EMPLOYMENT TRIBUNALS

Claimant: Ms B Sam

Respondent: Department for Work and Pensions

Heard at: Manchester Employment Tribunal (by CVP)

On: 14 July 2023

Before: Employment Judge Holmes

Representation
Claimant: In Person
Respondent: Ms E Hodgetts (of Counsel)

JUDGMENT ON PRELIMINARY HEARING

It is the judgement of the Tribunal that :

1.The claims at paras. (yy) and (zz) of the List of Issues have no reasonable prospects of success, and are struck out pursuant to rule 37(1)(a) of the rules of procedure.

2. No orders are made in respect of paras. (xx) and (aaa) of the List of Issues.

3. There shall be a further preliminary hearing (before any Employment Judge) for case management of the remaining claims on **25 April 2024** at 2.15 p.m. at **Manchester** by CVP, listed for 2 hours.

REASONS

1. On 6 and 7 March 2023 , the Tribunal heard the respondent's application to strike out claims (3(a – ww) (Issue (1) in the respondent's Skeleton Argument). It determined that save in respect of allegation (ss) , the claims had no reasonable prospects of success, and they were struck out pursuant to rule 37(1)(a) of the 2013 rules of procedure.

2. Reasons were given orally at the time, and, pursuant to rule 62, written reasons were then provided , and sent to the parties on 12 April 2023.

3. Time did not permit the determination of the respondent's remaining application, Issue 2 in its Skeleton Argument, which relates to the claimant's claims of race discrimination outside those already dealt with, which are said by the respondent to lack reasonable prospects of success. Additionally, the respondent has made further application, by email of 10 March 2023, in respect of the particulars the claimant has provided under claim (aaa). This was not, in fact, pursued.

4. The Tribunal, therefore, reconvened on 14 July 2023 to continue the hearing to determine these remaining applications.

5. The claimant again appeared in person, and the respondent was represented by Ms Hodgetts of counsel.

6. The parties made their submissions, and the hearing concluded. Judgment was reserved. The Employment Judge , however, indicated to the claimant that if she wished her means to be taken into account in the determination of whether any deposit orders should be made, and, if so, in what amounts, she should provide the Tribunal of details of her income and expenditure, and any assets and liabilities that she wishes the Tribunal to take into account.

7. The claimant duly did so, and by email of 21 July 2023 she sent to the Tribunal (and the respondent) details of her financial position.

8. That in part , and, in greater part, the Employment Judge's continued involvement in a long running and complex full panel hearing, into which these hearings have been interposed, has delayed the promulgation of this judgment, for which he apologises.

9. By way of recap, by a claim from presented on 2 August 2021 the claimant brings claims of race discrimination, sex discrimination and disability discrimination against the respondent, her former (now, not at the time of the presentation of the claim) employer.

10. At a preliminary hearing held on 25 April 2022 Employment Judge Butler ordered that there be an open preliminary hearing to consider the following:

8.1 Whether acts 2(a)-(ww) (using the numbering on the respondent's list of issues) should be struck out pursuant to Rule 37 because the claimant has no reasonable prospect of success of showing that they are part of conduct extending over a period of time, with the last act being in time and/or that time should be extended on a just and equitable basis. Or whether the claimant should pay a deposit, pursuant to Rule 39, as a condition for pursuing these allegations. [These applications were determined in the last hearing]

8.2 Whether the complaints of race discrimination relating to allegations 2(a)-(nn), (qq)-(rr), (tt)-(ww) and 4(a)-(d) should be struck out, pursuant to Rule 37, because the claimant has no reasonable prospects of success of showing that they were because of her race or related to her race. Or whether the claimant should pay a deposit, pursuant to Rule 39, as a condition for pursuing these allegations.

11. The parties duly prepared for the hearing, the respondent producing a hearing bundle of some 714 pages, and a skeleton argument, and the claimant a witness statement , signed and dated 30 November 2022. These were still before the Tribunal in the postponed hearing on 14 July 2023.

12. No further evidence was heard on this part of the applications. In the interim the claimant by email of 10 March 2023 at 06.23 sent further particulars of the allegations in (xx) and (aaa) . The respondent responded by maintaining its application for an order striking out for failure to comply with the Tribunal's orders for further particularisation in respect of (aaa). The claimant then provided, at 18.01, an email with such further particulars of allegation (aaa) as she could, saying in essence what she contends that the respondent should have done and when.

The respondent's application.

13. The application by the respondent was set out in initially in the Submissions, where the issue was identified thus:

    Issue (2): whether complaints of race discrimination relating to allegations 3(a-nn), (qq-rr), (tt-ww) and 5(xx-aaa), should be struck out because C has no reasonable prospects of success of showing that they were because of her race or related to her race.

14. As the complaints at 3(a-nn), (qq-rr), (tt-ww) have been struck out, the remaining applications before the Tribunal relate to claims 5(xx to aaa) , which the respondent contends should also be struck out, or, in the alternative, deposit orders made.

15. The claims made , therefore, that are the subject matter of this part of the application , are set out in the List of Issues as follows:

    5. Did the following constitute less favourable treatment than was or would be afforded to a person of a different race from C [black British of African descent], because of race?

    (xx) Failing to address the matters at 3(a)-(ww) above; including by taking these matters seriously and addressing these issues in a timely and a fair manner in line with DWP's own policies.

    (yy) The investigator Julie Anderson failing to locate Vicky Boland

    (zz) The grievance decision-maker failing to uphold C's grievances in relation to the matters at 3(a)-(rr) and (ww) above, and in relation to the matters at (ss)-(uu) to the extent that they were not upheld

    (aaa) Failing to offer C any support in a timely and respectful manner; in line with DWP's own policies.

The respondent's submissions.

21. Ms Hodgetts submitted that in relation to these allegations the Tribunal is entitled to have regard to:

(a) The fact that the claimant has not even pleaded a prima facie case of race discrimination; and

(b) In turn, that there is no basis on which a Tribunal could draw an inference, that the acts complained of at were influenced by race. On the evidence provided in the grievance process, it was clearly reasonable for the decision-makers to come to the conclusions they did;

(c) Further, the fact that the claimant still has not provided the information she was Ordered to provide;

highlighting the weakness of the claims , and entitling the respondent to seek a strike-out of those allegations on that separate basis in any event.

22. She relied , as previously upon ***Chandhok v Tirkey***, to support her contentions that there are occasions when a claim can properly be struck out. Where, for instance, "on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic". Again, the race complaints relating to these allegations she submits fall squarely into that category, and it is appropriate to strike out.

23. She referred to paras. 18 and 19 of her Skeleton argument, in which she set out the law in s.136 of the Equality Act 2010 on the burden of proof in discrimination case, and the caselaw of ***Madarassy v Nomura Interntional plc [2007] EWCA Civ 33*** , which confirmed the requirement for a claimant to show more than just a difference in treatment and a difference in status, something more was required.

24. She also referred the Tribunal to ***Anyanwu v South Bank Students Union [200] ICR 391***, and submitted that the claimant had, in her pleadings, or in her further and better particulars, come nowhere near identifying a prima facie case. In essence all the claimant is really saying is that she does not like the outcome of the internal processes that the respondent undertook. Whilst discrimination claims are usually fact sensitive, the time and resources of the Tribunal should not be taken up by cases that are bound to fail.

25. She also referred the Tribunal to ***Ezsias v. North Glamorgan NHS Trust [2007] ICR 1126***, which counsels Tribunals against cases where there are disputed facts, submitting that none these four allegations fall within this category. Allegations 5(yy) and (zz) do not fall into the category of factual disputes. They are undisputed facts, but the claimant has made no link to her race. She needs to do more. The claimant has pleaded nothing that shew could put to Julie Anderson to suggest that her actions were influenced by the claimant's race, such as racist remarks, but she has nothing. The unpalatable truth for the claimant was that because Julie Anderson had reached a different conclusion , the Tribunal can infer that the

reason she did so was the claimant's race. That is not enough, the claimant needs something more.

26. The same, she submitted, applies to allegation (zz). There is a range of responses to grievances, and in one aspect, allegation (ss), the comments made on Facebook by Clark Crilly, was upheld. That undermines the claimant's case that the outcome was influenced by her race. Julie Anderson had been the decision maker , and it would have been perfectly open to her to reject that element of the claimant's grievance. She did not, and the claimant cannot establish the "something more" that she needs to.

27. The investigation was substantial, and the overwhelming weight of the evidence from the interviewees before Julie Anderson was not supportive of the claimant. She is to be judged on the evidence before her. Not only can the claimant not point to "something more", all the evidence was against the allegations that the claimant made. There is no disputed core of facts here, the interviewees told Julie Anderson what has been recorded, so there is no dispute on this.

28. Turning to the allegation at (yy), the failure to locate the witness Vicky Boland, the claimant had raised her allegations about Vicky Boland's comments and actions in a G1 grievance document (pages 253 to 257 of the bundle). The details of the management investigation are at pages 259 to 260 of the bundle. The investigators were told that Vicky Boland had left the respondent's employment, and were unable to locate her from records that the respondent held. The claimant informed them that she believed that she had gone to work for HMRC , based in Bootle. Further attempts to locate her in January 2021were unsuccessful, and it was therefore not possible to progress the claimant's complaint any further. In fact, as the Employment Judge pointed out, the allegation at (yy) in relation to the failure to locate Vicky Boland may be more appropriately directed at Lynne Hornby and Trish Frawley, the two members of the HR Mediation and Investigation Service who carried out the enquiries to locate her.

29. Ms Hodgetts submitted that the issue was not whether the respondent had acted reasonably in its attempts to locate Vicky Boland, but whether the failure to do so was because of the claimant's race. She cited ***Bahl v Law society [2004] EWCA Civ 1070*** in this regard, Unreasonable treatment may give raise to an inference of discrimination, if there is no explanation for it, but here there is.

30. This was another instance of the claimant not liking the findings on her grievance, and saying, without more, that they were discriminatory. The claimant has pleaded nothing at all to justify a prima facie case.

31. Whilst the claimant may argue that these claims are different from those which the Tribunal has struck out, as they involve additional, and disputed , facts , that is not really so.

32. The claim at 5(xx) is of failure to address her grievance in a timely and fair manner. That begs the question, what would be timely? The evidence is that the time period was from August 2020 to April 2021. That appears to be the period that the

claimant means. If so, that is not unreasonable, given how extensive the investigation was.

33. Julie Anderson had been the referring manager, the investigation was carried out by HRMIS, so its pace was dictated by them. The claimant has no positive case on delay. Some 18 grievances came in, and that volume was the likely explanation for the time it took , it would not have been appropriate for management to undertake the task of interviewing everyone. There is no basis for the claimant's claim that any of this was related to her race, and this is deeply implausible, as referred to in ***Chandhok v Tirkie.***

34. Turning to claim 5(aaa), what the claimant had set out in her email of 10 March 2023 reads more like a guide to best practice, which the claimant has extracted from some Policy or Guidance. Even if she is able to establish a departure from those standards, that is not prima facie evidence of any discriminatory reason for her treatment. It comes nowhere near evidence of "something more".

35. There were, as the Tribunal has already found in paras. 10.7 and 10.8, of its Reasons on the earlier application, instances of the claimant telling a manager something, but then not wanting to take the matter further.

36. Ms Hodgetts referred further to ***Ezsias*** cited above. Whereas it was recognised that to strike out would be an exceptional step where the central facts were in dispute, an example of where this may be appropriate would be were the facts that the claimant sought to establish were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. She submitted that was the case here.

37. Later in 2020 the claimant made allegations of sexual harassment or assault. For some weeks management waited for her to pursue a grievance, but she did not. Clare Friend's interview on 8 December 2020 (pages 295 to 298 of the bundle) sets out the involvement that she had, and how she tried to help the claimant advance her complaints about the events in May 2020. It was not until after then that another 17 grievances were received. This was the claimant , not the respondent, failing to address matters in a timely manner.

38. All the evidence shows that the claimant's contentions are at odds with the contemporaneous documents.

39. Ms Hodgetts then addressed the allegations set out at para. 90 of the claimant's Grounds of Claim, at (d) which was now claim "yy", (c), (h) and (i), which are now "xx", or "aaa". Para. 90(e) relates to the grievance process, but was wider than not upholding the claimant's grievances, as it also went to the investigation. She went through these allegations in the List of Issues, identifying that (e) was now "xx", (d) was "yy", (e), (f) and (g) were "zz", and (c) , (h) and (i) were "aaa". The claimant had been represented at the preliminary hearing on 25 April 2022 . Further particulars were ordered to be provided by 6 June 2022. The respondent's request had included that the claimant identify just what should have been done by whom

and by when. The claimant's response is at pages 81 to 88 of the bundle, and was prepared by her legal representatives.

40. The respondent responded on 25 July 2022 (page 89 of the bundle) pointing out that there remained an on-going failure to fully particularise some allegations in the claim.

41. In para.72 of the Amended Grounds of Resistance (page 107 of the bundle) the respondent pleaded that the claimant has still failed to provide this particulars. She had failed to identify what should have been done, when, and by whom.

42. The claimant's email of 10 March 2023 adds nothing. It was not for the respondent to second guess what her case may be. The respondent still does not know, between 2 to 4 years after the events, what the claimant's case will be.

43. It was right to strike out these claims too. They remain inadequately particularised. Rule 37 provides that claims can be struck out where they are scandalous or vexatious , or because of the manner in which they have been conducted, or for breach of the Tribunal's rules or orders.

44. Ms Hodgetts cited ***Bennett v London Borough of Southwark [2002] IRLR 407*** where the need to consider the proportionality of striking out was highlighted, and also ***Bolch v Chipman [2004] IRLR 140*** on the same point.

45. She said the Tribunal had two choices. The first was to strike out these claims, which still left the claimant with other claims that would proceed, albeit these were now some 3 years or some on from the events to which they relate. The second was to afford her one more chance to put the claims in order, but this would make no difference, as the claimant would not be able to do so.

46. Ms Hodgetts then moved on to a different point, that relating to whether any of the claimant's claims were to be struck out under the principle of *"res judicata"* , the legal principle that precludes re-litigation of claims, or issues, which have previously expressly, or by implication, been determined by a Court or Tribunal of competent jurisdiction. She referred the Tribunal to the Supreme Court judgment in ***Virtgin Atlantic Airways Ltd. v Zodiac Seats UK Ltd. [2013]4 All E R 715*** , and the principles set out in the judgment of Lord Sumption.

47. This was , however, not an argument that had been previously been relied upon, or indicated in advance, and Ms Hodgetts did not, in the end, persist in it.

The claimant's submissions in reply.

48. Not being legally qualified or represented, the claimant naturally did not seek to reply on the legal principles, nor was she expected to, those being matters for the Employment Judge to ensure were correctly applied.

49. Rather, she went through the claims which are the subject of the application, and set out her case on why she considers that they do have reasonable prospects of success.

50. In relation to claim (aaa), the allegation that the respondent failed to offer the claimant any support in a timely and respectful manner, and in accordance with its own policies, the claimant's submission was that once the matters were reported to managers, they were expected to respond in a timely manner, but they did not.

51. In relation to claim (yy) , the failure to locate Vicky Boland, the respondent could have tried harder to find her, which she contended had been deliberate, because of the nature of the allegations that she was making, i.e that her grievance related to her race. Julie Anderson was the decision maker, but the investigators had been Trish Frawley and Lynne Hornby. The claimant was contending that the failure to find this witness was because of her, the claimant's, race. The claimant has also referred to the ability of the DWP to trace persons in connection with benefits claims, and how the information she had received was that Vicky Boland was working for HMRC, so should have been traceable.

52. Returning to claim (aaa), the claimant's case is that Claire Friend did say that she would raise a grievance on her behalf. She will feature in this allegation, as will others.

53. The claimant elaborated that the delay in her grievance being dealt with between August and November was something that her trade union had encouraged, as they said the respondent should be allowed more time to conclude it. She believed that this was deliberate collusion between the trade union and the respondent so tat her claims would be out of time. She believed there were connections between the office to which the grievance was sent and the managers about whom she had grieved.

54. The claimant commented upon the witness statement made by Peter Morrisey (pages 462 and 463 of the bundle), but the immediate relevance of this was unclear. He was aware of the allegations that the claimant made, and ow she felt her team were treating her. He gives some evidence of some behaviour of the type that the claimant complains about, but does not relate it specifically to the claimant. he may, to some extent , be considered by the claimant to be supportive of her claims, but he does not, in facts, say he ever witnessed the behaviours fo which she complains being directed to the claimant herself.

55. In relation to claim (zz) , namely that the grievance decision-maker failed to uphold the claimant's grievances, the claimant said that the respondent had tried to "control the narrative" by not allowing someone from a different office to investigate. The two decision makers Julie Anderson and Andy Minnis were affiliated, and this was not fair.

56. HRMIS were based in Blackpool, and were affiliated with the Blackpool office. They had a good relationship with Julie Anderson, whose decision it was to use

them. The claimant had been advised, she accepted , by her trade union throughout her grievance, and accepted that she had not raised with them this allegation of and potential conflict of interest or undue influence upon the investigation.

57. In response to a question from the Employment Judge as to how, if the grievance process was biased against her, and not a genuine one, it upheld one of her grievances in relation to the conduct of Clark Crilly, the claimant said that she believed that the respondent had no choice, its hands were tied, and it would have to find in her favour on that aspect , because of the clear evidence .

The respondent's submissions in reply.

58. Ms Hodgetts in reply stated that the respondent could not legally have used its powers for tracing persons for benefits payment issues for the purpose of an internal grievance, so this was not any evidence of any racial motive. As it was, there were a number of other witnesses that the claimant identified in her complaint (se pages 254 and 255 of the bundle) about the incident in April 2019, so the unavailability of Vicky Boland was not fatal to the investigation. She drew the Tribunal's attention to what other witnesses had said in the course of the investigation (Ms Pandit pages 284 to 285, Mr Mushrow page 301, and Mr Hewitt pages 276 to 278 of the bundle) , and submitted that the claimant had no hope of establishing any claim of race discrimination.

Discussion and findings.

59. The Tribunal will start by setting out again the claims in respect of which this application is made. They are:

(xx) Failing to address the matters at 3(a)-(ww) above; including by taking these matters seriously and addressing these issues in a timely and a fair manner in line with DWP's own policies.

(yy) The investigator Julie Anderson failing to locate Vicky Boland

(zz) The grievance decision-maker failing to uphold C's grievances in relation to the matters at 3(a)-(rr) and (ww) above, and in relation to the matters at (ss)-(uu) to the extent that they were not upheld

(aaa) Failing to offer C any support in a timely and respectful manner; in line with DWP's own policies.

60. The Tribunal's task in determining this application is firstly to determine whether any of these claims have, firstly, no reasonable prospects , and secondly, in the alternative , little reasonable prospects of success. These are the threshold conditions for , firstly, striking out any of the claims, or, secondly, making any deposit orders in relation to any of them.

61. The starting point, the Employment Judge considers, is to bear in mind that these are secondary claims, in that they all relate to the manner in which the respondent responded to, and dealt with the claimant's grievances about, primary acts of race discrimination which formed the subject matter of her claims of direct race discrimination, and which have, save for (ss), been struck out by the Tribunal's previous judgment.

62. That does not mean, of course, that claims such as these cannot succeed, but this is an important consideration. That is partly because none of the claimant's claims of direct race discrimination or harassment made against any of the persons named in her other claims are the same persons by whom she alleges that these further acts of alleged discrimination were committed. Rather , these persons are Julie Anderson, and Andy Minnis, Site Leader, Disability Services.

63. These claims, however, are all of direct race discrimination. That is to say that the claimant's case is that the respondent treated her and her grievances in the manner that it did because of her race. It is therefore helpful to set out the law on direct discrimination claims.

The Law.

64 The applicable law is s.13 of the Equality 2010, which provides:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

In relation to comparators, s.23 of the Act provides:

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

And in relation to the burden of proof:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

65. Thus, in the first place, the complainant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in ***Madarassy v Nomura International plc [2007] IRLR 246*** :

"The bare facts of a difference in status [e.g. race] and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on a balance of probabilities the respondent had committed an unlawful act of discrimination."

66. The words 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. That means that the claimant has to 'set up a prima facie case'. Whilst in ***Madarassy*** it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically, Underhill P in ***Hussain v Vision Security Ltd and Mitie Security Group Ltd UKEAT/0439/10***, warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific.

67. In terms of what the 'something more' needs to be , Sedley LJ in the judgment of the Court of Appeal in ***Mr S Deman v The Commission for Equality and Human Rights [2010] EWCA Civ 1279*** at para. 19 said this:

"We agree with both counsel that the "more" which is required to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non – response, or an evasive or untruthful answer , to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

68. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act.

69. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant, having regard to Equality Act 2010 s 23, above. The question of whether a comparator relied upon is in circumstances which are 'materially different' is a question of fact for the Tribunal; and even if there are some material differences within section 23, the treatment of the purported comparator might be of relevance when considering a hypothetical comparator: ***CP Regents Park Two Ltd v Ilyas UKEAT/0366/14.*** The fact that a claimant is unable to point to a real-life, flesh and blood comparator in the workforce (or in the pool of rival candidates for employment) will not prevent their bringing a claim of unlawful discrimination; they can instead rely on a hypothetical comparator whose hypothetical circumstances are the same, or not materially different, to those of the claimant.

70. It will always be important to ensure that all relevant circumstances are the same as between the claimant and the comparator. In consequence, the claimant will

often have to rely on a hypothetical comparator. It is for the claimant to show that the hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the Tribunal to draw inferences from all relevant circumstances, but it is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn. It would appear that there is a duty on the Tribunal to have regard to how a hypothetical comparator would be treated , even where the claimant has only identified real comparators in the claim, at least where there is prima facie evidence of discrimination (***Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting [2001] EWCA Civ 2097, [2002] IRLR 288*** .

71. In deciding how a hypothetical comparator would be treated, the evidence that comes from how real individuals were actually treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the weightier will be the significance of their treatment. Comparing the treatment of those in non-identical but not wholly dissimilar cases – 'evidential', rather than 'statutory' comparators – is a permissible means of constructing a hypothetical comparator and judging how he or she would have been treated, see ***Chief Constable of West Yorkshire v Vento [2001] IRLR 124, EAT***, per Lindsay J.

72. A number of points arise. Firstly, whilst not expressly addressed in the hearing, the claimant relies upon a hypothetical comparator (see para.4 of the List of Issues, page 85 of the bundle).

73. Secondly, the claimant clearly has to establish more than just unfavourable treatment and possession of the characteristic of race. She needs the “something more” referred to above. As is clear, however, that need not be much, but there must be (and be pleaded to be) something.

74. The claimant has not, with respect to her, not really addressed the issue of what the “something more” that she relies upon actually is. That is doubtless because she is acting in person, but she was expressly asked in the hearing, and could not do so.

75. The Tribunal , accordingly, without stepping into the arena, but consistent with its duty to ensure a level playing field, has considered what she could rely upon.

76. The four claims are:

(xx) Failing to address the matters at 3(a)-(ww) above; including by taking these matters seriously and addressing these issues in a timely and a fair manner in line with DWP’s own policies.

(yy) The investigator Julie Anderson failing to locate Vicky Boland

(zz) The grievance decision-maker failing to uphold C’s grievances in relation to the matters at 3(a)-(rr) and (ww) above, and in relation to the matters at (ss)-(uu) to the extent that they were not upheld

(aaa) Failing to offer C any support in a timely and respectful manner; in line with DWP's own policies.

77. There are, the Tribunal considers, differences between them. To start with claim (zz), this a complaint that the finding of the grievance process, save for the one instance where a complaint was upheld, was direct discrimination. Other than the fact that the complaints were about race discrimination, the claimant has pleaded nothing which could amount to "something more". She only has, therefore, the difference in treatment and her race to rely upon, which, under the caselaw is insufficient. She has no actual comparator, so she cannot point to someone who had brought similar grievances in similar circumstances but who was white, and succeeded , as an actual comparator. Upon what basis , therefore, can the Tribunal be invited to find that a hypothetical comparator would have been more successful? The claimant has, the Tribunal concludes , no reasonable prospects of this claim succeeding, and the Tribunal considers that it is entitled to consider striking it out.

78. Turning to claim (yy), the failure to locate Vicky Boland, this is pleaded as another act of direct discrimination. The first observation to make is that the claimant has changed this claim, as whilst it was pleaded that this was an act of direct discrimination by Julie Anderson, this was changed during the hearing to include Trish Frawley and Lynne Hornby, the HRMIS investigators working under Julie Anderson.

79. Their account of their attempts to locate Vicky Boland is set out in an untitled and undated document at pages 259 and 260 of the bundle. In essence , as Vicky Boland had left the respondent's employment, and had probably gone to work for HMRC, despite attempts to find her contact details from former colleagues which were unsuccessful, she could not be located, and could not be interviewed, or approached to give her account of what was alleged to have occurred.

80. The claimant has maintained that this was an act of direct race discrimination. This was, of course, no conduct by her former colleagues, against whom she had made allegations of racism, but on the part of two or three persons whose only involvement was to investigate her grievance, which, as can be seen, they clearly did very extensively.

81. There is nothing whatsoever that the Tribunal can see could amount to "something else" in this scenario, and the claimant again has no more that this treatment (if such it be) and her race.

82. As an aside, and without wishing to add gratuitous comment, the Employment Judge would, however, invite the respondent to consider whether, in such circumstances, the non – availability of the alleged perpetrator of any discriminatory or other form of unacceptance workplace conduct should, as it appears to have done in this case, have led automatically to the conclusion of this aspect of the grievance. The Employment Judge appreciates that the respondent would want to approach such investigations in the spirit of "natural justice", and allow the "accused" an opportunity to answer the charges, and that in some cases, without hearing both sides it may not be possible to reach a fair conclusion. When,

however, there are other witnesses available, why would it not be possible, and fair to the employee, to continue the investigation, even if handicapped in this way? For the future, the respondent may wish to re-consider this policy, as it appears to be, and consider whether in such cases, some further consideration is not then given as to whether it would still be possible, as it clearly would be desirable, to carry on with the investigation.

83. That is, however, not the issue in this application. The investigators' "Conclusion" section on page 260 is quite clear, the non – availability of Vicky Boland was the reason why that aspect of the grievance was taken no further. The claimant has not suggested, nor laid any foundation for any suggestion , that a white person's non – race related grievance would have been treated any differently, so again the claimant has no reasonable prospect of establishing that this was an act of direct race discrimination, and consideration will be given to striking it out too.

84. That leaves claims (xx) and (aaa). These are similar in that they both allege failures on the part of the respondent. The former is more significant, as it alleges that the respondent, because of the claimant's race , failed to conduct her grievance in a timely and fair manner. The second remains unparticularised.

85. Whilst the respondent makes the same points in relation to these claims as it does with the other two discussed above, in terms of the lack of prospects of success, the Tribunal considered whether the same conclusion follows.

86. Whilst not referred to by the claimant , but included in the bundle, there was, it is clear, correspondence from her union representative raising the issue of delay in the grievance process. The chronology is important, and is non – contentious. The claimant raised her grievance on or about 11 August 2020 . This was , it would appear, by means of a G1 form, submitted with help from her union representative, Clare Ross. This document does appear in the bundle, at pages 253 to 258, but it is curiously dated 15 February 2017. The email communications from the claimant's union representative from 4 August 2020 onwards is included at pages 584 to 596 of the bundle.

87. The claimant was not interviewed in the early stages of the investigation. The respondent's Grievance and Issue Resolution Procedure , which is assumed for these purposes to be the applicable policy, is at pages 647 to 669 f the bundle. To summarise, where any grievance raised by an employee , if a Management Investigation is requested by submission of a form G1, which is what the claimant did, it should then be considered by a manager, initially to decide whether they should deal with it, or whether it referred to (amongst other options) HRMIS. If the latter does not occur, the manager is to meet with the employee within 5 working days.

88. In this case, there appears to have been some prevarication as to whether HRMIS were to deal with the matter. Whatever the position, by 29 September 2020, the claimant had not been interviewed, and on that day (pages 593 and 594 of the bundle) Clare Ross wrote to HRMIS questioning why the claimant had not been seen about her grievance. Whilst the claimant suggested that the union colluded in the delay, by late September 2020 , it clearly was not doing. In that email Clare

Ross set out how she had been in contact with Julie Anderson two weeks earlier, and what her response had been. She pressed for a response as to who was going to deal with the grievance, and how the claimant was upset and worried that it may be passed back to "the business".

89. After further communication on 29 September 2020 as to who would decide who would deal with the matter, and yet more on 30 September 2020, on 21 October 2020 Clare Ross wrote again to HRMIS , having managed to speak to the referring manager (presumably, Julie Anderson). She pointed out the continued lack of contact with the claimant , and expressing her concerns. She received reply that day, but this did not take matters much further, although the claimant was reminded of the availability of confidential counselling.

90. On 6 October 2020 Clare Ross wrote to Anne Williams (whose position is unclear, but presumed to be within the "business") again raising the lack of any information as to when the claimant might expect to have an investigation meeting. The position at that time was that the matter had been referred back to the business (which Julie Anderson has said in her email of 14 September 2020, page 586 of the bundle) , and Anne Williams was to be the investigation manager.

91. The email trail in the bundle ends, but from the document at page 259 of the bundle referred to previously, it then appears that HRMIS did on 7 October 2020 accept the case for investigation, and the claimant was then, finally, interviewed on 10 and 17 November 2020. She was, it would appear, the first person interviewed, as one would expect.

92. The upshot and potential relevance of all this is that there , on the face of matters, a considerable delay in the claimant submitting her grievance and it being actioned, with her not being interviewed for almost three months. This does indeed appear to be a breach of the respondent's own policies.

93. There may be a perfectly innocent explanation for this, but in terms of the "something else" that the claimant may be able to point to in support of this claim the Tribunal considers that the claimant can rely upon this to assist her attempts to establish a prima facie case. She may not be able to do so, of course, but that is not the test. The Tribunal is not prepared to say that this claim, (xx), has no reasonable or little reasonable , prospects of success, and it can continue.

94. The same, perhaps cannot be said of claim (aaa), but that is such a minor element that adds so little , or would take away so little if it was struck out, or a deposit order made , that the Tribunal would consider it disproportionate to make any orders in respect of that claim alone.

95. Returning therefore to the two claims where the Tribunal has found that they have no reasonable prospects of success, (yy) and (zz), having so found the Tribunal should not automatically proceed to strike them out, but should consider whether, in all the circumstances, it should do so. One factor in favour of doing so is that the claimant will not be left with no claims, she has her other claims which are proceedings. Against that it may be said that there is likely to be little difference in the evidence that will be required in the final hearing, given the claims that remain,

especially as (xx) survives. That may be so, but, where possible a Tribunal should clarify and limit the issues, and meritless claims should not be allowed to proceed merely because they accompany ones with greater potential validity.

96. The Tribunal does, accordingly strike out claims (yy) and (zz) pursuant to rule 37(1).

Further case management

97. The respondent suggested that a further preliminary hearing be listed once these applications had been determined, and the Tribunal has done so.

98. The Employment Judge reminds the respondent of is previous observations as to its prospects of successfully defending claim (ss), given the absence of any plea under s.109(4) of the Equality Act 2010 that the respondent was not vicariously liable for the actions of Clark Crilly. Whilst no application has been made to strike out the response to that part of the claims, the Tribunal can consider doing so of its own motion. The parties may, however, wish to consider whether , perhaps through the vehicle of a judicial mediation, or through ACAS, that matter cannot now form the basis of some sensible discussions for resolution of these claims as a whole, which, although reduced in some respects, are likely to take up considerable time , effort and resources some time next year, or even later.

Employment Judge Holmes
17 November 2023

Sent to the parties on:
24 November 2023

For the Tribunal Office: