EMPLOYMENT TRIBUNALS

Claimant: Miss C Rose

Respondent: Jet2.Com Limited

Heard at: Manchester **On:** 15 January 2019

Before: Employment Judge Langridge

REPRESENTATION:

Claimant: Mr M Broomhead

Respondent: Mr N Siddall, Counsel

REASONS

The Judgment of the Tribunal was given to the parties at the hearing on 15 January 2019. The claimant requested written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, which are set out below.

Introduction

1. The claimant's Application to the Tribunal was received on 7 March 2018 and comprised claims for constructive unfair dismissal, sex discrimination, and breach of contract relating to notice pay. Information about the complaints was set out in "Schedule A" attached to the form ET1. It referred (without providing details) to "a sustained campaign of harassment and bullying" by Ms Elizabeth Acker, an employee

of the respondent, and said this was prohibited conduct under section 26 Equality Act 2010. The repudiatory conduct leading to the claimant's resignation was linked to the respondent's handling of her grievance about the alleged bullying and harassment, and this was described as conduct "based on the claimant's sex". In making this assertion the claimant relied on the fact that Ms Acker "would never carry out a course of conduct and has never carried out a course of conduct against a male colleague".

2. In its Response the respondent defended all claims and sought further information about the alleged harassment. It also identified issues about whether the discrimination claim was brought in time, and stated an intention to apply to strike out the claims or seek a deposit order. The respondent reserved its position on the time points, which were not addressed directly today.

3. The purpose of this Preliminary Hearing was to hear applications from both parties. The respondent applied for an order striking out the claimant's sex discrimination claim (or claims), or alternatively a deposit order on the grounds that such claims had little reasonable prospect of success. The respondent sought to strike out the claims only so far as they were brought under the Equality Act 2010 ('the Act'), leaving undisturbed the claims for breach of contract and for constructive unfair dismissal under the Employment Rights Act 1996.

4. The claimant's application to strike out the Response was also heard today. The grounds for this were that an agreed bundle was not produced by the respondent in compliance with Case Management Orders made in May 2018.

5. The claimant was prepared to give evidence to the Tribunal about her means, for the purpose of the deposit order application, though this became unnecessary when the respondent accepted her figures and her disposable income of £455 per month. A small agreed bundle was provided and included key documents including the claimant's grievance letter dated 3 November 2017, and correspondence between the parties' representatives.

6. The parties were expecting this hearing to take place on 7 December 2018, and had agreed between themselves (without involving the Tribunal) that the witness statements and an agreed bundle for the final hearing would be produced at the end of December, by which time the scope of the claims would be clearer. Once notified by the Tribunal that the 7 December hearing could not proceed through lack of judges, the respondent made an immediate application to vacate the substantive hearing of these claims which was due to take place on 15-17 January 2019. Again for reasons relating to Tribunal resources, it was not until 8 January 2019 that this postponement was agreed by the Tribunal.

7. The claimant, meanwhile, had been understandably concerned to have the bundle in December 2018 and finalise preparation for the final hearing in January, but rather than take up an invitation from the respondent on 28 December to send her a copy of the bundle, she applied to strike out the Response. By 8 January 2019 the

parties were aware that the final hearing had been postponed to some uncertain future date. Nevertheless, the claimant wished to proceed with her application today.

8. The applications required the Tribunal to consider a number of questions:

(1) What discrimination claims have actually been pleaded?

(2) Is a mere assertion of sex discrimination enough, or does the claimant need to say more to persuade the Tribunal that her claims have a reasonable prospect of success and should continue?

(3) Do the multiple documents setting out the claimant's claims clarify the pleaded case in the original ET1, or do they add new claims to the scope of the proceedings? If the latter, should such claims be introduced by way of amendment (although no application to amend was in front of the Tribunal today)?

(4) On the face of it, do disputes of fact exist which are central to the discriminations claims and need to be tested at a full merits hearing?

(5) Alternatively, can the Tribunal be confident that no further evidence relating to the issues as pleaded would affect a decision to strike out claims?

(6) If it cannot be said that the claimant's discrimination claims have no reasonable prospect of success, should a deposit order be made on the grounds that they have little prospect of success?

(7) Is it no longer possible to have a fair trial of the issues given the respondent's delayed compliance with the order to serve an agreed bundle on the claimant by 20 August 2018?

<u>The pleadings</u>

9. In total the claimant produced three documents purporting to set out her claims. The content (so far as relevant to the respondent's strike out application) can be summarised by reference to each document, as follows.

(1) **Application to the Tribunal dated 7 March 2018, Schedule A**.

This identified a "sustained campaign of harassment and bullying" by Ms Acker amounting to prohibited conduct under section 26 of the Act. The conduct was "based on the claimant's sex" because Ms Acker "would never carry out a course of conduct and has never carried out a course of conduct against a male colleague".

(2) **Full particulars of the claimant's allegation of sex discrimination dated 11 May 2018**

This repeated the assertion in the ET1 about a "sustained campaign of harassment and bullying" in breach of section 26(1) of the Act and added that this "created an intimidating hostile degrading, humiliating or offensive environment" for the claimant. The conduct was said to be "related to the claimant's protective [sic] characteristic namely her sex" as Ms Acker "had never displayed such conduct against a male colleague of hers", nor had Ms Acker "been the subject of a grievance made by a male colleague".

(3) **Schedule of Allegations dated 4 June 2018**

This table identified six allegations, giving in each case the date of the allegation, the alleged perpetrator, the nature of the "less favourable treatment", the "ground/reason why" and finally the comparator. It did not identify the Equality Act provisions relied on, though this was explored during today's hearing.

10. The content of the Schedule of Allegations requires further scrutiny, by reference to each of the six allegations:

(1) ***Allegation 1*** – A sustained campaign of harassment and bullying by Ms Acker between 28 February 2017 and 7 August 2017, the reason being the claimant's sex, and naming a hypothetical male comparator. This reflects the original allegation but still no details of dates or events are provided. As a comparator is not needed for a section 26 claim, this raises the question whether the claimant is also seeking to treat this as a direct discrimination claim under section 13.

(2) ***Allegation 2*** – A failure by Marc Burns on 24 August 2017 to "comply with the respondent's grievance procedure dealing with informal grievance". The stated "reason" is that the claimant made an allegation that Ms Acker had contravened the Act, and a hypothetical comparator is identified as someone who had not made such an allegation. While not stated, this allegation has the appearance of a victimisation claim under section 27 of the Act, for which a comparator is again unnecessary.

(3) ***Allegation 3*** – A failure by Amanda Harris on 11 October 2017 to deal with the claimant's grievance concerning Ms Acker at a welfare hearing. The same (unnecessary) hypothetical comparator is named as for Allegation 2. This too has the appearance of a victimisation claim under section 27.

(4) ***Allegation 4*** – A failure on 9 November 2017 by Ms Harris to treat a meeting of that date as a grievance hearing, "instead suggesting a formal meeting and prejudging its outcome namely that of mediation". The reason for

the treatment and the hypothetical comparator mirror Allegations 2 and 3, suggesting this too is intended to be a section 27 victimisation claim.

(5) ***Allegation 5*** – That the grievance hearing was not held in good faith by Nicola Towns on 23 November 2017, and a letter dated 4 December 2017 recommended mediation and a conversation between the claimant and Ms Acker, "an outcome intimated at the meeting on 9 November 2017". Although the box for the "reason" for the treatment is blank, the same hypothetical comparator is given as for Allegations 2, 3 and 4, suggesting a further victimisation claim is being set out.

(6) ***Allegation 6*** – This relates to the respondent's alleged dismissal of the claimant on 8 December 2017, "which was in the circumstances unfair". The assertion has the appearance of a further section 27 victimisation claim because it refers to the same allegation that Ms Acker had contravened the Act, and the hypothetical comparator is again a person who had not made such an allegation. It could also be a discriminatory dismissal claim under section 39.

11. The Tribunal had made the claimant aware of the need to fully particularise her claims at an early stage, initially requesting such detail prior to a case management preliminary hearing on 14 May 2018. At that hearing Judge Feeney noted that the sex discrimination claim was unparticularised and that the claimant's "Full Particulars" document was insufficiently detailed. The claimant has been represented throughout by Mr Broomhead. He told Judge Feeney that in her discrimination claim his client relied on the grievance and the failure to uphold it, in response to which the Judge pointed out that even if the alleged harassment amounted to discriminatory conduct, this does not necessarily mean the respondent's handling of the grievance could be assumed to be discriminatory in nature. She ordered that the claimant provide:

> "a schedule of all the allegations describing as far as possible when they occurred, who was responsible for the event, whether there were any witnesses, and setting out what type of discrimination is relied on."

12. The product of that order was the Schedule of Allegations dated 4 June 2018. It is apparent from the face of that document that the six allegations go beyond providing further particulars of matters already pleaded in the ET1. Given that the original pleading alleged discrimination only in the form of harassment contrary to section 26 of the Act, it could be expected that the further particulars would amplify and clarify that claim. It does not. Instead, the document suggests the claims also fall under section 13 (direct discrimination) and section 27 (victimisation). Indeed, Mr Broomhouse confirmed today that he does wish to pursue claims under those provisions as well as under section 26. This judgment shall therefore refer to the discrimination claims in the plural, notwithstanding the dispute about whether the claims under sections 13 and 27 of the Act had been properly brought.

13. In dealing with the harassment claim under section 26, the Schedule of Allegations repeated that there was a "sustained campaign of bullying and harassment" between 28 February 2017 and 7 August 2017. It said nothing else about the harassment allegation (other than unnecessarily to identify a hypothetical male comparator), and made no attempt to describe the individual incidents of harassment.

14. Although not part of the pleadings, the Tribunal was taken to the claimant's grievance letter dated 3 November 2017. In it the claimant referred to her concerns about Ms Acker's "attitude and rude comments" towards her and requested that the respondent find a resolution. The letter was accompanied by a note headed "Some of the comments that have been made to me by Elizabeth", referring to occasions when Ms Acker was said to have "snapped" at her or spoken "abruptly" or insensitively. Nowhere in the letter or note was any reference made to the treatment being related to the claimant's sex, nor was there any suggestion (even impliedly) that the conduct was in breach of the Equality Act.

Submissions on the respondent's application

15. The application to strike out the discrimination claims was made under Rule 37(1)(a) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'), on the grounds that these claims as pleaded have no reasonable prospect of success. The respondent also relied on Rule 53(1)(c) as giving the Tribunal the power to make such an order at a preliminary hearing, as well as referring the Tribunal to the principles of the overriding objective set out in Rule 2.

16. In his submissions Mr Siddall referred the Tribunal to a number of key cases, including North Glamorgan NHS Trust v Ezsias 2007 IRLR 603 on the approach to be taken to the question whether the claims have a reasonable prospect of success. Relying on the judgment of Maurice Kay LJ, he submitted that the test is:

> *"whether an application has a realistic as opposed to a merely fanciful prospect of success".*

17. He went on to refer to these passages from the Court of Appeal's judgment:

> *"… I too accept that there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success […]. However, what is important is the particular nature and scope of the factual dispute in question."* [paragraph 27]
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> *"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the Applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."* [paragraph 29]

18. The EAT authority in Chandock v Tirkey 2015 ICR 527 was also relied on, in particular the following passages:

> *"In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."* [paragraph 18]
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> *"This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out—where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867, para 56):*
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> > *"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."*
>
> *Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."* [paragraph 20]

19. The respondent acknowledged in its submissions that a strike out on the basis of facts is rarely appropriate, though it is in this case, citing Anyanwu v South Bank Students Union 2001 ICR 291:

> *"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more*

than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest." [paragraph 24]

20. The alternative application for a deposit order was made under Rule 39(1) of the Rules, relying on the claims having little (as opposed to no) reasonable prospect of success. The respondent cited Van Rensburg v Royal Borough of Kingston 2007 UKEAT/95/07 in support of the proposition that the test is a lower one than applied in Ezsias. Quoting paragraphs 26 and 27 of the judgment:

> *"Ezsias then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike out is considered pursuant to r 18(7). It would be very surprising if the power of the tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal is assessing the prospects of success, albeit to different standards.*
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> *Moreover, the test of little prospect of success in r 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in r 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

21. The Tribunal was referred to the more recent authority of Hemdan v Ishmail 2017 IRLR 228 on the question of the lower threshold test to be applied to a deposit order application. This judgment (in paragraph 13) sets out some relevant guidance on the approach to be taken to an assessment of the facts in a case:

> *"The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the preliminary hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested."*

22. In summarising his submissions, Mr Siddall included the following points:

(1) The claimant had failed despite three attempts to particularise her discrimination claims.

(2) The allegations of harassment were still undefined.

(3) The claimant's grievance letter of 3 November 2017 disclosed no case of gender-based harassment.

(4) No protected act was identified as regards items 2-6 in the Schedule of Allegations.

(5) The pleaded case raised no evidential basis for suggesting that any protected act was in the mind of the respondent's decision-makers.

23. The claimant's submissions in answer to the strike out application referred the Tribunal to some of the same case law, including Anyanwu and Ezsias. In addition, Mr Broomhead relied on Tayside Public Transport v Reilly 2012 IRLR 755, in which the Court of Session overturned a decision to strike out an unfair dismissal claim in circumstances where there were disputed facts which could be "properly resolved only by a hearing before a full tribunal". He also relied on Dossen v Headcount Resources Ltd 2013 UKEAT 0483/12, in which the EAT cited paragraph 24 of Anyanwu (quoted above). In paragraph 13 of its judgment the EAT referred to the following passage in Ezsias:

> *"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise."*

24. Like Mr Siddall, Mr Broomhead drew attention to paragraph 29 of the Ezsias judgment (quoted above), arguing that a strike out order should be made only in an exceptional case. He also referred the Tribunal to paragraph 14 of Dossen:

> ***"****In this case there was without doubt a "crucial core of disputed facts". Indeed, there was virtually no common ground between the case for Mrs Dossen and the case for Mr Colman on the question of sex and associative race discrimination. The two allegations that were struck out were part of that crucial core; they were not in any sense peripheral. It would therefore require an exceptional case before striking-out would be appropriate. The Employment Judge was alive to the point that discrimination cases are fact-sensitive. He struck these allegations out because he considered them incapable of proof as a matter of fact in the light of the documents."*

25. Mr Broomhead urged the Tribunal not to strike out the discrimination claims as this would be an exercise of a draconian power. He relied on the words of caution expressed in paragraph 20 of Chandock, pointing out that the power to strike out should be used cautiously and sparingly.

26. In relation to the deposit order application the claimant referred the Tribunal to Van Rensburg and Hemdan, and to several other authorities on questions relating to the correct legal test and the party's ability to pay. He summarised his submissions as follows:

(1) A Tribunal can make a sensible summary assessment on disputes of fact in some cases, but not in other cases which would involve disproportionate steps such as holding a mini-trial.

(2) Where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances.

(3) The Tribunal has a discretion to make a deposit order if it forms the view that a claim has little reasonable prospect of success.

27. During his submissions Mr Broomhead was invited repeatedly to identify what central facts were in dispute, such as to support his argument that the claimant's discrimination claims should be aired fully at a final hearing. In answer, he referred in broad terms to:

(1) the interactions between the claimant and Ms Acker, referring to the grievance outcome letter dated 4 December 2017;

(2) the unsatisfactory handling of the grievance, including the lack of action by managers and the fact that the respondent did not "nip the bullying and harassment in the bud";

(3) the disagreement about whether mediation should take place or not.

28. When asked what facts brought the claims within the scope of the Equality Act, Mr Broomhead replied that the grievance "implied" that the bullying and harassment was about sex discrimination because the claimant is a woman and because other women had also complained about Ms Acker. The Tribunal took Mr Broomhead through each item in the Schedule of allegations and asked him to identify the factual basis for saying it was a claim which could be brought under the Act. Mr Broomhead was unable to identify any such facts. In discussion about how the 3 November 2017 grievance letter identified any claim under the Act, Mr Broomhead commented that the claimant "did not know what Elizabeth Acker's motives were for the conduct".

<u>Conclusions on the scope of the pleaded case</u>

29. The application was to strike out all claims brought under the Equality Act 2010, which required the Tribunal first to establish exactly what claims had been properly brought. The sequence of documents by which the claimant sought to plead her claims has already been recited in detail. It comprised the ET1 with its attached Schedule A, the Full Particulars of the Allegations of Sex Discrimination, and the Schedule of Allegations.

30. The ET1 identified only one claim under the Act, namely unlawful harassment contrary to section 26. The person said to have harassed the claimant was Ms Acker. The allegation was a discrete one relating to the conduct of one individual over a

particular period of a few months in 2017. That allegation was the only reference to a claim under the Act, and section 26 was explicitly mentioned. No reference was made to any other type of discrimination claim, nor did sections 13 or 27 feature in the pleading. Even in the Schedule of Allegations served some months later, the claimant made no reference to particular sections of the Act. Importantly, no facts were set out in any of the three pleading documents which could form the basis for any claims for direct discrimination or victimisation. Notably, no attempt was made to identify the factual basis for alleging that the claimant had done a protected act for the purposes of a victimisation claim. Mr Broomhead's submissions today added nothing to those omissions.

31. Following Chandock, it is important not to treat extraneous documents as part of the pleaded case, and the Tribunal has not done so. But even if the grievance letter of 3 November 2017 were taken into account, that would not assist the claimant because there is nothing in her description of Ms Acker's comments which remotely suggests the alleged harassment was related to her sex.

32. The subsequent pleading documents did not add anything to the allegation of harassment, simply restating what had been said in the ET1. The Schedule of Allegations directed the respondent to aspects of its handling of the grievance, but left it no wiser as to the detail of Ms Acker's alleged conduct.

33. The additional information provided in the Schedule of Allegations cannot be characterised as further details of the existing harassment claim. Instead, wholly new allegations and causes of action were raised for the first time some three months after the claim was brought. To introduce new causes of action would require an application to amend the claim, and no such application was made. If it had, the Tribunal would have had to consider the time elapsed since the events took place in deciding whether to allow new claims to be added, as they were likely to be out of time.

34. The five new allegations in the Schedule of Allegations related to incidents between 24 August 2017 and 8 December 2017. The information simply outlined bare factual complaints about the handling of the grievance, and added an entirely new claim that the claimant's dismissal was discriminatory. If a claim were to proceed under section 39(7)(c) of the Act, this would be a wholly different argument than a constructive unfair dismissal claim in that it would require evidence from which a Tribunal could infer discrimination.

35. No provisions of the Act were set out in the Schedule of Allegations, though it was suggested that the five new allegations amounted to victimisation claims under section 27 of the Act, the protected act being a bare assertion that the claimant had "made an allegation that the said Elizabeth Acker had contravened the Equality Act 2010". No information was provided then or today about the facts underpinning that assertion. It is not a pleading which the respondent can be expected to understand or against which it can be expected to defend itself.

36. The Tribunal is satisfied that the five new allegations in the Schedule of Allegations are of a quite different kind from the harassment claim pleaded in the ET1. They do not clarify or amplify the harassing conduct. They seek to enlarge the number of causes of action from a section 26 claim only, to claims of direct discrimination, victimisation and discriminatory dismissal. The claimant has made three attempts in writing to help the respondent and the Tribunal understand the nature of the Equality Act claims and even in the face of an application to strike out, has still failed to produce any information suggesting such claims have any factual basis or any merit. Without hearing full evidence today, the Tribunal would nevertheless expect the claimant to be able to point to the evidence she intends to bring to a final hearing to support her bare assertions. The claimant has unambiguously been unable to do so.

37. To the extent that the claimant is seeking to add any claims under the Act other than a section 26 harassment claim, the Tribunal's conclusion is that mere service of a Schedule of Allegations some months after instituting the claim does not permit the claimant to add new causes of action. They were not intimated in the original claim, and neither in that document nor in the later Schedule of Allegations were any facts set out which could form the basis of such new claims.

38. While the Schedule of Allegations did purport to identify victimisation claims under section 27, and raised the possibility (confirmed today) of an attempt to bring a claim under section 13, those are separate and distinct causes of action. In order for those other claims to form part of the pleaded case, the claimant would have to apply to add them by way of amendment, an application which Mr Broomhead has explicitly declined to make and which would no doubt be resisted by the respondent, not least because of the delay and consequential issues about the claims being out of time.

39. Accordingly, the Tribunal concludes that the only claim under the Act which has been validly identified in the pleadings is the harassment claim under section 26. No claims have been properly brought under sections 13, 27 or 39 of the Act, and no application to amend the ET1 to add those new claims has been made.

Conclusions on the respondent's applications

40. Having determined that the scope of the discrimination claims properly pleaded is limited to the harassment claim, the Tribunal has gone on to assess the merits of allowing that claim to continue to a full hearing.

41. Mr Broomhead on the claimant's behalf gave an account in his submissions in an effort to identify, at the Tribunal's request, the nature of the claims and in particular why it was important for a future Tribunal to hear evidence about disputed facts. In essence the disputed facts he identified came down to the following:

> (1) The interactions between the claimant and Ms Acker. He referred to the grievance outcome letter dated 4 December 2017 which acknowledges that Ms Acker was spoken to, but that letter does not show that she disputed making any comments. What she did say, as expressed by the author of the letter, is that

she did not intend any malice by her comments. In other words, it is not a case where the making of the comments was in dispute so much as a question of what interpretation should be placed on them.

(2) The lack of action by managers. Initially Mr Broomhead submitted that the claimant had "implied" to Mr Burns that the problems she was having with Ms Acker were about sex discrimination, though later in his submissions he conceded that the claimant had not asserted her rights under the Act then or at any time during her employment. He said the claimant did not know at the time what Ms Acker's motives were.

(3) The disagreement about whether or not mediation should take place. The facts surrounding that disagreement were not in dispute as far as the Tribunal could see. Mediation was offered and declined. The rights and wrongs of that argument will be for another Tribunal to assess, but from the information before me today, no dispute of core facts could be discerned from that or the other matters relied on by the claimant.

42. In making the concession that the claimant had not asserted her rights under the Act at the time, Mr Broomhead said this allegation was raised only after the claimant had been advised by him. The Tribunal has no difficulty with the idea that employees cannot be expected to know and understand their statutory rights, nor to be able to articulate the law. That said, it can be expected that an employee who believes she is being harassed because she is a woman to understand that fact, and to be able to say to her managers, 'This is because I'm a woman'. It does not need any knowledge of the law.

43. On her own case the claimant alleges that she was bullied and harassed, but even by the time of her formal grievance she did not assert that her gender was the reason for the bullying and harassment. This is at odds with the assertion of discriminatory dismissal in the Schedule of Allegations.

44. The question posed by Ezsias is whether the discrimination claim – meaning here the harassment allegation – has a realistic rather than fanciful prospect of success. Where there are disputed facts it is necessary for the Tribunal to examine the particular nature and scope of the dispute. The Tribunal sought to do so with the benefit of Mr Broomhead's submissions. The scope of the factual dispute is very limited in this case, given the absence of any pleaded details about the alleged bullying and harassment. The only source of information about the detail is in the claimant's grievance letter and its attached examples of comments which she described as "rude" or "abrupt". That letter does not form part of the pleadings, but even if it did, it discloses nothing from which a Tribunal could conclude that the claimant had been subjected to discriminatory harassment.

45. Whether the facts as described in the grievance letter were denied or admitted by the respondent, this would make no difference to the question whether the

treatment amounted to a breach of the Act. If there were a proper factual basis for alleging that the harassment related to sex, beyond a mere assertion to this effect, this Tribunal would have expected to be made aware of it. The nature and extent of any dispute about that key issue could then have been evaluated. The difficulty for the claimant is that she was wholly unable to explain what facts a future Tribunal would need to hear evidence about, in order to determine the merits of a section 26 claim.

46. Anyanwu makes clear that a strike out on the basis of disputed facts is rarely appropriate, and the Tribunal is mindful of the fact that this is especially important when dealing with discrimination allegations. That said, the guidance in Ezsias and Hemdan do permit the Tribunal to make a summary assessment of the facts as presented and as pleaded, without holding a mini-trial on facts. In Chandock the court envisaged that there may be cases where it is appropriate to strike out because they consist of a bare assertion of discrimination based merely on a difference of treatment and a difference of protected characteristic. That is exactly the case here.

47. It is therefore permissible and proportionate to carry out a sensible assessment of the available facts in order to determine the likelihood of the claimant being able to establish facts essential to her discrimination claims, per Hemdan. There is no core conflict of facts relevant to the discrimination allegations which needs to be resolved at a full merits hearing. The Tribunal was able to reach its decision on the strength of the pleadings, read alongside the claimant's grievance letter. Mr Broomhead was given multiple opportunities to identify the central or core facts relevant to the Equality Act claims which meant this case was not susceptible to determine other than by an evaluation of the evidence at a final hearing. He was unable to do so. Like the Tribunal in Dossen, this Tribunal considers the core factual allegation of harassment to be incapable of proving sex discrimination at a full hearing.

48. The Tribunal has taken into account the possibility of making orders for further particulars of the claims to be provided, and asked itself whether any lack of clarity in the pleadings could be cured in this way rather than take the ultimate decision to strike out. Weighing up the balance of fairness and proportionality between the parties, and the overriding objective, the Tribunal concludes that the harassment claim falls within the exceptional cases which merit a striking out order following a summary assessment of the facts. Despite having three opportunities to formulate her claims with the assistance of a professional representative, the claimant has been wholly unable to do so. A further case management order would evidently achieve nothing more.

49. Although it is clear that a striking out application should be approached with caution, the Tribunal is not satisfied there is any likelihood of the claimant being able to establish the facts which would be essential to her harassment claim. There is therefore a proper basis upon which to strike out the discrimination claim.

50. Having concluded that the scope of the pleaded claims is limited to the harassment claim under section 26, the Tribunal has also considered whether the

position would be any different if the pleaded claims were to include those intimated under sections 13, 27 and 39 of the Act. There is nothing about the limited facts pleaded in support of those claims which points to an arguable sex discrimination case, and the Tribunal concludes that none of them have a reasonable prospect of success. Like the harassment allegation, they are bare assertions of fact which say nothing at all about when and how any protected act was carried out so as to underpin a victimisation claim. The Tribunal's reservations about the lack of any factual basis to support the allegation of harassment apply equally to the other claims which the claimant has sought to bring forward under the Act.

51. Having decided to strike out the claimant's claim under the Act, it is not necessary to determine the respondent's application for a deposit order under Rule 39(1). Had it been so, the Tribunal would have had no difficulty in concluding that any discrimination claims had little prospect of success, such as to warrant the making of a meaningful deposit order.

Conclusions on the claimant's application

52. The claimant's application to strike out the Response was made under Rule 37(1)(c) of the Rules on the grounds of the respondent's non-compliance with the order to produce the agreed bundle on time. The relevant test is whether it is no longer possible to hold a fair trial of the issues. In considering this application the Tribunal also had to consider whether other steps were available to it which could cure the problem, for example by the provision of a bundle with an extension of time to the original order.

53. It was not in dispute that the bundle was not provided to the claimant in accordance with the case management order of 14 May 2018, which required the respondent to prepare an agreed bundle and provide a copy to the claimant by 20 August 2018. The parties agreed to put that date back by some considerable time, to December 2018, and so the claimant cannot complain about the intervening period. The explanation for the delay in December 2018 required some scrutiny.

54. The claimant's application may well have been warranted at the time when it was made, although in the face of the respondent's offer to send her a bundle on 28 December it is difficult to see what such an application could hope to achieve. That is all the more the case today, given that the parties have known since 8 January that the final hearing is not taking place this month.

55. It is also relevant to take into account the delays which the claimant caused or contributed to during the parties' preparation for the final hearing, and the correspondence between the parties shows that the claimant has at times been slow to deal with the case preparation.

56. Circumstances changed after the date when this application was made, and from 8 January there was really no purpose in pursuing it. It is undoubtedly possible to keep the preparation of this hearing on track and ultimately to have a fair trial of the

unfair dismissal claim. Mr Broomhead was unable to provide reasons why a fair trial would not be possible, or point to any other substantive argument why the response should be struck out. Indeed, his 10-page submission document made no reference to the point. The Tribunal is satisfied that the failure to produce a bundle in a timely way in no way impairs the ability to have a fair trial. The parties have already completed most of their preparation, including drafting witness statements, the finalisation of which is subject to the question whether the discrimination claims would be allowed to continue. There is therefore no question of the delay having any untoward impact on the claimant or on the future hearing.

57. Furthermore, the preparation of the bundle and the witness statements was liable to be directly affected by the outcome of this preliminary hearing. The respondent's application was originally intended to be heard before the date for exchange of statements and provision of the bundle. If, as has turned out to be the case, the discrimination claims are struck out, then there is no need for those to be dealt with in the evidence.

58. While the respondent did not comply with the order on time, the correspondence shows that some delays were contributed to by the claimant. In any event the respondent was entitled to await the outcome of the preliminary hearing before finalising the bundle. It then offered to provide a bundle on 28 December, an offer which the claimant refused for no good reason. Having taken into account the overriding objective, especially proportionality, and the fact that case management orders can now be made to ensure the preparation is on track for a final hearing, the application to strike out the Response is refused.

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Employment Judge Langridge

Date 20 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 September 2019

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