Neutral Citation Number: [2024] EAT 139

Case No: EA-2021-001068-DXA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 August 2024

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS. QUOROUS SLATER **Appellant**

- and –

ALLEN FORD UK LTD **Respondent**

- -
- -

Mrs Yvonne Slater (lay representative) for the **Appellant**
Mr James Tunley (instructed by **MILS Legal Ltd**) for the **Respondent**

Hearing date: 6 August 2024

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Striking Out

Following her dismissal for the given reason of gross misconduct the claimant in the employment tribunal brought wide-ranging legal complaints. At a preliminary hearing the tribunal struck out all of the complaints on various bases.

The claimant appealed and the challenge was permitted to proceed to a full hearing in respect of the decision to strike out three (only) of her complaints.

In relation to a complaint of unfair dismissal by reason of protected disclosures, the tribunal erred in holding that the claimant had not complied with an earlier order to provide particulars, because the claimant had in fact complied with that order in relation to that particular complaint. The tribunal also erred in striking out that complaint because it relied upon an erroneous premise as to when the disclosures were said to have been made, and because it failed to consider the claimant's case in respect of factually disputed matters at its highest, in particular in relation to matters which, she claimed, might have supported an inference in her favour.

The tribunal also erred in striking out a complaint that the dismissal was an act of direct sex discrimination as having no reasonable prospect of success, in particular because it only considered the claimant's case in relation to one out of three male comparators relied upon by her. It also erred by treating the third complaint as an unlawful deduction from wages claim, when it was in fact a breach of contract claim, and failing to consider sufficiently whether there might be an arguable basis for it, framed in that way.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal was employed by the respondent from 21 May 2018 until 2 December 2019. The respondent operates car dealerships. The claimant worked in its Romford showroom in East London. She had particular responsibility for looking after customers who required Motability Scheme vehicles. Her manager was Matthew Wheelans.

2. In November 2019 disciplinary charges were raised by Mr. Wheelans leading to a hearing before another manager, Dan Clampett, on 2 December at the conclusion of which the claimant was summarily dismissed. The given reason was misconduct by way of unauthorised use by the claimant of a Metropolitan Police fuel card to fill one of the respondent's vehicles which she had been using. The use of this card had been brought to Mr Wheelans' attention by the police.

3. The claimant, in summary, said that she had been given the card by a friend by way of repayment of money that he owed her; and that she had been told by the friend that it was his card. The respondent's case before the tribunal was that she was dismissed because Mr Clampett rejected that explanation and concluded that the claimant's use of the card had been dishonest.

4. Following her dismissal the claimant began a claim in the employment tribunal acting as a litigant in person. The claim form was accompanied by a 17-page document setting out a lengthy narrative of events and referring to a wide range of complaints. Representatives for the respondent, MILS Legal Ltd (MILS), put in a defence to the claim. The respondent considered that there was a severe lack of clarity as to what legal complaints which the employment tribunal had jurisdiction to consider the claimant was seeking to pursue, and on what factual basis.

5. There was a preliminary hearing before EJ Crosfill on 19 March 2021. The day before that hearing, the claimant emailed the tribunal a document setting out proposed amended particulars of claim and also attached various supporting documents. At that hearing the claimant was represented by her mother, Mrs Yvonne Slater, and the respondent by Mr Baylis, a barrister from MILS.

6. The judge produced a detailed minute of that hearing that was sent to the parties on 15 April 2021. In it the judge set out a provisional list of issues which worked through the types of legal complaint that it had been identified that the claimant was seeking to bring, and, for each complaint, set out the issues to which that complaint gave rise. The document also identified, in relation to each particular complaint, the points on which further information was required from the claimant in order to clarify the factual and/or legal basis of that complaint. She was directed to provide that further information by 6 May 2021. Other directions were given as to further steps to be taken thereafter.

7. Just after midnight on 6/7 May 2021 the claimant emailed a five-page document in response to the order made by EJ Crosfill. The respondent considered this still to be inadequate and on 10 May it applied for the whole claim to be struck out on the basis that it had no reasonable prospect of success, the conduct of the proceedings had been unreasonable, there had been non-compliance with EJ Crosfill's order and a fair trial was not possible. A letter of 5 June notified the parties that EJ Crosfill had directed that the full hearing of the claim, which had been listed for 15 and 16 July 2021, be replaced with a preliminary hearing on 15 July to consider the respondent's strike-out application. On 10 and 11 June the claimant sent emails opposing that application. She attached to these an amended version of her original particulars of claim document and she applied to amend her claim to reflect its contents. She also attached a number of other background documents.

8. The hearing to consider the strike-out application came before EJ Housego sitting at East London on 15 July 2021. The claimant was represented by Mrs Slater, the respondent by Mr Baylis. The tribunal struck out all of the complaints.

9. A written decision was sent on 19 July 2021. In the opening section, at paragraphs 5 and 6, the tribunal observed that the claimant had not ignored EJ Crosfill's order but had failed to comply with it, as none of the claims had been particularised sufficiently to enable the respondent to defend them or the tribunal to adjudicate them. The tribunal also stated that the claimant was wrong to say that the present hearing was an unfair trial before the trial, in particular (she had argued) because it was

taking place prior to disclosure. The tribunal said that all that had been required was for the claimant to set out exactly what she alleged and how much she claimed. In the main body of the reasons which followed the tribunal worked through, in turn, each of the types of legal complaint that the claimant sought to pursue, setting out in each case the reasons why that particular complaint was struck out.

10. On 2 August 2021 the claimant submitted an application for reconsideration of that decision. She also instituted an appeal to the EAT on 31 August. The Notice of Appeal set out short grounds of appeal and also referred at the end to the reconsideration application to the tribunal. That reconsideration application was refused by the judge in a decision sent on 9 September 2021.

11. The claimant's grounds of appeal were considered on paper not to be arguable. However at a rule 3(10) hearing Judge Stout permitted three grounds of appeal to proceed to a full appeal hearing. All other grounds of appeal were dismissed. That full appeal hearing came before me today. The claimant has, once again, been represented by her mother, Mrs Yvonne Slater. Mr Tunley of counsel appeared for the respondent. I have had before me a bundle of documents to which one addition has been made, a bundle of authorities and skeleton arguments from both parties, the skeleton from the respondent having been drafted by Mr Baylis. I heard oral argument this morning.

Overview of the tribunal's reasons, the appeal and the respondent's response to it

12. The live grounds of appeal that were permitted to proceed to this hearing relate to three of the legal complaints that were struck out by EJ Housego, being of:

(a) automatic unfair dismissal for the sole or principal reason that the claimant had made protected disclosures;

(b) direct sex discrimination by way of dismissal;

(c) breach of contract in respect of "forced overtime".

13. The tribunal's specific reasons for striking out the complaint of automatic unfair dismissal by reason of the claimant having made protected disclosures were as follows:

> **"15. There is a public interest disclosure claim. The disclosures are not made clear, but were said to have been made in June 2018 and December 2018. They related to the way a motability customer's matters were handled, fraudulently and not to the customer's advantage is the allegation. I do not need to form a view as to whether or not there were such public interest disclosures, as even if there were the claims cannot succeed for the following reasons.**
> **...**
>
> **17. There is a claim of automatically unfair dismissal under S 103A for having made public interest disclosures. The difficulty with this claim is that dismissal was a year after the last claimed dismissal, and that there was an admitted use of the police fuel card. There is no reasonable prospect of the Claimant succeeding in showing that her dismissal fell within the relevant test: that is it will be for the Respondent to show that the reason for dismissal was a potentially fair one. If it does that, the evidential burden will shift to the Claimant to show that there is a real issue as to whether that was the true reason. That reason may be challenged by the Claimant at a final hearing by adducing relevant evidence. It is not enough for the Claimant simply to assert in argument that it was not the true reason. She must produce some evidence that casts doubt on the employer's stated reason and so raises an issue: see *Kuzel v Roche Products* [2008] ICR 799 at [52] –[60]. There was a year's gap between asserted public interest disclosure and dismissal, and the Claimant accepted that she had used the police fuel card (albeit, she says, unknowing that it was such). The Claimant gives no reason why the person who dismissed her did not genuinely do so by reason of that use.**
>
> **18. The claim could be structured along the lines of *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 – from the summary:**
>
> **'*So the answer to the appeal's key question is, "yes, if a person in the hierarchy of responsibility above the employee determines that she should be dismissed for one reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason" [62].***
>
> **The Claimant says that her manager lied about what she had said to him in his report to the decision maker. However, the problem with that is what the Claimant said in the disciplinary hearing, and the decision maker's reaction to it. It is at page 101: the Claimant said that her manager had asked her if she had used the card and that she had said that she had not. Later, that she did not admit it straight away. The response was 'All you had to do was say that you had used a friend's card, but you did not, you said you had not.' It is clear from this that the decision maker concluded that the fact that the Claimant had not initially been transparent meant that her claim was not true, and that she was dishonest, and so dismissed her, for that reason. There is no plausible causative connection between any public interest disclosure and his dismissal of the Claimant, and no reasonable prospect of succeeding in showing that her manager manipulated the decision maker into making the decision he made.**
>
> **19. The Claimant does not accept the minutes are entirely correct, and says that they record only about half of the meeting. She does not say anywhere in her 26 page final statement of case that she did not say in the meeting what is set out above, and she puts something very similar at paragraph 67 of her final submission (page 78), and that she told her manager later (if quite soon after). This claim has no reasonable prospect of success."**

14. The complaint that the dismissal was an act of direct sex discrimination was addressed by the tribunal in the following paragraph:

> **"21. There is a claim of direct sex discrimination, which while not pleaded well is at least comprehensible. It is that she was dismissed for suspected dishonesty, but her male manager was not. The real difficulty with that claim is that there was nothing pleaded to indicate that the manager was suspected of dishonesty by his own management. The Claimant admitted that she had used the card, and there is no suggestion that the manager admitted anything, nor could he if not accused. In addition, the Claimant had been employed less than 2 years, so could not claim unfair dismissal, which means managers have a less inhibited approach to dismissal than if the employee has that right. This claim also has no reasonable prospect of success."**

15. The complaint in relation to what the claimant referred to as "forced overtime" was addressed in the following paragraph:

> "**12. There is a claim for *'forced overtime'* which appears to be a S13 deduction from wages claim, and EJ Crosfill gave detailed orders about what detail was to be provided, but it has not been provided. I dismiss this claim both for failure to comply with that order, and as having no reasonable prospect of success: the Claimant had a contract of employment at a fixed salary and does not say that there was any hourly rate for extra hours. The basis for the claim, the extra hours claimed to have been worked and the amount of the claim are not made clear."**

16. So far as the protected-disclosure unfair-dismissal complaint is concerned, Judge Stout identified in her reasons arising from the rule 3(10) hearing that she considered it arguable that the tribunal had erred because, in summary:

(a) the claimant had in fact provided the particulars of the claimed disclosures required by the order of EJ Crosfill;

(b) EJ Housego erroneously proceeded on the footing that the claimed disclosures were said to have been made in June and December 2018, whereas the claimant's case was that they had been made in December 2018 and June 2019;

(c) in holding that the claimant had not advanced any "plausible causative connection" between the dismissal and the claimed disclosures, the tribunal had failed to consider the case that the claimant had set out on this aspect and/or to take it at its highest;

(d) in relying upon the claimant having acknowledged at the disciplinary hearing that she had not initially owned up to using the fuel card, the tribunal had again failed to consider the claimant's case in relation to this and/or failed to take it at its highest.

17. In relation to the complaint that the dismissal was an act of direct sex discrimination Judge Stout considered it to be arguable that the tribunal had erred because, in summary:

(a) the claimant had provided the particulars required by EJ Crosfill;

(b) the tribunal only addressed Mr Wheelans as a male comparator, but there were two other male comparators relied upon by the claimant;

(c) the judge proceeded on the erroneous basis that Mr Wheelans had never been accused of misconduct, whereas it was the respondent's own case that he had been investigated but exonerated;

(d) the judge failed to consider that the claimant's case was that allegations against her male colleagues were not treated as being gross misconduct, whereas those against her were.

18. In relation to the "forced overtime" complaint Judge Stout considered it to be arguable that the judge erred, in summary:

(a) because he treated this as a deduction from wages complaint in respect of which the claimant had not provided the detailed information required by EJ Crosfill; but it was a breach of contract complaint which had been addressed separately in EJ Crosfill's order, and in relation to which the claimant had provided the required information;

(b) because the judge had failed to give consideration to the fact that the claimant had identified that she was not relying upon an express term as to overtime pay, but contended that it should be implied into her contract that she should be paid for hours that she had been required to put in over and above her written contracted hours.

19. The Answer, and Mr Baylis's written skeleton, cited familiar authorities and principles relating to challenges to findings of fact made by a tribunal and the high bar for a perversity challenge. But it is essential to keep in mind that what is being challenged by this appeal is a decision to *strike out* these three complaints, taken at a preliminary hearing at which the tribunal did not hear any evidence, and arising from which the tribunal did not make, and could not have made, any findings of fact.

20. Mr Baylis's skeleton, and Mr Tunley orally today, contended that, in relation to the protected-disclosure and sex-discrimination complaints relating to the dismissal, the judge did not ultimately rely on the alternative ground of non-compliance with EJ Crosfill's order, but struck out both of those complaints solely on the basis that they had no reasonable prospect of success.

21. In relation to the so-called "forced overtime" complaint, Mr Tunley acknowledged that the judge did rely also on the alternative ground of non-compliance with EJ Crosfill's order. He accepted that the claimant had in fact complied with it, by providing the particulars that had been required of that specific complaint, as well indeed of the other two complaints with which this appeal is concerned. But he submitted that the judge did not, in the event, err in striking out that third complaint either, because he properly did so on the alternative basis that it had no reasonable prospect of success.

The Law

22. The law in relation to decisions to strike out a complaint on the ground that it has no reasonable prospects of success under rule 37(1)(a) is well established, has been often restated and was not in dispute before me. Because the evidence is usually not heard and facts are not found at a preliminary hearing considering such an application, the tribunal must generally take the claimant's claim as advanced by her at its highest, on the assumption that the facts will be found to be as she claims.

23. In **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330; [2007] ICR 1126 Maurice Kay LJ (Moore-Bick and Ward LJJ concurring) said this:

> **"26. Mr Pitt-Payne seeks to draw comfort from this lowering of the threshold. I accept his submission that what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. It seems to me that Elias J also**

proceeded on this basis – see paragraph 56 of his judgment. Mr Pitt-Payne then submits that when Elias J observed that in the present case the facts are disputed he went on to place an unwarranted gloss on the 'no reasonable prospect of success' test. He refers in particular to two passages in which Elias J said this:

> **'58. However where the facts themselves are in issue in my judgment it can only be in the most extreme case that the chairman can say that without any evidence being tested in cross-examination that the disputed facts would inevitably or almost inevitably be resolved against the claimant.'**

And a little later:

> **'64. Mr Pitt-Payne submits that it must in principle be possible for a tribunal in a clear case to make a finding that a claimant has no chance of establishing the facts alleged. I would not discount the possibility that very exceptionally it might be. But it seems to me that at the very least if such a step is going to be taken then the primary factual basis on which a tribunal infers that the dismissal must have been for the reason advanced by the employer and not the counter varying reason advanced by the employee must itself be undisputed.'**

27. I too accept that there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success – see *ED&F Mann Liquid Products Limited v Patel* [2003] EWCA Civ 472 at paragraph 10 per Potter LJ; a commercial rather than an employment case. However, what is important is the particular nature and scope of the factual dispute in question. In the present case it is stark. Mr Ezsias is contending that others turned on him because he was a whistleblower. The Trust says that he was impossible to work with and that he unreasonably jeopardised the proper functioning of the hospital. What was it that caused the chair of the Employment Tribunal to consider that that head-on conflict of fact could be resolved without a trial to the point of a conclusion that Mr Ezsias's case has no reasonable prospect of success? Although in the document of 20 July 2005 she purported to identify some legal points, these effectively fell away in the September reasoning and Mr Pitt-Payne does not seek to rely upon them. In the September reasoning she based her decision on 'the letter from all your nine colleagues and the statements they made' concluding that 'any reasonable tribunal' would on that basis decide that Mr Ezsias was dismissed not because he had made protective disclosures but because of an irretrievable breakdown of relationships for which he was responsible.

… …

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

30. There is another aspect of this type of case that calls for comment. Whistleblowing cases have much in common with discrimination cases, involving as they do an investigation into why an employer took a particular step, in this case dismissal.

> **31. The applicant will often run up against the same or similar difficulties to those facing a discrimination applicant. There is a similar but not the same public interest consideration. In *Anyanwu v South Bank Student Union* [2001] ICR 391, [2001] UKHL 14 Lord Steyn said at paragraph 24:**
>
> > **'For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest.'**
>
> **Lord Hope of Craighead added at paragraph 37:**
>
> > **'I would have been reluctant to strike out these claims on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to leave evidence.'**
>
> **32. In my judgment the same or a similar approach should generally inform whistleblowing cases, subject always of course to the kind of exceptional case to which I have referred. If she had had it in mind the chair of the Employment Tribunal would surely not have concluded as she did. She ought not to have done so in any event."**

24. Mr. Tunley emphasised that the authorities do not go so far as to say that whistleblowing or discrimination claims can never be struck out as having no reasonable prospect of success. He noted that this was among the points included in the recent summary of principles emerging from the authorities, given in **Cox v Adecco Group** [2021] ICR 1307 at paragraph 28.2. I note that the relevant sentence reads, in full, as follows:

> **"Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate".**

25. The high threshold for a strike-out on the grounds that a complaint has *no* reasonable prospect of success is to be contrasted with the lower threshold for making a deposit order, being that a complaint has *little* reasonable prospect of success. The authorities confirm that there may be room for a tribunal to conclude that there is little reasonable prospect of success of a given complaint even

where there is a measure of factual dispute although the tribunal does still need to identify what feature or features in the given case it considers supportive of that conclusion.

26. As Mr Tunley did not seek to rely on the strike out of any of these complaints as being justified by reference to non-compliance with EJ Crosfill's orders, I do not need to say more about the discussion in the authorities of the approach to be taken to an application to strike out on that ground.

Discussion and Conclusions

27. I turn now, first, to the challenge to the decision to strike out the claimant's complaint of unfair dismissal by reason of having made protected disclosures. In so far as it is said that EJ Housego erred by concluding that the claimant had failed to comply with EJ Crosfill's orders in this respect, as I have noted, early on in EJ Housego's decision there was a broad statement to the effect that the claimant had failed to comply with those orders or provide sufficient particulars in relation to *any* of the complaints. However, reading the passage which specifically sets out his reasons for striking out this particular complaint, it appears to me that the respondent is right that it was in fact struck out solely on the basis that it had no reasonable prospect of success. The judge therefore did not err by wrongly striking it out on the basis of non-compliance with EJ Crosfill's order.

28. As to the substance of the claimed protected disclosures, the claimant's case, as set out in her various documents that had been tabled by the time of the strike-out hearing, was that these related specifically to the handling of the case of a particular customer (who she had identified by name) who required, and was sold by a colleague, a Motability vehicle. The claimant's case was that this was an instance of mis-selling and that the handling of the transaction amounted to defrauding the customer and breach of the respondent's legal obligations to her. It was also her case that aspects of how the transaction had been handled had also been covered up.

29. The claimant's case was specifically that she had made disclosures about these matters to Mr Wheelans on two particular occasions. Mr Tunley rightly accepted before me that EJ Housego incorrectly identified when these two disclosures were said by the claimant to have occurred. It was

her case that she had first raised her concerns with Mr. Wheelans in December 2018 around the time when the transaction occurred. Some months later the customer had complained to the respondent. That prompted a discussion between the claimant and Mr Wheelans, which the claimant claimed happened in late June 2019, in which, on her account, she reminded him of her previous concerns and indeed suggested that the customer's complaint was tantamount to an allegation of fraud.

30. EJ Housego therefore did wrongly identify the dates of the claimed disclosures as being June and December 2018. That error does seem to me to have been at least potentially material, as the judge specifically relied on the last claimed disclosure as having been a full year before the dismissal in support of his conclusion that there was no reasonable prospect of the tribunal finding there to have been a link between the two events.

31. However, the judge also relied on his conclusion that there was no factual dispute that at the disciplinary hearing the claimant had acknowledged that she had used the fuel card and acknowledged that when first asked by Mr Wheelans about the matter, she had not immediately admitted to having done so. The judge considered that Mr Clampett had properly relied on this as supporting his conclusion that her use of the card had not, as she claimed, been innocent. The judge also relied on his conclusion that the claimant had not identified any feature supporting a positive case that there was a link between her earlier claimed disclosures to Mr Wheelans and the decision to dismiss, such as might undermine or contradict the respondent's case as to the reason for dismissal being solely about the view that Mr Clampett took of the use of the fuel card.

32. Mr Tunley submitted that, even though the judge did get the dates of the claimed disclosures wrong, this was not, in the event, therefore, a material error, as these other aspects formed a sufficient substantial foundation of EJ Housego's decision to strike out this particular complaint. He submitted that the judge permissibly considered in the light of these features that there was no reasonable prospect of the claimant's case displacing the respondent's case as to Mr Clampett's sole reason for dismissal. There was also, he submitted, no suggestion in the disciplinary hearing notes that the

claimant had raised with Mr Clampett at the time, her case that Mr Wheelans had taken against her because of the prior disclosures that she relied upon before the tribunal.

33. In response, Mrs Slater referred to two documents which were before the tribunal. The first was a statement signed by the person who the claimant said had given her the card, in which he stated that he had told the claimant untruthfully that the card was his. The second was a letter of advice from his solicitors to him, referring to his account that the claimant, and indeed another woman who he had allowed to use the card, had both been deceived by him in this respect. I note that while these two documents were both before the tribunal, they both dated from after the date of the disciplinary hearing and dismissal, and there was no dispute that these documents were not before Mr Clampett when he took his decision.

34. However, the claimant's case as set out in her particulars of claim, also took issue with the reliance placed by the respondent on her having not, when first approached by Mr Wheelans, admitted to using the fuel card. Her case was that when he first asked her about a "cloned Met Police fuel card" and whether it had anything to do with her, she initially answered, "no" because she did not make the connection with the card that her friend had given her which, on her case, she had not known was a police card. But afterwards, she said, she thought about the matter and spoke to her friend about the card he had given her and then discovered that he had lied to her. She then went back to Mr Wheelans, admitted that the card he had asked about had been used by her, but gave him her explanation of how she had come by it and why she said she had used it entirely innocently.

35. It was also part of the claimant's case, in her documents tabled to the tribunal, that when she was subsequently suspended she offered to Mr Wheelans to identify her friend to him and to obtain a statement from the friend, but was told by Mr Wheelans that this would not be necessary as he gave her to understand that she had nothing to be concerned about in light of her explanation, and that the respondent was just following due process in light of the matter having been raised by the police.

36. It was also part of the claimant's case that the note of their discussions that Mr Wheelans had attached to the letter setting out the disciplinary charge was not accurate, and that she raised this at the disciplinary hearing before Mr. Clampett and also told him that she wanted to put in a statement from her friend, but to no avail. It was also her case that Mr Clampett broke off the hearing to speak again to Mr. Wheelans about his account of his conversations with the claimant, but when the hearing resumed Mr Clampett then proceeded straight away to announce his decision to dismiss her.

37. It was also her case that the record embodied in the minute of the disciplinary hearing, of what Mr Wheelans had told Mr Clampett when Mr Clampett broke off the hearing to speak to him, showed that Mr Wheelans had significantly changed his account of his conversations with the claimant from that which he had set out in the initial note prepared and attached to the letter inviting the claimant to a disciplinary hearing. It was also the claimant's case that the shorthand note and typed minute of the hearing, which it was not claimed were verbatim, had significant gaps in them.

38. There would appear to have been at least some support for the claimant's account of aspects of how matters unfolded in the typed note of the disciplinary hearing that was before the tribunal, in terms of what it recorded the claimant having told Mr Clampett about her conversations with Mr Wheelans, and in so far as it recorded Mr Clampett breaking off the hearing to go and speak to Mr Wheelans again and Mr Clampett then telling the claimant, as soon as the hearing reconvened, that he had decided to dismiss her. There were, as I have indicated, other areas of factual dispute.

39. The respondent, however, submits that the tribunal properly approached this complaint on the basis that it had a cogent case that, having heard both sides of the story, Mr Clampett, reasonably, did not believe the claimant's explanation for her admitted use of the fuel card and dismissed her because, at least on the balance of probabilities, he genuinely concluded that she had been dishonest. Mr. Baylis's skeleton submits that it is entirely unsurprising that Mr Clampett dismissed the claimant for such conduct, particularly given her lack of qualifying service and when there was no suggestion that

she had told Mr Clampett that she believed Mr Wheelans had taken against her because she had raised the matters that she told the tribunal amounted to protected disclosures.

40. However, what this appeal challenges is not a decision arising from a trial at which the documentary evidence has been considered and the witnesses heard and cross-examined, resulting in findings of fact about the reason or reasons for dismissal. It challenges a decision to strike out the protected-disclosure unfair-dismissal complaint as having no reasonable prospect of success at a future trial.

41. There were, it seems to me, essentially three planks for that conclusion by the tribunal:

(a) that the last claimed disclosure had been a full year before the dismissal;

(b) that the claimant initially denied that she had used the card but then later admitted it;

(c) that she had advanced no positive basis for linking the decision to dismiss to the claimed disclosures.

42. The tribunal, as noted, did err on the first point. The claimant's case was that the last disclosure was in late June 2018 and that the fuel card matter had come to light around 20 November 2018. Her case was that her initial response to Mr Wheelans was not deliberately misleading and that when she realised the connection, she voluntarily went back to him and gave her account of what had happened. It was her case that her initial response should not, therefore, have been regarded as incriminating. It was also her case that she had attempted to be allowed to put in corroborating evidence but had been rebuffed, and that she did not have the chance to comment further on Mr Wheelans' account after Mr Clampett had spoken to Mr. Wheelans during the course of the disciplinary hearing.

43. It appears to me that the tribunal did fail to engage with these aspects of the claimant's case and consider them when evaluating the prospects of success of this complaint. This complaint could certainly be viewed as ambitious, given the admitted use of the fuel card, as such, and given that, for

this complaint to succeed, the tribunal would have to conclude not only that the claimant had made what amounted to protected disclosures, but also that such disclosures were either the sole or the principal reason for the dismissal. But it appears to me that the tribunal did not consider whether, taking the claimant's case at its highest, this complaint, even if perhaps more likely to fail than to succeed, at least had better than no reasonable prospects of success at all.

44. In particular, the tribunal did not consider whether the features of how the process unfolded on the claimant's account, could, if her disputed account was found to be factually correct, have arguably supported an inference that Mr Wheelans had taken against her following her disclosures and that Mr Clampett had either colluded with, or been misled by, Mr Wheelans, in particular when he spoke to him for a second time. The tribunal did not consider whether these features of her account should be tested at a trial at which both she and the respondent's witnesses could be cross-examined.

45. I note also that EJ Housego did not in fact appear to place weight in his decision, on the claimant having failed to raise with Mr Clampett that she believed that Mr Wheelans had taken against her on account of her whistleblowing. Nor is this a case where the tribunal, in its decision, examined the detailed scenario on which the claimant relied and concluded, in terms, that it was so inherently fanciful or far-fetched that it obviously had no reasonable prospect of success.

46. It therefore appears to me that the judge's error in relation to the timing of the claimed disclosures did play a material part in his decision, and that his decision cannot properly be supported by reference to the other features that he relied upon, because he failed to engage with the claimant's case in relation to those features, taken at its highest.

47. I therefore conclude that the judge did err in striking out this complaint for the reasons that he gave, and this ground of challenge succeeds.

48. I turn to the decision to strike out the complaint of direct sex discrimination by way of dismissal. I agree with Mr Tunley that this complaint was also in fact struck out solely on the basis that it had

no reasonable prospect of success. Mr Tunley, drawing on Mr Baylis's written skeleton, submitted that the cases of each of the three male comparators relied upon by the claimant were plainly materially different in their circumstances from her case. There was no evidence that Mr Wheelans had been found guilty of any kind of dishonesty himself. A second named comparator had been investigated on suspicion of having taken cannabis, but no evidence was found. No allegations had been made at all against the third comparator. It could not, therefore, be argued that consideration of these cases provided any support for an inference that the decision to dismiss the claimant had been influenced by the fact that she is a woman.

49. However, once again it appears to me that the tribunal failed to engage with the specifics of how the claimant in fact advanced her case in relation to each of these individuals. I note again that where there were factual disputes the starting point should have been that the claimant's case needed to be considered at its highest unless the tribunal could confidently state that it was unsustainable because of a conflicting document, because it was obviously fanciful or patently implausible or something of that sort.

50. The tribunal in fact only addressed in its decision the position in relation to Mr Wheelans. While it said that there was nothing pleaded to indicate that he was suspected of dishonesty by his own more senior management, the claimant's case was that she had raised with the HR officer, who attended the disciplinary hearing as a notetaker, that she considered he had been involved in covering up the mishandling of the customer matter about which, she told the tribunal, she had made her protected disclosures. So this was an area of factual dispute.

51. The claimant's case in relation to the second named comparator was that drugs had been found in his company car for which he received only a warning, and then they were found on a second occasion, but the gross misconduct disciplinary process was not instigated. That account appears again to have differed factually from the factual case advanced by the respondent. The other comparator was the individual who, on the claimant's case, was responsible for the miss-selling which

she said had been the subject of her protected disclosures to Mr Wheelans. Her case was that despite Mr Wheelans' awareness of what had gone on in that case, and the customer complaint, no action had been taken against the individual concerned. Again, it appears that there was a dispute of fact as to what had actually happened in relation to that matter.

52. Once again, it might fairly be asserted that this complaint of direct sex discrimination was ambitious, given the respondent's account of these matters and that the claimant had as such admitted to the use of the fuel card, though she maintained that she had done so innocently; and bearing in mind, I may note, that the claimant appeared also to be saying that these individuals were treated more leniently than her because they were viewed as good performers, which would be a different reason than because of something to do with sex.

53. All of that said, it would be sufficient to this complaint if the dismissal had been materially influenced by the claimant's sex even if that was not the main reason why she was dismissed. Once again, even if it could be said that this complaint faced difficulties, the tribunal needed to consider whether, taken at its highest, in the way that she advanced it, its prospects were so poor that it had no reasonable prospect of success at all. Once again, it appears to me that the tribunal failed to engage with how specifically she put her factual case in relation to what happened to each of the comparators, and to consider the prospects, if the facts were found to be as she claimed, of the treatment of any or all of them supporting an inference that the way that she was treated was influenced by her sex.

54. In relation to the so-called "forced overtime" complaint, as I have noted, Mr Tunley accepted that the claimant had in fact complied with EJ Crosfill's order, but submitted that the decision to strike out this complaint on the basis that it had no reasonable prospect of success was sound. The factual gist of this complaint, and the documents put before EJ Crosfill and later EJ Housego, was that the claimant had been required on occasion to work additional hours in the evenings beyond her contracted hours, in order to put in additional customer prospecting calls. It was her case that a requirement to work these extra evening hours from time to time had never been raised or agreed by

her when she was recruited. She claimed that being forced to do these extra hours caused disruption to her family life and put her to additional childcare costs. The respondent's case in its grounds of resistance was that the claimant *had* been told that the job would include her being required to do what were called "prospecting evenings" particularly at certain times of the year.

55. EJ Crosfill's order required, in respect of this complaint, the claimant to identify any terms of her contract that she relied upon and whether she was relying upon an express or an implied right to be paid for working in excess of her contracted hours; and, if not, what the basis of the claim was. The claimant's reply was that her contract referred to fixed hours Monday to Saturday and Sundays but that these were not contractually adhered to even though the issue was raised many times; and that she believed that there was an implied right to pay for working in excess of the agreed hours.

56. Mr Tunley submitted that it was therefore no part of the claimant's case that there was an express written term entitling her to payment for overtime hours nor that there had been any other express agreement that she would be paid for doing such hours. He referred to **Driver v Air India Limited** [2011] IRLR 992, in particular at paragraphs 128 to 130. He submitted that there was no doctrinal basis on which the tribunal could have implied a right to payment, as it could not be said that such an implied term was necessary, nor was the claimant relying on a custom and practice.

57. Although Mr Tunley did not seek to defend the striking out of this complaint on the basis of non-compliance with EJ Crosfill's order, it is important to note that EJ Housego did err in this regard because he treated it as being covered by the part of EJ Crosfill's order that related to wages complaints. That appears to have been the basis of EJ Housego's criticism that the claimant had not made clear the number of extra hours worked or the amount of the claim. Such particulars had been required by EJ Crosfill of the wages complaints, but *not*, in fact, of this particular complaint, in that particular order, though one would expect that these would be required at some point.

58. I note that EJ Housego did also make the point that the claimant was not saying that there was any identified rate for extra hours, nor had she identified the "basis" of the claim. But the information

that had been provided by the claimant and the very label that she gave to this claim indicated that she considered that she had been forced to work extra hours beyond her contracted finish time and that she should be compensated for having done so. The judge, it seems to me, did not address how, more precisely, the claimant was putting her case in this regard, nor that the basis of the respondent's defence, at least at that point, was merely that the claimant had in fact been told that she would have to work these late hours from time to time, which was itself a point of factual dispute.

59. While I appreciate Mr Tunley's submission that there was no doctrinal basis for claiming an implied term, I am not sure, on the basis of the submissions that I have read and heard, that if the facts of the case were as the claimant claimed them to be, the discussion in **Driver v Air India** would be determinative of whether those facts could support this claim, bearing in mind that it was the claimant's case that these were extra hours that she had effectively been forced to work and that this complaint was put as being for breach of contract as opposed to unlawful deduction from wages. I do not rule out that on proper consideration of the relevant authorities the tribunal might reach the conclusion that this complaint was doctrinally unsustainable, but I consider that would require closer examination of precisely how the claimant advanced this case and of the relevant authorities than was given by EJ Housego or canvassed in argument before me today. I am therefore not satisfied that the judge properly struck out this complaint as having no reasonable prospect of success.

Outcome

60. For these reasons I allow this appeal in respect of the decision to strike out each of these three complaints. I will now hear further argument as to what consequential directions I should give.

Further Directions

61. Following my initial decision on the substance of this appeal and a break, during which Mr Tunley was able to obtain some instructions, I have now heard further argument as to what further directions I should give consequent on my having allowed this appeal on all three points.

62. Mr Tunley indicated that his clients intend, if permitted, to seek fresh consideration by the tribunal of whether each of these three complaints should be struck out or, in the alternative, they will apply for deposit orders. Mrs Slater however invited me to substitute a decision in each case declining to strike out the complaint on the basis of matters as they currently stand, although she recognised that I could not, if I did so, preclude a strike-out application being made afresh at some later stage in the litigation if the respondent considered some further development gave it a fresh basis to do so.

63. Mr Tunley responded that this was not a case where I could say, in respect of any of these three complaints, that there was only one right answer to the strike-out application applying the law to the facts in terms of the information available to the tribunal as matters presently stand, although he accepted that all of the relevant information that was available to the tribunal is also available to me.

64. In relation to the protected-disclosure unfair-dismissal claim I consider that on the basis of the information that was available to the tribunal and is also available to me, in particular as to how the claimant factually puts her case, that claim could not at present properly be struck out. It requires findings of fact at trial as to precisely what the claimant communicated to her line manager, Mr Wheelans, in the two discussions that she says she had with him, and whether those communications amounted in law to protected disclosures. It also requires findings of fact as to the precise sequence of events between when Mr Wheelans was first alerted by the police to the issue of the fuel card and the point at which Mr Clampett announced his decision to dismiss the claimant.

65. There is just enough in the factual scenario painted by the claimant, such that it could not be said with certainty at this stage that, on that scenario, this complaint has *no* reasonable prospect of success. That does not mean that the tribunal would not be properly entitled to conclude that it has *little* reasonable prospect of success for the purposes of a deposit application; but I do not decide that point, as it will be a matter for the tribunal to decide if such an application is pursued.

66. In relation to the direct sex discrimination complaint, I am not in a position to say that only one legal outcome is possible on fresh consideration of the strike-out application, nor, even if Mr Tunley

was able to obtain instructions consenting to the process, would I be in a position to determine that application afresh today. I consider that it will require close examination, and in all likelihood further clarification from the claimant, of precisely what she asserts factually happened in relation to each of her three male comparators, what is the basis for her belief as to that and why she says that this would support an inference that the decision to dismiss her was influenced specifically by the fact that she is a woman, as opposed to being unfair in some other way. Though it is a matter for her, she may wish to reflect on whether this particular complaint is maintained. If it is, and the respondent renews its application for a strike-out order and/or applies for a deposit order, she must expect that this further information as to the basis of her case in this regard may well be required of her.

67. In relation to the so-called "forced overtime" breach of contract complaint, I consider that assessment of its prospects of success requires close examination of the basis on which that complaint is now being advanced and further consideration by the tribunal of relevant legal authorities potentially casting light on whether there could be a sound doctrinal basis for that complaint in law, an exercise that has not hitherto sufficiently been carried out and which the parties would not be in a position to carry out this afternoon even if Mr Tunley, in principle, were able to obtain consent to the EAT considering the application afresh on the tribunal's behalf.

68. I will therefore quash the decisions of the EJ Housego tribunal striking out all three complaints. In relation to the complaint of unfair dismissal by reason of having made protected disclosures, I will substitute a decision refusing to strike out that complaint. In relation to the other two complaints, I will remit the matter to the tribunal to consider the intimated fresh application by the respondent for strike out, as well as its intimated application for deposit orders in relation to all three complaints.

69. I have heard argument as to whether such matters should be directed to be heard before EJ Housego if available, which is Mr Tunley's preference, but opposed by Mrs Slater. I have no doubt that if I remitted these matters to him, EJ Housego would deal with them professionally and conscientiously. But I see no great advantage in his doing so, given the significant passage of time

since he last considered these matters. There is also a risk of further delay if these matters, which have been outstanding for some time, are remitted specifically to be considered by him. Bearing in mind that his decision last time around was to strike out all three complaints, I also consider that it would be a big ask to expect him to put that previous decision entirely out of his mind; and it is important that the new decisions of the tribunal on such applications, whatever they may be, command the confidence of both parties. I am therefore directing remission to a judge other than EJ Housego.