Neutral Citation Number: [2022] EAT 50

Case No: EA-2020-000347-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 November 2021

Before :

MRS JUSTICE HEATHER WILLIAMS

- -

Between :

MS Z SIMMONDS-PLUMMER	**Appellant**
- and -	
LONDON BOROUGH OF HAMMERSMITH & FULHAM	**Respondent**

- -
- -

Mr D Ibekwe (instructed by PTSC Union) for the **Appellant**
Mr S Bishop (instructed by Hammersmith & Fulham Council Legal Services) for the **Respondent**

Hearing date: 25 November 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The appellant complained that after she had resigned from her employment, her employer decided to continue a disciplinary process, finding that she was guilty of gross misconduct and purporting to dismiss her and that this was damaging for her future employment.

Her appeal against the striking out of her **Equality Act 2010** claims succeeded. The Employment Tribunal had erred in failing to appreciate that her claims of harassment (race and sex) and victimisation in respect of these actions were for post-termination discrimination and had struck out the claim on a misconceived basis.

MRS JUSTICE HEATHER WILLIAMS:

Introduction

1. This is an appeal from the decision of the Central London Employment Tribunal (Employment Judge Burns sitting alone) striking out the claims. It was sent to the parties on 9 May 2020. The appeal only concerns the decision to the strike out the claims brought under the **Equality Act 2010** for harassment (race and sex) and for victimisation. They were struck out on the basis that they did not have reasonable prospects of success. I will refer to the parties as they were known below.

2. The claimant's application pursuant to rule 3(10) of the **Employment Appeal Tribunal Rules** was allowed by Eady J in relation to one ground which she reformulated as follows:

> **"Did the Employment Tribunal err in striking out the claimant's claim of discrimination (harassment and victimisation) by failing to consider these as complaints of post-termination discrimination?"**

3. The employment judge reconsidered her judgment, and by a further judgment sent to the parties on 16 June 2020 she declined to vary or revoke her earlier decision. There has been no separate notice of appeal against that decision, but both parties rely on the reconsideration judgment as informing the employment judge's reasoning and conclusions.

The Material Circumstances and the Employment Judge's Judgments

4. I gratefully take much of my summary of the material circumstances from the judgment given by Eady J when she considered the rule 3(10) application, albeit I will need to amplify some aspects at this stage.

5. As the employment tribunal was considering a strike out application, findings of fact were not

made at this stage.

6. The claimant commenced her employment with the respondent on 25 September 2007. In her ET1 she said she resigned from her job and that her last day of employment was 4 March 2019. On 6 December 2018 she was suspended from her position as a traffic orders officer on full pay, pending the outcome of a disciplinary investigation. A disciplinary hearing was arranged for 27 December 2018, it being alleged that while working on the 2016 electoral registration, the claimant had fraudulently completed electoral service documents and had falsified residents' signatures. It was further said she had dishonestly claimed times off canvassing whilst working for the respondent.

7. At the claimant's request, the hearing was postponed to enable her to be accompanied. It was rearranged for 10 am on 4 March 2019. At 9.21 am that day, the claimant sent an email attaching a letter of resignation. The respondent's case was that her email was caught in its email quarantining message service and not released until 1.21 am on 5 March 2019. At 10.57 on 5 March 2019 the claimant sent a further email stating that her notice was to be with immediate effect from her resignation at 9.21 the previous day.

8. The respondent's position was that as it had not received the claimant's email by the time the disciplinary hearing commenced, it proceeded in her absence. The manager conducting the hearing, after taking time to consider the evidence, determined the claimant should be summarily dismissed for gross misconduct. The decision was communicated to the claimant by letter of 3 April 2019. The claimant responded on 7 April 2019 reiterating that the effective date and time of termination of her employment had been 9.21 on 4 March 2019 via her resignation letter. She also said in this letter of 7 April:

> **"… In light of the above, I therefore deem your actions to continue with a disciplinary process where you and the Disciplinary Panel, as well as HR, being fully aware of my tendered resignation, to amount to actions of post-employment victimisation on grounds of my race and sex designed to destroy my future career. In that there was no legal or legitimate basis for you to have carried out the said disciplinary process against me and especially where there was no contractual requirement permitting you to do so once the termination of my employment became manifested. …"**

9. On 23 August 2019, the claimant presented a claim to the Employment Tribunal indicating, by ticking the relevant boxes on the ET1 form, that she was pursuing complaints of unfair constructive dismissal, race discrimination and notice pay. Her claim was prepared by her union representative. The accompanying particulars of claim were not easy to follow in some respects, but, as material, they included the following. Paragraph 2 included a bullet point list of what was said to be express and implied terms of the contract and one of those was:

> **"The right not to be subject to pre and post unwanted and discriminatory conduct as well as victimisation detriment when the Claimant [sic] job was terminated on 4 March 2019 and had ended;"**

10. The pleading then set out the chronology of events that was relied upon, and then continued as follows:

> **"(13) That by a letter dated 3 April 2019 from the respondents [sic] disciplinary panel. Respondent placed the claimant on notice that a disciplinary hearing went ahead in her absence due to the fact that they were aware of her resignation letter/notice sent on 4 March 2019 and her job had ended. The claimant contends that her resignation was sent to at least four different managers of the respondent, of which information had been received by her trade union representative, Mr John Neckles, that in fact the respondent was not only fully aware that she had resigned prior to the commencement and the conclusion of a disciplinary decision; but they had in fact chose to deliberately ignore it in order to cause the claimant serious detriment by having a gross misconduct charge found against her in order to cause her serious financial difficulty in finding alternative employment.**

> **It is the claimant's position that the respondents [sic] disciplinary taken against her after she had resigned amounts to a nullity in law as her job had come to an end on 4 March 2019 prior to the commencement of her disciplinary hearing and therefore the respondent did not have any contractual relationship with the claimant in order to pursue a disciplinary hearing against her and to find as they did, which the claimant maintains was a spiteful act on the respondent disciplinary panel to do so.**
>
> **(14) The claimant by letter dated 7 April 2019 responded to the respondent's dismissal decision of 3 April 2019 as contained in that letter voicing her concerns of the treatment that she had received surrounding the issue her allege [sic] summary dismissal at the hands of the respondent. That contained in the same letter the claimant has made a protected act of been [sic] discriminated on victimising grounds of race and sex by the respondent in the treatment that she has received pronunciation of a gross misconduct dismissal at the hands of the respondent to her detriment.**
>
> **The claimant maintains that because she had made various protected act during the course of employment and prior to the tender of her resignation which was known to the respondent's managers who took the decision to dismiss, the claimant suffered the unlawful detriment of summary dismissal where there existed no legal or legitimate basis for the respondent to have taken the actions that they did, as such the decision the claimant contends amounted to victimisation and harassment and bullying in accordance with section 26 and section 27 of the equality act 2010."**

11. In the next section of the pleading headed "The Claims", three claims were referred to: constructive unfair dismissal, unfair dismissal and wrongful dismissal.

12. A question the employment judge had to consider and which I will also have to consider is whether this pleading did contain allegations of post-termination harassment and victimisation. I will refer to those claims collectively as "the discrimination claims".

13. A preliminary hearing was listed to determine whether the proceedings should be dismissed for want of jurisdiction as being out of time and/or whether it should be struck out as having no

reasonable prospect of success or a deposit order made. For the avoidance of doubt, the **Equality Act** claims were not struck out on the basis they were brought out of time.

14. The hearing was postponed twice to suit the availability of the claimant's representative and was listed for 20 February 2020 as a date that fitted in with the claimant's representative's stated availability. On that date, however, neither the claimant nor her representative attended the hearing. The respondent attended by counsel. At the respondent's request, the Employment Tribunal proceeded to consider the strike out application in the claimant's absence. It did not consider it could determine the other applications without the claimant being in attendance and it said it would be open to the claimant to apply for a reconsideration should she consider there was additional information that the Employment Tribunal ought to have taken into account.

15. The Employment Tribunal identified the principles applicable to a strike out application, and then addressed the dismissal claims. Mrs Justice Eady summarised its approach to the latter as follows:

> **" (10) Considering the Claimant's claim of constructive unfair dismissal, the ET noted that the case, taken at its highest, made clear that the Claimant was relying on an effective date of termination of 4 March 2019, when her resignation was sent to the Respondent. On that basis, the applicable three-month time limit expired on 3 June 2019; it was not extended by the early conciliation period as this had not been commenced by the Claimant until 2 July 2019…the ET recorded that her resignation letter and subsequent correspondence made clear that she had always been aware of her right to pursue a claim for constructive dismissal and it was also apparent that she was assisted by an experienced adviser throughout the disciplinary process and in the making of her ET claim. In the circumstances, the ET concluded that it was likely that the claim would be held to have been presented out of time when it had been reasonably practicable for it to be lodged in time. On that basis it found that the Clamant had no reasonable prospect of success in relation to what it described as "the time point" and therefore struck out the claim on that basis.**

> **(11) The ET then went on to consider the strike out application in terms of any complaint of direct (so, not constructive) unfair and/or wrongful dismissal. Taking the Claimant's case at its highest, however, the ET considered that it was bound to assume that she would be found to have been constructively dismissed. It therefore concluded that her claims on these bases could have no reasonable prospect of success."**

16. The employment judge then addressed the discrimination claims at paragraphs 59 to 65 of her judgment. She firstly set out paragraph 14 of the claimant's particulars of claim, which I have already cited. She then observed that it was "very confusing and unclear". I have some sympathy for that observation. The employment judge said that she had interpreted it as describing two complaints. She then continued:

> **"61. The first is a complaint that the alleged summary dismissal of the claimant by respondent constituted unwanted conduct related to sex and/or race which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her pursuant to section 26 of the Equality Act 2010.**
>
> **62. The second is a complaint that the respondent subjected the claimant to a detriment, consisting of summary dismissal, because she had done a protected act pursuant to section 27 of the Equality Act 2010. I note the claimant has not provided details of any protected act, but I have proceeded on the basis that she would be able to do so, in order to take her claim at its highest.**
>
> **63. To succeed in both of these complaints, the claimant would need to persuade a tribunal to find that her resignation was not effective and that instead, the respondent's subsequent summary dismissal of her brought her employment to an end. As noted above, this is not what she has argued as her primary case.**
>
> **64. I reiterate that taking the claimant's claim at its highest means finding it is likely that the tribunal would find that she was constructively dismissed rather than summarily dismissed.**
>
> **65. I therefore judge that the claimant's claims of discrimination (as outlined above) also do not have reasonable prospects of success. If there was no summary dismissal, the detriment and/or unwanted conduct about which the claimant is complaining cannot**

> **have occurred. I therefore strike out these complaints as well."**

17. Pausing there, the claimant through Mr Ibekwe, accepts that the employment judge was right to say that her claims were for victimisation and for harassment related to race and sex. The employment judge's reasoning rested on her assessment that the claimant's complaints concerned her summary dismissal by the employer, which was precluded by her earlier resignation and her primary pleaded case of constructive dismissal. The employment judge did not interpret the pleaded claim as containing an allegation of post-termination employment and I will come back to whether she was correct to do so.

18. As the employment judge did, I will proceed on the basis that the claimant would be able to identify the protected acts she relied on in support of her victimisation claim.

19. By application dated 22 March 2020, the claimant applied for a reconsideration of the Employment Tribunal's decision claiming she had not known the hearing was taking place on 20 February 2020 and objecting that the Employment Tribunal had failed to appreciate that her claims of discrimination concerned post-termination acts of victimisation and/or harassment. I will give a flavour of the contents of the application. For example, at 2.1 the claimant said:

> **"(c) The Employment Tribunal Judge failed to have proper [or little] regard that the Claimant's Sex and Race discrimination complaints are predicated upon legal basis set by the EqA 2010, which does not require existence of an actual contract or ongoing relationship, but merely relies upon acts/ actions/ omissions complained about!**
>
> **(d) Further, the EqA 2010 permits or allows claims predicated upon post employment detriments, so long or so far as it arises out of an employment relationship whether existing or extant!"**

20. She then made a similar point in paragraphs 2.1(i) and 2.3.

21. The reconsideration judgment recited the procedural history and referred to the appellate case law regarding when it would or would not be appropriate to strike out discrimination claims. I will return to those principles when I come to the relevant case law.

22. At paragraph 11, the employment judge summarised the reconsideration application as being that she had failed to have regard for the fact that the **Equality Act 2010** allows claims to be brought for post-termination detriments. She then noted that the respondent had accepted that in principle, and dependent on the particular facts, the carrying out of a disciplinary procedure post-termination and in relation to an employee who has resigned, could amount to an act of harassment and/or victimisation. The employment judge then said:

> **"13. As can be seen from the extract from my judgment above, my reason for striking out the claim was not because I failed to understand that a claim for a post termination detriment could not succeed.**
>
> **14. Instead, my reason for striking out the claim was because I judged that the claimant had no reasonable prospects of establishing that she was summarily dismissed. Her expressly pleaded case was that:**
>
> ***'…the claimant suffered the unlawful detriment of summary dismissal where there existed no legal or legitimate basis for the respondent to have taken the actions that they did…'"***

23. The passage quoted by the employment judge was from paragraph 14 of the particulars of claim.

24. The employment judge then continued in paragraph 15:

> **"I interpreted this as being a complaint that the claimant suffered**

> **the detriment of actual summary dismissal rather than a complaint that she suffered the detriment of being taken though a post termination disciplinary procedure or that the detriment was that the respondent reached a decision that she would have been summarily dismissed had she continued to be employed. The claimant has not sought to correct this interpretation of her claim."**

25. The employment judge then added a further point at paragraph 17, which is relied upon by the respondent in this appeal:

> **"Finally, I add that in any event, I consider this is a case where the claimant would have little prospects of success in establish [sic] that the respondent's actions towards her were because of her gender, race and/or any protected acts. The respondent appears, on the face of it, to have a cogent explanation for deciding to continue with the disciplinary procedure notwithstanding the claimant's resignation letter. The alleged misconduct involved, namely electoral fraud, was extremely serious. The respondent, as a public sector body and was arguably not only entitled to complete the investigation into the misconduct and reach a conclusion as to the appropriate penalty, but was probably bound to do so in view of its nature."**

The legal framework

The Equality Act Provisions

Section 26(1) of the **Act** provides:

> **"(1) A person (A) harasses another (B) if -**
>
> > **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> >
> > **(b) the conduct has the purpose or effect of -**
> >
> > > **(i) violating B's dignity, or**
> > >
> > > **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**

26. Subsection (5) lists the protected characteristics that can be relied on in relation to this definition; both race and sex are included.

27. Section 27(1) provides:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because -**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act."**

28. Section 108(1) provides:

> **"(1) A person (A) must not discriminate against another (B) if -**
>
> **(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and**
>
> **(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.**
>
> **(2) A person (A) must not harass another (B) if -**
>
> **(a) the harassment arises out of and is closely connected to a relationship which used to exist between them, and**
>
> **(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act."**

29. In **Rowstock Limited v Jessemey** [2014] WLR 3615, the Court of Appeal held that victimisation claims were within these post-termination provisions and that subsection 108(1) should be read as including the words "**in this subsection discrimination includes victimisation**".

Striking out claims with no reasonable prospect of success

30. Rule 37 of the **Employment Tribunal Rules** provides at subrule (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 …"**

31. In **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126, Maurice Kay LJ said that the issue this wording gave rise to was whether a claim "**has a realistic as opposed to a merely fanciful prospect of success**" (see paragraph 26). He went on to accept:

> **"… there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success …" (Paragraph 27)**

32. He added that what was important "**is the particular nature and scope of the factual dispute in question**". He went on to hold that in the particular case there was a crucial core of disputed fact not susceptible to determination otherwise than by hearing and evaluating the evidence. In paragraph 29 he said:

> **"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."**

33. A well-known line of authorities have considered the position in relation to applications to strike out in discrimination cases. In **Anyanwu v South Bank Student Union** [2001] ICR 391 at paragraph 24, Lord Steyn emphasised:

> **"… 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."**

34. At paragraph 37 Lord Hope said:

> **"I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."**

35. In **Chandhok v Tirkey** [2015] ICR 527 at paragraph 20, Langstaff J, (President), observed, after referring to **Anyanwu**:

> **"This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):**
>
> > **' …only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'**
>
> **Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious…"**

36. He also emphasised the importance of parties setting out their cases in their pleadings, saying at paragraph 17:

> **"… the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a 'claim' or a 'case' is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was 'their case', and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.**
>
> **18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."**

37. Finally on this topic, in **Ahir v British Airways plc** [2017] EWCA Civ 1392 Underhill LJ summarised the position as follows at paragraph 16:

> **"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, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment. … Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be '*little* reasonable prospect of success'."**

The parties' submissions

The claimant

38. In his written and oral arguments, Mr Ibekwe emphasises that strike out is a draconian remedy that should only be employed in the most obvious and plainest of cases and not where there are significant disputes of fact and where disclosure has yet to occur. He says that insofar as there were defects in the claimant's pleading, they could be remedied by case management orders, in particular the provision of further particulars. On the central issue he submits that the employment judge failed to recognise that the claimant's pleaded discrimination claims were advanced on the basis of post-employment acts and that therefore she struck out these claims on an erroneous basis.

The respondent's submissions

39. In his skeleton argument, Mr Bishop had submitted that the employment judge did consider the claims as post-termination discrimination in both her strike out decision and in the subsequent reconsideration. However, when asked to amplify these propositions and to identify the passages in her judgments where the employment judge had done this, Mr Bishop realistically accepted that she did not approach the claims as allegations of post-termination discrimination.

40. He also submitted that in any event the employment judge had identified an additional or

alternative basis for striking out the claim in her reconsideration judgment at paragraph 17 (which I have already read,) namely that there was no real prospect of a tribunal finding that the acts complained of were because of the claimant's gender, race or any protected act. Mr Bishop submits that in the circumstances, even if the employment judge erred in the way alleged in the ground of appeal, the decision to strike out was plainly and unarguably right, so that the EAT should nonetheless dismiss the appeal rather than remit the case to the ET.

41. He relied on a further contention in support of this proposition based on the wording of section 108(1)(b) and (2)(b) of the **Equality Act**. He submitted this required that the act complained of was unlawful if the claimant had still been employed and he said this was not addressed in the claimant's pleading. For the avoidance of doubt, the respondent did not pursue a suggestion raised in the respondent's answer to the appeal that the discrimination claims were also brought out of time.

Discussion and conclusions

The ground of appeal

42. The ground has not been formally conceded by the respondent and so it is still necessary for me to address it.

43. I accept that the claimant's particulars of claim did raise an argument of post-termination harassment and victimisation. I have already set out the material passages. The claimant alleged that, despite the respondent having received her resignation which brought her employment to an end, it had proceeded to make a gross misconduct finding and purport to summarily dismiss her with consequent detriment to her which she outlined: see in particular paragraph 13 of her pleading. She then referred to this action in paragraph 14 of her pleading by way of a shorthand as the "alleged summary dismissal". She said this was done by the respondent because she had

undertaken a protected act and/or it was related to her sex or race.

44. Mr Bishop accepted in response to questions that I put to him that post-termination claims were pleaded. However, it is clear from paragraphs 61, 62, 63, 64 and 65 of her original judgment, that the employment judge misunderstood the claim, believing that the **Equality Act** claims related to an actual dismissal by the employer rather than to post-termination discrimination.

45. The passages I have already referred to in paragraphs 61 and 62 of her judgment indicate that the employment judge misunderstood the reference in paragraph 14 of the particulars of claim to "summary dismissal", believing it to be a complaint that the respondent had actually summarily dismissed the claimant and that this constituted the victimisation or harassment. This misunderstanding is all the clearer from what the judge then said at paragraph 63, where she indicated that the claimant could not rely on having been summarily dismissed, given her primary case was that she had already been constructively dismissed. That analysis would not be a response to a claim of post-termination discrimination, but only to one where the judge thought that an actual dismissal by the employer was being asserted by the claimant as the detriment she relied upon.

46. This impression is further reinforced by what the employment judge said at paragraph 64, where she again emphasised that she had to proceed on the basis that the claimant was constructively dismissed. This would not have been an answer to a post-termination discrimination claim.

47. Furthermore, in her paragraph 65, the employment judge said:

> **"If there was no summary dismissal, the detriment and/or unwanted conduct about which the claimant is complaining cannot have occurred."**

48. Again, this shows the employment judge had misunderstood the claim and was proceeding on

the basis that the claimant had alleged, and thus had to establish, that she was actually summarily dismissed by her employer for the purposes of her **Equality Act** claims.

49. This misunderstanding was then replicated in the reconsideration judgment. The claimant's reconsideration application emphasised that post-termination was relied upon. However, the employment judge rejected that proposition in her reconsideration decision. In paragraph 14 she stated in terms that the claimant had no reasonable prospects of establishing that she was summarily dismissed, and in paragraph 15 that this was a complaint of actual summary dismissal rather than a complaint of being taken through a post-termination disciplinary procedure. That was a misunderstanding of the claimant's pleading, as I have explained.

50. I do not understand the employment judge's reference in her paragraph 15 to the claimant not having sought to correct her earlier interpretation of the claim, because in fact the whole thrust of the reconsideration application was that the judge had misunderstood that this was a post-termination discrimination claim.

51. I therefore conclude that ground one is well-founded in that the employment tribunal did err in failing to approach the claimant's discrimination claims as complaints of post -termination discrimination.

Respondent's submission that the strike out was in any event plainly and unarguably correct

52. As I have already indicated, the conclusion I have just expressed is not the end of the matter as the respondent submits that the strike out decision should be allowed to stand, as it was plainly and unarguably correct for an alternative reason (relying on **Dobie v Burns International Security**

Services (UK) Limited [1984] ICR 812 CA). Mr Bishop relies on what he submits are inherent weaknesses in the claimant's discrimination claims. In short, the respondent's case is that it was pursuing a proper misconduct procedure, supported by substantial evidence of serious wrongdoing and that it proceeded with the disciplinary hearing as scheduled because it was unaware of the resignation letter.

53. In particular, Mr Bishop places reliance on the employment judge's reasoning at paragraph 17 of her reconsideration judgment which I have already read out. In that passage she says that there was little prospect of the tribunal concluding that the acts complained of were "because of her gender, race and/or any protected acts". Mr Bishop also emphasises the limited nature of the claimant's pleading in relation to the discrimination claims and in particular the limited basis upon which she identifies that the action she complains of was taken for reasons related to her race or sex or because she had undertaken protected acts.

54. I can see there is potential force in these points, however, the question for me is whether the relatively draconian step of striking out the claim at this juncture is plainly and unarguably the correct thing to do. That is a high threshold for the respondent to meet.

55. I have the following reservations about relying on the employment judge's reasoning in paragraph 17 to support the strike out. Firstly, the employment judge's own conclusion was expressed as "little prospect of success", an approach more in keeping with a decision to grant a deposit order. Mr Bishop says that, as the employment judge relied on this "in any event", she must have been viewing it as a secondary or alternative reason sufficient to strike out the claim, but at best her phraseology is ambiguous.

56. Secondly, the claimant was not given an opportunity to address this point below. It did not

form part of the reasoning in the original strike out decision and therefore it had not been addressed by the claimant in the reconsideration application, which was determined on the papers.

57. Thirdly, the employment judge's conclusion was explicitly based on the proposition that the respondent as a public authority was "probably bound" to complete the disciplinary procedure in any event, i.e., there clearly existed a non-discriminatory reason for undertaking this action. However, that was not the respondent's pleaded case, which was, as I have indicated, that it proceeded because it did not know about the resignation letter and there were evidential grounds for doing so. As to the state of the respondent's knowledge; as the claimant's pleading indicates and as Mr Ibekwe has confirmed to me today, that is a matter of disputed fact. It is a proposition very much challenged by the claimant.

58. Insofar as I am invited to consider this point wholly afresh and without reliance or significant reliance upon the employment judge's paragraph 17; whilst I accept that a discrimination claim can be struck out, as indicated in the authorities I have cited, I am also mindful of the considerable caution that is required. The claimant is not legally represented. I was told this morning by Mr Ibekwe that there are actual comparators to be relied on, both in relation to the sex and race claims, where the respondent did not progress gross misconduct proceedings to a conclusion. There has been no request for, nor indeed provision of, further and better particulars of the claimant's pleaded case. I am told that there are disputes of fact, as I have indicated.

59. I make clear that my decision is not intended to preclude the respondent from renewing its strike out application on this basis on remission of the case and/or from seeking a deposit order. It may be that the claimant's position, or the respondent's position, will be strengthened by a request for further particulars of the way the discrimination claims are put before further steps are taken in that regard. Certainly the claimant will want to plead her reliance on comparators. I am simply

concluding that it is not appropriate at this stage for me to say that the strike out was plainly and unarguably right on the basis of the alternative ground raised by the respondent. In these circumstances it would not be appropriate for me to express a more detailed view about the apparent merits (or lack thereof) over and above what I have already said.

60. As I have already mentioned, Mr Bishop also advanced what he suggested was a freestanding argument based on the wording of section 108(1)(b) and 108(2)(b) of the **Equality Act**, specifically the wording "**would, if it occurred during the relationship, contravene this Act**". He submitted this wording required the claimant to show that the disciplinary proceedings were unlawful from the outset or that it was unlawful for the respondent to have continued the process to the point of making a decision and/or that the finding of gross misconduct was not one that a reasonable employer could make. He accepted this argument had not been put forward in support of the strike out application before the employment judge. I do not agree that this is the effect of the statutory provisions, let alone that it is plainly so, such that strike out is the correct course.

61. These provisions require that the act said to constitute the victimisation or harassment would have contravened the **Equality Act** had it occurred during the relevant relationship, that is to say, here, the employment relationship. In other words, the act in question will not be regarded as unlawful unless it would have met the applicable statutory criteria for the cause of action, had it occurred whilst the claimant was still employed. To take one example, which I stress is not this case, section 27(3), when setting out the ingredients of the definition of victimisation, provides that giving false evidence or making a false allegation is not a protected act if the evidence is given or the allegation is made in bad faith. So in a post-termination case of victimisation, if section 27(3) was raised, then the tribunal would have to be satisfied of the absence of bad faith, just as much in that post-termination case as in a case where the person in question was still in employment. But I do not consider that these provisions in section 108 require the claimant to meet some additional hurdle that would not apply if

she was still in employment.

62. Further or alternatively, in the passages I have already read, the claimant's pleading did in fact refer to there being no legal or legitimate basis for the respondent to have taken the actions that it did in relation to the disciplinary process. So insofar as it is a pleading point that is being raised, it is something that is in fact addressed in the claimant's pleading.

63. As I have already noted, the claimant's pleading will require further particulars, not least, in addition to the matters that I have recently referred to, to identify the protected acts that are relied on, but I do not consider that Mr Bishop's submission identifies any fatal deficiency in the particulars of claim. For the reasons I have given, I do not consider that the statutory provisions incorporate a freestanding requirement to establish additional elements to the claimant's case or, in the alternative, if I am wrong about that, then the respondent is raising a novel legal argument which, whilst they may develop it further as the case proceeds, it is not a matter that supports a strike out at this stage.

64. At one point during his submissions Mr Bishop appeared to resile from the proposition that these provisions provided a freestanding basis to support the striking out of the claim. He appeared to say that these provisions were simply another way of emphasising the point which the employment judge had made in paragraph 17 of her judgment. Insofar as it is not a freestanding submission, then I have already dealt with it when I addressed the employment judge's paragraph 17 and Mr Bishop's related contentions.

65. It therefore follows that I will allow the appeal and remit the claim. It will be a matter for the respondent to decide whether to pursue the application to strike out at this or at a future juncture. If it does so, Mr Ibekwe has sensibly suggested that it could be decided either by Employment Judge

Burns or by another employment judge, whichever course is less likely to occasion delay.