EMPLOYMENT TRIBUNALS

Claimant: Ms N Fazilova

Respondent: 1. Moorfields Eye Hospital NHS Foundation Trust
2. Ms G Jackson
3. Ms C Feasby

Heard at: **London Central (remotely by CVP)**
On: **17 October 2022**

Before: **Employment Judge Heath**

Representation
Claimant: In person
Respondent: Mr C Kennedy (Counsel)

JUDGMENT

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Introduction

1. The claimant was employed by the first respondent from 1 February 2016 until 25 May 2022 when her notice of resignation, given 27 April 2022, took effect. She began the ACAS Early Conciliation process in respect of the second and third respondents (R2 and R3) on 30 May 2022, and she received certificates on 1 June 2022. She presented her ET1 to the tribunal on 5 June 2022, making claims of unfair dismissal and race discrimination against R2 and R3.
2. The first respondent (R1) was added as a respondent at a Case Management Preliminary Hearing before Employment Judge J Burns on 19 August 2022. The claims were clarified, and it was confirmed that the claimant brought the following claims;
    a. Constructive unfair dismissal (resignation on 27 April 2022 with an EDT of 25 May 2022). The matters which she relied on singly or cumulatively as a repudiatory breach of her contract were the matters that she relied on as acts of direct discrimination and/or harassment which occurred before her resignation;
    b. Direct race discrimination, section 13 Equality Act 2010 (EA). Employment Judge J Burns set out the act of less favourable

treatment in a schedule, which I annexe below. When I refer to this schedule in this decision, I will use the abbreviation "LOI" (for List of Issues);

c. Race-related harassment, section 26 EA. The unwanted conduct relied on was the same as relied on as less favourable treatment for the direct race discrimination claim.

3. Employment Judge J Burns listed an Open Preliminary Hearing (OPH) to "*consider such of the following as the judge deems appropriate:*

a. whether or not the claims have been brought in time;

b. whether or not to make an order striking out the claims on the grounds that they have been brought out of time;

c. whether or not to make an order striking out any claims on the grounds that they have no reasonable prospects of success;

d. whether or not to make an order requiring the Claimant to pay a deposit or deposits not exceeding £1000 per claim as a condition of permitting her to continue with any claim, on the grounds that it has little reasonable prospect of success;

e. *whether or not to strike out the unfair dismissal claims against R2 and R3 on the grounds that they were not the Claimant's employer*".

4. At the beginning of the hearing the claimant confirmed that she withdrew her claims against R2 and R3 and I have dismissed them in a separate judgment.

Procedure

5. Employment Judge J Burns made Case Management orders for the preparation of this OPH. These provided for disclosure of documents, the preparation of a bundle and the preparation of a witness statement. He made an order that if the claimant wishes to suggest that she would be unable to pay deposit/s she should disclose documentary evidence and refer to it in her witness statement.

6. I was provided with a 667 page bundle. The respondents say that the vast majority of the documents in it are irrelevant to the issues under consideration and were included at the insistence of the claimant. I was not referred to the vast majority of the bundle. The claimant also produced a witness statement and gave evidence under oath. She was cross examined briefly by Mr Kennedy. Both parties produced written submissions.

7. I raised with the parties that it appeared to be the case that, given the acts relied on as less favourable treatment and unwanted conduct for the direct race discrimination and race-related harassment claims were the repudiatory breach/es, that the constructive dismissal might itself be considered an act of discrimination. However, it did not appear as such in the schedule prepared by Employment Judge J Burns. The claimant clarified that she was relying on her constructive dismissal as a discriminatory one. Mr Kennedy said he could not take matters further than what was in the Case Management Summary but pointed out that for

a discriminatory dismissal the time would run from the acceptance of the repudiatory breach, and not the EDT (this is right, see *De Lacey v Wecheln Ltd* [2021] IRLR 547 at para 72).

8. I asked the parties at the start of the hearing how they considered I should approach issues a) *whether or not the claims had been brought in time* and b*) whether or not to make an order striking out the claims on the grounds that they have been brought out of time*. Mr Kennedy understood a) to involve the determination of a preliminary issue (presumably under Rule 53(1)(b) Employment Tribunals Rules of Procedure 2013 ("ET Rules")) and that this related to whether there was a continuing act of discrimination. Mr Kennedy understood b), the application to strike out on a time point, as relating to whether it was just and equitable to extend time if the Tribunal determined that the claims were out of time. I noted that Employment Judge J Burns had left me with the discretion to determine such matters as I deem appropriate.

9. It became clear at the hearing that the claimant had not disclosed any documentation relating to her ability to pay a deposit, and that she had not referred to her financial means in her witness statement. When this issue was raised, the claimant clarified that she understood the case management orders but that she had not complied with the orders in respect of financial evidence. Mr Kennedy submitted the claimant should not be allowed to give evidence of her means. I considered that the order had been made, in part, to avoid any surprises at this hearing, and that there would be a risk that the respondents would not be on an equal footing with the claimant if she were allowed to introduce evidence at the hearing. I also had regard to the fact that the claimant is a litigant in person, that I must deal with the case in ways that are proportionate to the complexity and importance of the issues, and must be appropriately flexible at times. Rule 39(2) obliges me to make reasonable inquiries into the party's ability to pay a deposit and to have regard to such information in deciding the amount of the deposit. Without any evidence from the claimant I would have little option but to set any deposit at £1000 per allegation or argument. If I did that, it might run the risk of presenting an obstacle to justice. I therefore allowed the claimant to give oral evidence of her means, and gave Mr Kennedy the opportunity to cross examine her. I considered this approach to be just and fair in the circumstances.

The law

Time limits EA

10. Section 123 EA provides:

> *(1) Proceedings on a complaint within section 120 may not be brought after the end of—*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *…*

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

11. The key question in determining whether there was conduct extending over a period is whether there was an ongoing situation or continuing state of affairs which amounted to discrimination (*Hendricks v Metropolitan Police Commissioner* [2002] IRLR 96). The claimant bears the burden of proving, by direct evidence or inference, that numerous alleged incidents of discrimination are linked to each other so as to amount to a continuing discriminatory state of affairs.

12. As to extending time, the Court of Appeal in *Abertawe Bro Morgannyg University Local Health Board v Morgan* [2018] IRLR 1050 observed that the wording of section 120(1)(b) "*such other period as the employment tribunal thinks just and equitable*" gives the Tribunal a wide discretion in considering whether to extend time. Leggatt LJ said that "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reason for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claims while matters were fresh).*"

13. Tribunals are encouraged to "*assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… 'The length of, and the reasons for, the delay*' " (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 22).

14. In *Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022]* UKEAT 132 the EAT held that the potential merits of a claim, which was not so weak as to be struck out under Rule 37, are not irrelevant when it comes to deciding whether it is just and equitable to extend time. If these the merits are weighed in the balance against the claimant the assessment of the merits "*must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing, and taken proper account, particularly where the claim is one of discrimination, of the fact that the tribunal does not have all the evidence before it, and is not conducting the trial*".

15. Reviewing the authorities, the learned editors of *Harvey's* set out a non-exhaustive list of factors that may prove helpful in assessing individual case:

    a. the presence or absence of any prejudice to the respondent if the claim is allowed to proceed

    b. the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;

    c. the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;

d. the conduct of the claimant over the same period

e. the length of time by which the application is out of time;

f. the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of the claim;

g. the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.

Time limits and preliminary hearings

16. In the case of *E v X and others* UKEAT/0079/20 the EAT reviewed previous authorities and identified a number of key principles to be applied when time points are being considered at a preliminary hearing. I set them out in full:

a. In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: ***Sougrin****.*

b. It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: ***Robinson****.*

c. Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: ***Sridhar****.*

d. It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue: ***Caterham****.*

e. 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****.*

f. *An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs:* ***Aziz; Sridhar.***

g. *The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor:* ***Aziz****.*

h. *In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading:* ***Caterham****.*

i. *A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason:* ***Robinson****.*

j. *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. If it fails, the claimant lives to fight another day, at the full merits hearing:* ***Caterham****.*

k. *Thus, if a 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:* ***Caterham****.*

l. *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:* ***Caterham****.*

m. *If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of*

discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: ***Caterham***

Strike out and deposits

17. Rule 37 of the ET Rules provides:-

> *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> (a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

18. In *Mechkarov v Citibank NA* [2016] ICR 1121 the EAT summarised the principles that emerge from the authorities in dealing with applications for strike out of discrimination claims:

> *"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*

19. The guidance in *Mechkarov* followed from a line of authorities including *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603. *Chandok v Tirkey* [2015] ICR 527 shows that there is not a "*blanket ban on strikeout application succeeding in discrimination claims*". They may be struck out in appropriate circumstances, such as a time-barred jurisdiction where no evidence is advanced that it would be just and equitable to extend time, or where the claim is no more than an assertion of the difference in treatment and a differencing protected characteristic. *Eszias* also made clear that a dispute of fact also covers disputes over reasons why events occurred, including why a decision-maker acted as they did, even when there is no dispute as to what the decision maker did.

20. In *Ahir v British Airways plc* [2017] EWCA 1392 the Court of Appeal held that tribunal's should "*not be deterred from striking out claims, discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger in reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context*".

21. Rule 39 ET Rules provides: -

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

22. In the case of *Hemdam v Ishmail* [2017] IRLR 228 the Court of Appeal gave guidance to tribunals on the approach to deposit orders. The guidance included:-

    a. The test for ordering a deposit is different to that for striking out under Rule 37(1)(a).

    b. The purpose of the order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and creating a risk of cost. It is not to make access to justice difficult or to effect a strike out through the back door.

    c. When determining whether to make a deposit order a tribunal is given a broad discretion, is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and reach a provisional view as to the credibility of the assertions being put forward.

    d. Before making a deposit order there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence.

    e. A mini trial on the facts is not appropriate.

The evidence

23. The claimant produced a witness statement dated 10 October 2022. In this she set out, among other things, that allegations about the way R2 spoke to her, her unfair appraisal rating along with the race discrimination "*are part of the continuum or ongoing sequence, connected together up to and including my resignation on 27th of April 2022*". She said she raised an informal grievance on 10 November 2020, and filed a formal grievance on 2 March 2021. She said the investigation lasted over eight months and a report was provided on 10 November 2021. She said the delay affected her health. The claimant outlined her appeal against the investigation outcome on 23 November 2021, outlined she had appeal meetings on 3 March 2022 and 26 April 2022 and that she was provided outcomes on 10 March 2022 and on 5 May 2022.

24. She set out that she had a meeting with occupational health on 28 April 2022 and 18 May 2022.

25. She asserts that "*older events are the same kind of events as a later meeting with Respondent 3 on 28 April 2022, so the early events must be considered as part of the continuous course of events and conduct*".

26. In terms of the merits of her case, the claimant says that R2 and R3 have a "*particular view of my performance because of my race and nationality consciously or subconsciously, causing the difference in treatment especially in comparison with Maria (Somalian) and Pierra (Italian)*." She refers to being asked *"Do you understand? Is it clear to you?*" In contrast with how her colleagues were treated. She says R1 did not investigate her grievances properly or in line with the ACAS Code of Practice. She claims she was not provided her appraisal, as required by policy. She says the respondents failed to apply various dignity at work and bullying policies after she reported bullying and harassment, and did not properly deal with her complaints. She said that R1 did not communicate with her properly. She asserts "*the grievance process was a part of the conduct and race discrimination and lasted from 10th of November 2020 until 26th of April 2022: the Respondent delayed investigation for 1 year and 5 months, they did not provide a timeframe for resolving my grievances by breaching their own timeframe. They took superficial approach to my grievance and did not evaluate the evidence and look at the evidence properly but dismissed them unreasonably*".

27. At the hearing, the claimant was asked why she brought the claims when she did. She said because the appeal did not work, and she felt she was not being heard. She said she had been bullied for two years, had health issues and felt she should have justice. When asked why she had not brought the claims earlier, she said she brought them after her resignation. She really enjoyed her job, but the respondents made it clear that they did not need her there, they did not investigate, and that it was unbearable. She said she did not take legal advice. She said she had heart pain which she had never experienced before, as well as headaches and mental health problems including panic attacks. She said she was prescribed medication including sleeping tablets.

28. In oral evidence the claimant said that she was now working receiving a monthly income of £1750 net. She pays rent of £800 per month plus £150-£200 bills. She has no debts.

29. Under cross-examination Mr Kennedy put to her that she was actively engaged in preparing the bundle. She agreed she could have provided GP records about her health, but that she did not as they were sensitive. In terms of the deterioration of health in 2020, it was put to her that she worked during this period. She said it was remote working and she did not have contact with R1 and R2, and that she had sick leave in 2021. She agreed that she had been able to progress her grievances and appeals. She agreed she was able to submit her claim to the tribunal.

Time limits – the facts

30. Initially the claimant brought her claim against R2 and R3, presenting her ET1 on 5 June 2022, having initiated the ACAS Early Conciliation procedure on 30 May 2022 and receiving his certificate on 1 June 2022.

31. On the face of it, any claims of discrimination against R2 and R3 which occurred prior to 2 March 2022 are out of time. This would mean all allegations apart from para 12 LOI (the dismissal of appeals). It is not clear that these are allegations she actually levels at R2 and R3.

32. R1 was added as a respondent on 19 August 2022. Any claim prior to 20 May 2022 is on the face of it out of time as against R1.

33. In terms of the timings of the individual acts (ignoring for the moment the contention that they together formed a continuing act) they appear to be as follows:

    a. LOI 1 - September 2022 October 2021 – R2
    b. LOI 2 - November 2020 – R2;
    c. LOI 3 - November 2020 – R2;
    d. LOI 4 - December 2020 – R2;
    e. LOI 5 - 24 February 2021 – R2;
    f. LOI 6 - 10 November 2021 – R1;
    g. LOI 7 - 29 June 2021 ongoing – R2;
    h. LOI 8 - September 2021 – R3
    i. LOI 9 - December 2021 ongoing – R3;
    j. LOI 10 - 8 December 2020 ongoing – R1, R2;
    k. LOI 11 - November 2020 ongoing – R2;
    l. LOI 12 - 5 May 2022 – R1
    m. Discriminatory dismissal - 27 April 2022 (resignation letter) – R1.

Conclusions

<u>"Whether or not the claims have been brought in time"</u>

34. It was not certain from the Case Management Orders how I was to approach the consideration of "whether or not the claims have been brought in time". However, the order was clear that I was left with the discretion to deal with such of the issues in the way I deemed appropriate.

35. I do not accept that I was being directed to determine as a preliminary issue whether or not there was a continuing act of discrimination. As the EAT pointed out in *E v X* it may be sensible and beneficial "in an appropriate case" for a tribunal to determine a time point substantively. However, caution should be exercised in disentangling individual time points from each other and other issues in the case. Determining whether there was an ongoing discriminatory state of affairs is a highly fact-sensitive exercise involving evidence which is highly likely to overlap with evidence required at the final hearing.

36. I can see some force in the thrust of Mr Kennedy's submissions that allegations of discrimination relating to the dismissal of the claimant's grievance appeals (Issue 12) are of a different character to the rest of the allegations. They do involve different individuals, which is a relevant factor, although not necessarily a conclusive one, in deciding whether there has

been an act extending over a period. Nonetheless, a determination of whether there has been an ongoing discriminatory state of affairs involves looking at the entirety of the allegations. I considered that this is a matter best left to the final hearing.

37. If I am not determining as a preliminary issue whether the acts extended over a period, I am not making a determination as to when the end of the period is. It would therefore not be possible for me to go on to determine as a preliminary issue whether is it is just and equitable to extend time. The point from which an extension is to be considered has not been determined.

"Whether or not to make an order striking out the claims on the grounds that they have been brought out of time"

38. Looking again at the guidance in *E v X*, I am to consider "*whether the claimant has established a reasonably arguable basis for the contention that the various act so linked as to be continuing acts, or to constitute ongoing state of affairs*". I bear in mind the "*acute fact-sensitivity of discrimination claims and the high strike-out threshold*".

39. What is less clear from *E v X* is how to approach the issue of extension of time. By implication, I must consider whether the claimant has established a reasonably arguable basis for contending that it is just and equitable to extend time.

40. I will deal first with the straightforward matter of the unfair dismissal claim. Time runs from the EDT, 25 May 2022. R1 was added on 19 August 2022, and the claim is therefore in time. In passing, the tribunal in determining this claim, will consider whether, cumulatively, the matters pleaded as acts of discrimination and/or harassment (apart from the dismissal of the grievance appeals) amounts to a repudiatory breach of contract.

41. Turning now to the discrimination and harassment claims. All of the LOIs apart from LOI 6 and 12 relate to actions of two managers, R2 and R3. These allegations span a period from September 2020 to December 2021. Taking her case at its highest, but looking at it critically bearing in mind the high bar of strikeout, it is reasonably arguable that the acts are linked.

42. Less compelling is the argument that the dismissal of the claimant's grievance appeals, LOI 12, was linked. While the subject matter of the grievance appeals covered the same ground as the allegations the claimant makes against her managers, the claimant will have to show that the dismissal of the appeals was less favourable treatment because of her race or unwanted conduct related to her race. This will involve an examination of the decision-making of those who took these decisions.

43. At this point, the difficulty raised by the extension of time issue rears its head. The issue I have to determine is whether to strike out the claims on the grounds that they have been brought out of time. A claim will have been brought out of time if it has been brought after the end of the period of three months starting with the date of the act to which the complaint relates, or such period as the tribunal thinks just and equitable.

44. In short, I consider that I am not able to strike out the claims without considering the just and equitable extension argument.

45. The claimant says she was exhausting an internal process and that her mental health was not good. While I am not determining the issue of whether it is just and equitable to extend time, but merely considering whether it is reasonably arguable that time should be extended, there are other issues which I take account of:

    a. The constructive dismissal claim is in time, and will go ahead unless I strike it out for other reasons. The tribunal will therefore be considering the self-same evidence relied on for the discrimination and harassment claims;

    b. The claimant was a litigant in person and was not in receipt of legal advice.

46. It may be that in due course a tribunal does not accept the claimant's contention that it is just and equitable to extend time on the basis of her ill-health and the fact that she was pursuing internal resolution of her complaints. However, for the purposes of a strikeout application on the basis of time limits, and even if time starts to run from December 2021, the claimant has established that it is reasonably arguable that it is just and equitable to extend time. Matters such as the exhausting of internal process and the state of health of the party seeking the extension are the sort of matters of commonly advanced. Obviously, without determining the issues finally, they are certainly reasonably arguable.

<u>Whether or not to make an order striking out any claims on the grounds that they have no reasonable prospect of success</u>

47. I bear in mind that it is not my function to conduct a mini-trial of these matters, and that I am to take the claimant's case at its highest.

48. In her grounds of complaint, the claimant states that until September 2020 she had a good relationship with her manager who rated her as outstanding or good in all her appraisals. Her claim is that this all changed when R2 took over. She claims she was subjected to hostility and criticism and was continually asked whether she understood things. The claimant says she felt humiliated by this and believes it was on the basis that she is not English and is from an Asian background and from Uzbekistan. The claimant says she was treated unfairly and inconsistently to colleagues of different races.

49. The claimant further alleges that her appraisal was conducted in a way she found unfair which led to a result that contrasted with her previous appraisals, and that she was told she would not be getting promotion. She says her grievances were dismissed, her managers did not do things they said they would do, she was threatened with dismissal and her right to work was questioned in a way it had not been previously, she was not given appraisals or development plans and not provided with certain forms. Finally, her appeals into grievance determinations were dismissed. She says there was a conscious or subconscious view about her performance based on her race and nationality.

50. Mr Kennedy focused on the detail but also asked me to stand back and look at the entire picture. Looking at the entire picture is useful this matter. The authorities are clear that discrimination is often hard to prove, is highly fact sensitive and most often depends on inferences drawn. Very rarely will there be evidence of overt discrimination. Taking the claimant's case at its highest, and standing back and looking at the overall picture, the claimant says she was treated unfairly in a number of respects by new managers, in stark contrast to how her previous manager treated her, in contrast to how others were treated and in ways which she felt were unfair.

51. The tribunal will have to determine the reason why the alleged discriminators acted as they did, which, taking the case at its highest, was unfairly and inconsistently. Where there is a dispute about the reason why an alleged discriminator acted as they did it would not be appropriate to strike the case out save in exceptional circumstances. This is not one of those exceptional cases, for example like *Ahir*, where the tribunal and the Court of Appeal held that there was no reasonable prospect of the tribunal accepting the basis on which the claimant put his case. The tribunal will have to resolve the dispute about what motivated the respondent's conduct and whether it related to race.

52. The respondent also sought to strike out the constructive unfair dismissal claim, as the alleged repudiatory breach of contract rested on the less favourable treatment of grounds of race and unwanted race -related conduct. There are numerous factual disputes to be resolved in such a claim. I have already held that it is not appropriate to resolve the dispute about the reason why the respondent's employees acted as they did and whether such conduct related to race. This is an essential element of the constructive unfair dismissal claim. It is not appropriate to strike out this claim either.

<u>Whether or not to make an order requiring the claimant to pay a deposit or deposits not exceeding £1000 per claim as a condition of permitting her to continue with any claim, on the grounds that it has little reasonable prospect of success</u>

53. While the bar for making a deposit order is lower than that of strikeout, and tribunals are given a little more licence to look into the facts, again there is a dispute about motivation. In order to order the deposit I must have a proper basis for doubting the likelihood of the claimant being able to establish the facts essential to her claim. I am not conducting a mini trial of the facts and I am not enabling a strikeout through the back door.

54. The EAT has also stressed that the caution which tribunals must show in considering strike out applications in discrimination cases applies also to deposit applications (*Sharma v New College Nottingham* UKEAT0287/11 also *Tree v South East Coastal Ambulance Service NHS Foundation Trust* UKEAT/0043/17/LA).

55. Superficially, it is not readily apparent how some of the claims, looked at individually, relate in any way to the claimant's race. Mr Kennedy singled out, for example, directing someone to a general number (LOI 2).

However, in discrimination claims sometimes focusing too tightly on the detail can make one lose sight of the bigger picture. It is also the case that when a whole pattern of conduct is alleged, findings in respect of certain elements of the claim can shed light on different parts of the claim. The claimant's claim is that her managers viewed her abilities through the lens of her race, and this affected how they behaved towards her.

56. In the circumstances I do not order the claimant to pay a deposit in respect of any of the claims.

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Employment Judge **Heath**

Date 10 November 2022_____

JUDGMENT SENT TO THE PARTIES ON

11/11/2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Schedule

1. Gemma Jackson (GJ) regularly humiliating C during weekly one-to-one meetings in Sept 2020 to October 2021 by asking: ”Do you understand?” and “Is it clear to you?” - and also putting a similar comment in a group email in 2021
2. GJ not helping C and sending C “to the switchboard” ie telling her to call a general number for help once in November 2020. After that C did not ask her for help
3. GJ asked C to draft emails to managers rather that to consultants in November 2020
4. GJ and Clare Feasby’s (CF) conduct of Cs annual appraisal in December 2020. C says it was excessively long and was spread over two meetings on the 2nd and 8th December 2020 that the manner of the questioning was inappropriate and C were given a “satisfactory” grading on 8/12/2020 instead of previous assessments which had been “good” or “excellent”, CF said C would not be getting promotion. GJ submitted the report without Cs signature or consent or approval and did not provide her with a copy.
5. 24/2/21 GJ make comments about “clarity of communications” with C during an informal resolution meeting 6. The dismissal by a panel headed Claudia Gomez of C’s grievance on 2/3/21 against GJ and CF which was investigated on 5/7/21 and dismissed in a report issued on 10/11/21
6. On 29/6/21 GJ said she would provide “a table of clinics” and told C to “nag her for it” but didn’t give it to C.
7. CF in Sept 2021 sent C an email threatening to terminate her contract and questioning her right to work - C visa had expired and she had to apply to the Home Office for new visa which she did
8. CF not giving C an annual appraisal after the December 2020 appraisal up until C’s resignation. She claims she should have been appraised again in December 21.
9. C not being given a development plan from 8/12/2020 onwards. C had one before that but was not given one after her December 2020 appraisal.
10. C was not provided with Standard Operational Procedure Forms (SOPs) from November 2020 onwards despite chasing. GJ promised them but did not provide them
11. The dismissal by 2 separate panels of Cs appeals against the dismissal of her grievance. The Claimant appealed on 23/11/21, the hearing before the first panel took place on 3/3/22 (outcome received by C on 10/3) and the hearing before the second panel took place on 26/4/22 (with the outcome received by C in the beginning of May 22)