Neutral Citation Number: [2022] EAT 83

Case No: EA-2020-000871-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01 June 2022

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MR PARAG BAHAD **Appellant**

- and -

HSBC BANK PLC **Respondent**

- -
- -

Mr A Watson (instructed under the Direct Access Scheme) for the **Appellant**
Mr S Purnell (instructed by Pinsent Masons LLP) for the **Respondent**

Hearing date: 29 March 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal erred in law in striking out claims of race and religious discrimination but not in striking out a claim of protected disclosure detriment.

HIS HONOUR JUDGE JAMES TAYLER:

Introduction

1. The claimant attended a preliminary hearing for case management by telephone on 18 September 2020. He was acting as a litigant in person. He was questioned about his claims, which were struck out one by one. After a hearing of one hour and fifteen minutes all of his claims had been dismissed. The first respondent had not applied for strike out, and the hearing had not been listed to consider strike out – so it seems something must have gone wrong. It had, badly. While all of the things that went wrong are not subject of this appeal, they form the background to it. It appears that the employment judge believed that the first respondent had applied for strike out, as possibly did the claimant, whereas the first respondent had only indicated that they might make such an application in the future. The solicitor for the first respondent thought that the employment judge had decided to consider strike out of his own motion. It would have been much better had the solicitor for the first respondent clarified the position with the employment judge.

2. The claimant started working for the first respondent, initially as a contractor, in May 2019. He asserts he was later engaged as a contract worker by Resource Solutions Limited, the second respondent. The claimant described his role as Global Equity Business lead for the Libor Programme. The claimant's engagement with the first respondent was terminated on 12 March 2020. The claimant submitted a claim form that was received by the employment tribunal on 14 May 2020. So far as is relevant to this appeal, the claimant alleged that he had been subject to discrimination because of race and/or religion and that he had been subject to detriment done on the ground that he had made protected disclosures. The claimant completed the claim form himself. He stated at box 8.2 (JK is a reference to Joseph Kavanagh, Head of Equity Regulatory Change at the first respondent):

> "my contract was terminated as at 12th Mar 2020 due to discrimination … JK behaviour towards me such that he was trying to frustrate me so that I could also leave the bank on 31st January. …
>
> JK told EC to terminate the contract on 13th Feb 20. EC called me to inform that my contract will be ended on 12th March with 4 weeks' notice. I repeatedly asked the EC and MS to provide me reason for termination but it was only after

> I stated that I will escalate the matter on 18th Feb 20, I was being told reason as "communication and stakeholder limitations".

3. The claimant also asserted that he had raised concerns about Mr Kavanagh's conduct to the respondent's confidential whistleblowing team after which he was not considered for an alternative role for which he had applied.

4. While briefly pleaded there were assertions of discrimination and whistle blowing detriment.

5. On 16 July 2020, the employment tribunal sent out a notice of a preliminary hearing for case management to be conducted by telephone on 18 September 2020. The notice stated:

> "An Employment Judge will conduct a preliminary hearing to identify the issues and to make case management orders including orders relating to the conduct of the final hearing. Your attention is drawn to the attached Agenda for guidance as to the types of Orders that will be considered and the information you will be required to provide at the preliminary hearing."

6. The notice did not suggest that consideration might be given to strike out or that the hearing would be held in public.

7. The respondent submitted its response on 13 August 2020.

8. On 26 August 2020 the claimant provided some additional information. The claimant emphasised that he was representing himself:

> "I am a layman and novice in this matter but I want to inform you in my lay terms on how I faced discrimination, how I was victimised, why it has happened and how to prove it."

9. On 3 September 2020 a letter was sent to the parties stating that the preliminary hearing for case management remained listed on 3 September 2020, fixing a final hearing on 11 and 12 March 2021, requiring the provision of a statement of remedy and an agreed list of issues. Again, there was no suggestion that strike out was to be considered at the preliminary hearing for case management.

10. On 3 September 2020 the first respondent wrote to the employment tribunal asserting that the claims were unparticularised and that it was not possible to draw up a list of issues on the basis of the information that the claimant had provided. The first respondent stated:

> "In the meantime the First Respondent reserves its position as to any relevant applications regarding the Claimant's claims."

11. On 4 September 2020 the second respondent wrote to the employment tribunal applying for the claims against it to be struck out at the preliminary hearing listed on 18 September 2020. There was no such request from the first respondent.

12. The first respondent provided an agenda for the preliminary hearing for case management which included the following comments:

> "As per the First Respondent's Grounds of Resistance, we consider that the legal basis of the claims being presented needs to be clarified as well as articulating which claims are presented against which Respondent."

13. In answer to the question "Is a further substantive preliminary hearing required ...?", the first respondent replied:

> "Possible PH for strike out / deposit orders depending upon clarification of issues at PH on 18 September."

14. The respondent clearly did not envisage that strike out would be considered at the preliminary hearing for case management, but had in mind the possibility of making such an application at a later date.

15. The claimant provided an agenda in which he stated, in answer to the question of whether a substantive preliminary hearing would be required:

> "Not required as representative Respondents are formulating to strike out"

16. Under the heading "Any other matters" the claimant stated:

> "Please do not strike out any element of case. The truth must come out of this process as it will provide justice and benefit country to manage racism and whistleblowing for better society."

17. This demonstrates that the claimant did appreciate that the respondents were likely to apply for strike out at some stage.

18. In the judgment the employment judge incorrectly stated "the Respondents both sought strike out orders in respect of the claims" – only the second respondent had applied for strike out – and that "the hearing was to consider the Claimant's application to strike out the ET3" – even assuming what

was meant by this was the respondents' application to strike out the claim form, it is also incorrect, because the hearing had not been listed to consider an application for strike out. It is not clear to me how the employment judge came to make these errors. During the Coronavirus pandemic employment judges have often had to deal with cases with limited electronic documentation, so it is possible that he was unaware of the error. It is unfortunate the solicitor for the first respondent did not correct the error and point out that the hearing had not apparently been listed in public so strike out should not be considered.

The Law

19. The power to strike out a claim or response is provided by Rule 37 of the Employment Tribunal Rules 2013:

> "37.— Striking out
>
> (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;
> …
>
> (2) 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."

20. The employment judge referred to the first sub-paragraph, but not the second. The ET Rules 2013 do not make specific provision for the amount of notice that must be given before strike out is considered, but the person against whom such an application is made must have sufficient time to prepare, so that they have a reasonable opportunity to make representations.

21. Rule 53 sets out the scope of preliminary hearings:

> "53.— Scope of preliminary hearings
>
> (1) A preliminary hearing is a hearing at which the Tribunal may do one or more of the following—
>
> (a) conduct a preliminary consideration of the claim with the parties and make a case management order (including an order relating to the

> conduct of the final hearing);
>
> (b) determine any preliminary issue;
>
> (c) consider whether a claim or response, or any part, should be struck out under rule 37;
>
> (d) make a deposit order under rule 39;
>
> (e) explore the possibility of settlement or alternative dispute resolution (including judicial mediation)."
>
> (2) There may be more than one preliminary hearing in any case. [emphasis added]

22. Strike out should only be considered at a public hearing:

> "56. When preliminary hearings shall be in public
>
> Preliminary hearings shall be conducted in private, except that where the hearing involves a determination under rule 53(1)(b) or (c), any part of the hearing relating to such a determination shall be in public (subject to rules 50 and 94) and the Tribunal may direct that the entirety of the hearing be in public"

23. Rule 6 provides:

> "6. Irregularities and non-compliance
>
> A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—
>
> (a) waiving or varying the requirement;
>
> (b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
>
> (c) barring or restricting a party's participation in the proceedings;
>
> (d) awarding costs in accordance with rules 74 to 84."

24. The fact that the preliminary hearing was not conducted in public does not necessarily mean that the determination was a nullity. However, determining a strike out application at a private preliminary hearing, without giving the claimant proper opportunity to make representations, is an error of law: see the decision of Eady J (President) in **Mendy v Motorola Solutions UK Limited**

and Ors [2022] EAT 47. The fact that the strike out application was determined at a hearing held in private is not a ground of appeal.

25. I consider the fact that the hearing was conducted in private and, in particular, the fact that the first respondent had not applied for strike out is relevant background to the question of whether the employment judge properly decided to strike out the claims brought by a litigant in person.

26. The approach that should be adopted to applications to strike out is of extremely long standing. From the House of Lords to the EAT, the appellate courts have for many years urged caution in striking out discrimination and public interest disclosure claims. Yet, on occasions employment tribunals having directed themselves that it is an extraordinary thing to do, strike out claims that are far from unusual. Experienced employment judges may sometimes feel that it is pretty clear that a claim will not succeed at trial and wish to save the expense and, possibly, the distress to the claimant of a failed claim. But that is what deposit orders were designed for. To strike out a claim the employment judge must be confident that at trial, after all the evidence has come out, it is almost certain to fail, so it genuinely can be said to have no reasonable prospects of success at a preliminary stage, even though disclosure has not taken place and no witnesses have given evidence. When discrimination claims succeed it is often because of material that came out in disclosure and because witnesses prove unable to explain their actions convincingly when giving evidence.

27. Periodically, the correct approach to applications for strike out is summarised once again, bringing together any new subtleties that have arisen in the case law. The employment judge referred to the then most recent decision bringing together the relevant authorities: the judgment of Choudhury J (President) in **Malik v Birmingham City Council** UKEAT/0027/19. The employment judge referred to paragraphs 29 –31, quoting the extract from **Mechkarov**:

> "30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see *Anyanwu & Another v South Bank University and South Bank Student Union* [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of *Mechkarov v Citibank N.A* [2016] ICR 1121, which is referred to in one of the cases before me, *HMRC v Mabaso UKEAT/0143/17*.

> 31. In *Mechkarov*, it was said that the proper approach to be taken in a strike out
> application in a discrimination case is that:
>
> (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."
>
> 32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that *"the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."*
>
> 33. A similar point was made in the case of *ABN Amro Management Services Ltd & Anor v Hogben* UKEAT/0266/09, where it was stated that, "*If a case has indeed no reasonable prospect of success, it ought to be struck out*." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in *Meek v City of Birmingham District Council* [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out."

28. The employment tribunal did not refer to an important passage of the judgement of Choudhury J in **Malik:**

> "50. The claimant was not professionally represented. He had, however, produced a detailed witness statement which, as I set out above, contained some material which might support an allegation of race discrimination. He also placed before the Tribunal other documents in which he attempted to set out his case. These included documents entitled "Additional information", which are appended to the claim form and which contained some of the matters referred to in his witness statement.
>
> 51. In my judgment, the obligation to take the Claimant's case at its highest for the purposes of the strike-out application, particularly where a litigant in person is involved, requires the Tribunal to do more than simply ask the claimant to be taken to the relevant material. The Tribunal should carefully

> consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it. Insofar as it concludes that there is nothing of substance behind it, it should, in accordance with the obligation to adequately explain its reasoning, set out why it concludes that there is nothing in the claim."

29. I considered this passage in **Cox v Adecco** [2021] ICR 1307, in which I noted that it was consistent with the approach recommended in the Equal Treatment Bench Book to dealing with litigants in person.

30. It is always worth going back to the key authorities. In **Anyanwu v South Bank Student Union (Commission for Racial Equality intervening)**, [2001] UKHL 14, [2001] ICR 391, Lord Steyn famously stated:

> 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.

31. Lord Hope stated at paragraph 37:

> I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. [emphasis added]

32. Strike out is not appropriate where there is a core of disputed fact: Maurice Kay LJ in **Ezsias v North Glamorgan NHS Trust**, [2007] EWCACiv 330, [2007] ICR 1126:

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

> contemporaneous documentation. The present case does not approach that level.

33. It is common for respondents to assert, when applying to strike out, that all the claimant is able to do is to point to a difference of protected characteristic and a difference of treatment, but cannot show the "something more" necessary to make out a claim of discrimination. The important point to note is that the tribunal is not assessing whether the "something more" has been established at the strike out stage but is predicting the likelihood that it will be established once the evidence is out. **Madarassy v Nomura International Plc** [2007] ICR. 867 was an appeal against the determination that the burden of proof had shifted at a final hearing. Having said that, in **Anyanwu** Lord Hope also made it clear that strike out is not prohibited in discrimination claims:

> "39. Nevertheless I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail."

34. This point was reiterated by Underhill LJ in **Ahir v British Airways** [2017] EWCA Civ 1392:

> "16. There is force in Mr Burns's point. Employment tribunals should not be deterred from striking out claims, including 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 of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. …
>
> 19. I have, of course, twice used the phrase 'on the face of it'. That invites the obvious riposte that the whole problem with a strike-out is that the appellant has no chance to explore what may lie beneath the surface, in particular, by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to

> identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it."

35. When considering strike out, it is not necessary that the claimant has already reached the destination of establishing the "something more", but a claim can properly be struck out if there is no realistic prospect of the claimant getting there.

36. As Maurice Kay LJ put it in **Ezsias** [26] the employment tribunal has to consider whether an application has a realistic as opposed to a merely fanciful prospect of success.

37. Just as the employment tribunal must be very careful before striking out discrimination or protected disclosure claims, the EAT, as an appellate court, must avoid seeking to determine afresh such applications and must remember that strike out is permissible in such claims. Decisions to strike out can only be overturned if they involve an error of law.

38. If an employment tribunal decides that the claim has no reasonable prospect of success it still has a discretion to exercise before it strikes the claim out: Wise J stated in **Hasan v Tesco Stores Ltd** UKEAT/0098/16/BA:

> "8. So far as ground 5 was concerned, Mr Watson argued that Rule 37 imported a two stage test. The first stage was to consider whether any of the grounds (a)-(e) have been established. Thereafter, a Judge had to consider whether or not to exercise the discretion in favour of striking out. Support for that could be found in the case of HM Prison Service v Dolby [2003] IRLR 694 EAT. So, it was not sufficient to decide that one of the strike out grounds was made out. The Judge had addressed only stage one of the two stage approach and had accordingly erred in law. …
>
> 17. This leads me to ground 5. There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claim s had no reasonable prospect of success, to consider how to exercise his discretion. The way in which Rule 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two stage approach."

39. In many cases once a determination has been made that a claim has no reasonable prospect of success it may be a relatively short step from making that determination to exercising the discretion

to strike out, as there will rarely be anything to be gained from allowing a claim, that can truly be said to have no reasonable prospect of success, to proceed. It may be possible in some cases to infer that the step has been taken, but taken it must be, before the claim can properly be struck out.

The decision of the employment tribunal

40. The employment judge struck out the claim against both respondents as having no reasonable prospect of success. The claimant appealed that decision. The appeal was considered on the sift by HHJ Martyn Barklem who considered that there were no reasonable grounds for bringing the appeal. At a Rule 3(10) hearing I granted permission for the appeal against the first respondent to proceed but refused permission in respect of the appeal against the second respondent against whom the claimant had made no clear specific allegations.

41. The employment judge stated of the race discrimination claim:

> "14. I asked about the race discrimination claim. This was based on the Claimant's Indian ethnicity. In one of his emails expanding on his claim, the Claimant said that this was "clever implicit racism" based on a colonialist view of India. It was not a nationality claim.
>
> 15. I asked what bad things had happened to him that he said were at least partly because of his Indian ethnicity. The Claimant said that Joseph Kavanagh had discriminated against him. **He had reported to Joseph Kavanagh, who had fabricated a reason to get rid of him**. The terms of the contract he had been offered were not right. He should have had a higher daily rate than before, and that had not happened. He was working in a small team and that meant more work, and the change from limited company status to employee meant less money. He had no reason to think that he had been treated any differently to anyone else. …
>
> 23. I asked the Claimant to return to his race discrimination claim. **The Claimant said that he had been dismissed, but named 3 people who were white and had not been dismissed. He said that may have been because he was of Indian ethnicity**, and that it was possible that Joseph Kavanagh may have benefitted financially in some unspecified way by so doing.
>
> 24. **The Claimant had not previously raised this** as an allegation, in his claim form, emails of 26 August 2020 and 07 September 2020, or in his PowerPoint "walkthrough" of the case. The Claimant repeatedly said that he had ticked the boxes at 8.1 of the claim form whenever he could see a difference (in the sense of a protected characteristic), not because he had any sense of grievance related to that characteristic. **The requirement for some evidence of a causal link between that characteristic and the**

> **detriment is absent in this claim**.
>
> 25. I bear fully in mind the case law guidance. **There are no core issues of fact to be decided. Taking the case at its highest** this is at best a speculative claim based on the Claimant's unhappiness at his role at HSBC ending. Even the claim form says only that it is "possible" that race was a factor. There is no reasonable prospect of the Claimant establishing facts from which a Tribunal might find that there was a taint of race discrimination in the non-selection of the Claimant for a new role with HSBC, or in his original dismissal. There is no reasonable prospect of success of any other race discrimination claim of the Claimant."

42. The employment judge analysed the claim of discrimination because of religion as follows:

> "10. I asked why the Claimant thought any of his issues with HSBC were connected with religion. The Claimant said that it was a difference between him and others, and so he had ticked all the boxes where there was a difference. That was race and religion. I asked how religion was relevant to what happened to him with HSBC. **The Claimant said that he did not eat meat and so there was a difference at lunchtimes. I asked the Claimant if he could identify anything about his claim to which religion was relevant, and he said that he could not**. I said that I would strike out the religious discrimination claim, because it had no reasonable prospect of success. The Claimant said that he had no objection to that – it was a point of difference was all, and he had simply ticked all the boxes where there was a difference."

43. The employment judge said of the protected disclosure claim:

> "9. I asked the Claimant about his public interest disclosure claim. After some time it emerged that the 4th paragraph of page 2 of the statement of claim refers to the detriment of **a job application within HSBC not being taken further in late March 2020. The Claimant thought this might be victimisation because of his disclosure**. The Claimant said that by reason of race or disclosure he had been dismissed and lost his income.
>
> 16. His claims for race discrimination and for public interest disclosure seemed to centre on Joseph Kavanagh, and I asked him to expand on what he said happened. First the Claimant said that his disclosure was on 03 February 2020, and was to the Financial Conduct Authority. I pointed out that his emails said this was on 03 April 2020: he said that at the end of March 2020 he should have been interviewed for another role in HSBC but was not. He made reference in his claim form to a disclosure to the HSBC Confidential whistleblowing process, at 27 February 2020.
>
> 17. The Claimant accepted that 03 April 2020 was after he left HSBC, and the 2nd Respondent, so that his dismissal could not be connected with it, as something that happens after something cannot be the cause of it.
>
> 18. The Claimant said that he had made an internal public interest disclosure

about Joseph Kavanagh on 28 February 2020. **He did not know if or how Joseph Kavanagh could have known of a report that was in a process expressly stated to be confidential.**

19. Ms Stephens pointed out that it was on 28 February 2020 that the Claimant made his disclosure to the HSBC's confidential reporting department, and that was during the Claimant's 4 week notice period, which had been given on 12 February 2020, so that again it was impossible for the ending of the employment to be because of the disclosure.

20. **After some considerable discussion the Claimant said that he had applied for another role within HSBC on 31 March 2020 and that might have been because of his internal disclosure.** He accepted that Joseph Kavanagh had no connection with that other role or recruitment for it. The Claimant thought that by not appointing him to another role HSBC was preventing him accessing their systems which might enable them to avoid him being further involved in the disclosures he had made to the FCA. The outcome of that disclosure had been notified to him, and it was that there was said to be no evidence of wrongdoing. There is also the point Ms Stephens made – the end of March 2020 was a time when recruitment was largely on hold throughout the country, lockdown having started about a week before.

21. **This is speculative, at best. There is no real prospect of success in a claim that the Claimant was victimised by not being taken on in another role because of a public interest disclosure**, for the reasons above. Accordingly I struck out the claim for public interest, **however framed. It would have needed an application to amend, which would not have passed the tests in Selkent.**

22. I note also (and in addition) there is only a hint of a public interest disclosure claim in the claim form, and I do not accept that this was because the Claimant put his Covid-19 claim in the box marked "other claims".

44. At paragraph 3 of the Notice of Appeal the claimant asserted in respect of the discrimination claims:

The Claimant's pleaded case in relation to this aspect is as follows:

(i) An allegation in the ET1 that his contract was terminated due to discrimination.

(ii) The ticking of boxes in the ET1 to indicate he was discriminated against on the grounds of race and religion.

(iii) That the behaviour of one of the First Respondent's managers. Joseph Kavanagh (referred as JK), was suspicious because he was trying to frustrate the Claimant so that he would leave his work with the First Respondent.

(iv) That JK wanted the Claimant to resign from his position

(iv) That the behaviour of JK was not motivated by JK having any concerns about the Claimant's performance.

(v) That JK treated him unlike others in the programme.

(vi) That there was a failure to provide the Claimant with any reasons as to why his contract was being terminated (until later).

(vii) That the reason that the First Respondent eventually produced to justify the termination was not made out.

(viii) That JK discriminated against the Claimant to satisfy his own personal motives by manipulating and falsifying information.

(iix) That the Claimant was subjected to racial discrimination at the First Respondent.

(ix) That the Claimant suffered “negative treatment by a white manager"

(x) That his case was a "classic example of implicit racism"

(xi) That the Claimant was perceived as different because his diet was different in that he did not eat meat at lunchtime.

45. The claimant asserts in the Notice of Appeal in respect of the protected disclosure claim that:

10. The Judge was wrong to dismiss the Claimant's case as speculative at best. His pleaded case was that he reported JK 's behaviour to the First Respondent's confidential team who took no action and then, having lost confidence in the First Respondent's process, reported the matter to the Financial Conduct Authority on 3rd April. In March he had been interviewed for another job with the First Respondent and had been rejected. The reasons for that rejection at least merited some attention and examination. Claims such as this very commonly have a speculative nature, in that the Claimant cannot be aware of all that has happened and why and, at least until there has been disclosure and witness statements have been

exchanged, there is a degree of proceeding on the basis of suspicion.

46. Mr Watson, for the claimant, summarised the somewhat discursive Notice of Appeal:

> (a) Ground 1: the ET erred in striking out the race and religious discrimination claim (Paragraphs 2-8).
>
> (b) Ground 2: the ET erred in striking out the public interest disclosure claim (Paragraph 10).
>
> (c) Ground 3: the ET erred in exercising its discretion to strike out the Claimant's claims, and ought to have considered alternatives to strike out such as ordering the Claimant to provide further particulars of his claim in writing (Paragraphs 11-12).

47. As mentioned above the fact that the strike out occurred at a private hearing is not advanced as a ground of appeal. There is also no ground of appeal asserting that having decided that the claims had no reasonable prospect of success the employment judge failed then to consider his discretion to strike out the claims. There was no application to amend the appeal so I consider that those matters are not before me.

48. The employment tribunal erred in law in striking out the race and religious discrimination claims. It was not correct to say that there were no core issues of fact to be decided. In particular, the claimant asserted that Mr Kavanagh had taken against him, wanted him to resign, that Mr Kavanagh did not initially give any reason for deciding that the claimant's engagement should be terminated, there were no genuine concerns about his performance or communications with stakeholders and the claimant felt he was perceived as different to others because of his religious dietary restrictions. The claimant asserted that he had been treated differently to white employees in comparable circumstances. There clearly were significant issues of fact in dispute between the parties. I also consider that the employment judge failed to take the claimant's case at its highest. The employment judge erred in the circumstances of this case in expecting the claimant to demonstrate, prior to disclosure, "evidence of a causal link" between his protected characteristics and the detriment. The employment judge failed to heed the warning at paragraph 50 of **Malik** about expecting a litigant in

person to explain his case under the pressure of questioning, without adequately considering the pleaded case, including the attempts by the claimant to provide additional information. This was of particular importance as the hearing had not been listed to consider strike out, and was conducted by telephone. I consider that the employment judge should have considered the race and religious discrimination claims in a similar manner. In effect, the claimant asserted that Mr Kavanagh had taken against him, and suggested that the reason could be his race or religion.

49. I consider that the position in respect of the protected disclosure claim is different. I consider that on a fair reading of the judgment the employment judge concluded that the claim was fanciful because it was based on the assertion that after making confidential disclosures Mr Kavanagh had been told of them and had then influenced a recruitment exercise he was not involved in. I do not consider that the employment judge erred in law in striking out this claim. While I do not follow the comment that the claim required an amendment that would not pass the "tests" in **Selkent**, I do not consider that this undermines the employment judge's analysis that the claim as asserted was so fanciful as to have no reasonable prospect of success. Mr Watson has not been able to put forward a more compelling basis for the claim than the claimant was able to do himself. While I might have been more inclined to deal with this element of the claim by making a deposit order I cannot say that the employment judge erred in law in striking it out.

50. Accordingly, the strike out of the race and religious discrimination claims is overturned. On the basis of the key assertions set out above, I consider that the only possible answer was that the race and religious discrimination claims were sufficiently arguable to proceed to a hearing so an order refusing the application for strike out will be substituted for that of the employment tribunal. The appeal in respect of the protected disclosure claim is dismissed. The matter will be remitted to the employment tribunal for further case management to prepare it for hearing.