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Case No: EA-2020-000251-JOJ

EA-2020-000597-JOJ

EA-2021-000495-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 May 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MS S SUALLY

Appellant

- and -

HM REVENUE & CUSTOMS

Respondent

- -
- -

Ms S Belgrove for the **Appellant**
Mr Henderson for the **Respondent**

Hearing date: 11 May 2023

- -

JUDGMENT

Revised

SUMMARY

Practice and Procedure

The employment judge erred in law in striking out complaints and making a deposit order.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal in respect of a judgment on what were described as preliminary issues at a hearing held on 17 January 2020 before Employment Judge Balogun. The decision was dated 6 February 2020 and sent to the parties on 10 February 2020.

2. Claims of victimisation, direct discrimination and harassment were struck out on the basis that they had no reasonable prospects of success; and a specific allegation of direct discrimination and harassment was subject to a deposit order. In addition, there was some consideration of limitation in respect of a reasonable adjustments claim. The appeal challenges these decisions.

3. In order to understand the matter, it is necessary to consider a little of the background history. The claimant was employed by the respondent from 31 January 2000. She asserted that she had various disabilities, that the respondent failed to deal with them, that she was subject to discrimination because of sex and to disability discrimination and that she eventually resigned on 23 October 2017, in circumstances in which she was constructively dismissed. Her claim form was lodged with the Employment Tribunal on 16 January 2018. The claim form was of excessive length when it was submitted. The claimant was a litigant in person receiving some assistance from her brother. At the time the claim was originally served, there were some 200 pages of documents attached to it. The matter was subject to extensive case management by a number of very experienced employment judges.

4. The matter was first considered at a preliminary hearing for case management on the 31 August 2018 by Employment Judge Barron. He noted that the particulars provided by the claimant were over 200 pages in length which was excessive and that a more concise document was required. Employment Judge Baron provided some information to the claimant about the various statutory claims she appeared to be bringing, although not specifically at that stage referring to a claim of victimisation.

5. The matter next came on for a preliminary hearing before Employment Judge Webster on

28 June 2019. There had been an attempt to clarify the matters, but that had resulted in a document that was still 97 pages long and was in the opinion of the employment judge of a nature that would make it impossible for the employment tribunal to determine the claims. However, the employment judge noted that claims should not be struck out merely because of their length, and at paragraph 7 stated her view that the claimant had been attempting to comply with tribunal orders, but had difficulty in understanding how to put her case together. The employment judge gave explained the components of the claims that the claimant was seeking to bring. Amongst other things, the employment judge noted that there was a complaint that appeared to have been put as a protected disclosure claim, when it was really a complaint of victimisation. The employment judge recorded at paragraph 5 that the claimant asserted that negative things had happened to her in response to her raising concerns about her requirement for reasonable adjustments was not being accommodated. The employment judge made a direction that the claimant provides what was described as an amended grounds of claim but has often thereafter been referred to as further particulars of the claim, that should not exceed 15 to 20 pages.

6. A further case management hearing was listed. The matter came before Employment Judge Freer on 28 October 2019. He noted that a document had been produced that was 18 pages long, although in small type. The employment judge considered that the new document still fell short of properly identifying the claim. Under the heading "Issues", the employment judge set out a history of the matter. The employment judge considered that the claimant's brother, who was assisting her, showed some understanding of the legal concepts and should be in a position to put the matter into a better form. A considerable amount of time was taken in going through the amended grounds, as is set out at paragraph 8 to 10 of the order:

> 8. In an attempt to move this matter on I explained again carefully to Mr Sually, on behalf of his sister, the information required and gave them a good deal of time to go through the further and better particulars and to mark in the margin the types of claims being pursued. At least at the end of that process the parties had a list of further and better particulars with the individual claims identified next to the relevant factual paragraphs. It was also confirmed to Mr Sually the difference between identifying the factual element of the claims being pursued

> and background evidence, in case that clarification was required.
> I then considered that the best way forward in this matter was for the further and better particulars now identified to be converted into a working copy of a list of issues. Accordingly, orders were made to facilitate this process. It is not for the Tribunal or the Respondent to make the Claimant's case for her and she is encouraged, through Mr Sually, to engage with the Respondent prior to the forthcoming preliminary hearing to identify precisely the legal and factual issues to be determined in this matter. The parties are also encouraged in this respect to have high regard to proportionality.
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> 10. It is hoped that at the end of that process it may be possible to identify accurately the Claimant's claims both legally and factually. If not and after four attempts, doubts may arise over whether or not a fair hearing is possible, particularly as a good number of alleged events date back to 2014 and 2016.

7. Annotations were made against sections of the particulars to show what type of claim was asserted. For example, certain matters were marked with a 'V' to record that they were allegations of victimisation. When one looks at the particulars, it is clear that the term victimisation was used to identify the detrimental treatment that the claimant asserted rather than any protected act relied upon. It appears that no particular thought was given at the time of this case management hearing to identification of the protected acts, although they had been identified in general terms by Employment Judge Webster.

8. The claimant could reasonably have assumed that the claims had now been identified, at least in broad terms. They were to be put into a list of issues by the respondent, as was provided by paragraph 5 of the order. A hearing was fixed to consider the respondent's applications for deposit order or strikeout, and it was noted that it was likely at the hearing there would be some further identification of the issues. As I read the Order it appears that EJ Freer considered that good progress had been made in identifying the issues and the applications for strike out or a deposit order were essentially made on the basis that the allegations now asserted had no, or little, reasonable prospect of success, rather than that they were so poorly identified that they could not progress.

9. By this stage there had been extensive case management. The judges of the employment tribunal had gone out of their way to assist a litigant in person who sought to comply with the orders for particularisation and to provide a more succinct document setting out her claim, even though she

clearly had difficulty in doing so. The respondent also was engaging in that process and, after the hearing, sought to put together a list of issues that set out in headline terms the specific detrimental treatment alleged. While some of the summary may have lost the more subtle detail of the complaints, I accept that it was a genuine attempt by the respondent to work with the tribunal and the claimant to move the matter forward.

10. The next stage was the preliminary hearing before Employment Judge Balogun. A draft list of issues had been provided by the respondent. The claimant was not prepared to agree to it, asserting that it did not fully represent what she had set out in her particulars. However, there was a basis upon which the claim could move forward. For example, it would have been possible to note the paragraph of the particulars from which the summarised allegations were taken, so that the claimant would be reassured that the subtleties of her allegations would not be overlooked. The particulars were not excessively lengthy by the standards of cases of this nature, and could have formed a reasonable basis upon which the hearing could proceed.

11. The respondent pursued the applications for strikeout and deposit order, which, with the benefit of hindsight, has had the effect of derailing proceedings that were moving towards a final hearing as a result of the extensive case management efforts of the employment judges who had sought to help the claimant, as a litigant in person, to identify her claims.

12. While I appreciate the decision under appeal is that of a highly experienced employment judge, it is a little troubling that other than referring to the tests in the **Employment Tribunal Rules 2013** ("**ET Rules**"), there was no consideration of the case law about the circumstances in which it is appropriate to strike out claims, or issue deposit orders. Generally, one would have expected a rather more detailed consideration of those matters.

The law

13. Provision is made for the striking out of claims by rule 37 **Employment Tribunal Rules 2013** ("**ET Rules**"):

> "37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a)that it is scandalous or vexatious or has no reasonable prospect of success ..."

14. There is very long-standing and well known authority as to the approach to be adopted when considering strikeout, particularly in relation to claims of discrimination. In **Anya v University of Oxford and Others** [2001] EWCA CIV 405, [2001] ICR 847 the Court of Appeal considered strikeout in a race discrimination claim. Sedley LJ held:

> '21. … If these are to any significant extent racial factors, it will in general be only from the surrounding circumstances and the previous history, not from the act of discrimination itself, that they will emerge. This court and the Employment Appeal Tribunal have said so repeatedly and have required tribunals to inquire and reason accordingly. …
>
> 28. … Evidence of racial discrimination does not have to be overt. Most commonly it is not. The only proven act of potential racial discrimination is not the final allocation of the research post: it is, in Dr Anya's contention, that event in the context of the series of prior events which, as the Employment Appeal Tribunal acknowledges, have been neither proven nor disproven. There is no difficulty in seeing what facts, if they were found, could make out the Appellant's case.

15. In **Anyanwu v South Bank Student Union** [2001] UKHL 14, [2001] ICR 391 Lord Browne-Wilkinson stated:

> '24. … For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university. …
>
> 37. … I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if

given an opportunity to lead evidence."

16. In **Ezsias v North Glamorgan NHS Trust** [2007] EWCACiv 330, [2007] ICR 1126 Maurice Kay LJ stated:

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

17. I summarised what I consider to be the key principles derived from the authorities on strike out in **Cox v Adecco** [2021] ICR 1307:

> 28. From these cases a number of general propositions emerge, some generally well understood, some not so much.
>
> (1) No one gains by truly hopeless cases being pursued to a hearing.
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.
>
> (3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.
>
> (4) The claimant's case must ordinarily be taken at its highest.
>
> (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.
>
> (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.
>
> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become

like a rabbit in the headlights and fail to explain the case they have set out in writing.

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.

31. Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key

> documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.
>
> 32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focused as possible.

18. The parties stated that they accepted that summary.

19. The respondent also referred me to a decision of HHJ Reid in **Croke v Leeds City Council** UKEAT/0512/07/LA in which a decision of an employment tribunal to strike out a discrimination claim when the claimant proved incapable of explaining any link between a protected characteristic and the treatment was upheld. However, that unreported decision has to be seen in the light of what was said by the then President of the Employment Appeal Tribunal, Choudhury J, in **Malik v Birmingham City Council** UKEAT/0027/19/BA and by myself in **Cox**.

20. Provision is made for deposit orders by rule 39 **ET Rules**:

> "39.— (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
>
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order."

21. The test of little reasonable prospect of success sets a lower threshold than that required for strike out. However, deposit orders are not generally appropriate where there are extensive disputes of fact, although they may be permissible in such circumstances. Guidance was given in **Van Rensburg v The Royal Borough of Kingston-Upon-Thames** UKEAT/0095/07.

22. When considering making a deposit order the employment tribunal is required to consider the resources of the party against whom the order is sought. The approach to be adopted was considered by the then President of the Employment Appeal Tribunal, Simler J, in **Hemdan v Ishmail and Others** [2017] ICR 486:

> '10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.
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> 11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience. …

> 16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely *Aït-Mouhoub v France* [2000] 30 EHRR 382 at paragraph 52 and *Weissman and Ors v Romania* 63945/2000 (ECtHR)). In the latter case the Court said the following:
>
> > '36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.
> >
> > 37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …
> >
> > 42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …'."

23. I will now move on to consider the grounds of appeal individually.

24. The first ground asserts an error of law in the decision to strike out claims of direct

discrimination and harassment. These were dealt with at paragraphs 12 to 14 of the reasons:

> '12. The matters complained about under these paragraphs of the draft List of Issues are said to have occurred after the Claimant resigned. They are:
>
> oo. After C resigned Mr Hamer emailed her to ask her to attend a meeting
>
> pp. On 20 November 2017 C received a phone call from Cara Lofthouse who said she had been appointed to investigate her "grievance letter", and she was subsequently sent a P45 which only covered a period of 7 months
>
> qq. On 24 November 2017 Mr Hamer emailed C with policy documents and a form for her to sign.
>
> 13. It was submitted by the Respondent that these acts cannot be pursued as acts of direct discrimination or harassment as they occurred post termination. However, section 108 of the Equality Act 2010 (EqA) prohibits post-employment discrimination if it arises out of and is closely connected to the employment relationship and (my emphasis) the conduct would have contravened the Act if it happened during employment. Similar provisions apply in relation to harassment.
>
> 14. Assuming for the moment that the factual allegations are true, a full tribunal is likely to find that they arise and are closely connected to the employment relationship. However, there is no explanation from the Claimant as to why these matters amount are because of or related to sex/disability. In those circumstances, I find that there are no reasonable prospects of a full tribunal concluding that they would have constituted direct discrimination or harassment had they occurred during employment. The allegations are therefore struck out.

25. The employment judge concluded that the claimant was unable to explain how the alleged treatment could have anything to do with sex or disability so as to constitute direct discrimination or harassment. The more detailed version of those allegations appeared at paragraphs 145 and 146 of the amended grounds of complaint:

> 145. On 20th Nov 2017 at 09:02am, nearly one month after her constructive dismissal letter, the Claimant received a completely unexpected phone call to her personal mobile number from Ms Cara Lofthouse (calling from 07393480645). The Claimant was completely unfamiliar with Ms Lofthouse. Ms Lofthouse claimed that she was an "independent" person who had been appointed to investigate her "grievance letter" and to arrange a meeting to discuss this. During the call Ms Lofthouse let slip that Mr Hamer had appointed her, instructed her and provided her with the Claimant's personal details and contact number. Ms Lofthouse quickly tried to backtrack on what she had revealed and said it was Mr Michael Charles who had appointed her. It turned out that Ms Lofthouse was a HMRC manager based in Euston Tower. The Claimant requested her P45. Ms Lofthouse said this would be

> sent, but this was only sent three months later, received in January 2018. The P45 was also completely wrong and only covered a period of 7 months. This event occurred despite Mr Hamer knowing that the Claimant had mental health disabilities and being in receipt of the Claimant certified medical note for stress at work and the time of her constructive dismissal. – DD, H
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> 146. On 24th Nov 2017, Mr Hamer again directly emailed the Claimant with policy documents and a form which he wanted the Claimant to sign. This caused the Claimant great distress and left her in tears. – DD, H

26. The allegations also stood to be considered in the context of the pleading as a whole, including paragraphs 79, 84, 88, 89, 91, 96, 103, 104, 110, 118, 120, 125, 138 and 140. The claimant complained that she had been treated badly by Mr Hamer in various respects that were asserted to be discriminatory against her, in particular the way in which her requests for reasonable adjustments had been dealt with. Those other allegations of discrimination were permitted to proceed

27. I consider that the employment judge erred in law in striking out a limited part of the allegations concerning Mr Hamer. They formed part of a sequence of events or treatment that the claimant asserted that she had been subjected to by Mr Hamer while working for the respondent that were said to be discriminatory. The allegations that were struck out had to be considered in the context of the allegations that were permitted to proceed.

28. The respondent asserted that the claimant was given repeated opportunities to explain her position. The claimant and her brother, even if he had some understanding of the relevant concepts, clearly struggled to identify their claims orally, but it was apparent from the particulars that the claimant had been directed to supply. The particulars were reasonably succinct and should have been considered in more detail by the employment judge.

29. The respondent contends that only a limited number of allegations were struck out and that the majority of the claim was permitted to proceed which minimises any prejudice to the claimant. That assertion cuts both ways. While the limited nature of the strike out might reduce the prejudice to the claimant, there was relatively little to be gained from striking out a limited part of the claim rather than allowing it to proceed to a hearing in full to be determined on the merits.

30. I consider that the error arose from a failure by the employment judge to direct herself

sufficiently as to the law and the limited reasoning she applied that did not consider the entirety of the pleaded case in sufficient detail. The reasoning did not demonstrate a full perusal of the particulars and the extraction of the overall claim that the claimant was seeking to bring. Accordingly, I uphold ground 1.

31. I also note that there is an overlap between ground 1 and ground 2, which deals with the deposit order. The deposit order was dealt with at paragraphs 9 through to 11 of the reasons. This was another matter involving Mr Hamer. Again, the claimant struggled to explain how the claim was put, although it appears that the claimant did manage to explain that Mr Hamer had long-standing involvement in her concerns at work which included refusal to respect her claim for reasonable adjustments. That was said to be sufficient to show that there was at least some prospect of success in that claim. I find it hard to see why that reasoning would not, at the very least, have applied to the decision in respect of the allegations against Mr Hamer that were struck out

32. I have found the issue of the making of the deposit order the most finely balanced point in the appeal. However, I conclude that on a more detailed consideration of the particulars, the employment judge erred in making a deposit order in respect of this single allegation. There was a sequence of events set out in the further particulars that required consideration at a full hearing. The judge gave insufficient reasoning to explain how she had analysed the full particulars, even in circumstances in which the claimant struggled to explain her case. I have concluded that there was an error of law in making the deposit order.

33. I also uphold ground 3 because I consider that the employment judge failed properly to take account of the claimant's resources. This was dealt with in the reasons for the deposit order, in which at paragraph 3 the employment judge set out the resources of the claimant, noting she had income support of £168 per month and carer's allowance of £286.65, with monthly expenditure of £200 per month, leaving a disposable income of £254.65. The employment judge made a deposit order of £300 to be paid within 28 days. The employment tribunal was informed that the claimant had no savings. On that basis I consider it was an error of law to make a deposit order in a sum that was greater, on

any view, than the claimant's monthly disposable income when the deposit had to be paid within a month.

34. It is also unclear how living expenses were assessed and how, if at all, the employment tribunal took into account the fact that carer's allowance was provided to the claimant because she was caring for her mother.

35. Ground 4 related to some consideration that the employment judge gave to a specific time point, at paragraphs 15 and 16:

> 15. There are 24 separate incidents of 'failure to make adjustments' relied on by the Claimant and they are set out at paragraphs 7 a-x of the draft list of issues. Relying on the case of *Matusuvicz v Kingston Upon Hull City Council* [2009] EWCA Civ 22 and *Abertawe BRO Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 it was submitted on behalf of the Claimant that the allegations were in time because the failure of the Respondent to redeploy her (allegation 7v) was continuous. However, my reading of that allegation: 'In May 2017 Mr Hamer told C that he had liaised with HR and their advice was to place her in the HMRC Priority Mover Scheme' is that it was a positive one off act rather than an omission or inadvertent failure to act as envisaged by the authorities referred to.
>
> 16. The earliest 'failure' relied upon under this head of claim is said to have occurred on or around 25.4.16 and the latest on 5-6 October 2017. As they all pre-date 18 October 2017, they are all out of time. I have therefore gone on to consider whether there are just and equitable reasons to exercise my discretion to extend time. For these purposes, I have focused only on the last incident on 5-6 October 2017 (Paragraph 7x). ...
>
> 18. In the circumstances, I consider it just and equitable to extend time in relation to allegation 7x of the draft list of issues. In relation to the other allegations, the issue that again arises is whether these are part of a series of acts extending over a period, ending with allegation 7x. For the reasons stated earlier, this is a matter that should be determined by the full tribunal. Accordingly, it is not appropriate for me to strike out those claims at this stage."

36. On one reading of the reasons, it might be thought that the judge had already concluded that there was a single one-off failure to provide an adjustment through moving the claimant to alternative work. The claimant has relied on two key authorities, **Kingston upon Hull City Council v Matuszowicz** [2009] EWCACiv 22, [2009] ICR 1170 (see paragraphs 2 and 25) and **Abertawe BRO Morgannwg University Local Health Board v Morgan** [2018] EWCACiv 640 [2018], ICR 1194

(see paragraphs 14 and 15) to challenge that reasoning.

37. Counsel for the respondent, Mr Henderson, stated that he did not contend that there has been any binding finding that there was a one-off act. He suggested that this section should be seen as just a provisional view of the employment judge which will not prevent the claimant seeking to fully argue this point at the full hearing on the basis that there was an ongoing failure to redeploy, potentially extending through to the date of her dismissal or, alternatively, there were a series of different failures to redeploy. On the basis of that concession, I do not need to determine ground 4, but were it to be resiled from, the matter could be subject to an application for reconsideration.

38. The final ground relates to the strikeout of victimisation complaints. This was on the basis that the claimant was unable to set out the protected acts relied upon. Again, regrettably, I conclude that the employment judge erred in so doing in that she failed to consider the material before her, relying solely on the fact that the claimant and her brother were unable to point to protected acts during the course of oral submissions. When one reads the particulars, there are numerous grounds that potentially constitute protected acts bearing in mind the relatively broad definition of victimisation. In broad terms the protected acts had been considered in the previous case management be employment judge Webster. While some of the earlier matters that Ms Belgrove relied upon as potential protected acts may be more challenging for the claimant, they gradually become more obvious potential protected acts, particularly some of the matters referred to in, for example, paragraphs 125 and 126. I note that the claimant also seeks to rely on paragraphs 25, 39, 40, 44, 45, 48, 50, 60, 67, 70, 83, 93, 94, 100, 121, 122, 125, 133 and 143. When the claimant applied for reconsideration she set out the broad headings of the types of protected act she had done.

39. Accordingly, I uphold grounds 1, 2, 3 and 5 and do not need to determine ground 4.

40. It was said for the respondent that this should be seen as a tribunal that had reached the end of its tether in trying to clarify the issues with a claimant who disputed everything and refused to cooperate with the tribunal. It is often a feature of extensive case management that parties can over time become entrenched. Claimants can become fearful that there is an attempt to prevent them

putting forward their case. While I have concluded that orders were made that involved errors of law, overall I consider that the employment tribunal has sought to engage with the claimant and that the respondent has generally sought to assist in that process. The parties must bear in mind the overriding objective, which requires that they cooperate with each other. It is important that the claimant sees the employment tribunal and the respondent as bodies with which she must cooperate to ensure that this matter is brought to a full hearing as soon as practical.

41. It will be for the regional employment judge to determine who conducts any further case management. The respondent will have to consider whether to pursue any further applications in respect of strikeout or for a deposit order, but may well be wise to focus on continuing their attempts to finalise the identification of the complaints including the protected acts for the victimisation claim in their draft list of issues to ensure that this matter can proceed to a full hearing at the earliest opportunity.

42. I am grateful to both counsel for their considerable assistance in this appeal and particularly to Ms Belgrove for the enormous amount of work that she has undertaken under the auspices of Advocate.