Appeal No. UKEAT/0204/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 7 January 2020

Before

HEATHER WILLIAMS QC

DEPUTY HIGH COURT JUDGE

(SITTING ALONE)

MR A LESLIE — APPELLANT

IMPERIAL COLLEGE HEALTHCARE NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GARY MCKETTY (Representative) Instructed By: KQ Solicitors Temple Chambers Luton LU1 2 SW
For the Respondent	MS HOLLIE PATTERSON (of Counsel) Instructed By: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

PRACTICE AND PROCEDURE

The Employment Tribunal dismissed the Claimant's claims for discrimination, harassment, victimisation, whistleblowing detriment and unfair dismissal part of the way through the final hearing because he indicated that he was not prepared to give evidence or otherwise continue to participate in the proceedings, after the Tribunal ruled against his application to strike out the Respondent's response and rejected his application for an adjournment to enable him to immediately appeal that decision.

It was agreed that the Claimant had not withdrawn his claims. The Tribunal's decision was, in effect, a judgment striking out the claims on the basis that they no longer had any reasonable prospect of success, pursuant to Rule 37(1)(a), **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**. It was agreed that the claims could not succeed without the Claimant giving evidence in support of them.

The Employment Appeal Tribunal dismissed the appeal, accepting that in the particular circumstances the Claimant had not been deprived of a fair hearing and had been given a reasonable opportunity to make representations before his claims were struck out. He was warned by the Tribunal of the consequences if he continued to refuse to participate; he was represented by an experienced consultant; a short cooling off period was twice offered by the Tribunal and twice rejected by the Claimant and his representative; and there was nothing to indicate to the Tribunal at the time that offering a longer cooling off period would have been likely to have a significant impact.

The Employment Tribunal's Written Reasons, though succinct, sufficiently expressed the reasons for its decision to dismiss the claims. Compliance with the requirements of Rule 62(5) had to be assessed by reference to the nature of the judgment being given.

DEPUTY JUDGE HEATHER WILLIAMS QC

1. This is an appeal brought by Mr Leslie who was the Claimant below. Imperial College Healthcare NHS Trust, the Respondent to this appeal, was the Respondent below. For clarity, I will continue to refer to the parties as they were known below. The Claimant was represented by Mr McKetty, Consultant with the Claimant's solicitors and the Respondent by Ms Patterson of counsel, both of whom also appeared below.

2. The appeal is from the decision of the London (Central) Employment Tribunal, comprising Employment Judge Grewal, Mr J Carrol and Mr T Robinson (the "ET").

3. On 22 October 2018 the Claimant's claims were dismissed by the ET. This occurred on day three of the Final Hearing of the claims. It will be necessary to refer to the circumstances leading up to this in greater detail, but in summary the ET said the claims were dismissed because the Claimant indicated he was not prepared to continue to participate in the proceedings.

4. By an Order sealed on 12 August 2019 following a Rule 3(10) Hearing, HHJ Auerbach permitted the appeal to proceed on two grounds only, namely that the ET "*erred in its decision to dismiss the Claimant's claims in all the circumstances that it did on the basis that: (a) such decision was wrong in law or perverse and/or; (b) the Tribunal's written reasons in that respect were not* ***Meek*** *or Rule 62 compliant.*" The Order made clear that all other grounds contained in the Notice of Appeal were dismissed. The Respondent contests the appeal.

5. It is agreed by the parties that the Claimant did not withdraw his claims. The Respondent accepts that if the ET's decision to dismiss the claims was a judgment, then it must, in effect,

have been a strike out of his claims pursuant to Rule 37 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (“”the ET Rules”).

The facts and circumstances

6. The Claimant was employed by the Respondent as a Medical Laboratory Assistant in the Client Services Unit at Chelsea and Westminster Hospital. By a claim form presented on 7 August 2017, he brought claims for sex discrimination, victimisation, harassment and detriment on grounds of making public interest disclosures. By a second claim form presented on 9 November 2017, he brought claims for constructive unfair dismissal, race and sex discrimination and victimisation. The Tribunal subsequently directed that the two claims be heard together.

7. It is unnecessary for me to detail the various Preliminary Hearings that then occurred, other than to indicate that following a Preliminary Hearing held before Employment Judge Dean, a Case Management Order was sent to the parties on 3 August 2018, recording at paragraph 2 that the Claimant pursued complaints of; (1) direct sex discrimination; (2) direct race discrimination; (3) harassment on the grounds of sex; (4) constructive unfair dismissal and; (5) detriment on grounds of whistleblowing. There was a list of issues accompanying the Order at Schedule A. The list indicates that there was also a live victimisation claim, so there was in fact a sixth claim before the ET too.

8. The list of issues indicates that there were matters of substance in dispute between the parties. By way of example only, this included: whether alleged acts of discrimination had occurred and, if so, whether this was because of sex and/or race; whether the Claimant had done a protected act and if so, whether he had been subject to detriments in consequence; whether the Respondent had acted in breach of the implied term of trust and confidence in the respects alleged at paragraph 14i - ix of the issues and, if so, whether the Claimant had resigned in response to this; if the Claimant was dismissed, whether this was for a potentially fair reason and if so,

whether the decision to dismiss was a fair one; and in relation to the whistleblowing claim, whether the Claimant had made a protected disclosure (a number of issues were set out in relation to alleged qualifying disclosures at paragraphs 20 - 22) and, if so was the Claimant subject to the alleged detriments listed in paragraph 23 on the ground of him having made protected disclosures.

9. The Full Merits Hearing to consider these issues of liability and also remedy was listed for seven days from 18 October 2018. What then occurred was set out by the ET in its Written Reasons which I need to quote from in some detail.

> **"2. The hearing of these claims commenced at 2pm on 18 October 2018. The Tribunal read the relevant documents that afternoon and the following morning. The Tribunal agreed at the outset of the hearing to hear the evidence of Mark Busby (who had heard the grievance appeal) first on Friday afternoon because he was going to be away on annual leave the following week.**
>
> **3. In the course of his cross-examination Mr Busby was asked whether at the time of the appeal hearing he had known the Claimant had started the Early Conciliation process. He replied he did not. He was then asked whether at the time of the appeal hearing he knew there had been a preliminary hearing at the Tribunal the previous day. He replied that he did not. The Claimant's representative did not challenge that evidence.**
>
> **4. On the morning of 22 October 2018, the Claimant applied for the response to be struck out on the grounds that Mr Busby had lied when he had denied knowledge of the Tribunal proceedings which amounted to the Respondent conducting proceedings in a scandalous, vexatious or otherwise [unreasonable] manner. The application was made in writing and in support of it the Claimant produced documents that showed that a letter sent by him to the Tribunal on 12 September had been emailed to Mr Busby on 13 September 2017. If the Tribunal was not prepared to strike out the response, he asked for the matter to be adjourned so he could appeal to the EAT.**
>
> **5. The Tribunal refused his application to strike out the response. We concluded that an allegation that the witness had lied was not an appropriate reason to strike out a response. The appropriate way to deal with that was for the Claimant to adduce the evidence upon which he relied to support that assertion and to make submissions at the end about the reliability and credibility of Mr Busby having regard to that evidence. We also refused to adjourn the hearing to enable the Claimant to appeal to the EAT. It was stated many times that the Claimant would be at disadvantage if the hearing were to proceed. I asked how the Claimant would be disadvantaged and the Claimant was not able to demonstrate any disadvantage.**
>
> **6. We told the parties that the case would proceed and if the Claimant chose not to give evidence, (as he was due to do), we would dismiss the case. We offered the Claimant and his representative a short adjournment to discuss how they wanted to proceed. They both declined that offer and stated the Claimant was not prepared to continue with the hearing.**
>
> **7. As the Claimant actively chose not to participate in the Tribunal proceedings and did not adduce any evidence to support his claims, we dismissed his claims."**

10. By an Order sealed on 26 November 2019, Soole J requested Employment Judge Grewal's notes of the hearing on 22 October 2018, limited to events immediately after the

decision to refuse the Claimant's application to strike out the Respondent's response to his claims. The Order was made because the parties were unable to agree a note of what occurred during this part of the hearing.

11. The notes were duly provided by the Employment Judge (the "EJ"). They are relatively brief. Insofar as they add to the ET's Reasons, I note they confirm that the Claimant's representative was asked by the EJ what prejudice there would be to the Claimant if the proceedings were to continue. Secondly, the notes confirm that an adjournment of 10 minutes was proposed. It is common ground that this was proposed by the EJ and declined by the Claimant's representative. Thirdly, the notes indicate that the Claimant's representative complained there was bias going on and argued that the hearing should be postponed as the merits of an appeal against the ET's refusal to strike out the Respondent's response were strong. He also argued the Claimant would not have a fair hearing if the adjournment request was refused.

12. Fourthly, the notes record that at 10.35 am that the EJ asked of the Claimant or his representative, "*Are you going to continue or not*?" The Claimant is recorded as replying, "*no*". The notes then continue: "*I objected to Busby going on holiday. No balance re how Claimant has been treated. Claimant has a right to a fair hearing*." These last three sentences appear to be a summary of the submission that Mr McKetty was making on the Claimant's behalf at that stage. The notes then recorded that at 10.40 am the EJ said the case was dismissed. (I should indicate that the hearing, which began with the Tribunal addressing the application to strike out the Respondent's response, had commenced at 10 am.)

13. Given the lack of agreement in relation to these documents there is limited assistance that I can gain from the parties' fuller notes of what occurred during this part of the proceedings. However, I note the following points from the notes of the Claimant's representative (albeit

recording, as he himself acknowledges, that they are not verbatim, and they were, at least partly, completed after the events occurred):

(a) the EJ warned the Claimant during the exchanges, that he should continue or otherwise the ET would dismiss all the claims;

(b) the proposal for a ten-minute adjournment was rejected by Mr McKetty;

(c) the Claimant told the ET that was he upset;

(d) that a second offer to take ten minutes to decide if he wanted to continue the case was made by the EJ, and on this occasion it was refused by the Claimant himself, who continued to ask for an opportunity to appeal to the EAT at this stage against the refusal of the strike out application.

14. Mr McKetty accepted to me during his submissions today that he did not specifically ask for a longer period of reflection. He also stressed that the EJ's notes were a brief summary of longer exchanges. However, from what he told me, it appears that the three sentences under the passage, "*Are you going to continue or not*?" and the Claimant replying "*no*" , represent a fair summary of the points that Mr McKetty was making at this stage.

15. The parties are agreed that in addition to these points that appear from the Tribunal's Reasons and the EJ's notes, during the latter part of these events there was a request made by Mr McKetty for the ET to provide Written Reasons for its earlier decision on the Claimant's strike out application and he was told by the EJ that he would receive these along with the substantive decision at the end of the hearing.

The scope of the appeal

16. The Notice of Appeal submitted to the Employment Appeal Tribunal ("EAT") included the following contentions;

(1) The ET did not properly consider the Claimant's application to strike out the Respondent's response;

(2) The ET was wrong to refuse him the postponement he sought in order to appeal at that stage to the EAT against the refusal of the strike out application;

(3) The EJ was biased against him and conducted an unbalanced hearing;

(4) His case was dismissed in response to the strike out application; and

(5) The circumstances breached his right to a fair hearing guaranteed by Article 6 of the **European Convention on Human Rights**.

In an affidavit sworn on 14 February 2019 the Claimant set out the allegations of bias he relied upon. In light of the way that the Claimant's appeal was put forward, particularly in his Skeleton Argument for this hearing (rather than in the oral submissions today), it is important to emphasise that none of these contentions were permitted to proceed at the Rule 3(10) hearing before HHJ Auerbach. I have already set out the grounds that he did permit to proceed. He ruled that the other grounds were unarguable.

17. The significance of this for present purposes is that I have to consider this appeal on the basis that there was no unlawfulness in those respects. Equally, it also follows that the Claimant's concerns that were being raised with the ET at the time over its refusal to strike out the response and its refusal to adjourn to permit an immediate appeal from that decision, were not well-founded.

18. In his reasons explaining why the appeal was allowed to proceed, HHJ Auerbach noted that counsel who then appeared for Mr Leslie had abandoned the allegation of bias or apparent bias. He explained his decision to permit the matter to proceed as follows:

> **"The gist of the Appellant's case is that there were seriously advanced detailed claims which were never actually withdrawn and in relation to which the Tribunal moved very rapidly indeed from the decision to dismiss the strike out application to the decision to dismiss the claims, initiating the process by placing the Claimant under pressure to reflect on whether**

> **he wanted to carry on. The Claimant and his representative before the ET (who were both at the 3(10) hearing) did not accept that the ET's reasons fully or fairly depicted the nature of what occurred.**
>
> **I do not have the benefit of hearing from the Respondent or in any event being able to resolve this at a rule 3(10) Hearing. Given this issue I considered that these grounds passed the threshold of arguability..."**

19. HHJ Auerbach also recorded that counsel had not argued that if the Claimant had said after a suitable cooling off period that he did not wish to participate further, the only proper course would have been for the ET to hear evidence from the Respondent and to determine the claims on their merits. This is consistent with the approach that Mr McKetty has taken in submissions to me today.

20. By an Order sealed on 24 December 2019, HHJ Auerbach refused the Claimant's application for disclosure of documents relating to the holiday bookings for Mark Busby and for similar material in relation to another of the Respondent's potential witnesses, Cynthia Savage. His accompanying reasons pointed out that this appeal was not against any decision made by the ET to accede to the Respondent's request as to the timing of their witness evidence and it was unclear how the material was relevant to the appeal. I mention this aspect for two reasons. Firstly, in order to clarify that this matter was not pursued before me. And secondly, because (as I will return to) it is said that this is one of a number of indications that the Claimant is still wedded (to use Ms Patterson's phrase), to a complaint about the Tribunal's conduct of his strike out application on the morning of 22 October 2018, although there is no live appeal in relation to that.

The parties' submissions

The Claimant's submissions

21. The Claimant submits that the ET was wrong to dismiss his claims because (in summary):

(1) This was a draconian and disproportionate decision made without first allowing adequate time for cooling off and mature reflection, in circumstances where the Claimant was plainly upset;

(2) It made the decision to do so rapidly and without a proper dialogue with the Claimant and his representative;

(3) This was a seven-day hearing of substantial claims of discrimination and whistleblowing detriment, which had involved a lengthy preparatory period, such that it should have been particularly cautious about doing so;

(4) (Although this was only pursued faintly, if at all), it acted perversely in taking this course; and

(5) Its reasons for doing so were not **Meek** compliant, failed to meet the requirements of Rule 62(5) of the **ET Rules** and contained inaccuracies.

The Respondent's submissions

22. The Respondent submits (in summary):

(1) The decision to dismiss the claims was open to the ET and plainly it does not meet the high threshold for perversity;

(2) No error of law was involved in the ET's decision. The Claimant and his representative refused to continue with the proceedings in circumstances where they were appropriately warned of the consequences of maintaining this and where they were given an opportunity to reflect first, which they declined;

(3) The ET gave the Claimant an opportunity to explain why he would be disadvantaged if the proceedings continued, but he was unable to identify a good reason. No inappropriate pressure was put on him;

(4) The Claimant was wilfully refusing to engage with the proceedings in circumstances where it was evident that none of his claims could be established without his evidence; and

(5) The ET's reasons were **Meek** compliant, given the reason why it was dismissing the claim. What is required in a Tribunal's reasons will differ depending on the nature of the judgment in question.

The relevant law

Dismissal of the claim

23. Rule 29 of the **ET Rules** provides that "*The Tribunal may at any stage of the proceedings, or on its own initiative or on application, make a case management order*." The Respondent's starting point was to argue that the ET's decision was simply an exercise of its broad case management powers. However, given that the decision finally disposed of the claims, it is clear to me that it was a judgment, within the meaning of the definition contained in Rule 1(3), rather than a case management order. Rule 1(3)(b) provides that "*a "judgment" is a "decision, made at any stage of the proceedings…which finally determines— (i) a claim, or part of a claim, as regards liability, remedy or costs...*" Accordingly, I consider that dismissing the claim cannot be regarded as simply the exercise of Rule 29 powers.

24. As I have already mentioned, if it was a judgment, the Respondent accepts the Claimant's position that this must have been a decision to strike out the claims, albeit the ET did not use that label. The power to strike out is contained in Rule 37 of the **ET Rules**. As relevant Rule 37(1) provides:

> **"(1) 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;**

> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant… has been scandalous, unreasonable or vexatious…"**

25. Rule 37(2) provides, "*A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*"

26. The Respondent submits that as the ET referred to the lack of evidence adduced by the Claimant (in paragraph 7 of its Reasons), it must have had in mind the power under Rule 37(1)(a), that is to say striking out on the basis that the case no longer had any reasonable prospect of success. The alternative candidate would be Rule 37(1)(b), striking out for unreasonable conduct; but I agree that the terms of the ET's Reasons appear to indicate that they proceeded on the basis of the former, rather than the latter. In either event, the Respondent accepts that the Tribunal was obliged to comply with Rule 37(2), that is to say strike out could not occur until after the Claimant was given a reasonable opportunity to make representations, whether orally or in writing. Accordingly, I must consider whether that occurred in this situation.

27. As the Respondent accepted when I put to the point to Ms Patterson, there is a line of authority which indicates that once the substantive hearing is underway, it is only appropriate to use the Rule 37(1)(a) power of strike out in exceptional circumstances. The relevant authorities were helpfully summarised by HHJ Richardson in **Timbo v Greenwich Council for Racial Equality** UKEAT/0160/12/SM at paragraphs 32 - 43. The rationale for this approach is encapsulated in the passage from the judgment of Langstaff P. in **Williams v Real Care Agency** [2012] UKEAT/0051/12, which HHJ Richardson cited at paragraph 39 of **Timbo**. Langstaff P. said:

> **"19. The power, as we have already indicated, is one which by the design of the rules is intended to have its principal use at a pre-hearing stage. It is easy to understand why that is. The power, properly used, is an aid, as we see it, to justice. It permits a Tribunal to look at the particular factual allegations made in an ET1; having done so, it may see that the facts could not on any view give rise to an entitlement to the relief claim. In such a case it would**

> **not be inappropriate to give notice that the claim might be struck out. Such a process… saves time, it saves the resources of the Tribunal, it saves costs, and it deals with matters in a manner proportionate to the importance to the parties, for the case to be struck out there and then without, on this scenario, going to the unnecessary, expensive, and, for a Respondent, if it be the claim that be struck out, disturbing, process of appearing before a Tribunal."**
>
> **20. None of that reasoning is likely to apply when an application is made in the middle of a hearing; quite the reverse is likely to occur. Time will be taken not by hearing the evidence, which is what the Tribunal's principal function is, but in hearing an application that it is unnecessary to hear any more evidence. That application will inevitably be contested. A Tribunal is invited to determine a case not on all the evidence but on part of the evidence. It is invited to have sufficient certainty of the correctness of its own view as to decide that it needs to hear no more, despite universal forensic experience that matters that seem very plain at one stage in a hearing might have a very different complexion at the end…"**

28. Ms Patterson submits that in the unusual circumstances that arose in this case, those kinds of considerations which generally apply once the evidence is underway, have no application to the present situation. I will return to this point when I come to my conclusions.

29. Mr McKetty relies on **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 405 citing paragraph 5 where Sedley LJ said as follows:

> **"This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."**

Mr McKetty submits that whichever of the Rule 37 routes the ET had in mind, it should be remembered that the power is a draconian one and it is important that a decision to strike out is proportionate to the relevant circumstances.

30. I have also been referred to the overriding objective which the ET is required to give effect to by Rule 2 of the **ET Rules**. It provides that the Tribunal's obligation in:

> **"Dealing with a case fairly and justly includes, so far as practicable—**
>
> **(a) ensuring that the parties are on an equal footing;**
>
> **(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;**
>
> **(c) avoiding unnecessary formality and seeking flexibility in the proceedings;**

> **(d) avoiding delay, so far as compatible with proper consideration of the issues; and**
>
> **(e) saving expense."**

Perversity

31. As is well known, a high threshold must be satisfied for an appeal to succeed on the ground of perversity. In **Yeboah v Crofton** [2012] IRLR 634 at paragraph 93, Mummery LJ said:

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care'."**

Written Reasons

32. In **Meek v City of Birmingham District Council** [1987] IRLR 250, the Court of Appeal held that although a Tribunal's reasons are not required to be an elaborate formalistic product of refined draftsmanship, they must nonetheless contain; (1) an outline of the facts of the case that gave rise to the complaint; (2) a summary of the Tribunal's basic factual conclusions and; (3) a statement of the reasons which led it to reach its conclusions on the facts it found. The Court of Appeal emphasised that the parties are entitled to be told why they have won or lost.

33. The EAT has also identified the importance of adequate reasons to enable it to be satisfied that the Tribunal properly and lawfully considered the matter; see for example the judgment of Choudhury J. in **Her Majesty's Revenue and Customs v Mabaso** [2012] UKEAT/0143/17 at paragraph 15.

34. Rule 62 of the **ET Rules** provides (as relevant) as follows:

> **"(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.**
>
> **(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the**

relevant law, and state how that law has been applied to those findings in order to decide the issues…"

35. In **Balfour Beatty Power Networks Ltd v Wilcox** [2007] IRLR 63 CA, at paragraph 23 Buxton LJ observed in relation to the forerunner rule, Rule 3(6) of the **2004 ET Rules,** that it was intended to be "*a guide and not a straightjacket*" and that "*provided it can be reasonably spelled out from the determination of the employment tribunal that what Rule 30(6) requires has been provided by that tribunal, then no error of law will have been committed*."

36. In **Sivagnansundarum v Whipps Cross University Hospital NHS Trust** UKEAT/0388/09, another case relating to Rule 30(6) of the **2004 ET Rules**, HHJ Hand QC emphasised at paragraph 64, "*It is important to recognise that questions of compliance with the Rule involve considerations of relevance*".

37. I accept the Respondent's submission that what is required to comply with Rule 62(5) may differ depending on the nature of the judgment involved. To take an obvious example (which is not this case), in a judgment dismissing a claim upon a Claimant's withdrawal, it would usually be unnecessary for the Tribunal to recite more than that.

38. The question in relation to the present case is therefore whether, bearing in mind the context, the ET's reasoning:

(1) Identified the issue it had to determine in relation to the dismissal of the claim;

(2) Stated the findings it made in relation to that; and

(3) Concisely identified the relevant law and how it had applied that law in arriving at its conclusion.

However, in relation to that third element, caselaw indicates it will not necessarily be fatal for the ET to fail to indicate the applicable law, provided it is clear that it had the appropriate

A legal principles in mind and applied them, for example see **Short (Appeal No. 2) v PJ Hayman and Co Ltd** UKEAT/0379/08/CA at paragraph 48.

B **Conclusions**

Ground 1

39. Mr McKetty accepts that if the Claimant did not participate in the proceedings and did not give evidence, then inevitably his claims would fail on their merits. The sex and race discrimination claims required him to establish a *prima facia* case before the burden of proof would shift to the Respondent (pursuant to Section 136 of the **Equality Act 2010)** to show a non-discriminatory reason for the treatment. This would also apply to the harassment and the victimisation claims. In relation to the unfair dismissal claim, Mr Leslie had to establish a breach of the implied term of trust and confidence in relation to one or more of the pleaded allegations and that he resigned in response to such a breach, before the statutory factors in Section 98(4) of the **Employment Rights Act 1996** arose for the ET's consideration. In relation to the whistleblowing detriment claim, the Claimant had to establish that he made protected disclosures in circumstances where the alleged qualifying disclosures were in issue, before the questions of whether detriments were sustained and, if so, on what grounds arose.

40. Given this position, Mr McKetty does not dispute that if the ET had otherwise lawfully addressed matters up to and including the point where they decided the Claimant was not participating, then there was no longer a reasonable prospect of the claims succeeding. He does not submit that having arrived at that point the ET should nonetheless have proceeded to hear the Respondent's evidence before dismissing the claims (and in that regard his approach is consistent with the concession made by the Claimant's counsel at the Rule 3(10) Hearing).

41. I accept that in terms of the line of authorities discussed by the EAT in **Timbo v Greenwich Council for Racial Equality** (above), this was an exceptional case, such that the sheer fact that the decision to strike out was made during the course of the substantive merits hearing was not of itself an error. The situation was not one where the Tribunal was part the way through hearing evidence that was going to continue (absent a strike-out decision), where it is plainly unsatisfactory for a premature decision to be made on the merits of the case for all the reasons identified by Langstaff P that I have already referred to. However, in this situation, if the ET had lawfully got to the point where the Claimant was no longer participating, then there was no evidence to be heard from him and it is accepted that the claims could not be made out in those circumstances, as I have indicated.

42. The real question for present purposes is whether, as Mr McKetty submits, the ET rushed matters in getting to that point, so that the Claimant was not given a fair hearing or, in the words of Rule 37(2), a reasonable opportunity to make representations before the decision was made. The heart of Mr McKetty's submissions to me is that the ET erred in making the decision to dismiss within a short timescale and without allowing a longer period for reflection. Mr McKetty suggests that an hour or two would have been an appropriate timescale in the circumstances.

43. Given the relative speed at which matters moved; the evidently heated atmosphere that had arisen; and the very substantial implications for the Claimant of the ET's decision to dismiss, this submission has given me pause for careful thought. However, ultimately, I do not accept that the ET erred in taking the course that it did or that a reasonable opportunity was not given. I say that for a combination of reasons.

44. Firstly, as I have already explained, the Claimant was warned as to the consequences of proceeding in the way that he indicated he was intending to, by the EJ.

45. Secondly, the Claimant was represented by Mr McKetty who told me during the course of his submissions this morning that he was an experienced employment law consultant with a number of years' experience in the Tribunals. I do not accept that it was part of the ET's role to protect the Claimant from his representative, if the ET though the latter was taking a wrong turn (as Mr McKetty appeared to suggest was part of the Tribunal's role). In my judgment, the ET was entitled to view the Claimant and his representative collectively and to take it that the latter was acting in the former's interest and to his instructions. Furthermore, in this situation there was nothing to suggest that there was any difference between the approach taken by the Claimant and his representative. As I have already described, they were both clearly indicating to the ET that they were of one mind.

46. Thirdly, a cooling off period was offered twice by the EJ. This was rejected on the first occasion by the Claimant's representative and then rejected on the second occasion by the Claimant himself. As for allowing a longer time, this certainly could have been done and with the wisdom of hindsight considering matters from this vantage point, it seems as if would not have been a bad idea had (for example), the ET simply said that it was not going to sit for the next hour or two. However, that is far cry from saying that the Tribunal erred in law in not taking that course in the circumstances that were presented to it at the time. Most notably, as he has fairly accepted to me today, Mr McKetty did not ask in terms for a longer period. In my judgement, this is a particularly key factor in my conclusion that it was not incumbent on the Tribunal to take that course.

47. Fourthly, insofar as Mr McKetty submits that the ET erred in not offering a longer cooling off period of its own motion, I accept that it is significant (as Ms Patterson submitted) that the refusal of the offered ten-minute adjournment was expressed in very clear and unequivocal terms

by both Mr McKetty and the Claimant. There was no ambiguity about what they were saying and no suggestion that a bit longer time might make a difference.

48. In the Claimant's affidavit (which I referred to earlier), he said the following:

> **"71. Judge Grewal then requested that my representative take ten minutes with me to discuss whether we should continue with proceedings or have all my claims dismissed. This was unreasonable and I felt that this was blackmail.**
>
> **72. My representative responded by saying that Judge Grewal could keep the 10 minutes and that I had a right to appeal her decisions once we received her written reasons.**
>
> **73. Judge Grewal then turned her attention on me personally and said I should take ten minutes to decide if I wanted to continue or have my case dismissed. To me she had dismissed my representative who had already told her his intention."**

This description graphically underscores that there was no ambiguity whatsoever about the determined way in which the Claimant and his representative were advancing their position to the ET, including telling the EJ that she "could keep" the suggested ten-minute adjournment. Furthermore, the Claimant was not able to explain to the ET how he was disadvantaged by the Tribunal continuing. (In his submissions to me this morning Mr McKetty suggested this was not accurate; but that is set out in the ET's Reasons and I have no clear note or other evidence from which I could possibly conclude that this was not what was said.)

49. The events that had already taken place from 10am onwards undoubtedly would have indicated to the ET that the Claimant and his representative felt very strongly about its rejection of his strike out application and his request for a postponement to enable an immediate appeal. They continued to make these points after the EJ had given the Tribunal's ruling upon these matters and after she had warned of the consequences of non-participation.

50. In these circumstances, I accept it was not a situation where it would have appeared to the ET that simply allowing a bit longer for a cooling-off period would be likely to have a significant impact. Indeed, in at this hearing over 12 months later, it is clear that the Claimant and Mr

McKetty still feel very aggrieved over the decisions that were made to reject the strike out application and to refuse the requested adjournment at that stage for an appeal.

51. Of course, a litigant is entitled to feel disappointment, perhaps very disappointed, when a Tribunal's ruling goes against the position they have argued for. However, at least for the remainder of that hearing, they have to accept the Tribunal's determination of how those proceedings will be conducted from thereon. Whereas, the Claimant and Mr McKetty were in effect refusing to do so and making no bones about that being their position.

52. I also note that when I asked Mr McKetty an open question this morning about what would have happened if a two-hour adjournment had been granted of the ET's own volition, his reply was "*we would have come back with a submission that hopefully the ET would have accepted.*" In other words, they would have used all, or at least substantial part, of that time to continue the argument that they had already lost, still trying to find a way to persuade the Tribunal that their way was the right way, as opposed to getting to a position where the hearing could have continued. Of course, there is a degree of speculation involved in this and I do not put too much store on what is said now over a year later as to what would or could have happened in that situation; the most important feature is how it appeared to the Tribunal at the time and I have already analysed that.

53. Fifthly, when I asked Mr McKetty what the ET should have done differently in relation to this aspect, he did not suggest to me anything concrete other than the longer cooling off period which I have already discussed. The only other proposition he put forward was that in a more general sense the EJ should have held more of a dialogue with him, a more "active discussion" as he called it, about the matters that were in issue that morning.

54. By this he meant that the dismissal of the Claimant's Rule 37 application, should have been conveyed in less peremptory terms and with more time allowed for submissions before a decision was made. However, as I have already explained, there is no live appeal in relation to that aspect of the matter. In relation to the ET's decision to dismiss the proceedings, it is difficult to see what scope for dialogue there was in circumstances where the Claimant and his representative had refused a proposed cooling off adjournment twice; had said they would not continue; and yet had not identified, or certainly not identified clearly, any disadvantage in so doing.

55. It follows from this analysis that whilst I have considered carefully Mr McKetty's submissions, I do not accept that the ET were wrong in law or acted perversely in dismissing the appeal in the circumstances that they did.

Ground 2

56. As I have already explained, compliance with Rule 62(5) must be judged in the light of the context and the nature of the judgment in question. The ET was dismissing the claim because of the Claimant's non-participation, which in turn meant that his case could not be established. In the circumstances, it was unnecessary and irrelevant for the ET to set out the facts on which his claim was based or to determine the disputed facts.

57. The ET did set out the events which led it to decide to dismiss the claims, as my earlier citation from the Written Reasons shows. Undoubtedly, the ET did this in a relatively succinct form, but the essence of their reasoning is identified and it enables the parties to know why the decision was made.

58. Mr McKetty said the Written Reasons were too short given the significance of the decision. However, when I asked him what was the missing from the ET's Reasons, he only

identified points concerning the refusal of the strike out application. He did not identify anything factually that was missing from the part that addressed the dismissal of the Claimant's claims.

59. Mr McKetty did say that he disputed the accuracy of paragraph 6 of the ET's Reasons in two respects. Firstly, at the outset of paragraph 6 where the ET said: "*We told the parties the case would proceed and if the Claimant chose not to give evidence (as he was due to do), we would dismiss the case*." However, at other points in his submissions Mr McKetty appeared to accept that this had taken place and indeed complained about it. There is nothing in any of the notes that I have before me to indicate that this did not occur or that the ET's text is inaccurate.

60. Secondly, Mr McKetty complains about the last sentence of paragraph 6, "*They both declined that offer and stated the Claimant was not prepared to continue with the hearing*." However, Mr McKetty also accepts that the notes of the EJ were correct; and they include (as I have already quoted) reference to the question being asked as to whether the Claimant would continue and the answer "*no*" being given.

61. Therefore, I am not able to conclude that the Written Reasons are factually wrong in any respect. Mr McKetty stressed to me that he could not be expected to make full verbatim notes given he was engaged in oral exchanges with the EJ at the time. That is undoubtedly true and it explains why both his notes and the EJ's notes are relatively brief. Nonetheless, there is nothing positive he can point to which indicates that the ET's Reasons are inaccurate.

62. It is true to say that the ET's Reasons did not identify the law it relied on and had applied. Plainly, it would have been better if this had been done, not least because of the appeal ground this has generated. However, as I explained when considering Ground 1, I am able to assess how the ET proceeded in this case and I am satisfied that in fact it acted lawfully. Accordingly, that

A omission does not in itself amount to an error of law. It is possible to distil the basis of the ET's actions from the reasoning that was provided.

63. I mention purely for completeness, that if this is not a correct analysis and there was an B error of law in the Tribunal not setting out a concise statement of the applicable law, then plainly it was not a material error as it has no impact in any substantive way upon the legitimate conclusion reached by the ET. No purpose whatsoever would be served by remitting the case to C the ET simply to expand on this aspect of its reasons for dismissing the claim, in particular in circumstances where I am in any event satisfied that it acted lawfully in so doing.

64. I am grateful for the helpful and clear submissions that have been made by both D representatives to me today, but in all the circumstances I dismiss the appeal.

Costs

E 65. Consequent upon my decision dismissing the appeal, I am asked by the Respondent to make an award for costs. The application is made pursuant to Rule 34A of the **Employment Appeal Tribunal Rules 1993**, firstly on the basis that the appeal was misconceived. I do not accept that this is established.

F 66. The grounds of appeal that were before me were permitted to proceed by HHJ Auerbach at the Rule 3(10) Hearing. That is one factor to take into account, rather than it being decisive, because there is now a fuller picture before me. However, with the benefit of that fuller picture, G I accept that the grounds of appeal were arguable. They did give me pause for thought in certain respects, as I have already indicated. Whilst I have ultimately rejected the grounds for the reasons that I have indicated and ultimately the Respondent's submissions have prevailed, that does not H detract from the fact that the Claimant's contentions were arguable. Therefore, I do not find this to be a misconceived appeal.

67. Secondly, Ms Patterson submits as a fall-back position that there were aspects of the conduct of the appeal by the Claimant or his representatives that were unreasonable. Firstly, this is said in relation to the application for the holiday records of Mr Busby and Ms Savage that I referred to earlier, which was rejected by Soole J on a consideration of the papers. Whilst I accept that this application generated at least several items of correspondence, if not more; looked at in the overall scheme of things, it comprised a relatively small part of the Respondent's preparation for resisting this appeal. I also bear in mind that in dismissing the appeal, I have not accepted everything that the Respondent has said to me; and that too has inevitably taken up a degree of time and a degree of the Claimant's time in responding to those points.

68. Secondly, Ms Patterson points out that the bundle is not compliant with the Practice Direction. Whilst that is true, it is a bundle which I have been able to work with, with little difficulty. I do not consider that this feature in itself is nearly sufficient in this situation. It might be different if a bundle was particularly poor in one respect or another, but in the present circumstances, I do not consider this a reason to award costs on the basis of unreasonable conduct and so I reject the application.