Appeal No. UKEAT/0246/19/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 November 2020
Judgement handed down on 18 December 2020

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR S MORGAN APPELLANT

DHL SERVICES LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant

Mr J Wallace
(of Counsel)

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For the Respondent

Mr N Caiden
(of Counsel)

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SUMMARY

PRACTICE AND PROCEDURE – STRIKE OUT

The Claimant's claims of direct race discrimination and race-related harassment were struck out at a Preliminary Hearing on the basis that he did not have an arguable case that there was "something more" in **Madarassy** terms, to shift the burden to the Respondent to explain the treatment complained of. His appeal against that decision was allowed. The case arose from two factually disputed incidents, and the aftermath of disciplinary and grievance processes.

The Claimant's case at its highest included that he had been falsely and maliciously accused of misconduct arising in those two incidents, and that aspects of how the attendant processes were handled were, at several points, unfair to him. His case was that these features supported an inference and/or shifting of the burden of proof in relation to his **Equality Act** claims.

The Tribunal had not specifically, or sufficiently, examined whether such features of his case might, individually or together, arguably support the drawing of an inference or the shifting of the statutory burden, such that his claims, or some of them, had better than no reasonable prospect of success. Or, if it had specifically considered these, and concluded that they did not, it had failed sufficiently to explain why.

HIS HONOUR JUDGE AUERBACH

Introduction and Background

1. The Claimant in the Employment Tribunal has been employed by the Respondent as a fork-lift truck operator since 2014. The employment is continuing.

2. On 3 January 2017 an altercation occurred in the car park of the site where the Claimant works, between him and two supervisors. I will call that the car park incident. This led to him facing allegations of misconduct. On 5 April 2017 there was an altercation at the security gate involving the Claimant, a colleague with whom he arrived at work by car, and a security guard. I will call that the security gate incident. This too led to allegations of misconduct on his part.

3. On 11 April 2018 the Claimant presented a claim form. He was a litigant in person. Initially, as well as his employer, he named a number of individuals as additional Respondents, but the claims against them, as such, were later withdrawn. The Claimant, who describes his race as black West Indian, complained of race discrimination. In box 8.2, as to the background and details of the claim, he wrote the following:

> **"On 03/01/17 I finished work at 9pm walking to my car my two supervisors Kevin Morris and Harry Hodson challenged me about a parking infringement onsite but next day my manager Manesh Chhanya suspended me Kevin and Harry accused me of hitting Kevin with my car this is a lie their statements is just hateful cockeyed nonsense management would not give me copies of their statement before or after hearing on 12/01/17 I was found not guilty but hearing manager paul nixon and Hr rep: Kelly Crompton invented another charge for me. I submitted grievance letter about the way I'm being treated and was told I will not get a grievance hearing. On 05/04/17 DHL manager David Churchill suspended me saying I caused an altercation with Jaguarlandrover security officer. An investigation and disciplinary was conducted in my absence 26//04/17&19/05/17 respectively I was issued with a final written warning. Disciplinary manager Richard Mcdonald wrote in his notes we have a statement from JLR security officer Rsolgat saying that I caused an altercation and was aggressively abusive. No statements No witnesses No evidence was presented at investigation in my absence so they found me guilty of nothing. I appealed decision against me on two occasion mentioning the lies and deceit told about me and the unjust treatment of me but dhl management seem hell bent on punishing me for nothing but the colour of my skin. I have spent over four months on the sick with work related stress and flair-up of ulcerative colitis because of way I'm being treated I asked for a referral to see occupational health practitioner but all my request are ignored. I feel dejected and lost with no hope, I'm presently off work again with anxiety, depression and work related stress and haviving to cope with my ulcerative colitis."**

4. The claims were defended. As well as raising time points, the Grounds of Resistance gave the Respondents' account of events, in particular in relation to the disciplinary, grievance and associated appeal processes that unfolded in connection with these two incidents, in the period from January 2017 to March 2018. They denied that the Claimant had been maliciously accused, or unfairly treated in the internal processes. They denied discrimination of any sort, and maintained that the description of events in the claim form was in various respects "incorrect" and that the true factual position was as set out in the Grounds of Resistance.

5. A case management Preliminary Hearing (PH) took place on 26 October 2018 before Employment Judge Brown. The Claimant was in person. The Respondents were represented by Mr Caiden of counsel. By that time the Claimant had submitted a table in respect of the specific alleged incidents or conduct about which he was seeking to complain, which, it appears, was prepared with the assistance of solicitors. It identified twenty alleged incidents or acts complained of, over the period from January 2017 to March 2018. For each, it had three columns, the first for the date and time, the second for the description of what occurred, and the third headed "reasons why the claimant asserts the act was discriminatory".

6. A number of the complaints advanced in the table directly concerned the car park incident, the security gate incident and the associated disciplinary, grievance and appeal processes, including a decision to suspend the Claimant following the first incident, a decision to impose a final written warning arising from the second incident, and matters to do with witness evidence and statements and the conduct of internal hearings. There were also complaints about how he was treated in respect of periods of sickness absence, which on his case were on account of the stress caused by his treatment over these matters. One of these complaints concerned the duties

assigned to him on return from the first such absence; others related to the refusal of his requests made at different times to be referred to Occupational Health (OH). Most of the complaints were identified as being of direct race discrimination, but a couple were identified as being, or alternatively being, of harassment related to race.

7. In the minute of that PH, the Judge listed twenty alleged incidents. He highlighted in bold those which he considered were covered by the original claim form. The Claimant applied for permission, so far as necessary, to amend his claim to include the remaining incidents. The Judge decided that there should be a further PH at which the Tribunal would consider whether any of those matters should be treated as covered by the original claim, or, if not, whether they should be permitted to be added by amendment. He also directed that the same PH should consider whether any parts of the claim should be struck out as having no reasonable prospect of success or made the subject of a deposit order as having little reasonable prospect of success.

The Employment Tribunal's Decision Under Appeal

8. The matter then came to an open PH on 11 February 2019 before Employment Judge M Warren. The Claimant was again in person and the Respondent again represented by Mr Caiden. The Claimant's application to amend was refused and his live claims were struck out as having no reasonable prospect of success.

9. In the written reasons the Judge noted that he had had a skeleton argument from Mr Caiden, a bundle, and the Claimant's table of particulars of complaints to hand. He said:

> **"7. I have elected to consider Mr Morgan's application to amend combined with the strike out and deposit order applications, because the merits of the amendment allegations and how they might fit in with the pleaded allegations, would be relevant to the relative prejudice to Mr Morgan were I to refuse the amendment and are therefore relevant to the question of whether or not I should exercise my discretion to allow the amendment."**

10. The Judge then directed himself as to the law, in relation to applications to amend and to strike out, referring to a number of authorities in relation to each. There is no criticism of that self-direction as such. He also cited from the definition of direct discrimination in section 13 **Equality Act 2010** and from section 39. He did not also cite the definition of harassment in section 26, but, as we shall see, there is a mention of harassment later on. He also said this:

> **"21. The reason for any such difference must be, in this case, race. Madarassy v Nomura International plc [2007] IRLR 246 CA explains that a mere difference in treatment is not enough, Mummery LJ stating:**
>
> **"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"**
>
> **There must be, "something more" other than the difference in treatment, to suggest that reason for the difference is race."**

11. I note that, although he did not specifically refer to section 136 of the **2010 Act**, which is concerned with the burden of proof, the Judge was citing there from [56] of **Madarassy**, which forms part of a discussion of the approach to be taken to what may or may not be capable of shifting the burden of proof under one of the statutory predecessors of section 136.

12. The Judge then said this:

> **"22. So then, I approach my decision here by taking Mr Morgan's case at its highest; that is his pleaded case set out in his ET1, having regard to the table of allegations prepared for him by his solicitors. I am going to do this by running through Mr Morgan's story as set out in the table."**

13. Then, at [23] to [46], the Judge gave an account of the Claimant's case as to the events that unfolded between January 2017 and March 2018. I do not need to set it all out, but I do need to note some general features of it. First, it fairly summarises his chronological account of events, as recorded in his table of particulars. It proceeds event by event, and is fairly full, though it is

still a summary. Secondly, it also includes several references to the content of a number of documents in the Judge's bundle, such as the suspension letter, a grievance letter from the Claimant, minutes of internal hearings and other correspondence relating to the disciplinary and grievance processes. Thirdly, the Judge notes at certain points, that a document appears to be at odds with the Claimant's account, but that he has assumed that the Claimant's version is right. Fourthly, the Judge at a number of points refers to documents or matters relied upon by the Respondent by way of response or explanation in reply to certain of the particular complaints. I shall return in due course, in particular, to this last feature.

14. There is then a section headed "conclusions" which I do need to set out in full.

> **"47. The difficulty that I have here, is that at no point is there an explanation of why Mr Morgan says that any of this is because he is black West Indian. That is even after a lengthy and detailed discussion about his case. He was unable to explain to me the link to his race. There is no suggestion in his stated case of another person in similar circumstances being treated more favourably than he was. There is a key instance in which someone else is treated the same way, (his colleague is suspended too). Nor is there anything from which a tribunal might infer that a hypothetical comparator might have been treated more favourably. This is not the sort of case where from a series of allegations, one might raise inferences that it must be because of race. There is no specific allegation suggesting any link to race. None of the allegations are 'related' to race in a way that might amount to racial harassment.**
>
> **48. If one goes through the 20 allegations listed by EJ Brown, (as I have done) and assume each and every fact asserted to be correct and each and every allegation to amount to a detriment, there is nothing to suggest that any of them are linked to race, or indeed that there was or would be any difference in treatment from an actual or hypothetical comparator.**
>
> **49. I have absolutely no doubt at all that Mr Morgan feels genuinely aggrieved by this history of things that have happened to him at work. However, this appears to be one of those cases where the claimant says, 'this has happened to me, I am black and therefore it must be because I am black'. That is not enough, I am afraid. Just because a person has been treated badly and unfairly, does not mean that the reason for that treatment was because of that person's race, their disability, their religion, their sexuality and so on. The tribunal needs, "something more". There is no such 'something more' here, there is nothing to make that connection.**
>
> **50. Firstly, I am afraid, because of the lack of prospects of success, I am going to refuse Mr Morgan's application to amend. The amendment allegations are out of time and it would not be just and equitable to extend time. There would be significant prejudice to the Respondent in allowing the amendment, causing it to expend great cost in defending allegations that have no reasonable prospects of success. There is little prejudice to the Claimant, because his amended claim has no reasonable prospect of success. Secondly, I am also going to take the step of striking out his pleaded claims on the grounds that even taking them at their highest, they have no reasonable prospects of success.**
>
> **51. To be clear about my reasoning, (I hope): it make logical sense to consider the totality of Mr Morgan's claim, that which is pleaded and that which is the subject of the application to amend, as identified by EJ Brown. I consider the claim in its totality, has no reasonable**

prospects of success and thus I strike out that which is pleaded and refuse leave to amend in respect of that which is not."

The Appeal

15. The Claimant presented a Notice of Appeal. He was again a litigant in person and the grounds of appeal are somewhat free-flowing and unstructured. But he highlighted at various points his case that, in relation to both the car park incident and the security gate incident, evidence had been (in so many words) invented, altered and/or not presented to him at certain points in the internal processes, and that the internal processes had been unfairly handled in certain other ways. The grounds convey, in lay language, his case that these features pointed to an inference that he had been treated in the manner complained of, because of his race; and that this aspect of his case was not properly taken on board in the Decision under appeal.

16. On considering the Notice of Appeal on paper HHJ Stacey (as she then was) was of the view that the challenge to the refusal of the amendment application was not arguable, but the challenge to the strike-out decision should be considered at a PH. (Her Order simply referred the appeal to a PH, but both counsel before me accepted that this was plainly an oversight, and that the live challenge was now to the strike-out decision only.) At the PH the Appellant was represented by counsel under the ELAAS scheme. HHJ Martyn Barklem directed that the matter (therefore, the challenge to the strike-out) should proceed to a full hearing.

The Arguments

17. At the hearing before me, Mr Wallace of counsel appeared for the Claimant, and Mr Caiden once again for the Respondent. The argument on both sides was thoughtful and wide-ranging. I decided to reserve and have reflected on it all. In this section I will give an overview

of what seemed to me to be the main strands of the written and oral arguments on each side. I will also further consider some other aspects of the arguments, in the next following section.

18. The original Grounds of Appeal drafted by the Claimant were allowed to proceed from the PH as they stood. Mr Wallace acknowledged that they were not well structured, but submitted that there were two overarching strands, which I may summarise as follows:

(1) The Judge had failed to consider properly the elements of the Claimant's pleaded case, and the basis for each complaint. Instead, the Judge had wrongly relied on his informal questioning of the Claimant and what he found to be the Claimant's inability to explain on what basis he alleged that the treatment complained of was because of race;

(2) When considering what might arguably, in **Madarassy** terms, provide the "something more", the Judge wrongly looked for an express "link" to race and/or in any event, did not give sufficient consideration to the Claimant's allegations that evidence had been falsified or fabricated, that he had been treated unfairly, to what might arguably be the cumulative effect of his complaints viewed as a whole, and/or to the ability of a trial Tribunal to draw secondary inferences from primary facts.

19. Mr Caiden's stance on these aspects was, in summary, as follows. First, the Judge *had* engaged with the Claimant's pleaded case. This, submitted Mr Caiden, had been set out in the twenty points listed by EJ Brown in the minute of the earlier PH. EJ Warren had, in turn, fully and faithfully set out that case at [23] – [46] of his decision. He had then properly considered, in the concluding section, whether there was anything in that pleaded case that would arguably support a shifting of the burden of proof. The Tribunal's decision, read in the round, showed that proper consideration had been given to the whole of the Claimant's case, at its highest.

20. Secondly, there was nothing wrong with the Judge engaging in dialogue with the Claimant about his case in the way that he did. Given that it was not clear to the Judge what his case was as to the "something more", this in fact properly gave the Claimant the opportunity to clarify and explain the basis on which he contended that he had an arguable case that there was some basis for shifting the burden or otherwise inferring race discrimination (or race-related harassment). It would be wrong to inhibit Tribunals from conducting this type of ordinary and helpful dialogue with a litigant in person at a Hearing of this sort.

21. As to the Judge's approach to the **Madarassy** "something more" test, Mr Caiden submitted that it was not apparent that this was a discrete and live ground of appeal. However, he fairly acknowledged that, even if that was right, were I to permit it to proceed by way of amendment, it was clearly identified in Mr Wallace's skeleton, and Mr Caiden was fully prepared and able to argue it on its merits, which he in fact did. To my reading, this aspect is covered by the notice of appeal, and did also feature in HHJ Martyn Barklem's reasons for allowing it to proceed. Having regard to all of that, and as the Respondent has been fairly able to respond to it, I have considered it.

22. Turning, indeed, to the substance, Mr Caiden submitted that the Judge had not erred in his approach to what might constitute the "something more". He did not assume that there *had* to be some allegation of, for example, express racist language or other overt discriminatory conduct, in order for a claim to be arguable. Rather, that was simply one possible way in which a direct discrimination or harassment claim *might* be advanced, which the Judge duly considered; but he rightly held that this Claimant's case did not feature any such allegations. Other possible ways in which such a claim might be advanced, such as by a claimant pointing to the contrasting

A treatment of an actual named comparator of a different race, were also considered by the Judge, but, as it were, eliminated from his enquiries.

B 23. Nor was the Judge wrong not to conclude that there was an arguable case based on the proposition that the Claimant's accusers had lied or that evidence about the car park and/or security gate incidents had been fabricated. A claimant could not establish an arguable case merely by asserting that evidence had been falsified. He had to advance some further case as to C the reason why the Tribunal should conclude that this was what had indeed occurred. If mere assertion was enough, then, the more outlandish the claim, the harder it would be to strike it out. Here, on careful examination of the Claimant's actual case, no such supporting reason was D advanced. Similarly, submitted Mr Caiden, it was not enough for the Claimant to assert that he had been treated unfairly. The Judge was entitled to consider whether there was an arguable basis for that assertion. Here, taking account of the documents before the Judge, no arguable case was made out. In summary, the Judge had an entirely proper basis for concluding that the Claimant E could not arguably establish a "something more".

Discussion and Conclusions

F 24. In relation to the first of his two over-arching grounds, Mr Wallace particularly relied on **Malik v Birmingham City Council**, UKEAT/0027/19, 21 May 2019. In that case, claims of direct race discrimination brought by a litigant in person were struck out and he then appealed.

G

25. Choudhury P set out the law in a very helpful summary, which I gratefully adopt:

> "29. Rule 37 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides:
>
> **"Striking out**
> **37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success..."**

H

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

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

(1) only in the clearest case should a discrimination claim be struck out;
(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
(3) the Claimant's case must ordinarily be taken at its highest;
(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

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

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

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

> **"54.I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by *Igen v. Wong* nor by any of the later cases in this court and in the Employment Appeal Tribunal. It was not accepted by the Employment Appeal Tribunal in the above mentioned cases of *Network Rail Infrastructure* ...paragraph 15) and Fernandez (paragraphs 23 and 24) and by the Court of Appeal in *Fox* (paragraphs 9-18 see above).**
> **55.In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in *Igen v. Wong*.**
> **'28. …..The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could have committed" such act.**
> **29. The relevant act is, in a race discrimination case …., that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example, in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities. [The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.]'**
> **56. The court in *Igen v. Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from**

which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
57."Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.""

26. In that case, the claimant had argued that there was a conspiracy and collusion against him, by a number of employees who had lied. The Judge had relied on the fact that, having been invited at the strike-out hearing to identify the basis for his belief that he had been discriminated against, he had not done so. Choudhury P opined, at [49]ff, that this was neither a fair nor an adequate assessment of the prospects of success. With a litigant in person, the Tribunal should "carefully consider the claim as pleaded and set out in relevant supporting documentation before concluding that there is nothing of substance behind it." If it does so conclude, then, in accordance with its obligation to explain its reasoning, it should set out why. It should also consider whether, if a number of individual allegations succeeded, the cumulative picture might support an inference. It might be said that the claim remains weak, but that is "quite different from saying that it has no reasonable prospects of success." [53]

27. Mr Wallace effectively submitted that the case before me was on all fours with **Malik**. He also prayed in aid the discussion in **Chandhok v Tirkey** [2015] IRLR 195 at [16] and [17] of the importance of pleadings, even in the supposedly more informal context of Employment Tribunal litigation. Mr Caiden, for his part, sought to rely on the same principle, arguing that the Claimant could not rely on extraneous material, or new lines of argument, in an attempt to bolster the strength of his case, in ways that were not reflected in his actual Tribunal pleadings.

28. My starting point is that, when considering a strike out application in respect of a claim, or part of one, the Tribunal should consider fully, and with care, the case that is currently pleaded, which, in general, must be taken at its highest. There is nothing wrong, as such, with the Judge engaging in dialogue with a litigant in person, or for that matter a representative, about the case they are advancing, and their arguments for and against the proposition that it has no reasonable prospect of success. The opportunity which it provides, to present, and respond to, arguments orally is, after all, the main point of having an oral hearing, rather than a Judge deciding an application on the papers. Indeed Rule 37(2) entitles a party who is at risk of having their pleading struck out specifically to request such a hearing.

29. However, the mischief identified by Choudhury P in **Malik** is a different one. It is that, when considering a strike out application in a case of this sort, particularly where the claimant is a litigant person, it is wrong for the Judge to simply put the onus on the claimant to explain their case orally and/or to take the Judge to the relevant material, as a *substitute* for a careful and proactive consideration of that material by the Judge his or her self. In **Malik**, as I have described, there was a witness statement, which Choudhury P considered contained potentially significant material, and should have been actively considered for its content. That was because it was "relevant supporting documentation", which, in the way that the litigation unfolded in that particular case, effectively formed part of the material setting out Mr Malik's case at is highest. (See the opening discussion leading up to [26].)

30. I should add a point, though it is perhaps obvious. There may be some cases where the material presented by a party, though described or proffered as a pleading, such as a particulars document attached to a claim form, is simply not in a form that the Judge can reasonably be

A expected to interrogate or assimilate in this proactive way, whether perhaps because of its sheer size, or the unwieldy, inscrutable or incoherent nature or structure (or lack thereof) of the contents. The same may apply to supporting documentation that is referred to, or otherwise put in. Indeed, a claim that cannot be sensibly responded to may be rejected under Rule 12(1)(b). But that was not the case in **Malik**; nor is it here.

B

C 31. I turn then to the case before me. The starting point is to ask where, by the time of the start of the hearing before EJ Warren, relevant material setting out or supporting the Claimant's pleaded case was to be found. In the course of oral submissions before me, Mr Caiden submitted that it was definitively recorded in the bold items in the list given by EJ Brown at [9] of the minute

D of the PH before him (being those which he considered were covered by the existing particulars of claim), rather than in the table proffered by the Claimant, as such.

E 32. I disagree. It seems to me that, in formal terms, what happened is that, in the run-up to the PH before EJ Brown, the Claimant submitted a table which he wished to stand as his definitive detailed particulars of claim, having had the opportunity to put this together with the help of a lawyer. EJ Brown, in the section of his minute headed "The claim", correctly identified at [8]

F that this document "set out details of the complaints he was seeking to pursue."

G 33. EJ Brown then described the matters complained of in the table, at [9], helpfully numbering them (including giving separate numbers to two incidents said to have occurred on the same date) and, at one point, reordering two incidents that the table had listed out of chronological order. Then, by reference to that summary, he identified those individual

H allegations which he considered did not require permission to amend. In respect of *those* allegations he therefore effectively permitted the content of the table to stand as further particulars

of the claim. It would have been better to make an express Order, but I think it is entirely clear that that is, in substance, what he did. He then left it open to the Claimant to advance argument at the next PH as to whether any of the other complaints were also covered by the original claim, and/or that he should be permitted to add them by amendment.

34. EJ Brown's summary at [9] assisted the process of cross-referencing the discussion and conclusions that followed, to the relevant entries in the table. But this summary was not intended to be, and could not have been, a substitute for the full contents of the table itself. Where matters stood at the end of the hearing before EJ Brown, therefore, is that the Claimant's current live pleaded case was reflected in the original particulars of claim, as further particularised, in respect of those allegations highlighted in the summary given by EJ Brown in bold, by the full content of the relevant entries in the Claimant's table.

35. I note for completeness, also, that, although [9] of EJ Brown's minute starts a section headed "The issues" it does not, in fact, contain a list of issues, but rather, the Judge's analysis and conclusions about the state of the Claimant's pleaded case. Ordinarily, one would expect there to be a requirement, or at least an opportunity, at the appropriate point, for the Respondents to amend their Grounds of Resistance in response to the Claimant's case in its latest form, which would *then* pave the way for the drawing up of a list of issues. In this case, however, the first next order of business was for the next PH to consider the applications for strike out or deposit orders, and possible amendment of the claims (and there was unfinished business in relation to the status of the individual Respondents). Had there been any complaints standing at the end of EJ Warren's Hearing, some direction in relation to consequential amendment of the Grounds of Resistance would have been appropriate at that point.

36. I have conducted this analysis somewhat painstakingly, because of the way that the arguments on the appeal were advanced before me. In truth I do not think the position was in any way complicated or unclear going into the hearing before EJ Warren. I do not think it was misunderstood by EJ Warren as such, who took care, as he described at [6] of his minute, to make sure that he had the Claimant's table itself to hand, and that he was looking at the right document; and he referred as such, correctly, at [22], to the Claimant's "pleaded case set out in his ET1, having regard to the table of allegations prepared for him by his solicitors."

37. Pausing there, the task for EJ Warren, when considering the strike out application, was therefore to consider with care the Claimant's pleaded case, as set out in his original particulars of claim, *and* the relevant entries in his table, and whether, on a fair assessment, it, or any part of it, passed the threshold of presenting a reasonably arguable case, taking it at its highest. If he did do that, and properly concluded that it did not, then there was no harm in the Judge's observation, arising from the discussion at the PH, that the Claimant "was unable to explain to me the link to his race." But if he did not sufficiently perform that task, or came to the wrong conclusion, then the fact that the Claimant, who was a litigant in person, was not, in discussion, able to add any cogent argument to the case presented in the documents, would not be something on which the Judge could properly have relied instead.

38. Mr Caiden submitted that the Judge had patently, on the face of his decision, diligently gone about the task the right way. He directed himself that he should take the Claimant's case at its highest. He said, in terms, that he was going to run through the Claimant's story as set out in the table. He then did just that, faithfully and in some detail, at [23] to [46]. He then came to properly reasoned conclusions in the final section, reflecting on the different ways in which claims of this type could potentially be advanced, how this claim was actually advanced, and

whether, on the Claimant's own pleaded case, there was any "something more" said to have been present. He properly concluded that there was not.

39. Mr Wallace, however, argued that Judge erred by taking too narrow an approach to what, in law, might be sufficient to establish an arguable case. In any event, while he had set out the Claimant's case in his summary at [23] to [46], he had also, wrongly, relied on material relating to the Respondent's case that did not incontrovertibly undermine the claims. He had then failed to consider, in the concluding section, the material features of the Claimant's case which might be said, separately or together, to provide support for his claims. At a minimum, the Judge had erred by not explaining in the final section how (if he had indeed done so) he had engaged with those particular elements of the Claimant's case, but found they did not help to make the case that his claims had better than no reasonable prospect of success.

40. I consider, first, the contention that, in the concluding section, the Judge took too restrictive an approach to the law, in terms of what features of a case might provide the basis for an arguable case that an inference might be drawn, or the burden of proof caused to shift. As to that, it is, I think, clear that the Judge was, in part, at [47], as it were eliminating certain scenarios from his enquiries. In the final couple of sentences I apprehend that his point was that this was not the sort of case where conduct is said to be by way of harassment "related to" race, within section 26 of the **2010 Act**, by virtue of overtly racist language having been used, or something of that sort.

41. Similarly, the Judge was, in the same paragraph, noting that this was not a case where the Claimant, in respect of any matter, relied upon any actual comparator of a different race. The Judge, however, also referred to the possibility of there being a hypothetical comparator, and the

possibility of inferences being drawn from a series of allegations. Reading these paragraphs as a whole, and though the word "link" is dangerously ambiguous, I do not think the Judge erred by thinking that there had to be more of an express or overt "link" to race than the law would in fact require, in order for such claims to succeed.

42. The Judge also referred to the significance, or not, of unfair treatment, at [49]. It is well established, of course, that unfair treatment is not to be equated, as such, with discriminatory treatment (**Glasgow City Council v Zafar** [1998] ICR 12). The Judge was right about that. But, as Mr Caiden properly acknowledged, it is equally well established that discrimination may be inferred if there is no explanation for unreasonable behaviour (see the discussion in **The Law Society v Bahl** [2003] IRLR 640 (EAT) at [93] – [98], upheld by the Court of Appeal [2004] IRLR 799 at [100] – [101]). That feature of the jurisprudence is not mentioned by the Judge. It is potentially significant, given that the Respondent's explanation would fall to be excluded from consideration at the first stage under section 136, and that the Judge's task was confined to considering only whether the Claimant's complaints had better than no reasonable prospect of success, not whether they were likely to, or ultimately would, succeed.

43. Pausing there, however, the Judge's exposition of this aspect of the law could have been fuller, but there is nothing wrong in it as such; and what matters in such cases, ultimately, is not whether the Judge could or should have set out the law more fully, but whether they have demonstrably carried out the substantive task in accordance with it.

44. I turn, then, to that substantive question. As to that, the Judge did not, in the short concluding section, refer to any particular features of the Claimant's case, by reference to any of the individual allegations, and explain what he made of them, whether they might arguably have

assisted the Claimant, or why the Judge considered that they did not. Mr Caiden submitted, however, that it was wrong to criticise the Judge for not saying more, in the concluding section, about the *absence* of an arguable case. He had fully and fairly set out the Claimant's factual case in the preceding section, in relation to every one of the matters of which he complained, or sought to complain, and then properly concluded that there was nothing in any (or all) of it that might provide arguable support for his claims. He did not need to go back over each complaint in order to support his conclusion that none of them exhibited any feature that would make the Claimant's case arguable.

45. However, I agree with Mr Wallace, that there *were* features of the Claimant's case – taken at its highest – that needed specifically to be considered and addressed. The following, in particular, were highlighted by Mr Wallace. First, the Claimant's case, in relation to the car park incident, was that his supervisors had falsely accused him of deliberately clipping one of them with his car. Mr Caiden submitted that the complaint relating to this was not arguable, given that it was an undisputed fact that, at the initial investigatory interview (of which the Judge had the Respondent's record) it was decided that this allegation would not be pursued (a fact to which the Judge referred in his synopsis at [25]). But I do not think that could, of itself, justify the conclusion that the complaint that the Claimant's supervisors had maliciously falsely accused him, in the first place, had no reasonable prospect of success.

46. Secondly, as to the security gate incident, the Claimant maintained that he had again been falsely accused. Mr Caiden submitted that, in his synopsis, at [31], the Judge properly referred to a document in his bundle (at page 65) which showed that the Claimant's colleague, who was not of his race, had also been suspended. In discussion, Mr Caiden was able to tell me a little more about this document, which was an incident note created by Jaguar Land Rover (the site

owner) recording that a Mr Dimitri was also suspended. The Tribunal was also informed that this individual was not of the Claimant's race. But it had no more information than that. I note also that the colleague is referred to by the Tribunal itself (at [30]) as Mr Burch. The Judge referred to this, at [47], as a "key instance in which someone else is treated the same way." But bearing in mind that this individual was relied upon as an evidential comparator, and the very limited evidence before him, I do not think this material could have been regarded as conclusively showing that this particular complaint had no reasonable prospect of success.

47. Thirdly, Mr Wallace referred to the complaint that the disciplinary hearing at which he received a final written warning had unfairly proceeded in the Claimant's absence. Mr Caiden notes that the Judge, in his synopsis (at [35]), referred to the fact that the invitation letter warned him that the hearing might proceed in his absence if he did not attend. But I do not see that this could, by itself, be regarded as a complete answer to the complaint that it was unfair to do so in all the circumstances of this case.

48. These are examples, it seems to me, where the Judge has referred to, or taken into account features of the Respondent's case which may have been reasonably viewed as tending to undermine the Claimant's case, as advancing a non-discriminatory explanation for the treatment complained of, or otherwise potentially providing a complete answer to the complaint in question. They may all potentially have properly been viewed as casting significant light on the Claimant's prospects of success. But the Tribunal needed to keep in mind, in respect of the strike-out application, the stringent "no reasonable prospect" test, and that the Claimant's case had to be taken at its highest. The Judge needed to take particular care, when referring to features of the *Respondent's* case, as to whether he could be confident, in that context, that they would be bound to provide a complete incontrovertible answer to the claim in question at trial.

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49. As I have noted, Mr Caiden submitted that it cannot be right that it is sufficient for a claimant merely to assert that there has been disputed treatment because of (or related to) race (or some other protected characteristic). Otherwise, the more outlandish the allegation, the harder it would be to strike it out. However, there are a number of answers to that concern.

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50. First, mere assertion alone clearly would not, indeed, be enough to make a case arguable. Mr Wallace did not so contend. His case was, rather, that there *were* features of the Claimant's factual case that gave him some arguable building blocks, once the correct legal approach was kept firmly in mind; and that these were not sufficiently considered.

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51. Secondly, as the discussion in the authorities makes clear, there can be cases in which, despite a material dispute of fact, the Tribunal can properly strike the claim out. Oft cited is the example given in **Ezsias** [2007] ICR 1126 by Maurice Kay LJ, of a factual assertion that is "totally and inexplicably inconsistent with the undisputed contemporaneous documentation." There may be other cases where, perhaps, factual assertions are made that are so extremely improbable and unlikely, that they, on their face, stretch credulity beyond any reasonable prospect of their being upheld. But the Tribunal does need to be confident that the basis for strike out, is, through one route or another, in the language of Lord Steyn in **Anyanwu** [2001] ICR 391, plain and obvious. The present case was not one where the Tribunal could properly rely on any documents as fatally undermining the Claimant's case in the sense envisaged by Maurice Kay LJ. Nor, Mr Wallace fairly submitted, did the Tribunal in this case purport to conclude that the Claimant's factual case was so outlandishly improbable that it, for *that* reason, plainly and obviously had no reasonable prospect of success.

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52. Thirdly, while the draconian nature of a strike out, and the high threshold for it, must be kept in mind, this does not mean that complaints which the complainant knows, or reasonably ought to know, have no foundation, can be pursued with impunity. First, as Mr Wallace fairly acknowledged in discussion, a complainant who unsuccessfully pursues a case which they know, or ought reasonably to appreciate, from the outset, has no merit, may be at risk of costs. It is also well established that the failure of the other party to seek (or, if sought, obtain) a strike out does not necessarily insulate a complainant against such an award.

53. Finally, in some cases, while a strike out is not appropriate, a deposit order may be. When considering the lesser standard of "little reasonable prospect of success" there is more room, provided it properly applies that test in a reasoned way, for the Tribunal to evaluate the credibility and likelihood of a particular disputed contention succeeding at trial, by reference to a range of material that may fairly be thought to throw light on that question. See **Van Rensburg v The Royal Borough of Kingston-Upon- Thames** [2007] UKEAT 0096/07.

Outcome

54. Returning to this specific case, as the Judge correctly reminded himself, he had to take the Claimant's case at its highest as pleaded. There were matters of dispute about the two incidents at the heart of this case, and their handling, which, for the purposes of deciding the strike out application, the Tribunal had to assume would be resolved in his favour. So it had to ask itself whether, for example, if it was indeed found to be true that false or exaggerated allegations against him, had, on both occasions, been deliberately advanced, and if the Tribunal did indeed consider, at trial, that the disciplinary process had, in some ways, been handled unfairly, that might provide the Claimant with sufficient building blocks for an arguable case, at least in respect of those complaints.

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55. Whilst the Judge referred, in his narrative description of the Claimant's case, to most (though not all) of the features of the Claimant's case, he did not, in the concluding section, engage directly with the particular features that might have been said to give rise to an inference of discrimination or a shifting of the burden of proof. If he did specifically consider them, but concluded that they did not arguably have that effect, he did not, in the concluding section, explain his reasons why. It was incumbent on him to do so. He also, in the course of the narrative, referred to features of the Respondents' case, without sufficiently considering whether they plainly and obviously showed that the corresponding complaints were bound to fail at trial, so that the strike-out standard was met.

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56. I will therefore allow this appeal and quash the judgment striking out the claims. In the course of argument, both counsel made submissions about what, in the event that I did so, I should do next. Mr Wallace submitted that a strike-out question is one to which, in a given case, there can only ever be one right answer, and that I could and should substitute a decision in this case refusing to strike out. However, I do not agree. There will be some cases which are plainly comfortably one side of the line or the other, in which there is only one right answer – **Malik** was such a case, which was why Choudhury P was able to substitute in that case, a decision declining to strike out. But in other cases, which are closer to the line, there may be room for disagreement on the evaluation of the overall material available to the Judge.

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57. The answer in this case, is, in my view, not as clear cut as it was in **Malik**. Further, a potential complication in the present case is that it is not impossible that, on closer scrutiny of all the materials, it might be properly concluded that *some* of the complaints fall to be struck out, but not others. I was given extracts from the Tribunal's bundle, but I do not have all the materials

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before me that it had; and, even had I had all the same materials, I could not in any event substitute my own decision unless I was confident that there is only one right answer, or both parties consented (and Mr Caiden told me that his client did not). Having reviewed all those aspects, I have therefore concluded that, in this case, I should remit.

58. Mr Wallace submitted that, if I did so, remission should be to a different Judge, Mr Caiden that it should be to the same Judge. I have no doubt that if I remitted to him, EJ Warren would conscientiously take a fresh look at all the features of the Claimant's case on which he relies. But the decision is one on which EJ Warren came to a clear and firmly stated view first time around; and it is important that, whatever the outcome next time, it commands the confidence of both parties. I have therefore concluded that it would be better to remit to a different Tribunal.

59. I note that, in view of his decision to strike out, the deposit application that was also before EJ Warren fell away. Assuming that both applications are maintained by the Respondent hereafter, the Tribunal will, once again, therefore need to consider whether to strike out some or all of the Claimant's claims, and, if some or all of them are not struck out, whether there should be a deposit order. However, as I have noted, EJ Warren's decision to refuse the amendment application stands, and therefore the Tribunal will now in any event solely be concerned with those complaints that, in EJ Brown's list, were highlighted in bold, though there may be other relevant matters of background or context.