Case Numbers: 3306138/2020, 3307401/2020 & 3311749/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Fofanah	v	NHS Professionals Limited

Heard at: Watford via CVP **On**: 31 May 2022

Before: Employment Judge Hyams, sitting alone

Representation:

For the claimant: Mr James Lewis-Bale, of counsel
For the respondent: Mr Declan O'Dempsey, of counsel

JUDGMENT

The claimant's claims have no reasonable prospect of success and are therefore struck out.

REASONS

Summary

1 Only exceptionally is it appropriate to strike out claims of (1) direct discrimination within the meaning of section 13 of the Equality Act 2010 ("EqA 2010"), (2) victimisation within the meaning of section 27 of that Act, and (3) harassment within the meaning of section 26 of that Act, on the basis that they all, individually, have no reasonable prospect of success. This is such an exceptional case. The case as clarified in the manner described below was also for sums claimed to be owed under a contract and/or unpaid wages and those claims also, unusually, in my judgment had no reasonable prospect of success.

The hearing of 31 May 2022

2 On 14 June 2021, Employment Judge ("EJ") Quill directed the holding of a preliminary hearing "to determine the following issue:

> To consider the respondents application to strike out on the ground that the tribunal has no jurisdiction to hear [the claims] (or part of them) and/or on the grounds that they have no reasonable prospect of success. Alternatively a deposit may be considered."

3 On 31 May 2022 I conducted an open preliminary hearing to determine the respondent's application to strike out the claims. In addition to arguing that the claims had no reasonable prospect of success and therefore should be struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, the respondent argued that (1) the conduct of the claimant in the course of pressing her claim and (2) her failure to comply with an order of the tribunal made on 15 May 2021 in themselves justified the striking out of the claim. The latter arguments were based on rule 37(1)(b) and (c) respectively of the Employment Tribunals Rules of Procedure 2013. The order made on 15 May 2021 was for the provision of further information by the claimant. The claimant had failed to comply with it, having instead, in a letter dated 15 May 2021 which was sent in response to the order of the tribunal of that day, demanded further information from the respondent.

The claims, their legal background, and the manner in which they were refined just before the hearing of 31 May 2022

4 There were three claims. The second and third ones were additions to the first one, and concerned events which had followed those which were the subject of the first claim. The first claim was presented on 26 June 2020 when the claimant was in Sierra Leone, having been there for over three months previously.

5 The claimant is a registered mental health nurse. She has in recent years at least worked for the respondent under a contract which was the subject of a determination by an employment tribunal sitting at Birmingham in 2019. That determination was in case numbers 1302529/2018 and 3307626/2018. Those cases were the subject of a hearing conducted by EJ Flood sitting with Mr Virdee and Mr Machon and held on 18, 20-22, and 25-29 November 2019. Judgment was reserved and was sent to the parties on 17 December 2019. In the judgment, that tribunal stated the applicable law relating to claims of direct discrimination and victimisation and applied it in such a way that the claimant could not have been in any reasonable doubt about what was required for the success of a claim of those sorts. One of the claims of the claimant in those cases was that she had been dismissed unfairly. The third of the three claims which were the subject of the application to strike out which I heard on 31 May 2022 was a claim of unfair dismissal. In its response to that claim, the respondent, in paragraph 64 of its grounds of resistance (which was at page 87 of the bundle created for the hearing of 31 May 2022; unless otherwise stated below, any reference to a page is to a page of that bundle) stated this:

"64.1 The Claimant was not an employee at the time at which her registration was terminated on 28 July 2020. The Respondent relies in particular on the facts set out in paragraphs 6 to 10 above. [There was no need to refer to those paragraphs in this judgment.]

64.2 The Claimant has previously brought a claim for unfair dismissal against the Respondent under case numbers: 1302529/2018 and 3307626/2018. In a judgment dated 12 December 2019 (a copy of which is attached), the Tribunal made the following findings at paragraph 38.1 of the judgment in respect of the Claimant's employment status, which the Respondent also relies upon:

64.2.1 there was no obligation on the Respondent to offer assignments to flexible workers and no obligation on flexible workers to accept such assignments;
there was no overarching or umbrella contract of employment in place between the Claimant and the Respondent when she was not carrying out assignments;

64.2.2 there was insufficient mutuality of obligation outside any period when the Claimant was carrying out a specific assignment to amount to an employment contract with the Respondent being in place between assignments. This is supported by the express terms of the registration contract and the reality of how the arrangements worked in practice;

64.2.3 there were no exchanges of mutual promises of future performance between the Claimant and the Respondent over and above the agreement to carry out each individual assignment as it was booked;

64.2.4 the Claimant was free to arrange her work to suit her needs and she specifically chose to be a flexible worker with the Respondent because she wanted that flexibility;

64.2.5 once an assignment was offered and accepted and the Claimant started to carry out work, then there was at this point a contract of employment in place. This started on the first day of each assignment and ended on the last day of an assignment.

64.3 As the issue of whether the Claimant is an employee of the Respondent and / or whether there is an overarching contract of employment in place between the Claimant and the Respondent has already been considered and determined by an Employment Tribunal, the Respondent maintains that the

> Claimant is issue estopped from litigating this issue again and the Claimant's complaint of unfair dismissal should be struck out."

6 I agreed with that analysis of the effect of the judgment of the tribunal presided over by EJ Flood, to which I refer below as "the Flood tribunal".

7 The claims as originally stated in the first of the claim forms which were the foundation of the proceedings before me were of

7.1 race discrimination

7.2 breach of contract

7.3 violation of human rights, and

7.4 "Deprivation of liberty and choice".

8 The second claim form added a claim of unfair dismissal and this (as stated in box 8.1 on page 35):

> "Hate incident crime reference no:20000373206
>
> Retaliation attack due to grudge, tantum to abuse of managerial power, suppression & violation of Freedom to speak up."

9 The third claim form also included a claim of unfair dismissal. It added a claim for holiday pay.

10 At 15:34 on 30 May 2022, solicitors acting for the claimant (1) informed the respondent and the tribunal that they were now acting for the claimant, and (2) sent to the respondent and the tribunal a set of "Further and Better Particulars of Claim on behalf of the Claimant". That document was prepared by Mr Lewis-Bale at short notice and was admirably clear (in that it was as clear as it could be given the way in which the claimant was stating her claims) and concise. It also stated that the claimant was not pressing her claim of unfair dismissal.

11 I found it helpful that the claimant had now, finally, honed her claims so that they were in an intelligible form. Mr O'Dempsey sought to persuade me that the claims should be struck out because that document had only now, finally, long after the time for complying with the order of EJ Quill of 15 May 2021 to which I refer in paragraph 2 above had passed, been provided. As I said on 31 May 2022, I thought that it was rather better from the point of view of fairness and the doing of justice to see what the claimant's case was now, as stated in the further information document of the day before, and to see whether it had any substance before considering whether the fact that the document had been

provided very late should be taken into account in deciding whether or not the claims should be struck out. I therefore followed that course.

12 It was not in dispute (and this was confirmed during the hearing of 31 May 2022) that the claimant was in Sierra Leone throughout the period from before the start of the first Covid-19 lockdown (which was at the end of March 2020) until November 2020. Her claim was made only in respect of events which occurred while she was in Sierra Leone. Unsurprisingly, it was evidenced for the most part by documents. That was because the claim was made in respect of no face-to-face events. There was one telephone call on which the claim was based, but the reliability of the claimant's account of what happened during that telephone call was capable of being assessed at least in large part by reference to some pre-existing contractual documentation which was before me. The claimant did not take issue with the provenance or the accuracy of the copies of the documents which were before me and on which reliance was placed by the respondent.

13 In what follows, I first set out relevant parts of the relevant documents. I then refer to the relevant case law briefly. I then assess the claimant's claims in sequence, dealing with them in the order in which they were stated in the claimant's further information of 30 May 2022 ("the claimant's further information) and by reference to the way in which they were so stated.

The case law which I took into account when deciding whether or not the claims should be struck out

14 While I do not refer in any detail in these reasons to the case law which needs to be applied when considering whether a claim should be struck out on the basis that it does not have a reasonable prospect of success, I discussed that case law with both counsel, and I applied it in arriving at my conclusions as stated below. That case law included

14.1 the decisions of the House of Lords in *Anyanwu v London South Bank Student Union* [2001] ICR 391 and *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, and

14.2 the decisions of the Court of Appeal in *Swain v Hillman* [2001] 1 All ER 91 and *Ahir v British Airways plc* [2017] EWCA Civ 1392.

15 The effect of those cases was stated in the paragraph PI[632.11] of *Harvey on Industrial Relations and Employment Law*, as follows:

> "Once a claim (or an amended claim, as the case may be) has properly been identified, the power to strike it out under SI 2013/1237 Sch 1 r 37(1)(a) on the ground that it has no reasonable prospect of success will only be exercised in rare circumstances *(Tayside Public Transport Co Ltd (t/a Travel*

Dundee) v Reilly [2012] CSIH 46, [2012] IRLR 755, at [30]). In particular, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute (see *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46, [2012] IRLR 755; *Romanowska v Aspirations Care Ltd* UKEAT/0015/14 (25 June 2014, unreported)). In *Ezsias* itself an employment judge's order striking out a whistleblowing claim was overturned on appeal as there was 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence'. Many weak cases will involve such a dispute of facts and where that is the case they cannot (subject to the 'exceptional case' discussed below) be resolved on a strike out application and must be resolved at a full hearing on the merits. That is because at a strike out hearing the tribunal is in no position to properly weigh competing evidence and 'should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts' (*Mechkarov v Citibank NA* UKEAT/0041/16, [2016] ICR 1121, per Mitting J at [14](5)). As such, a claimant's case must ordinarily be taken at its highest – with the assumption being that the claimant will establish that the facts which they have asserted in their claim are true, however vehemently the other side takes issue with them. Taking the claim at its highest means taking it at its highest not just in the pleadings but in any relevant supporting documentation available to the tribunal (see the discussion of *Cox* and *Malik*, above)."

16 I also took into account in assessing the claims of breaches of the EqA 2010 the impact of section 136 of the EqA 2010 and the now leading authority on the application of that section (*Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263), as well as the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. The claim of harassment under section 26 in my judgment added nothing to the claim of direct race discrimination. That was because of the analysis of Underhill LJ in paragraphs 83-101 of his judgment in *Unite the Union v Nailard* [2019] ICR 28, which shows that in order to succeed in claiming harassment under section 26 of the EqA 2010 there is a need for a mental element of the same sort as that which is required for the success of direct discrimination within the meaning of section 13 of that Act.

The factual background as evidenced by the documents before me

17 The claimant worked for the respondent as a "flexible worker". She was registered with the respondent as such, under the terms of a document dated 5 March 2013 of which there was a copy at pages 179-190. That document led to the determinations by the Flood tribunal to which I have referred in paragraphs 5 and 6 above. The document contained the following relevant provisions.

18 In paragraph 10.2 on page 185, this was said.

> "You are entitled to take up to 28 days' annual leave every Leave Year in line with your statutory entitlements under the Working Time Regulations. Payment for annual leave will be made in accordance with (J) above and the Appendix (FW Annual Leave Accrual Calculations), which is intended to be contractual."

19 That appendix was at page 190 and contained these words: "The annual leave hours calculation will be based on the hours you actually work and are paid for during the Leave Year". The words of "(J) above" were only about the means by which holiday pay was recorded and were immaterial here.

20 The respondent had a "Flexible Worker Non Compliance Process" for dealing with human resources issues. There was a copy at page 191 and it had the effect that if the respondent sought information from a worker such as the claimant and the worker did not provide it, then the process was for "HR to write to the FW [i.e. the Flexible Worker] to inform them that their registration is terminated from immediate effect due to non-compliance."

21 The respondent issued a series of documents stating its COVID-19 HR Policy. Version 6 of those documents, issued on 4 May 2020, was put before me. It was not asserted on behalf of the claimant that its terms were not applicable (whether in a previous version or in version 6) at all material times. Its first section (numbered 1) was in these terms:

> '1. **Short Term (14 Day) Isolation & COVID 19 Sick Pay - Pay Approach**
>
> This policy sets out NHSP's [i.e. the respondent's] approach to self-isolation as a result of an individual or a member of their household showing COVID-19 symptoms. The same process will be followed for illness relating to COVID-19.
>
> a. All pre-booked shifts will be paid within the isolation period.
>
> b. Flexible workers should compete the form available on the NHSP website to alert us of self-isolation.
>
> c. They should refuse out of any existing bookings with the reason "Self Isolation".
>
> This approach is in line with the wider NHS approach that bank workers should not be financially disadvantaged as a result of precautionary self-isolation.
> If self-isolation or illness results in an absence of longer than 14 days, flexible workers will be entitled to statutory sick pay once the 14 day period has passed, or if no shifts have been pre-booked.

All self-isolation shifts are subject to an audit process which reviews at prior work pattern and timing of booking and refusal as well as other data points.'

22 On 13 July 2020 Ms Anastasia Phiri, an HR Projects Advisor employed by the respondent, sent the claimant the letter at pages 195-197. It set out 2 allegations of wrongdoing by the claimant. The whole of the section under the heading "Allegation 1" was material. It was this:

> "On 26th April 2020 you submitted a claim for payment for self-isolation pay up until 31 December 2020.
>
> On 15th May 2020 at 14:16, you booked a shift on My Bank for 19th May, (Reference No. 94157312) and then refused the shift on 15th May at 14:17 on the grounds of self-isolation. On 15th May 2020 at 14:16, you booked a shift on My Bank for 25th May, (Reference No. 94923560) and then refused the shift at 14:17 on the grounds of self-isolation.
>
> It is alleged that the claim for self-isolation pay up until 31 December 2020 and the shift bookings you made on 15th May for 19th and 25th May 2020, are in breach of NHSP's Covid-19 self-isolation payment scheme and that you failed to follow NHSP procedures.
>
> NHSP's COVID-19 policy provides for special payment during the COVID-19 pandemic and is only applicable to workers who are unable to work pre-booked shifts due to self-isolation as a result of an individual or a member of their household showing COVID-19 symptoms or as a result of illness relating to COVID-19. Such payments are limited to a period of isolation of 14 days.
>
> The claim form for self-isolation payments clearly states that if you book into shifts with no reasonable prospect of working that shift the matter may be referred to the NHS Counter Fraud Authority and it may also be subject to separate disciplinary proceedings. You had previously advised NHSP that you were unable to work any shifts as you were stranded abroad and it appears that you booked shifts in May with no reasonable prospect of working those shifts."

23 The second allegation of wrongdoing set out in the letter at pages 195-197 was of the use of "inappropriate and offensive language" towards a member of the respondent's staff on 10 June 2020. That language was used in a written response to a letter of that date which Ms May Oyinlade of the respondent had sent the claimant. The relevant parts of the claimant's response were set out in paragraph 17 of the grounds of resistance to the first claim. That paragraph was on page 26. In the claimant's response to the letter of 10 June 2020 from Ms Oyinlade she referred to Ms Oyinlade as being "ineffective", "inefficient", and a

"muppet". The claimant also asserted that Ms Oyinlade was fraudulent. The claimant did not assert that the contents of paragraph 17 of the grounds of resistance on page 26 were in any way inaccurate.

24 The letter of 10 June 2020 from Ms Oyinlade to the claimant was about the circumstances which were the subject of allegation 1. The claimant did not refer to that letter in her pleadings, but on page 16, in box 15 of her first claim form, she said this about Ms Oyinlade:

> "HR Manager May Oyinlade was not involved in the assessment process and when eligibility was confirmed however, she took it upon herself to fabricate that payment made to me was done in an in error as she cc'd no other person into her emails and further went to restrict my viewing of my online profile or booking all part of hate, retaliation attack, bullying and victimisation.
>
> I will not be humuliated [sic] and this is causing financial constraints, is a psychological rape that this lady is on my case and needs to leave me alone once and for all. In a recent case she fraudulent tampered with emails attempting to recall when the Tribunal was in the middle of croo [presumably cross-] examination. I reported this to the Tribunal now she is after my life.
>
> How could you restrict my access to an online system that makes a difference to my mental wellbeing just viewing shifts gives me freedom even though I am not able to book shifts due to flights restrictions."

25 What Ms Oyinlade was claimed by the respondent to have done was described in paragraphs 11-14 of the grounds of resistance to the first claim. They were in these terms:

> "11…. [T]he Respondent became aware that it had paid the Claimant for the seven shifts in March and April 2020 in error. Upon discovering this error, this issue was passed to May Oyinlade in her capacity as National HR Manager. Ms Oyinlade reviewed the information and wrote to the Claimant to alert her to the error that had been made. This was a perfectly reasonable step for Ms Oyinlade to take given the circumstances and her role within the Respondent's organisation. The Respondent has not paid any other worker or employee for shifts they were unable to undertake due to being stranded abroad. Further, as stated above, the Claimant and all other flexible workers are not entitled to be paid for any shifts that they do not work.
>
> 12. Ms Oyinlade wrote to the Claimant on 10 June 2020 and advised that its COVID-19 policy and Government guidance stated that special payment during the COVID-19 pandemic was only applicable to workers who were unable to work due to showing symptoms of COVID-19 or due to

sickness. Ms Oyinlade went on to advise the Claimant that the payment made to her was therefore made in error as her circumstances did not fall into any of these categories. Ms Oyinlade advised that, even though she was not entitled to any payment, as a gesture of goodwill, the Respondent would not be recouping these monies from her.

13. Ms Oyinlade also advised that it was aware that, on 15 May 2020 she had booked shifts for 19 and 25 May 2020 which she had immediately cancelled citing self-isolation as the reason for the cancellation. Ms Oyinlade advised the Claimant that this behaviour was unacceptable as the Claimant had previously mentioned that all flights had been cancelled and she was therefore aware that she would not be able to work these shifts as she was not in the United Kingdom. Ms Oyinlade pointed out that the claim form which she had previously submitted to claim special pay clearly stated that if she booked shifts which she had no reasonable prospect of working the matter may be referred to the NHS Counter Fraud Authority and it may also be subject to separate disciplinary proceedings.

14. Ms Oyinlade also advised the Claimant that it was aware that she had made self-isolation claims up to 31 December 2020. The Respondent advised that it would be unable to make any further payments to her as, given her circumstances, she did not qualify to receive self-isolation payments. It flagged that, in any event, if she had qualified for self-isolation payments, she would only have received two weeks' worth of payment. For that reason, Ms Oyinlade asked the Claimant to desist from making further self-isolation claims as she was not eligible to receive these payments and, as such, no further payments would be made to her."

26 The only thing in that passage which the claimant asserted (through Mr Lewis-Bale) was not correct was the assertion that she had "booked shifts for 19 and 25 May 2020 which she had immediately cancelled citing self-isolation as the reason for the cancellation". However, at no time before 31 May 2022 was that stated to the respondent, as far as I could see. Certainly, there was no response by the claimant in writing to the substance of allegations 1 and 2 set out in the letter of 13 July 2020 at pages 195-197 to which I have referred in paragraphs 22 and 23 above. That was evident from the two letters from Ms Phiri to the claimant dated 20 and 23 July 2020 at pages 9-12 of a small supplementary bundle which was put before me by Mr O'Dempsey during the course of the hearing of 31 May 2022. Those letters preceded the letter at pages 198-199 dated 28 July 2020 which was the first act of the respondent about which complaint was made by the claimant in the third claim. The relevant part of the letter at pages 198-199 was this:

> "I write further to the letter I sent to you on 23 July 2020, in which I requested that you provide a written statement setting out your version of events in relation to the two allegations detailed in the Terms of Reference previously provided to you in my letter dated 20 July 2020.
>
> The letter I sent to you dated 23 July 2020 gave you a deadline to provide the written statement by no later than 3 calendar days from the date of the letter, but it is now 28 July and I have still not received it from you. Disappointingly, you have advised me that you will not be providing a statement and have reported me to the Police for a hate crime despite being advised that a request for a written statement is within NHSP's usual process of investigation. You remain determined to not provide me with a written statement and cooperate with the investigation process. Given your very clear position on this matter, I understand that I am unable to persuade you to cooperate with me in respect of this investigation.
>
> My previous letter advised you that your continued failure to comply with the request may result in the termination of your registration with NHS Professionals. Given your stance on this matter and continued refusal to cooperate, I write to confirm that, as I have not received a written statement from you and as you have made it clear that you will not be providing me with a written statement, your registration has been terminated with immediate effect."

27 The claimant accepted that she had at no time before 28 July 2020 responded to the substance of allegation 1, which I have set out in paragraph 22 above.

28 She did, however, appeal against the decision to terminate her registration with the respondent. The way in which the appeal was eventually advanced and was stated in paragraph 32 of the grounds of resistance to the third claim, which was on page 82 and was in these terms:

> "The Appeal Hearing took place on 20 August 2020 and was heard by Jo Corcoran, Regional HR Manager, and Linda Wardley, Nurse Lead. The Claimant outlined her grounds of appeal at the hearing as being as follows:
> 32.1 The letter she received from May Oyinlade, National HR Manager on 10 June 2020 was an outcome letter to the allegations presented to her on 13 July 2020 by Anastasia Phiri, HR Projects Advisor;
> 32.2 Anastasia Phiri used excessive power and harassed her and further, called her names.
> 32.3 She felt the Panel had not received all the communications between her and Anastasia Phiri contained within the investigation pack.
> 32.4 NHSP had hacked her emails."

29 While paragraph 33 of the grounds of resistance on page 82 referred to the sending of an outcome letter to the claimant, dismissing her appeal, on 11

September 2020, that letter was not in the bundle before me on 31 May 2022. That, however, was not material because the claimant did not, in her further information of 30 May 2022, assert that the manner in which her appeal was dealt with was in any way contrary to the EqA 2010.

30 There was at pages 192-194 a record of the claimant's bookings with the respondent from 2017 to 2019 inclusive. The claimant's last shift worked for the respondent was shown to be 1 December 2019. The claimant did not assert that she had worked a shift for the respondent since that date.

The claimant's claims as advanced in her further information of 30 May 2022 and my analysis of those claims as so advanced

(1) The claimant's claim to be entitled as a matter of the law of contract to be treated as being on special leave while she was "stuck abroad"

31 The claimant's first claim stated in her further information was of breach of contract. Paragraphs 2, 3 and 5 of the further information were the material part of that document in that regard, and were as follows:

> "2. In respect of Breach of Contract, the Claimant had corresponded with the Respondent's pandemic response team. She had spoken and corresponded with Ms Charlotte Pinner over the period of 22nd April 2020 until 22nd May 2020. Ms Pinner confirmed the Claimant's eligibility for special leave and the pandemic response team sanctioned such payments.
>
> 3. The Claimant states that this agreement to pay special leave constituted part of her contract in respect of remuneration. At the very least, an agreement was formed between the Claimant and the Respondent that she would be remunerated under special leave.
>
> ...
>
> 5. The Respondent has breached the Claimant's contract by not paid [sic] special leave whilst she was stuck abroad despite her eligibility."

32 There was a short answer to this claim. That was that it could have been advanced only under section 3 of the Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623 ("the 1994 Order"), and those provisions could not be relied on by the claimant here. That was for the following reasons.

32.1 Article 3 of that Order applies only where there is "a claim of an employee for the recovery of damages or any other sum" and "the claim

arises or is outstanding on the termination of the employee's employment".

32.2 The claimant was here estopped by the Flood tribunal's judgment from asserting that she was an employee of the respondent while she was not working for the respondent and therefore for the whole of the period while she was in Sierra Leone.

32.3 The claim for sums due under a contract was in respect only of the period while the claimant was "stuck" in Sierra Leone.

(2) The claim for unpaid wages

33 However, the second claim which was advanced was based on the claimed contractual agreement to pay the claimant for that period. That was because of what was said in paragraph 6 of the claimant's further information of 30 May 2022, which was preceded by the heading "Unlawful deduction of wages" and was in these terms:

> "Turning to unlawful deduction of wages, the Claimant asserts that she had agreed with the Respondent that special leave would be payable whilst she was absent due to being stuck abroad. The Claimant avers that the Respondent agreed to make payment based on loss of predicted earnings. The calculation was to take the amounts paid and calculate sums payable going forward based on these precedents."

34 During the hearing of 31 May 2022, Mr Lewis-Bale sent me and Mr O'Dempsey a screenshot which the claimant had sent him that day and which the claimant relied on as showing that she was entitled to "special leave" with pay. It was a screenshot of part of an email which Mr Lewis-Bale later on sent to me and Mr O'Dempsey as a forwarded email. The relevant passage in the forwarded email was this:

> "**Special leave with pay - new arrangements for bank workers**
>
> In line with DHSC guidance, you can take special leave with pay for the recommended period of self-isolation. Your health and safety is our priority and this special pay provision is in place to ensure you are not financially disadvantaged during the COVID-19 pandemic.
>
> Please note: You will receive the normal shift payment for pre-booked shifts during any period of self-isolation or sickness with Covid-19. These shifts will be automatically released on your behalf. This method will create greater equity for all workers supporting Trusts at this critical time, regardless of contractual arrangements."

35 I regarded that passage as adding nothing to the passage from the document that I have set out in paragraph 21 above.

36 What the claimant was claiming was to be paid throughout her period of absence from the United Kingdom because she was unable to get a flight back from Sierra Leone: that was clear from paragraph 5 of the further information of 30 May 2022, which I have set out in paragraph 31 above. That claim was inconsistent with both the email set out in paragraph 34 above and the passage from the respondent's document set out in paragraph 21 above. It was also to my mind inconceivable that the respondent would have agreed to pay the claimant throughout the period when she was "stuck abroad" merely because she was so stuck. That would have been so if the claimant had been an employee under an ongoing relationship. As a flexible worker who (1) had merely booked shifts before she was stranded abroad and after then while she was so stranded (2) was unable to book shifts with any hope of working them since she knew that she would be abroad and therefore unable to work them, she had no conceivable contractual entitlement to be treated as being on special leave and entitled to remuneration of any sort while she was "stuck abroad".

37 I noted that the claimant had not, before providing her further information of 30 May 2022, referred in the bundle of documents before me to Ms Pinner. I bore it in mind that the bundle was far from comprehensive, so I did not take that factor into account in deciding whether there was no reasonable prospect of successfully claiming that a sum (or sums) due under a contract was (or were) owed by the respondent to the claimant here. What I did, however, take into account was the possibility of Ms Pinner having authority to agree with the claimant that the claimant would be treated as being on paid special leave for the whole of the period of her absence while she was "stuck abroad".

38 Against the background of the documents before me and in the light of all relevant practical considerations, including the likelihood of a company which was part of the NHS agreeing to pay the claimant while she was "stuck abroad", I concluded that there was no reasonable prospect of successfully claiming that Ms Pinner had had either actual or apparent authority to agree to that on behalf of the respondent.

39 For those reasons, I concluded that the claim to have been entitled under the law of contract to be paid on the basis that the claimant was on special leave throughout her period of absence in Sierra Leone had no reasonable prospect of success.

40 In addition, I concluded that the claimant had had no entitlement to claim or be paid financial compensation in respect of the shifts which she had booked in March 2020 and then not been able to work merely because she was "stuck abroad" in Sierra Leone. It was fanciful to suggest otherwise.

(3) Direct race discrimination

41 The whole of the section of the claimant's further information of 30 May 2022 stating the refined claim of direct discrimination because of race needed to be set out. It was this:

> "10. In respect of Direct Race Discrimination, the Claimant relies on the following acts as being Direct Race Discrimination.
>
> a. The Respondent's decision not to pay the Claimant for shifts she had not booked and had not worked.
> b. Ms May Oyinlade's letter to the Claimant dated 10th June 2020.
> c. Ms Phiri's emails to the Claimant on 13th, 17th, 20th and / or 23rd July 2020.
> d. The restriction of the claimant's ability to be able to book on her profile from 2nd June 2020
> e. The termination of the Claimant's contract on 28th July 2020.
>
> 11. The Claimant relies on a hypothetical comparator for the acts claimed above. The hypothetical comparator being a person of another race to the Claimant.
>
> 12. The Claimant states that all of these actions were part of an ongoing culture of discrimination towards her and by their nature were linked acts showing a chain of events.
>
> 13. In respect of 10a above, the Claimant states the day this was retracted was the letter of Ms Oyinlade on 10th June 2020."

42 Given the contents of the documents to which I refer in paragraphs 20-22 above, I could not see any basis on which a tribunal could lawfully conclude that there were here facts from which the tribunal could draw the inference that the claimant was treated less favourably than she would have been if she had been of a different race.

43 In addition, there was in my view no reasonable prospect of satisfying any tribunal that any other person in the same or similar circumstances would have been treated differently. In my judgment it was fanciful to suppose that the tribunal hearing the claim of direct race discrimination would come to any view other than that the reason why the claimant was treated in the manner in which she was in fact treated by the respondent was that she had wrongly claimed pay for shifts which she could not have worked because she was in Sierra Leone. Even if the claimant had had COVID-19 when she was in Sierra Leone, that would not have been the real and obvious reason why she could not work those shifts. Rather, it was that she was "stuck abroad". The terms of the respondent's policy for paying persons such as the claimant, i.e. the respondent's flexible

workers, plainly did not apply to the claimant's circumstances, and she was not entitled to payment under that policy.

44 For all of those reasons in my view the claim of direct race discrimination had no reasonable prospect of success and accordingly had to be struck out.

(4) Victimisation

45 The claim of victimisation was stated in this way in the claimant's further information of 30 May 2022:

> "14. The Claimant asserts that she committed a protected act on 31st May 2020 when she lodged her first claim with ACAS. She had previously informed the Respondent in the form of Ms Pinner that she intended to lodge a claim for discrimination if matters could not be rectified. The Respondent knew, or ought to have known, that the proceedings related to matters arising under the Equality Act 2010 namely the bringing of a claim of discrimination.
>
> 15. The Claimant therefore states that she has suffered detriment as a result of bringing her claim to the Tribunal. She submits that the detriment suffered is being put through an investigation by Ms Phiri in the form of letters dated 13th, 17th, 20th, 23rd July 2020, and the letter from Ms Oyinlade on 10th June 2020."
>
> 16. The Claimant also avers that due to her raising claims under the Act, her contracted was terminated."

46 The termination of the claimant's contract was stated to have occurred for the reasons set out at the end of paragraph 26 above. Those reasons were entirely consistent with the documents referred to in paragraphs 20-22 above. Given the contents of those documents, I could not see any basis on which a tribunal could lawfully conclude that there were here facts from which the tribunal could draw the inference that the claimant was treated detrimentally because she had done a protected act within the meaning of section 27 of the EqA 2010.

47 In addition, or alternatively, there was in my view no reasonable prospect of satisfying any tribunal that any other person in the same or similar circumstances would have been treated differently. In my judgment, for the same practical reasons as those which I state in paragraph 43 above in regard to the claim of direct race discrimination, it was fanciful to suppose that the tribunal hearing the claim of victimisation would come to any view other than that the reason why the claimant was treated in the manner in which she was in fact treated by the respondent was that she had wrongly claimed pay for shifts which she could not have worked because she was in Sierra Leone.

(5) Harassment

48 The claimant's claim of harassment was set out in paragraphs 17 and 18 of her further information of 30 May 2022, in the following way:

> "17. The Claimant submits that she suffered harassment as a result of the conduct of Ms Phiri's investigation which was unwarranted in the Claimant's assertion. The emails from Ms Phiri dated 13th, 17th, 20th, 23rd and 28th July 2020 represented a course of conduct which was unwanted by the claimant.
>
> 18. The conduct caused embarrassment and humiliation to the Claimant. It created an environment which was degrading and caused great upset. The Claimant felt so aggrieved by the conduct that she felt no alternative but to report a hate crime to the Police. The conduct caused distress and made the Claimant feel very upset and violated."

49 Mr Lewis-Bale urged on me the significance of the fact that the claimant had felt that she had "no alternative but to report a hate crime to the Police." I could not see that as being relevant at all here: the issue was whether or not there was no reasonable prospect of successfully claiming that the claimed detrimental treatment was done to any extent because of the claimant's race (that being in my view the only way in which it could reasonably be argued that the treatment was "related to" the claimant's race). In formulating that issue, I did not include the word "material" before "extent".

50 In my view, given the factors to which I refer in paragraphs 42 and 43 above, the claim of harassment had no reasonable prospect of success and therefore had to be struck out.

(6) Wrongful dismissal

51 The claim of "wrongful dismissal" was stated in paragraph 20 of the claimant's further information of 30 May 2022 in these terms:

> "The Claimant states that the Respondent did not dismiss her in line with her contract and therefore has been wrongfully dismissed. The Claimant avers that the Respondent did not follow their own terms and policies instead deploying a made-up scheme to ultimately dismiss her. She therefore has lost the ability to book further shifts or maintain her special leave."

52 This was a claim about the decision of 28 July 2020 stated in the document of which I have set out the relevant passage in paragraph 26 above. At that time, as stated above, the claimant was not an employee of the respondent. The only possible basis for a claim for wrongful dismissal, i.e. damages for breach of

contract, was the 1994 Order, and for in substance the reasons stated in paragraph 32 above, no such claim could be advanced here.

(7) Holiday pay

53 In the final paragraph (number 21) of her further information of 30 May 2022, the claimant claimed this:

> "The Claimant states that from 19th March 2020 until her termination on 28th July 2020, she had accumulated holiday pay and such sums still have not been paid post termination."

54 Given the terms of the document to which I refer in paragraphs 18 and 19 above, the claimant had a contractual right to holiday only if she had in fact worked one or more shifts for the respondent. She had worked no such shifts throughout the period from March to July 2020 inclusive. She therefore had in my judgment no contractual right to holiday pay in respect of that period.

55 I could not see how any different conclusion could in the circumstances stated in paragraphs 5 and 6 above have been reached as a result of the application of the Working Time Regulations 1998. That was because I could not see how the claimant could argue with any prospect of success at all in those circumstances that she had earned any right to holiday pay since she had worked her last shift for the respondent. That shift occurred, as recorded in paragraph 30 above, on 1 December 2019.

56 For those reasons, I concluded that the claimant's claim for holiday pay had no reasonable prospect of success and therefore had to be struck out.

Costs

57 The respondent then claimed its costs incurred in defending the claim and in relation to the hearing of 31 May 2022, including through Mr O'Dempsey's attendance on behalf of the respondent.

58 I concluded that the test for the making of a costs order was plainly satisfied. Whether or not the respondent had asked for a costs order, I was in the circumstances obliged by rule 76(1)(b) of the Employment Tribunals Rules of Procedure 2013 to consider whether to make one.

59 I heard submissions from both parties on that question. Mr O'Dempsey's submissions were cogent and forceful, and I was initially minded to make an order for the payment by the claimant of at least a proportion of the respondent's claimed costs. Those claimed costs were on one view relatively modest in the circumstance that there were three claims made, all of which could be

responded to properly only after some careful thought. A schedule of costs was put before me and the total sum claimed was £6,622.50.

60 I therefore heard from the claimant about her means. She was cross-examined by Mr O'Dempsey about her evidence about those means, although there was no documentary evidence before me about her means. The claimant said in oral evidence that she had no money available to her apart from Universal Credit, having been too unwell (by reason of stress, anxiety and depression, caused in part by these proceedings, it appeared) to work for the 9 months before 31 May 2022. The claimant had a house subject to a mortgage but she owed (she said) £14,000 in mortgage arrears and was facing an application in a county court in June of this year for a possession order in relation to her home. Assuming that that was true, that meant that the claimant would be unable to pay anything until after the forced sale of her home (assuming that the equity in the property would exceed the mortgage and the mortgagee's costs incurred in obtaining possession and selling the property).

61 Mr Lewis-Bale urged on me the importance, in relation to the question whether costs should be awarded, of the factor that the claimant felt very strongly that she had been discriminated against because of her race. However, I regarded that factor as being of peripheral relevance only.

62 However, after careful consideration, I concluded that I should make no order for costs. On 31 May 2022 I stated that conclusion and said that I would give my reasons later, in writing. These are those reasons.

63 The starting point in the jurisdiction is that, as stated in paragraph PI[1044] of *Harvey:*

> "the fundamental principle remains that costs are the exception rather than the rule, and that costs do not follow the event in employment tribunals (see *Gee v Shell UK Ltd* [2002] EWCA Civ 1479, [2003] IRLR 82, at paras 22, 35; *Lodwick v Southwark London Borough Council* [2004] EWCA Civ 306, [2004] ICR 884, at paras 23–27; *McPherson v BNP Paribas (London Branch)* [2004] EWCA Civ 569, [2004] ICR 1398, at para 2; *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, [2012] IRLR 78, at para 7)."

64 A further relevant consideration was that it is vital in a pluralistic society that claims of discrimination should normally be determined on their merits for the reasons neatly summarised in the Industrial Relations Law Reports report of the decision in *Anyanwu* ([2001] IRLR 305), namely that:

> "Discrimination cases are generally fact-sensitive, and their proper determination is vital in a pluralistic society. In the discrimination 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."

65 I had denied the claimant that opportunity here. I had done so because in my view the claim should never have been made.

66 I was precluded by the decision (to which my attention was helpfully drawn by Mr O'Dempsey) of Her Honour Judge Eady QC (as she then was) sitting in the Employment Appeal Tribunal in *Smolarek v Tewin Bury Farm Hotel Ltd* (unreported; UKEAT/0031/17/DM; 5 July 2017) from making an order for costs with a view to deterring the claimant in the future from making unfounded claims.

67 The respondent had here procured the ending of the claims by them being struck out. It was therefore saved the cost and inconvenience of what would have been a lengthy hearing on the merits.

68 Taking into account all of the circumstances, I concluded that, despite the facts that (1) the conditions for an order for costs being made were fully satisfied and (2) in my view the claims should not have been made, it would not be appropriate to make an order for costs.

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Employment Judge Hyams

Date: 22 June 2022

SENT TO THE PARTIES ON

30/6/2022

N Gotecha

FOR THE TRIBUNAL OFFICE