THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE ROSS (sitting alone)**

BETWEEN:

Claimant

MS S EDEY

AND

Respondent

LONDON BOROUGH OF LAMBETH (1)
MR KEITH McMAHON (2)

ON: **4 November 2019**

APPEARANCES:

For the Claimant: **Did not attend**

For the Respondent: **Mr J Arnold**

RESERVED JUDGMENT

PRELIMINARY HEARING

1. The complaints in the table of allegations, entitled "Further Particulars", at B2, B3, B4, C2, D6, E1 and E3 are not part of the Claim.

2. The following parts of the Claim are struck out:

   2.1 The fourth (alleging a wrongful accusation by the Second Respondent), fifth, ninth (headed "S.27-Victimisation"), eleventh (headed "S.13 Direct Discrimination") and thirteenth (headed "Section 15 Discrimination

arising from a disability") paragraphs of the grounds of claim attached to the ET1.

2.2 The complaints in the table of allegations entitled "Further Particulars"at A2, D7(xiv)(xiv), and (xviii), D10, D11, D12, D13, and E2.

REASONS

Introduction

1. In this set of Reasons, I have used the following abbreviations:

"R1": the First Respondent;

"R2" : the Second Respondent;

"the grounds of claim" refers to the two pages of particulars attached to the ET1 (pages 17-18 of the bundle);

"the Decision": the Judgment and Reasons promulgated on 23 August 2019 (after determination of the first seven claims brought by the Claimant against R1)

"the first Tribunal" refers to the Employment Tribunal which made the Decision.

"EA*":* The Equality Act 2010

The issues

2. This Preliminary Hearing was listed for the Employment Tribunal to consider:

2.1 Whether the complaints, or any part of the complaints, should be struck out as having no reasonable prospect of success; and if not struck out, whether a deposit order should be made in respect of any complaints having little prospect of success;

2.2 Whether there should be a restricted reporting order, given the prospective damage these allegations could have on the career of R2;

2.3 Whether the decision should not be published on the Employment Tribunal website; and

2.4 If so published, whether R2's name should be redacted.

3. A further application to consider moving the hearing of this Claim to another region was not pursued by R2.

4. Mr. Arnold represented both Respondents.

5. The Claimant did not attend this Preliminary Hearing. At 10.05 am, on the date of the hearing, an email was sent to the Tribunal, copied to the Respondents. This stated that the Claimant:

"…*will be unable to attend the preliminary hearing scheduled for today at 2pm (4th November 2019) due to an incident related to her disability and therefore she is too unwell to attend.*

Please see attached for the submissions that she would have given in the Tribunal today. Hopefully, the Judge will be able to take these submissions into consideration."

6. The Claimant did not apply for a postponement. Looking at the history of this Claim, including where a postponement has been sought before by the Claimant, and the relative quality of the Claimant's submissions (both for this Preliminary Hearing and earlier in this Claim) given that she is a lay person, I concluded that the Claimant knew that a postponement could have been applied for. I determined that proceeding to hear the applications would further the overriding objective of justice between the parties, because it would avoid delay and save expense and, not least, because the Claimant implicitly accepted that the hearing would take place by asking for her submissions to be taken into consideration.

7. I took the Claimant's submissions into account in reaching my decision on the applications before me.

8. The Respondent provided a bundle of documents. I was taken to a selection of these documents, which are referred to in these Reasons. Page references in this set of reasons refer to pages in that bundle. Counsel for the Respondent provided written submissions. I read and considered both sets of submissions and the authorities within them.

The application for orders to strike out or for deposit orders

9. In brief, the Respondents' submissions were that the complaints should all be struck out because they were vexatious or had no reasonable prospect of success.

10. On the question of whether the Claim was vexatious, Mr. Arnold submitted that:

10.1. The complaints were groundless and unwarranted. They were extracting a high emotional cost, not just legal cost.

10.2. Pages 54-74 were all particulars of alleged complaints. Looking at the content and the details, these were all vexatious.

10.3. The Claim was vexatious as it was the eighth Claim; claims 1-7 had not been upheld.

11. Mr. Arnold made oral submissions to support the Respondents' written arguments that the complaints had no reasonable prospect of success:

11.1. As an example, Mr. Arnold referred to A1. He alleged that every action challenged by the Claimant was on the basis that the action was because of disability or race. This was the Claimant's mode of operation in all the claims: where she took umbrage at an action, she alleged the cause was race or disability discrimination.

11.2. Paragraph 15.2 of his written submissions were all reasons why R2 would not discriminate because of race or disability.

11.3. The Decision showed that the Claimant's credibility was severely undermined. The Respondents relied on paragraphs 45, 88, and 66 as examples of findings of fact which proved this.

11.4. The most important allegation was that in relation to the lap top (A2 and elsewhere in the table). The Claimant had taken the laptop home to work on. The school received anonymous emails which made serious allegations and which were unpleasant, to such extent that the first Employment Tribunal had not wanted to record the words in its findings of fact (see paragraph 172 of the Decision). The complaint at A2 in the table arose because R1 had asked for the laptop back, because it wished to carry out forensic examination of it in case the emails came from it. The Claimant was suspected as the author, because her sister's name was found in the properties of a Word document sent to the school. When asked to return it, the Claimant stated that she had misplaced the lap-top. The first Tribunal concluded that the Claimant had deliberately withheld the computer so that analysis could not take place, despite the fact that it belonged to the school: see paragraph 160 of the Decision (p.108). The first Tribunal found Claimant had been dismissed fairly; and that her employer had an honest belief based on reasonable grounds that the Claimant was involved in the sending of the emails, which broke the trust and confidence that R1 had in the Claimant (see paragraph 166 of the Decision).

11.5. Certain allegations were so implausible as to be not credible. For

example, A4 alleged direct race discrimination by R2 at a Preliminary Hearing. R2 prepared the case for R1; he had no prior involvement.

11.6. All in all, this was an exceptional case because of the outcome and findings of the first seven claims brought by the Claimant. There was almost nil chance that any of these further complaints would succeed.

12. In the alternative to striking out, the Respondents contended that the complaints had little reasonable prospect of success and that the Tribunal should make deposit orders.

13. The Claimant's case on strike out was set out at paragraphs 1-4 of her submissions:

13.1. The Respondents had already applied to strike out the Claim and failed; this further application was a waste of time and costs;

13.2. R2 had been told that he could apply to remove himself as a respondent;

13.3. This case had only been separated from the other 7 claims that she had brought because there was insufficient time to hear it;

13.4. The fact that the Claimant had not been successful in her other claims could have no bearing on this case. The Claimant would be deprived of her right to a trial if the Claim was struck out. The power to strike out a claim should be used sparingly.

14. In respect of the first point, the Respondent's first application to strike out the Claim or part of it was determined on 9 January 2019. This application was brought on the grounds of judicial proceedings immunity (described in the Judgment of 9 January as "absolute privilege in court proceedings"). This application was dismissed by Employment Judge Baron. At that time, the Decision had not been promulgated; Employment Judge Baron did not have the benefit of the findings of fact in the Decision, nor had the table of allegations entitled "Further Particulars" been served and filed. The application to strike out and for deposit orders advanced before me were advanced on a different basis. There was different evidence before me in the form of the findings of fact within the Decision. The previous judgment of Employment Judge Baron does not prevent me determining the present applications to strike out.

15. From my reading of both sets of submissions, certain key facts cannot be disputed, for reasons which I shall now explain. The Claimant has brought seven previous claims against the First Respondent. One of these claims was withdrawn and then dismissed. The other six claims were dismissed after a fully merits hearing by the first Tribunal, an outcome that the Claimant refers to

in her submissions. This hearing lasted 15 days.

16. The findings of the first Tribunal are set out in detail in the Decision (p75-137). At points in the Decision, the first Tribunal found the Claimant's evidence to be contradictory, and in places not credible; it found her sister to be a wholly unreliable witness. In contrast, that Tribunal found each of the Respondent authority's witnesses to be consistent and credible.

17. This Claim is the eighth Claim brought by the Claimant. In this Claim, the Claimant has joined R2. He was a locum lawyer working for R1 for 3 months in 2018, and acted for R1 in the preparation of their case in the hearing of the earlier Claims. According to his ET3, he has worked in employment law for 20 years, primarily for organisations or firms which represent claimants.

18. Pursuant to an order for further information, the Claimant filed a table of complaints headed "Further Particulars". From one page of complaint attached to the ET1, the Claimant's alleged "Further Particulars" in that table span 20 pages (pp 54-74). This sets out several complaints, including allegations of direct disability discrimination, direct race discrimination, disability discrimination under section 15 EA 2010, harassment related to disability, victimisation, and breach of the duty to make reasonable adjustments. As I will demonstrate, several of these "particulars" are new complaints, for which no amendment application has been made.

19. The complaints within the table are in respect of incidents alleged to have occurred between 25 June 2018 and 1 August 2018 – and therefore all the incidents alleged occurred after the Claimant's employment terminated. On the first page of the table, the Claimant states that she relies upon section 108 Equality Act 2010 as protecting her from post-employment discrimination and harassment.

20. Several of the incidents alleged within the table are alleged to give rise to several different complaints of discrimination. For example, A2 (p.55 – the lap-top allegation) is alleged to amount to direct race discrimination, direct disability discrimination, section 15 EA disability discrimination and victimisation.

21. In the Grounds of Resistance of R1 and Amended Grounds of Resistance of R2, the Respondents deny key factual allegations. For example, facts are denied in respect of allegations A1 to A5.

22. It is relevant that several of the factual issues raised by the table of allegations in this eighth Claim have been determined already in the Decision. In the light of those findings of fact, the Claimant cannot be permitted to re-litigate them; this would be an abuse of process, and undermine the principle of finality in litigation. Given the history of these claims, it would be particularly unfair to R1 to undermine that principle.

Relevant law

23. A complaint must form part of a Claim before it can be responded to or proceed to a merits hearing. In *Chandhok v Tirkey* [2015] ICR 527, at paragraphs 16-17, the EAT explained:

> "16.…*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1*.
>
> *17. I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute."*

The power to strike out

24. Rule 37(1)(a) contains a power to strike out where all or part of a claim or

response has no reasonable prospect of success.

25. In general, the grounds for striking out a pleading under r 37(1)(a) include anything that might be deemed to be an abuse of the process of the tribunals. The term 'abuse of process' is not to be narrowly construed, and, in particular, the circumstances constituting such an abuse are not limited to claims that are 'sham and not honest and not bona fide': *Ashmore v British Coal Corpn [1990] ICR 485, CA*). According to Stuart-Smith LJ in *Ashmore*:

> "A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material."

26. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In *Anyanwu v South Bank Students' Union [2001] IRLR 305, HL*, a race discrimination case, Lord Steyn put forward the proposition against striking out in terms almost amounting to public policy, when he stated (at para 24):

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. 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*."

27. However, in *Anyanwu*, Lord Hope observed that the time and resources of the tribunal should not be taken up by hearing evidence in cases that are bound to fail.

28. This point was also recently re-emphasised by the Court of Appeal in *Ahir v British Airways Plc* [2017] EWCA Civ 1392, paragraph 16 and the passages referred to in submissions. In *Ahir*, it was held that discrimination claims could be struck out, even where there was a dispute of fact, where there was no reasonable prospect of the facts necessary to establish liability being established.

29. As the EAT observed in *Chandhok*, there are other occasions when a claim can properly be struck out. The examples given included the following:

    29.1. 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):
"*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*."

29.2. Claims may have been brought repetitively concerning the same essential circumstances that a further claim is an abuse.

30. The circumstances in which abuse of process can arise are very varied: per Lord Bingham in *Johnson v Gore Wood* [2002] 2 AC 1, 22.

31. One form of abuse would be the re-opening of a matter already decided in proceedings between the same parties, as where a party is estopped from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings

Section 108 EA

32. Under the heading 'Relationships that have ended', section 108 provides (so far as is material):

"(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and,

(b) conduct of a description constituting the discrimination would cover if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another another (B) if—

(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act."

33. Whether the conduct complained of 'arises out of and is closely connected to' the past employment relationship will be a matter of fact for the employment tribunal to determine on the evidence: *Rhys-Harper v Relaxion Group plc*; *D'Souza v London Borough of Lambeth*; *Jones v 3M Healthcare [2003] ICR 867*

34. The phrase "where the discrimination arises out of and is closely connected to" the relationship that has ended has been held by the EAT, to extend to remarks

made outside a tribunal hearing during the course of employment tribunal proceedings: see *Nicholls v Corin Tech & ors* UKEAT/0290/07 (4 March 2008, unreported).

35. In *Nicholls*, the judgment (Underhill J) included the following:

> *"14. I take first the question whether the acts complained of arise out of and are closely connected to the employment relationship. I start from the position that it is necessary that the acts in question should not only "arise out of" the relationship in question and be connected with it but that the connection should be "close". The requirement of closeness should be given due weight. It should not be enough that the conduct in question would not have occurred but for the fact of the previous relationship or that some other indirect connection with that relationship can be shown. Parliament expressly provided that the connection should be close, and the intention must be that it be sufficiently close to justify the case falling within the scope of a group of statutory provisions designed to protect employees. Whether the requisite degree of closeness has been shown requires an exercise of judgment by a Tribunal which may not always be easy, as is illustrated by the decision of the House of Lords in Rhys-Harper v Relaxion Group plc [2003] ICR 867. ….*
>
> *In considering whether the connection is sufficiently close, it is legitimate, indeed necessary, to take account of the purpose behind the provision. …"*

Conclusions on the strike out applications

36. Following that review of the circumstances in which this application is made, and applying the principles of law set out above, I have concluded as follows (adopting where necessary the numbering with the table of "Further Particulars").

Vexatious Claim?

37. In respect of the application to strike out on the ground that the Claim is vexatious, I directed myself in accordance with *E.T. Marler Ltd v Robertson* [1974] IRLR 72. On balance, I concluded that there was no direct evidence that the Claimant acted out of spite or improper motive. For example, she had not worked with R2, and Mr. Arnold could not help me when questioned about the improper motive.

No reasonable prospect of success?

38. Unlike in any of the cases cited above, such as *Anyanwu*, in this case, six previous claims have been determined against the Claimant, dismissing a raft of allegations against a range of alleged perpetrators, whose evidence was preferred to that of the Claimant. The Claimant withdrew a seventh claim, which was dismissed.

39. The Claimant's approach in this further Claim may be considered something of a scattergun one, involving further allegations, set out in alleged further particulars, which are then multiplied by allegations of various types of discrimination.

40. Certain allegations in this Claim turn on factual disputes. The first Tribunal found that the Claimant's evidence was contradictory and in parts not credible. Examples of where her evidence was found not credible are highlighted in the application to strike out (p.154) and the Respondents' oral submissions and Skeleton Argument (paragraph 15). Some of these examples can fairly be described as very grave findings that the Claimant did not give honest evidence. In particular:

    40.1. One example indicates that the Claimant attempted to abuse the court process for her own benefit; the first Tribunal found that the Claimant wanted to hide the fact that she had fibromyalgia because she was pursuing a personal injury claim against the school in respect of an incident involving a child: see paragraph 45 of the Decision. This is a strong finding against the Claimant's credibility.

    40.2. A further example is the finding relating to the deliberate withholding of the school lap-top set out at paragraphs 171-172 of the Decision. Moreover, at paragraph 172, the first Tribunal noted that the emails stopped when the Claimant was interviewed by the police, leading to the inference that she had a hand in sending them.

41. In the present case, serious factual allegations are made against a locum lawyer, a paralegal with 20 years of experience. Certain facts about R2 as a witness cannot realistically be disputed by the Claimant:

    41.1. He only worked for R1 for 3 months.

    41.2. He is very experienced in the employment law field.

    41.3. The nature of the allegations against R2 are so serious that such acts, if found proved, could well have a negative effect on his career as a locum lawyer. (He alleges that being named as a party has already had a negative effect on his job prospects because he has generally worked for firms or organisations representing claimants).

42. The matters in the Respondents' submissions and in the above four paragraphs all point to the Tribunal at the full merits hearing of this Claim being less likely to determine factual disputes in the Claimant's favour.

43. In addition, the alleged acts of discrimination in this Claim all occurred <u>after</u> the fair dismissal on 18 March 2018 and fair appeal on 10 May 2018: see the

findings of fact within the Decision (paragraphs 174-176). Whilst section 108 EA 2010 does provide for post-termination discrimination claims to fall within the jurisdiction of the Employment Tribunal, this is only where the discrimination (1) arises out of the former employment, and (2) is closely connected to the former employment relationship. Therefore, in order to succeed at trial, the Claimant must be able to show that each of the acts of discrimination alleged are, on their face, linked in both these ways to the former employment relationship.

44. Whilst recognising all the above, I realise that I should not carry out a mini-trial to resolve disputed facts.

45. However, the individual allegations in the table headed "Further Particulars" should not be permitted to proceed to trial where such allegations have no reasonable prospect of success. I have concluded that there is no reasonable prospect of success for those complaints where, in particular, there is an issue estoppel (and/or abuse of process) arising from the findings of fact made against the Claimant in the Decision. Moreover, where the Claimant is attempting to add complaints to the Claim by serving the table of further allegations, yet without any application to amend being either made or granted, those complaints cannot proceed to trial at all.

46. I have considered each complaint in the grounds of claim and table of allegations in turn.

Allegation A2, B4, D7, and fourth, fifth and eleventh paragraphs of the grounds of claim: retention of the lap-top issue

47. In respect of the lap top issue, the Claimant makes various allegations in respect of this issue in the table. However, core facts have already been determined against the Claimant in the Decision. The Decision precludes re-hearing these factual issues determined against the Claimant. The Claim includes the following at the third and fourth paragraphs of the grounds of claim (p.17):

"*Mr. McMahon has wrongly accused the Claimant of not giving back the laptop due to the Respondents conducting forensic analysis on it. However, the Claimant was not aware that the Respondents were planning to conduct forensic analysis.*

The Respondents have (for a second time) reported the Claimant to the Police over a laptop, even though the Claimant was honest to admit that she left work (unwell) with the laptop 3 years ago …The Claimant was unable to find the laptop after searching for it…"

48. The findings of fact within the Decision, at paragraph 160, show that R2, if he did make that accusation, did not do so wrongfully, because the first Tribunal

concluded in the Decision that the Claimant deliberately withheld the laptop in an attempt to avoid analysis of it. The third paragraph of the grounds of claim has no reasonable prospect of success.

49. The findings of fact in the Decision at paragraph 160 also contain a finding that the Claimant could find the laptop, had she looked for it, because there was no suggestion that it had been stolen or lost outside her home. Therefore, the complaint that reporting her to the police was in some way discrimination has no reasonable prospect of success. This allegation does suggest the type of deflection tactic that Mr. Arnold identified in submissions.

50. Furthermore, the Claim form itself does not contain several of the allegations now set out in the table. I have studied the Claim in detail. It has one and a bit pages of pleaded grounds (pp17-18). None of the alleged complaints at A2 i-viii feature in the Claim form. The Claim form does not include the allegations at A2: it does not state that R2 "*incorrectly informed the Court*" of any matter concerning the lap-top, let alone the list at A2 i to viii.

51. Moreover, the grounds within the Claim form conclude with sub-headings for each type of discrimination, which, on a fair and plain reading, are a summary of the complaints of discrimination advanced in the Claim. Under "Section 13 Direct Discrimination", the grounds of claim plead as follows:

> *"The Claimant has suffered less favourable treatment – please see above. The comparator can be a hypothetical person or Alan Bolson as he did not have the police called on him when he was unable to return a school lap-top."*

52. For reasons I have explained, given the findings of fact in the Decision at paragraph 160, this complaint has no reasonable prospect of success.

53. In respect of the section 15 EA complaint at B4, none of the alleged complaints at B4 (ix)-(xiii) feature in the Claim form. The Claim form does not state that R2 "*incorrectly informed the Court*" of any matter concerning the lap-top, let alone that list. In any event, the first Tribunal found as a fact that the Claimant did retain the lap-top and withheld it from its employer. Given the findings of fact at paragraph 160 of the Decision, B4 has no prospect of success, quite apart from the damage done to the Claimant's credibility as a witness by other findings of fact and the matters identified at paragraphs 14-16 and 40 above.

54. Therefore, I conclude that:

    54.1. B4 does not form part of the Claim.

    54.2 In any event, the fourth, fifth and eleventh paragraphs of the grounds of claim attached to the ET1, and A2 and B4 are an abuse of process and/or have no reasonable prospect of success, due to the findings of fact within the Decision.

55. Similar points can be made in respect of the victimisation complaint at D7. For example, R2 did not "*incorrectly*" inform the Tribunal that the Claimant had retained the lap-top; R2's statement is cannot be incorrect given the findings of fact made by the first Tribunal. Given the findings of fact in the Decision about the lap-top, and the findings that it was owned by R1 and that the Claimant was retaining it despite the requests of R1, R1 and R2 were entitled to warn the Claimant that a civil claim for its return would be made. Therefore, D7(xiv), D7(xv), and D(xvii) have no reasonable prospect of success, either because of issue estoppel or because the facts determined by the first Tribunal would mean that it would be an abuse of process for these complaints to continue. In the alternative, these complaints should be struck out because there is no reasonable prospect of the Claimant proving the statements alleged were made because of any protected act nor that they were "*incorrect*".

56. In respect of the complaints at D7(xvi)and D7(xviii), I have concluded that these have little reasonable prospect of success. Given the findings of fact in the Decision, there is little reasonable prospect of the Tribunal accepting the Claimant's allegations that these statements were either false, manipulated the Claimant's words or lied. The reality is that the first Tribunal did not believe the Claimant on key issues of fact and found that she did not give credible evidence; contrary to D7, the Claimant was found not to have been "*open and honest*" about the lap-top.

57. In contrast, R2, an experienced paralegal in employment law matters, was acting for R1 in this eighth Claim. He was bound to act on instructions and to promote the interests of R1 by writing to the Tribunal and seeking orders. There is no suggestion by the Claimant that she has returned the laptop.

Allegation: A1 (direct discrimination), B1 (section 15 EA 2010), C1 (harassment); D1 (victimisation): Unwanted Phone call and contents

58. Although it is admitted that one phone-call was made by R2 to the Claimant, the factual substance of the treatment is denied. Given the disputes of fact, and given the guidance in the authorities, I do not find that the complaint has no reasonable prospect of success. R2 has yet to give evidence as a witness in this Claim.

59. However, I concluded that these allegations have little reasonable prospect of success for the following reasons:

    59.1. There is, even on the Claimant's case, only one phone-call from R2. Given the facts about his limited time and locum role with the Respondent and his experience, which the Claimant cannot realistically dispute, the alleged behaviour would seem to be inherently less, rather than more, likely.

59.2. Moreover, the findings of fact made by the Employment Tribunal contain a number of examples where the Claimant alleged that herself, or her witness, had evidence to prove some alleged act by an employee of the Respondent which was rejected: see for example paragraph 63 ("SG delivery", where the complaint that SG was "*aggressive*" was rejected).

59.3. I repeat the points at paragraphs 14-17 and 40 above. It is more likely rather than less likely that the evidence of R2 will be preferred over that of the Claimant.

59.4. The allegation does not on its face appear to be closely connected to the Claimant's former employment. Even though this is a matter of fact for the Tribunal, there is little reasonable prospect of the Claimant establishing section 108 applies.

59.5. Allegation A1 consists of an assertion of difference in treatment and a difference in ability. In respect of the direct discrimination complaint, the alleged facts do not indicate that a reason why R2 acted as he did was a discriminatory one. On the face of the allegation, R2 would have treated a non-disabled person in the same way. R2 was, allegedly, seeking proof of disability.

Allegation B2-B3 and thirteenth paragraph of the grounds of Claim

62. The only reference in the Claim form to section 15 EA is the following in the grounds of claim:

> "*Discrimination arising from a disability.*
>
> *The Claimant has a disability and was unable to conduct a thorough search. The Respondents have continued to pressure the Claimant for a device that she has misplaced from 3 years ago. The Respondents have called the police on the Claimant.*"

63. B2 and B3 contain entirely new allegations which are not contained in the Claim form.

64. Moreover, the section 15 EA allegation which is within the thirteenth paragraph of the grounds of claim (p.18) has no prospect of success and is struck out. The findings of fact at paragraph 160 of the Decision mean that it would be an abuse of process for the Claimant to have a second bite of the evidence cherry; it would amount to a collateral attack on the finding of fact at paragraph 160 if the Claimant were permitted to argue that she was unable to search thoroughly for the lap-top because of her disability: the first Tribunal found as a fact that, had the Claimant looked for it, she would have found it.

Allegation C2 (unwanted conduct at Preliminary Hearing on 29 June 2018)

65. Allegation C2 is not part of the Claim. There is nothing in the Claim remotely like this.

66. In any event, I have considered whether this complaint has reasonable prospects of success, if it were part of the Claim. I am satisfied, however, that it has no reasonable prospect of success, because:

    66.1 The first Tribunal found that Ms. Andrews used "*injudicious terminology*" by using the word "*coloured*" during an investigation meeting, but the Respondent apologised; and it decided that there was no race discrimination: see paragraph 139 Decision (and I contrast these findings with the original allegation which had been that Ms. Andrews had used "*racially aggressive language*"). Given the findings of fact at paragraph 139 Decision, there can be no dispute over the core fact that R1 did not commit discrimination in respect of the Ms. Andrews incident. Therefore, there is no reasonable prospect of the Claimant successfully showing that the comment of R2 during the Preliminary Hearing on 29 June 2018 amounted to harassment.

    66.2 There is no reasonable prospect of the Claimant showing that this complaint is "closely connected to the former employment relationship" as required by section 108 EA. On the face of the complaint, it has little to do with the former employment relationship. It is a complaint about a comment made by a locum lawyer in a Preliminary Hearing, about the nature of a comment made by an external investigator (not an employee of R1) in July 2017.

Allegation D2: Victimisation (threat to report Claimant's sister to SRA)
Allegation D3-D5: Victimisation (Correspondence sent to the Claimant on 2 July 2018)

67. These allegations are not expressly stated within the Claim form. This is apparent from the section of the Claim form (p17) expressly dealing with victimisation. Given the contents of the second and third paragraphs of p.17, however, these allegations could be further particulars of complaints which are made.

68. I have considered whether allegations D2 to D5 have reasonable prospects of success.

69. I have concluded that D2 to D5 have little reasonable prospect of success because:

69.1 The Claimant's credibility as a witness is damaged because of the findings of fact made in the Decision, as explained above and as stated in the submissions of R1 and R2.

69.2 The Respondents deny the facts on which these complaints are based. On the face of the pleadings and on the facts which cannot be disputed at paragraphs 14-17 above, there is at this stage no question over the credibility of R2 as a witness, in contrast to damaging findings about the Claimant's credibility in the Decision.

69.3 The allegation at D2 is, on its face, a serious one. It would require cogent evidence to prove it, yet it appears to rely on the Claimant's oral evidence.

69.4 The actual complaint of victimisation at D3 is impossible to understand. No detriment is identified. In any event, any legal representative is required to put his client's case in correspondence.

69.5 Further, in respect of D3, an email of 2 July 2018 sent by R2 is set out at paragraph 27 of the Amended Response of R1 (p.33). This email is reasonable in tone, and reads as a contemporaneous record of what happened at the recent Preliminary Hearing on 29 June 2018. This email supports the Respondents' account of events.

69.6 I repeat paragraphs 33-36 above. These allegations do not on their face appear to be closely connected to the Claimant's former employment. They relate to alleged inappropriate actions within these proceedings by a locum lawyer for the local authority. In respect of D5, this relates to a complaint made to R1 about R2. On the face of this complaint, there is nothing to indicate that it is closely connected to the Claimant's employment.

Allegation D6: Victimisation (9 July 2018, failure to allow complaint to move to stage 2)

70. From the Amended Response, this failure is admitted. However, this allegation is neither pleaded in the Claim form, nor can it be described as further and better particulars of any complaint made.

71. This allegation, because it is not part of the Claim at all, will not proceed to full merits hearing.

Allegation D8: Victimisation (accusation by email by R2 on 9 July 2018 that the Claimant referred confidential minutes to GMB)

72. It is admitted (paragraph 43 Amended Grounds of R1) that R2 sent an email to the Tribunal on 10 July 2018 which suggested the Claimant had disclosed

confidential minutes of a Governors meeting to her trade union; but that this allegation was withdrawn at the full merits hearing in February 2019 by R1 when the Claimant demonstrated that this information was not confidential.

73. R2's case is that he was instructed by the School that the minutes were confidential.

74. This Claimant has little reasonable prospect of successfully showing that this accusation was made because of a protected act because:

    74.1 R2 was a locum lawyer who was, on the face of the facts, rather than assertion, carrying out his duty for his client. In that role, he was required act on instructions received. The Claimant has little reasonable prospect of establishing that he knew the instructions from the School were incorrect when he sent the email. R1 did not withdraw the allegation until the full merits hearing, before the first Tribunal.

    74.2 The Claimant has little reasonable prospect of showing "something more" to create a prima facie case to shift the burden of proof to R1 and R2.

Allegation D9 Victimisation (email from R1 to the Tribunal 16 July 2018)

75. This is denied in the Amended Grounds of R1 (paragraph 21), which alleges that the email sent to the Tribunal on 16 July 2018 complained of multiple failures by the Claimant to comply with case management directions from the order made on 29 June 2018.

76. I concluded that the complaints at D9(i – iii) have little reasonable prospect of success, because:

    76.1 The email is sent during the course of R2's work on behalf of R1, in the course of litigation.

    76.2 There is no allegation that anything misleading or false is said about the Claimant's sister. Merely referring to the Claimant's sister is not capable of being a detriment, not least if she was a witness in the case.

    76.3 The allegation that R2 "misled" the Tribunal about the Osteopath report and why the Claimant discontinued her Personal Injury claim against the School is a serious allegation, particularly against an experienced paralegal, which would require cogent evidence. There is little reasonable prospect of this allegation succeeding because:

        (a) The Claimant sought to hide from the first Tribunal the fact that she has the physical impairment of fibromyalgia. The first Tribunal found that she did not disclose any medical records to the Respondent

during her employment, nor to the Tribunal at the full merits hearing. The first Tribunal found as a fact that the Claimant "*deliberately concealed*" her fibromyalgia because she was bringing a personal injury claim in respect of the alleged incident involving Child D, and wish to blame all her symptoms on that incident: see paragraph 45 Decision. These findings indicate that the allegation that the Tribunal was misled by R2 has little reasonable prospect of being upheld.

(b) This is particularly so where R2 was acting in the course of his duties for R1, where R1 faced the allegation that the Claimant was disabled from the date of the alleged incident involving Child D, which the Claimant alleged was September 2014, and where R1 denied knowledge of the disability.

(c) Moreover, the findings of fact in the Decision (paragraphs 44-54) give a detailed account of the evidence and the findings of the Tribunal on the issue of knowledge, which include reference to the osteopath seen by the Claimant and to a letter from the Chronic Pain Service (heavily redacted by the Claimant) of 8 January 2016 which states "*My impression is that she suffers from chronic widespread pain most probably in the form of fibromyalgia*…". On the face of the findings, the Tribunal were not "misled" by the email of 16 July 2018, but reached a conclusion on the whole of the evidence presented. It is difficult to see what detriment the Claimant could have suffered from the email given the detailed consideration of the relevant evidence by the first Tribunal at the full merits hearing.

77. In addition, the allegation at D9(v) should be struck out. It is entirely proper for a local authority, if not its duty (given the public sector equality duty under section 149 Equality Act 2010), to raise with the Tribunal potential reasonable adjustments that a party or witness may require. Furthermore, the allegation that R1 unnecessarily raised this matter is not part of the Claim; and, in any event, it has no reasonable prospect of success.

78. Further, the allegation at D9(iv) is not closely connected to the Claimant's employment. The allegation that the Claimant's personal injury solicitor required a Court order before releasing the Claimant's documents is a matter that arose from the fact that there was a personal injury claim made but discontinued. The Tribunal has no jurisdiction to consider that matter.

Allegations D10 (Victimisation) and E2 (Failure to make a reasonable adjustment) - email from R2 to the Claimant's personal email address, 18 July 2019, at 2145

79. This is denied in the Amended Grounds of R1 (paragraph 49), which admits that an email was sent to the Claimant's personal email address at 2145, but

explains why, and denies that this related to the Claimant's disability at all. It describes these complaints as "spurious.

80. I concluded that these allegations have no reasonable prospect of success for the following reasons:

80.1 From the grounds within the Claim form, there are no particulars of any PCP that placed the Claimant at a disadvantage. Indeed, the heading "Failure to make a reasonable adjustment" is devoid of particulars. Moreover, the Claim form does not complain of any email sent outside working hours, nor can any actual complaint under sections 20-21 EA 2010 be gleaned from a fair reading of the Claim. I concluded that Allegation E2 was not part of the Claim at all. Allegation E2 cannot be described as further particulars of a substantive complaint that was never made.

80.2 Applying the guidance in *Chandhok*, merely naming sections 20 and 21 EA is not a substantive complaint; the Claim "*is not something just to set the ball rolling"*.

80.3 There is no reasonable prospect of the Claimant proving that the allegations at E2 and D10 are closely connected to the Claimant's employment. The allegations appear to have only a very loose connection with her former employment. In respect of E2, the table of allegations pleads that the PCP did not exist at the school nor as part of the Claimant's duties. The sole email which is said to be the PCP was sent during and as part of this eighth set of proceedings.

80.4 R2 sent the email to the email address used by the Claimant; neither Respondent was told not to use it. I agree with R1's point that it was up to the Claimant whether she opened it, or responded to it, outside office hours. There is no evidence that more than one email was sent outside office hours. I concluded that there is no reasonable prospect that sending this email out of hours, on one occasion, will be found to be a PCP, nor that it will be found to have caused more than trivial disadvantage to the Claimant, nor that it will be found to be a detriment (in the *Shamoon* sense). Moreover, R2 explained in an email sent the following day, 19 July (alleged in D11 and referred to in the Grounds of Response of R1) that the school's position had to be communicated to the Claimant as soon as possible, after the decision was made to report the matter to the police; it would seem more fair, not less fair, to the Claimant to know when the police had been informed of the laptop matter.

80.5 Part of these complaints is that the Claimant inferred that the report to the police had been a complaint about her. There is no reasonable prospect of the inference drawn by the Claimant in these

circumstances, where no clarification was sought by her, being found to be an act of victimisation by R1 or R2.

Allegation D11 Victimisation (on 19 July 2018, "unnecessarily" responding to the Tribunal and copying in the Claimant)

81. In respect of this allegation, it is important to note that the complaint is about an email sent to the Tribunal which was copied to the Claimant. By rule 92 of the Rules of Procedure 2013, R1 and R2 were obliged to send a copy of any correspondence to the Tribunal to the Claimant.

82. Although the Claimant describes this email from R2 to the Tribunal as "unnecessary", the assessment of whether it was necessary to advance the case of R1 in the litigation is not relevant. R2 was entitled to take all reasonable steps on behalf of R1 to pursue its defence of the Claims faced by it. Responding to correspondence sent to the Tribunal by other parties is reasonable as a step, although sometimes not strictly necessary.

83. In any event, I repeat the reasoning set out above at paragraphs 50-53 given the findings of fact made in the Decision at paragraph 160, allegation D11 has no reasonable prospect of success.

84. Furthermore, assuming this complaint forms part of the Claim, within the table of allegations the detriment is not particularised; there is no explanation as to why the Claimant's dignity is violated nor why she was humiliated.

85. Accordingly, for all the above reasons, allegation D11 has no reasonable prospect of success and should be struck out.

D12 Victimisation (19 July 2018, R2 email to the Tribunal denying collusion by a School Governor, Ms. Osbourn, with the police)

86. As set out in the table of allegations, D12 alleges that the email sent by R2 on 19 July 2018 caused the alleged detriment of violation of the Claimant's dignity and caused an offensive, degrading and humiliating environment. D12, in the body of the allegation, complains about the contents of this email, particularly that it denied the alleged collusion between Sue Osbourn and the police, that R2 had wrongly accused the Claimant of stating that the laptop was stolen and that she appeared nervous of being reported to the police (even though the laptop, not the Claimant, had been reported to the police by the Respondents).

87. The Response of R1 relies on the findings of fact in the Decision, because the allegation of collusion was part of Claims 1-4 and 6-7.

88. Paragraph 135 of the Decision sets out the finding of fact that there was no collusion whatsoever between Ms. Osbourn and the police. Ms. Osbourn's evidence was accepted.

89. In the Decision, as explained above, the first Tribunal found that the Claimant deliberately withheld the laptop from her employer.

90. Consequently, given those findings of fact, the allegations within D12 have no reasonable prospect of success, because R2 was justified in sending this email to the Tribunal, in the terms alleged by the Claimant.

91. Moreover, this email was sent to the Tribunal as part of R2's handling of R1's case, and it was copied to the Claimant. Rule 92 required that it was copied to the Claimant.

92. For all the above reasons, the complaint of victimisation at D12 has no reasonable prospect of success and should be struck out.

D13 Victimisation (email to Claimant, 31 July 2018)

93. This complaint is difficult to understand as an act of victimisation. There is no explanation as to how R2 "*manipulated the Claimant's words from the Claimant's email on 30 July 2018*" nor what is meant by that, other than R2 is alleged to have told the Claimant to choose her words more carefully.

94. There is a further allegation concerning 1 August 2018, when allegedly R2 accused the Claimant of not sending the witness statements at the agreed time. It is unclear whether this is a separate act of victimisation (given that it is not labelled D14).

95. It is admitted that R2 sent an email on 31 July 2018; but R1 cannot trace any email allegedly sent to the Claimant on 1 August 2018.

96. In any event, there is no reasonable prospect of the Claimant successfully showing that either of the above acts were connected with the employment relationship between R1 and the Claimant, let alone that any connection was a close one. The complaints concern the content of two emails, which concern case management or other matters connected to the litigation.

97. Accordingly, these complaints have no reasonable prospect of success and should be struck out.

98. In any event, if I am wrong about the applicability of section 108 EA, the Claimant has no reasonable prospect of successfully showing that the alleged correspondence placed her at any detriment, let alone the alleged violation of dignity or creation of a hostile environment. On any view, this correspondence is a common feature of Tribunal litigation.

99. Moreover, R2 was acting for R1 for a short time, and was acting on behalf of R1 to prepare the case for the full merits hearing. It is unlikely that a Tribunal would

find that these actions of R2 were because of the alleged protected acts, given R2's lack of prior personal involvement and his experience as a locum lawyer.

100. I quite accept the Claimant's submission that no employment judge in a discrimination case should rush to judgment in a case of contested fact; but neither the general principle in *Anyanwu*, stated above, cannot protect a complaint which lacks reasonable prospects of success.

E1 Failure to make reasonable adjustments (16 July 2018)

101. This complaint is not mentioned in the Claim form. On a fair reading of the Claim, this allegation does not amount to particulars of any complaint within the Claim. The Claim form merely states "Failure to make a reasonable adjustment" with no particulars. I recognise the guidance in *Chandhok* is relevant to my consideration of E1. Accordingly, there is no need to consider striking out E1.

102. If I am wrong about that, I concluded that this complaint should be struck out as having no reasonable prospect of success for the following reasons:

102.1 There is no reasonable prospect of the Claimant showing that the alleged act has a close connection with the employment relationship between R1 and the Claimant. The complaints concern the content of an email to the Tribunal, which concerned case management or other matters connected to the litigation. Section 108 EA is not engaged

102.2 The PCP is alleged to be the length of time to respond to an email. It is alleged that the Claimant was unable to respond to emails in a quick time which placed her at substantial disadvantage. The Claimant does not explain what the PCP length of time was, nor why it was a PCP at all. In the context of this Claim, I concluded that she was very unlikely to be able to show a PCP existed.

102.3 The email from R2 (referred to at D9) was sent after alleged breaches of a case management order. The times for compliance are set by the Tribunal. They are, on their face, lawful orders unless appealed. On the face of the pleadings, R2 was seeking compliance with those orders.

E3: Failure to make reasonable adjustment (29 July to 1 August 2018)

103. This allegation is that the Claimant did not have sufficient time to prepare her witness statements for use in the first Tribunal full merits hearing. It is alleged that the Respondent agreed to extend time for exchange once, but unreasonably threatened to obtain a court order when the Claimant asked for another extension of time.

104. This allegation is not part of the Claim. I repeat the points made in respect of E1 on this subject.

105. Furthermore, if I am wrong and this complaint is part of the Claim, the allegation has no reasonable prospect of success for at least the following reasons:

    105.1 The Claimant could have, but did not, apply to extend the time for exchange. The Claimant could have, but did not, apply to adjourn the full merits hearing. The full merits hearing took place. The Claimant's first seven claims were all dismissed for the reasons set out in the Decision. The Claimant cannot now bring this complaint in this eighth claim; to allow this would be an abuse of process, because it would potentially amount to a collateral attack on the Decision.

    105.2 The Claimant has no reasonable prospect of showing that section 108 EA is engaged. This alleged act, so far as it is understood, is very unlikely to be shown to be closely connected to the Claimant's employment relationship with R1.

    105.3 The Claimant has no reasonable prospect of proving the existence of a PCP, as a matter of law. The allegation states that the PCP is "*to adhere to deadline for the witness statements*". The original date given in the case management order of the Tribunal stood as the date for exchange. This remained the lawful date for exchange, whether or not the bundle was served late.

Additional allegations of victimisation expressly pleaded within ninth paragraph of the grounds of claim

106. The Claimant has no reasonable prospect of success in respect of the detriments actually listed in the ninth paragraph of the grounds of claim at p.17, under the "Victimisation" heading, because:

    106.1 The loss of her job cannot be an act of victimisation, given the findings of fact in the Decision at Paragraphs 162 to 176 of the Decision. In particular, at paragraph 175, the Tribunal found as a fact that the Claimant was dismissed not as an act of victimisation but because of the emails which the disciplinary panel to be deliberately false and extreme.

    106.2 The first Tribunal concluded that her dismissal was fair, and found that the disciplinary panel had an honest belief based on reasonable grounds after reasonable investigation that the Claimant had done the acts charged. Moreover, although the first Tribunal did not make an express finding of fact that the Claimant had a hand in sending the malicious emails, it did find that the emails stopped after she was spoken to by the police. Therefore, given the evidence uncovered by

the disciplinary investigation as found by the first Tribunal and the timing of when the emails stopped, there is strong evidence that the Claimant was in fact involved in, if not responsible for, sending those emails.

106.3 The alleged exacerbation of the Claimant's illness, and the alleged stress caused to the Claimant, cannot amount to acts of victimisation.

Conclusion on the applications for striking out

107. The complaints in the table of allegations at B2, B3, B4, C2, D6, E1 and E3 are not part of the Claim.

108. The complaints in the table of allegations at A2, D7(xiv)(xiv), and (xviii), D10, D11, D12, D13, and E2 are struck out.

109. The fourth, fifth, ninth, eleventh and thirteenth paragraphs of the grounds of claim (p.17-18) are struck out.

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Employment Judge Ross
Date: 6 December 2019