



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondents**

**Ms D Ahmed**

**v**

- (1) Medexpress Enterprises Limited**
- (2) Mr D Acharya**
- (3) Ms V Lee**
- (4) Ms K McCann**
- (5) Mr D D'Souza**

**Heard at:** London Central  
(By Cloud Video Platform)

**On: 24 September 2021**

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

## **Representation**

**For the Claimant:** Mr J Sykes, advocate

**For the Respondent:** Mr D Barnett, counsel

## **RESERVED JUDGMENT**

- 1) The respondents' applications to strike out parts of the claimant's claims are refused.

- 2) The respondents' applications for deposit orders are refused.

## **REASONS**

1. This was an open preliminary hearing listed by Employment Judge Nicolle to determine the following issues:
  - Whether some of the claims should be struck out or alternatively a deposit order made on the basis that the claims had no, alternatively little reasonable prospect of success.
2. The hearing was held remotely due to the lack of resource for in person hearing. The parties were able to participate satisfactorily.
3. I was provided with an agreed bundle of 218 pages, comprising pleadings, orders, skeleton arguments submitted by the parties, various witness statements produced by the parties and some documents contemporaneous with the claims, including photographs of the claimant's workplace.
4. The hearing commenced with the respondents' applications to strike out the claimant's claims and for deposit orders. I had declined to hear an application made shortly before the open preliminary hearing, to strike out parts of the responses, on the grounds that insufficient notice of the application had been given and there was insufficient time available at the hearing. In the event, the hearing of the respondents' applications took until late in the afternoon and I had to reserve judgment. The rest of the hearing was used for necessary case management and I have issued a separate Case Management Summary.

### **The claims**

5. The claimant was employed by the first respondent as a pharmacy assistant at its online pharmacy business.

#### *Claim form 1*

In her first claim form, present on 5 March 2021, she brought complaints of direct discrimination, sexual harassment and victimisation.

The claims were largely about alleged conduct of the second respondent, another pharmacy assistant. The second respondent is alleged to have made remarks of a sexual / sex-specific nature to / in front of female pharmacy assistants other than the claimant, which remarks were reported to the claimant by female pharmacy assistants. The other female pharmacy assistants also reported some occasions of alleged physical harassment – the second respondent sitting too close, brushing against bottoms, digging his left elbow into another employee's chest.

The second respondent is alleged to have sat too close to the claimant on two occasions in February 2020 whilst shredding documents. He is alleged to have brushed against the claimant on 27 November 2020 and then touched her bottom with his hand.

There are also complaints that the first respondent failed to take action about or deal appropriately with complaints made by the claimant and other employees about these matters, including the claimant's grievance presented on 1 December 2020. There are further complaints about the claimant's treatment by the first respondent after she raised a grievance, including disciplinary action taken about lateness. The claimant resigned and claims that she was constructively dismissed and that her constructive dismissal was itself an act of discrimination and/r victimisation.

### *Claim form 2*

In her second claim form, the claimant made claims of direct race discrimination, harassment related to race, and detriment because of making protected disclosures.

Ms Lee is the first respondent's HR Manager, Ms McCann is the pharmacy manager and Mr D'Souza is the chief executive officer.

The direct race discrimination / harassment complaints concern five matters:

- The second respondent saying to the responsible pharmacist, Mr Shah, in front of the claimant in about August 2020: 'He has a weird African name. It reads from left to right.'
- In about September 2020, Mr Shah saying to the claimant: 'You look white with a really good tan.'
- On 28 January 2021, the third respondent refusing to let the claimant return to work with the documents she had produced in support of her claim that she was entitled to work.
- On 18 February 2021, the third respondent allegedly rudely challenging the claimant's description of herself as an 'international pharmacist'.

The alleged protected disclosure was an anonymous disclosure made by the claimant on 5 February 2021 to the General Pharmaceutical Council that the first respondent was allegedly reselling returned medicine and Covid 19 test kits.

The detriments alleged were:

- On 1 March 2021, the third respondent writing to the claimant on Slack, a messaging application, to ask whether the claimant had made a complaint to the GPC

- The third respondent contacting the claimant by text message to her private mobile phone to ask for her personal email address, without giving a reason or identifying herself
- The third respondent contacting the claimant's previous solicitor 'asking questions about the Claimant's personal information that reflected Ms Lee's email to the Claimant.'

## **Strike out application**

6. The claims sought to be struck out are as follows:

### *Claim 1*

The following allegations of direct sex discrimination, identified by reference to the Particulars of Claim:

Para 12.1 Particulars: On 7 December 2019, the second respondent saying to staff other than the claimant that his brother inherited 'the good genes' while he inherited the bad ones, adding while pointing between his legs, 'But at least down there I'm bigger.'

Para 12.5 Particulars: In about June 2020, the second respondent telling another member of staff about his sexual experience with a woman with 'weird nipples'.

Para 12.6 Particulars: In late August or early September 2020, the second respondent speaking in front of female staff about the type of porn he watched.

Para 12.7 Particulars: In about September 2020, the second respondent sitting very close to a female member of staff whilst shredding.

Para 12.9 Particulars: In about November 2020, the second respondent referring to a female manager as 'baby'.

Para 12.10 Particulars: In about November 2020, the second respondent digging his elbow into a female member of staff's chest.

Para 12.12 Particulars: In November 2020, the second respondent asking a female member of staff out for lunch repeatedly.

Para 12.15 Particulars: on 30 November 2020, the second respondent saying to a female member of staff: 'A beautiful woman should not be having lunch on her own'.

Para 12.16 Particulars: On or about 30 November 2020, the second respondent brushing his body against a female member of staff's bottom several times.

Para 12.17 Particulars: In December 2020, the first respondent telling staff he wanted people to call him 'Big D' a reference to his genitalia.

The respondents also sought to strike out the claim at paragraph 12.29 , about the warning given for lateness, insofar as Ms McCann appeared to be relied upon as a comparator

## *Claim 2*

The allegation of direct race discrimination at paragraphs 6.5 – 6.7 of the Particulars:

*6.5 On 28th January 2021 Ms Lee refused to permit the Claimant to return to work following sick leave. The Claimant had shown Ms Lee letters dated 30th November 2020 from the Home Office granting her refugee status and stating inter alia she had 'the right to take a job without the permission of any Government Department.'*

*Despite that, Ms Lee's reason was the Claimant had not received her Biometric Resident Permit. That reason implied the Respondent would not accept an official refugee into the workplace, as if marked by their ethnicity, as opposed to being authorised for British residence by the permit.*

*6.6 On or about 1st February 2021 the Claimant was told by Agnessa Stublla via Eva Ahmed that the Pharmacy Manager Ms McCann had stated the Claimant was not coming back to work because she had 'visa issues.'*

*6.7 On 1st February 2021 Ms Lee told the Claimant 'You can go back to work' after the Claimant sent her a picture of the residence permit.*

The allegation of direct race discrimination / harassment at paragraph 6.8 of the Particulars:

*On 18th February 2021 Ms Lee rudely challenged her self-description as 'International Pharmacist' (which reflected in short form her MSc in Clinical Pharmacy International Practice and Policy from University College London, of which the Respondent was aware from the CV) stating 'we are not aware of any such qualification and indeed you are unable to use the title of pharmacist within the United Kingdom as your qualification is not valid here.' The comment ignored the Respondent's knowledge of her qualification, and implied she would seek illegally as a foreign citizen to practice as a pharmacist when no such assertion had been made.*

The allegations of protected disclosure detriment.

## **Deposit order application**

The claims in respect of which a deposit order is sought are:

### *Claim 1*

All of the above claims in respect of which strike out is sought, in the alternative.

The factual allegations at paragraphs 12.1, 12.5, 12.6, 12.7, 12.9, 12.10, 12.12, 12.15, 12.16, 12.17 of the Particulars as harassment

The allegation at paragraph 12.2 of the First Particulars about the second respondent sitting close to the claimant to shred paper as direct sex discrimination or harassment.

The direct sex discrimination allegations about the respondent failing to take action about complaints at paragraphs 12.3 and 12.11

The allegations relating to the respondent's failures to investigate the claimant's grievances at paragraphs 12.18 – 12.20, 12.22 – 12.24 and 12.28, as direct sex discrimination.

Allegations about the claimant being asked to provide details of witnesses and witness statements for her grievance appeal at paragraphs 12.31 and 12.32 as direct sex discrimination.

### *Claim 2*

All of the above claims in respect of which strike out is sought in the alternative.

## **Law**

### Striking out

7. Under rule 37 of the Employment Tribunals Rules of Procedure 2013, a claim or response may be struck out on various grounds including that it is scandalous and vexatious or has no reasonable prospects of success: rule 37(1)(a).

8. In heavily fact-sensitive cases, such as those involving whistleblowing or discrimination, the circumstances in which strike out is appropriate are likely to be rare: Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.
9. The test is not whether the claim is likely to fail. It is not a test that 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 a high test: Balls v Downham Market High School and College 2011 IRLR 217, EAT.
10. It is crucial when considering strike out to take the claimant's case at its highest; where there are core issues of fact which turn to any extent on oral evidence, these should not be decided without an oral hearing: Mechkarov v Citibank NA [2016] ICR 1121.
11. The following helpful summary was given by Linden J in Twist DX Limited v Armes UKEAT/0030/20/JOJ(V):

*43. The relevant principles relating to the application of this provision for present purposes can be summarised as follows:*

*a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, Tayside Public Transport Company Limited v Reilly [2012] IRLR 755 at paragraph 30.*

*b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success": see, for example, paragraph 26 of the Judgment of the Court of Appeal in the Ezsias case (supra).*

*c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of Ezsias.*

*d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.*

*e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, Campbell v Frisbee [2003] ICR 141 CA.*

*f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it “may” do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see Soo Kim v Yong [2011] EWHC 1781.*

*g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in Hassan v Tesco Stores Limited UKEAT/0098/16 and Mbuisa v Cygnet Healthcare Limited UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.*

## Deposit orders

12. A tribunal may make a deposit order where a claim has little reasonable prospect of success, pursuant to rule 39 of the Tribunal Rules 2013. The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim fails. Their purpose is not to make it difficult to access justice or to effect a strike out through the back door. Even where a claim has little reasonable prospect, there is a discretion as to whether to make a deposit order, which must be exercised in accordance with the overriding objective: Hemdan v Ishmail and anor [2017] ICR 486, EAT.



### Direct discrimination

13. Section 13(1) of the Equality Act 2010 provides: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
14. Part 5 of the Equality Act 2010 specifies the circumstances in which discrimination is unlawful in the context of work. Section 39(3) provides so far as is relevant to these applications:  
  
An employer (A) must not discriminate against an employee of A's (B)—  
...  
(d) by subjecting B to any other detriment.
15. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an ‘effective cause’ O’Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.
16. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: “(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. “

### Harassment

17. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant’s perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

18. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.
19. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:  
'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so.....Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'
20. Given the facts of this case, I referred the parties to Moonsar v Fiveways Express Transport Limited UKEAT/0476/04/TM and Weeks v Newham College of Further Education UKEAT/0630/11/ZT. I was interested in exploring with the parties the extent to which conduct directed at individuals in the workplace other than the claimant can constitute harassment of a claimant or discrimination against a claimant.
21. Moonsar was a case in which a female claimant's male colleagues downloaded pornography onto screens in the claimant's vicinity. The claimant brought a claim of sex discrimination under the Sex Discrimination Act 1975 and the EAT overturned the tribunal's finding that there was no such discrimination.
22. In 2004, when Moonsar was decided, the SDA had not been amended to add harassment as a separate cause of action. That change came about as a result of the Employment Equality (Sex Discrimination) Regulations 2005.
23. In Weeks, the claimant had complained amongst other matters of the circulation of an animated cartoon showing an elderly woman having her nipples twisted and of references to 'power dressed women' 'the principal's harem' and 'girlie chat' not directed at the claimant. The tribunal dismissed the claims, which were claims of harassment and Langstaff J dismissed the claimant's appeal. He said: 'The fact that unwanted conduct was not itself directed at the Claimant is a relevant consideration. It does not prevent that

conduct being harassment, and will not do so in many cases, but we cannot say it is an irrelevant consideration.'

### Protected disclosure detriment

24. A worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure under s 47B ERA 1996.
25. There is guidance on the meaning of 'detriment', particularly in the context of discrimination claims. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRG Employment Code, paras 9.8 and 9.9. and Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.

### **Submissions**

#### *Respondent's submissions*

26. In support of the strike out and deposit order applications, Mr Barnett submitted:
  - a) Direct discrimination allegations concerning the second respondent's actions toward other individuals which the claimant subsequently heard about: Section 13(1) required it to be the *claimant* who was treated less favourably because of sex. He accepted, per Weeks, that conduct not directed at a claimant could nonetheless constitute harassment. If the claimant was suggesting that the claimant was told by her colleagues about these things because she was a woman, that treatment was not 'less favourable' and/or the claimant had no reasonable prospect of establishing that the treatment occurred because she was a woman as opposed to because she was a work colleague.
  - b) Direct discrimination about being given a warning for being late to work. Ms McCann seemed to be named as a comparator. A woman cannot name another woman as a comparator for a sex discrimination claim.
  - c) Race discrimination / harassment claim about entitlement to work: The claim as pleaded was that the claimant was not allowed to work because she had not provided the correct right to work papers. The claimant relied on the fact that she was in fact entitled to work. It was unlawful for the first respondent to

employ the claimant without having seen the necessary documents and this claim had no reasonable prospect of success.

- d) Race discrimination / harassment claim about not being allowed to use the title 'international pharmacist': The claimant was not allowed to use this title because no such title exists and it would be misleading to customers. The claimant had no reasonable prospect of establishing that the statement was made because of race or that it created the proscribed effect.
- e) Public interest disclosure detriments: The claimant had no reasonable prospect of establishing that the alleged detriments amounted to detriments. The first respondent was taking reasonable actions to investigate the claimant's disclosure. The actions were innocuous and *de minimis*.
- f) Allegations about the second respondent sitting too close to the claimant: The claimant had little reasonable prospect of establishing that someone sitting too close to her in a small office space where the printer and shredder were next to each other had the proscribed effect and/or occurred was she because she was a woman.
- g) Allegations of failure to take action and failures in respect of the grievance and grievance appeal: It was not likely that a tribunal would find that failures of investigation etc were because of the claimant's sex rather than for example because the first respondent thought a matter was trivial, was too busy, lacked appropriate HR support or knowledge or concluded that no sanction was warranted.
- h) Race discrimination / harassment in respect of the comments about the name and the claimant looking like a white person with a suntan: The claimant had little reasonable prospect of showing that these comments amounted to less favourable treatment of the claimant (one of the comments not having been directed at her) or created the proscribed environment.

### *Claimant's submissions*

27. The claimant's submissions in response were:

- a) Direct discrimination allegations concerning the second respondent's actions toward other individuals which the claimant subsequently heard about: Mr Sykes argued that section 39(2)(d) only required that an employee be 'subjected to a detriment' and that there was 'no link' to the requirement for 'less favourable' treatment in section 13(1). I raised with him the fact that s 39 required one of the types of discrimination set out in part 1 of the Equality Act 2020 to be in play and, in this instance, it was section 13 that was relied on.

Mr Sykes also pointed to cases such as Showboat Entertainment Centre Limited v Owens [1984] ICR 64 in which claimants receive detrimental

treatment because of someone else's protected characteristic, in support of a submission that this was what was complained of in the claimant's case.

- b) Direct discrimination about being given a warning for being late to work: The claimant had made it clear elsewhere in her Particulars that she was relying on a hypothetical comparator in respect of this claim. Ms McCann was not relied on as a comparator.
- c) Race discrimination / harassment claim about entitlement to work: The respondents had misunderstood the allegation. The allegation was that Ms Lee had refused to accept the claimant's Home Office asylum document, which the claimant said proved she did have a right to work, and instead insisted on a residence permit. Saying that the claimant had 'visa issues' was also race discrimination for reasons I set out as they were stated in Mr Sykes' skeleton:

*Secondly, that she had 'visa issues' implying that, because she was unable to produce a residence permit, the Claimant was inferior as an asylum-seeker to a person with a residence permit, and that was because of racial origins. A certain kind of asylum-seeker, it was implied, could not get a residence permit. That kind of asylum seeker had unattractive racial origins, like a North African Egyptian person. Ms Lee's conduct and comments were racially coloured.*

- d) Race discrimination / harassment claim about not being allowed to use the title 'international pharmacist': Per Mr Sykes' skeleton:

*Ms Lee's comment was another nasty racially coloured comment. It was a put-down on the basis that the Egyptian pharmaceutical qualification stated in the Claimant's CV, which she had seen, was inferior to a UK pharmacy qualification.*

There was some debate before me as to whether the title 'international pharmacist' had any meaning, which I discuss further in my Conclusions.

- e) Public interest disclosure detriment: the respondents had inaccurately summarised the facts. The claimant had made an anonymous complaint and the respondents had breached her anonymity and her privacy and harassed her and her solicitor. The appropriate response to the GPC complaint would have involved respecting the anonymity of the complainant. It was intimidating for the claimant to receive emails from her employer asking her about a complaint she had made anonymously.
- f) Allegations about the second respondent sitting too close to the claimant: This allegation involved consideration of evidence. The photographs showed that the second respondent would have to squat close to the claimant whilst shredding. *The geography shows that was an unnecessary and offensive invasion of her personal space. It was discriminatory and harassing because it was unnecessary as there was a gap.*

- g) Allegations of failure to take action and failures in respect of the grievance: The respondent's argument appeared to be that they will be able to adduce a non-discriminatory explanation. That required assessment of the evidence.
- h) Race discrimination / harassment in respect of the comments about the name and the claimant looking like a white person with a suntan: These are obviously references to the claimant's race and are offensive. The implication of the second remark was that being white was superior to being dark-skinned.

28. Mr Sykes said in the round that the allegations turned on core factual disputes which could only be resolved by hearing evidence.

### **Conclusions**

29. For convenience and concision, I considered the allegations in order of their presentation rather than separating out those which were sought to be struck out and those in respect of which a deposit order was sought.

#### *The allegations relating to the second respondent's treatment of other employees: as harassment*

30. It is clear from the case law that actions in the workplace which are not directed at an individual may amount to harassment. It is not difficult to understand why that might be the case. If a woman is aware that a male colleague has sexually harassed a number of other female colleagues, that could create the proscribed environment for the woman herself. Taking the claimant's case at its highest, and assuming she establishes the facts alleged, I cannot say that these allegations have little reasonable prospect of success. It is in any event inappropriate to consider them in isolation from the allegations the claimant makes about her own treatment by the second respondent. If the context in which those actions occurred is one where the second respondent is found to have harassed other women in the workplace, that may well influence the Tribunal's view as to the effect that the latter actions had on the claimant.

31. I do not make a deposit order in respect of these allegations.

#### *The allegations relating to the second respondent's treatment of other employees: as direct sex discrimination*

32. I was more troubled by the question of whether treatment of other individuals could amount to less favourable treatment *of the claimant*. Mr Sykes' argument about the relationship between sections 13 and 39 of the Equality Act 2010 was erroneous and the analogy he sought to draw with cases where a claimant is discriminated against because of someone else's protected characteristic was not apt, because in those cases things were done or said to the claimants involved, whereas the claimant in this case seeks to complain about things said or done to others.
33. However, in the case of Moonsar, treatment not directed at a claimant was nonetheless found to be less favourable treatment of that claimant. There may be arguments to be made at trial as to whether Moonsar would be differently decided under the Equality Act 2010, which makes express provision for harassment, unlike the Sex Discrimination Act 1975, pre-amendment. I did not hear full argument on this issue and it seems to me that it will have to be resolved at trial on the basis of facts actually found. It certainly does not seem to me to be inarguable that if women are harassed in the workplace, another woman in that workplace is less favourably treated than a male employee in the same workplace, who does not fear similar treatment.
34. I did not strike out these claims nor make deposit orders in respect of them.

*Direct discrimination about being given a warning for being late to work.*

35. Mr Barnett was not seeking to strike this claim out insofar as a hypothetical comparator was advanced and Mr Sykes made it clear that Ms McCann was not advanced as a comparator. The claim proceeds on that basis. A possible male comparator was mentioned during the hearing but no application to amend was made.

*Race discrimination / harassment claim about entitlement to work*

36. The parties took me to various documents which it is said were provided by the claimant as evidence of her right to work and to some contemporaneous messages. Mr Barnett pointed to a letter dated 30 November 2020 from the Home Office entitled Determination of Asylum Claim. That letter stated: 'This letter does not confirm you have leave, give you the right to work or allow you access to benefits.' The claimant's registration card which I saw a copy of and which confirmed her right to work expired on 17 December 2020.

37. It appeared from messages passing between the claimant and Ms Lee on 15 January 2021 that the claimant told Ms Lee that she had not yet received her new registration card but could provide her with her leave to remain letter (ie the letter described above). On 18 January 2021 Ms Lee chased the claimant for the document and the claimant sent through the letter. On 20 January 2021, Ms Lee wrote to the claimant:

*Morning Dara - As soon as your card arrive as states you have the right to work - please can you send a photo of it for your file. I note that it says on your letters that they do not automatically prove that you have the right to work. Is there anything that you can provide me with to verify your right to work? I need to do some research as what is best to do as the company can get into very serious trouble if employees do not have the right to work and we allow them to continue to work - it's a very large fine associated.*

38. The claimant replied to say that she did have the right to work; her asylum claim had been accepted but she had not received her 'BRP card' yet because of Covid delays. She attached some guidance notes she had received which included a statement that 'You are free to take a job and do not need the permission of any Government Department before doing so.'

39. The claimant was on sick leave at the time of these events.

40. On 28 January 2021, Ms Lee said to the claimant in a message that she had spoken to the Home Office and was told that:

*you can not work without your card. I am very sorry to say that the company are not legally compliant in accordance with the home office right to work regulations and until we have this card and you will not be permitted to work. I am letting you know now in the hope that you are able to sort this issue out quickly and before Monday. If I can help in anyway, please let me know.*

41. On 31 January 2021, the claimant replied that her lawyer was getting in touch with the Home Office and on 1 February 2021 the claimant sent through a copy of her card which showed she had the right to work

42. Ms Lee replied:

*Thank you Dara - please return to work tomo, if you are well enough. If you are not please follow the normal procedure to let your manager know.*

43. It will be a question for the tribunal which hears the claims to determine whether Ms Lee was materially influenced by the claimant's race or whether, as the respondent says, Ms Lee was simply concerned with ensuring that the first respondent acted lawfully. I cannot say that the documents are incontrovertibly inconsistent with the claimant's allegation as to Ms Lee's motivation although on their face they suggest that Ms Lee was working to ensure that the first respondent was complying with the law and acting on



advice she received for the Home Office. Nonetheless, it appeared to me that I was in effect being asked to carry out a mini trial of this point without live evidence or all of the documents. Legitimate areas of enquiry which might cast light on Ms Lee's motivation included what questions Ms Lee had asked of the Home Office and what answers she received. What did she make of the guidance notes the claimant sent? On the face of the documents, there was a tension between the guidance notes and the letter; was that a point Ms Lee investigated?

44. Although, on the basis of the documents alone, this claim did not appear to be a strong one, I have to be wary about forming views on the basis of only a small part of the evidence which would be before a tribunal at trial. This is precisely not the type of claim which is suitable for strike out. I cannot say that this claim has no reasonable prospect of success.
45. Does the claim have little reasonable prospect of success and should it be the subject of a deposit order? It seemed to me that this claim came close, looking at the documents, to having little reasonable prospect of success. However, even if I had found it met that test, it would not have seemed to me in accordance with the overriding objective to make a deposit order. The tribunal which hears these claims will not doubt be looking at this matter as part of the factual matrix for the other claims, including other claims involving Ms Lee. I can see no significant saving in time or cost should this claim be the subject of a deposit order and then not pursued.

*Race discrimination / harassment claim about not being allowed to use the title 'international pharmacist'*

46. A difficulty presented by the pleadings was that the context for the remark made by Ms Lee was not made clear in the claim form. The remark was '*we are not aware of any such qualification and indeed you are unable to use the title of pharmacist within the United Kingdom as your qualification is not valid here*'
47. I did not have in front of me the full correspondence in which this passage occurred. The only document in the bundle was Ms Lee's own email dated 18 February 2021 which contained the passage but not the claimant's email to which this email was a response.
48. Without the full context and the oral evidence, it was impossible for me to determine whether there were prospects that a tribunal would conclude that Ms Lee had been materially influenced by the claimant's race. It may be that there was nothing in the claimant's letter which suggested that she had any intention of putting herself forward as having a UK-recognised pharmacy

qualification or saying anything which might mislead the first respondent's customers. Ms Lee's motivation for responding as she did seemed to me to be a quintessentially fact-sensitive issue which could not be resolved on a strike out application. It was not possible to say, based on the document alone, filleted out of all relevant context, that this allegation had no reasonable prospect of success. The fact that the representatives spent some time directing me to evidence from the Royal Pharmaceutical Society website as to whether the title of 'international pharmacist' existed, whether as a qualification or as a category of membership of the RPS, further demonstrated to me that this issue was not capable of the sort of summary assessment which rendered it suitable for strike out.

49. Given the uncertainty about the context, it also seemed to me that I was unable to say that the allegation had little reasonable prospect of success.
50. I did not strike this claim out or make a deposit order.

*Public interest disclosure detriment*

51. Again, it seemed to me that I was being asked to assess the merits of these allegations wrenched out of any context. The situation was that the claimant had made an anonymous complaint to a regulatory body. The first respondent came to know or suspect that the complaint had been made by the claimant and wrote to her on 1 March 2021 asking her about the matter. On 10 March 2021, Ms Lee forwarded the complaint to a solicitor, whom I understand to be the solicitor then instructed on the claimant's behalf in relation to her employment claims. The solicitor replied saying that the matter was outside of her remit and that the respondent should approach the claimant directly.
52. That day Ms Lee messaged the claimant asking for her email address. The claimant did not know who was messaging her initially and when she found out it was Ms Lee, she says she as distressed.
53. The gist of the claimant's complaint about detriment was that it was distressing to her that the respondents were seeking to approach her in various ways in order to investigate the whistleblowing complaint she had submitted anonymously.
54. Amongst the matters which were wholly unclear to me at this preliminary stage are exactly how the respondent knew or suspected that the complaint came from the claimant, what guidance is provided by the GPC as to how a pharmacy should investigate complaints where the complainant has requested anonymity, what process the respondent was seeking to initiate with the claimant and what the claimant herself was aware of about appropriate process at the time the approaches were made.
55. Without any of the factual nexus, I cannot say that there is no reasonable prospect or even little reasonable prospect of establishing that these

approaches were a detriment in the sense of something a reasonable employee could feel put her at a disadvantage. It may be that they were rightly perceived as an unexpected and inappropriate and intimidating approach or the claimant may be wrong about that. The question is fact sensitive.

*Allegations about the second respondent sitting too close to the claimant*

56. These allegations seemed to me to be almost quintessentially the type of fact specific allegations which require to be decided on the basis of all of the evidence at trial. Detail and context are everything in relation to behaviour which may be innocuous and may be anything but innocuous; the truth or otherwise of the allegations made about the second respondent's alleged behaviour towards other female employees is likely to be important context. The tribunal will no doubt be concerned to consider in detail the size and layout of the office, whether it was practicable for the second respondent to undertake shredding without being very close to the claimant, whether the shredding could have waited or the claimant been asked to pause in her activity and so on and so forth.
57. I did not make a deposit order in respect of these claims.

*Allegations of failure to take action about complaints and failures in respect of the grievance*

58. Mr Barnett was right to observe that handling of complaints and grievances about discrimination is often alleged to be discriminatory but it can often be difficult to find any evidence that any failures in these processes were because of a protected characteristic rather than, for example, because the employer just did not do a very good job or did not know what it was doing. In this case, he pointed out, part of the claimant's grievance was upheld, the second respondent was given guidance and training was provided to the team. I should therefore conclude there was little reasonable prospect of success in relation to these complaints.
59. In respect of the requests that the claimant provide names of witnesses or witness statements, he said that the claimant was falling into contradiction – she complained of a lack of investigation and then complained when further investigation was proposed.
60. I reminded myself that I had to take the claimant's claims at their highest and assume she could establish the facts she had pleaded, unless these were

demonstrably false on the basis of incontrovertible evidence or otherwise fanciful.

61. The facts pleaded by the claimant were that the first respondent failed to take effective action when the claimant first complained to Mr Shah about the second respondent sitting unnecessarily close to her. He spoke to the second respondent but did not continue to monitor the situation. The claimant alleges that the first respondent failed to fully investigate her grievance about the second respondent's alleged sexual harassment and stated that it would not investigate comments by the second respondent which were not directed at the claimant. There are further complaints about the respondent's analysis of and handling of CCTV footage.
62. So far as the grievance appeal is concerned, the claimant says that she was asked to provide witnesses and time and dates for the events complained of and that the first respondent, instead of investigating her appeal, asked for signed testimonies in support of her appeal.
63. Taking all of that at its highest, I have to assume that the claimant will establish that there were deficiencies in the first respondent's response to her complaints and grievances. The grievance and grievance outcome document in the bundle are not inconsistent with any such findings being made – they will have to be considered in the context of the other documentary and oral evidence.
64. Can I say that the claimant has little reasonable prospect of establishing facts from which a tribunal could reasonably conclude these deficiencies were materially influenced by her sex? I cannot say so, particularly if, instead of lifting a number of those allegations out of the context of the other allegations, I return them to that context, which is the material a tribunal will have to look at when deciding what inferences it is appropriate to draw. I note, for example, the claimant makes allegations about other detrimental treatment she received from the first respondent at the time of the grievance and grievance appeal, including an allegation that the first respondent's CEO posted a link to the CAB guidance on constructive dismissal on Slack, allegedly aimed at the claimant, an allegedly unfair disciplinary warning received by the claimant and a low job rating and a threat to put the claimant on a performance improvement plan, also allegedly unfair.
65. Looking at that context, I am far from being in a position to say, at this preliminary stage, that these claims have little reasonable prospect of success.
66. I do not make a deposit order in respect of these claims.

*Race discrimination / harassment in respect of the comments about the name and the claimant looking like a white person with a suntan*

67. I could not say that these claims had little reasonable prospect of success. Questions of whether conduct can reasonably be regarded as having the proscribed effect are particularly fact sensitive and depend on detailed findings being made about the context in which the remarks are made. These remarks both have a racial content which could be regarded as offensive. Assessing whether they fall below the threshold at which they could reasonably be regarded as creating the proscribed effect cannot be done out of context on a summary basis.
68. I do not make a deposit order in respect of these claims.

### **Conclusion**

69. I have not struck out any of the claimant's claims nor made any deposit orders for the reasons set out above. These proceedings still require a finalised list of issues. If the claimant submits her finalised draft to the tribunal, it can be incorporated into the list drawn up by Employment Judge Nicolle at the case management preliminary hearing on 8 June 2021.

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Employment Judge Joffe  
London Central Region  
19/10/2021

Sent to the parties on:  
19/10/2021.

For the Tribunals Office