Case Number: 2200468/2024

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Ms V Singhakowitna		**Petroineos Trading Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 9-10 December 2024**

BEFORE: Employment Judge A M Snelson

On hearing Ms D Romney KC on behalf of the Claimant and Mr D Martin KC, on behalf of the Respondent;

And on reading the written representations of the parties delivered after the hearing;

The Tribunal determines that:

(1) The Respondent's application for a part of the claim to be struck out is refused.
(2) The Respondent's application for a deposit order is refused.
(3) The Claimant's application delivered to the Tribunal on 18 December 2024 for permission to amend the claim form shall be considered at a further preliminary hearing for case management on a date to be fixed.

REASONS

Introduction

1 The Respondent is the vehicle for a joint venture between the INEOS Group and a London-based subsidiary of which the ultimate parent company is the China National Petroleum Corporation.

2 The Claimant, who is of Thai national origin and a naturalised British citizen, entered the employment of the Respondent as a trader in 2012. She held trading roles, the last being General Manager ('GM'), Crude, until 1 June 2022, when she

was moved to a non-trading position as Chief Operations Excellence Officer ('COEO') with a consequential reduction in remuneration and (in her eyes at least) status. She remains nominally in the COEO post but, having raised a grievance in August 2023, went on sick leave in September 2023 and has not returned to work since.

3 Having contacted ACAS on 3 November 2023 and received a certificate dated 15 December 2023, the Claimant presented a claim form on 12 January 2024, complaining of sex discrimination, race discrimination and victimisation under the Equality Act 2010 ('the 2010 Act') and detrimental treatment on 'whistle-blowing' grounds under the Employment Rights Act 1996. In bare summary, her case is that, as a person of Thai descent, she was systematically discriminated against on grounds of race and sex by the senior management which consisted of, and/or was dominated by, Chinese men and that when she complained of discrimination she was unlawfully penalised for doing so.

4 By its response form and 'holding' grounds of resistance of 8 March 2024, the Respondent disputed the claims on a combination of jurisdictional and substantive grounds.

5 It is agreed that the claims as they currently stand (and leaving to one side the Claimant's very recent application to add further claims by amendment) are for the following.

(1) Sex discrimination based on:

(a) Annual discretionary bonus payments (declared April 2019-April 2023);
(b) Denial of Vice President status (January 2018-May 2022);
(c) Forcible transfer from GM, Crude to COEO (1 June 2022).

(2) Race discrimination based on:

(a) As (1)(b);
(b) As (1)(c).

(3) Victimisation based on protected acts of 18 August and 18 October 2023, by:

(a) Requiring the Claimant to attend a grievance interview which she was unfit to attend;
(b) Failure to supply details of the comparator's pay;
(c) Placing the Claimant on statutory sick pay.

(4) Detriment on 'whistle-blowing' grounds based on various disclosures, by:

(a) Mr Zhu ordering the Claimant's removal from the PNL list (June 2023);
(b) Mr Zhu instructing the Claimant to hand over the Bio Streaming Initiatives to a colleague (19 July 2023);
(c) Mr Zhu announcing at a management meeting that he wanted the Claimant to look at areas of the business other than Bio;

(d) As (3)(a);
(e) As (3)(b);
(f) As (3)(c).

6 At a preliminary hearing for case management on 12 September 2024 Employment Judge Adkin listed a final hearing for 15 days between 15 September and 8 October 2025 and a public preliminary hearing for 9 to 10 December 2024 to:

(1) Determine whether a part of the claim should be struck out;
(2) Approve a final list of issues;
(3) Deal with all outstanding case management issues; and
(4) Address the possibility of judicial mediation.

It was later agreed that the Respondent would be permitted to apply for deposit orders as an alternative to its striking-out application.

7 The background to EJ Adkin's order should be explained. An application had been made on behalf of the Respondent for a preliminary hearing on time, which had been resisted on behalf of the Claimant on the ground that all time issues should be determined at the final hearing. That 'fully contested' procedural dispute came in front of EJ Adkin. It seems that, in pressing the case for a preliminary hearing, Mr Dale Martin KC argued that the Claimant's case rested to a large extent on allegations of direct discrimination which were, on their face, out of time, having occurred (if they did occur) before 4 August 2023, and she had not made out a *prima facie* case that those matters, taken with the admittedly in-time complaints, together amounted to 'conduct extending over a period' in such a way as to bring them within time and thus within the Tribunal's jurisdiction. Moreover, it was proportionate to conduct a preliminary hearing: the historic allegations included complaints relating to alleged pay disparities and, on the Claimant's case, would, if successful, justify compensation measured in millions of pounds. By contrast, the victimisation and 'whistle-blowing' complaints, most of which, as the Respondent accepted, had been brought within time,[1] were quite narrow in scope and had at best a much more modest monetary value. If the strike-out application succeeded, the final hearing would require no more than about five days and there would be a massive saving of the time and resources of the parties and the Tribunal. Ms Daphne Romney KC responded, maintaining the line that a preliminary hearing was inappropriate.

8 EJ Adkin framed the first question for consideration at the preliminary hearing in these terms (Order, para 5.1):

> **Whether any complaint should be struck out because no prima facie case can be demonstrated in relation to continuing act …**

In the narrative part of his order, the judge referred to case-law put before him and continued:

[1] The Respondent did not press for a preliminary hearing in relation to those victimisation and 'whistle-blowing' claims which, on its case, were, or might be, out of time.

> **14. It is clear … that in setting up a preliminary hearing a decision needs to be made about whether the time point is being dealt with substantively or simply as a strike-out application being pursued by the Respondent. I have decided that it should be the latter, *ie* strike out, not substantively to determine the limitation issue. A substantive decision on limitation would be difficult, time-consuming and not save time.**
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> **15. Oral evidence may be called at the Public Preliminary Hearing …**
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> **16. It was specifically canvassed with Mr Martin for the Respondent, and he agrees, that the Claimant may in her witness statement for the Public Preliminary Hearing listed give evidence as to reasons why it might be just and equitable to extend time. His contention is that it is premature for the question of just and equitable to be determined substantively, but the factors going to just and equitable can be considered by the Tribunal as part of the exercise of discretion [in] relation to strike out. He explained that the Respondent had pursued this application due to the absence of a clear continuing act based on the pleaded claim bringing the earlier matters in time and absence of [a] basis to see why [a] just and equitable extension might be made. …**
>
> **…**
>
> **20. It is open to the Respondent, once in receipt of the Claimant's witness evidence, to consider whether it still wishes to pursue this application, bearing in mind the high threshold required for a strike out application. …**

9 On 4 October 2024 the Respondent's solicitor sent a letter to the Tribunal which resulted in it being permitted to run a deposit order application in parallel with the strike-out application (see above). The letter included the following observations on the effect of EJ Adkin's decision to list a preliminary hearing:

> **Accordingly, if the Employment Judge at the Open Preliminary Hearing decides that the Claimant has no reasonable prospect of establishing that the Tribunal has jurisdiction to consider the complaints predating 4 August 2023 (either by reference to a continuing act and/or just and equitable arguments), the Tribunal will strike out the relevant claims.**

As will become apparent, save that the words in brackets might have been better reformulated to acknowledge explicitly the uncontroversial fact that the Respondent would need to win on both questions, I consider that summary to be impeccable. But, as will also become apparent, the presentation of the application on behalf of the Respondent before me did not correspond with the questions which its solicitor had identified in the letter of 4 October 2024.

10 The preliminary hearing came before me on 9 December 2024. As before, the Claimant was represented by Ms Romney and the Respondent by Mr Martin. I had the benefit of very full skeleton arguments. More dubious was the benefit (if any) of the large volume of documents and multiplicity of witness statements (two in the Claimant's name, four in the name of the Respondent's witness). The bundle of authorities also contributed to the inappropriate and disproportionate burden of paper, containing 31 items and running to 566 pages.

11 We began by dealing with a concern which had been raised by the Respondent in correspondence to do with late medical evidence served by the Claimant. A possible postponement application had been mooted. Fortunately, the

problem evaporated on the Claimant's assurance that no reliance would be placed on that evidence at the preliminary hearing.

12 We next turned to the scope and nature of the hearing. I expressed puzzlement that, the matter having been listed for consideration of applications for strike-out or deposit orders, rather than a substantive hearing to determine jurisdiction as a preliminary issue, provision had been made for the giving of evidence. I thought that the orthodox view was that the function of the Tribunal at a strike-out hearing was not to make findings but to assess the relative strength and weakness of the rival cases on the time point. I struggled to understand what I was supposed to do with sworn evidence if not to base findings upon it. I wondered what status any finding I might make would have. Would it bind the parties at trial? If not, why not? I also reminded myself (aloud) that first-instance tribunals have been repeatedly reminded by the upper courts that they are not permitted to conduct 'mini-trials' when considering strike-out or deposit order applications. If I was being asked to hear evidence, weigh submissions, make findings and apply the law to those findings to reach conclusions, how could such an activity not amount to holding a 'mini-trial'? In preliminary exchanges with Mr Martin, I heard nothing to assuage these concerns. My view was and remained that the correct way forward would be to hear no evidence and decide the applications on the strength of oral argument by reference to the documents. (The documents might properly include the witness statements, although they would not have the character of evidence. Rather, they could stand as material on which the advocates might rely in support of their arguments as to the prospects of their cases succeeding.) Nonetheless, despite my strong misgivings, I was in the end persuaded to follow the procedure for which the parties (in keeping with the directions given on 12 September 2024) had prepared. Although there was no sign that, in a time-pressured preliminary hearing for case management called on short notice, there had been any debate before EJ Adkin about the propriety of hearing witness evidence at a strike-out application,[2] the fact was that the judge had given permission. Moreover, Mr Martin was adamant that I should hear from the witnesses and Ms Romney, although much less emphatic on the matter, certainly did not urge me to take any contrary course.

13 Having read into the case for the rest of the morning of day one I heard evidence from the Claimant and, on behalf of the Respondent, Mr Robert Boot, its Chief of Staff. That took us to lunchtime on day two. In the afternoon of day two I heard submissions from both sides, which left no time for me to reach my decision on the applications or address the other matters identified for consideration by EJ Adkin. In particular, I was made aware that the Claimant intended to apply to amend her claim. Accordingly, I gave directions for that application to be put in writing and delivered to the Tribunal by 20 December 2024 and the Respondent's reply by 17 January 2025.

[2] EJ Adkin seemed not to have been taken to the well-established Court of Appeal authorities but did refer to a recent EAT decision in the conjoined unreported cases of *E v X and others* UKEAT/0079/20/RN(V) and *L v Z and others* UKEAT/0080/20/RN (Ellenbogen J sitting alone in the EAT, judgment handed down 1 March 2021) (hereafter referred to jointly as *E v X*), to which I return below.

14 An application to amend was duly delivered by the Claimant on 18 December 2024, to which the Respondent replied on 16 January 2025.

The Law

Time

15 By the 2010 Act, s123 (1) provides that proceedings on a complaint under s120 (which gives the Tribunal jurisdiction in relation to a contravention of the protection against discrimination in the workplace) after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Tribunal thinks 'just and equitable'. The limitation period is now extended by the time occupied by any period of Early Conciliation. By subsection (3)(a) it is provided that 'conduct extending over a period' is to be treated as done at the end of the period.

16 In most cases under the 2010 Act where limitation is in issue, both provisions are in play. Where that happens, it is necessary to address the second before the first since, if the Tribunal upholds the claimant's argument on 'conduct extending over a period', the question whether to substitute a more generous time-limit than the 'default' three months may not arise at all or, if it does arise, the length of any extension required in order to bring the claim within time will be correspondingly shortened.

17 The proper application of s123(3)(a) is a matter for the broad, common sense assessment of the Tribunal. There is no hard and fast rule but the decided cases offer helpful guidance. Whether two or more acts can properly be seen as 'conduct extending over a period' will involve consideration of all relevant circumstances but some are likely to have particular significance. Typically, attention fastens on the duration of the relevant period, the identity or identities of the putative wrongdoer(s) and the nature of the acts relied upon. The longer the period, the harder it is likely to be to find that the acts constitute a single piece of 'conduct'. It will be easier for a claimant to show conduct extending over a period where the complaint is against a single perpetrator. And the more diverse the forms of adverse treatment relied upon, the greater will be the difficulty of characterising them as continuing conduct rather than a series of discrete acts. For the purposes of the corresponding provision in relation to 'whistle-blowing' protection (Employment Rights Act 1996, s48(3)), it is possible (in a proper case) for a series of apparently unconnected acts to be treated as 'similar' solely because they are all motivated by the protected disclosure, with the consequence that time runs from the last (*Arthur v London Eastern Railway Ltd* [2007] ICR 193 CA). By parity of reasoning, the same principle would appear to apply in the context of the 2010 Act, s123(3)(a).

18 The 'just and equitable' power under s123(1) invests the Tribunal with a wide discretion. It is for the claimant to make out a reason to depart from the primary three-month period, but that is not to say that the law imposes any presumption against the exercise of discretion. It means only that a ground must be shown. The Tribunal must have regard to all the circumstances of the case. It must exercise its discretion having regard to relevant factors and having no regard

to irrelevant factors. Its decision must not be perverse in the sense of falling outside the wide margin of appreciation afforded to it. Subject to these mild constraints, the exercise of the discretion is at large (see *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 CA).

Striking out

19 By the Employment Tribunals Rules of Procedure 2024 ('the 2024 Rules'), r38(1)(a) the Tribunal may, on the application of any party or on its own initiative, strike out any claim or response (or part thereof) on the ground that it is 'scandalous or vexatious or has no reasonable prospect of success'.

20 Leading counsel did not disagree about the principles to be applied when considering strike-out applications, which are very well known. I was reminded of a number of leading authorities at Court of Appeal level and above. These include *Anyanwu v South Bank Students Union* [2001] ICR 391 HL, *North Glamorgan NHS Trust v Ezsias* [2007] ICR 1126 CA and *Ahir v BA Plc* [2017] EWCA Civ 1392. I take three core principles from the leading cases. First, the power to strike out exists for a good reason and, in a proper case, should be exercised. It is not in anyone's interests for the system to be clogged up with hopeless cases. Second, although conflicts on major factual issues are rarely amenable to summary disposal through strike-out, some instances will arise where a tribunal can properly assess that one party's case has no reasonable prospect of success on such an issue. That may arise, for example, where a party's pleaded case is directly contradicted by contemporary documents. Third, notwithstanding the first two points, tribunals should be exceedingly cautious in exercising strike-out powers where key facts are in issue. The need for caution is particularly clear in cases involving complaints of discrimination and/or detrimental treatment on 'whistle-blowing' grounds, which tend, by their nature, to be highly fact-specific.

21 It is clear from long-established authority at a high level that a preliminary hearing on time may take one of two quite different forms. It may be a substantive hearing to determine whether the relevant claim is, or is not, out of time. This is a trial, on evidence, to determine, finally and definitively, a jurisdictional point. Alternatively, it may address the question whether, on time grounds, the relevant claim should be struck out as having no reasonable prospect of success.[3] This involves an assessment by reference to the rival contentions of the parties, primarily through the 'pleadings', of the prospect of a claimant's case on a jurisdictional issue succeeding.

22 The leading authorities also recognise that the different forms of preliminary hearing will be reflected in differences in procedure. In particular, a substantive hearing is likely to require evidence to be adduced and findings of fact to be made. By contrast, on a strike-out application, the Tribunal assesses the prospects of the relevant claim succeeding on the documents. Here, as the authorities show, the Tribunal is not permitted to conduct a 'mini-trial' or make findings of fact, precisely what it is required to do in the case of a substantive hearing.

[3] A strike-out hearing will often consider, in the alternative, whether a deposit order should be made on the basis that the claim has little reasonable prospect of success.

23 In *Caterham School Ltd v Rose* UKEAT/0149/14/RN the EAT (HHJ Auerbach, sitting alone) considered an appeal against a decision of an Employment Judge ('EJ') at a preliminary hearing to determine jurisdiction. In the first place, he held that, on a proper construction, the EJ had decided, definitively, that relevant pre-resignation conduct taken with the allegedly discriminatory constructive dismissal amounted to 'conduct extending over a period' under the 2010 Act, s123(3)(a). He then went on to hold that the EJ had erred in law in arriving at her decision in circumstances where she had been supplied with no evidence to substantiate it and had relied only on the Claimant's pleaded case. The case decided that the Tribunal could not properly determine the substantive question of jurisdiction without evidence. There was nothing new in that: substantive findings require evidence. But the judge took the opportunity to offer the following useful summary of well-established principles.

> **57. The skeleton arguments referred to a number of authorities, including Lindsay v Ironsides Ray & Vials [1994] IRLR 318 (EAT), Hendricks v Commissioner of Police for the Metropolis [2003] ICR 530, Pugh v The National Assembly of Wales, UKEAT/0251/06, Allen v Secretary of State UKEAT/0498/08, Aziz v FDA [2010] EWCA Civ 304, City of Edinburgh Council v Kaur [2013] CSIH 32, and Hale (above). Given, in particular, the common ground that there was as to the substantive legal position, it is not necessary for me to analyse each of these decisions (or the other authorities mentioned) closely in turn; but I make the following general observations.**
>
> **58. First, it is always important for there to be clarity, when a Preliminary Hearing is directed, at such a Hearing, and in the Tribunal's decision arising from it, as to whether the Tribunal is considering (or directing to be considered), in respect of a particular complaint, allegation or argument, whether it should be struck out (and/or made the subject of a deposit order), or a substantive determination of the point.**
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> **59. The differences, in particular, between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, are generally well understood, but still worth restating. A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. If a strike out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point, or on the merits), that will bring that complaint to an end. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be.**
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> **60. By contrast, definitive determination of an issue which is factually disputed requires preparation and presentation of evidence, to be considered at the Preliminary Hearing, findings of fact, and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the Full Merits Hearing of the case.**
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> **61. All of that applies equally where the issue is whether there has been conduct extending over a period for the purposes of the section 123 time limit. If the Tribunal considers (properly) at a Preliminary Hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out. But if it is not struck out on that basis, that time point remains live. If, however, the Tribunal decides at a Preliminary Hearing, that the claim does relate to something that is part of continuing conduct, and so is in time, then the issue has been decided and cannot be revisited.**

> **62. Some of the authorities do, I think, need to be read with some care in this regard, because it is not always apparent, without a close and careful reading, whether the Tribunal's decision under challenge was by way, effectively, of a decision whether or not to strike out a complaint by reference to a time point, or by way of definitive determination of that point. That is, sometimes, because the authorities do not always use the express language of "strike out", or refer to the strike-out Rule, or use the language of "no reasonable prospect of success". But, on a careful reading, it is clear that a number of these authorities are, indeed, concerned with whether a particular complaint or complaints should have been struck out, on the basis that there was no reasonable prospect of success of establishing that they were in time because they formed part of conduct extending over a period; and that these authorities (properly) use the "*prima facie* case" test as a synonym or shorthand for the strike-out test.**
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> **63. So, in short, the *prima facie* case test is appropriate, as shorthand for the "no reasonable prospects of success" test, where the Tribunal is persuaded that the matter is suitable for consideration at a Preliminary Hearing, of whether a particular complaint or complaints should be struck out on the basis that it is, in isolation, out of time, and there is no reasonable prospect of success, on the pleaded case, of it being found in time as forming part of continuing conduct.**
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> **64. But a determination of whether, substantively, there is conduct continuing over a period, cannot be reached at a Preliminary Hearing on the basis merely of consideration of whether there is a *prima facie* case on the pleading. Were it otherwise, it would mean that there was actually a lower threshold for establishing conduct extending over a period, if the matter were considered at a Preliminary Hearing, than if it were considered at a Full Hearing. That cannot be right. Read as a whole, and with care, none of the previous authorities so holds.**
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> **65. The authorities do indicate that it is not *necessarily* in every case an error of law for an Employment Tribunal to consider a time point of this sort at a Preliminary Hearing, either on the basis of a strike out application, or, possibly even, in an appropriate case, substantively. *If* that can be done properly, it may be sensible and, potentially, beneficial, so that time and resource is not taken up preparing, and considering at a full merits hearing, what may be properly found to be truly stale complaints that ought not properly to be so considered.**
>
> **66. But, as is well-known, the authorities also repeatedly urge caution – having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; because there may be no appreciable saving of preparation or hearing time in any event, if episodes that could potentially be severed as out of time, are in any case relied upon as background to more recent complaints; because of the acute fact-sensitivity of discrimination claims, and the high strike-out threshold; and because of the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue.**

24 I respectfully add two observations on Judge Auerbach's summary. First, the reference (at para 61) to a claim being properly struck out where there is no reasonable prospect of a finding of 'conduct extending over a period' such as to bring it within time was necessarily subject to the question (if, as it usually does, it arises on the particular facts of the case) whether the Tribunal should substitute a longer period in place of the primary three-month time limit for presenting the claim. No doubt the learned judge regarded the point as too obvious to require stating. Second, while noting that the '*prima facie* case test' is considered an acceptable shorthand for the statutory test, namely whether the 'conduct extending over a period' argument has no reasonable prospect of success (para 63), I prefer

to avoid the risk of being misunderstood and instead, in line with copious authority at upper appellate level, direct myself in accordance with the applicable statutory language.

25 In *Arthur* (already cited), the Court of Appeal noted the differences between the two forms of preliminary hearing and the limitations of both. Overturning the ET and the EAT, the court held that the ET had not been entitled to determine without evidence the question whether, for the purposes of 'whistle-blowing' claims under the Employment Rights Act 1996, there had been a 'series of similar acts' such as to cause time to run from the last (the provision corresponding with the 2010 Act, s123(3)(a)). The hearing had been a 'strike-out situation' rather than a substantive hearing and so proceeded on the basis of an assumption as to the truth of the facts alleged. Evidence would be needed to sustain a finding as to what link, if any, there was between the acts relied upon. Substantive preliminary hearings with evidence are, of course, possible, but will often not be a practical or proportionate option. In any event, that was not the route taken here (see on all points, paras 34-37 (Mummery LJ)). Lloyd LJ, concurring, observed (para 43) that the procedure adopted was 'equivalent' to considering a striking-out application.

26 In *E v K* the issue before the EAT (Ellenbogen J, sitting alone) was whether the EJ at a preliminary hearing fixed pursuant to directions given by another EJ for the purpose of determining time points had erred in law in declining to do so. It was held that he had. In the course of her judgment, the judge reviewed the case-law. At para 48 she took issue with the observation of HHJ Auerbach in *Caterham* (para 59) that a strike-out application 'can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant' and that evidence or findings of fact are not required. She expressed the view that this ran counter to the binding authority of *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548 CA and practice explicitly or tacitly approved by the higher courts in cases such as *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 CA. In a list of principles which, as she explained, she derived from the case-law, she included (para 50(5)) the following:

> **When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a *prima facie* case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: *Lyfar.***

27 I return to this difference of opinion in my analysis below.

Deposit orders

28 The 2024 Rules, r40(1) provides that where, at a preliminary hearing, the Tribunal considers that any specific allegation or argument in a claim, response or reply 'has little reasonable prospect of success', it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

29 In *Jansen van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0096/07/MAA, Elias J, sitting in the EAT, observed (para 27) that the test

for a deposit order is less rigorous than that for a strike-out and that accordingly a Tribunal has more leeway when considering whether or not to make an order. That said, it must have a proper basis for doubting the likelihood of a party being able to establish any essential fact.

30 In *Hemdam v Ishmail* [2017] ICR 486 Simler J, sitting in the EAT, observed (para 13) that on deposit order applications, as on strike-out applications, mini-trials must be avoided.

Submissions

31 The comprehensive skeleton arguments on both sides can largely be left to speak for themselves. For present purposes, the following brief outline will suffice.

32 As to strike-out, Mr Martin's central submission was that the application must be determined by asking whether the Claimant had made out a *prima facie* case that: (a) the complaints based on events prior to 4 August 2023 formed, with admittedly in-time allegations, 'conduct extending over a period' for the purposes of the 2010 Act, s123(3)(a); and (b) in so far as any complaint was presented outside the primary three-month limit, it would be 'just and equitable' to substitute a longer period such as to bring it within the Tribunal's jurisdiction. This formulation of the issue for decision was said to be dictated, as I understood Mr Martin, by two things: first, the way in which EJ Adkin had framed the preliminary issue; and secondly, what was said to be binding authority in the form of *E v X.*

33 Building on that platform, Mr Martin contended by reference to the 'pleadings', the witness evidence and certain other documents that I should strike the claim out because the Claimant had not made out the requisite *prima facie* case. Although his argument focused very heavily on the 'conduct extending over a period' point and seemed on occasions to proceed on the footing that success on that issue would win the day for him without more, he did also turn his attention briefly to the question of a 'just and equitable' extension, contending that, here again, the Claimant had not established a *prima facie* case.

34 In the alternative to strike-out, Mr Martin submitted that I should make deposit orders on the basis that the Claimant had little reasonable prospect of succeeding either on the 'conduct extending over a period' point or on the issue of whether the Tribunal should substitute a more generous time limit than the 'default' three-month period.

35 Ms Romney submitted that the Claimant's pleaded case and the evidence before the Tribunal demonstrated that the Claimant had an eminently arguable case on the s123(3)(a) question and, if it arose at all, on the matter of a 'just and equitable' extension under s123(1)(b). There was no basis for any pre-trial intervention on the part of the Tribunal.

Analysis and Conclusions

Strike-out – the proper approach

36 My starting-point is to remind myself that (as the appellate courts, and in particular the senior appellate courts, have reminded first-instance courts and tribunals on countless occasions) there can be no substitute for applying the statutory language under which any question or issue arises and errors and there are obvious dangers in re-formulating, or adding glosses to, the language which the legislature has chosen to use (see e.g. *Ahir v BA Plc* [2017] EWCA Civ 1392, para 16).

37 The statutory question which I am asked to answer is that posed by the 2024 Rules, r38(1)(a), namely whether, on time grounds, the pre-4 August 2023 claims should be struck out having no reasonable prospect of success. In order to answer the question, I have to decide (a) whether the ground (any claim having no reasonable prospect of success) is made out; and (b) if it is, whether I should exercise my discretion to strike it out (the rule is permissive, using the word 'may', not 'must' or 'shall'). In view of my decision on (a), (b) does not arise.

38 Despite referring to the relevant rule, Mr Martin submitted in terms (skeleton, para 5):

> **The hearing is to determine the question as to whether there is a *prima facie* case that there is jurisdiction to hear the earlier complaints.**

This proposition was said to follow from language used by EJ Adkin in framing his case management orders. Mr Martin continued (skeleton, para 16):

> **Accordingly, at this hearing the Tribunal is looking for a *prima facie* case that it has jurisdiction to consider the earlier complaints. If it finds that there is a *prima facie* case, the question of whether that case succeeds (both jurisdictionally and substantively) will be for the later trial. If and to the extent that it fails, those claims will be struck out. …**

39 With great respect to Mr Martin, the way in which he puts the case is, in my judgment, entirely misguided. I have a number of reasons for this view. In the first place, his test is quite different from, indeed bears very little relation to, the statutory test under rule 38. It is that test which I must apply.

40 Second, Mr Martin's approach places the burden of proof on the Claimant. (He seemed to acknowledge this in preliminary argument, suggesting at one point that, since she had to make out a *prima facie* case, it was appropriate for her to be heard first.) This is obviously wrong. The burden in any strike-out application lies heavily on the party seeking the summary dispatch of a claim or response.

41 Third, the logic of Mr Martin's argument has surprising consequences in relation to the Tribunal's parallel jurisdiction to make deposit orders. If a claimant facing a strike-out application bears the burden of making out a *prima facie* case on s123(3)(a) and (1)(b), does it follow that, in responding to the alternative application for a deposit order, she must make out a 'good *prima facie* case', since

the threshold for such an application is lower? If not, why not? If so, I can only say that I am aware of no authority for the proposition that the 2024 Rules, rule 40 imposes *any* burden on the party against whom a deposit is sought. The case-law is all to the contrary.

42 Fourth, I reject Mr Martin's remarkable contention that I am bound by the precise language used by EJ Adkin in his order, para 5.1, in formulating the question for preliminary decision as, 'Whether any complaint should be struck out because no *prima facie* case can be demonstrated in relation to the continuing act'. It is obvious that the judge was merely seeking to set out what he understood (no doubt after hearing Mr Martin's persuasive advocacy) to be the main focus of the strike-out application. He was not seeking to limit the scope of permissible argument or to impose upon the judge at the preliminary hearing any particular view as to how the question of strike-out should be approached. (I might add that, had I accepted Mr Martin's pedantic argument, I would have been driven to hold that the strike-out dispute was limited to the question of 'conduct extending over a period' since the executive part of the order (para 5) said nothing at all about the question of a 'just and equitable' extension. That, self-evidently, would have made strike-out impossible altogether since, as already noted, the Respondent needed to win on both questions.)

43 Fifth, EJ Adkin's decision to list a strike-out hearing (assuming there was to be a preliminary hearing at all) was not only unambiguous but also the only possible option open to him. It seems that Mr Martin accepted as much at the time. Self-evidently, a substantive preliminary hearing, which amounts to a final trial of a material part of the dispute, could not have been held in circumstances where (apart from anything else) the Respondent's case had yet to be pleaded (save in bare outline) and (as was not, I think, in dispute) disclosure of documents had yet to be completed.

44 Sixth, I cannot accept that binding authority requires me to translate the statutory test applicable to a strike-out hearing into the quite different language for which Mr Martin contends. In particular, I am unable to see that the summaries of applicable principles provided in *Caterham* and *E v K* stand, in themselves, as binding authority. In both cases they were volunteered as general, broad guidance. That guidance, in each case, was incidental to the narrow question on which the appeal turned and formed no part of the *ratio*. In these circumstances, I do not have to consider whether the later opinion of Ellenbogen J should be seen as 'trumping' the earlier opinion of HHJ Auerbach and I hold myself free to choose between them. In my respectful opinion, the analysis offered in *Caterham* is the more helpful. I regard it as faithful to orthodox, long-established principles. I have not been shown any binding authority that runs counter to Judge Auerbach's analysis. I respectfully agree that it is of critical importance to differentiate between substantive preliminary hearings and strike-out hearings. The failure to do so is commonplace in the profession, in the ET and (as Judge Auerbach politely observes) in some decisions of the higher courts. The point is well exemplified in the cases of *Caterham* and *E v K* themselves. In the former, the EAT had to start by performing a careful analysis of the case management history to determine the legal character of the preliminary hearing which the ET had held. In the latter, one EJ had directed a substantive preliminary hearing but the EJ before whom that

hearing came purported to treat the matter as one of strike-out. And at EAT level there seems to have been no acknowledgment of the apparent inconsistency between the two approaches or of the importance of the need to differentiate between them. Rather to the contrary, the EAT appears to treat the two forms of preliminary hearing as interchangeable for the purposes of setting out key principles. In particular, *Lyfar* does not, with respect, appear to help in the present context since that was an appeal arising out of a substantive preliminary hearing, not a strike-out application. And the well-known case of *Hendricks* also arose out of a substantive preliminary hearing.

45 Seventh, even if I am wrong in not regarding reported decisions such as *Caterham* or *E v K* as 'authorities' in so far as they merely offer general guidance by helpfully collecting established principles, I would not in any event be able to read *E v K* as being intended to stand as a considered decision on the permissibility of calling evidence and making findings of fact in strike-out hearings. On the contrary, the passage at para 50(5) (cited above), given in particular the references to *Lyfar* and *Hendricks*, seems clearly to be concerned with the proper approach to a substantive preliminary hearing (the form of hearing which had been directed) and the reference to 'a strike-out application arising from a time point' must, I think, be seen as an example of imprecise language of the kind which HHJ Auerbach commented upon in *Caterham*.

46 Eighth, specifically on the subject of evidence at preliminary hearings, I again respectfully adopt the guidance of HHJ Auerbach based on established authority. While a substantive hearing will (at least in the usual case) require evidence, it is otherwise where the Tribunal is dealing with a strike-out application. I am not able to reconcile the principles that, for strike-out purposes, a claimant's case is ordinarily taken at its highest (*Caterham*, para 59) and the Tribunal is not permitted to conduct a 'mini-trial', with the notion that it is proper for him or her to give evidence at a strike-out hearing and for the Tribunal to make findings of fact. Moreover, I am not aware of any binding authority acknowledging the propriety of hearing live evidence on a strike-out application.

47 Ninth, if oral evidence and findings of fact were features of strike-out hearings, there would be precious little distinction (if any) between such hearings and substantive preliminary hearings. This would wholly undermine the principle (acknowledged in *E v K* as well as *Caterham*) that there is a clear distinction between the two processes, which the Tribunal must respect.

48 Tenth, if accepted, the unhappy hybrid of a strike-out hearing with oral evidence would lead to the confusion of thought and legal and practical difficulties to which I adverted in my initial discussion with leading counsel. I will not repeat the points made above on that subject.

49 Eleventh, the logic of accepting oral evidence in strike-out hearings, if accepted, would naturally lead to the argument that such evidence should also be permitted on deposit order applications. That argument would be very hard to resist since it is well established that such applications involve the Tribunal in the same exercise as strike-out applications, save only that the requisite degree of weakness of the relevant claim or argument is set lower. The absurd idea of

Tribunals holding evidence-based hearings of deposit order applications can be left to speak for itself.

The strike-out application - conclusions

50 In my judgment, on a proper application of rule 38(1)(a), the strike-out application verges on the unarguable. The Respondent has to persuade me that the Claimant's case both on 'conduct extending over a period' and (if it arises at all) on the 'just and equitable' extension is so hopeless as to have no reasonable prospect of success. On the former point, I do see challenges in her path. At trial, she may fail to overcome them. But, on the material before me, I consider her position nowhere near hopeless. She has respectable arguments for saying that the succession of decisions on bonus payments were, in context and properly understood, manifestations of a practice or policy or state of affairs motivated by discrimination and, as such, properly seen as amounting to 'conduct extending over a period'. She also has what appears at this stage to be an entirely tenable ground for contending that unlawful decisions on bonus take effect when the deferred element (which is subject to change) is paid, rather than when the annual bonus declaration is made. That would mean that time ran from the April following the April in which the relevant bonus was declared. If these arguments succeed, the bonus claims will be comfortably within time.

51 If at trial the Tribunal determines the bonus-based 'conduct extending over a period' points in favour of the Claimant, she will have respectable grounds for arguing that the second and third elements of her sex discrimination claims, repeated as race discrimination claims, are also in time. She will argue that those matters are further instances of the continuing discriminatory state of affairs which characterised the bonus decisions from year to year. That argument may fail, but I find it quite impossible to say that it has no reasonable prospect of success.

52 If, as may happen, time for all the older claims is found to run from April 2024 (when the April 2023 bonus decision was finalised) submissions presented to me concerning whether older, *prima facie* out-of-time acts or events are salvaged by linkage with the admittedly in-time victimisation and 'whistle-blowing' detriment claims will not arise. If they do arise, they will turn on a close examination of the evidence concerning the handling of the Claimant's grievance. In his four witness statements, Mr Boot strenuously contended that he alone was responsible for the relevant acts and decisions relating to the grievance. On the strength of this evidence, Mr Martin contended that, absent a *prima facie* case to the contrary from the Claimant, I must proceed on the footing that there was no reasonable prospect of linkage being established between the in-time treatment and Mr Zhu and the Chinese decision-makers around him. And if that was right, said Mr Martin, there was no reasonable prospect of the in-time matters saving the *prima facie* out-of-time matters. To hold otherwise would be to resort to Micawberism. The Tribunal could not properly proceed on the basis that 'something might turn up.' Again, I reject Mr Martin's argument. Again, it rests on the false premise that the burden is on the Claimant in this strike-out application. I note what Mr Boot says. If it needs to enquire into the issue of linkage at all, the Tribunal may find that what he says is entirely right. But it may find otherwise. It will have to consider his evidence in the light of everything that comes from the Claimant's side, which will seek to establish

a sustained policy and trend of discriminatory treatment driven or at least materially influenced by Chinese interests within the dominant part of the company. I see no reason to dismiss that central allegation as itself having no reasonable prospect of success. The Tribunal at trial will make of it what it will. If it finds persuasive evidence in support, it will look particularly critically at what happened in relation to the grievance and who was truly behind all actions and decisions of which complaint relating to the grievance is made. It is quite impossible for me at this stage to form any confident view as to the prospects of either of the rival positions being vindicated at the end of the trial.

53 For all of these reasons, Mr Martin's arguments fall a very long way short of persuading me that the Claimant has no reasonable prospect of succeeding on the issue of whether the pre-4 August 2023 claims are properly seen as constituting, with the in-time claims 'conduct extending over a period'.

54 Even if he had succeeded in that argument, I would not have been close to striking the earlier claims out. That is because I would not have been close to accepting that the Claimant had no reasonable prospect of persuading the Tribunal to exercise its broad discretion to substitute a longer limitation period in place of the 'default' three-month period. That question would turn on a careful examination of all relevant factors. One would be the length of delay. I am in no position to speculate on that. If it arises at all, the delay may be minor (for example if, as it might, the Tribunal found that time in respect of the bonus-based claims ran from April 2023). Or it may be more substantial. Then the question of the Claimant's mental health may be a material factor. Her case as to the extent to which that may have affected the timing of the presentation of her claim would need to be tested in cross-examination. She would be likely to adduce medical evidence. I have no reason to assume that her case on her mental state over the relevant period (whatever the relevant period may prove to be) is unlikely to be accepted, let alone that it will have no reasonable prospect of success. Likewise I cannot speculate as to the likely strength or weakness of any prejudice-based argument on behalf of the Respondent. There is not even a starting-point because I cannot identify the likely extent of the delay (if any) which the Respondent will be in a position to complain about. Here, the strike-out arguments of the Respondent are, in my view, even more difficult than those on the 'conduct extending over a period' issue, because there is no firm premise from which they can start.

55 For these reasons, I am quite satisfied that there is no proper basis for striking out any part of the Claimant's case as having no reasonable prospect of success. I also regret that the Respondent did not heed EJ Adkin's wise remark at para 20 of his Order.

56 I have reached my conclusions without regard to the oral evidence presented before me (although I have had regard to the contents of the witness statements, for what they are worth). I have made no factual findings. That is because I regard it as wrong in principle to do so. All of this having been said, had I considered the oral evidence and even made factual findings upon it, I have no doubt at all that I would have arrived at exactly the same outcome and my reasons for doing so would have been more or less indistinguishable from those given above.

The deposit order application

57 The deposit order application, at least in relation to the 'conduct extending over a period' point,[4] is, in my view, just arguable, but I have no doubt that it must be dismissed. For the reasons given above in relation to strike-out, I find that the Respondent has failed by an appreciable margin to demonstrate that the Claimant has 'little reasonable prospect of success' in her arguments under s123(3)(a). She fails by a significantly wider margin to show that the test is met in relation to a 'just and equitable' extension under s123(1)(b).

58 Even if I had thought that the Claimant's case under s123(3)(a) had little reasonable prospect of success, I would have had strong reservations about making an order. That part of the case will turn on argument. It will not necessitate evidence which might otherwise be dispensed with and it will add only minimally to the costs of the trial. Accordingly, making the order would expose the Claimant to very little risk: she would in all probability pay the deposit rather than sacrificing a very important element of her case. In short, I would have had a real doubt that ordering a deposit would result in any appreciable benefit for either party.

The amendment application

59 Having seen the Gargantuan amendment application and the lengthy response to it, I entirely agree with the Respondent that the matter must be considered at a case management hearing. It is not practicable to deal with an application of that sort on paper. A notice of hearing will follow.

60 That said, I would hope that both parties will reflect on the importance of keeping this dispute within sensible bounds and the obvious risk that a failure to do so would put the September trial date at risk. If that date is lost a new date might fall in the second half of 2026 or later.

Result

61 The applications are refused. A further case management hearing will be listed.

Employment Judge Snelson

_____

Date: 8 February 2025

Judgment entered in the Register and copies sent to the parties on 12 February 2025
..... for Office of the Tribunals

[4] I am mindful that rule 40 affords more flexibility than rule 38: a deposit may be attached to an 'argument or allegation' whereas strike-out powers are restricted to claims or responses, or parts thereof. Mr Martin rightly did not suggest that the Claimant's reliance on s123(1)(b) and (3)(a) were individual 'parts' of her claim.