Appeal Nos. UKEAT/0079/20/RN (V)
UKEAT/0080/20/RN (V)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 9 & 10 December 2020

Before

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

(SITTING ALONE)

UKEAT/0079/20/RN

E — APPELLANT

1) X 2) L & 3) Z — RESPONDENT

UKEAT/0080/20/RN

L — APPELLANT

1) X 2) Z & 3) E — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For E	The Appellant E in Person
For L	MR STEFAN BROCHWICZ-LEWINSKI (Of Counsel) Instructed by: Hempsons Solicitors 16th Floor City Tower Piccadilly Plaza Manchester M1 4BT
For X	MS BETSAN CRIDDLE (Of Counsel) Instructed by: Thompsons Solicitors 88-94 Church Street Liverpool Merseyside L1 3AY
For Z	The Respondent Z No appearance made or represented

SUMMARY

JURIDICTIONAL/TIME POINTS & PRACTICE AND PROCEDURE

Two appeals against the order of an employment tribunal which had revisited the order of an earlier tribunal of equivalent jurisdiction, in the absence of a material change in circumstances, or the original order being based on a material omission or mistreatment, or some other substantial reason necessitating the interference, would be allowed. The orders of the original employment tribunal would be restored and a preliminary hearing would take place before a fresh employment tribunal.

Earlier authorities relating to applications to strike out, at a preliminary hearing, claims which assert a continuing act but are said by the respondent to be time-barred, were reviewed and qualified.

A

THE HONOURABLE MRS JUSTICE ELLENBOGEN

B

1. This is my deferred ex tempore judgment following the Full Hearing, yesterday, of two appeals from the orders of Employment Judge Sherratt, sent to the parties on 9th December 2019. Following an earlier anonymity order, I shall refer to the parties as they were identified at first instance. The Appellants are, respectively, L and E. The Respondent (who was the Claimant before the Employment Tribunal ("the Tribunal")) is X. There is a further (second) respondent to proceedings; Z, whose position will be affected by the outcome of this appeal but who did not, herself, appeal from the relevant order. Before me, L was represented by Mr Stefan Brochwicz-Lewinski, of Counsel, E represented herself and X was represented by Ms Betsan Criddle, of Counsel. I am grateful to them all for their assistance.

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Background

E

2. The appeal comes about in the following circumstances. By a claim form presented on 15th January 2019, X brought complaints of harassment and victimisation. The allegations of harassment relate to the alleged conduct of her colleagues, E and Z, and are made against all three respondents to the claim. The claim of victimisation is made against L. In circumstances which I shall come on to explain, it will be necessary for me to determine whether it is also made against Z and/or E. Following a TUPE transfer, L is the employer of X, E and Z.

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3. The conduct giving rise to the harassment allegation is said to have taken place between September 2016 and 23rd January 2018. In February 2018, X made a Dignity at Work complaint which, it is agreed by L, amounted to a protected act. Her claim of victimisation alleges acts of detriment taking place from that date until December 2018. On 10th December

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2018, X commenced early conciliation and ACAS issued a certificate on 10th January 2019. In relation to the alleged acts of harassment by E and Z, L relies upon the statutory defence outlined in section 105(4) of the **Equality Act 2010** ("EqA") asserting that it took all reasonable steps to prevent acts of harassment occurring such that it is not liable for any such acts. It is common ground between the parties that, in order for the Tribunal to have jurisdiction to determine the harassment claims, either X needs to establish that the alleged acts of harassment can be taken together with the alleged acts of victimisation, so as to amount to a continuing act extending into the primary limitation period, or the Tribunal must be satisfied that it is just and equitable to grant X the required extension of time in which to bring her harassment claims.

4. On 2nd September 2019, a preliminary hearing for case management took place before Employment Judge Ryan, at which L sought a preliminary hearing to determine the jurisdictional matters arising and X resisted that course, contending that all matters should be dealt with at the full merits hearing.

5. At paragraphs 4 and 5 of his Reasons, Employment Judge Ryan recorded:

> **"4. … The Claimant sought to persuade me that all matters should be dealt with at the final hearing. Having regard to the fact that the Second and Third Respondents are not represented and that, if the Tribunal decides that it does not have jurisdiction to consider the allegations of harassment they would not then be parties, I decided that a preliminary hearing was appropriate.**
>
> **5. At the preliminary hearing the Tribunal will determine whether the allegations of harassment against the Second and Third Respondents:**
>
> **5.1 could be considered as acts extending over a period which also compromises the acts of victimisation;**
>
> **5.2 if not, whether it would be just and equitable for the Tribunal to extend time so as to have jurisdiction to determine the allegations of harassment."**

6. The Employment Judge went on to give directions for the service of evidence by each party and the preparation of a bundle of documents and authorities for that preliminary hearing, which was listed for one day on 19th November 2019. A full merits hearing was also listed to take place from 12th to 26th October 2019, although that hearing has since been postponed and is now listed to take place between 20th January and 11th February 2021. Attached to Employment Judge Ryan's order was a list of the substantive issues arising from the claim which had been agreed between X and L and which, so Employment Judge Ryan recorded, at paragraph 10, neither E nor Z had suggested to be incomplete or inaccurate.

7. The preliminary hearing to determine jurisdictional issues came before Employment Judge Sherratt (sitting alone), as listed, and it is against his Order that L and E now appeal. The Employment Judge ordered that:

> **"The Tribunal does not consider that the question of whether the claimant's complaints of harassment against the second and third respondents should be struck out, on the basis that they are out of time, is suitable for consideration at a preliminary hearing."**

In his Reasons, having recited the Order made by Employment Judge Ryan, he noted that the Employment Appeal Tribunal ("EAT") had:

> **"2. … considered such a question in the case of *Caterham School Limited v Mrs K Rose UKEAT/0149/19/RN* which was at the Tribunal on 22 August 2019 before His Honour Judge Auerbach. That Judgment did not become widely available until 14 November 2019. I brought it to the attention of the parties this morning."**

He went on to cite paragraphs 63 to 66 of **Caterham**, before stating as follows, at paragraphs 7 and 8 of his Reasons:

> **"7. Having considered the judgment of His Honour Judge Auerbach and the submissions made by the parties, it seems to me that the allegations of harassment made by the claimant are the precursors to the alleged protected act and the alleged victimisation which follows. It is therefore inevitable that all of the matters that appear in the claimant's pleaded case will have to be considered by the Tribunal at the final hearing with no hearing time being**

saved even if the harassment claims were struck out against the second and third respondents.

8. In my judgment the question as to whether to strike out parts of the claim against two of the three respondents in this case is not one that is suitable for consideration at a preliminary hearing."

The Appeals

8. Separate Notices of Appeal have been lodged, respectively, by L and E. Whilst the grounds are not identically framed, each raises the same essential issue – whether it was open to Employment Judge Sherratt to decline to conduct the preliminary hearing of the issues set out in Employment Judge Ryan's order. In that connection, it is said, variously, that he: misunderstood, or misapplied, the **Caterham** decision; reached a perverse conclusion that there would be no saving of hearing time and that it would not be beneficial to determine the jurisdictional issues at a preliminary hearing; erred in law, by effectively concluding that Employment Judge Ryan's earlier order should be re-opened and revoked, when he had no appropriate grounds on which to do so; failed to give adequate reasons for his decision; and, in failing to have considered statements of fact, evidence or witness statements at the preliminary hearing, was responsible for unlawful procedural irregularity, or unfairness.

9. X submitted a separate Respondent's Answer to each appeal. Collating her position as set out in those documents, she first states her intention to rely upon the grounds upon which Employment Judge Sherratt relied and further contends that:

1) the Tribunal had been correct, alternatively, entitled, to conclude that striking out the harassment claims as being out of time would entail no saving of hearing time. This

ground of appeal is predicated upon the erroneous assumption, it is said, that, if the harassment claims could not proceed, the evidence relating to those complaints would not be heard. However, in determining whether E and Z had been involved in victimising X, as she contends by her claim form and witness statement for the preliminary hearing, it would be material and relevant to consider whether they had harassed her;

2) At best (as L acknowledges), the Tribunal could have determined whether X's claim disclosed a prima facie case of a continuing act. However, it is clear that there *was* such a continuing act; alternatively, if there is no such continuing act, that the evidence relating to harassment would be material and relevant to the determination of the victimisation claim (see above). Thus, determination of the time point would not have affected the proper management of the claim. Alternatively, the appeal should be dismissed, in any event, as being academic, for the same reasons. That is particularly so, given that Z has not appealed from the Tribunal's order, meaning that the full hearing will consider evidence and all issues regardless of the outcome of this appeal;

3) The Tribunal had not reopened and revoked the case management order by Employment Judge Ryan. It had been required judicially to consider the correct approach to the issues appealed, and had done so; alternatively, if it is correctly regarded as having re-opened and revoked the earlier case management order, it had been correct and perfectly entitled to have done so, as there had been a change of circumstances, in the form of the **Caterham** authority, since the case management order had been made. Further, the Tribunal had had the benefit (not available to the original tribunal) of X's

witness statement, which had been relevant to the way in which she put her case as to a prima facie continuing act; and

4) E had not particularised the respects in which she contended that the Tribunal's order had been inadequately reasoned. As the decision under appeal is an order, rather than a judgment, Rule 62(4) of Schedule 1 to the **Employment Tribunals (Constitution, Rules and Procedures) Regulations** 2013 had been engaged, which stipulates that:

> **"The reasons given for any decision shall be proportionate to the significance of the issue and decisions other than judgments may be very short."**

The reasons given satisfied that requirement.

The Parties' Submissions

On Behalf of L

10. Mr Brochwicz-Lewinski points to the chronology and procedural background to X's claims, as drawn from X's detailed Particulars of Claim. He notes that all acts of alleged harassment are constituted in comments made by E and Z, the earliest of which having been made in September or October 2016. Following a break, from December 2016 to September 2017, the comments relied upon resumed in September 2017 and concluded on 23rd January 2018. There had then been a further gap, following which the Dignity at Work complaint had been made and X had then allegedly been victimised by colleagues in her team (other than E and Z), linked to E and Z being moved to a back office when X was off work. The first alleged act of detriment had taken place on 16th May 2018 and further acts were alleged to have taken place, respectively, on 20th May 2018, in October 2018 and on 29th November 2018. L contends that any complaint arising from an act occurring prior to 11th September 2018 has

been presented out of time, subject to any just and equitable extension of the primary limitation period[1].

11. Mr Brochwicz-Lewinski submits that, from the chronology outlined above, it is clear that X's claim falls in two distinct parts; a harassment claim, arising from the alleged actions of E and Z between September 2016 and January 2018; and the claim of detriment suffered in consequence of having submitted a Dignity at Work complaint, in February 2018. None of the actions is such as to amount to a detriment is alleged to have been carried out by E or Z in this case. The last complaints made against those individuals are the final alleged acts of harassment; namely, the comments made in January 2018. It had been that state of affairs which had led Employment Judge Ryan to order that a preliminary hearing should take place to determine the relevant jurisdictional issues.

12. That order had followed a contested hearing and had been manifestly rational and sensible, in the circumstances, as the harassment claims against Z and E appeared to be very significantly out of time, and it was difficult to see how there could have been conduct over a period for which Z and E could be held liable, which could bring the case within time and/or how discrete alleged acts of harassment by Z and E could be viewed as a continuing series of acts, together with the later alleged act of detriment. Put simply, no claim of victimisation had been pleaded against Z and E and no application to amend X's claim had been made before the Tribunal or this tribunal. As neither Z nor E could be held liable for the alleged acts of victimisation perpetrated by others, determining whether the harassment claim is in time would determine whether they ought to be parties to the proceedings at all. Further, it would operate to narrow the issues significantly and potentially limit the evidence to be adduced at the final

[1] In the list of substantive issues annexed to Employment Judge Ryan's order, the same date is given in relation to Z. In relation to E, the relevant date is said to be 12th October 2018.

hearing. There were plainly time- and cost-savings to be made, were the harassment claims against Z and E to be struck out: they would be released as parties to the litigation and would not need to be represented; there would be no questioning or submissions made on their part; and the issues to be scrutinised at the merits hearing would necessarily be reduced to the alleged detriment said to have resulted from the protected act. Furthermore, as Employment Judge Sherratt had concluded that there would be no time saved in the full merits hearing by releasing Z and E as parties, at best, that could have been neutral by the time of the hearing before him. In any event, questions as to the duration of the merits hearing could not be allowed to trump or determine whether individuals should, as a matter of jurisdiction, be parties to the claims brought. There was an obvious and significant difference between attending a hearing as a witness and attending it as a party. It would be disproportionate and unjust to enable a claim to proceed against an individual simply because that individual might be a witness, in any event. Thus, if, which L did not accept, Employment Judge Sherratt had had a discretion to make the order which he made, that discretion had been exercised perversely.

13. Mr Brochwicz-Lewinski further submits that the **Caterham** decision provides that jurisdictional time points may be determined by way of preliminary hearing, either substantively or at summary level, upon the consideration of whether a prima facie case is made out, taking the claimant's case at its highest (see paragraphs 58 to 65), whilst being astute to ensure that the high threshold applicable to the striking out of discrimination claims is observed (paragraph 66). There had been no good reason arising from **Caterham** as to why the preliminary hearing could not have proceeded, in particular given that the parties had invested time and cost in preparing the necessary evidence and a hearing had been convened for that purpose. It is not correct that evidence relating to the alleged harassment would be material and relevant to the determinisation of the victimisation claim, the only question in which being

whether X had been subjected to later detriment by reason of her protected act on 12th February 2018. Even if such evidence were to be relevant, that would not afford a good reason for maintaining claims against individual parties which ought to be struck out, alternatively, which the Tribunal lacked jurisdiction to consider, nor would it afford a good reason for refusing to determine the jurisdictional issues framed by Employment Judge Ryan.

14. The appeal is not academic, and X's assertion to the contrary is irrational: were the appeal to succeed, the disposal requested would be that the matter be remitted in order that the jurisdictional hearing listed by Employment Judge Ryan could take place. The outcome of that preliminary hearing would affect the proceedings generally and, as such, with respect to X's claims, it is irrelevant that Z has not herself appealed against the order of Employment Judge Sherratt.

15. X's position that Employment Judge Sherratt had not been exercising the power to make case management orders under rule 29 of schedule 1 to **The Employment Tribunal Rules of Procedure 2013** (as amended) is untenable, submits Mr Brochwicz-Lewinski: if he had not been invoking that rule, pursuant to which power vested in him by the procedural rules had he been acting? Under Rule 29, an earlier case management order may only be set aside *"where that is necessary in the interests of justice"*. Yet, for the reasons already submitted, the contrary had been the case here. From the Employment Appeal Tribunal's decisions, respectively in **Goldman Sachs Services Ltd v Montali** [2002] ICR 1251 and in **Serco Ltd v Wells** [2016] ICR768, it is clear that a tribunal ought not to reverse any earlier interlocutory order which had dictated the parties' preparation of their cases in the absence of a material change in circumstances; and if variation or revocation of an order were necessary in the

interests of justice where: (1) there has been a material change of circumstances since the order was made; or (2) the order has been based on a mistake (of fact or, possibly, in very rare cases, of law, although that sounds much more like the information for appeal); or (3) there had been an omission to state relevant facts and, given that definitions cannot be exhaustive, there may be other occasions, although those would be "rare" and "out of the ordinary". The operative circumstances would need to be such as to justify the setting aside of the earlier ruling, yet none of them applied or accorded that justification in the instant case. Mere disagreement with the earlier order would not, as a matter of law, suffice (per John Cavanagh QC, as he then was, sitting as a Deputy Judge of the High Court, in **Dobson v PriceWaterHouseCoopers LLP** UKEAT/022/18/OO, at paragraph 60). **Caterham** might have clarified the law, but it provided no bar to the preliminary hearing proceeding as listed; indeed, it facilitated the process which Employment Judge Ryan's earlier order had required and supported his approach. Similarly, X's witness statement cannot be said to have provided the necessary material change in circumstance, because the Tribunal had refused to consider or deliberate upon it, or any other witness statement.

16. In all the circumstances, Employment Judge Sherratt's refusal to consider and determine the preliminary issues had been perverse and/or otherwise constituted an error of law: he had overlooked the fundamental case for determining the issues, which would release respondents (particularly, private individuals) from proceedings in which the Tribunal lacked jurisdiction and had misinterpreted **Caterham**. In so doing, he had deprived the respondents to X's claims of the possibility of justice. They had been deprived of justice in two ways: they had been refused the opportunity to put their arguments and have the preliminary issues determined, itself leading to the potentially far greater injustice of being retained as parties to proceedings for

which there was no jurisdictional basis. In order to justify that course, an impressive, compelling reason was required, and there had been none.

17. Finally, the imminence of the full merits hearing and any need to postpone it in the event that the appeal succeeds would not afford good reason for upholding Employment Judge Sherratt's order; the same position had arisen in **Montali** and in **Serco**, notwithstanding which each such matter had been remitted for a preliminary hearing. This matter, too, ought to be remitted, to a different tribunal, to determine the first and second issues in relation to L and the second issue, only, against Z and E.

For E

18. In her admirably clear and succinct written and oral submissions, E adopts the points made by L and seeks the same disposal of them. In addition, she submits that Employment Judge Sherratt provided inadequate reasons for his order. Albeit citing from **Caterham**, he had not related the principles in that case to the facts of this one. He had not considered the witness, or any other, evidence provided by the parties. The overriding objective required that parties be placed on an equal footing and that the case be dealt with in a proportionate manner, saving expense, avoiding unnecessary formality and seeking flexibility in the proceedings. X's claims against her had been presented significantly out of time, and yet Employment Judge Sherratt had refused to hear any evidence during the preliminary hearing and had relied solely upon **Caterham**. There had been no recognition of the fact that the parties had been on a very unequal footing and that time and expense could have been saved, for all parties, by proceeding with that hearing. Ms E emphasises the significant difference between attending as a party and attending as a witness, noting the physical and mental toll that the case has taken on her, and

her family, to date and the associated need for the preliminary issues to be remitted and determined, as Employment Judge Ryan had ordered.

On behalf of X

19. I summarise below the submissions made on behalf of X, insofar as they extend beyond the matters set out in the Respondent's Answers to which I have already referred.

20. Ms Criddle refers me to the content of paragraphs 4 and 5 of the witness statement which X had prepared in relation to the abortive preliminary hearing, in which she emphasises the contents of paragraph 5:

> **"4. Arising from the harassment by the Second and Third Respondents and the submission of my Dignity at Work complaints I believe that I was victimised on the following dates. I do not know whether any of this victimisation was instigated by the Second and/or Third Respondent to get back at me for having complained about them as it was undertaken by fellow team members who had relationships with them. Further as neither was suspended from work, both the Second and Third Respondents remained in contact with them…**
>
> **5. I strongly believe that the above series of events are clearly interlinked in that the conduct involved the Second and Third Respondents and/or arose from the conduct of the Second and Third Respondents and that there was an ongoing state of affairs arising from their conduct."**

21. Ms Criddle refers to the well-known principles by reference to which continuing-act cases are to be addressed. In summary, she submits, where the issue is whether discrete acts are capable of amounting to a continuing act of discrimination, the claimant has to show that she has a prima facie case, or a reasonably arguable basis for the contention, that the various acts are so linked as to constitute a continuing act: **Aziz v FDA** [2010] EWCA Civ 304 (paragraphs 35 and 36); **Lyfar v Brighton and Sussex University Hospitals NHS Trust** [2006] EWCA Civ 304 (paragraph 10). An example of a continuing act is where the employer instigates disciplinary procedures, creating a state of affairs until the process is concluded: **Hale v**

Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA. It is not necessary specifically to plead a continuing act provided that it is apparent that such a contention is being raised, for example from a witness statement: **Sridhar v Kingston Hospital NHS Foundation Trust** UKEAT/0066/20/LA (paragraphs 40 and 44 to 46). Where, at a preliminary hearing, the issue is whether the acts complained of are capable of amounting to a continuing act, the facts are to be assumed to be as pleaded by the claimant. Caution is to be exercised in deciding time points at a preliminary hearing, having regard to the difficulty of disentangling them, because there may be no appreciable saving of preparation or hearing time by deciding them; because of the acute fact-sensitivity of discrimination claims; the high threshold for strike-out and the need for evidence to be prepared, if facts are not agreed: **Caterham** (paragraphs 60 and 66). A continuing act can comprise acts which fall under different "headings" of discrimination: **Robinson v Royal Surrey County Hospital NHS Foundation Trust** UKEAT/0311/14/MC (paragraph 65).

22. Whilst primarily contending that Employment Judge Sherratt had not, in fact, exercised his power under rule 29, in the alternative Ms Criddle relies upon that power, noting that, in this case, it would have had to have been approached by asking whether there had been a material change of circumstances: **Serco** (paragraph 43(b)). In this case, that had taken the form of the **Caterham** decision and the clarification of X's position provided by her witness statement. Ms Criddle also places reliance upon the high hurdle which an appellant must surmount in order to succeed in a perversity appeal, per **Yeboah v Crofton** [2002] IRLR 624 (paragraph 93).

23. Ms Criddle submits that it is clear from X's claim form and, in particular, her witness statement for the preliminary hearing, that X contends that there was an on-going state of affairs

which had been created by Z and E, for which L was responsible, as their employer. That alleged state of affairs had begun with harassment in the form of Z's and E's comments relating to X's sexual orientation and continued with her victimisation by others when she had raised a Dignity at Work complaint, with the clear implication that this had either been a case "directed" by Z and E or "inspired" by them. It was not contended that the acts of detriment pleaded at paragraph 23 of the Particulars of Claim had been carried out by Z and/or E, although it was to be noted that sub-paragraph 23(i) alleged that the alleged perpetrators:

> **"… were very regularly going to the back office where the Second and Third Respondents were based, leaving me on my own in the main office; contributing to feelings of isolation and then not talking to me when they eventually returned."**

That was a factual allegation as to the discussions taking place between Z, E and the perpetrators of the victimisation alleged by paragraph 23.

24. X had been forced to move away from her existing room, in circumstances in which Z and E had been allowed to remain working where they were. In determining whether, on the balance of probabilities, Z and E had victimised X, it would plainly be material and relevant for the Tribunal to consider whether they had harassed her: put simply, such behaviour would provide a plausible explanation for X being treated badly, or "punished" when she raised a Dignity at Work claim about that harassment. Ms Criddle fairly accepted that she could not point to any paragraph in the Particulars of Claim which stated that a claim of victimisation was being advanced against Z and/or E (on any basis). There was sufficient material upon which a claim, whether under section 111 or 109 of the **EqA**, was being advanced. The latter would proceed on the basis that Z and/or E, through the agency of the alleged perpetrators identified at paragraphs 22 and 28(a) of the Particulars of Claim, themselves victimised X. Notwithstanding

Employment Judge Ryan's stated view that the claims against Z and E would fall away in the absence of a continuing act or an extension of time, it was clear, from paragraph 8 of Employment Judge Sherratt's Reasons, that he had understood there to have been a pleaded claim of victimisation against Z, otherwise he would not have referred to the strike out of "parts of the claim" against them. Similarly, Z and E had denied victimisation in their respective response forms, from which it follows that they had understood such a claim to have been advanced against them.

25. Ms Criddle submits that paragraph 4 of X's witness statement raises a hypothesis and echoes the position pleaded at paragraph 23(i) of the Particulars of Claim (by reference to the ongoing relationship between Z and E and those identified at paragraphs 23 and 28 of that document). Paragraph 5 of the witness statement asserts that Z and E were "involved in" the acts of victimisation by their colleagues. In summary, all of the "building blocks" are present in the Particulars of Claim and elaborated upon in X's witness statement. Following sequential exchange of witness statements for the preliminary hearing, it was clear, from the Respondents' statements, that they understood X to have asserted a claim of victimisation against E and Z in her own statement. It follows that the continuing act question applies to E and Z, as it applies to L. In any event, any striking out of the harassment claims against Z and E would not necessarily indicate that those claims should be struck out against L.

26. Accordingly, the Tribunal had been correct, or, at least, entitled, to regard this as a case in which all of the evidence was bound to be heard at the full merits hearing, such that it was not a case in which it would be suitable to decide the issue of a prima facie continuing act at a preliminary stage. It was the scope of the evidentiary enquiry that would be required of the

Tribunal at the full merits hearing which was relevant, not jurisdiction. Irrespective of whether the harassment claims were out of time, they would need to be addressed by way of background to, and motive for, the alleged acts of victimisation. The claims had been presented in time by reference to the date of the last incident of alleged victimisation. If L is correct in contending that it would remain open to it, at the full merits hearing, to argue that a claim in respect of individual acts, within each set of claims, is itself statute-barred, all that would be determined by a preliminary hearing is whether the collected alleged acts of harassment and the collected alleged acts of victimisation are linked, leaving open at the full merits hearing any further time points to be taken within each set of acts. That would serve to resolve little between the parties and indicated the lack of practical value in the preliminary hearing previously ordered. In any event, L and E placed excessive weight on the savings in time and cost which could be made: as it had in this appeal, L would take the lead at the full merits hearing and the additional time likely to be taken up in questioning and submissions on behalf of Z and E would be marginal.

27. Whilst Ms Criddle accepted that simple disagreement with Employment Judge Ryan's approach could not justify the setting aside of his order under rule 29, she submitted that it was clear, on the face of Employment Judge Sherratt's Order, that he did not purport to exercise his powers under that rule. What he had been required to do, and had done, was judicially to consider the correct approach to the issues before him, as to which he had reached a permissible conclusion. He had not been obliged slavishly to follow an obviously inappropriate course. In recognising that fact, he is not to be taken as having revoked the earlier order; rather to have exercised his judicial powers afresh to decide whether it was right for the relevant issues to be determined at that appointed time. His reasons referred to the parties' submissions and were to be interpreted as meaning that, having regard to the way in which the case was put, it was

inappropriate for time points to be determined at a preliminary hearing. Alternatively, if Employment Judge Sherratt is considered to have exercised his powers under rule 29, he was correct, or, at least, entitled, to have done so; X's witness statement, which had not been before Employment Judge Ryan, had put "flesh on the bones" of the case. That statement, coupled with the caution urged in **Caterham** (to which Employment Judge Ryan had not been referred), indicated that this was a proper case in which to conclude that there had been a material change of circumstances justifying his order and there had been no misinterpretation of that authority. **Caterham** had brought to the fore the difficulty in addressing, at a preliminary stage, a prima facie case, given the obligation to consider the pleaded case at its highest, and had emphasised the difference between determining time points, respectively on a prima facie and on a substantive basis. There had been no inadequacy in the reasons provided by Employment Judge Sherratt for his decision, which were proportionate in all the circumstances and identified those factors which had weighed most heavily in favour of the order made – the fact that E disagrees with those reasons is nothing to the point.

28. If, contrary to Ms Criddle's primary case, the Tribunal ought to have decided the issues identified by Employment Judge Ryan, the appeal should be dismissed, in any event. First, she submits, given the nature of the claim advanced in X's witness statement, this is a case in which the EAT is itself able to determine the correct result — that X has shown a prima facie case that there was a continuing act. Relevant to its willingness to do so are the inevitable delay and additional expense which would result from the postponement of the full merits hearing which remission would cause. Alternatively, the appeals are academic because, in deciding whether Z and E had victimised X, the Tribunal would be bound to consider the factual background and whether X had been harassed. In any event, the absence of an appeal by Z

makes that course an inevitability. In such circumstances, preliminary determination of the jurisdictional issues is unnecessary and contrary to the overriding objective. It will lead to the loss of a multi-day full merits hearing, at short notice, which will have to come back long into the future to consider the same evidence as is due to be heard during the existing listing.

29. For all such reasons, Ms Criddle contends, Employment Judge Sherratt made no error of law, alternatively, the appeal should be dismissed in any event, either because X has established a prima facie case of a continuing act, or the appeal is academic. In the further alternative, the matter should be remitted to the same tribunal for determination of the preliminary issues (unless, as might be the case, Employment Judge Sherratt had now retired).

L and E in Reply

30. In reply to Ms Criddle's submissions, Mr Brochwicz-Lewinski (whose submissions E adopted) submitted that the gravamen of Ms Criddle's submissions is that there is a "phantom claim" somehow pleaded by her, which Employment Judge Sherratt is to be taken as having acknowledged in adopting the approach which he did. That claim is to be divined, it is said, from a combined reading of paragraph 23(i) of X's Particulars of Claim and certain paragraphs of her witness statement. Neither suffices:

1) Paragraph 23(i) simply asserts that the relevant colleagues would regularly go into the office in which Z and E were based. Conspicuously absent is any allegation against Z and/or E themselves. At its highest, that paragraph pleads the occasions on which any relevant activity by them could have occurred, but does not assert that it did so;

2) Paragraph 25 of the Particulars of Claim contains the following material averments, with emphasis added, which run contrary to the phantom case asserted:

a) *"I wanted to return to work but knew that I could not return to the department whilst the Second and Third Respondent worked there as well as those responsible for the above victimisation ..."*; and

b) "I would have been expected to work in the same team and building as the Second and Third Respondents, as well as with colleagues that had caused victimisation... ";

3) Paragraph 4 of X's witness statement actively contradicts a case of incitement pursuant to section 111 of the **EqA**, which could not be pleaded in the stated absence of the requisite knowledge. The same point applies to any alleged claim under section 109, said to arise from acts directed or inspired by Z and/or E;

4) The fact that the protected act constituted a complaint about earlier alleged mistreatment by Z and E does not establish that the victimisation claim itself is made against either of them;

5) The victimisation claim has been pleaded with precision and is not as now asserted by Ms Criddle. It follows that the latter cannot afford a justification for Employment Judge Sherratt's approach.

31. Mr Brochwicz-Lewinski submits that **Caterham** had decided nothing which had not been apparent from earlier authority (including **Balls v Downham Market High School and College** [2011] IRLR 217, EAT – albeit in connection with a different asserted basis for strike-out – to which **Robinson** had referred, at paragraph 24). Further, and in any event, in so far as inconsistent with **Lyfar** (as paragraphs 59(a) appeared to be), **Caterham** could not be followed. **Robinson** itself afforded no assistance to X: as is apparent from paragraphs 64 and 65 of that case; paragraphs 45 and 69 of **Sridhar;** and from paragraph 10 of **Lyfar**, whilst a claimant's assertion that the acts on which reliance is placed form part of the continuing act need not itself be pleaded, the alleged acts themselves must appear from the pleaded case and do not do so in this case. Indeed, the allegations pleaded against Z and E are expressly pleaded to have concluded in January 2018.

32. A requirement to take the claimant's case at its highest when determining whether a prima facie case has been made out does not require an uncritical acceptance of everything said in that claimant's witness statement. Nor does it suggest that material in a respondent's statement which serves to indicate or highlight any implausibility in the claimant's position cannot be considered. That is consistent with paragraph 71 of **Robinson**, in which Her Honour Judge Eady QC (as she then was) had held:

> **"71. [The employment tribunal] was then entitled to conclude that [the relevant claim] should be struck out. It expressly had regard to the test whether the claim had any reasonable prospect of success; it reached a view that it did not. The reasons it provides … go through the various layers of implausibility inherent in the Claimant's case. Having heard that case emerge from the Claimant during the course of the hearing, that was a permissible conclusion for the ET to reach… Where a claim is so implausible, it can be right that it be struck out: an ET is not obliged to let every matter proceed, however improbable."**

33. In any event, as there is more than one answer reasonably possible to the continuing act question, that must be remitted to the employment tribunal to decide (**Jafri v Lincoln College**

[2014] ICR 920, CA applies), along with the second issue identified by Employment Judge Ryan, should that be engaged. Whether or not Employment Judge Sherratt had retired, it was appropriate for a fresh pair of eyes to consider the preliminary issues: he had "shown his hand" and there was a risk that he might let that affect his judgment, or, at least, that the parties might reasonably perceive that to be the case.

Discussion

The pleaded case against Z and E

34. As in any claim, the issues arising in this case are defined by pleadings. In her Particulars of Claim (at paragraphs 4, 6, 9, 11 and 13), X makes clear that comments said to constitute harassment, contrary to S26 **EqA**, were made by Z and/or E. The first set of alleged acts of victimisation, contrary to S27 **EqA**, is particularised at paragraph 23 and alleged to have been perpetrated by individuals other than Z and E. Confirmation, were it required, that no allegation of victimisation made in that paragraph is made against Z and E appears from the sentences in paragraph 25 on which L relies (set out above). Further and subsequent alleged acts of victimisation are particularised at paragraphs 28(a) and (b) of the Particulars of Claim. There is no pleaded suggestion that Z and/or E are implicated in sub-paragraph (a) and neither is included in the list of those said to have ignored X during a training session which took place in October 2018 (sub-paragraph (b), as Ms Criddle confirmed. At paragraphs 27 and 29, certain management actions are identified as further acts of alleged detriment. Neither Z nor E is employed in a management capacity, or alleged to have been responsible for those acts, even taking X's case at its highest.

35. As is apparent from paragraph 10 of Employment Judge Ryan's reasons, the list of issues which is annexed to his order had been agreed between X and L, and neither E nor Z had suggested that list to have been incomplete or inaccurate. Paragraphs 1 to 9 of that list again made clear that the allegations of harassment derived from comments made by Z and/or E. The alleged acts of victimisation were the subject of paragraphs 10 and 11. As framed, the issues do not identify by name those alleged to have been responsible for the alleged acts of detriment, but do cross-refer to paragraphs 25 and 27 to 29 of the Particulars of Claim (see above). At paragraph 15 of the list of issues, reference is made to liability under S109 **EqA**. Nowhere is it stated that an issue arises under S111 of that Act.

36. Thus, the first occasion on which X has sought to implicate Z and/or E in the alleged acts of victimisation is in the witness statement which she served in relation to the abortive preliminary hearing before Employment Judge Sherratt. Paragraphs 4 and 5 of that statement are instructive. Paragraph 4 does not allege that the victimisation in question was perpetrated by Z and/or E and reiterates X's allegation that it was *"undertaken by fellow team members who had relationships with* [Z and E]*"*. Further, X states that she does not know whether any such victimisation was instigated by either Z or E. That cannot support a positive case that they carried out such acts. Moreover, any such positive averment would be at odds with X's pleaded case. As to paragraph 5 of the witness statement, X's stated belief that the conduct in question *"involved* [Z and/or E] *and/or arose from the conduct of* [Z and/or E]" is similarly problematic. The former assertion is directly at odds with the statement made at paragraph 4 and, in any event, departs from her pleaded case. Further, an allegation that any act of victimisation 'arose from' the conduct of Z and E does not equate with an assertion that either carried out the alleged acts and/or is otherwise to be held liable for them. I agree with Mr Brochwicz-

A Lewinski's analysis of paragraph 23(i) of the Particulars of Claim, which does not bear the weight which Ms Criddle asserts it to support.

B 37. In short, in my judgment, the Particulars of Claim, drafted by lawyers, do not allege that Z and/or E perpetrated, or instigated, or directed, or instructed, any of the acts of victimisation which it is sought to establish, a fact which cannot be circumvented by a witness statement which seeks to overstep the boundaries of the pleaded case: **1) Mr A Chandhok 2) Mrs P Chandhok v Ms P Tirkey** UKEAT/0190/14/KN, paragraph 17. In any event, taken at its highest, X's witness statement makes inconsistent assertions regarding the point in issue. The acts of victimisation to which Employment Judge Ryan referred, at paragraph 5.1 of his reasons, were, inevitably, those pleaded by X and fall to be considered separately as against each respondent to her claims. Unlike Employment Judge Sherratt, he recognised that E and Z would not remain parties to the proceedings, unless the harassment claims against them were found to have been brought in time, by virtue of any warranted extension of the primary limitation period.

F 38. In the absence of a pleaded case of victimisation against Z or E (cf the clear allegation that each has been responsible for acts of harassment), it is common ground that proceedings in relation to the last act of harassment of which each has been accused were commenced out of time, subject to any appropriate extension of the primary limitation period. I shall return to the consequence of that fact later in this judgment.

G *Continuing Act by L*

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39. It is also common ground that X makes claims of victimisation against L. It follows that the principles upon which Ms Criddle relies to establish a continuing act are engaged and I start by reviewing the relevant authorities.

40. In **Lyfar**, Hooper LJ held that it is for the claimant to show a prima facie case, noting that,

> **"to resolve that issue it may be advisable for oral evidence to be called, see e.g. Arthur v London Eastern Railway Limited (trading as One Stansted Express) [2006] EWCA Civ 1538"**

(paragraphs 10 and 11). Having cited the well-known dictum of Mummery LJ, at paragraph 48 of **Hendricks v Metropolitan Police Commissioner** [2002] EWCA 1686, Hooper LJ cited, with approval, the following dictum of the EAT in **Lyfar**, at paragraph 17:

> **"The extension is most useful where the acts are said to be continuing or different in nature, but they constitute a continuing state of affairs in which discrimination occurs."**

At paragraph 29 Hooper LJ also cited, with approval, the following passage from the judgment of the EAT:

> **"It was open to the Tribunal to consider that one [act] leads into another, but that was not the finding that the Tribunal made here. Such a finding is one of fact."**

41. In **Aziz**, at paragraph 36, Jackson LJ held:

> **"Another way of formulating the test to be applied at the pre-hearing review is this: the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be a continuing act or to constitute an ongoing state of affairs: see Ma v Merck Sharp & Dohme Ltd [2008] EWCA Civ. 1426 at paragraph 17"**

In **Aziz**, a claim of race discrimination had been brought against the FDA union, arising from a series of acts alleged to have been carried out by different individuals, all of whom said to have

A been acting in the same way. Grounds one and two of Ms Aziz's appeal respectively asserted that: (1) the tribunal had misunderstood and/or misapplied the principle of a continuing act; and (2) the tribunal had erred because her complaints had been made against the FDA, not against other named respondents, and individuals had been named in order to make clear those who had carried out the acts. In this respect, the tribunal had failed to understand the vicarious liability of employers for their employees. The fact that the FDA had had several individuals dealing with Ms Aziz's case over a number of years did not prevent the act/s from being continuous.

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C

42. Ms Aziz had been granted permission to appeal on the second of those grounds, but required permission from the Court of Appeal in relation to ground one (and a further ground), on her renewed application. At paragraph 43 Jackson LJ held that it was clear from the authorities to which he had referred earlier in his judgment that, in determining whether there has been a continuing act, one has regard to whether the same, or different, individuals are involved, as a relevant, but not conclusive, factor. He went on to analyse the various acts of which Ms Aziz had complained, noting that her dealings with the FDA had fallen into three, clearly defined, periods. At paragraph 47, he held:

D

E

> **"Applying the principles set out by the Court of Appeal in Hendricks and adopted by the courts in the later authorities, I can well see that Ms Aziz has a *prima facie* case for saying that FDA's conduct in each period constituted a continuing act or possibly a continuing omission."**

F

He concluded, however, that there was no basis for connecting the three periods in question as a continuing act and, therefore, refused permission to appeal on ground one. The same issue was said to undermine ground two, which was dismissed.

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43. In **Robinson**, Her Honour Judge Eady QC (as she then was) admitted of the prospect that a claimant could make out a prima facie case that the matters of which she complained

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amounted to conduct extending over a period, in circumstances in which the relevant facts, taken individually, fell under different headings of discrimination (in which, it is clear, she included harassment). She stated that such an assessment will inevitably be case-specific, but that, if the claimant were, for example, complaining that putting her on particular shifts was a continuing act of direct discrimination and that, as the other side of that particular coin, failing to put her on different shifts constituted a failure to make reasonable adjustments, she could not see why that claimant would not be entitled to say that those matters should be considered together as constituting conduct extending over a period. However, Her Honour Judge Eady QC considered that such an argument could not succeed when one addressed the case as put. At paragraph 64, she noted:

> **"As her Particulars made clear, [the claimant] understood that her dismissal was because she could not attend work, as advised by Occupational Health, because (on her case) of the consequences of the earlier discriminatory conduct. That was not the same as saying that the dismissal decision was part of the same conduct. ... In the present case, however, at a more basic level, the claimant's claim did not link the earlier acts of discrimination to the decision to dismiss. At most, she was complaining that the decision to dismiss related to the consequences of the earlier acts of discrimination. She plainly saw that as unfair - she saw it as an act of direct disability discrimination - but her case did not characterise it as an extension (or continuation) of the same conduct…"**

44. In **Hale**, Choudhury P considered an appeal (so far as material for current purposes) from the tribunal's finding that an NHS trust's decision to instigate the MHPS procedure should be treated as a one-off act of discrimination, rather than as part of an act extending over a period. Having cited the dictum of Balcombe LJ, in **Sougrin v Haringey Health Authority** [1992] ICR 650, CA, by which he held that "in order to see what is "the acts complained of" within the meaning of section 68(1) it is necessary to look at the originating application", Choudhury P held (at paragraph 38) that the issue as formulated complained of being subjected to disciplinary procedures and ultimately being dismissed. That formulation

suggested that the complaint was about a continuing act commencing with a decision to instigate the process and ending with a dismissal." At paragraph 42, he continued:

> **"By taking the decision to instigate disciplinary procedures, it seems to me that the respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the basic process is initiated, the respondent would subject the claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "a succession of unconnected or isolated specific acts" as per the decision in Hendricks, paragraph 52."**

He concluded that the tribunal had erred in treating the first stage of the process as a one-off act. In the end, **Hale** stands as no more than an example of the application of the applicable principles and I did not understand Ms Criddle to suggest otherwise.

45. In **Caterham**, His Honour Judge Auerbach considered an appeal from the tribunal's determination that the treatment complained of, up to and including a complaint of constructive dismissal, had all formed part of "conduct extending over a period", for the purposes of S123(3)(a) of the **EqA**. The ground of appeal under consideration contended that the judge had erred in law in definitively deciding that question at a preliminary hearing without having determined, in respect of the relevant allegations, what had factually occurred and whether any of it, subject to the time point, had involved discriminatory treatment, as alleged. Having first concluded that the tribunal had made a definitive determination that all of the alleged conduct, up to and including the alleged dismissal, had formed part of a single piece of conduct extending over a period, His Honour Judge Auerbach held that determination to have been an error of law:

> **"53. … in short, because, at this preliminary hearing, the judge did not have any evidence before her, at all, on the continuing conduct issue; and she did not make, indeed could not have made, any finding of fact at all relevant to that issue, nor any findings about whether any of that alleged conduct involved (subject to the time point) conduct amounting to discrimination, as alleged. Absent such findings she could not properly have determined, definitively,**

whether any of the matters complained of involve something which, taken together with other matters complained of (so all of them), formed part of conduct extending over a period.

54. Rather, as is apparent in particular from paragraph 28, she reached her conclusion – in respect of the conduct extending over a period issue relating to these claims – solely on the basis of the consideration of the contents of the claim form. That, indeed, may be contrasted with the tribunal's conclusion on the question of just and equitable extension, which proceeded from the facts found…

…

56. But even if (which I did not, I think, have to decide), the Judge did, and was entitled to, take that view, that could only have led to the conclusion that the claims in question should not be struck out as being out of time. They would then proceed to a full hearing on the basis that the continuing conduct issue, and all the time points attendant upon it, remained live. …"

46. At paragraphs 58 to 66 of his judgment, His Honour Judge Auerbach observed as follows:

58. First, it is always important for there to be clarity, when a Preliminary Hearing is directed, at such a Hearing, and in the Tribunal's decision arising from it, as to whether the Tribunal is considering (or directing to be considered), in respect of a particular complaint, allegation or argument, whether it should be struck out (and/or made the subject of a deposit order), or a substantive determination of the point.

59. The differences, in particular, between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, are generally well understood, but still worth restating. A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. If a strike out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point, or on the merits), that will bring that complaint to an end. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be.

60. By contrast, definitive determination of an issue which is factually disputed requires preparation and presentation of evidence, to be considered at the Preliminary Hearing, findings of fact, and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the Full Merits Hearing of the case.

61. All of that applies equally where the issue is whether there has been conduct extending over a period for the purposes of the section 123 time limit. If the Tribunal considers (properly) at a Preliminary Hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out. But if it is not struck out on that basis, that time point remains live.

If, however, the Tribunal decides at a Preliminary Hearing, that the claim does relate to something that is part of continuing conduct, and so is in time, then the issue has been decided and cannot be revisited.

62. Some of the authorities do, I think, need to be read with some care in this regard, because it is not always apparent, without a close and careful reading, whether the Tribunal's decision under challenge was by way, effectively, of a decision whether or not to strike out a complaint by reference to a time point, or by way of definitive determination of that point. That is, sometimes, because the authorities do not always use the express language of "strike out", or refer to the strike-out Rule, or use the language of "no reasonable prospect of success". But, on a careful reading, it is clear that a number of these authorities are, indeed, concerned with whether a particular complaint or complaints should have been struck out, on the basis that there was no reasonable prospect of success of establishing that they were in time because they formed part of conduct extending over a period; and that these authorities (properly) use the "prima facie case" test as a synonym or shorthand for the strike-out test.

63. So, in short, the prima facie case test is appropriate, as shorthand for the "no reasonable prospects of success" test, where the Tribunal is persuaded that the matter is suitable for consideration at a Preliminary Hearing, of whether a particular complaint or complaints should be struck out on the basis that it is, in isolation, out of time, and there is no reasonable prospect of success, on the pleaded case, of it being found in time as forming part of continuing conduct.

64. But a determination of whether, substantively, there is conduct continuing over a period, cannot be reached at a Preliminary Hearing on the basis merely of consideration of whether there is a prima facie case on the pleading. Were it otherwise, it would mean that there was actually a lower threshold for establishing conduct extending over a period, if the matter were considered at a Preliminary Hearing, than if it were considered at a Full Hearing. That cannot be right. Read as a whole, and with care, none of the previous authorities so holds.

65. The authorities do indicate that it is not necessarily in every case an error of law for an Employment Tribunal to consider a time point of this sort at a Preliminary Hearing, either on the basis of a strike out application, or, possibly even, in an appropriate case, substantively. If that can be done properly, it may be sensible and, potentially, beneficial, so that time and resource is not taken up preparing, and considering at a full merits hearing, what may be properly found to be truly stale complaints that ought not properly to be so considered.

66. But, as is well-known, the authorities also repeatedly urge caution – having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; because there may be no appreciable saving of preparation or hearing time in any event, if episodes that could potentially be severed as out of time, are in any case relied upon as background to more recent complaints; because of the acute fact-sensitivity of discrimination claims, and the high strike-out threshold; and because of the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue."

47. With respect to His Honour Judge Auerbach, I do not share his view as stated at paragraph 59, that:

> **"A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact."** (emphasis added.)

It seems to me that the emphasised parts of such a conclusion are at odds with the conclusion of Hooper LJ, at paragraphs 10 and 11 of **Lyfar** (cited above), by which I am bound. It is also at odds with the way in which such cases proceed in practice and without criticism by the higher courts – see, for example, **Hendricks**, at paragraph 22, from which it is clear that the claimant had produced a 42-page witness statement and given oral evidence at the preliminary hearing. In my judgment, whilst, in any given case, it may be possible and appropriate to determine a strike-out application by reference to the pleaded case alone, it cannot be said that that approach should be adopted on every occasion. That is not to say that the tribunal is to consider the assertions made by the claimant uncritically, or to disregard any implausible aspects of the claimant's case, taken at its highest. Save, *possibly*, to highlight any factual basis for asserted implausibility (which is not synonymous with the mere running of an alternative case), one would not expect evidence to be called by a respondent in relation to the existence, or otherwise, of a prima facie case (see, for example, paragraph 36 of **Hendricks**; and paragraphs 23 and 35 of **Aziz**).

48. In **Sridhar**, Cavanagh J held that, (1) whilst it is better if a continuing state of affairs point is made specifically in a claim form, that is not essential; and, similarly, (2) as a matter of law and procedure, it is not necessary that an agreed list of issues state in terms that the claimant is complaining of a continuing discriminatory state of affairs. On the facts of that case, so Cavanagh J held, by the time of the preliminary hearing on time limits, it had been clear, from his witness statement, that the claimant was alleging a continuing act. He had said that, *"the Respondent is responsible for the ongoing situation and continuing state of affairs…All the allegations are linked to a policy of the Respondent"*. In the light of **Hendricks**,

Lyfar and **Aziz**, the tribunal should only have struck out the complaints at the preliminary hearing stage if, on the material before it, the claimant had not established a prima facie case relating to the continuing discriminatory state of affairs, the claims were not capable of being part of such a continuing discriminatory state of affairs, and it was not reasonably arguable that there was such a continuing discriminatory state of affairs. All of these were different ways of saying the same thing.

49. At paragraphs 69 and 70, Cavanagh J went on to conclude:

> **"69. The only material of substance that the tribunal had to go on was the pleaded case. Mr Sridhar had not given oral evidence and his contentions have not been tested by cross-examination. On the basis of the pleaded case, in my judgment, it could not properly be said that the individual allegations were not capable of being part of a continuing discriminatory state of affairs. The allegations, if true, could at least potentially indicate a state of affairs [through] which Mr Sridhar as a doctor of Indian origin was being treated less favourably than a white doctor would have been treated in similar circumstances. There was, at least arguably, a constant theme running through the allegations relating to general treatment and undervaluing of Mr Sridhar as an associate specialist.**
>
> **70. The allegation of a continuing discriminatory state of affairs on the pleading was not just a bare assertion without any possible foundation in fact. There was material in the pleaded case from which the inference of a continuing discriminatory state of affairs may be drawn. ... "**

In answer to the respondent's contention that there was no substance to the allegation of continuing acts and that there had been breaks in time during which nothing was the subject of complaint, Cavanagh J held (at paragraph 71) that that might or might not be so but was a matter for the tribunal to decide, at the full merits hearing. It had not been open to the tribunal, at the preliminary hearing, to find that the claims were not capable of being part of a discriminatory state of affairs and to strike out the claims, even bearing in mind the broad discretion which a tribunal has in relation to strikeouts. That was particularly so in circumstances in which the tribunal had not heard any evidence on the point.

The key principles distilled

50. With the qualification to which I have referred at paragraph 47 above, from the above authorities the following principles may be derived:

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

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

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

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

5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**;

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

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

8) In an appropriate case, a strike-out application in respect of some part of a claim can been approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading: **Caterham** (as qualified at paragraph 47 above);

9) A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: **Robinson** and paragraph 47 above;

10) If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because

of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: **Caterham**;

11) Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: **Caterham**;

12) Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: **Caterham**;

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

prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham**.

The Principles Applied to this Case

51. Revisiting the Particulars of Claim with the above principles in mind, it is first necessary to consider the substance of the claim, as identified in the Claim Form:

Alleged Harassment

1) The initial set of comments. which are alleged to constitute harassment by Z and E are said to have been made in September/October 2016 (paragraph 4);

2) The second set of comments is said to have been made in December 2016 (paragraph 6);

3) Further comments are said to have been made by Z and/or E in September and October 2017 (paragraphs 9 to 11); and

4) The last comments alleged to constitute harassment are said to have been made on 23rd January 2018 (paragraph 13).

Alleged Victimisation

5) Following her protected act in submitting a Dignity at Work complaint, in February 2018, X is said to have been victimised:

(a) by colleagues within the team, between 14th February and 23rd March 2018 (paragraph 23);

(b) in the form of her move from the Urgent Care Department to the Central Community Rehabilitation Team ("CRT") Department, initially on a temporary basis, on 16th May 2018 (paragraph 27);

(c) through the absence of any acknowledgement of her wedding, on 25th May 2018, and through being ignored in the course of a training session in October 2018 (paragraph 28); and

(d) when her move to the Central CRT Department was made permanent, from 1st December 2018 (paragraph 29).

52. Implicit in paragraph 31 of her Particulars of Claim and explicit, at paragraph 5 of her witness statement for the preliminary hearing, is the Claimant's assertion that there is a link to be made between the various acts of which complaint is made. As a matter of principle, it matters not that they encompass allegations of harassment and victimisation. Again, as a matter of principle, the fact that different individuals may have been involved in the various acts alleged, whilst relevant, is not conclusive. Nonetheless, at a preliminary hearing, L would have been entitled to direct the tribunal's attention to any matters which, in its critical assessment of the pleading and relevant evidence, might be thought to be implausible.

53. The issues identified by Employment Judge Ryan, and his related directions, were framed so as to enable determination, at a preliminary hearing, of the issues in relation to which evidence would be called (in line with the approach in **Lyfar**), and the parties had prepared for a preliminary hearing accordingly. Sensibly, there has been no suggestion by X that the issues to be determined at that hearing lacked the requisite clarity. Whilst not cited to Employment Judge Ryan by any party, nothing in **Caterham** precluded that course; indeed, His Honour Judge Auerbach had observed, that, if it can be done properly, such a course may be sensible and, potentially, beneficial. I note that, at paragraph 59, he had also observed that the applicable principles were well understood, but were worth re-stating; and, and at paragraph 66, that, *"as is well-known, the authorities also repeatedly urge caution"*. On its face, such language refers to what His Honour Judge Auerbach considered to be established principle, not a development of, or departure from, it.

54. In my judgment, at its highest, **Caterham** serves as a reminder that caution should be exercised, for the reasons stated by His Honour Judge Auerbach, which are fact-sensitive considerations. There is nothing new in that proposition (helpful as it is to have it re-stated), which may be found, for example, in **Arthur v London Eastern Railway Limited (trading as One Stansted Express) [2006] EWCA Civ 1538**, to which reference is made at paragraph 11 of **Lyfar**. In **Arthur**, at paragraph 36, Mummery LJ had held:

> **"36. Ms Seymour objected that, if this was the case, there was no point in having a pre-hearing review to determine time-limit issues in a case such as this. The matter would always have to go to a full hearing. Two points can be made on this submission. First, it is possible to direct a preliminary hearing with evidence relevant to the time limit point. Secondly, I agree that there would be no real point in having a preliminary hearing with evidence, if it was not going to save time and costs. That will often be the case in this sort of situation. Even if it is decided at a pre-hearing review or other preliminary hearing that there is no continuing act or series of similar acts, that will not prevent the complainant from relying evidentially on the pre-limitation period acts to prove the acts (or failures) which establish liability. It will in many cases be better to hear all the evidence and then decide the case in the round,**

> **including limitation questions, on the basis of all the evidence: see, for example, Hendricks v. Metropolitan Police Commissioner [2003] 1 All ER 654 (particularly at paragraphs 48 and 49) regarding the approach to multiple acts alleged to extend over a period."**

55. There is nothing to suggest that Employment Judge Ryan did not have the appropriate principles in mind when ordering a preliminary hearing, in circumstances in which X's then-representative had sought to persuade him that all matters should be dealt with at a final hearing (see paragraph 4 of his reasons). There was no appeal from his order. The parties complied with his directions and attended the preliminary hearing before Employment Judge Sherratt, ready to call evidence and make submissions on the issues which he had identified.

56. Against that background, the question arises as to whether the course adopted by Employment Judge Sherratt was permissible. Before addressing that question, I turn to consider the cases of **Montali**; **Serco** and **Dobson**, on which L and (by adoption of L's submissions) E rely.

Montali

57. The facts giving rise to **Montali** are similar to those with which I am concerned. The applicant had presented an originating application, complaining of disability discrimination and victimisation. In its notice of appearance, the employer asserted that the majority of her complaints were statute-barred. It sought determination of that issue, as a preliminary issue, a course which the applicant's solicitors opposed, contending that the issue ought to be determined at the full merits hearing of the complaint. At a directions hearing, the tribunal chairman ordered that a preliminary hearing be convened to determine whether the applicant's claims were statute-barred. The applicant did not appeal against that direction and each side prepared for the hearing of the preliminary issue. At that hearing, a differently-constituted

tribunal took the view, of its own motion, that the matter would be better decided at the full hearing and declined to hear it as a preliminary issue. The employer appealed from that order.

58. At paragraphs 26 and 28, the EAT held that the overriding objective provided the clearest possible indication that, when exercising any power under the rules, the employment tribunal will follow the same principles as those spelled out in the Civil Procedure Rules. In particular in the present case, it would not reverse any earlier interlocutory order which had dictated the parties' preparation of their cases, in the absence of a material change in circumstances. The second employment tribunal had fallen into error in reversing the earlier tribunal's direction as to the holding of a preliminary hearing, in the absence of any change in circumstances. The aborting of the preliminary hearing had been a wrong exercise of discretion and wrong in principle. If the applicant had been dissatisfied with the earlier direction, she ought to have appealed it. She had not done so. Nor had she made any complaint at the commencement of the preliminary hearing. If litigants and, more particularly, the tribunal itself, revisit procedural points already decided in the absence of change of circumstances, there will be uncertainty and repetition, rather than clarity and finality, within the processes of tribunal litigation.

59. Having so held, at paragraph 30 the EAT addressed disposal. The full hearing of the applicant's claims had previously been fixed for the fifteen-day period commencing approximately six months after the date of the appeal hearing. The EAT ordered that the Regional Chairman should direct a fresh hearing date for the hearing of the preliminary issue as originally ordered, before a tribunal different from that which had declined to hear that issue. The EAT noted that such an order would inevitably put back the timetable set for the

substantive hearing and that it would be for the employment tribunal to reconsider that timetable. If the existing full hearing listing could be retained, all well and good. Otherwise, a new date would have to be set. The full hearing would also take place before a fresh employment tribunal.

Serco

60. In **Serco**, an employment judge had ordered a preliminary hearing to determine whether the claimant had sufficient length of service to bring, amongst others, a claim of unfair dismissal. Subsequently, a list of 96 issues had been agreed between the parties. Before the preliminary hearing took place, a different employment judge, at a case management hearing, concluded that the preparation and agreement of that list of issues, which extended beyond those envisaged by the previous judge, constituted a material change, meaning that the preliminary issue previously ordered would resolve only a few of the issues between the parties. On that basis, pursuant to Rule 29 of the 2013 procedural rules**,** he decided to revoke the order as being "necessary in the interests of justice" and in accordance with the overriding objective to deal with the case fairly and justly.

61. Allowing the employer's appeal, the EAT held (at paragraphs 43 and 45) that the principle underlying the procedural rules, of the finality, certainty and integrity of judicial decisions and orders, usually directed any challenge to an order of the tribunal towards an appeal to a superior tribunal and discouraged a judge of equivalent jurisdiction from looking again at any order. Any interference with a previous interlocutory order by a judge of equivalent jurisdiction had to be "necessary in the interests of justice", in accordance with rule 29, which was to be interpreted as requiring a material change of circumstances since the order was made, or that the order had been based on a material omission or mistreatment, or some

A other substantial reason necessitating the interference. Whether or not a subsequent event amounted to a material change in circumstances was a matter of jurisdiction and not a question of the exercise of discretion, and was, therefore, to be decided by taking an objective view of the factual matrix. At paragraph 48, the EAT went on to hold that the compilation of the list of issues in that case, distilled, no doubt, from the respective pleadings, had made no difference to the nature of the case and could not be regarded as a material change of circumstances. Accordingly, there had been no judicial basis upon which the second judge could have interfered with the earlier order. Having so held, the EAT ordered that the original tribunal's order should be restored and a separate preliminary hearing listed. If that meant that the full hearing, then listed to commence just over six weeks later, could not proceed, so be it (paragraphs 47 and 50).

Dobson

62. Dobson was a case in which the principles in **Serco** were endorsed and applied by John Cavanagh QC (as he then was), sitting in the EAT as a Deputy Judge of the High Court. Having cited the three sets of circumstances in which an employment tribunal can set aside an order previously made by a different employment tribunal in the same proceedings, as identified in **Serco**, he held, at paragraph 60:

> **"60. However, this Rule should be applied consistently with what is done in the High Court in the Civil Procedure Rules, and that means that the cases in which a subsequent Tribunal will set aside the original tribunal's order will be rare and out of the ordinary. In my judgment, it is clear that the power is not akin to a right of appeal. If, as in this case, a second employment judge has come on the scene, the fact that the second employment judge thought that the first employment judge had been wrong is not a good enough reason in itself to set aside the prior order."**

The Principles Applied in this Case

63. Analysed by reference to the above principles, the following position is clear:

1) There had been no appeal from the order of Employment Judge Ryan and Employment Judge Sherratt was a judge of equivalent jurisdiction.

2) The parties had prepared their respective cases in accordance with the order of Employment Judge Ryan and there had to have been a material change in circumstances to warrant Employment Judge Sherratt's reversal of that order;

3) In so far as is apparent in his reasons, Employment Judge Sherratt did not consider whether there had been a material change in circumstances since Employment Judge Ryan had made his orders, nor did he cite the line of authority summarised above. It is unclear whether he was even referred to the latter. Tribunals are creatures of statute and derive their powers from the relevant procedural rules. I agree with Mr Brochwicz-Lewinski that, if Employment Judge Sherratt was not purporting to invoke rule 29 of the 2013 procedural rules (whether or not expressly), the source of his power to make the order which he made has not been identified and does not exist. Try as she did to convince me that Employment Judge Sherratt's order constituted no more than the proper exercise of judicial discretion in connection with the substantive issues before him, Ms Criddle did not succeed in that endeavour.

4) In fact, Employment Judge Sherratt was interfering with an earlier interlocutory order, which had to be "necessary in the interests of justice", requiring a material change of

circumstances since that order had been made, or that the earlier order had been based on material omission or mistreatment, or some other substantive reason necessitating the interference. Of those, X relies only upon the first alleged state of affairs as justifying Employment Judge Sherratt's order.

5) The factors now asserted to constitute that material change are the availability of **Caterham** and X's witness statement at the preliminary hearing. Whether or not they did so is a question of jurisdiction, to be decided by taking an objective view of the factual matrix (see **Serco**). In my judgment, so viewed, neither constitutes the requisite change (whether considered in isolation or jointly with the other). Even allowing for the fact that **Caterham** itself had not been drawn to the attention of Employment Judge Ryan (albeit decided by the date of the hearing before him), it did nothing more than re-state the need for caution urged by earlier established authority (see above). If X had considered that Employment Judge Ryan had misunderstood or misapplied the law, the proper route by which to challenge his orders would have been an appeal. As to X's witness statement, Employment Judge Sherratt did not have regard to it (or to any other witness statement). In any event, it is difficult to see how that statement (served in accordance with Employment Judge Ryan's directions in relation to the issues which he had ordered to be determined at a preliminary hearing) could serve as a material change of circumstances. It made no difference to the nature of her case, namely that the various alleged acts of which she complained constituted a continuing act; alternatively, should be allowed to proceed following a just and equitable extension of the primary limitation period.

6) In those circumstances, Employment Judge Sherratt's view that the preliminary hearing would entail no saving of hearing time, whether or not justified on the facts, was immaterial: it was not for him to make that decision, following the earlier order of Employment Judge Ryan and the question of whether the factors which he identified as tending against a preliminary hearing were legitimate concerns, justifying the exercise of his discretion to decline to determine the issues arising at a preliminary stage, does not arise. His disagreement with the approach which Employment Judge Ryan had adopted did not itself afford a good enough reason to set aside the earlier order (see **Dobson**).

7) Thus, Employment Judge Sherratt was obliged to consider the substantive issues before him, arising from Employment Judge Ryan's earlier orders. Instead, he revisited those earlier orders, in circumstances in which he lacked jurisdiction to do so.

8) For the sake of completeness, however, I reject Ms Criddle's submission that, in determining whether E and Z had been involved in victimising X, as she contended by her claim and witness statement for the preliminary hearing, it would be material and relevant to consider whether they had harassed her. First, there is no pleaded victimisation claim against E and/or Z (see above). Secondly, and in any event, that is a submission which, if viable at all, ought to have been made (and, indeed, may have been made) to Employment Judge Ryan. Thirdly, as Employment Judge Ryan had recorded (at paragraph 4 of his reasons), the decision to convene a preliminary hearing reflected the fact that E and Z were unrepresented parties and would not be parties at all, were the tribunal to decide that it had no jurisdiction to hear the harassment claims. That

remained the case before Employment Judge Sherratt. There is a significant difference between being a party to proceedings and giving evidence in connection with them. Further, any acts of harassment by E and/or Z would, of themselves, shed no light on whether L, through the acts of others, had victimised X by reason of her protected act. In all such circumstances, had it been necessary, I would have concluded that Employment Judge Sherratt's exercise of any discretion which he possessed had been perverse, in particular at a point at which the parties had been ready to proceed with the substantive preliminary hearing and had attended for that purpose.

64. To be clear, the fact that Z has not herself appealed from the order of Employment Judge Sherratt is, in my judgment, immaterial. If the order of Employment Judge Ryan is restored, the original issues will be reinstated and will equally affect her. In any event, the tribunal cannot appropriate to itself jurisdiction to hear any claim against Z which it does not have (should that be its finding): **Secretary of State for Health & Another v Rance** [2007] IRLR 665, EAT (paragraph 37).

65. Given the conclusions set out above, strictly, it is not necessary to consider whether the reasons given by Employment Judge Sherratt for his decision were inadequate, in the sense of being **Meek**-compliant, however I shall deal with the point briefly. Those reasons were set out in paragraphs 7 and 8 and have been cited above. Whilst compressed, they explained his rationale, albeit without setting out the particular submissions made by each party. I do not consider that this ground of appeal adds anything of substance to those which I have upheld above. Put simply, Employment Judge Sherratt was not entitled to revisit the orders of Employment Judge Ryan at all.

Disposal

66. Having concluded that the appeals succeed, I turn to the appropriate disposal.

67. The proper course is that the orders made by Employment Judge Sherratt be set aside and those of Employment Judge Ryan restored. As I have concluded that no victimisation claim is pleaded against Z or E, only the second issue identified by Employment Judge Ryan is engaged in relation to each of them. Both issues are (at least potentially) engaged in relation to L.

68. Consistent with the approach adopted in **Montali** and in **Dobson**, in my judgment the proper course is that the preliminary hearing be listed to take place before an employment Judge other than Employment Judge Sherratt (irrespective of whether he has retired), for the reasons given by Mr Brochwicz-Lewinski. Ideally, that preliminary hearing will be listed, and the issues arising determined, within a timeframe which enables the full merits hearing to proceed in its existing slot, to determine such claims as remain extant, but without incurring any party in potentially unnecessary preparation time and cost in relation to that hearing before the outcome of the preliminary hearing is known. If that cannot be achieved, however, the existing dates for the full merits hearing will need to be vacated by the employment tribunal and the matter re-listed, as appropriate. Regrettable though that would be, if it is a necessary consequence of this judgment, so be it. Following the outcome of the preliminary hearing, it may become apparent that a shorter listing for a full merits hearing is required, in any event.