegations, as Mr Meichen points out, have also been relied upon as allegations of victimisation for having made the DAW complaint. It would appear that these allegations have been allowed to proceed as allegations of victimisation. The Tribunal has not explained that it rejected these complaints on the basis that there was an overlap with the victimisation complaint, but rather because they amounted to no more than mere assertions. It seems to me that the mere fact that the Claimant has chosen to rely upon

an act, both as having been done by reason of a protected act and because of race, does not mean that one or both of those claims is bound to fail.

6. The seventh allegation is that the decision by Mr Carrigan to refuse a request for annual leave was discriminatory. In relation to this claim, the Claimant does identify three named comparators whom he says were subject to different treatment in respect of requests for extended leave. That factual assertion and the fact that the Claimant, who was suspended at the time, was required to use up his annual leave before the end of the holiday year, could potentially give rise to the conclusion that the Claimant was being treated differently and that the reason for that treatment was because of his race. I accept that the claim, on its face does not appear to be particularly strong, but the test is not whether or not it is strong but whether it has a reasonable prospect of success. Given the entirety of the matters set out in the statement, it seems to me that that threshold is crossed.

7. The final allegation is that against Councillor Trickett. This appears to have been withdrawn and I say no more about it.

62. Mr Meichen, as I said, invited me to conclude that even if the Decision was inadequately reasoned, it was unarguably correct. For the reasons set out above, I am not satisfied that it can be said that the Decision was unarguably correct. On the contrary, having considered the material in some detail, it seems to me that the relatively low threshold of establishing a reasonable prospect of success is crossed in this case.

Constructive Dismissal

63. The Tribunal correctly identified the "last straw" relied upon by the Claimant as being the failure to contact him during his absence. However, the Tribunal rejects this as being a wholly

innocuous act on the part of the Respondent, which cannot be relied upon as a last straw. In coming to that Decision, the Tribunal made some general observations about the difficulties faced by employers when deciding whether or not to contact employees who were absent with depression and anxiety, and concluded that in the absence of any evidence from the Claimant to show that he wanted such contact, the Tribunal could not find that the failure to contact him was anything other than innocuous. I am told that there was no evidence from the Respondent that its failure had anything to do with reticence on its part to contact the Claimant due to his ill health.

64. Whilst the Tribunal does note that the Claimant refers to the Respondent's procedures in relation to this claim, it does not at any stage attempt to set out what those procedures were. It is clear from the extracts from the Respondent's policy before me that there was a policy to maintain contact every two or three weeks. No exceptions are stipulated for absences due to anxiety and stress.

65. I note from the **Omilaju** case that the last straw need only contribute to the breach of the implied term of trust and confidence, even though that contribution may be relatively minor. In my Judgment, the fact that there was a policy, which in the ordinary case would entitle an employee to expect to be contacted during the period of absence, means that the failure to maintain such contact could potentially contribute something to the growing lack of trust and confidence. I consider it to be incorrect to disregard that potential contribution merely because in other cases, an employer might be reluctant to do so for fear of being criticised for engaging in intrusive or oppressive behaviour.

66. It is noteworthy in this case that the day after the Claimant's resignation, there was an email from the Respondent requesting arrangements to make contact. This tends to undermine

any suggestion that the Respondent's reasons in this case for not contacting the Claimant were to do with ill health.

Conclusion

67. For all of those Reasons, I consider that the Tribunal erred in law in striking out the Claimant's claims, as it cannot be said that they had no reasonable prospect of success. This appeal is allowed.

Disposal

68. An assessment of whether the claim does have a reasonable prospect of success may be made on the material before the EAT. In my Judgment, for the reasons set out above, the claim does have a reasonable prospect of success and I substitute a Decision to that effect.