# THE EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Ms S Kasparaviciute** | **v** | **(1) Wilson James Limited**<br>**(2) Ms S Watts** |

**Heard at**: London Central **On**: 12, 13, 16, 18 October 2017
(17 October 2017 in Chambers)

**Before:** Employment Judge Pearl

**Members:** Ms J Cameron
Ms S Boyce

**Representation:**

**Claimant:** In Person
**Respondent:** Mr A Robson, Counsel

**JUDGMENT** having been sent to the parties on 18 October 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

1. By ET1 received on 30 December 2016 the Claimant has claimed unfair dismissal, race and sex discrimination. She was employed from 21 April 2010 to 7 October 2016, by which time she was Duty Security Manager ("DSM"). There was a Preliminary Hearing for Case Management on 28 March 2017 and aside from the unfair dismissal claim, the discrimination claim was set out as follows:-

> **"Race Discrimination**
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> 3. The Claimant says she suffered race discrimination because she is Lithuanian. She does not need an interpreter. Her comparator is a hypothetical British/Non-Lithuanian person. The alleged incidents are:-
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> 3.1 The second Respondent failed to investigate her complaint about Mr Clark.

3.2 The Claimant was overlooked for the job of Site Manager at the Francis Crick site where she worked.

3.3 She was overlooked for the role of Site Lead at Facebook when she applied on 2 August.

**Sex Discrimination**

4. The Claimant said she suffered direct sex discrimination because she is a woman. The alleged incidents are:-

4.1 She was removed from site by the First and Second Respondents but the male security guard who was skateboarding (the Claimant's comparator) was not removed. I pointed out that whilst the Claimant was a Manager the skateboarder was not and so he might not be an appropriate comparator.

4.2 Mr Clark, an employee of the Respondent's client at the Francis Crick Institute used profane language at the Claimant. He said "you are fxxxing in charge, this is all a mess. All this is fxxxing shxx". He did not speak to any male manager that way this could also be described as harassment except that it is not clear that the words related to the Claimant's gender. As I explained to the Claimant today I do not believe that the law enables her to make a claim against the Respondents in respect of such actions by a third party …"

2. In resolving these issues we heard evidence from Ms Watts, Mr Ely, Mr Zach, Ms Osman and Mr Gregory; and from the Claimant. We studied a bundle of about 300 pages together with one additional exhibit. Witness statements from two other witnesses were tendered but they were not called to give evidence.

**Facts**

3. It is not our function to resolve each and every disputed fact that can be identified in this case but, having said this, most of the relevant facts are not in dispute. The Claimant has been employed in various roles with the Respondent and had advanced within the company by experience and qualification. In 2015 she was appointed DSM and at the time of the events that we are concerned with she was DSM at the Francis Crick Institute ("FCI"). This was in the process of being built and by 12 August 2016 it was due to open imminently.

4. Ms Watts was the Security Operations Manager ("SOM") at FCI. Having taken up the post in May 2016, she managed the Claimant. We deal first with the process by which Ms Watts was appointed. The claim is at paragraph 3.2 above. Ms Watts was in competition for the appointment with three DSMs from the FCI who applied for this post.

5. Ms Osman (People Development Manager) was responsible for the recruitment process. She refers to the job description at pages 100 A-D and is adamant that the size and importance of the FCI meant that proven management

experience was an essential requirement. FCI is a large site with about 40 to 50 employees of the Respondent. The view was taken that the experience required had to be either as previously working as a Site Manager, or an SOM, as opposed to managing shift teams. Many of the candidates were sifted out. Page 100W is a contemporaneous document that shows that Mr Bishop, Mr Carlyle and Mr Ely were rejected on the same basis as the Claimant, i.e. "no SM experience or in Mr Ely's case insufficient experience". They were all given this feedback. In evidence Ms Osman said that 8 people were rejected and 3 were interviewed. She insisted that nationality had nothing to do with her decision. We have seen Mr Ely give evidence and he had been employed inter alia as Security Manager (on the Rio Tinto contract) and also Administrator of the Olympic Village. He was one of the unsuccessful candidates who was not put up for interview.

6. The FCI is not only a large site, it is complex and has significant and unique security requirements. Ms Watts started as SOM at the point at which the transition was occurring from a construction site to an operational building. She needed to speak to the Claimant informally concerning the Claimant's tone adopted in some of her emails, but this was not in any sense a large issue and was never taken to any formal procedural stage.

7. In the Claimant's contract of employment clause 3.4 reserves the right to the Respondent to change the location of her work. In the Employee Handbook it is further provided that:-

"**Client Approval**

Your employment at your site location remains at all times subject to client approval. In the event that our client requests your removal from site, we will fully investigate the events leading up to the request before any action is taken. Action taken may include redeployment to another site; there is a time limit of 2 weeks for redeployment to an alternative role within the business. You will continue to be paid at your existing site rate during this 2 week period or until an alternative site is offered to you if less than 2 weeks. If an alternative role is not agreed upon during the redeployment period you may be dismissed from the Company for some other substantial reason."

8. Mr Clark was the Head of Security for the FCI and an employee of that entity. He had a concern as to how the Claimant communicated with one of his co-employees and he raised this with Ms Watts on 25 July. This complaint, assuming it was a complaint, plays no further part in the story at all.

9. The FCI was formally opening in August 2016 and Friday 12 August 2016 is described by Mr Clark as the first evening of ownership. The Claimant was on the night shift. Taken shortly, all sorts of things went wrong and Mr Clark raised his concerns with Ms Watts as well as her immediate manager, almost immediately. His email was sent at 10.12pm. He began as follows:-

"Some observations from day one so far, report accurate at 21.00 hours. What I am trying to convey here, very quickly is my disappointment, the standards required by myself and the Crick and what I expect (as a minimum) it is not my

intent to lay blame at your door or to criticise your methods but what I have seen tonight is not good. I want to infuse some sort of invigoration into the security service from the ground up, usually I do this through positive reinforcement but right now I need you to kick some arse – hard … I need you to get it all rectified quickly so that this difficult communication does not ever have to happen again."

10. There then followed a heartfelt plea to the Respondent to put matters right. He claimed that there were nine problems that he had spotted and page 210 should be read for its full effect. Problems included: an entry not being manned; a Controller being seen 'skateboarding' inside the building; the Claimant wearing a T-shirt and trainers; a Security Officer not seeming to know basic procedures. In the ensuing narrative, we omit the various formal requirements as to uniform because the allegations made against the Claimant as to what she was wearing are accepted.

11. Mr Clark ended in these terms:-

"This is all security 101, the issues are very basic and far from what I expected, it simply is nowhere near good enough and I am professionally embarrassed. I don't care how much it costs or what it takes to leverage appropriate manning and support from WJ, this building needs to be secure and I need to be confident in the security service that is securing it, I cannot be here 24/7 but right now it feels like I need to be … as you can imagine I am incredibly disappointed and need the situation to drastically change …"

12. The Claimant realised that Mr Clark was angry. The site was officially due to open on 15 August and on that day, Monday, the Claimant had volunteered to work an additional day shift and she again attended wearing the wrong, non-standard issue shirt. It seems that she had been unable to get to the dry cleaners early enough that morning. Ms Watts tried to hide her, in effect, by directing her to the control room but Mr Clark had seen the uniform breach.

13. He next met with Ms Watts on 17 August and he said that he had no confidence in the Claimant continuing in her role of DSM. He expressed himself strongly, as we find, and he asked that she be removed from the site, he was then asked to confirm this in writing and he sent pages 111 to 112. This is highly critical of the Claimant and ends:-

"I have no confidence in her being able to fulfil the DSM role and request that she is removed from this contract with effect from the end of today."

14. It is clear from the evidence of Ms Watts, and also page 111, that he was going to remove her site pass and also disable her IT account. There can be no doubt, as we find, that he was entirely set on having the Claimant removed and there was no prospect that he would ever change his mind.

15. The essence of the Claimant's case is that:-

(a) She should not have been removed;

(b) In any event the Respondent should have carried out a full investigation within the terms of the procedure in the Handbook that we have cited;

(c) It would have been more reasonable for the Claimant to have suspended her;

(d) If appropriate, disciplinary proceedings against her should have been considered; and

(e) Her claim that Mr Clark was bullying her should have been investigated before she was formally removed from site.

16. By 18 August the Respondent had started to investigate the allegation that Mr Ali had been skateboarding outside the control room. He pre-emptied that investigation by resigning (page 177B) and he formally resigned on 4 September with an effective date of termination in due course on 29 September.

17. A meeting with the Claimant fixed for 19 August was postponed (see pages 124 – 125) and the reasons were that Mr Dann (another Manager) was unable to come. Also, Ms Watts could not leave the site because Mr Clark "does not want me off site". She said that if she did not attend the site, that might push him over the edge. We interpret this comment as suggesting that he might take steps to terminate the Respondent's contract. The Claimant was sent the letter at page 126, that formally notified her of the redeployment process. She then raised a grievance on 19 August and, because it involved Ms Watts, the latter said that she would have to drop out of the redeployment process. There is nothing to criticise about that decision. The Claimant alleges in her email of 19 August (pages 127 to 128) that the Respondent had breached procedures in not investigating Mr Clark's allegations. She complained also about not being appointed SOM at the Institute and she alleged that Ms Watts was unqualified to perform the role.

18. The email chain shows that Ms Rogers in HR removed herself from the case because of the terms of the Claimant's grievance. In the earlier email correspondence on 18 August, we can see the following. (1) The reasons for being removed from the site were to be discussed at the meeting with the Claimant. (2) The Respondent did not, on the basis of its initial assessment, believe that a disciplinary investigation was merited. The upcoming meeting was not disciplinary in nature, it "will not result in any formal action." We also note that Ms Watts raised, in effect, a witness statement on 25 August which is consistent with everything that we have narrated.

19. Mr Gregory was at the time an account manager and has experience of chairing grievance and disciplinary hearings. He was appointed to hear the grievance. He met with the Claimant on 2 September 2016 and she had a union representative present. In her closing argument she makes a point that Mr Gregory should not have held this meeting as he had not fully investigated matters. This is misconceived. He was entitled to hear the Claimant's side of the story first and, indeed, that is in our view the best industrial practice.

20. The Claimant gave a full account and this needs to be read in the minutes at pages 211B-E. She said that Mr Clark had been very angry on 12 August but she held that her removal from the site was discriminatory and she made various procedural criticisms. She specifically raised the allegation that Mr Clark had sworn at her on 12 August and she said this was bullying. Mr Gregory told her that he was adjourning the meeting and needed to investigate further.

21. Reverting to the swearing on 12 August, it appears not to be in dispute that Mr Clark used words to the effect of those set out in the issues at paragraph 4.2 above.

22. Mr Gregory made enquiries of Ms Watts and Mr Clark, although the latter did not respond. However, Mr Gregory was now shown the contemporaneous email of 12 August that he had not earlier seen. He also looked at other documents. There was then a further meeting with the Claimant on 15 September.

23. We turn to the redeployment process and note that Mr Ely, Contracts Manager and also a senior manager of the Respondent, was asked to deal with the process in late August. By way of background, he confirms that the Respondent would generally act on a client's request to transfer an employee from the site provided that there is a valid basis to the request.

24. The Employee Relations Manager, Ms Burns, wrote to the Claimant on 19 August and suggested that she needed to meet with Mr Ely. She repeated this the same day but it appears from the Claimant's email that she took the view that the Respondent was in contractual breach, that her grievances were not being properly investigated and that she should not have been removed from site; and that she should have been given the job that Ms Watts was performing. She was reluctant to meet Mr Ely.

25. She was then sent weekly opportunity bulletins that set out vacancies within the business. Mr Ely was told by the Claimant that her union representative would be back in contact but when this did not happen he wrote on 25 August that the Respondent was "making every effort to meet with you to discuss further however you have failed to agree a date. Sarah informed you of a redeployment meeting, which you advised you would not be attending, I called you on Friday 19th August to reschedule the meeting without success. I followed up with you on Tuesday and put you in touch with the recruitment manager to try to move this matter on. Without your attendance at the redeployment meeting to discuss with you what positions are currently available and what your expectations are, there is little else that we can do."

26. He suggested meeting on 26 August, but that was not possible. As Mr Ely states, neither the Claimant nor the representative requested another date and it is clear, as we find, that the Claimant was reluctant to meet him because of her underlying complaint that it was wrong to be moved from the site at the behest of a discriminatory and bullying client.

27. To deal with the impasse, the Claimant was invited to attend the formal redeployment meeting the next day which would take place after her grievance –

page 172. It was put back on that day in order to assist her in this regard. However, it is also clear from page 174 that the Claimant had no intention of attending. She wrote on 2 September "I will not be attending the redeployment meeting before the grievance meeting has been managed fairly."

28. Mr Ely comments as follows and we consider the comment to be justified:-

"I found the Claimant's behaviour to be quite simply inexplicable. She was prepared to attend a meeting to discuss her grievance which was taking place at our offices in Fleet Street in London at 2pm on 2 September 2016. However, she refused to attend a meeting (when it was clearly in her interests to do so) to consider her continue employment with the business and possible options for redeployment, despite this second meeting taking place at exactly the same location at 3.30pm on the same day."

29. He dismissed the Claimant because he felt he had no alternative and she was refusing to engage in the process and he had by that point run out of options. He states in paragraph 25 of his statement: "what was particularly galling was that I was sure that we could have found her alternative employment because the vacancies were there, so not to engage in the process or apply for any opportunities seemed utterly unreasonable."

30. This is all reflected in the letter of dismissal of 7 September at page 196. "We will continue to provide you with the weekly opportunities and try to work with you to source an alternative position within the business during your notice period. Myself and Chloe are still available during this time if you do decide to discuss your requirements for an alternative role; this will assist the company in being able to support you to find a new position." He told the Claimant that she had a right of appeal. She did appeal but it appears that she did not pursue it.

31. We turn to the Facebook posts. Facebook is a client of the Respondent. On 3 August 2016, before the events referred to above, the Claimant applied for the post of Site Lead. This was described (page 100Y) as "a newly created role identified to bridge the gap between Security Manager and the team of Team Leaders on this portfolio. Junior to the Security Manager but responsible for managing the team of Team Leaders this role is pivotal and therefore an experienced 'PEOPLE PERSON' is required."

32. The Claimant was not shortlisted for the role and the relevant evidence comes from Mr Zach, Strategic Account Director. Because there was no SOM at the Facebook site at the time, the client, Facebook, was sent all the applications and Mr Coetzee, a Facebook manager, dealt with them. We find on the basis of the oral evidence of Mr Zach that five internal candidates applied: the Claimant, Mr Huggi (French National), Mr Simona (UK National), Mr Shaharabari (Israeli by Nationality originally but a UK National) and Mr Noriega (Trinidadian racial origin but also now a UK Citizen). Mr Noriega already worked at the Facebook site and none of the others did. It was Mr Noriega who was eventually selected by the client to fulfil the role.

33. The second Facebook post was Team Leader, which was found for her by the Respondent. She was given an interview date for 28 September and she chose not to attend.

34. We finally turn to some aspects of the Claimant's evidence in the Tribunal. She made certain assertions which are part of her case. First, she told us that not only should she have been suspended after 12 August, but that a man would have been. Second, the Respondent had a duty of care towards her and, because they breached this by not properly investigating her complaints against Mr Clark, she "did not go along with redeployment." Third, the Facebook Team Leader job was not relevant to her own post, was at a lower grade and she did not want to engage with the process.

**Submissions**

35. We are grateful to both parties for their oral submissions and in the case for Mr Robson for his written document. The Claimant repeated that the Respondent was in breach of a duty of care towards her and that it valued the relationship with its client more than it valued her employment relationship. The grievance and redeployment processes were mixed up, she said. Mr Ali should have been investigated. She should have been selected for the SOM post at FCI and the Facebook Site Lead position.

**The Law**

36. Section 98(1) of the Employment Rights Act 1996 provides that:
" It is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a reason falling within subsection (2) "or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.".

Section 98(4) of the Act provides that:
" Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race and sex are protected characteristics.

Section 23(1) provides that: "On a comparison of case for the purposes of section 13 … or 19 there must be no material difference between the circumstances relating to each case."

Section136(2) provides that: if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

" (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. "'Could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

**Conclusions**

37. The first matter is the FCI post of SOM. The Claimant and her colleagues were not shortlisted. At the time the Claimant raised no complaint about this and, in our view, the claim fails at the first hurdle because no Tribunal properly directed could either find or infer that the appointment had anything to do with Ms Watts being a UK Citizen or the Claimant being a Lithuanian Citizen or of Lithuanian national origin. Other experienced candidates and UK Nationals were not shortlisted. One of the striking features of this case is that the Claimant's Lithuanian origin or citizenship has never surfaced in the evidence and there is no explanation or even suggestion as to why this might be regarded by her as a barrier to advancement. This particular claim has no evidence anywhere to support it and the Claimant fails to establish a prima facie case. It is also out of time, but this is not the basis of the decision we have come to and, for clarity, we are making no adjudication on the time point.

38. Staying with racial discrimination, the Site Lead Facebook role was dealt with by the client. We agree with Mr Robson that the nationalities and origins of the three other unsuccessful candidates than the Claimant, together with Mr Noriega's nationality and origins, raise no suggestion of race discrimination. Again, there is an absence of any evidence on which the Claimant can fasten so as to base a claim of direct race discrimination. The agent of the Respondent could theoretically commit direct racial discrimination in its employment process, but there is no evidence here that merits such a conclusion and the claim has no prospects of success.

39. The claim of failing to investigate the grievance or claim against Mr Clark, because of the Claimant's nationality etc., also falls foul of the basic underlying facts established in evidence. She said that his criticisms of her, including the swearing, were less favourable treatment than he would have afforded to somebody of a different nationality or national origin and she calls it bullying. But to be actionable, such behaviour needs to be directly discriminatory. The evidence to support this is and was at the time wholly absent. The claim against the Respondent is that the failure to investigate the allegation against Mr Clark was itself less favourable treatment because of her race.

40. We cannot accept this analysis. The client was evidently angry and not open to persuasion. He categorically refused to contemplate having the Claimant back on site. This put the Respondent in a dilemma because he is a client and not an employee and was giving an instruction rather than making a request. He had protested about standards and the Claimant in extremely strong terms and could not be "investigated" in the same way that a fellow employee could be. The facts are stark. If any hypothetical comparator had found himself or herself in the same position, there is not the slightest doubt, in the view of the Tribuna,l that such a person would have been removed from the site. Nor would any different investigation of a subsequent complaint have taken place. The Respondent relies on its right to make an assessment of the facts and this is what it did in this instance. The claim is further weakened once it is appreciated that no disciplinary action was contemplated at any point against the Claimant. This of course has led her to argue that she should have been suspended on disciplinary grounds even though it was made clear to her that her disciplinary record would remain intact and unblemished.

41. Moreover, the investigation of the grievance was reasonably thorough and the various criticisms of the process that have been made cannot be sustained. There was a closely reasoned decision from Mr Gregory that runs to 6 pages and we can see no basis overall for identifying any prima facie case of discrimination.

42. Turning to sex discrimination, on 12 August Mr Clark swore at the Claimant but there is no gender specific language used and nothing to indicate that her gender had any bearing on his loss of control. The sex discrimination claim therefore also is one that cannot succeed.

43. Removal from site relies for its direct sex discrimination claim on the comparison with Mr Ali, the 'skateboarder'. He was not removed from site because no request or instruction was made by Mr Clark; he is not therefore, on this basis alone, a valid comparator with the Claimant. However, there is an additional factor which is that he was not a manager and the gist of Mr Clark's criticism that the Claimant was not in control of her shift did not and could not apply to him. Again, there is no basis upon which the sex discrimination claim could succeed.

44. As to the unfair dismissal claim, the authority of *Henderson v Connect [2010] IRLR 466*, is instructive but it is not entirely applicable because this was not a dismissal "at the behest of the third party." Here the Respondent had no intention of dismissing the Claimant and not only wanted her to work in alternative employment and expected her to do so. The weekly job lists that were sent to her

number eight in total and are specified by Mr Robson in his closing submission. A list of about a dozen alternative roles are set out at page 255. In general terms, the Respondent could not reasonably expect Mr Clark to change his mind and acted reasonably in not even attempting that exercise. Its subsequent attempts to find and secure an alternative role for the Claimant amply satisfy its statutory duty to act reasonably within the terms of Section 98(4).

45. The unfortunate cause, and the reason for the Claimant's dismissal was her principled refusal to enter into the process. It is abundantly clear that she took this stance in protest at the Respondent's actions. She regarded these as unfair and discriminatory, both in substance and also procedurally, and she was not therefore prepared to accept that her removal from the site could not be reversed. She would not accept that there was any fair or proper investigation of her grievance.

46. In taking this position, she was in our view adopting an extreme stance and she was characterising the Respondent's acts in an unreasonably way. Ultimately, the Respondent had no choice but to dismiss her for some other substantial reason such as to justify her dismissal. Even in the letter of dismissal it held out the prospect of re-engagement if the Claimant was prepared to accept that resolution. Sadly, she was not and our conclusion is that the Respondent acted reasonably in the circumstances in treating her behaviour and refusal to engage as a sufficient reason to dismiss. Dismissal lay within the band of reasonable responses open to a reasonable employer and we can identify no other steps that they ought to have taken in compliance with their statutory duty.

47. After these reasons were given, Mr Robson for the Respondent made an application for costs. Rule 76(1)(a) provides that costs may be ordered where a party has acted unreasonably in either bringing the proceedings (or part) or in the way that the proceedings (or part) have been conducted; and in sub-section (b) costs can also be awarded if a claim has no reasonable prospects of success.

48. It is evident to the Tribunal that the application for costs is justified on two grounds. The first is that the discrimination claims at no point had any prospect of success and this is clear in some ways from the terms of the Claimant's own witness statement and the absence of any references to race. It was an entirely speculative claim with no basis to it, in our view. So far as sex discrimination is concerned, the Claimant was expressly warned at the preliminary hearing about one aspect of that when the Judge indicated that Mr Ali might not be an appropriate comparator. The discrimination claims have, of course, involved the addition of Mrs Watts as a Second Respondent.

49. The second respect in which a costs order is justified arises from the express terms of the letter dated 28 April 2017, which was sent to the Claimant and which it appears she must have received, although we will go into the circumstances of the receipt in a little bit more detail below. This needs to be read for its full effect but the solicitors, in short, told her that she had overstated the strength of her claim and set out some grounds upon which they considered she would fail in the claims including the discrimination claims; and they gave her a costs warning. This was accompanied by an offer of £5,000.

50. There is no question that on both of these bases the Respondent's application for costs is justified. We probably should indicate that we would not be making an order for costs in relation to the unfair dismissal claim. This is also not a very strong claim but it differs from the discrimination claim in that it is for the Respondent to establish the substantial reason for dismissal and questions of reasonableness are always open, particularly as neither party bears a burden of proof under sub section (4). In these circumstances, even though the claim was far from strong, we would not exercise our discretion to make an order for costs on the basis that an aggrieved employee can question Respondent's witnesses about a dismissal of this sort, which is in somewhat unusual circumstances, in order to see whether or not grounds of unfairness can be identified.

51. We accordingly restrict our consideration to the discrimination claims and we are grateful to Mr Robson for handing up the case of *Ayoola* from 2014 in the EAT. We consider that the costs after 5 May 2017 are in principle recoverable, but the difficult issue for the Tribunal is whether or not to make an order.

52. The factors against making an order are that the Claimant at the time was heavily pregnant, that is to say at the time that she was sent the solicitors' costs warning letter. She had been in and out of hospital, it is was a difficult pregnancy and she gave birth to premature twins on 21 May. We have little doubt that this would have been an extremely difficult time for her and reading between the lines it seems tolerably clear that although she must have received this letter, she left it to her friend Ms West to respond, as indeed she did in May. We cannot ignore the costs warning and there ought also to have been warning lights flashing in the Claimant's mind before the date of the letter, but it is right to say that it might not have been the first matter of concern to her at that time. The other substantial ground of reservation is that her means are meagre and her circumstances far from happy. She is not working and the twins take up all her time. She expects that she may not be able to work until they are 2 years old. She has unfortunately separated from her partner, although she is for practical reasons of finance living within the same household at the moment. She receives income support at the rate of £73.00 a week, child benefit for the twins and also tax credits. She has no savings. She has her share of the rent covered by housing benefit but she has no imminent prospect of paying a substantial sum of costs, not least because she has £15,000 of indebtedness. In short, the Claimant's means can be urged as a basis for making no costs at all.

53. In the exercise of our discretion, we have decided to make a nominal costs order only and to do so on the main ground that we consider that the evident and conspicuous weakness of the discrimination claims ought to be recognised by an order for costs. These claims could not on any objective analysis have had any realistic prospect of success and the Claimant has during the course of the hearing really been unable to say anything that could move them to a more hopeful category in terms of prospects. They were speculative claims on the basis that there was no reason why sex discrimination or race discrimination could be inferred from the evidence. The Claimant was hoping, as some claimants do, that some aspect of cross examination would turn out in her favour or that the Tribunal would, for some reason that we cannot divine, draw an inference in her favour. In normal circumstances we probably would have taken the view that a Claimant

who had means to satisfy an order should pay £10,000 costs. The reason for this is that Mr Robson says that £20,000 have been incurred since the date of the costs warning letter, there is a detailed schedule that stops a little short of £8,000 but that excludes counsel's fees and other costs which include costs of the hearing.

54. However, in these circumstances, to make an order that the Claimant has no prospect whatsoever of fulfilling seems to us to be wrong. We consider that we should mark the weakness of the claims by a nominal order and we have assessed the figure of costs to be £500.

Employment Judge Pearl on 14 November 2017