Neutral Citation Number: [2023] EAT 41

Case No: EA-2021-000713-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 15/03/2023

Before

MR JUSTICE SWIFT

- -

Between

HHJ Kalyany Kaul KC **Appellant**

- and –

(1) Ministry of Justice
(2) The Lord Chancellor
(3) The Lord Chief Justice **Respondents**

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JESSE CROZIER (instructed by **Edwin Coe LLP**) for the **Appellant**
MATHEW PURCHASE KC (instructed by **GLD**) for the **Respondents**

Hearing date: 3 February 2023

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JUDGMENT

Summary

Practice and procedure – disability discrimination – harassment – victimisation

The Claimant appealed against a decision under Rule 37(1)(a) of the Employment Tribunal Rules, striking out claims of indirect discrimination, victimisation, failure to make reasonable adjustment, harassment, and discrimination arising from disability, on the ground that the claims had no reasonable prospect of success. The claims struck out arose from the way in which grievances had been addressed (but did not concern the substantive outcome of the grievances).

The Tribunal considered whether the Employment Judge's conclusions were consistent with authority: *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 applied. Although caution had to be exercised, Rule 37(1)(a) included the power to strike out a claim because on one or more critical factual issues it has no reasonable prospect of success: *Ahir v British Airways* [2017] EWCA Civ 1392 applied.

In the present case, the Employment Judge had been entitled, as a matter of assessment, to reach the conclusions he had. The need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit. In this case, the claims rested on undisputed events. The matters complained of were apparently ordinary events that might occur in the course of any grievance process. No part of the Claimant's case explained why those events should not be taken at face value. In these circumstances, the decision that the claims had no reasonable prospect of success was one reasonably open to the Employment Judge.

MR JUSTICE SWIFT

A. Introduction

1. The Claimant has brought claims in the Employment Tribunal under section 50 of the Equality Act 2010 ("the 2010 Act"). Section 50 applies to persons holding public offices. The Claimant is a Circuit Judge.

2. In May 2019 she raised two grievances. The first grievance was under the Judicial Grievance Policy (dated November 2018), which applies to complaints made by judicial office holders against other judicial office holders. The Claimant's grievance under that policy concerned the actions of three other judges during the period 2016 to 2018 ("the judicial grievance"). The second grievance was made under the Grievance Policy (dated September 2017) issued by the Human Resources Directorate by the Ministry of Justice. That complaint concerned the actions of three members of staff employed by HMCTS ("the staff grievance"). Both grievances arose from events that had started in November 2015, shortly after the Claimant's appointment as a Circuit Judge. I do not for the purposes of this judgment need to set out the details of the complaints. However, put generally, the Claimant considered the judges had failed properly to support her both during and after a trial that had commenced in November 2015 and then been re-started in January 2016; that one of the judges acted so as to victimise her by reason of previous complaints she had made against court staff; and that actions by court staff had in various way amounted to bullying, harassment and victimisation.

3. The judicial grievance was determined on its merits by a decision dated 7 July 2020, made by Sir Patrick Elias, a retired judge of the Court of Appeal. Sir

Patrick concluded that the grievances against the judges were not made out, and that a significant number of the complaints made were "totally without foundation". The staff grievance has been the subject of two determinations. By letter dated 12 December 2019, Andrew Baigent (Chief Financial Officer for HM Courts and Tribunals Service) decided that the staff grievance was "out of time under the policies" and that in consequence it would not be investigated. The Claimant appealed against that decision. The appeal was considered by Susan Acland-Hood, then the Chief Executive of HM Courts and Tribunals Service. Her decision was set out in a letter dated 14 February 2020. She concluded:

> "… Andrew Baigent's decision that the grievance was out of time was a reasonable decision and that the process he followed to reach it was also reasonable. I uphold his decision that the grievance was out of time."

The appeal therefore failed.

4. The Claimant commenced proceedings in the Employment Tribunal on 29 March 2020. The complaints concerned the way in which the grievances were handled and, in the case of the staff grievance, the conclusion that it would not be determined on its merits because it was "out of time".

5. The Claimant's pleaded case, set out in the Grounds of Complaint may be summarised in this way. *First*, that failure to deal with the staff grievance within a reasonable time amounted to: (a) victimisation (section 27 of the 2010 Act); (b) indirect discrimination on grounds of disability (section 19 of the 2010 Act); and (c) a failure to make a reasonable adjustment (section 20 of the 2010 Act).

This victimisation complaint, and each of the other victimisation complaints referred to below, rests on the premise that the relevant protected act was raising the judicial grievance and/or the staff grievance. *Secondly*, after the grievances had been submitted the Claimant had, by a letter sent on 19 July 2019, been "required" to provide a schedule (one for each grievance) listing the complaints made. The Claimant's case is that this also amounted to (a) victimisation; (b) indirect discrimination on grounds of disability; and (c) a failure to make a reasonable adjustment. *Thirdly*, after the Claimant provided the schedules as requested, the Claimant received a letter dated 30 October 2019 "asserting that [her] grievances might be held to be out of time…", which asked her to set out why they should not. The Claimant's case is that this too was (a) victimisation; (b) indirect discrimination on grounds of disability; and (c) a failure to make a reasonable adjustment. She further claims that the request amounted to discrimination arising from disability (section 15 of the 2010 Act). *Fourthly*, the Claimant's case is that the decision not to determine the staff grievance on its merits amounted to (a) victimisation; (b) indirect discrimination on grounds of disability; (c) a failure to make a reasonable adjustment; and (d) discrimination arising from disability. *Fifthly*, the Claimant contends that the part of Ms Acland-Hood's letter dated 14 February 2020 (the letter that refused her appeal against Mr Baigent's decision) to the effect that, on the information available to her she did not accept the Claimant was disabled for the purposes of the 2010 Act, amounted to harassment on the grounds of disability (section 26 of the 2010 Act).

6. All these claims are resisted by all the Respondents. The Respondents applied to the Tribunal under Rule 37(1)(a) of the Tribunal Rules (Schedule 1 to the

Employment Tribunals (Constitution and Rules of the Procedure) Regulations 2013) that the Claimant's claims be struck out on the grounds they had no reasonable prospect of success. The Respondents also applied for deposit orders under Rule 39 of the Tribunal Rules.

7. The application to strike out was determined by Employment Judge Snelson. It was partially successful. The Judge declined to strike out the complaints based on the decision not to decide the staff grievance on its merits, but concluded that the remainder of the complaints had no reasonable prospect of success, and struck them out on that basis. The Judge's decision under Rule 37(1)(a) is the subject of this appeal. Put in general terms, the Claimant's submission is that on a proper application of Rule 37, as explained in the authorities, the Judge's conclusions that the complaints struck out had no reasonable prospect of success were not conclusions properly open to him.

B. Decision

8. The nature of the case in the Grounds of Complaint is that each event or omission she relies on gave rise to more than one type of claim under the 2010 Act. In his judgment, the Judge considered the Claimant's claims type by type – i.e. the victimisation claims, then the indirect discrimination claims, and so on. I take a different approach in this judgment, taking each event or omission relied on and considering all claims made by reference to it. But this is only for convenience; the difference of approach between this judgment and the Judge's judgment is irrelevant both to the merits of the Judge's decision, and the merits of this appeal.

(1) The delay in deciding the staff grievance

9. The Claimant relies on three periods of delay: (a) from 30 May 2019 to 17 July 2019 (7 weeks), the time between the date the staff grievance was submitted and Mr Baigent was appointed to consider it; (b) from 12 November 2019 to 12 December 2019 (4 weeks), the time between the letter containing the Claimant's representations on whether the grievance had been submitted too late and the date of Mr Baigent's decision that the grievance had been submitted "out of time"; and (c) from 27 December 2019 to 14 February 2020 (7 weeks), the time between the Claimant's letter of appeal against Mr Baigent's decision and Ms Acland-Hood's decision on the appeal.

10. The Judge's first conclusion was that the victimisation claim based on these matters had no reasonable prospect of success: there was no reasonable prospect a tribunal would conclude that the passage of time in the periods relied on amounted to detriment and, even if that was wrong, no reasonable prospect that the delay was because the Claimant had raised the grievance. The material passages in his judgment are at paragraph 32 and paragraph 36.

> "32. Despite Mr Crozier's confident submissions to the contrary, it seems to me that the complaints of delay … framed as they are, obviously fall short of what is required in order to constitute a detriment capable of grounding a legal claim. The periods complained of here were wholly unobjectionable, particularly given the gravity of the subject-matter raised and the complexity of the allegations. As to period i), there had been a very substantial and unjustified delay by the Claimant in bringing her grievances. She presented them as the summer holiday season was approaching. She does not say that the time taken to appoint the investigating officer offended against a published policy, standard or norm. Period ii) was also, in my judgment, entirely reasonable. And period iii), given that it spanned the Christmas and New Year holiday period and that the appeal was intrusted to the Chief Executive, who must be assumed to have had many other responsibilities to attend to, was also beyond reproach. In my judgment there is no reasonable prospect that seen in their proper context, the periods of delay,

> individually or collectively, would be held to constitute detrimental treatment.
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> …
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> 36. Mr Purchase further submitted that, if and to the extent that any detrimental treatment was shown, the victimisation claims should be struck out on the ground that there was no reasonable prospect of the Tribunal finding that any detriment was applied to the Claimant *because* she had done the protected act or the Respondent believed that she intended to, or might do, a further protected act. Had I been against him on the issue of detriment … I would have upheld his submission on the 'reason-why' question. The acts complained of were on their face rational and plausibly explained. Nor is it said that there is any 'background' material which tends to undermine the explanation. Quite simply, there is no sensible basis for suspecting any unlawful motivation (conscious or unconscious)."

11. The Judge's next conclusion was that the indirect discrimination claim based on the same matters had no reasonable prospect of success. This claim was pleaded on the basis that the Respondents applied a provision, criterion or practice that "… it fails or refuses to deal with complaints under the Grievance Policies within a reasonable time" (Grounds of Complaint, paragraph 35(1)(a)); that placed the Claimant at a particular disadvantage because, by reason of her disability, she was either "significantly more likely to suffer anxiety and/or stress from dealing repeatedly with traumatic events forming the basis of her grievance" and/or "at risk of further damage from [her] mental health" (Grounds of Complaint, paragraph 35(2)(a) and (b)); that other judicial office holders similarly disabled, would be subject to the same particular disadvantage which would not apply to a person not similarly disabled; and that provision, criterion or practice was not a proportionate means of achieving a legitimate aim. His reasons, at paragraphs 40 and 43 and 47, were as follows:

> "40. In my view there is no reasonable prospect of the Tribunal finding that [this practice] was applied by any Respondent – in relation to either of the Claimant's grievances or in relation to any other grievance by any other judicial officer holder. I do not need to repeat my observations on detriment under [the victimisation complaint]: there was no unreasonable delay in this case. And I have been shown no basis whatever for the theory of a general practice of failing or refusing to deal with judicial grievances within a reasonable time frame.
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> …
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> 43. The indirect discrimination claim based on [delay] is hopeless not only because [the practice relied on] is untenable but also because, in any event, there is not arguable basis for contenting that the alleged [practice] (a) put, or would put, those who share(d) the Claimant's protected characteristic at a particular disadvantage when compared with others, or (b) put the Claimant at that disadvantage. As explained above in the context of detriment, the delay complained of, if any, was very minor. There is no reasonable prospect of the Tribunal finding that the requisite particular advantage (collective or individual) is made out.
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> …
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> 47. The result of my reasoning so far is that, in the context of indirect discrimination, complaints (1), and (2) and (3) have already fallen away. Had they not I would have struck them out in any event on the basis that such indirect discrimination as was demonstrated resulted from actions that were entirely justified and that there was no reasonable prospect of the case to the contrary succeeding. It is rightly not disputed that the Respondents' 'legitimate aim' was to conduct a fair, proportionate, effective and efficient investigation into the Claimant's complex grievances. If and to extent that there was a modest delay in completing the procedure … these were plainly proportionate means of achieving that aim."

12. The Judge also concluded that the claim under section 20 of the 2010 Act, based on the same alleged practice and the same substantial disadvantage had no reasonable prospect of success. The pleaded case was that the Respondents failed to make the reasonable adjustment of taking "steps to ensure that the Claimant's grievances and the steps in the grievance process were dealt with

reasonably promptly" (Grounds of Complaint, paragraph 39(1)). The Judge concluded this claim had no reasonable prospect of success (a) because the practice relied on had not been applied (Judgment, paragraph 50); (b) because on the facts there was no substantial disadvantage (Judgment, paragraph 51); and (c) because the adjustment contended for was not reasonable (Judgment, paragraph 54).

13. Thus, the Judge dismissed all the claims relying on the complaint that consideration of the staff grievance had been delayed.

14. The Claimant advances three submissions. Two are to the effect that the Judge applied incorrect principles when dealing with some aspects of these decisions; the third is that the decisions the Judge made on matters of fact and matters of assessment were taken too soon – that decisions on such matters should have awaited the usual course of litigation, including disclosure and the final evidential hearing.

15. The first submission concerns the conclusion (on the victimisation claim) that there was no reasonable prospect that a Tribunal would conclude there had been detriment. Mr Crozier submitted that the Judge had approached the issue on a wrong basis because it was possible for a complainant such as the Claimant "to have a reasonable sense in all the circumstances that they have been subjected to detrimental treatment" when a staff grievance commenced at the end of May 2019 did not reach its conclusion until February 2020. I do not accept this submission because it assumes that deciding what counts as detriment for the purposes of a victimisation is not an entirely objective exercise. That assumption is at odds with the conclusion reached by the House of Lords in

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. The conclusion in that case was that a detriment exists "if a reasonable worker would or might take the view that the treatment accorded to her had in all the circumstances been to her detriment": see, per Lord Hope at paragraph 35, where he described the test as a "test of materiality". Mr Crozier relied on the judgment of this Tribunal in *Warburton v Chief Constable of Northamptonshire Police* [2022] ICR 925, in particular at §51 of that judgment where it is suggested that the standard that a reasonable worker "might" take the view that treatment was a detriment means the test is "not wholly objective". To the extent that that reasoning is inconsistent with *Shamoon*, it cannot stand. A standard formulated by reference to the notion of a reasonable worker is an objective standard. The "would" or "might" in Lord Hope's formulation go only to the threshold that must be passed; when attached to the notion of a reasonable worker "might" is no less objective than "would". Thus, in the present case, the Judge was correct to approach the question of detriment objectively, and to consider on that basis whether there was any reasonable prospect at that this part of the claim would succeed.

16. The Claimant's second submission also concerned the conclusion on detriment. Mr Crozier submitted that the Judge failed to take the Claimant's case at its highest because he disregarded the possibility that the delay relied on was the consequence of "unlawful motivation" (see the Judgment at paragraph 31). The requirement to take a Claimant's case at its highest required the Judge to approach matters on the basis of the facts relied on by the Claimant (which in this case were not in dispute), to identify the inferences the Claimant sought to draw from those facts, and then to consider whether there was reasonable

prospect that that case would succeed. In this case the Judge made no error because it was no part of the Claimant's case that there had been "unlawful motivation". No such point is referred to in the Grounds of Complaint and no such matter is a necessary element of a victimisation claim. Taking a case at its highest does not require a Tribunal to speculate on a case that a claimant might have advanced, but has not advanced.

17. The Claimant's third submission on the delay-based claims is that the Judge's various conclusions of fact and assessment were premature. There is obvious close connection between all these findings: the case set out in the Grounds of Complaint relies on the same delay to found various different legal claims. Three of the Judge's factual findings concerned whether the delay relied on was (put generally), prejudicial. He concluded: (a) that it did not amount to a detriment for the purposes of the victimisation claim; (b) that it gave rise to no disadvantage for the purposes of the indirect discrimination claim; and (c) that it resulted in no substantial disadvantage for the purposes of the reasonable adjustment claim. The Judge also considered the reason why the delay occurred, for the purpose of the victimisation claim: was it "because" the Claimant had done a protected act. Further, for the purposes of the indirect discrimination claim and the reasonable adjustment claim, the Judge concluded that there was no reasonable prospect that a tribunal would conclude there was a practice of delay, and that even if such a conclusion were reached, there was no reasonable prospect a Tribunal would not conclude that such a practice was a proportionate means of achieving the legitimate aim of a fair determination of the Claimant's grievance.

18. The power at Rule 37(1)(a) to strike a claim out on the ground it has no reasonable prospect of success is not limited to claims that cannot succeed as a matter of law. The Rule, as made, contains no such limitation. This is clear from the authorities: see for example *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 per Maurice Kay LJ at paragraph 27. However, the authorities are equally clear that the scope for striking out a claim on the ground that there is no reasonable prospect that it will succeed on one or more critical issues of fact is limited. The reasons for this require little explanation. A strike-out application is a means of summary determination. When the application is made the litigation process will be some way from completion: disclosure may not have occurred (that was so in the present case); no evidential hearing will have taken place. All this being so, there is a risk that any conclusion that there is no reasonable prospect of success on a material matter of fact will be premature, a risk that something that might emerge later in the litigation might wrong-foot what at the time of the strike-out application appeared to obvious.

19. The authorities therefore urge caution. In *Ezsias*, Maurice Kay LJ accepted a submission that the standard set by this part of Rule 37(1)(a) would be met if the prospect of success on a matter (be it fact or law) was "merely fanciful" (see paragraph 26 of his judgment). This is of a piece with statements by other judges in other contexts to the effect that the simple hope that something might come up is not sufficient reason to refuse an application to strike out or refuse an application for summary judgment: see per Megarry VC *Tennant v Associated Newspapers* [1979] FSR 298 ("You do not get leave to defend by putting forward a case that is all surmise and Micawberism."); per Potter LJ in *ED and F Man Liquid Products Ltd v Patel*, at paragraph 10 ("The court [does

not have] to accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance to factual assertions made, particularly if contradicted by contemporaneous documents. If so, issues which are dependent on those factual assertions may be susceptible of disposal at an early stage …"); and per Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm), at paragraphs 21 – 22.

20. The need for caution applies equally to questions of inference as questions of primary fact. In cases where the 'reason why' question is the premise for success (including various discrimination claims arising under the 2010 Act), a court needs to think carefully before curtailing its opportunity to discover, examine and evaluate the primary facts, since those are the processes that equip it to decide which inferences relevant to the reason why question can fairly be drawn. This supports the long-recognised strong public interest that discrimination claims are thoroughly considered: see per Maurice Kay LJ in *Ezsias* at paragraphs 30 – 32; and *Anyanwu v South Bank Student Union (Commission for Racial Equality intervening)* [2001] ICR 391 per Lord Steyn at paragraph 24, and Lord Hope at paragraph 37.

21. But, all this notwithstanding, the power to strike out a claim because on one or more critical factual issues it has no reasonable prospect of success, remains. In *Ahir v British Airways* [2017] EWCA Civ 1392 Underhill LJ stated as follows:

> "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 for liability being established, and also provided they are keenly aware of the danger of reaching such 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, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for making of a deposit order, which is that there should be 'little reasonable prospect of success'."

22. In that case the claimant had been disciplined and dismissed. The employer said this was because it had found out that the claimant had provided false information on his job application. The claimant's case was that the decision to dismiss was victimisation and that he had been dismissed because he had raised a complaint under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. The Tribunal struck out the victimisation claim. At paragraphs 18 – 23 Underhill LJ said this:

> "18. For present purposes … it was enough if the appellant could prove that any one of the individuals involved in the process was motivated to a significant extent by his having done any one of the three protected acts on which he relied … On the face of it, none of the relevant individuals had any knowledge of these matters, let alone was motivated by them. On the face of it, this was a case of dismissal for the dishonesty involved in the appellant having submitted a CV which gave a false account of his departure from Continental Tyres.
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> 19. I have, of course, twice used the phrase 'on the face of it'. That invites the obvious repost that the whole problem with a strike-out is that the appellant has no chance to explore what may lie beneath the surface, in particular, by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been the real story, or be it (as I emphasise) they are not yet in a position to prove it.

20. The appellant picked up that gauntlet. It was his case, advanced in his particulars of claim and also in correspondence with the Tribunal prior to the strike-out hearing seeking disclosure of documents and telephone records, that a BA employee in the legal department [Mr Deol] was already aware of the circumstances of the appellant's departure from Continental Tyres and had a copy of the Employment Tribunal judgments; that he had in that knowledge sent that anonymous letter to the HR department; that he was motivated by one or more of the protected acts. There was, as he put it, a "well laid plan" to get rid of him as a troublemaker. All this was summarised by the employment judge at paragraph 16 of the reasons and to some extent in paragraph 21.

21. That 'case theory' is not only speculative but highly implausible. The appellant says that it is supported by the coincidence of the timing – that is, that the letter was received so soon after the two incidents of January 2014 – and that the speed at which it was responded to was also suspicious. It was 'as if they were expecting it'. These are not in the least cogent points. It is possible there was some connection between the incident on 18 January and the sending of the letter – that is, it may have well been sent by someone involved in that incident or associated with them – but that is very different from saying that there was reason to believe it was Mr Deol who had sent it. There is nothing in the least surprising in the BA treating seriously an allegation that an employee, especially one with air side clearance, has been dishonest in the account given in of the circumstances in which they left their previous employment.

22. After reviewing all that material, the employment judge at paragraph 22 of his reasons said this:

> "Having considered the material currently before me and having considered what the claimant accepts was correct and what he puts forward as a challenge to the respondent's stated case I am unable to conclude there is any prospect of success. There were clear grounds for dismissal of the claimant. The matters upon which they are based are not contested, i.e. the provision of a CV containing false information as to the reason for the termination of the claimant's employment with Continental Tyres. The claimant's case appears to rest substantially on the assertion that the respondent sent itself the anonymous letter to trigger an investigation which would reveal true information of which the respondent was already aware as a justification for dismissing. This unlikely assertion cannot be proved by the claimant or evidence identified which might put in doubt the respondent's case."

> 23. Mr Allen criticises the use of the word 'unlikely' at the end of that passage. He says that 'unlikely' is not enough. It might perhaps justify the making of a deposit order, but it is not the same as a finding that the claimant had no reasonable prospect of success. Likewise, it was unfair to rely on the absence of 'evidence' at this stage. The stage for evidence had not yet arrived. I do not believe that that is a fair criticism of the paragraph in question. In my view, it is clear, reading it as a whole, that the employment judge did indeed, and wholly unsurprisingly, find that there was no reasonable prospect of an Employment Tribunal accepting the basis at which the appellant's case was being advanced. That was partly because of its inherent implausibility, which is no doubt what he had in mind with the reference to likelihood, and partly because the appellant could point to no material which might support it, which is all I think by the phrase 'in evidence identified'."

I have referred to Underhill LJ's reasons at length because they make it clear that the need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit.

23. One further matter to consider is the approach this Tribunal should take on an appeal against a decision to strike-out when the submission asserts error of law in the sense that the Employment Tribunal has reached conclusions not reasonably available to a tribunal properly directing itself on the law. In this appeal, the submission is that the Judge was wrong to reach the various conclusions of fact on the claims based on delay in that those conclusions are inconsistent with the approach required by the authorities on applications under Rule 37(1)(a); that a proper application of the principles set out in the authorities required that the determination of these matters of fact should be made only once the litigation had run its usual course, up to and including a final evidential hearing.

24. Mr Purchase KC for the Respondents has taken me to the already well-known paragraphs in *DPP Law v Greenberg* [2021] IRLR 1016, per Popplewell LJ at paragraphs 57-58, that emphasise that decisions of Tribunals must be read fairly and as a whole. An appeal court must have well in mind that it is a virtue for a Tribunal to give its reasons simply, clearly and concisely. Decisions should therefore be subject to sensible evaluation, not "pernickety critiques" or over-analysis. See also on this point, *Brent LBC v Fuller* [2011] ICR 806 per Mummery LJ at paragraphs 29- 30. These are all important matters. But I do not think they are specifically on-point in this appeal. Whether or not it is premature for a question of fact to be determined on an application under Rule 37(1)(a) is, in the first instance, a matter of evaluation for the Employment Tribunal. The usual position on appeal is that this Tribunal will only rarely interfere with an Employment Tribunal's assessment of fact. Typically, this is because the Employment Tribunal has made its assessment having heard live evidence. However, that will rarely, if ever, be the position when an appeal is against a conclusion on an application under Rule 37(1)(a). This is not to say this Tribunal can or should simply step into the shoes of the Employment Tribunal – that would amount to ignoring the jurisdiction provision in section 21(1) of the Employment Tribunals Act 1996: an appeal lies only on "any question of law". However, because the Employment Tribunal's conclusions on questions of fact were not the consequence of an assessment of live evidence, this Tribunal may look at the matter more closely. The question remains the same: was there an error of law? But the fact that the Employment Tribunal had had the advantage of seeing and hearing witnesses is no longer part of the equation.

25. Applying that approach, the Judge's conclusions on the delay issues were all reasonably open to him. There were no relevant disputes of fact. The periods relied on as periods of delay were common ground. So far as concerns the conclusions on detriment, and disadvantage, and substantial disadvantage, what was required was assessment of a very straightforward scenario. The facts were ordinary, and of themselves called for no particular explanation. The Claimant's case did not rely on any further matters to suggest that the facts she relied on in support of the delay claims were anything other than common-place. All this being so, it was open to the Judge, entirely consistent with the caution the authorities urge, to assess the facts and reach the conclusions he did on whether there was any reasonable prospect that a tribunal would conclude that the delay relied on comprised detriment, disadvantage or substantial disadvantage. The Judge's evaluation was sufficiently supported – see for example his judgment at paragraph 32. His conclusions were supported by reasons derived from common experience. In the context of this case that creates no ground for criticism. This part of the Claimant's case relied only on the assertion that the time taken for particular tasks to be completed amounted to delay. There was no reason why the Judge, could not, quite properly, assess that assertion in the way he did.

26. For very similar reasons the challenge to the Judge's other conclusions on the delay complaints also fails.

27. For the purposes of the victimisation claim the Judge concluded there was no reasonable prospect that the claimant would succeed on the 'reason why' question. That conclusion was reasonably available in the context of this case.

To adopt the language of Underhill in *Ahir*, this is a case where there is "an ostensibly innocent sequence of events" and nothing was relied on to suggest that things were not as they seemed.

28. The Judge's further conclusion that there was no relevant 'practice' for the purposes of the indirect discrimination claim and the reasonable adjustment claim was consistent with the general approach explained by the Court of Appeal in *Ishola v Transport for London* [2020] ICR 1204, per Simler LJ at paragraphs 38 – 39. He made no assumption that evidence of a one-off decision could not show the existence of a practice that would be applied to future similar cases. The conclusion the Judge reached that there was no such practice was an evaluation of fact, but the conclusion that there was no reasonable prospect that a Tribunal would conclude there was such a practice was reasonably open to him. Here too, what the Claimant relied on can be an all too common incident of working life. Any Employment Judge would know very well, from his own experience, that on some occasions delay occurs while on others it does not. The Claimant relied on nothing to suggest that here the explanation lay in anything other than the ordinary unpredictabilities of a workplace. The Judge reached the conclusion he did, no doubt satisfied that there was no realistic prospect that anything more would emerge if the matter continued to trial. This too was a conclusion he was entitled to reach.

29. For the purposes of his conclusion on justification, the Judge assumed that a practice of delay did exist. No point is taken against the way in which the Judge formulated the relevant legitimate aim. There is no identifiable error in his conclusion that there was no reasonable prospect that a tribunal would not

conclude the passage of time in this case was a proportionate means to achieving that aim. On this matter too, there was no relevant dispute of fact and nothing in the Grounds of Complaint to suggest that the ordinary matters relied on were something other than they seemed.

(2) The claims arising from the 19 July 2019 letter (the schedule claims)

30. On 19 July 2019 Maureen Gillespie, (senior case worker Judicial HR) wrote to the Claimant's solicitor as follows:

> "… To assist in providing [Sir Patrick Elias] and HMCTS with as much information as possible it would be helpful if [the Claimant] could provide a table (Scott Schedule) setting out for each grievance raised:
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> 1. The parts of the chronology provided relevant to each grievance;
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> And the following information:
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> 2. The specific act relied on;
> 3. The date;
> 4. Brief details of what happened, identifying the person or persons concerned;
> 5. Whether there are any witnesses;
> 6. If the complaint is discrimination, the type of discrimination complained of, and specific details of the discrimination alleged."

31. The Claimant relies on this to pursue claims under the same provisions in the 2010 Act as relied on for the purposes of the delay-based claims. The Judge decided that the 19 July 2019 letter had comprised a request (rather than instruction) to provide a schedule. He concluded it did not comprise a detriment for the purposes of the victimisation claim; and did not give rise to relevant

disadvantage for the purposes of the indirect discrimination claim; and did not amount to substantial disadvantages for the purposes of the reasonable adjustment claim. His reasons for these conclusions were as follows:

> "33. In my judgment it was also plainly no detriment to the Claimant to invite (not compel or require) her to clarify and improve her case by identifying her core allegations in an orderly fashion by means of a schedule … It is said that on her behalf that doing so subjected her to the pain of having to 're-live' the experiences complained about. But that is what inevitably happens when a person raises a grievance and invites an independent authority to investigate it. Mr Crozier submitted that the Claimant should have been asked to give further particulars rather than prepare a schedule. With respect to him, I do not follow that argument. A schedule serves as a means of *distilling* from a longer narrative the central points relied upon. By contrast, a request for particularisation seeks to draw out fresh detail and any response will if anything tend to *expand* the case to be considered and thereby call on the responder to 're-live' not only the events already deposed to but also new matters which the request is directed. The assertion of detrimental treatment … has no reasonable prospect of success. Indeed, it is hopeless.
>
> …
>
> 44. … It would not be remotely arguable that a [practice] of requiring complainant judges to produce Scott schedules in support of their grievances, if one was applied, would occasion the necessary group disadvantage (the comparator group consisting of judges sharing the Claimant's disability), whether or not the strong personal reaction asserted by the Claimant was made out."

32. Applying the approach explained above, the conclusions on all these matters were assessments of fact the Judge was entitled to reach. In the circumstances of the grievance raised by the Claimant, the request for a schedule – a document aimed at helping clarify the matters complained of – was an entirely unexceptional request. Were the Claimant's own circumstances to be factored

in – she is a very experienced lawyer – that would only serve to make that conclusion all the more obvious. There is no part of the Claimant's case in the Grounds of Complaint that suggests anything that might undermine that conclusion. Thus, on the facts available the Judge's conclusions were properly open to him and there is nothing that undermines his view that there was no reasonable prospect that the Claimant's case on these matters would succeed at trial.

33. The Judge also reached further conclusions on the discrimination claims made in reliance on the request to provide a schedule of the grievance claims. He concluded there was no reasonable prospect a Tribunal would conclude the request had been made because the Claimant had performed a protected act. The same reason applied here as for the delay-based claims. See the passage set out above (at paragraph 10) from paragraph 36 of the Judge's judgment. This was an evaluation he was entitled to make.

34. Next, the Judge concluded there was no practice of requiring persons who had raised grievances to provide schedules of their complaints. This was relevant both to the indirect discrimination claim and the reasonable adjustment claim. His reasons were as follows:

> "41. … As I have noted, there was no 'requirement' to supply a Scott Schedule in the Claimant's case, only an invitation to do so. Nor is there any foundation for the assertion of a general practice of requiring judicial office holders to serve Scott Schedules. Common sense suggests that such a requirement (or invitation) would not ordinarily be applied without a prior assessment that it is needed in order to clarify the complaints. The claim based on [this practice] has no reasonable prospect of success."

This too was a conclusion properly available at the stage of the Rule 37(1)(a) application. Whether there was a practice was a question of fact, requiring assessment of the Claimant's pleaded case. At face value, the existence of such a requirement was unlikely. The much more likely position was the one set out by the Judge at paragraph 41 of his judgment. The Claimant's Grounds of Complaint referred to no matter that suggested otherwise; the Grounds did no more than assert the existence of a practice. The conclusion that there was no such practice was an entirely unsurprising conclusion. The Claimant pointed to no reason why her case on this point has any reasonable prospect of success other than the possibility that by the time of the trial something might turn up. That does not identify any error of law affecting the conclusions the Judge reached.

35. The Judge further concluded that if any such practice did exist, it was justified, a finding relevant both to the indirect discrimination claim and the reasonable adjustment claim. He concluded that a practice of requiring a person raising a grievance to set out a schedule of the points raised was a proportionate means of achieving a legitimate aim of an effective and efficient determination of the Claimant's grievance. Given the apparent ordinariness of the practice the Claimant identified and relied on, and given also the absence of anything in the Claimant's case to suggest a reason why a request for a schedule in her case was anything other than an ordinary request, the Judge's conclusion on justification, that there was no reasonable prospect that the Claimant would succeed, was a conclusion properly open to him.

36. On all these matters, the Claimant's submission to the contrary is that to reach the conclusions he did, the Judge made findings of fact, and the findings he made were premature. The Judge did make findings of fact but there is no prohibition against making findings of fact on the occasion of a Rule 37(1)(a) application. The question that is key, so far as concerns the claims based on the schedule, is whether there was anything in the circumstances of the claim to require the conclusion that Judge's own conclusions were premature – that he ought not to have concluded that these aspects of the claim had no reasonable prospect of success. The reasons given by the Judge are sufficient to demonstrate that the answer to this question is 'no'.

(3) The claims based on the request to make representations on the 'out of time' issue.

37. On 30 October 2019 Michelle Bayley, a senior case worker at the Judicial Office wrote to the Claimant's solicitor stating:

> "Sir Patrick Elias (judicial grievances) and Andrew Baigent (staff grievances) have reviewed the documents and have asked me to write to you. They have asked the [Claimant] for her response on why she did not raise a formal grievance sooner and why the grievances shouldn't be treated as out of time.
>
> In this respect, the Judicial Grievance Policy states:
>
>> "2. It is in the interest of all concerned that matters dealt with in an informal and formal basis are resolved as quickly as possible. It is intended that the actions described below for dealing with a complaint should be taken with due speed and as soon as is reasonably practicable after the incident has occurred and certainly within three months of its occurring or, if the complaint is about a series or pattern of incidents, the latest incident."

> Similarly, the Informal Resolution Procedure for complaints by Judicial Office – Holders against MoJ staff states:
>
> > "1. … It is in the interests of all concerned that matters dealt with in an informal basis are resolved as quickly as possible. It is intended that the actions in dealing with a compliant should be taken with due speed and as soon as reasonably practicable after the incident has occurred and certainly within three months of the incident occurring."
>
> The Ministry of Justice Grievance Policy and Guidance states:
>
> Page 7: "Employees will…raise problems such as complaints, criticisms and misunderstandings openly with your manager, and in a timely fashion"
>
> Page 26: "If it is not possible to raise a grievance informally you should raise the matter formally in writing and without unreasonable delay."
>
> We appreciate that it may take [the Claimant] time to respond to this request but would be grateful if it could be dealt with as quickly as possible."

38. The Claimant's third group of claims arise from this letter. For the purposes of the victimisation claim two detriments are identified: (a) "asserting" that grievances "might be held to be out of time"; and (b) "requiring the Claimant to justify why her grievances should not be treated as out of time", in each case five months after the grievances were commenced and only after requiring preparation of the schedule. In addition, the 30 October 2019 letter also gives rise to (a) a claim of indirect discrimination; (b) a reasonable adjustment claim; and (c) a claim of discrimination arising from disability (section 15 of the 2015 Act). The starting point for all these claims is the Claimant was "required… to justify why her grievances should not be treated as out of time".

39. The Judge's first set of conclusions was that he did not consider the claims of detriment (for purposes of the victimisation claim), disadvantage or substantial

disadvantage (the indirect discrimination claim, and the reasonable adjustment claim, respectively), or unfavourable treatment (the discrimination arising from disability claim) had any reasonable prospect of success. Two passages in the judgment set out his reasons:

> "34. … the Claimant's case on detriment was, as I have said put in two ways. First, it was oppressive and unfair to raise the question of the time taken to bring the grievances at all. Second, that treatment was compounded by the way in which the issue of time was raised and specifically by including in the letter of 30 October 2019 the suggestion that the grievances were "out of time". Here again, I find the Claimant's case unsustainable. It was obviously not merely permissible but right to ask her to put forward a good reason for considering her exceedingly stale complaints. The proposition that merely asking the question was capable of amounting to an actionable detriment strikes me as extraordinary. Nor is the use of the words "out of time" remotely capable of elevating and entirely unobjectionable enquiry into an actionable wrong. The sense conveyed was clear: comment was invited on whether the grievances should be rejected *in limine* for having been raised too late. There was no suggestion of a formal, exclusionary time bar. There was no deception or attempted deception. There is no reasonable prospect of the tribunal fining a detriment.
>
> …
>
> 45. … I am satisfied that the indirect discrimination claim dependent upon [the out of time contention] has no reasonable prospect of success because there is no arguable disadvantage (group or individual) in being given the opportunity to defend the late presentation of a grievance and argue in favour of it being considered on its merits despite the delay. Accordingly [the complaint on the out of time issue] pursued as a claim for indirect discrimination, has no reasonable prospect of success."

40. The Claimant's submission on these matters is that the Judge reached premature conclusions on fact-sensitive matters. I disagree. The Judge's conclusion that this part of the Claimant's case had no reasonable prospect of success does not disclose any error of law. The request in the 30 October 2019 letter that is the

premise for this group of complaints was not an unusual request. Nor was it a request that was out of keeping with either of the grievance procedures; both place emphasis on timely resolution of complaints, and that brings with it an expectation that the complaints themselves would be raised promptly. Mr Crozier referred to an email of 27 February 2018 sent to the Claimant by Iain McKerow a Judicial HR Regional Advisor the which includes the following:

> "Please find attached the policy covering grievances between members of the judiciary and HMCTS/MOJ Staff.
>
> I think the policy is fairly straight forward. Although, I have read through the document and I am not sure if gives us anything terribly useful in the context of the circumstances described yesterday, as the outcomes do seem focused on resolving ongoing issues. (sic) Having said that there is no formal time limit but I think the time lag just narrows down the range of (relevant) outcomes (see page 7)."

41. There is nothing in this that makes the request in the 30 October 2019 letter out of the ordinary, in any way. Moreover, the request in that letter was reasonable. It simply gave the Claimant the opportunity to deal with a matter that was, by reference to the provisions of each grievance procedures, a material matter, and which she had not previously addressed. On this analysis, the request was not any form of detriment or disadvantage but rather gave the Claimant the opportunity to be heard on a point. Mr Crozier suggested that the use of the word "out of time" was in some way inherently prejudicial. He was unable to explain why this was so, and I can see no reason to consider those words, *per se*, evidence obvious detriment or disadvantage. They are ordinary words carrying no significance beyond their ordinary meaning. Overall therefore the no reasonable prospect of success conclusion on these matters was not

premature. There was nothing in the circumstances of this case that should have caused the Judge to wait and see.

42. The same applies to the Judge's conclusion on the victimisation claim that the request in the 30 October 2019 letter was not because the Claimant had done any protected act (in this case raising either of the grievances). There was nothing in the circumstances raised by the Claimant that prevented the Judge from concluding that this part of the victimisation claim had no reasonable prospect of success. The Judge was clearly of the view that this part of the claim was speculative and, given the way the case was put in the Grounds of Complaint that was a conclusion reasonably available to him.

43. The Judge reached further conclusions on the claims based on the 30 October 2019 letter, that any requirement that persons raising grievances provide reasons for delay was justified (for the purposes of the indirect discrimination claim) and that the adjustment contended was not (in the context of the reasonable adjustment claim) a reasonable step. See the judgment at paragraphs 47 and 54. These conclusions are different sides of a single coin: each is to the effect that notwithstanding the legitimate aim of a fair and effective and efficient consideration of the Claimant's grievances, the submission that it was not appropriate to ask the Claimant to address whether her grievances had been commenced to late had no reasonable prospect of success. These were conclusions of fact reasonably open to the Judge. Requirements that grievances should be raised within a reasonable time are common, and exist for obvious good reason.

(4) The harassment claim

44. The final part of the Claimant's claim dismissed as a result of the Rule 37(1)(a) application, was a claim for harassment based on a passage in the letter dated 14 February 2020 from Miss Acland-Hood dismissing the Claimant's appeal against Mr Baigent's decision on the staff grievance.

45. The letter of appeal (dated 27 December 2019) had included the following, under the heading "Disability discrimination":

> "As noted previously [the Claimant] continues to suffer ongoing issues with her mental health; it is averred as a result of the events forming the subject of her grievances. She is disabled for the purposes of Equality Act 2010.
>
> The refusal to investigate is, in and of itself, a further act of disability discrimination. It places [the Claimant] at a substantial disadvantage, as you know or ought reasonably to know, because the lack of an investigation and resolution will cause her (and would cause others with her disability) greater anxiety and distress than an individual that is not disabled. It is averred both that the decision cannot be justified and it would be a reasonable adjustment for HMCTS to investigate in the circumstance."

In her letter, Miss Acland-Hood replied as follows:

> "Finally, your letter states that the refusal to investigate is an act of disability discrimination, which places the [Claimant] at a substantial disadvantage because the lack of investigation and resolution would cause her (and would cause others with her disability) greater anxiety than would be caused to an individual who is not disabled; and that investigation would be a reasonable adjustment.
>
> I am not in a position to accept that [the Claimant] is disabled by reason by what is described as "ongoing problems with her mental health". Notwithstanding that, I do not agree that it would be a reasonable adjustment for HMCTS to modify its approach, to investigate a grievance which is considered to be out of time. Taken to its logical extreme, this argument appears to suggest that, where an individual is likely to respond more negatively than others to any decision of event because of their disability,

> matters should be decided in their favour as a "reasonable adjustment" I do not find this argument persuasive."

This response is the premise for the harassment claim.

46. By section 26(1) of the 2010 Act, A harasses B if A engages in conduct related to a protected characteristic and the conduct has the purpose or effect of either violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In the Grounds of Complaint, this claim is put as follows:

> "42. Further, or alternatively, the Respondent harassed the Claimant by Ms Acland-Hood's unwanted conduct relating to disability in making the statement referred to [that she was "not a position to accept that the Claimant is disabled by reason of what is described as ongoing problems with her mental health"], for which the correspondent is vicariously liable, and which had the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant."

Therefore, the claim rests only on the statement made in the 14 February 2020 letter.

47. The Judge struck out this claim for the following reasons:

> "I agree with Mr Purchase that this claim is the most obvious candidate of all for a striking-out order. I regret that the Claimant has not thought better of persisting with it. Self-evidently, declining to accept that her condition amounted to a disability under the 2010 Act was incapable of constituting and act of harassment. Equally self-evidently the measured, courteous language in which Miss Acland-Hood expressed herself could not render the innocuous message unlawful owing to the terms in which it was couched. The complaint of harassment is hopeless and must be struck out as having no reasonable prospect of success."

48. The Claimant submits that the Judge did not address 'purpose': had Miss Acland-Hood acted with the purpose of violating the Claimant's dignity or creating an intimidating etc. environment? She further submits that the Judge failed to take this claim at its highest by not taking account of her perception of the statement in the letter.

49. I do not accept the first part of this submission. The reasons at paragraph 59 of the judgment do consider this issue: that is necessarily inferred from the description that the letter is in "measured, courteous language" and the reference to the message being conveyed as "innocuous", i.e. that in the absence of evidence to support the Claimant's assertion that she was disabled for the purposes of the 2010 Act, Miss Acland-Hood approached the appeal on the assumption the Claimant was disabled. As to the latter point, the Claimant's only case was that what was in the letter spoke for itself, and that what was said in the letter amounted to harassment. The Grounds of Complaint advanced no case by reference to Claimant's 'perception' of what was said in the letter. Overall, the Judge was undoubtedly right to conclude that this harassment claim was a demonstrably weak claim. *In Land Registry v Grant* [2011] ICR 1390, the Court of Appeal stated that the language used in the statute to describe what amounts to harassment, emphasises the gravity of the conduct necessary and that those words must be given their ordinary meaning so that their significance should not be cheapened (per Elias LJ, at paragraph 47). Applying that guidance to the circumstances of this Claimant's claim, the Judge was not merely entitled to conclude that the claim based on the passage in the 14 February 2020 letter had no reasonable prospect of success, he was clearly right to do so.

C. Conclusion

50. For these reasons the Claimant's appeal is dismissed. Throughout his submission for the Claimant, Mr Crozier emphasised that decisions that a claim has no reasonable prospect of success on its facts should be decisions more rare than common. He was right to do so – that is the clear tenor of the authorities, all of which identify the caution Tribunals must apply when dealing with Rule 37(1)(a) applications. However, that submission on its own, is not sufficient for his purpose: the strength attaching to it must be measured in the specifics of the case in hand. It is not at all surprising that the Judge considered the Claimant's claims in this case to be weak claims. The claims he struck out rested on undisputed events (the periods of delay, the requests in the 19 July 2019 and 30 October 2019 letters, and the passage in the 14 February 2020 letter), which at face value, were all entirely ordinary matters. The Claimant's Grounds of Complaint simply asserted – in terms that can only be described as formulaic – that each event gave rise to a series (in some instances, the same series) of causes of action under the 2010 Act. The Grounds of Complaint provided little if anything at all to explain why the events relied on ought not to be accepted at face value. Were they to be accepted at face value the claims based on those events would envitably fail. In these circumstances, the Judge's factual conclusions were permissible; the submission that in this case the Judge's conclusions were premature and matters ought to have been leftover to a final hearing rests on no matter of true substance.