Case Numbers: 2504210/2019 (A)
1807143/2019 (A)
2501408/2020 (A)

EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: **Ms B Sharkey**
Respondents: **Mr G Davis (1)**
Asda Stores Limited (2)

Heard at: **Newcastle Hearing Centre (by telephone)** **On:** **4 February 2021**

Before: **Employment Judge Morris (sitting alone)**

Representation:
Claimant: **Ms H Hogben of counsel**
Respondent: **Mr P Starcevic of counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The scope of the preliminary hearing today is limited to the respondent's applications that

    1.1 an order be made striking out the claimant's claim of discrimination on grounds of sex, or if not,

    1.2 an order be made requiring the claimant to pay a deposit as a condition of continuing to advance her allegations.

2. The Tribunal is not satisfied that it can be said that that claim "has no reasonable prospect of success" and, as such, that application to strike out that claim is refused.

REASONS

Representation and evidence

1. The claimant was represented by Ms H Hogben of counsel. The respondent was represented by Mr P Starcevic of counsel.

2. No oral evidence was given to the Tribunal, the parties relying instead upon submissions made by their respective representatives during the course of which they both made reference to a small bundle of documents entitled, “Collated ET documents”, and a bundle of eight authorities; both bundles having been prepared on behalf of the respondent. The numbers shown in parenthesis below are the page numbers in the document bundle.

Context

3. There had already been three Private Preliminary Hearings in this case on 6 February, 24 July and 25 September 2020, at the last of which, amongst other things, Employment Judge Jeram consolidated the above three claims of the claimant and made various case management orders.

4. Of particular relevance to this hearing today, Employment Judge Jeram recorded that the respondent could request a public preliminary hearing to consider striking out one or more of the claimant’s claims or, alternatively, making deposit orders.

5. Such applications were made by the respondent within its amended Grounds of Resistance (particularly in paragraphs 20 to 29) including, for the reasons stated, as follows:

> “ASDA does not believe that the Claimant's claim of discrimination on the grounds of sex has any reasonable prospects of success. Therefore, ASDA respectfully requests that the Claimant's claim is struck out pursuant to Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.”
>
> “Should the Tribunal decide not to strike out the claims, ASDA invites the Tribunal to make an order in accordance with Rule 30 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that the Claimant pay a deposit order of £1,000 in respect of each allegation in order to continue her claim on the basis that it has little reasonable prospects of success.”

6. In the circumstances, Employment Judge Sweeney directed that there should be this preliminary hearing today to determine the following issue:

> “The Employment Tribunal will consider the applications as set out in paragraphs 24-29 of the Respondent’s representative’s amended grounds of resistance (email of 6 November 2020).”

Determination of a procedural issue

7. At the commencement of today’s hearing Ms Hogben sought clarification as to its scope. In particular, accepting that the applications referred to above related to the claimant’s complaints of sex discrimination, whether they also related to her complaint of constructive unfair dismissal. I invited submissions from the

representatives in turn, all of which I took into account notwithstanding that every detail that was submitted might not be specifically recorded below.

8. Ms Hogben referred expressly to the direction of Employment Judge Sweeney set out above that the Tribunal was only to consider the applications referred to in paragraphs 24-29 of the respondent's representative's amended grounds of resistance within which, she said, there was reference to the claim of sex discrimination but no reference to the claim of unfair dismissal. Similarly, there was no reference to unfair dismissal in the skeleton argument submitted for today's hearing: indeed paragraphs 6 to 18 related only to a complaint of victimisation. Additionally, the authorities to be relied upon by the respondent today (as contained in the authorities' bundle it had compiled) were directed to the applications relating to the sex discrimination claim and not the unfair dismissal claim. Finally, there had been no suggestion either in the pleadings or correspondence that the claim of unfair dismissal was also to be considered today.

9. Ms Hogben continued that in these circumstances she had prepared to address only the applications in respect of the claimant's sex discrimination claim, had not considered the unfair dismissal claim and, therefore, she would be disadvantaged if that claim were also to be considered today.

10. Mr Starcevic clarified that the claimant had submitted three claim forms (ET1) and the applications to be considered today related only to the third and that in that claim claims of both unfair dismissal (constructive) and discrimination (victimisation) were made (5). He invited me to look carefully at the Case Management Summary and Orders produced by Employment Judge Jeram (50) and the claimant's resulting further particulars in which reference was again made both to unfair dismissal and sex discrimination (57).

11. I took a short adjournment while I considered all of the submissions that had been made by the representatives together with the documents that were before me. Upon reconvening the hearing I informed the representatives of my decision in this regard to the following effect.

12. It is right that Employment Judge Jeram referred to the third of the claimant's claims consisting "of a claim for unfair constructive dismissal and sex discrimination". Additionally, in the Orders she made she required the claimant to provide "full particulars of her claim for unfair constructive dismissal and sex discrimination as set out in her claim presented on 21 July 2020" (53).

13. Those further particulars (57) are headed "Further particulars to discrimination claim" and it is stated that the further particulars are being provided "in relation to the discrimination claim raised with the claim of constructive unfair dismissal by way of the ET1 lodged on 21st July 2020". They continue that the circumstances described at a meeting on 3 March 2020 amounted "to a detriment and it was because of her having complained about the harassment previously, a protected act. The claim is under s.27 Equality Act 2010." Although apparently not part of the further particulars, it is then confirmed "that from allegation (1) of the 28th of February 2020 further particulars, that allegation is brought under s.26 (1) and (2) Equality Act 2010".

14. In light of the above further particulars, amended grounds of resistance were submitted on behalf of the second respondent (58). In paragraph 24 of that document it is stated (as more fully quoted above) that the second respondent maintained its position that it did not believe that the claimant's "claim of discrimination on the grounds of sex has any reasonable prospects of success", and, at paragraph 26, that if the Tribunal decides "not to strike out the claims" it should make a deposit order.

15. Finally, in this respect Employment Judge Sweeney then directed as also set out above making express reference to paragraphs 24 to 29 of the respondent's amended grounds of resistance.

16. In the above context, I reminded the representatives that the stated function of this Tribunal was to consider the applications as set out in paragraphs 24 to 29 of the second respondent's amended grounds of resistance as Employment Judge Sweeney had directed. I noted that as recorded above, Employment Judge Jeram had referred to the third of the claimant's claims comprising both unfair constructive dismissal and sex discrimination, and she had ordered the claimant to provide full particulars of each of those claims, which the claimant had done albeit only making what I considered to be the briefest of references to the claim of constructive unfair dismissal. Notwithstanding those references to unfair dismissal as well as sex discrimination in both the Summary and Orders of Employment Judge Jeram and the further particulars submitted by the claimant, I was unable to identify anything in those paragraphs 24 to 29 of the second respondent's amended grounds of resistance that referred to the complaint of unfair dismissal. On the contrary, paragraph 24 expressly refers only to the claimant's "claim of discrimination on the grounds of sex" having no reasonable prospect of success. Furthermore, the submissions contained in the sub-paragraphs of paragraph 25 relate only to "alleged discriminatory treatment", "allegations of discrimination", "the discrimination claims" being highly speculative and having no reasonable prospect of success; there being "no facts or evidence to support that any of the alleged discrimination is attributable to the Claimant's sex"; the claimant having failed to identify a comparator (which is clearly only relevant to a complaint of discrimination and not to unfair dismissal). That discrimination as opposed to unfair dismissal is the focus of the respondent's applications is confirmed, as Ms Hogben submitted, by the absence of any reference to unfair dismissal in the skeleton argument that had been submitted on behalf of the respondent for today's hearing, particularly as follows: paragraph 1 invited the Tribunal to strike out the claim "for discrimination on the grounds of sex (victimisation)"; paragraph 3(e) referred to the respondents having notified "the "Tribunal that it would pursue its application for C's claim of victimisation to be struck out"; paragraphs 6 to 18 related only to a complaint of victimisation.

17. In the circumstances and for these reasons, I explained to the representatives that I was satisfied that the scope of the preliminary hearing today was to be limited to the applications of the second respondent as follows:

17.1 an order be made striking out the claimant's claim of discrimination on grounds of sex, or if not,

17.2 an order be made requiring the claimant to pay a deposit as a condition of continuing to advance her allegations.

18. It follows, therefore, that I was satisfied that this Tribunal could not consider any equivalent application for strike-out or a deposit order in relation to the claimant's claim of unfair dismissal.

19. That said, I reminded Mr Starcevic (undoubtedly, unnecessarily so) that rule 37 of the Employment Tribunals Rules of Procedure 2013 ("the Rules") provides that a Tribunal may strike out all or part of a claim at "any stage of the proceedings, either on its own initiative or on the application of a party" and enquired whether he wished to make any application in respect of the claim of unfair dismissal. He responded that he would not apply today to strike out the unfair dismissal claim (although such application might be made in the future) because he did not want to lose today's hearing but he would pursue the applications made in respect of the discrimination claim, which we then proceeded to do.

20. For clarity, although reference is made above to the claimant's claim of discrimination on grounds of sex, at the hearing the representatives were agreed that the specific complaint in relation to which I was to make determinations as to strike-out or a deposit order was a complaint of victimisation under section 27 of the Equality Act 2010 as specifically referred to in the claimant's further particulars.

Submissions

21. The parties' representatives made oral submissions as to the issues to be determined by this Tribunal by reference to relevant statutory and case law; Mr Starcevic also relying upon the skeleton argument that had been submitted by the claimant's solicitors. It is not necessary for me to set out the representatives' submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made in the context of relevant statutory and case law to which I was referred and the parties can be assured that all submissions were taken into account in coming to my decision.

22. That said, the key points made by Mr Starcevic on behalf of the respondent included as follows:

22.1 The claimant's original claim is of discrimination (the dismissal having been discriminatory) not victimisation; there is a clear difference. When further particulars were provided there was a fundamental change. It was not that the dismissal was discriminatory but that the conduct on 3 March 2020 amounted to victimisation. That is a new claim that requires an amendment to the original claim. Whilst the claim was in time for unfair dismissal in that the dismissal is said to have occurred on the claimant's resignation on 16 April it is not in time for a victimisation claim because the alleged act occurred on 3 March 2020. Absent an application to amend, the claim is hopeless. There had been no claim that the dismissal was because of sex, which is no doubt why there had been a change in the nature of the claim from the

discrimination being the dismissal to a discrete act of victimisation. The claim form imports conduct in respect of the earlier claim forms being part of a course of conduct giving rise to dismissal. The claim should be struck out as the claimant had tried to introduce a new claim and there had been no amendment application.

22.2 As to the merits of the claim in the further particulars, the test of victimisation is entirely different. It is not because of sex or being treated less favourably; the claimant has to prove detriment. By reference to the Headnote in the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11: detriment is analogous to disadvantage; the test is not entirely subjective but is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his disadvantage; an unjustified sense of grievance cannot amount to detriment.

22.3 The claimant's description in her further particulars (57) is entirely subjective, nebulous and does not amount to detriment. What Mr Oliver is supposed to have said is analogous to Judge Jeram asking 'What is your case'. That is to say, in asking 'What's the problem', Mr Oliver was enquiring 'What's wrong with the investigation?' when he commented "I don't understand what the problem is". The law is not concerned with trifles; there has to be disadvantage and this is not. The claimant is labouring under an unjustified sense of grievance. It is apparent from the note of the meeting on 3 March 2020 (69) that the claimant raised no complaint at the time that there was disadvantage. There is nothing untoward referred to in that note; indeed it concludes, "Please let me know if there is anything we can do to support you". There is no disadvantage, the claimant's case is hopeless and it will add time to the hearing dealing with the detail and the context.

22.4 The Tribunal should adopt a two stage process:

22.4.1 decide if the claim has no reasonable prospect of success; and, if not,

22.4.2 exercise its discretion not to allow the claim to proceed because of the following points:

22.4.2.1 the inherent weakness of the claim;
22.4.2.2 the lengthening of time for the hearing involving an additional witness to address the context of the meeting on 3 March;
22.4.2.3 the claim requires amendment and is out of time;
22.4.2.4 of particular significance, the witnesses would be required to remember what occurred on 3 March when the note of the meeting records nothing untoward;
22.4.2.5 not until 11 October did the respondent understand the nature of the claim, which compounds the issues of the claim being out of time and delay.

23. The key points made by Ms Hogben on behalf of the claimant included as follows:

23.1 In paragraph 1 of the claimant's third claim of 21 July (11) she cites the ongoing discrimination claim, which contains a number of allegations of victimisation. In large part her concerns were that she had been dismissed and treated in an unsympathetic and belittling manner. There is no requirement for amendment. This is not a new claim as victimisation is a subspecies of discrimination. In section 8.1 of the ET1 there is no stand-alone box for victimisation, just discrimination for a protected characteristic. The claimant talks about the way the grievance was handled and describes being belittled at the meeting on 3 March. It is clear that there is significant dispute as to the intention of Mr Oliver when he uttered the words; the claimant saw it as belittling and the final straw.

23.2 In the claimant's further particulars she has described what was said, where and who was present, and had specified the relevant statutory provisions. There is no special requirement dealing with the extent of particularity in any claim, which should be viewed in light of the overriding objective. Formal requirements for the pleadings are "minimal" – to set out the essential case. It is not a witness statement, which is discouraged, and being legalistic would be contrary to the overriding objective because of the chance of inequality of arms; which would benefit those with the deepest pockets. The claimant's particulars are short and succinct but set out the essentials.

23.3 In <u>Mechkarov v Citibank NA</u> [2016] ICR 1121 the EAT approved the approaches outlined in <u>Anyanwu v South Bank Students' Union</u> [2001] ICR 391, <u>Ezsias v North Glamorgan NHS Trust</u> [2007] EWCA Civ 330 and <u>Tayside Public Transport Company Ltd (T/a Travel Dundee) v Reilly</u> [2012] IRLR 755 (to sections in all of which Ms Hogben made specific reference). In this case there was clearly dispute of fact regarding the manner in which Mr Oliver uttered the words, "I don't understand what the problem is", during the meeting on 3 March and the reason why he said that; if indeed, the respondent accepted that he had. This is a factual matter to be determined by the Tribunal, which will assess credibility and consider whether the explanation of the claimant that she felt belittled and Mr Oliver was irritated is to be accepted or (as Mr Starcevic had suggested) he was only attempting to understand the problem. Mr Starcevic relies upon the note of the meeting that day (69) but that is not an accurate reflection of the welfare visit given that in the claimant's further particulars she says that she was speaking about her illness and how she felt about the way that the respondent had handled the investigation, which is not recorded in the note. This conflict needs to be determined on evidence by the Tribunal. Further, contrary to the facts in the case of <u>Ahir v British Airways Plc</u> [2017] EWCA Civ 1392, in the present case the claimant's explanation is not speculative. She says that she personally observed and heard the manner in which the words were spoken by Mr Oliver.

For all the above reasons the Tribunal is invited to refuse the strike-out application.

24. In light of the above submissions Mr Starcevic made further submissions including as follows:

    24.1 It is right that strike-out is not appropriate if there is a central dispute of fact (Mechkarov) but there is not such a dispute in this case. In her further particulars the claimant says she felt, that Mr Oliver appeared irritated and said, "I don't understand what the problem is". The Tribunal must determine whether he said that but must take it that he did. In her pleadings the claimant has maintained that Mr Oliver appeared irritated as he used those words but even if he said the words there is no reasonable prospect of success. The decision in Mechkarov relates to the majority of cases but not this case. The Tribunal should approach it as if the words were said but even if they were, the claim is still hopeless.

    24.2 In her submissions, Ms Hogben had suggested that the Tribunal should look at Mr Oliver's intention but that is not the law. Disadvantage does not depend on the undisclosed or secret intent of the employer. The test is whether a reasonable worker would or might take the view that in all the circumstances it was to his disadvantage. The Tribunal has to ask, given the words said, was it reasonable for a worker in the position of the claimant to say there was disadvantage.

Consideration

25. I have given careful consideration all the relevant material before the Tribunal: Balls v Downham Market High School and College [2011] IRLR 217. Notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below, I have thus had regard to the claimant's three claim forms and the respective responses (albeit paying particular attention to the third of the above claims (5)); the further particulars provided by the claimant (57) following the orders made at the previous preliminary hearing (50); the submissions made at this hearing; the relevant statutory and case law.

26. In relation to any assessment of whether a claim either has no reasonable prospect of success or little reasonable prospect of success, general principles in relation to a complaint of discrimination are relevant considerations. One such general principle is the shifting of the burden of proof provided for in section 136(2) of the Act, which states, "If there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred." It is well-established (e.g. Igen Ltd v Wong [2005] ICR 931) that this involves a two-stage approach. At the first stage the claimant is required to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. Thus the tribunal is required to make an assumption at this stage which may be contrary to reality.

This first stage has been explained as the claimant establishing what has been referred to as a 'prima facie case of discrimination'. Although the burden of proof is on the claimant at this stage and the standard of proof is the usual civil standard of balance of probabilities, the threshold of "could" decide/conclude is not particularly high; albeit something more is required than a difference in 'status' between the claimant and her comparators (i.e. in this case sex) and a difference in treatment between them: Madarassy v Nomura International plc [2007] ICR 867.

27. Within the above general principle there is a second, which is also referred to in Igen Ltd, that at this first stage it is appropriate for the tribunal to draw inferences from primary facts and, in doing so, must assume that there is no adequate explanation for those facts. If the burden of proof thus shifts to the respondent it is then for the respondent to prove that its treatment of the claimant was in no sense whatsoever on the ground of sex. I bring these general principles of the reverse burden of proof and the drawing of inferences into account in my consideration of whether the claim of the claimant has either no reasonable prospect or little reasonable prospect of success.

28. In accordance with Rule 1(3) of the Rules, the decision of this Tribunal regarding the respondent's strike-out application is a judgment, which must be registered, whereas its decision regarding the respondent's application for a deposit order is obviously an Order. These Reasons therefore relate primarily to that Judgment as to the strike-out application even though the separation of the two decisions is somewhat artificial given that, despite the different thresholds, similar principles apply to any consideration of whether all or part of a claim should be struck out under rule 37 of the Rules on the basis that there is "no reasonable prospect of success" or whether a deposit order should be made under rule 39 on the basis that an allegation "has little reasonable prospect of success". Thus, in these Reasons I address, principally, the application that the claimant's claim should be struck out.

29. In relation to the issue of striking out a claim of discrimination on this ground of no reasonable prospect of success, the House of Lords in Anyanwu highlighted the importance of not striking out discrimination claims thus:

> "….. 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."

30. This general approach has been consistently followed. In this regard, there is little dispute between the parties that strike-out on this ground should only be exercised in exceptional or rare circumstances. In Ezsias, for example, the Court of Appeal stressed that it will only be in an exceptional case that a claim will be struck out as having no reasonable prospect of success where the central facts are in dispute:

> "It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words 'no reasonable prospect of success'. It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

31. Similarly, in Reilly the Court Session stated:

> "Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls v Downham Market High School and College* [2011] IRLR 217, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (*ED & F Man Liquid Products Ltd v Patel* [2003] CP Rep 51, Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Man* … ; *Ezsias* …). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias* … Maurice Kay LJ, at para 29)."

32. Having reviewed the above authorities, Mitting J in Mechkarov set out the approach that should be taken in a strike-out application in a discrimination case as follows:

> "(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."

33. Notwithstanding the caution expressed in the caselaw above in respect of striking out a discrimination claim, I do accept Mr Starcevic's submission, in which he relies upon Jaffrey v Department of Environment Transport and

Regions [2002] IRLR 688, that this does not impose a fetter on a tribunal's discretion to do so in appropriate circumstances. A similar point is made in the decision in Chandhok v Tirkey [2015] IRLR 195 in which mention is made of it being rare for a strike-out application to succeed before the full facts of the case have been established in evidence. That said, "This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic …" (Madarassy).

34. I also accept Mr Starcevic's submission that where a straightforward and documented explanation for what occurred is provided, a case should not be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation, even in the context of a usually fact-sensitive discrimination claim, in which he relies upon the authority in Ahir. I note, however, that in that case while it was certainly said that employment tribunals should not be deterred from striking out claims including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established but "the hurdle is high". On a different point I also accept Mr Starcevic's submission that the correct approach is to take the claimant's case at its highest: Ukegheson v London Borough of Haringey [2017] EWCA Civ 1140.

35. In making its application that the claimant's claim of victimisation be struck out, the respondent relies upon the ground that it "has no reasonable prospect of success". As such, I first remind myself of the general context within which I am to consider the respondent's application for a strike-out order, which is provided in the case precedents referred to above: amongst other things, the importance of not striking out discrimination claims (Anyanwu); striking out on this ground should only be exercised in rare circumstances (Reilly) and in an exceptional case where the central facts are in dispute (Ezsias); while employment tribunals should not be deterred from striking out claims in appropriate cases "the hurdle is high" (Ahir); yet, this stops short of a blanket ban on strike-out applications succeeding in discrimination claims (Chandhok); more is required than an assertion of a difference of treatment and a difference of protected characteristic (Madarassy).

36. More particularly, in the decision in Balls, Lady Smith stated as follows:

> "…. the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are

likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

37. Mr Starcevic put forward the strike-out application on two principal bases: first, that in providing her further particulars the claimant had fundamentally changed her claim from one of discrimination (the dismissal having been discriminatory) to one of victimisation; secondly, that, on the merits, there was no reasonable prospect of success.

38. As to the first of those bases, I first note that in paragraph 3 of section 8.2 of her third claim form (11) the claimant refers to the welfare meeting on 3 March 2020 at which she considered the respondent's management to be "entirely unsympathetic and belittling towards her", having told the manager that this was a difficult subject for her to speak about and that it appeared that she had to drag the respondent to investigate her concerns of harassment, and being told "I don't understand what the problem is". I am satisfied that there are indications there of the respondent subjecting the claimant to detriment.

39. I accept that there is no clear statement to the effect that the claimant was subjected to detriment because she had done a protected act but I am satisfied that this third claim has to be considered in the context of the claimant's two earlier claims. Indeed, in paragraph 1 of that section 8.2 the claimant expressly records that she already has a discrimination claim proceeding in the Employment Tribunal relating to events in August and September 2019. I am satisfied that that provides a sufficient context to establish that the detriment was because she had done a protected act.

40. Even if I had found to the contrary in that respect, the claimant then provided further particulars of her claim in which she recapitulates the above points but goes on to add that Mr Oliver appeared irritated at the claimant commenting on the way the respondent had handled the investigation and had said "I don't understand what the problem is". The claimant continued that in the context of a welfare meeting with an upset employee, what Mr Oliver said was not a request for information but a means of curtailing the discussion. Mr Oliver's irritation and lack of sympathy towards the claimant amounted to detriment and it was because she had complained about the harassment previously, which was a protected act. The claimant then expressly stated, "The claim is under s.27 Equality Act 2010".

41. In Chandhok it is made clear that the claim as set out in the ET1 is something which has an element of formality about it and the claimant is not free to augment it on her say-so. That said, in this case the claimant was not simply electing to augment her original claim; rather, in providing her further particulars she was complying with an Order of this Tribunal. That being so, I am satisfied that I can and should bring the information in the further particulars into account in determining the application before me.

42. Having thus brought into account the information contained in her claim form together with the additional information contained in the claimant's further particulars I do not accept the first basis of Mr Starcevic's application that the

claimant had fundamentally changed her claim from one of discrimination to one of victimisation.

43. As to the second basis relied upon by Mr Starcevic (the merits), I broadly accept the submissions he made, with reference to the decision in <u>Shamoon</u>, that detriment is analogous to disadvantage; the test is not entirely subjective but is whether the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his disadvantage; an unjustified sense of grievance cannot amount to detriment.

44. Mr Starcevic continued that in saying what he had said Mr Oliver had merely been enquiring, 'What's wrong with the investigation?' That is a possible interpretation but so is the interpretation given by the claimant to Mr Oliver's words. That is precisely the point, however, as even taking the claimant's claim at the highest (as I should do) those competing interpretations be can only be properly tested at a substantive hearing in light of the evidence given by on behalf of the parties. Mr Starcevic also relied upon the absence of any reference to these matters in the note of the meeting on 3 March. That could be a valid point but, again, whether that note is accurate and comprehensive is also a matter for evidence at a substantive hearing.

45. Drawing on previous case law, the EHRC Employment Code at paragraph 9.8 suggests as follows: "Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. …. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment". In this context, taking the claimant's case at its highest, the meeting on 3 March was a welfare meeting where, the claimant having commented about the respondent's handling of the investigation into her complaint, Mr Oliver showed irritation and a lack of sympathy and sought to curtail the discussion. This being so, I am not satisfied that it can be said that the claimant has no reasonable prospect of success of establishing that a reasonable worker in such a situation might take the view that Mr Oliver subjected her to disadvantage and this was more than an unjustified sense of grievance. In short, I am not satisfied that it can be said that the claimant had no reasonable prospect of success of establishing detriment.

46. I finally address Mr Starcevic's submission regarding the additional costs that would be involved given the lengthening of time for the hearing involving an additional witness to address the context of the meeting on 3 March. It might be that allowing this claim to proceed will add to the length of the hearing but that in isolation is not a good basis for agreeing that the claim should be struck out and I accept Ms Hogben's submission that Mr Oliver may well be required to give evidence in any event. In any event, the ground upon which the respondent relies in making its strike-out application is that the claim "has no reasonable prospect of success", there being no reference to the question of costs; although I accept that that question might be relevant to the exercise of discretion

47. By reference to the approach set out in Mechkarov referred to above my findings are as follows:

    (1) This case is not one that can be categorised as a "clearest case" warranting a decision that it should be struck out.

    (2) There are in this case "core issues of fact" that will turn to an extent on oral evidence, which should be heard.

    (3) I have made my decision taking the claimant's case "at its highest".

    (4) I am not satisfied that in this case the claimant's case has been "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents.

    (5) In coming to my conclusions I have not conducted an impromptu mini-trial of oral evidence to resolve core disputed facts.

48. Applying the above and other relevant case precedents to the facts and circumstances before me, for the above reasons I am not satisfied, on either of the bases advanced by Mr Starcevic for the respondent's application that the claimant's claim should be struck out, that it can be said that that claim has "no reasonable prospect of success" and I refuse that application.

49. In conclusion I would only add that as submitted by Mr Starcevic, a two-stage test applies in respect of the respondent's application for a strike-out order: first, does the claim have no reasonable prospect of success and, if so, secondly, does the tribunal in the exercise of its discretion consider it appropriate to strike out the claim? Thus, even if I had been satisfied that the claimant's claim has no reasonable prospect of success, I would then also need to have considered whether, even if so satisfied, it is appropriate to strike out her claim, which includes a consideration of whether there are alternatives to striking out that might pursued. In this case, I am satisfied that the alternative of making a deposit order would have been an appropriate alternative such that it would not have been appropriate to exercise discretion strike out the claimant's claim in this case.

50. For the above reasons, I am not satisfied that it can be said that, referring to rule 37 of the Rules, the claimant's claim "has no reasonable prospect of success" and, as such, the respondent's application in that regard is refused.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7 February 2021

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