Case Number: 3328827/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Robinson	v	The Crown Prosecution Service

Heard at: Watford **On**: 8 November 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Did not appear and was not represented
For the respondent: Mr C Milsom, of Counsel

RESERVED JUDGMENT

(1) The claimant's application for permission to amend her claim by the addition of a claim of detrimental treatment by the respondent within the meaning of section 47B of the Employment Rights Act 1996 is refused.

(2) The application to strike out the claims of direct race discrimination within the meaning of section 13 of the Equality Act 2010 and victimisation within the meaning of section 27 of that Act, contrary to section 47 of that Act, does not succeed.

(3) Only the claims referred to in (2) above may proceed.

(4) The application of the respondent for a deposit order in respect of those two claims succeeds.

(5) The hearing of 21-25 January 2019 is converted to a 3-hour preliminary hearing for the making of case management orders. That hearing should start at 10.00am, or as soon as possible after that time.

REASONS

Introduction; the hearing of 8 November 2018

1 The hearing of 8 November 2018 was the second day on which I resumed a hearing that had commenced on 31 August 2018 and which, for the reasons stated in the case management summary which was sent to the parties on 13 September 2018, was adjourned part of the way through the day (i.e. 31 August 2018).

2 The hearing of 31 August 2018 was a preliminary hearing listed for the determination of (1) the respondent's application to strike out the claims or for a deposit order, and (2) the claimant's application to amend her claim by the addition of a claim of detrimental treatment for whistleblowing.

3 At the hearing of 31 August 2018, the claimant and Mr Milsom, counsel for the respondent, agreed that the hearing should resume on 24 September 2018. The claimant subsequently sought the postponement of that hearing on the basis that she had an appointment with her GP on that day which she needed to attend. She did not attend the hearing of 24 September 2018, and I stated my reasons for adjourning the hearing on that day in a further case management summary, which was, I see from the tribunal file, sent to the parties on 26 September 2018. I also made some orders at the end of that case management summary, to which I refer further below. On 24 September, I adjourned the hearing on the basis that it would be resumed (and not again postponed) on 9 November 2018. That day was convenient for both Mr Milsom and me, and the claimant was, I surmised for the reasons stated in my case management summary sent to the parties on 26 September 2018, going to be able to attend.

4 On 24 September 2018, at 13:51, which was after the hearing before me had ended, the respondent wrote to the tribunal asking for the hearing to be resumed on 8 November rather than 9 November, as Mr Milsom had found that he was not after all available on 9 November but was available on 8 November. At 16:59 on that day, having been copied into the email of 13:51, the claimant wrote:

> "Dear Sir/Madam
>
> I confirm my attendance at preliminary hearing listed on 9 November 2018.
>
> Yours sincerely [etc]".

5 The claimant then wrote on 25 September 2018, at 09:49:

> "Dear [and the claimant named one of the Tribunal's listing clerks]

I am the Claimant in above matter and confirm my attendance at preliminary hearing re-listed for 9 November 2018. I reject application by Respondent to change this date:

-The Respondent is the Treasury Department of Government with access to a very wide pool/source of advocacy lawyers who are familiar with and able to take on matters in court at short notice.

-the PH has already been re-listed once before.

Yours sincerely [etc]".

6 The respondent's application to change the date of the resumed hearing from 9 November to 8 November 2018 was put before me on 24 October 2018. I granted it for the reasons stated in a letter of that date, namely that (1) I was available to sit on 8 November rather than 9 November, (2) the claimant had given no reason why the hearing should not be relisted to take place on 8 rather than 9 November, so that her objection to the relisting was "not based on any practical factor", and (3) it was in my view in the interests of justice that the respondent was represented by its existing counsel.

7 On 1 November 2018, the claimant wrote by email to both the Watford office of the Employment Tribunals and the Employment Appeal Tribunal in the following terms:

"Dear Sir/Madam

To Whom It May Concern

I am the claimant in the Watford Employment Tribunal case reference: 3328827/2017 and intend to appeal the Watford Employment Tribunal order of 24 September 2018. I request the Employment Tribunal's written reasons on the order of 24 September 2018 and therefore would like to also apply to postpone the preliminary hearing on Thursday 8th November 2018. I am grateful for urgent dispatch of the Tribunal's written reasons of the order above, and an urgent decision on my application.

Yours faithfully [etc]".

8 That application was considered by Employment Judge Manley on 7 November 2018, who directed that the matter remained listed for the hearing of 8 November 2018 and that if the claimant wished to make any further application to postpone the hearing, she could do so at the start of the hearing. It was, decided Judge Manley, "not in the interests of justice to delay matters further."

9 That decision was sent to the claimant at 13:06 on 7 November. At 15:23 on the

same day, the claimant wrote to the Employment Tribunal in these terms:

> "Dear Sir/Madam
>
> I would like to make a second application to postpone preliminary / case management hearing on 8 November 2018 on following grounds:
> - I am a disabled litigant in person and always accompanied with my carer to tribunal hearings. The tribunal only notified very recently the change of hearing date of 8 November 2018, on 26 October 2018. This was very short notice and my carer is unable to attend and accompany me to the Watford Tribunal on 8 November 2018 because of other commitments on 8 November 2018. Furthermore, I intend to further appeal reasons given by the EAT for dismissal of my appeal and propose to have the matter heard before a judge pursuant to Rule 10(3) of the Employment Appeal Tribunals Rules. Therefore it would be expedient for PH on 8 November 2018 to be postponed pending the outcome of the oral appeal to the judge because the issue of appeal is directly related to PH on 8 November 2018."

10 That application was responded to by a letter sent to the parties by email on the same day at 16:36, in which it was recorded that Employment Judge Lewis had considered the claimant's request to postpone the hearing and had refused it. His reasons for doing so were recorded in this way:

> "Further delay is not in the interests of the parties. Claimant may state her application at the start of the hearing day."

11 At the start of the hearing day on 8 November 2018, I was given a copy of a further email from the claimant to the tribunal, in the following terms:

> "Dear Sir Madam
>
> I request review of tribunal's decision to refuse application to postpone PH on 8 November 2018 as I am dissatisfied with reason. Furthermore no consideration has been given to other reason of my disability and carer unable to attend hearing. It is not in the interest of justice to compel attendance at hearing despite practical reasons given for non-attendance. The request to attend despite my inability to attend is not taking into account my circumstances as a disabled person.
>
> Yours faithfully [etc]".

12 I noted that none of those emails of 1-8 November 2018 from the claimant to the Watford Employment Tribunal email address and (in some cases) that of the Employment Appeal Tribunal had been openly copied to the respondent or its solicitor.

13 The claimant was not present at the tribunal building by 10:15. I therefore waited

for a further 20 minutes to see whether she attended the hearing. She did not do so. I was therefore forced to consider whether to proceed with the hearing in her absence. In doing so, I saw that the claimant's claim to be disabled was stated in paragraph 23 of her document at pages 40-46 of the hearing bundle. That document was dated 2 May 2018. In paragraph 23, the claimant wrote:

> "My disability is lower back pain, that affects my abilities in walking and standing for short periods. The Respondents were on notice of my disability in March 2017 because I had a conversation with Wendy Barrett, and because reasonable adjustments were always made whenever I appeared in the Crown Court or Magistrates' court because I was allowed ... to remain seated whilst conducting advocacy in Court because of my disability."

14 The claimant had never before, as far as I could see, said that she needed a carer, although she did say in paragraph 7 of her disability impact statement at pages 37-39 of the bundle that she has to "seek additional support from members of my family to cook meals and complete household cleaning because I am also unable to bend down". She had in fact been made aware on 24 September 2018 of the possibility of the hearing that she was then told was to take place on 9 November 2018 being heard instead on 8 November 2018. In addition, the claimant accepted that she knew by 26 October 2018 that the hearing was going to take place on 8 November and not 9 November. Furthermore, a sufferer from lower back pain does not normally need a carer by way of an adjustment for his or her condition. Nor was it clear how a carer could assist the claimant, since she had not stated in what way the absence of a carer would affect her ability to attend and present her case.

15 In fact, I had in the case management summary document sent to the parties on 26 September 2018 made the following orders:

> "2 The claimant must, if she continues to claim that she was a worker within the meaning of section 230(3) of the Employment Rights Act 1996, send the respondent a witness statement stating the basis on which she worked for the respondent during 2017, by 4pm on Monday 8 October 2018.
>
> 3 The parties must by 4pm on Monday 15 October 2018 exchange skeleton arguments on the issue of whether or not the claimant was at the material times during 2017 a worker within the meaning of section 230(3) of the Employment Rights Act 1996.
>
> 4. The claimant must be prepared to give oral evidence at the hearing of 9 November 2018 about when her GP appointment for 24 September 2018 was made, and what efforts, if any, she made to avoid it occurring on that day. If she has any documentary evidence in that regard which she has not already sent to the tribunal and the respondent, then she must send it to the tribunal and the respondent by 4pm on Monday 15

October 2018.

5. If the claimant intends to contend, in the event that I conclude that any aspect of her claim has little reasonable prospect of success so that a deposit order should (subject to the question of the claimant's means) be made, then she should put before me (whether or not she attends in person) documentary evidence concerning (1) the current state of her bank and other relevant accounts, (2) her assets (such as her house and her car), and (3) any evidence of contributions to the household expenditure. If she does not do so, then I will assume that I can make a deposit order of up to £1000 in respect of any aspect of her claim which I consider has little reasonable prospect of success."

16 The claimant had complied with none of the first three of those orders, and she had not taken the opportunity afforded by the fourth of those orders to put before me evidence about her means.

17 If, however, the claimant had not received those orders, then that was a relevant factor. If she had received those orders, then she would have seen that I had written in paragraph 29 of my case management summary sent (according to the file) to the parties on 26 September 2018:

> "I ascertained that the earliest date that both [Mr Milsom] and I could be present at Watford was 9 November 2018, and I determined to relist the hearing to take place on that date, on the basis that if the claimant is unable to attend in person, then she can put before me all the documentary evidence on which she relies and can make written submissions on all of the issues which I will then be determining. She could also put before me a witness statement, although its weight would be diminished by reason of her failure to attend and be cross-examined on it. In addition, she could put before me all documents in her possession showing her assets and her outgoings, in case I were minded to make a deposit order."

18 I therefore started the hearing with only Mr Milsom present and asked him (without telling him why) whether he had received a copy of the document recording my case management summary and orders which it was stated in the file had been sent to the parties on 26 September 2018, and, if he had, whether he knew how it had been sent to those instructing him. He said that he had indeed received it. When I told him why I wanted to know the answer to that question, I asked him whether he had been sent copies of all of the emails to which I refer in paragraphs 7, 9 and 11 above. He had, he said, received at least one of them, but not the one dated 1 November 2018. However, he had been given, by his instructing solicitor, copies of two letters stating decisions of judges of the Employment Appeal Tribunal which had been sent to the claimant and the respondent and of which there were no copies in the Employment Tribunal's file. One letter was dated 6 November 2018 and the other was dated 7 November 2018. That of 6 November 2018 was a record of a decision made by Her Honour

Judge Eady QC under rule 3(7) of the Employment Appeal Tribunal Rules 1993 (as amended). The record started:

> "This appeal has been put before me for urgent preliminary consideration on the papers given that there is a hearing before the Employment Tribunal on 9 November 2018. The Appellant (the Claimant below) is seeking to challenge a decision of the ET sent out on 26 September 2018 but delayed until 5 November 2018 before lodging her appeal. I do not know why the Appellant delayed so long before lodging her appeal.
>
> In any event, to the extent that the proposed appeal seeks to challenge the ET's decision on the Appellant's employment status, it is premature. The ET has expressly not made a decision in this regard, having postponed this question to be determined at the hearing on 9 November 2018. It is for this reason that the ET has directed that the Appellant lodge a witness statement and skeleton argument addressing this issue. As to the question of any earlier concession on worker status by the Respondent, this is addressed by the ET in its reasoning at paragraphs 15-21. The ET has not determined the worker status issue but has identified that this is a question that goes to jurisdiction and thus still arises for determination. I cannot see that the proposed grounds of appeal identify any error of law arising from the ET's approach in this regard."

19 The reasons of Her Honour Judge Eady QC referred in three places to parts of the document which had been sent to the parties on 26 September 2018, showing that at least by 5 November 2018, the claimant had in her possession a copy of that document. There was nothing in the file showing that the document had been sent to the claimant otherwise than on 26 September 2018, and I saw from the passage set out at the end of paragraph 18 above that the claimant had given in her reasons for seeking an urgent decision by the Employment Appeal Tribunal no justification for making her application for permission to appeal only on 5 November 2018 (i.e. and not before then).

20 The letter of 7 November 2018 recorded a decision of Mrs Justice Simler DBE, President, concerning a notice of appeal "from the Decision of an Employment Tribunal sitting at Watford and promulgated on 24 October 2018". That was described by Simler P as a decision "to change the Preliminary Hearing date from 9 November to 8 November 2018". The decision of Simler P was in these terms (and these terms only):

> "1. The impugned decision (to change the Preliminary Hearing date from 9 November 2018 to 8 November 2018) is not arguably in error of law. Employment Tribunals have wide case management powers. Here, no practical difficulty with the change of date was relied on by the Claimant. Her objection was based solely on her intention to appeal the order dated 24 September 2018 and her request accordingly to postpone the Preliminary Hearing.

2. The Employment Tribunal was entitled in the exercise of its discretion to conclude that the hearing should proceed despite the appeal and change the Preliminary Hearing date accordingly.

3. The Claimant did not contend that she was not available and identified no practical difficulty with the changed date. Accordingly, it is not arguable that the Employment Tribunal failed to take account of a relevant consideration, or exercised its discretion in a way that no reasonable Employment Tribunal could do.

4. In the absence of an arguable error of law, this appeal cannot proceed."

21 I considered carefully what I should do, and I concluded that I should determine both of the applications which were before me, on the basis of the evidence and submissions which were already before me, and on the basis of any oral submissions which Mr Milsom might make.

22 In coming to that conclusion, I considered whether there was any indication that the claimant had not received the orders which I made at the hearing of 24 September 2018 and which were (as recorded by Her Honour Judge Eady QC) "sent out on 26 September 2018" before 1 November 2018 (when the claimant sent the email to which I refer in paragraph 7 above). In doing so, I noted that the claimant had not stated in her applications to the tribunal for the postponement of the hearing of 8 November 2018 sent on 7 November 2018 that she had not had an opportunity to comply with the orders which I set out in paragraph 15 above. She had also not given any reason in, or in any document accompanying, her notice of appeals for her delay in filing those notices.

23 Indeed, in all of the circumstances I could not see how I could, consistently with the interests of justice, do anything other than proceed with the hearing and determine the applications which were before me. I therefore now turn to those applications.

My determinations of the applications before me

The claimant's application to amend her claim to add a claim of detrimental treatment contrary to section 47B of the Employment Rights Act 1996 ("ERA 1996")

24 I concluded that the claimant's application to amend her claim by the addition of a claim of detrimental treatment within the meaning of section 47B of the ERA 1996 should be granted only if such a claim were potentially sustainable: there could be no point in me permitting the claimant to add a claim which it would be outside the jurisdiction of the Employment Tribunal to consider.

25 If, for the reasons which I stated in paragraphs 8.1 and 8.2 and the first part of

paragraph 9 of my case management summary which was sent to the parties on 13 September 2018, the claimant was neither an employee nor a worker within the meaning of section 230(3)(b) of the ERA 1996, then the claimant could not validly claim (and the tribunal had no jurisdiction to consider) a claim of a breach of section 47B of that Act.

26 The claimant had not complied with orders 2 and 3 of those made by me after the hearing of 24 September 2018 and set out in paragraph 15 above. She had in the circumstances put before me no evidence to show that she was anything but a barrister in private practice during 2017. Accordingly, her application to amend her claim by the addition of a claim of a breach of section 47B of the ERA 1996 was in the circumstances an application to add a claim which it would be outside the jurisdiction of the tribunal to hear, and it would have been pointless to give the claimant permission to amend her claim in that way. I therefore concluded that the claimant's application to amend her claim to add a claim of detrimental treatment within the meaning of section 47B of the ERA 1996 should be refused.

27 In coming to that conclusion I did not need to decide whether or not the respondent should be given permission to resile from the concession made by Mr Milsom at the hearing of 22 February 2018 that the claimant "was a worker for the purposes of part [IVA] of the Employment Rights Act 1996". That is because, having reconsidered what I said in paragraphs 19-21 of my case management summary sent to the parties on 26 September 2018, I concluded that what I wrote there was correct: a party cannot, by a concession, give the tribunal jurisdiction.

The respondent's applications for a strike-out of the claimant's claims, or for one or more deposit orders

Introduction; the claim of disability discrimination

28 In deciding whether to strike out or make a deposit order in respect of any part of the claimant's claims, I had to decide what those claims were, i.e what claims were in fact before the tribunal.

29 The ET1 claim form contained in box 8.2 (on page 7 of the bundle) this and this only about the details of the claims:

> "The conduct of Respondents decisions to dismiss me on 17/05/2017 and 14/06/2017; sending harassment emails, text message and telephone calls on 28/04/2017, 29/04/2017, 10/04/2017, 08/03/2017, 30/03/2017; 04/05/2017, decision letters of 21/08/2017, 21/06/2017, 14/09/2017 was on the grounds of my disability and race. I was treated less favourably because of my race and disability. The reason for the Respondents conduct above was because of my race and disability. I raised complaints about discrimination but the respondents did not take any steps to prevent

discrimination."

30 The claimant had (as ordered by Employment Judge Smails on 22 February 2018) provided "finalised particulars of claim, including an application to amend her claim for unfair dismissal to be a claim of detriment in the form of dismissal for having made a protected disclosure". She had also procured the sending of a letter by her GP to the tribunal on 24 April 2018. That letter was in the bundle at page 211. It referred to the claimant as being recorded in her medical records (no person from the GPs' practice having, the letter indicated, seen the claimant before the letter was written) to be suffering from "severe back ache and hip pains." It was recorded in that letter also that the claimant "has chronic pain and poor mobility connected with this" and that she "is also clinically obese, [which] contributes to her chronic pain and difficulties with mobility." The letter recorded also that the claimant started to take anti-depressant medication on 2 August 2017.

31 In the further particulars of the claimant's claims she did not state (or indicate in any way) that she was claiming that she had been discriminated against directly because of her disability. The only way in which she put her claim of a contravention of the Equality Act 2010 ("EqA 2010") in so far as disability was concerned was in paragraphs 23-27 of her particulars of claim (at pages 44-46 of the bundle). Those paragraphs contained an assertion only of a failure to make a reasonable adjustment by failing to make her aware on four separate series of dates "of a vacant room next to the CPS room at Willesden Magistrates' Court, where [she] could sit at a vacant desk and chair and carry out work on [her] laptop." The particulars continued: "Therefore, I was compelled to walk the long distance of 30 metres along the corridor of the court to the prosecution witness room to sit and do work, when the CPS room at Court was full." The claimant wrote in each of paragraphs 24 to 27 (which were allegations of the same wrongdoing, on the four separate series of dates to which I have referred) that she "only became aware of it after dismissal in June 2017".

32 Even though there is a need to read claims made to an employment tribunal in a generous way to claimants, i.e. by reading them as including by implication any claim that can be made out from the ET1 claim form and any document accompanying it, a claim of a breach of section 20 of the EqA 2010 is very different from a claim of a breach of section 13 of that Act because of the protected characteristic of disability within the meaning of section 6 of that Act. It is not open to a claimant by the giving of further particulars of his or her claim to add what is substantively a new claim. Given those factors, I concluded that the claim of direct disability discrimination was not being pressed, and that a separate claim of a breach of section 20 of that Act was pressed, but which needed to be the subject of an application to amend the claim. Assuming that at least one element of the claimant's claims were permitted by me to proceed, an application to amend the claim could be made by the claimant. I return to the claim of disability discrimination below.

The application to strike out the claims

The applicable case law and the test to be applied

33 Mr Milsom's skeleton argument set out a comprehensive and helpful summary of the case law concerning striking out one or more parts, or the whole of, a claim made to an employment tribunal. He also put before me copies of the authorities on which he relied. I read with particular care the decision of the Court of Appeal in *Ahir v British Airways plc* [2017] EWCA Civ 1392. Paragraphs 15 and 16 of the judgment of Underhill LJ (with whose judgment McFarlane LJ agreed) were of particular assistance. The nub of the test to be applied (in the light of the case law referred to in the earlier part of the judgment) was stated in paragraph 16 in this way:

> "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'."

34 That case was an unusual one, where so far as relevant the claimant (who was the appellant) asserted that the respondent's impugned acts (which it was claimed constituted victimisation within the meaning of section 27 of the EqA 2010 and "detriment as result of raising a complaint under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002") were the result of the victimisation by one employee, employed in the respondent's legal department. As Underhill LJ recorded in paragraph 20 of his judgment):

> "It was [the appellant's] case, advanced in his particulars of claim and also in correspondence with the Tribunal prior to the strike-out hearing seeking disclosure of documents and telephone records, that a BA employee in the legal department, Mr Navdeep Deol, was already aware of the circumstances of the appellant's departure from Continental Tyres and had a copy of the Employment Tribunal judgments; that he had in that knowledge sent the anonymous letter to the HR department; and that he was motivated by one or more of the protected acts. There was, as he put it, 'a well-laid plan' to get rid of him as a troublemaker."

35 Mr Milsom also put before me a copy of the decision of Underhill P in *ABN Amro Management Services Ltd* UKEAT/0266/09/DM and relied heavily on it in emphasising the requirement to strike out a case if it has no reasonable prospects of success. He did so in paragraph 26 of his submissions, which was in these terms:

> 'Indeed, in such a case an ET is likely to err in law by not striking out the complaint. Thus in *ABN Amro Management Services and anor v Hogben* UKEAT/0266/09 the ET's refusal to strike out complaints of age discrimination was overturned. "If a case has indeed no reasonable prospect of success it ought to be struck out:" [16]. As the EAT observed in *Hak v St Christopher Fellowship* [2016] ICR 411 at [55], "the words are "no reasonable prospect." Some prospect may exist, but be insufficient."'

36 In *Hogben*, reference was made to the decision of the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, which concerned the application of the test in rule 24.2(a) of the Civil Procedure Rules 1998 ("CPR"). That provision empowers a court to give summary judgment (which is in substance what striking out a case because of a lack of a reasonable prospect of success does in the Employment Tribunal) where there is "no real prospect" of success. At page 260 of *Three Rivers*, in paragraph 93, Lord Hope set out the following key passage from Lord Woolf's judgment in *Swain v Hillman* [2001] 1 All ER 91, which concerned rule 24.2(a):

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

37 In paragraphs 94 and 95 of his speech in *Three Rivers*, at 260-261, Lord Hope said this:

> "**94** ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of

crucial importance lies in the answer to the further question that then needs to be asked, which is – what is to be the scope of that inquiry?

95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

38 The decision on the facts before the Court of Appeal in *Swain v Hillman* is instructive. There, Lord Woolf said (at p 93e) that it was:

> "fair ... to take the view that the judge regarded this as a case where he thought that it was possible, but improbable, that the claim or defence would succeed."

39 I see no material difference between the tests in CPR r 24.2(a) and that which is in rule 37, namely whether or not a case has "no reasonable prospect of success". Even if there is a minor such difference, I see it as being possible accurately to say that while it may be improbable that a claim will succeed it may at the same time be incapable of being characterised as a claim which has no reasonable prospect of success. There is a considerable gap between a claim that has a reasonable prospect of success and a claim that has no reasonable prospect of success. The latter is a fanciful claim. The former is a substantial one. A claim which it is improbable will succeed but which might do so (i.e. it is possible will succeed) falls within the gap between a claim which is fanciful and one which has a reasonable prospect of success, even though the line between an improbable claim and a fanciful one is thin.

The claimant's claims which the respondent sought to be struck out

40 Here, given that I had refused the claimant permission to amend her claim by the

addition of a claim of a breach of section 47B of the ERA 1996, she was advancing claims as stated in box 8.2 of the ET1 claim form and as particularised in her further and better particulars dated 2 May 2018.

41 I saw no claim of harassment within the meaning of section 26 of the EqA 2010 in those further particulars: what those particulars appeared to do in paragraphs 5-22 was state a claim of direct discrimination because of race, rather than harassment within the meaning of section 26. There was an implicit claim of victimisation by Ms Wendy Barrett, i.e. victimisation within the meaning of section 27 of the EqA 2010, but it was by no means clear whether that was in fact pressed. Certainly, there was no claim that the ultimate decision-makers, i.e. the persons acting on behalf of the respondent in deciding that the claimant should cease to be engaged to act on behalf of the respondent, were affected in any way by the fact that she had, in 2006, made a claim of race discrimination and/or victimisation.

42 However, in the skeleton argument which the claimant wrote and exchanged in preparation for the hearing of 31 August 2018, which was dated 30 August 2018, the claimant stated in paragraphs 7 and 10 in clear terms that she was making a claim of victimisation on the part of Ms Barrett, i.e. victimisation within the meaning of section 27 of the EqA 2010.

43 There was, nevertheless, in that skeleton argument no claim that the decision to terminate the claimant's engagement with the respondent to provide advocacy services was affected by the fact that she had in 2006 made a claim of race discrimination/victimisation.

The basis of the application to strike out the claims

44 Mr Milsom's skeleton argument described in paragraph 6 in some detail the complaints which led to the termination of the engagement of the claimant to provide advocacy services. That paragraph started with this passage:

> "It is unusual for a prosecuting agent to be the subject of complaint. In the Claimant's case, however, a host of complaints were made from various individuals including defence counsel, legal advisors, court ushers, Magistrates and District Judges. Each complaint relates to a series of discrete incidents and there are no repeat complainants."

45 That was an accurate summary of the breadth and depth of the complaints which had been made in writing, of which there were copies in the bundle. In paragraphs 31 and 32, Mr Milsom wrote:

> '31. As the ET1 recognises, ... the crux of this claim concerns the Claimant's "dismissal." It would have to be shown either that the ten complaints cited at [6] above were the product of conspiracy or that they were a mere pretext for a disability/race-related withdrawal of instructions. The

ET has nothing more than the Claimant's say-so on which to proceed.

32. This is woefully inadequate. There are no reasonable prospects of establishing that the Respondent was not genuinely concerned or motivated by the slew of complaints. Moreover, it took a measured approach to those complaints: each was considered on its merits and two were taken no further.'

My conclusions on the application to strike out the claims

46 While I concluded that the claimant's claims of victimisation on the part of Ms Barrett and of discrimination because of her race on the part of one or more other persons acting on behalf of the respondent had little reasonable prospect of success, I could not say, even in the light of the cogent submissions of Mr Milsom, that those claims had no reasonable prospect of success. I think that it is improbable that those claims will succeed, rather than that they have no reasonable prospect of success.

47 However, if I am mistaken in thinking that there is currently no claim of direct discrimination because of the claimant's disability before the tribunal because it has been abandoned, then I am of the very clear view that that claim has no reasonable prospect of success.

48 In coming to the conclusion stated in paragraph 46 above, I recognised that it would impermissible to permit the claims of direct discrimination because of race and of victimisation within the meaning of section 27 of the EqA 2010 to proceed on the basis that something might turn up in cross-examination. I also recognised that even if there were any unlawful discrimination against the claimant here committed by any relevant person, it is, if the documents in the bundle (on which and on the contents of which I heard no oral evidence, of course) are accurate, highly unlikely that the decision to end the claimant's engagement with the respondent would not have been made if there had not been such discrimination. Thus, it might well be the case that the claimant would be awarded no more than compensation for injury to her feelings even if her improbable claim succeeded.

<u>The application for one or more deposit orders</u>

49 As I say above, in my view the two surviving claims of direct discrimination because of race and victimisation within the meaning of section 27 of the EqA 2010 have little reasonable prospect of success. I see no good reason to order the payment of a deposit of less than £1000 for each claim, and I do so order.

<u>Case management</u>

50 Since the claim is not struck out in its entirety, it is necessary to consider the next steps in it. The respondent, after the hearing of 24 September 2018, applied

for the postponement of the hearing of 21-25 January 2019. The claimant resisted that application on the basis that it was in the interests of justice that the case remained listed on 21-25 January 2019, on the basis that justice delayed is justice denied. Mr Milsom pressed orally the application for the postponement of the full merits hearing, and I agreed with him that the timetable was now rather tight if the full merits hearing were to start on 21 January 2019. In addition, the deposit order is going to need to be considered by the claimant, as are the contents of this judgment. In those circumstances, I agreed with Mr Milsom's suggestion that the hearing of 21-25 January 2019 be vacated and that the first half-day of that period be set aside for a case management hearing to make appropriate procedural orders.

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Employment Judge Hyams

Date: 10/12/2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE