EMPLOYMENT TRIBUNALS

Claimant: **Ms A Sendula**

Respondent: **Penrose Homes Limited**

Heard at: **East London Tribunal Hearing Centre (by video link)**

On: **Tuesday 2 April 2025**

Before: **Employment Judge S Shore**

Representation

For the claimant: In Person

For the respondent: Mr D Cutler, Director

JUDGMENT having been sent to the parties on 8 April 2025 and reasons having been requested in accordance with Rule 60(4) of the Employment Tribunal Procedure Rules 2024.

REASONS

History of Case

1. This claim has a long, complex and unhappy history. Today should have been the first day of a 7-day final hearing listed to determine liability only. There have been multiple postponements of the final hearing.

2. The claimant started early conciliation with ACAS on 2 March 2021 and obtained a conciliation certificate dated 13 April 2021 [15]. The claimant presented her ET1 [16-30] and Particulars of Complaint [31-38] on 11 May 2021. The claimant was represented by Ms Jala Patang of Counsel.

3. Paragraph 5 of the claim form [19] stated that the claimant was employed by the respondent as a Marketing Manager from 1 February 2017 to "*March 2021*".

4. Paragraph 6 of the claim form [20] stated that:

   4.1 The claimant worked 34 hours per week.

   4.2 The claimant was paid £400 per week net.

   4.3 The claimant had not been paid notice.

   4.4 The claimant received other benefits stated to be:

   4.4.1 Property Rent £1,350 per month;

   4.4.2 Quarterly payments of £4050 per month, and

   4.4.3 Clothing allowance of £25 per month.

5. Paragraph 8 of the claim form [21] indicated claims of:

   5.1 Unfair dismissal;

   5.2 Sex discrimination; and, in the box titled "I am making another type of claim which the Employment Tribunal can deal with:

   5.2.1 Unpaid wages;

   5.2.2 Outstanding property rent; and

   5.2.3 Outstanding clothing allowance.

6. In paragraph 3 of the claimant's Particulars of Complaint [31], she wrote:

   "*I was in a relationship with David Cutler, the commercial director of the Respondent from 2009 to 2020. In February 2017, Dave Cutler offered me a job in his company as his personal assistant and I commenced this work the same month. My ole involved cleaning Dave Cutler property* (sic) *situated at Canary Wharf* [address provided]*. I would also be asked to organise and prepare the property for his business meetings of which would take place in the premises* (sic)*. I would also do the grocery shopping. My role further consisted of taking pictures for advertising agencies and websites for the purpose of renting properties.*"

7. The claimant's Particulars of Complaint went on to allege:

   7.1 Her relationship with Mr Cutler had ended at the start of August 2020 (paragraph 5 [32]).

   7.2 In July/August 2020, Mr Cutler offered the claimant another role in his company as Marketing Manager, which she commenced in August 2020 (paragraph 6 [32]).

7.3 The claimant was paid the remuneration package set out in her claim form (see paragraph 4 above).

7.4 There were frequent emails between her and Mr Cutler about money, her work and their living arrangements.

7.5 The claimant was summarily dismissed without notice dismissed on or about 12 December 2020.

8. The Tribunal acknowledged the claimant's claim on 15 December 2021 [41-42] and sent the parties a Notice of Hearing for a preliminary hearing to take place on 27June 2022 (there was a typo in the Notice that gave the date 27 June *2011*, which was clearly incorrect). The respondent was required to file an ET3 by 12 January 2022 [39-40]. The Tribunal acknowledged receipt of the respondent's ET3 [44-51], and Grounds of Resistance [52-63] was received on 1 February 2022 [64].

9. The Tribunal acknowledged receipt of the respondent's ET3 [44-51] and Grounds of Resistance [52-63] on 1 February 2022 [64].

10. On 19 February 2022, the Tribunal sent the parties a number of case management orders [not in bundle] that required the claimant to submit full particulars of her claim by 7 March 2022, and a statement of remedy by 4 April 2022. The parties were ordered to agree and send a List of Issues to the Tribunal by 4 April 2022.

11. On 22 February 2022, the Tribunal sent the parties a Notice of Hearing listing the final hearing for two days on 4 and 5 August 2022. On the same date, the claimant submitted an amended Schedule of Loss that revised the value of her claim from £68,333.33 in her first Schedule to £319,577.45. The revised Schedule included compensation for claims that the claimant had not made in her original application.

12. The case came before Employment Judge Speker on 27 June 2022 [66-71] for a closed preliminary hearing at which the claimant was represented by Ms Patang and the respondent by Ms Goodway, the respondent's solicitor.

13. EJ Speker listed the case for a 3-day final hearing in January 2024 and made case management orders which can be summarised as follows together with a commentary on how the orders were complied with (or not):

13.1 A final agreed list of issues was to be prepared and filed with the Tribunal by 11 September 2022. That did not happen.

13.2 The respondent made two requests for further information about the claimant's claim [72-73 and 74-117]. The respondent was to send a request for further information to the claimant by 11 July 2022. That was done. The request was for "further and better particulars", which is a phrase often used by lawyers in the Employment Tribunal, but the term "further information" is the correct one as set out in Rule 21 of the 2013 Rules that were in force at the time.

13.3 The claimant was to provide the further information requested by 10 August 2022. That not done until 31 August 2022 following a successful application for an extension of time by Ms Patang on behalf of the claimant made on 10 August 2022 and granted by EJ Massarella on 23 August 2022.

13.4 The respondent was to file an amended response by 31 August 2022. At the closed preliminary hearing before me on 7 August 2023, Ms Goodway thought that a response had been filed but couldn't find a copy at that hearing. The amended response was actually submitted on 29 September 2023 [113-130], which explains why Ms Goodway could not find a copy on 7 August 2023.

13.5 The parties were to exchange lists of documents by 24 August 2022. That was not done. None of the other orders relating to documents were complied with either.

13.6 Witness statements were not exchanged as ordered by 15 November 2022.

14. In preparation for the preliminary hearing on 27 June 2022 before EJ Speker, the claimant had submitted a copy of the Particulars of Complaint document, which EJ Speker believed was the first time that the Tribunal had seen it. It was not produced to me before the start the preliminary hearing that I held on 7 August 2023. In writing up this hearing, I confirmed that the document was not on the Tribunal's digital file as lodged with the claimant's ET1.

15. EJ Speker noted that the claimant's ET1 contained ticks at paragraph 8.2 indicating claims of unfair dismissal and sex discrimination. The claimant also completed the box referring to 'other claims' of unpaid wages, outstanding property rent and outstanding clothing allowance. It was noted that the box for race discrimination remained unticked.

16. EJ Speker noted that the claimant's agenda for the preliminary hearing on 27 June 2022 included a claim of race discrimination. The narrative of his case management order records that EJ Speker considered the application to amend the claimant's claim and refused it, noting that the case had been commenced on the basis of unfair dismissal and sex discrimination "and they are the matters to be resolved by the Tribunal." It was also noted that there had been no detailed application to amend or reference to the considerations in the case of **Selkent Bus Company Ltd v Moore** [1996] ICR 836.

17. Judicial mediation was mentioned at the preliminary hearing before EJ Speker, but an appointment for 6 September 2022 was vacated at the request of the respondent.

18. AREJ Burgher wrote to the claimant dated 9 March 2023 acknowledging her letter of 27 December 2022 and confirming that the case would be listed for a preliminary hearing to consider Ms Sendula's application to amend her claim. The hearing was also to finalise the list of issues and make case management orders for the final hearing. There was no copy of the claimant's letter of 27 December 2022 or her application to amend her claim on the Tribunal's digital file. I was advised at the hearing on 7 August by Ms Goodway that the application to amend was submitted on 21 November 2022.

19. The Notice of Hearing for a public preliminary hearing on 7 August 2023 was sent to the parties on 11 March 2023 together with a blank case management agenda. [no copy in bundle].

20. I dealt with the PPH on 7 August and produced a case management order dated 16 August 2023 [131-167]. My Case management order (paragraphs 16-33) noted that:

> "*The notice of hearing for this preliminary hearing stated it was listed for 3 hours. My hearing list for the day had this preliminary hearing at 10:00am. I had another hearing listed at 12:00pm. It became obvious that this hearing would take at least 3 hours, so I asked my clerk to contact the parties in the 12:00pm case to see if they could attend at 14:00pm. They could not, so I started this hearing at 10:00am, paused at 11:55am to deal with the other case, and then returned at 14:00pm to finish this hearing. We finished at 15:55pm.*
>
> *The only documents I had at the start of the case were the respondent's draft list of issues, which was not agreed, and the respondent's case management agenda.*
>
> *I had not been provided with the claimant's application to amend, her Particulars of Complaint, a case management agenda that she had submitted, her further information ordered by EJ Speker, or the bundle that had been provided for the preliminary hearing before EJ Speker. I was provided with all these documents during the early part of the hearing. I took a break to read them and returned at 11:00am.*
>
> *The claimant is unrepresented. I reminded her that the Tribunal operates on a set of Rules (I have set out the link to those Rules below). Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here [Rule 2, as it then was set out]out] …reminded the parties that the purpose of this hearing was for me to consider the claimant's application to amend her claim and to make such case management orders as may be necessary.*
>
> *The claimant speaks English as a second language. The technical language that is used in a Tribunal is not easy for anyone whose first language is not English to understand. The claimant should consider whether she would benefit from using an interpreter in her first language at the final hearing. One will be provided for her free of charge if she writes to the Tribunal to ask for one.*
>
> *I briefly outlined the law and rules regarding applications to amend claims in the Employment Tribunal. I started with the principles that arise from the* ***Selkent*** *case.*
>
> *The Employment Appeal Tribunal (EAT) decided that a Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*

It was impossible and undesirable to attempt to list all the relevant circumstances exhaustively, the EAT considered that the following are relevant:

- *The nature of the amendment – this can cover a variety of matters such as:*
- *The correction of clerical and typing errors;*
- *The additions of factual details to existing allegations;*
- *The addition or substitution of other labels for facts already pleaded; or*
- *The making of entirely new factual allegations, which change the basis of the existing claim.*
- *The applicability of time limits – if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.*
- *The timing and manner of the application – it is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.*

I then went on to briefly cover the current position on amendments as set out by HHJ Tayler in the EAT case of in ***Vaughan v Modality Partnership*** *UKEAT 0147 20/BA when deciding the application. The Summary of the decision states:*

"The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly. The balancing exercise is fundamental.

The Selkent factors should not be treated as if they are a list to be checked off."

I advised the parties that the key to deciding whether to allow an amendment is to balance the prejudice to the two parties of granting or refusing the application.

I agreed with Ms Sendula that the applications to amend were contained in her case management agenda.

The first amendment sought was an application to add David Cutler and what the claimant called "Haydon M & E" as respondents. There was no such company on the register of Companies House, but there was a company called Haydon Mechanical & Electrical Limited, which had gone into administration on 25 July 2023 and of which David Cutler was a director. This was the company

that the claimant wished to add. Ms Goodway had no instructions to act for either Mr Cutler personally or Haydon Mechanical & Electrical Limited.

The second amendment sought was a list of claims set out in the claimant's case management agenda as follows:

Wrongfully dismissal

Unfair dismissal

Unlawful dismissal Breach of contract, three times

Future loss of earning

Unlawful reduction from my salary Late charge payment on my salary

Sex discrimination

Sexual orientation discrimination

Age discrimination

Gender discrimination

Nationality discrimination

Disability discrimination

Race discrimination

Belief discrimination

Ex – partner "civil" partner discrimination

Human Rights

Modern Slavery

Harassment

Controlling

Keeping Threatening Force another male director Andy Cuddy, Projects Director in Haydon M & E, on me to move into my Flat 3 at 199 Gloucester Place, NW16BU by Dave Cutler, Haydon, Penrose.

Force by Dave Cutler, Haydon, Penrose. to move back his apartment in Flat 146 at 3 Limeharbour, London, E14 9LU.

Bullying

Humiliation

Distress

Disrespect

Inconvenience

Effect my well-being.

Disrespect

Dishonestly

Directly targeted by Dave Cutler, Haydon, Penrose as vulnerable induvial because him told me "his the boss and owner so him can do everything with me so I don't be able to complain to anyone to his companies because his charge of the money and companies, everyone work for me so his way or highway", I against that, I do have my full rights as woman, human, employee and ex – partner. Dave Cutler, Haydon, Penrose. did put me back to depression, anxiety, panic attack, sleeping disorder, eating disorder and made me paranoid. Dave Cutler, Haydon, Penrose given high amount of stress which caused me other health issues.

Fraud to HMRC

Fraud to Universal Credit Fraud to furlough scheme in 2020 as Dave Cutler, Haydon, Penrose told me only will pay furlough but I received £0 but HMRC received full pay slips from Dave Cutler, Haydon, Penrose under the furlough scheme.

Domestic abuse

Financial control and abuse

Emotional control and abuse

Psychologic control and abuse

Dave Cutler, Haydon, Penrose use of power on me as him known me well with my disability, health and financial situation because his was my ex – partner 10 + years.

Use of power in 2020 under the Covid Pandemic as everything still restricted.

In 2020 Under Covid Pandemic restriction made me more vulnerable so preparator Dave Cutler, Haydon, Penrose able to control everything (money, movement, freedom and all wish of mine all taking away by him).

Unpaid wages

Unpaid holiday payment

Unpaid sick leave

Unpaid special leave

Uplifts compensation

Outstanding property rent

Outstanding clothing allowance

Redundancy

Grievance procedure

Pension

Interest charge on everything by Dave Cutler and Haydon, Penrose because his owns my monies.

The list above contains 51 separate items. Some items are duplicated. Some items relate to the remedy available in existing claims. Some items relate to claims that the Tribunal has no jurisdiction to hear. Some items appear to relate allegations by the claimant that she has been the victim of criminal activity. Some items are unintelligible.

The list above differs significantly from the list of matters that the claimant set out in the redrafted ET1 that she says was her application for amendment on 21 November 2022. I have dealt with the list in the claimant's case management agenda, as she says that is the definitive list.

Reading the list whilst preparing this order I have concerns that the claimant could be using the Employment Tribunal process as a means of exacting some form of revenge on David Cutler for the breakdown of their relationship and the claimant's subsequent financial difficulties.

I would urge the claimant to think very carefully about how she presents this case from now on, as if a Tribunal decides that she is using the Tribunal to exact revenge from Mr Cutler, that could be an abuse of process. Cases can be struck out if they are found to be an abuse of process.

The respondent submitted a bundle of documents consisting of 844 pages for this hearing. If I refer to any of the documents from the bundle in these Reasons, I will usually record the relevant page numbers in square backets with the reference.

I read all the documents I could open before the hearing and read the Tribunal's digital file."

21. I refused the claimant's application to amend her claim to add three additional respondents. I refused all her applications to amend her claim. My case management order recoding the decision was over 14,000 words long.

22. By the time that the hearing on 7 August 2023 happened, the claimant was no longer represented by lawyers.

23. I produced a List of Issues and advised the parties that if they did not object to the List by 1 September 2023, the List would be treated as final unless the Tribunal decided otherwise. Neither party objected to the List I produced.

24. I remade the orders for exchange of documents. The respondent was to send a list and copies to the claimant by 13 October 2023, and the claimant was to send her own list and copies by 27 October 2023. The parties were then to agree a final bundle (also called a 'file') by 17 November 2023.

25. The parties were to exchange witness statements on 22 December 2023.

26. I identified the following claims:

    26.1 Unfair dismissal under Part X of the Employment Rights Act 1996.

    26.2 Direct sex discrimination under section 13 of the Equality Act 2010.

    26.3 Harassment related to sex under section 26(1) of the Equality Act 2010 and/or harassment of a sexual nature under section 26(2) of the Equality Act 2010.

    26.4 Unauthorised deduction from wages under section 13 of the Employment Rights Act 1996.

    26.5 An award under section 38 of the Employment Act 2002 because the respondent did not provide the claimant with a written statement of terms and conditions of employment.

27. I confirmed that the final hearing remained listed for three days on 9, 10, and 11 January 2024.

28. Following my case management order, the parties engaged in copious correspondence, mostly initiated by the claimant. REJ Burgher removed the final hearing from the list and replaced the first day with a preliminary hearing.

29. That preliminary hearing took place on 9 January 2024 before Employment Judge Massarella. He extended the final hearing to seven days to start on 2 April 2025. He noted that witness statements had been exchanged but there were many disputes about the bundle, which EJ Massarella sought to resolve. He also listed a Judicial Mediation appointment that was later vacated by the respondent.

30. Between EJ Massarella's case management order and the hearing on 2 April 2025, there were over 40 items of correspondence on the file, mostly generated by the claimant.

31. A DRA (Dispute Resolution Appointment) was listed for 28 March 2025 before Employment Judge Crosfill. The claimant reacted angrily to the Notice of Hearing and failed to attend.

32. On 31 March 2025, the respondent, which was now acting through its Director, David Cutler, requested that the claimant's case be struck out. The claimant objected by an email of the same date.

33. The parties received an urgent email from the Tribunal dated 1 April 2025, advising that the seven-day final hearing that was due to start on 2 April 2025 would be converted to a one-day public preliminary hearing to consider whether to strike out some or all of the claimant's claims for:

    33.1 Non-compliance with the ET order to attend the DRA hearing; and

    33.2 Consider employee status.

    33.3 Consider continuity of employment.

    33.4 Consider whether any claims advance have no reasonable prospects of success.

    33.5 Strike out any individual claims in respect of the claim.

    33.6 Determine any preliminary issues arising from the claim.

34. When concluded, the PPH would set a new date for the DRA, and a final hearing would be listed. The claimant seemed to misunderstand what the hearing on 2 April was now to do and sent two angry emails to the Tribunal.

35. I looked at the Tribunal's digital file on the morning of 2 April 2025 and saw the claimant's two emails. I caused the following email to be sent to the claimant at 9:38am:

> "*Your emails to the Tribunal of 1 April 2025 were not copied to the respondent. This reply is copied to the respondent together with copies of your emails of 1 April 2025.*
>
> *The emails have been forwarded to Employment Judge Shore, who has been allocated to the hearing that will start at 10:00am today. He has asked me to forward his response.*
>
> *"I have read the file in preparation for today's hearing and note the claimant's emails of 1 April in response to the Tribunal's email postponing the second to seventh day of the scheduled final hearing and replacing the first day with a public preliminary hearing to consider the matters contained in the notice of conversion.*
>
> *Today's hearing is not a DRA. It is a public preliminary hearing ordered by Regional Employment Judge Burgher at which I am required to make decisions about the six bullet points in the Tribunal's letter of 1 April:*

- *Non-compliance with the ET order to attend the DRA hearing; and*
- *Consider employee status;*
- *Consider continuity of employment;*
- *Consider whether any claims advance have no reasonable prospects of success;*
- *Strike out any [individual claims] in respect of the claim, and*
- *to determine any preliminary issues arising from the claim.*

When concluded, if appropriate, a new date for DRA and final hearing date will be listed.

You should join the hearing at 10:00am."

36. Before the hearing, I had skim-read the 844 page bundle (which was the same bundle as had been presented to me at the preliminary hearing on 7 August 2023) and carefully read the witness statements of the claimant (which started at page 129 of the Judicial Mediation Bundle) and Mr Cutler's witness statement (which started at page 160 of the Judicial Mediation bundle). If I refer to documents from the main bundle, I will add the page numbers from the bundle in square brackets (e.g., [34-36]). If I refer to any documents in the 405-page Judicial Mediation Bundle, I will add the page numbers from the bundle in square brackets with the addition of the letters "JMB" (e.g., [230-250 JMB]).

The Hearing

37. The hearing started at 10:06am. The claimant represented herself. The respondent was represented by Mr Cutler. I introduced myself and explained the purpose of the hearing. I went through the six bullet points contained in the Tribunal's letter to the parties dated 1 April 2025 that I have set out above.

38. Without prompting, the claimant said she had been in Hungary when the email containing the Notice of DRA was sent on 275 March 2025. She had not seen the Notice until 28 March 2025. She had tried to call the Tribunal, but no one answered.

39. Mr Cutler applied for an anonymity order under Rule 49 of the Employment Tribunal Procedure Rules 2024. I refused the application as his right to privacy was outweighed by the principle of open justice.

40. I heard the submissions of the parties on the matters that I had to determine until 12:25pm. The claimant said she had tried to upload her own bundle. I asked the Clerk to located it, which they did. I considered the claimant's bundle in the break.

41. I reconvened the hearing at 2:00pm and delivered my oral Judgment and Reasons. The Judgment was sent to the parties on 4 April 2025.

42. The claimant requested written reasons. I can only apologise to the parties for the delay in producing these written reasons. I have had periods of ill health since the hearing and have also had caring responsibilities for members of my immediate family.

Law

Strike Out

43. The Employment Tribunal Procedure Rules 2024 include the provisions for striking out all or part of a claim or a response on a number of grounds:

Striking out

38.— *(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—*

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing…

44. His Honour Judge Tayler in **Cox v Adecco and ors** [2021] I.C.R 1307 (UKEAT) (§ 28) set out the Employment Appeal Tribunal's guidance strike outs. They are directly relevant to the present hearing:

44.1 (1) No-one gains by truly hopeless cases being pursued to a hearing;

44.2 (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

44.3 (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

44.4 (4) The claimant's case must ordinarily be taken at its highest;

44.5 (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

44.6 (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

44.7 (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

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

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

45. **Cox v Adecco** is also authority for the principle that a claim should not be struck out unless the Tribunal had determined what the clams were, usually by the creation of a List of Issues. I had created an undisputed List of Issues at the preliminary hearing on 7 August 2023, at which I had also determined the claimant's lengthy application to amend her claim. The List is reproduced below.

46. In **Mr V Mbuisa v Cygnet Healthcare Limited** UKEAT/0119/18/BA, Her Honour Judge Eady said as follows:

> "*19. […] The striking out of the claim amounts to the summary determination of the case. It is a draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial.*
>
> *[…]*
>
> *21. Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person […]*"

47. For a strike out application to succeed, the Tribunal cannot simply be of the opinion that the claimant's claim is likely to fail, or that it is possible his claim will fail. The test also cannot be satisfied by deciding whether a respondent's case on disputed facts is more likely to be factually established. There must be **no** reasonable prospects of success (**Balls v Downham Market** [2011] IRLR 217 (UKEAT) at

[§6]). The tribunal must also be wary of conducting a 'mini-trial', which presents the possibility of binding the trial tribunal on preliminary factual findings: **Mr A Kwele-Siakam v The Co-Operative Group Ltd** UKEAT/0039/17/LA at [§25].

48. Tribunals should be particularly slow to strike out discrimination claims, as stated in ***Anyanwu and Anor v South Bank SU* [2011] UKHL 14**, at [§24]:

> "*For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.*"

49. It has repeatedly been stated in the upper appellate courts that contentious facts should properly be determined at trial, and the tribunal should be slow to strike out claims where central facts are disputed.

Deposit

50. Rule 40 of the ET Rules states:

> ***Deposit orders***
>
> ***40.****—(1) 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 ("the depositor") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument ("a deposit order").*
>
> *(2) The Tribunal must make reasonable enquiries into the depositor's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*
>
> *(3) The Tribunal's reasons for making the deposit order must be provided with the order and the depositor must be notified about the potential consequences of the order.*
>
> *(4) If the depositor fails to pay the deposit by the date specified by the deposit order, the Tribunal must strike out the specific allegation or argument to which the deposit order relates…*
>
> *(7) If the Tribunal following the making of a deposit order decides the specific allegation or argument against the depositor for substantially the reasons given in the deposit order—*
>
> *(a) the depositor must be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 74 (when a costs*

order or a preparation time order may or must be made), unless the contrary is shown, and

(b) the deposit must be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit must be refunded.

(8) If a deposit has been paid to a party under paragraph (7)(b) and a costs order or preparation time order has been made against the depositor in favour of the party who received the deposit, the amount of the deposit must count towards the settlement of that order.

51. The purpose of a deposit order is to identify weak elements of a claim or response. It should not be used as a means of punishing deficient pleadings. For example, in **Tree v South East Coastal Ambulance NHS Foundation Trust** EAT 0043/17, even where the pleading was unclear, and the respondent had put up a "*good defence in its ET3"*, Her Honour Judge Eady determined that there was still a "*clear dispute of fact needing to be resolved on the evidence"* which made a deposit order inappropriate (see §40).

52. The Tribunal should be slow to make a deposit order where there are factual issues in dispute. In **Sharma v New College Nottingham** EAT 0287/11, the Tribunal was held to have erred in imposing a deposit order, even where the contemporaneous documentation was inconsistent with a claimant's case. Similarly, in **Javed v Blackpool Teaching Hospitals NHS Foundation Trust** EAT 0135/17, Mrs Justice Laing emphasised that the inferential nature of discrimination law does not lend itself to a summary assessment of contemporaneous documents:

> [40] […] An undisputed document could, I have no doubt, provide evidence wholly inconsistent with, or contradicting, a primary factual allegation made by a Claimant, so, for example, if a Claimant sought to establish that he was in Bristol on a particular date and not in Hull and there were several documents signed by him or photographs of him in Hull on that particular date, contemporaneous documents could show that the primary fact which he sought to establish was not capable of being established. **It is considerably less easy to see, however, how a document could contradict the inference which the claimant seeks to persuade an employment tribunal to draw when he makes an allegation of race discrimination.**

53. Given the costs consequences prescribed by rule 39(5)(a) of the ET Rules upon the making of a deposit order, and the resulting practical effects on a claimant's right of access to justice, the tribunal must be satisfied that there is a "*proper basis"* for making one in the first place: **Sami v Avellan** [2022] EAT 72 at [§26].

54. Even if a Tribunal concludes that a claim or allegation has little reasonable prospect of success, it does not follow that a deposit order must be made, because r.39(1) says that an order "*may"* be made in those circumstances.

55. The Tribunal must consider the rights of the paying party in accessing justice, with particular consideration to their means to pay: "*it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued*" (***Hemdan*** at [§16]).

Unfair Dismissal

56. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 (ERA) are section 98, and section 230.

Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical, or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

57. Section 230(3) of the Employment Rights Act 1996 ("ERA 96") sets out that a claimant has to meet the definition of 'employee' and provides in part;

230 Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

58. A claimant must have been continuously employed for a period of at least two years to bring a claim of unfair dismissal under section 108(1) of the Employment Rights Act 1996.

Discrimination

59. The relevant sections of the EqA 2010 for the claims of direct discrimination and harassment are sections 13, 26, and 83:

13. Direct discrimination

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

If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

83. Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work; …

26. Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b)

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.

60. The relevant statutory law for an unauthorised deduction of wages claim is sections 13 and 23 of the ERA 1996:

13. Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction…

23. Complaints to employment tribunals.

(1) A worker may present a complaint to an employment tribunal —

(a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b) that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),

(c) that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or

(d) that his employer has received from him in pursuance of one or more demands for payment made (in accordance with section 20) on a particular pay day, a payment or payments of an amount or aggregate amount exceeding the limit applying to the demand or demands under section 21(1).

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

(4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j)…

My Approach to this Hearing

61. As set out above, the Tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response (Rule 38) on the grounds:

(a) that it is scandalous or vexatious or has no reasonable prospect of success (r 38(1)(a));

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious (r 38(1)(b));

(c) for non-compliance with any of the Rules or with an order of the tribunal (r 38(1)(c));

(d) that it has not been actively pursued (r 38(1)(d));

(e) that the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out) (r 38(1)(e)).

62. In this hearing, I was concerned with determining strike out, employee status, continuity of employment and case management. The consideration of strike out was whether part or all of the claimant's claims should be struck out because:

62.1 The claimant's claims had no reasonable prospects of success (r38(1)(a)).

62.2 She failed to comply with an order of the Tribunal by failing to attend the DRA on 28 March 2025 (r 38(1)(c)).

62.3 A fair trial was no longer possible (r 38(1)(e)).

55. I also had the discretion to consider whether a deposit order should be made if I considered that part or all of any of the claims made by the claimant had little prospect of success.

63. Deposit orders are regulated by Rule 40. Where a Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may order the party putting forward the allegation or argument ('the depositor') to pay a deposit of an amount not exceeding £1000 as a condition of continuing to advance the allegation or argument (r 40(1)).

64. However, before making an order, the tribunal must make reasonable enquiries into the ability of the depositor to pay the deposit and have regard to any such information when deciding the amount of the deposit (r 40(2)). The tribunal's reasons for making the order must be provided with the order and the paying party must be notified about the potential consequences of the order (r 40(3)). The order will specify the date by which the deposit must be paid (r 40(4)).

65. In considering the claimant's chances of success, I considered the likelihood of her being able to demonstrate that she was an employee of the respondent.

66. In **Autoclenz Ltd v Belcher and ors** [2011] ICR 1157, the Supreme Court held that the written agreement is not decisive in determining employment status, and the relative bargaining powers of the parties must be considered.

67. There are three conditions for the existence of a contract of employment set out by McKenna J in **Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2QB 497**, albeit in the old-fashioned terminology of 'master', 'servant' and 'contact of service', rather than 'employer', 'employee', and 'contract of employment':

> "(1) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master.
>
> (2) He agrees, expressly or impliedly, that in the performance of that service he will be subject to that other's control in a sufficient degree to make that other master.
>
> (3) The other provisions of the contract are consistent with its being a contract of service."

68. The above formulation has been binding for a long time and is often the starting point for arguments about status.

69. In **Uber BV and ors v Aslam and ors** [2021] ICR 657, the Supreme Court held that 'worker' status is a question of statutory, not contractual, interpretation, and it is therefore wrong in principle to treat the written agreement as a starting point. The following are some relevant extracts from of the speech of Lord Leggatt:

> *"38. The effect of these definitions, as Baroness Hale of Richmond observed in Bates van Winkelhof v Clyde & Co LLP [2014] UKSC 32; [2014], paras 25 and 31, is that employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers*

who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. Some statutory rights, such as the right not to be unfairly dismissed, are limited to those employed under a contract of employment; but other rights, including those claimed in these proceedings, apply to all "workers".

….

69. Critical to understanding the Autoclenz case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.
….

75. The correlative of the subordination and/or dependency of employees and workers in a similar position to employees is control exercised by the employer over their working conditions and remuneration. As the Supreme Court of Canada observed in McCormick v Fasken Martineau DuMoulin LLP 2014 SCC 39, para 23: "Deciding who is in an employment relationship ... means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. ... The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace ..."
…

87. In determining whether an individual is a "worker", there can, as Baroness Hale said in the Bates van Winkelhof case at para 39, "be no substitute for applying the words of the statute to the facts of the individual case." At the same time, in applying the statutory language, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done. As also discussed, a touchstone of such subordination and dependence is (as has long been recognised in employment law) the degree of control exercised by the putative employer over the work or services performed by the individual concerned. The greater the extent of such control, the stronger the case for classifying the individual as a "worker" who is employed under a "worker's contract".
….

91. Equally, it is well established and not disputed by Uber that the fact that an individual is entirely free to work or not, and owes no contractual obligation to the person for whom the work is performed when not working,

does not preclude a finding that the individual is a worker, or indeed an employee, at the times when he or she is working."

70. I also considered the cases of **Clark v Oxfordshire Health Authority** [1998], IRLR 125 CA, **Pimlico Plumbers Ltd v Smith** [2018] UKSC 29, and **Ter-Berg v Simply Smile Manor House Ltd and ors** [2023] EAT 2.

Issues

71. The Issues in the case were as set out in my case management order dated 1 6 August 2023 with the addition of the question of whether the claimant was an employee of the respondent, as determined by REJ Burgher:

Time limits

1. *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 December 2020 may not have been brought in time.*

2. *Were the discrimination claims made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*

    2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

    2.2. If not, was there conduct extending over a period?

    2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

    2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

        2.4.1. Why were the complaints not made to the Tribunal in time?

        2.4.2. In any event, is it just and equitable in all the circumstances to extend time?

Unfair dismissal

3. Did the Claimant have the required two years' continuous service to bring a claim for unfair dismissal under section 98 ERA 1996? The Respondent contends that the Claimant did not have the required service.

4. If so, did the Respondent dismiss the Claimant?

5. *If so, what was the reason for dismissal? The burden of proof is on the respondent to show the reason for dismissal.*

6. *If the reason for dismissal was a potentially fair one, did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?*

7. *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

8. *If the dismissal was unfair, did the Claimant contribute to the dismissal by her conduct?*

Remedy for unfair dismissal

9. *Does the claimant wish to be reinstated to their previous employment?*

10. *Does the claimant wish to be re-engaged to comparable employment or other suitable employment?*

11. *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*

12. *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.*

13. *What should the terms of the re-engagement order be?*

14. *If there is a compensatory award, how much should it be? The Tribunal will decide:*

    14.1. *What financial losses has the dismissal caused the claimant?*

    14.2. *Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

    14.3. *If not, for what period of loss should the claimant be compensated?*

    14.4. *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

    14.5. *If so, should the claimant's compensation be reduced? By how much?*

    14.6. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

14.7. Did the respondent or the claimant unreasonably fail to comply with it?

14.8. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

14.9. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

14.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

14.11. Does the statutory cap of fifty-two weeks' pay?

14.12. What basic award is payable to the claimant, if any?

14.13. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

Direct discrimination because of sex (Equality Act 2010 section 13)

15. Did David Cutler of the respondent do the following things:

15.1. Between August and November 2020 constantly change the terms of the claimant employment (paragraph 11 of the Grounds of Complaint)?

15.2. Made offensive and or intimidating comments to the Claimant by:

15.2.1. Controlling the claimant's day-to day affairs (paragraph 5 of the Grounds of Complaint)?

15.2.2. Dictating who the claimant could have a relationship with or speak to (paragraph 5 of the Grounds of Complaint)?

15.2.3. Made denigratory comments in respect of the Claimant's weight, her former work as an escort, and call her a prostitute (paragraph 5 of the Grounds of Complaint)?

15.2.4. Questioning the claimant on her daily activities (paragraph 5 of the Grounds of Complaint)?

15.2.5. Calling the claimant uneducated and inexperienced (paragraph 14 of the Particulars of Complaint)?

15.3. Sent an offensive email on 28 November 2020 (paragraph 28 of the Grounds of Complaint)?

15.4. Made threats about job security from 23 October 2020 (paragraphs 20, 22, 24, 25, 27, 28, 30, 31, 34, and 36 of the Grounds of Complaint)?

15.5. Exploit the Claimant for his own sexual pleasures and demands by, for example, demanding sex from 21 November 2020 (paragraph 28 of the Grounds of Complaint)?

15.6. Withhold furlough scheme money from the Claimant?

15.7. Exert excessive and unreasonable control in forcing the Claimant to vacate her property 3 times a week to accommodate his colleague from work at the Claimant's residence (paragraphs 19 and 20 of the Grounds of Complaint)?

15.8. Dismiss the claimant?

16. Was that less favourable treatment?

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

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

The claimant has not named anyone in particular who she says was treated better than she was.

17. If so, was it because of sex?

18. Did the respondent's treatment amount to a detriment?

Harassment related to sex or of a sexual nature (Equality Act 2010 section 26)

19. Did the David Cutler of the respondent do the following things:

19.1. Between August and November 2020 constantly change the terms of the claimant employment (paragraph 11 of the Grounds of Complaint)?

19.2. Made offensive and or intimidating comments to the Claimant by:

19.2.1. Controlling the claimant's day-to day affairs (paragraph 5 of the Grounds of Complaint)?

19.2.2. Dictating who the claimant could have a relationship with or speak to (paragraph 5 of the Grounds of Complaint)?

19.2.3. Made denigratory comments in respect of the Claimant's weight, her former work as an escort, and call her a prostitute (paragraph 5 of the Grounds of Complaint)?

19.2.4. Questioning the claimant on her daily activities (paragraph 5 of the Grounds of Complaint)?

19.2.5. Calling the claimant uneducated and inexperienced (paragraph 14 of the Particulars of Complaint)?

19.3. Sent an offensive email on 28 November 2020 (paragraph 28 of the Grounds of Complaint)?

19.4. Made threats about job security from 23 October 2020 (paragraphs 20, 22, 24, 25, 27, 28, 30, 31, 34, and 36 of the Grounds of Complaint)?

19.5. Exploit the Claimant for his own sexual pleasures and demands by, for example, demanding sex from 21 November 2020 (paragraph 28 of the Grounds of Complaint)?

19.6. Withhold furlough scheme money from the Claimant?

19.7. Exert excessive and unreasonable control in forcing the Claimant to vacate her property 3 times a week to accommodate his colleague from work at the Claimant's residence (paragraphs 19 and 20 of the Grounds of Complaint)?

19.8. Dismiss the claimant?

20. If so, was that unwanted conduct?

21. Did it relate to sex?

22. Alternatively, was it of a sexual nature?

23. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

24. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

25. Alternatively, if the unwanted conduct was of a sexual nature or related sex?

26. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

27. *Did the respondent treat the claimant less favourably because the claimant rejected or submitted to the conduct?*

Remedy for discrimination or victimisation

28. *Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?*

29. *What financial losses has the discrimination caused the claimant?*

30. *Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

31. *If not, for what period of loss should the claimant be compensated?*

32. *What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?*

33. *Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?*

34. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

35. *Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?*

36. *If so, is it just and equitable to increase or decrease any award payable to the claimant?*

37. *By what proportion, up to 25%?*

38. *Should interest be awarded? How much?*

Unauthorised deductions from wages (section 13 Employment Rights Act 1996)

39. *What was the claimant's contractual entitlement to wages?*

40. *Did that include paying the claimant's rent of £1350.00 per month and a clothing allowance of £25 pr month?*

41. *Were the wages paid to the claimant between December 2020 and the end of March 2021less than the wages she should have been paid?*

42. *Was any deduction required or authorised by statute?*

43. *Was any deduction required or authorised by a written term of the contract?*

44. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

45. Did the claimant agree in writing to the deduction before it was made?

46. How much is the claimant owed?

Section 38 and Schedule 5 Employment Act 2002

47. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

48. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

49. Would it be just and equitable to award four weeks' pay?

Findings

Failure to Attend DRA on 28 March 2025

72. I heard from the claimant regarding her failure to attend the DRA hearing on 28 March 2025. The parties originally received a notice of hearing dated 27 March 2025 for a hearing to take place on 28 March 2025. The respondent wrote to the tribunal pointing out the impossibility of the listing date with such short notice. The claimant was in Hungary at the time that the notice of hearing was sent on 27 March and remained in Hungary on 28 March.

73. A DRA hearing is one that the Tribunal has power to order without reference to or consultation with the parties. The claimant is completely unjustified in her anger about the case being listed for a DRA.

74. The claimant tried to ring the tribunal on 28 March but did not get through. Whilst she might have attended the DRA hearing on 28 March 2025 by remote video from Hungary, I accept that she thought that she could not participate from a foreign country because of the indication she had been given to previous preliminary hearing that participation from a foreign country would not be allowed. I therefore find that the claimant's claim should not be struck out and failing to attend the DRA hearing.

Employment Status

75. The factual circumstances of this claim are extremely complicated. A central difficulty in this case is that the personal relationship between the claimant and Mr

Cutler intertwined with the claimant's work arrangements with the respondent. The written evidence of both claimant and Mr Cutler accepted this to a substantial degree, albeit that each characterised the arrangement very differently.

76. Mr Cutler's evidence was that the relationship was a consensual, intermittent, a largely private one, and that the claimant's paid role with the respondent was limited, informal, and often marginal. He described repeated difficulties in separating personal support from any employment relationship and said that by late 2020, the respondent could no longer afford to continue paying the claimant where little productive work was being done [162-166 JMB]

77. The claimant, by contrast, described a situation in which she felt financially dependent upon Mr Cutler, she felt subject to shifting expectations and unable in practice to disentangle a personal relationship from working arrangements. Her witness statement presented events as part of an ongoing pattern of pressure and control, which she perceived as extending into her employment [136–150 JMB].

78. I find that the boundaries between the personal working relationships were poorly defined and that it is extremely likely that the final hearing of this matter find that the lack of clarity give rise to misunderstanding, resentment, and conflict. However, I find that it would not necessarily follow that every aspect of that conflict engaged statutory employment protection or the Equality Act 2010.

79. One of the essential qualities of a contract of employment is mutuality of obligation. That is to say the employer is obligated to provide work for the claimant, and the claimant is obligated to do it. Having read the documents in the file and the witness statements of the claimant and Mr Cutler, I find that there was no mutuality of obligation between the claimant and Penrose Homes Ltd.

80. I find that the nature of the agreement between Penrose Homes Ltd and the claimant was a to provide money to the claimant but there is no compelling evidence she provided for work in consideration for the payments she received, or that she was obligated to do work. The limited work she says she undertook amounted to filing papers and occasionally keeping the flat owned by Mr Cutler clean.

81. The bundle of documents is full emails from the claimant to Mr Cutler over an extended period of time demanding large sums of money from him to pay for things like cosmetic surgery, rent, and personal debts. All of these are matters entirely outside the ambit of any contract of employment. It is clear to me from the documents that the purpose of the monies paid by Penfold Homes Limited to the claimant was effectively to pay the claimant for participating in relationship with Mr Cutler. I find that the claimant did not regard herself as obligated to carry out the work she occasionally undertook.

82. An example of the true nature of the relationship between the parties is where she the claimant demanded to be paid for six weeks while she went back to Hungary to comfort her mother who was grieving the death of the claimant's maternal grandmother.

83. Following the line of precedent cases that begin with **Ready-Mixed Concrete** and led to the Supreme Court decision in **Uber**, I find that the claimant has no reasonable prospect of showing that there was mutuality of obligation and therefore the claimant was not an employee the respondent.

84. If the claimant was not an employee of the respondent, then she cannot bring claims unfair dismissal or discrimination. Both the unfair dismissal and discrimination claims are dismissed as having no reasonable prospect of success for that reason.

Continuity of Employment

85. Although I have already dismissed the claimant's claim to have been an employee of Penfold Homes Ltd, I would address her continuity of employment. The claimant's claim to have been employed by the respondent until 31 March to 2021 is supported by a letter from HMRC which states her termination date to be 31 March 2021. However, the claimant herself has stated that she was dismissed on 7 December 2020, and/or 11 December 2020 and her last payment was only £100. The claimant's allegation that she was paid £3**.**150 per month was factually incorrect and unsustainable. If the claimant was an employee of the respondent, her employment ended on 11 December 2020.

86. I do not accept the claimant's assertion that she was continuously employed by the respondent as there were clear breaks in the period of employment where she received no pay and indeed there was no contact between her and Mr Cutler. I therefore find that the claimant did not have two years' continuous employment and therefore has no reasonable prospect of showing that she had two years' continuous employment with the respondent. Therefore, her unfair dismissal claim is doomed to failure.

87. The documentary evidence, which I find to be more likely to be viewed as credible than the claimant's evidence at the final hearing shows that the claimant was employed by the respondent during an initial period ending in October 2018. On 24 October 2018, the claimant signed a document agreeing to have no further contact with Mr Cutler in return for a one-off payment of £5000. The documentary evidence shows that from late October 2018 to August 2019 there was no payment of wages no expectation of work, and no evidence of mutual obligations between the claimant respondent.

88. During that intervening period, as the documentary evidence shows in the bank statements and the claimant's own admissions in evidence: –

    88.1 the claimant undertook other work;

    88.2 the respondent neither required nor received services from her: and

    88.3 there was no wage payment or contractual framework consistent with employment.

89. The claimant's written evidence and various submissions and admissions made during the many preliminary hearings in this case have suggested many alternatives for the effective date of termination of her employment. Her ET1 suggested "March 2021", supported by her P45. However, a P45 is not determinative of the effective date of termination. If I am wrong about the effective date of termination, the claimant would still not have the necessary two years' continuous service to bring an unfair dismissal claim.

90. I therefore find that the final hearing is unlikely to find that there was any contract of employment between the respondent and the claimant after October 2018 and that there was a clear break in continuity. If new employment relationship commenced in October 2019 when the claimant again began to be paid by the respondent undertook administrative work, albeit on an irregular and limited basis.

I find that the claimant's prospects of showing her that the personal relationship financial assistance or accommodation arrangements during the intervening period amounted to disguised employment to be negligible. Those arrangements were not characterised by mutual obligations of the kind required for a contract of employment.

91. The claimant and Mr Cutler were engaged in an on off relationship over a number of years until 2020. At times that relationship was physical and other times it was not. The claimant's emotional relationship with Mr Cutler is inextricably intertwined with her employment history with the respondent Penfold Homes Ltd. I should make it clear that there is no claim before the tribunal against Mr Cutler personally although he was the managing director of Penrose Homes Ltd.

Prospects of success

92. If the claimant was an employee of the respondent, I find that none of the claims made by the claimant have any reasonable prospects of success. I found that the claimant's witness statement to be vague and inconsistent with itself and inconsistent with the documents produced. Her claim of sexual harassment and has a number of insurmountable obstacles.

93. I find that the claimant's evidence should be approached with care. She obviously feels very strongly about what occurred and devoted considerable time and energy to recording, reconstructing, and explaining events in detail from her perspective. Her witness statement is lengthy, discursive, and often argumentative, moving frequently from narrative into submissions. Assertions of motive and intention are advanced as fact, and events widely separated in time are sometimes presented as part of a single, continuous course of conduct.

94. The claimant, throughout these proceedings has tended to return repeatedly to a perception of injustice, even when dealing with matters of narrow fact. The Tribunal that hears the final hearing would have to exercise caution to distinguish carefully between what she genuinely experienced, what she inferred, what she believed ought legally to follow from her perceived experiences. I find that the final hearing will have difficulty her in finding that Mr Cutler's alleged actions were

driven by the claimant sex rather than personal disagreement, financial pressure, or relationship breakdown. The final hearing is very likely to find that the assertions made by the claimant there were not supported by the contemporaneous documents.

95. Mr Cutler's witness statement was more concise and focused on explaining the respondent's position. He accepted that relationship between him and the claimant complex and at times fraught consistently denied that his conduct towards the claimant was motivated by sex or intended to humiliate or intimidate her. I find that the final hearing is likely to find Mr Cutler's evidence to be generally consistent with the clear documentary record, particularly with regard to the respondent's financial position in late 2020 and attempts to identify work for the claimant, including the proposed secondment to Haydon, an associated company.

96. Mr Cutler's language in messages to the claimant was sometimes abrupt, impatient or dismissive there but I find that the final hearing is likely to find that it reflects the breakdown of a personal relationship and the financial and emotional strain, not discriminatory harassment as defined by statute.

97. In relation to the claimant's working arrangements, I find that the documentary evidence appears to show that the discussions in autumn 2020 about the claimant's undertaking work for Haydon, changes in pay, and accommodation arrangements were attempts to manage a deteriorating business and personal situation rather than a strategy to disadvantage the claimant because she was a woman. The documentary evidence demonstrated ongoing negotiation rather than unilateral imposition.

98. I understand why the claimant experienced this as destabilising, but I cannot see how the final hearing would find that it was less favourable treatment because of sex. The communications from Mr Cutler which were blunt and insensitive are likely to be found to have been made in his capacity as an employer exercising power over subordinate employee rather than as an individual involved in a collapsing personal relationship. I note that similar disagreements arose around money, accommodation, and expectations, none of which were inherently gender specific many of which would apply in respect of the sex of the claimant.

99. The claimant makes allegations of sexual misconduct and harassment. Both parties both the claimant and Mr Cutler agreed that there had been a sexual relationship between the various points however I do not find that it is likely that the tribunal final hearing would find that sexual conduct in late 2020 was imposed by Mr Cutler's condition is continued employment.

100. There is no evidence in the claimant's witness statement that suggests that her claims of discrimination were brought in time. She started to early conciliation with the respondent on 2 March 2021 and there is no allegation that post-dates the cut-off date which would be 3 December 2020. In the circumstances of the case claimant's prospects of extending time would be negligible.

101. I find that the claimant has no reasonable prospect of showing that the respondent underpaid her.

102. In making this decision, I was mindful of the law as set out above but find that the claimant was legally represented when she submitted her claim form and in the early stages of the proceedings. She was given ample opportunity to amend her case but failed to make a successful application.

Fair Trial

103. A fair trial of the claims was not possible if the final hearing had started today because of the claimant's conduct. She has conducted these proceedings unreasonably. It is her fault that the final hearing was unable to proceed today.

Approved by:
Employment Judge S Shore
Date: 20 April 2026