EMPLOYMENT TRIBUNALS

Claimant: **Ms S Dean**

Respondent: **West London NHS Trust**

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: **London South (by CVP)**

On: **8 July 2024**

Before: **Employment Judge Truscott KC**

Appearances
For the Claimant: In person
For the Respondent: Mr A Ross, barrister

JUDGMENT on PRELIMINARY HEARING

1. The application for the amendments sought by the claimant is refused.

2. The claim of direct race discrimination under section 13 of the Equality Act 2010 is struck out under Rule 37(1)(a).

3. The claim of direct disability discrimination under section 13 of the Equality Act 2010 is struck out under Rule 37(1)(a);

4. The claim of discrimination arising from disability under section 15 of the Equality Act 2010 is struck out under Rule 37(1)(a);

5. The claim of harassment related to race under section 26 of the Equality Act 2010 is struck out under Rule 37(1)(a);

6. The claim of harassment related to disability under section 26 of the Equality Act 2010 is struck out under Rule 37(1)(a);

7. The claim of victimisation under section 27 of the Equality Act 2010 is struck out under Rule 37(1)(a).

REASONS

Preliminary

1. At a previous case management hearing, on 15 March 2024, EJ Emery set out the issues for this hearing:

> "The hearing will consider the following issues:
> 1 The claimant's amendment applications if they are being pursued
> 2 The respondent's current applications to strike out some or all of the claim, and / or that the claimant pay a deposit as a condition of continuing the claim
> 3 Any other application which may be made in advance of the hearing.
>
> The hearing may be converted during its course to a private case management discussion to discuss consequential case management directions.

2. The Tribunal heard evidence and submissions from the claimant and submissions from Mr C Ross, barrister for the respondent.

3. There was a bundle of documents to which reference will be made where necessary.

4. At paras 2 and 3 of a case management note dated 15 January 2024 EJ Byrne said:

> An initial matter for resolution at the outset of the public preliminary hearing will be determinations concerning the italicised amendment applications indicated with asterisks in the list of issues below. The amendment applications arose in the course of efforts to clarify the Claimant's claims and the Tribunal found it appropriate to give the Claimant time to set out in writing the reasons for the applications. Where the Claimant did provide some specific oral reasons at the preliminary hearing, these are set out at relevant junctures below. More generally, the Claimant stated that, if there was a lack of specific detail on certain points, this was because she had been advised that she should keep things reasonably general in her Grounds of Complaint and that she could provide greater detail in her witness statement.
>
> The Claimant has until **12 February 2024** to supplement any oral reasons set out in this record with written reasons in support of her amendment applications. The focus ought to be on reasons why the content of the amendments was not specifically included in the original Grounds of Complaint appended to the ET1 form.

5. The claimant provided no such written statement because of her continuing health issues. The evidence on extending time was taken orally by the Tribunal.

Findings

1. The claimant was employed by the respondent on 7 July 2021 as a Senior Facilitator, National KUF Hub. The claimant was employed on an 18-month contract that finished on 6 January 2023.

2. The ET1 form was presented on 13 April 2023.

3. At a hearing on 15 March 2024, EJ Emery identified the issues as follows:

The Complaints

1. The ET1 form discloses that the Claimant is making the following complaints:
   1.1 Direct race discrimination under s.13 Equality Act 2010;
   1.2 Direct disability discrimination under s.13 Equality Act 2010;
   1.3 Discrimination arising from disability under s.15 Equality Act 2010;
   1.4 Harassment related to race under s.26 Equality Act 2010;
   1.5 Harassment related to disability under s.26 Equality Act 2010;
   1.6 Victimisation under s.27 Equality Act 2010.

The Issues

2. The issues the Tribunal will decide are set out below. As noted above, matters amounting to amendments of the original Grounds of Complaint are asterisked and italicised. Determinations will be required by the Employment Judge sitting at the next preliminary hearing as to whether each of the amendments is accepted or rejected.

3. **Time limits**

   3.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

      3.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
      3.1.2 If not, was there conduct extending over a period?
      3.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
      3.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
         3.1.4.1 Why were the complaints not made to the Tribunal in time?
         3.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

4. **Direct race discrimination (Equality Act 2010 section 13)**

   4.1 The Claimant is a British Pakistani woman.

   4.2 Did the Respondent do the following things:

      4.2.1 On 7 July 2021 expose the Claimant to an induction exercise, administered by an unnamed female black facilitator, that affirmed racist stereotypes about black people in such a way that left the Claimant feeling fearful for herself as a British Pakistani woman.
      4.2.2 On 19 November 2021 Julia Blazdell said of the Claimant ‘She’s very angry’ at a meeting in a manner that evoked an ‘angry black woman’ trope.
      4.2.3 On 19 November 2021 Melissa Ellison said to the appellant that the appellant had ‘misperceptions’ in a manner designed to make the Claimant feel lesser.
      4.2.4 **On 26 November 2021 C was feeling sick. When she phoned Julia Blazdell to tell her, Julia Blazdell said on the phone call that the Claimant*

and Anthea Husbands were more vulnerable to stress-related incidents because they were black and brown.

4.2.5 **At a meeting in early February 2022 with four senior managers, including Julia Blazdell, Melissa Ellison and Kimberley Barlow and Claire Evans, the Claimant was closed down when she tried to focus the conversation on the issue of race discrimination. Specifically, Julia Blazdell and Melissa Ellison said that diversity encompasses many other things and Claire Evans said she felt hurt by the Claimant's contribution. Melissa Ellison also said the meeting wasn't the place to talk about what the Claimant wanted to discuss.* [This matter was not expressly pleaded in the Grounds of Complaint. The Claimant said 'My senior four managers co-ordinated opposition to me.' was the part of her ET1 form that referred to this particular incident.]

4.2.6 On 4 April 2022 Julia Blazdell said to the Claimant that the Claimant was upset at the Claimant's former manager, Anne Ayegbusi, leaving in a manner that was infantalising and suggested the Claimant needed Anne Ayebusi.

4.3 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

4.4 If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

4.5 The Claimant says she was treated worse than Anthea Husbands, who is a black woman.

4.6 If so, was it because of the Claimant's race?

5. **Direct disability discrimination (Equality Act 2010 section 13)**

5.1 The Claimant claims to be disabled.

5.2 Did the Respondent do the following things:

5.2.1 On 5 May 2021 Peter Lewie said to the Claimant that Julia Blazdell and Anne Ayegbusi had reservations about employing the Claimant because she was requesting part-time hours on account of her disabilities.

5.2.2 On 7 July 2021 expose the Claimant to an induction exercise, administered by an unnamed female black facilitator, that exploited a vulnerable service user by requiring her to share her life story in such a way that left the Claimant feeling fearful for herself as someone with vulnerabilities arising from her disabilities.

5.2.3 On 9 or 10 July 2021 at local induction, Anne Ayegbusi did not heed the Claimant's request for help to bring her up to speed or heed the Claimant's observation that she had not been provided with a 'buddy' (at induction on 7 July 2021, the materials provided to the Claimant indicated that a 'buddy' would be assigned to her).

5.2.4 In the four months that she was the Claimant's line manager, Anne Ayegbusi failed to provide the supervision and reflective practice that the Claimant needed to address the Claimant's Borderline Personality Disorder.

5.2.5 At one of a series of Wednesday meetings on Teams spanning the period end of October 2021 to 17 November 2021, Julia Blazdell told the Claimant that a project was being taken off her because she had been off sick.

5.2.6 On 14 September 2021, Fiona Kuhn-Thompson, on the instructions of Julia Blazdell, asked the Claimant to co-host KUF Hub Launch Event at short notice.

5.2.7 At the event on 14 September 2021 the running order of speakers was changed at short notice by Marsha MacAdams.

5.2.8 In early October 2021 Julia Blazdell and the Claimant were co-delivering training. Julia Blazdell failed to put a family member of the Claimant who had been abusive towards the Claimant in a different cohort (meaning put them on to a different training day).

5.2.9 In the week after the Claimant returned from leave that ended on 18th October 2021 Julia Blazdell said 'Wasn't it quiet without Sheena' and 'the NHS paid for that' in reference to a retreat the Claimant had been on during her period of leave.

5.2.10 In the week after the Claimant returned from leave that ended on 18th October 2021 the Claimant discovered that Julia Blazdell had not consulted with before changing the remit of the Claimant's role from quality assurance tasks to an additional task of delivering cohorts.

5.2.11 **At end of a training debrief in the week of 18 October 2021 or 25 October 2021, Julia Blazdell confided in the Claimant that everyone had nearly lost their jobs in manner that indicated that she was not to say it to anyone else and in a manner that did not leave an adequate opportunity to discuss the matter.* [The Claimant explained that the use of the word 'confided' sought to encapsulate the manner in which Julia Blazdell conveyed information, even though this detail is not in the Grounds of Complaint.]

5.2.12 On 25 October 2021 Julia Blazdell told the Claimant that Anthea Husbands had a heart attack in a manner that did not allow enough time for C to absorb the information before the Claimant began training and left her shocked and in a state of distress.

5.2.13 On 25 or 26 October 2021 Julia Blazdell ignored the Claimant during an end-of-day work debrief and failed to have a debrief.

5.2.14 At the end of October 2021, Julia Blazdell said an LXP peer, Tamar Jaynes, had been spreading rumours about the Claimant stealing her work before hanging up and leaving no opportunity to discuss the matter.

5.2.15 **In November 2021 Anthea Husbands was praised for a piece of work by Julia Blazdell who at the same time admonished the Claimant unfairly.*

*5.2.16 *On 19 November 2021 Melissa Ellison conducted a meeting involving the Claimant inappropriately insofar as a stranger (Amanda 'Mc') was brought in to conduct the meeting.*

5.2.17 **At the same meeting on 19 November 2021 Julia Blazdell informed the Claimant that she could not work with her.*

5.2.18 On 24 January 2022 Julia Blazdell ignored the Claimant for the entire day.

5.2.19 At a mediated meeting in February 2022 Melissa Ellison said to the Claimant 'these kinds of accusations are hurtful, yes you are stressed by

what you perceive. She also repeatedly stated that the Claimant 'misunderstood'.

5.2.20 **On 31 January 2022 the Claimant informed Melissa Ellison that she could not to a particular course safely. Melissa Ellison reacted with annoyance and denied the Claimant's request to have a union representative with her.*

5.2.21 **On 9 February 2022 there was a meeting at which the Claimant attempted to raised boundary issues but was rebuffed by Melissa MacAdams who said it was not the place to discuss such issues.* [The Respondent's position is that this is not in the Grounds of Complaint. The Claimant states that the content of paragraph 48 of the Grounds of Complaint covers this matter.]

5.2.22 A fact-finding investigation on 24 May 2022 was conducted by Gail Dearing in a chaotic manner in that there were no clear terms of reference; the Claimant was not informed of any complaint against her; and there were errors in the notes of the investigation.

5.2.23 On 10 June 2022 Gail Dearing phoned the Claimant and told her to resign.

5.2.24 On 7 November the Claimant received a letter dated 1 November 2022 informing her of a second investigation.

5.3 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

5.4 If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

5.5 The Claimant says she was treated worse than a non-disabled person would have been.

5.6 If so, was it because of the Claimant's disability? (The Claimant has linked the Respondent's conduct to all of her asserted disabilities.)

6. **Discrimination arising from disability (Equality Act 2010 section 15)**

6.1 Did the Respondent treat the Claimant unfavourably by:

6.1.1 At one of a series of Wednesday meetings on Teams spanning the period end of October 2021 to 17 November 2021, Julia Blazdell told the Claimant that a project was being taken off her because she had been off sick.

6.1.2 On 3 November 2021 the 'Trainer Competency Framework' project was taken off the Claimant by Julia Blazdell in a Team Meeting and given to Tea 'U' because the Claimant had been off sick.

6.2 Did the following things arise in consequence of the claimant's disability:

6.2.1 The Claimant was off work due to sickness.

6.3 Was the unfavourable treatment because of the fact that the Claimant was off work due to sickness?

6.4 Was the treatment a proportionate means of achieving a legitimate aim?

6.5 The Tribunal will decide in particular:

6.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
6.5.2 could something less discriminatory have been done instead;
6.5.3 how should the needs of the claimant and the respondent be balanced?

6.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

7. Harassment related to race (Equality Act 2010 section 26)

7.1 Did the Respondent engage in unwanted conduct?

7.2 If so, which acts does the Claimant allege amounted to unwanted conduct? The Claimant relies on:

7.2.1 On 7 July 2021 expose the Claimant to an induction exercise, administered by an unnamed female black facilitator, that affirmed racist stereotypes about black people in such a way that left the Claimant feeling fearful for herself as a British Pakistani woman.
7.2.2 On 19 November 2021 Julia Blazdell said of the Claimant 'She's very angry' at a meeting in a manner that evoked an 'angry black woman' trope.
7.2.3 On 19 November 2021 Melissa Ellison said to the appellant that the appellant had 'misperceptions' in a manner designed to make the Claimant feel lesser.
7.2.4 **On 26 November 2021 C was feeling sick. When she phoned Julia Blazdell to tell her, Julia Blazdell said on the phone call that the Claimant and Anthea Husbands were more vulnerable to stress-related incidents because they were black and brown.*
7.2.5 **At a meeting in early February 2022 with four senior managers, including Julia Blazdell, Melissa Ellison and Kimberley Barlow and Claire Evans, the Claimant was closed down when she tried to focus the conversation on the issue of race discrimination. Specifically, Julia Blazdell and Melissa Ellison said that diversity encompasses many other things and Claire Evans said she felt hurt by the Claimant's contribution. Melissa Ellison also said the meeting wasn't the place to talk about what the Claimant wanted to discuss.* [This matter was not expressly pleaded in the Grounds of Complaint. The Claimant said 'My senior four managers co-ordinated opposition to me.' was the part of her ET1 form that referred to this particular incident.]
7.2.6 On 4 April 2022 Julia Blazdell said to the Claimant that the Claimant was upset at the Claimant's former manager, Anne Ayegbusi, leaving in a manner that was infantalising and suggested the Claimant needed Anne Ayebusi.

7.3 Did this conduct relate to the Claimant's race?

7.4 If there was unwanted conduct, did it have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, considering:

7.4.1 The Claimant's perception;

7.4.2 The circumstances of the case; and

7.4.3 Whether it was reasonable for the conduct to have that effect.

8. Harassment related to disability (Equality Act 2010 section 26)

8.1 Did the Respondent engage in unwanted conduct?

8.2 If so, which acts does the Claimant allege amounted to unwanted conduct? The Claimant relies on:

8.2.1 On 5 May 2021 Peter Lewie said to the Claimant that Julia Blazdell and Anne Ayegbusi had reservations about employing the Claimant because she was requesting part-time hours on account of her disabilities.

8.2.2 On 7 July 2021 expose the Claimant to an induction exercise, administered by an unnamed female black facilitator, that exploited a vulnerable service user by requiring her to share her life story in such a way that left the Claimant feeling fearful for herself as someone with vulnerabilities arising from her disabilities.

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consulted with before changing the remit of the Claimant's role from quality assurance tasks to an additional task of delivering cohorts.

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8.3 Did this conduct relate to the Claimant's disability?

8.4 If there was unwanted conduct, did it have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, considering:

8.4.1 The Claimant's perception;
8.4.2 The circumstances of the case; and
8.4.3 Whether it was reasonable for the conduct to have that effect.

9. **Victimisation (Equality Act 2010 section 27)**

9.1 Did the Claimant do a protected act as follows:

9.1.1 **At a meeting on 24 May 2022 aired concerns that she was the subject of acts of discrimination.* [The Respondent's position is that this does not appear in the Grounds of Complaint.]

9.2 Did the Respondent do the following things:

9.2.1 **Delay in dealing with issues raised by the Claimant at the meeting on 24 May 2022.* [The Respondent's position is that this does not appear in the Grounds of Complaint.]
9.2.2 Direct a second investigation of the Claimant by way of letter received by the Claimant on 7 November 2022.

9.3 By doing so, did the Respondent subject the Claimant to detriment?

9.4 If so, was it because the Claimant did a protected act?

The Law

Amendment

4. In the case of **Selkent Bus Company Limited v Moore** [1996] ICR 836 the Employment Appeal Tribunal ("EAT") set out the test to be applied by a Tribunal in deciding whether to exercise its discretion to grant an amendment. It said the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The EAT in **Selkent** also set out a list of factors which are certainly relevant, which are usually referred to as the "**Selkent** factors". In brief they are:

(1) The nature of the amendment i.e. whether the amendment sought is one of the minor matters or is a substantive alteration pleading a new cause of action;
(2) The applicability of time limits. If a new complaint of cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended; and
(3) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the rules for making amendments, but delay is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made (for example the discovery of new facts or new information).

5. In the case of **Vaughan v Modality Partnership UKEAT/0147/20/BA** the EAT reminded parties and Tribunals that the core test in considering applications to amend

is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. That balancing exercise is fundamental. The **Selkent** factors should not be treated as if they are a list to be checked off.

6. Although **Selkent** says it is essential for the Tribunal to consider whether a complaint is made out of time and if so whether the time limit should be extended, in **Galilee v Commission of Police of the Metropolis [2018] ICR 634** the EAT held it is not always necessary to determine time points as part of an amendment application. A Tribunal can decide to allow an amendment subject to limitation points being determined at a later stage in the proceedings, usually at the final hearing. That might be the most appropriate route in cases where there is alleged to be a continuing act and the Tribunal needs to make findings of fact on this issue.

7. The assessment of the balance of injustice and hardship may include an examination of the merits but there is no point in allowing an amendment if it will subsequently be struck out. That extends to cases not only which are utterly hopeless but also to ones where the proposed claim has no reasonable prospect of success. The authority for that is **Gillett v Bridge 86 Limited [2017] 6 WL UK 46**.

Time limits
Just and equitable extension

8. Section 123(1)(b) of the 2010 Equality Act permits the Tribunal to grant an extension of time for such other period as the employment tribunal thinks just and equitable. Section 140B of the Equality Act 2010 serves to extend the time limit under section 123 to facilitate conciliation before institution of proceedings.

9. Contacting Acas after primary limitation has expired has no effect on limitation limits; there is no extension of time in such circumstances: **Pearce v. Bank of America Merrill Lynch** UKEAT/0067/19, *per* HHJ Eady QC at para 23.

10. The meaning of conduct / an act extending over a period was summarised in **Lyfar v. Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548, *per* Hooper LJ at para 17: that the allegations of discrimination are "linked to one another and… evidence of a continuing discriminatory state of affairs".

11. A distinction must be drawn between a continuing act and an act with continuing consequences (usually a one-off decision): **Sougrin v. Haringey Health Authority** [1992] ICR 650, CA, *per* Lord Donaldson MR at 659E-660C.

12. Non-discriminatory acts alleged to be part of a conduct extending over a period cannot form part of a continuing act: **South Western Ambulance Service NHS Foundation Trust v. King** [2020] IRLR 168, *per* Chaudhury P at para 33.

13. Tribunals have a wide discretion, as long as they consider the length and reasons for the delay and any prejudice to the Respondent: **Abertawe v Morgan** [2018] ICR 1194, CA, *per* Leggatt LJ at paras 18-19.

14. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

15. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

16. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised." See also the comments of Judge Tayler in **Jones v. Secretary of State for Health** 2024/EAT/2

17. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

- the length and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information;
- the promptness with which the claimant acted once he knew of the possibility of taking action; and
- the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

18. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

19. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case.

Striking out

20. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially:-
> "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

21. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether

to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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22. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

23. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the claimant's case should be taken at its highest.
(ii) Strike out is available in the clearest cases – where it is plain and obvious.
(iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

24. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

25. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

26. The key principles in relation to striking out claims on the basis of prospects of success, as summarised by Langstaff J in **Ukegheson v. Haringey London Borough Council** [2015] ICR 1285, EAT at paras 3-4, are that:

a. Tribunals should be cautious in exercising their power under rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013;
b. That is particularly so in discrimination claims, because there is a public interest in such claims being heard and because they are likely to be fact-sensitive;
c. Tribunals should not conduct a mini-trial at a strike-out hearing; and
d. The Claimant's case should be taken at its highest, unless "conclusively disproved by" or "totally and inexplicably inconsistent" with undisputed contemporaneous documentation.

27. Nevertheless, there are cases where it is proper to strike out a (discrimination) claim as having no reasonable prospect of success. This protects employers from unnecessary expense, which may be irrecoverable from a party with no substantial assets. It also removes fanciful cases from the tribunal system, preserving valuable resources for more deserving litigants: **Ukegheson** at para 23.

28. A claim can properly be struck out, where there is a time bar to jurisdiction and no case concerning the extension of time advanced, or where the pleaded case is no more than an assertion of difference of treatment and a difference of protected characteristic, which (per Mummery LJ at paragraph 56 of his judgment in **Madarassy v. Nomura International plc** [2007] IRLR 246 CA) "... only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination": **Chandhok v. Tirkey** [2015] ICR 527, EAT, *per* Langstaff P at para 20.

Burden of proof

29. Section 136 EqA alters the ordinary civil burden of proof for proceedings under the Act. A claimant must start the case by showing that there is a *prima facie* case of discrimination before the respondent is then required to discharge the burden of showing that the discrimination did not occur: **Ayodele v. Citylink Limited** [2018] IRLR 114, CA at §§92-93 *per* Singh LJ. The effect of the burden of proof provisions under Section 136 EqA is the same as was the case under its antecedents: **Ayodele** at para 105; **Efobi v. Royal Mail** [2021] ICR 1263, SC, *per* Lord Leggatt at §para 4.

30. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient to shift the burden of proof: **Madarassy v. Nomura International plc** [2007] ICR 867 CA at para 56 *per* Mummery LJ.

31. At the first stage, the Tribunal should have regard to all of the available evidence: **Madarassy** at para 57. This may include evidence from the respondent showing that the alleged discriminatory acts never happened; that, if they did, they were not less favourable treatment of the complainant; that the comparator or situations with which comparisons are made are not truly alike; or that, even if there was less favourable treatment, it was not on the grounds of the relevant protected characteristic: **Madarassy** at para 71.

Harassment

32. The question of whether unwanted conduct is "related to" a protected characteristic is broad and context-dependent: **Bakkali v. Greater Manchester Buses [**2018**]** ICR 1481 *per* Slade J at para 31. While the threshold is more easily satisfied than direct discrimination, it is not without limit: **Tees Esk and Wear Valleys NHS Foundation Trust v. Aslam** [2020] IRLR 495, *per* HHJ Auerbach at para 20.

33. It is important for Tribunals not to cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment", which are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment: **Land Registry v Grant** [2011] ICR 1390, CA, *per* Elias LJ at para 47.

34. The proper approach to s26(4) was set out by Underhill LJ in **Pemberton v. Inwood** [2018] ICR 1291, CA at para 88:

> In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

Direct discrimination

35. A "detriment" exists if a reasonable worker would or might take the view that the treatment accorded to her had disadvantaged her, bearing in mind that an unjustified sense of grievance cannot amount to "detriment": **Shamoon v. Chief Constable of Royal Ulster Constabulary** [2003] ICR 337, HL, *per* Lord Hope at paras 34-35.

36. Discrimination may be inherent in the act complained of, in which case there is no need to inquire into the mental processes of the alleged discriminator: **Amnesty International v. Ahmed** [2009] ICR 1450, EAT, *per* Underhill J at paras 33-34. In other cases, the act complained of may be rendered discriminatory by the mental processes, conscious or unconscious, of the alleged discriminator: **Nagarajan v. London Regional Transport** [1999] ICR 877, HL.

37. In those latter cases, the Tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin: **Shamoon**, *per* Lord Nicholls at §10.

38. Pursuant to Section 23(1) EqA, "on a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case."

39. Pursuant to Section 23(2) EqA, "the circumstances relating to a case include a person's abilities" if on a comparison for the purposes of Section 13, the protected characteristic is disability. The EHRC Code at paras 3.29 and 3.30 give examples and comparison is discussed at para 40 of **Bennett v. Mitac Europe Ltd.** [2022] IRLR 25 EAT.

40. While the motivation for discriminatory action may be subconscious, such a finding must be supported by clear findings of primary fact from which such an inference can properly be drawn: **Nagarajan** at 885E-H.

41. If someone else with a medical illness or injury of the same gravity as the claimant's but not having his or her particular disability would have been treated no more favourably, direct discrimination will not have been established: **High Quality Lifestyles Ltd v Watts** [2006] IRLR 850, EAT, *per* Judge McMullen QC at paras 46-49; endorsed in **Stockton-on-Tees Borough Council v. Aylott** [2010] ICR 1278, CA, *per* Mummery LJ at para 39.

42. Because a person's health is not irrelevant to their ability to do a job, the concept of indissociability cannot readily be translated from the area of racial or sex discrimination into the context of disability discrimination: **Owen v. Amec Foster Wheeler Energy Ltd** [2019] ICR 1593, CA, per Singh LJ at §78. The **Watts** case is an archetypal example of this, in that an HIV+ care worker was dismissed because of the risk of transmission to the users of the respondent's health care facilities. On the approach taken in a direct race or sex discrimination claim, the concept of indissociability would have prohibited the hypothetical comparator from being attributed with a communicable disease; the EAT reversed the ET in **Watts**, though, because the ET had erroneously applied the indissociability principle and misconstructed the hypothetical comparator.

Discrimination arising from disability

43. The first stage of the analysis under Section 15(1) EqA requires two questions to be answered: firstly, what was the relevant treatment? And, secondly, was it unfavourable to the Claimant? **Trustees of Swansea University Pension and Assurance Scheme and another v Williams** [2019] ICR 230 SC, *per* Lord Carnwath at para 12.

44. Unfavourable treatment is a relatively low threshold and means some sort of disadvantage or detriment: **Williams** at para 27.

45. The second stage of the analysis requires an assessment of the causal connections between the disability, the "something arising" and the alleged unfavourable treatment.

a. The "something arising" must have a more than trivial influence on the unfavourable treatment and so amount to an effective reason for or cause of it. The focus must be on the conscious or unconscious thought processes

of the alleged discriminator, as in direct discrimination cases: **Pnaiser v NHS England** [2016] IRLR 170, EAT, *per* Simler P at para 31.

b. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". This is an objective question. "Something arising in consequence of B's disability" could describe a range of causal links and could include more than one link. The more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact: *ibid*.

46. In order for an objective to be a proportionate means of achieving a legitimate aim, it must correspond to a real need, the means used must be appropriate with a view to achieving the objective and (reasonably) necessary to that end. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group: **R (Elias) v. Secretary of State for Defence** [2006] 1 WLR 3213, CA, *per* Mummery LJ at para 151.

47. It is for the Tribunal to weigh the real needs of the undertaking against the discriminatory effects of the requirement: **Hardy & Hansons plc v. Lax** [2005] ICR 1565 CA, *per* Pill LJ at §32.

Discussion and decision

48. The claimant went off sick in April 2022 and did not return to work. Her contract ended in January 2023. The earliest *prima facie* in-time act, based on Acas Early Conciliation occurring between 30 January and 13 March 2023 (and the claim having been received on 13 April 2023) is 31 October 2022.

49. The time-limit points are set out on the basis that there is no reasonable prospect of a full Tribunal concluding that it has jurisdiction to hear the claimant's complaints; the Tribunal was not invited to deal with time limits as a preliminary issue.

50. The claimant's state of health was relied on by her for any failures in her narrative or responses. The detail of her health issues has been set out in previous correspondence with the Tribunal and referred to by various employment judges. It is not repeated here but the Tribunal is mindful of what was said when coming to its judgment. Although the claimant relied on her health difficulties for the delay in making the claims and omitting claims, she confirmed that she had the benefit of assistance from her trade union with her employment issues. Such were the difficulties that the Regional Secretary became involved. He is named in the ET1 as her representative [10]. The Tribunal addressed the contents of the proposed amendments and concluded that they did not materially assist the claimant in any of the claims she was making except where indicated otherwise later. The balance of hardship favours the respondent. In evidence, the claimant said she had more to say but she cannot keep adding to her claim over lengthy periods of time when with union assistance she was able to provide a very extensive account of events. The Tribunal concluded that the amendment should not be allowed.

51. The Tribunal addressed the issues using the paragraph numbers within EJ Byrne's List of Issues.

Direct race discrimination and harassment related to race

52. As a generality, the Tribunal proceeded on the basis that the race allegations happened but they demonstrate nothing to suggest race.

53. The complaints are set out at paras 4 and 7, respectively. They relate exclusively to the period between 7 July 2021 and 4 April 2022. They are therefore all significantly out of time, even if there were an act extending over a period.

54. 4.2.1-4.2.2 and 7.2.1-7.2.2 are complaints about an unnamed person affirming (unspecified) racist stereotypes about Black people and a complaint about being called "angry", which the claimant links to an " 'angry black woman' trope".

a. The first complaint is no basis for a direct discrimination complaint, it is not an allegation that the claimant (who is British Pakistani) was treated less favourably because of her race. It fails as an allegation of harassment, because the stereotypes are unspecified and any proscribed effect was *prima facie* unreasonable. There is no narrative on the proscribed purpose.

b. As to the second complaint, for the purposes of this hearing, the Tribunal assumed that the claimant was called angry. Both legal claims based on this fail because the only link between anger and race is the link that the claimant has postulated. As before, this is not an allegation that the claimant was treated less favourably because of her race. As a harassment claim, any proscribed effect was unreasonable and there is no narrative with the proscribed purpose.

55. 4.2.3 and 7.2.3 have no stated connection with race, so fail under both legal claims even if the comment is found to have been made as alleged. The comment is not a detriment. Any proscribed effect was unreasonable and there is no narrative on the proscribed purpose.

56. 4.2.4 and 7.2.4 do have a connection with race, but they were not included in the claim and permission was not given for amendment. It is noted that this alleged incident was omitted from the claimant's Particulars of Claim. There is no reasonable prospect of establishing that the alleged comment was a detriment or that it reasonably had the proscribed effect. There is no narrative on the proscribed purpose.

57. 4.2.5 and 7.2.5 are complaints that the claimant was not allowed to talk about race discrimination in a particular meeting in February 2022. This was not referred to in the claim and permission is not given for amendment. It is noted that this incident was omitted from the Particulars of Claim. There is no reasonable prospect of establishing that the alleged comment was a detriment, that the claimant was treated less favourably because of race, or that it reasonably had the proscribed effect. There is no narrative on the proscribed purpose.

58. 4.2.6 and 7.2.6 have no stated connection with race, so fail under both legal claims even if the comment is found to have been made as alleged. The comment is not a detriment. Any proscribed effect was unreasonable and there is no narrative on the proscribed purpose.

Direct disability discrimination and harassment related to disability

59. As a generality, the Tribunal proceeded on the basis that the claimant was disabled. Her complaints run from before her employment to the last time she worked.

60. Because of the provisions of sections 23(1) and 23(2) EqA and the case law set out above, direct disability discrimination effectively relies on stigma and irrational stereotypes.

61. The claimant relies on four impairments as disabilities, but has in almost all cases failed to say which impairments she relies on for those complaints.

62. 5.2.1 and 8.2.1 do not make it clear whether it is the conduct of Mr Lewie or Ms Blazdell and Ms Ayebusi that is impugned. In either case, however, the cause of the comment is the part-time hours, which does not amount to direct disability discrimination or harassment related to disability, applying the legal tests set out above.

63. 5.2.2 and 8.2.2 appear to relate to the same occasion as 4.2.1 and 7.2.1. It is a complaint about something done to someone else, not the claimant. It cannot be direct discrimination. The exploitation is unparticularised. Any proscribed effect was unreasonable and there is no narrative on the proscribed purpose so it fails as an allegation of harassment related to disability.

64. 5.2.3-5.2.24 and 8.2.3-8.2.24 are (duplicated) lengthy lists of matters in which the claimant alleges she was treated wrongly between July 2021 and November 2022. In none of the matters complained of, does the claimant allege facts that would allow a full Tribunal to conclude that someone without her alleged disability / disabilities, but with the same abilities, would have been treated better than she was treated, applying sections 23(1) and 23(2) EqA. There is no reasonable prospect of the claimant shifting the burden of proof on causation even if the facts occurred as alleged. Similarly, the claimant does not allege facts that would allow a full Tribunal to conclude that any unwanted conduct found to have occurred was related to one or more of her disabilities, even putting aside the questions of purpose and effect. The fact that the claimant's complaints are so wide-ranging undermines the connection of any of the matters alleged with disability. They are simply things that are alleged to have happened to someone who alleges they have particular disabilities. This is insufficient to satisfy the "related to" test.

65. The claimant is refused permission to amend in 5.2.15-5.2.17 (or 8.2.15-8.2.17) or 5.2.20-5.21 (or 8.2.20-8.2.21), as she could have mentioned these matters in her lengthy Particulars of Claim but did not. Whilst the respondent did not pursue the point that 5.2.11 (or 8.2.11) requires permission to amend, it sought strike out of the paragraphs with which the Tribunal agreed.

Discrimination arising from disability

66. The complaints are arguable but very much out of time. The latest allegation against Ms Blazdell relates to 4 April 2022 (6.2.6), so there is no reasonable prospect of establishing conduct extending over a period ending within the primary time limit. There is therefore no reasonable prospect of a full Tribunal concluding that it had jurisdiction to hear these complaints.

Victimisation

67. A potential basis for a victimisation complaint is set out but the claimant is refused permission to pursue this complaint, as she did not mention anything about a meeting on 24 May 2022 (in which she aired concerns that she was the subject of acts of discrimination or otherwise) in her Particulars of Claim. She has also failed to identify an individual whom she says was motivated to do the things at 9.2 by the fact that she had done a protected act.

Strike out

29. In relation to strike out, the Tribunal took the claims at their highest and considered them separately and together and concluded that they had no reasonable prospects of success.

30. In the light of the foregoing findings, the Tribunal exercised its discretion to strike out all the claims.

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Employment Judge Truscott KC
Date 15 July 2024