EMPLOYMENT TRIBUNALS

Cl aimant Respondent

Dr P Cruise v The Chancellor, Masters & Scholars of The University of Cambridge

Heard at: Bury St Edmunds On: 21 & 22 August 2018

Before: Employment Judge Laidler

Appearances
For the Claimant: Mr S Keen, Counsel
For the Respondent: Miss O Dobbie, Counsel

JUDGMENT

1. The Respondents application to strike out the claims is dismissed
2. The Respondents application that deposit(s) be ordered is refused
3. Leave to amend the claim to rely on the 'Dear John' letter as a protected act is granted
4. Case management orders are set out as below.

REASONS

1. This is a claim that was issued on 3 December 2017, in which the claimant brought various discrimination claims on the grounds of race and sex against both respondents.

5. There was a preliminary hearing before Employment Judge Sigsworth on 3 May 2018. At that hearing he noted that:

"On the face of it, most if not all of her claims may be a long way out of time, as the respondent contends that the claimant has not been an employee of the University since 2009 and has not carried out any work for the University that might be subject to proceedings under the Equality Act 2010, since 2013. "

6. The respondent had made an application to strike out the claims on the basis they had no reasonable prospects of success, or in the alternative, for a deposit order on the basis they had little reasonable prospect of success. It was determined that those matters would be determined at a preliminary hearing, together with the issue of whether it was possible to have a fair trial.

7. Counsel for the respondent had started to draft a Scott Schedule of the allegations and it was noted, would continue to work on that and then seek to agree it with the claimant. Orders were made in that respect for the respondent to send the first draft to the claimant by 1 1 May 2018, and the claimant to amend / agree the Scott Schedule by 1 June 2018, with the final version to be filed with the tribunal by 15 June 2018.

8. This preliminary hearing was listed and it was ordered that the parties agree a bundle of documents by 31 July 2018, and there was a specific order with regard to witness statements:-

"On or before, 7 August 2018, the parties are ordered mutually to exchange witness statements for the preliminary hearing. It is anticipated that the claimant will make a short statement on the preliminary issues, and also an HR representative for the respondent. "

9. The tribunal file recorded that there were difficulties with regard to the Scott Schedule and by letter of 1 1 August 2018, Employment Judge Sigsworth directed:-

'The parties were ordered to agree a Scott Schedule and send it to the tribunal. They must endeavour to do this.

The open preliminary hearing listed on 21 and 22 August 2018, will go ahead. Issues of jurisdiction such as time and continuity of employment will be determined then. To the extent deemed sensible and appropriate, any application to strike out all or part of the claim, or for a deposit order, can also be determined. As previously stated, the preliminary issues will largely be determined on the basis of submissions on the pleadings and the law. "

10. The claimant, who had been unrepresented, instructed solicitors who advised the tribunal of their instructions on 27 July 2018. She was represented by Counsel at this hearing.

11. Both Counsel prepared skeleton arguments and the tribunal had a bundle of documents of 451 pages. The tribunal was also provided with witness statements by the claimant and by Emma Mason and Angela Pollentine, for

the respondent. Ms Pollentine did not attend. Miss Mason was not called to be cross examined.

Unfair Dismissal

9. At the outset of this hearing, the claimant withdrew her unfair dismissal claim and in so doing was prepared to accept that she was not an employee of the respondent after September 2013.

The claimant's witness statement

10. The respondent raised an issue about the claimant's statement which comprised 36 paragraphs. It was submitted that in the order made on the last occasion it was very clear as to what it should deal with. Paragraphs 16 onwards were not relevant to the issues before this preliminary hearing. They should not be before the tribunal. The statement was only received by the respondent at 9pm the previous Wednesday and they had not been able to obtain evidence to answer it. Neither would it be relevant for the preliminary hearing for them to do so and for the claimant to be cross examined on those aspects. The respondent had no issue with paragraphs 1 to 16. It was however, submitted that they were largely irrelevant now the issue of status has been conceded.

1 1 . For the claimant, it was submitted that where there is an application that the claim should be struck out as having no reasonable prospects of success, the claimant's case should be taken at its highest. The witness statement helps to inform as to the background of the relationship between the claimant and the second respondent and their interaction. It is not entirely irrelevant. It would be wholly unfair to cut it down and ignore the claimant's evidence at this hearing.

12. It was agreed that before she could make any determination the Judge needed to read the witness statement and having read EJ Sigsworth order that it would be, a "short statement on the preliminary issues", was satisfied that it was not. It is in effect a statement on all the issues. The Judge took account of the submissions made on behalf of the respondent that they had not had the opportunity to take detailed instructions upon it to be able to reply to it. Neither would that be appropriate, however, for this preliminary hearing, as it is not a hearing of the evidence. The Judge accepted that in considering the claimant's case, "at its highest", it should do so on the claimant's pleaded case. The witness statement would therefore be given limited weight.

13. Submissions having been heard, it was then suggested that the claimant had given no evidence as to why it would be just and equitable to extend time. Her counsel stated that this was covered in her witness statement at paragraph 35. It was therefore agreed that she would be cross examined upon that paragraph only. When it came to that point in the hearing, counsel for the respondent stated, she did not intend to cross

examine the claimant on that paragraph, but would made submissions on it.

T he Issues

14. Counsel for the respondent had listed the issues in her skeleton argument from the preliminary hearing summary of 3 May 2018, as follows:-

a. Was the Claimant an employee within the meaning of s230(1) ERA until 24 July 2017, as C contends or did her employment terminate on 31 December 2009 (as Rs contend)?

b. Are all or any of the claims out of time?

c. Does the C have any reasonable prospects of demonstrating that the acts complained of form part of a continuing act the last of which is in time?
d. Insofar as any claims are out of time, should time be extended?

e. Do any or all of the claims have little or no reasonable prospects of success such as to require strike out or deposit orders?

f. Should any of the claims be struck out on the basis that it is no longer possible to have a fair trial?

15. Mr Keen, for the claimant, said he was surprised by the last reference to whether a fair trial was possible as that was not something he had understood as a separate ground for consideration. It may be one of the matters to be considered on a strike out application, but he had not understood that to be one of the discreet issues. The Judge made reference to the end of paragraph 2 of the previous Summary, where it was recorded that the respondent contended that it may not be possible to have a fair trial, and after summarising some of the difficulties, the Judge had recorded, 'The preliminary hearing will also consider that matter." This tribunal was therefore satisfied that it was indeed one of the issues to be determined at this hearing.

Submissions for the Respondent

Continuing Act

16. Reference was made to the decision in Hendricks v Metropolitan Police Commissioner [20031 IRI-R 926, in which it was stated at paragraph 48:-

"...the burden is on her to prove, either by direct evidence, or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of, 'an act extending over a period'".

17. There must, it was submitted, be a link between the acts and the burden was on the claimant to demonstrate that link.

18. Reference was also made to, Aziz v FDA 2010 EWCA Civ 304, as authority for the proposition that the fact that a single person is responsible for discriminatory acts is a relevant, but not conclusive, factor in deciding whether an act has extended over a period.

19. With regard to the Scott Schedule, counsel for the respondent explained that the text that was in feint type had been added by the claimant and was not accepted by the respondent as being part of the issues in her pleaded case. Counsel therefore proposed to refer to only those in the heavier text and numbered 1 through to 17.

20. Anything before 5 July 2017, is potentially out of time. It is the for the claimant to demonstrate there are reasonable prospects of establishing there was a continuing act, and issues 1 to 15 in the Scott Schedule must link to issues 16 and 17, which are the only matters in time. As the respondent understood the claimant's case, the theme relied upon is that the second respondent 'had it in for' her and continued to keep her 'in his clutches' even when she had left. However, it is of note that the two acts that are in time do not assert that the second respondent was involved. They are only advanced against the first respondent and the claimant has not added that the claims are against the second respondent. The respondent's primary point therefore, is even if the claimant can establish there are reasonable prospects of demonstrating that the acts prior to the 16 and 17 were linked by the second respondent, it does not mean they are in time. The last matter involving the second respondent, in the Scott Schedule was 14 May 2015, that is two and a half years before the two incidents which are in time. The matters that are in time do not concern the second respondent.

21 . In relation to items 13 (of which by error there have been made two, these were numbered 13.1 and 13.2) the claimant does not make assertions against the second respondent. She does in relation to item 14, but then after that the second respondent is not implicated. Even on the claimant's case, there is no link between the acts in time and those that she says the second respondent was involved in. There is nothing to bridge that gap. There is no suggestion that there has been some sort of collusion with the second respondent. This has not been put as a case of institutional bias / discrimination. If the tribunal is looking for links between the acts, there is nothing after May 2015, against the second respondent. There is, it was submitted, no reasonable prospect of demonstrating there is a link and an ongoing state of affairs.

Time Points

22 In considering whether it is just and equitable to extend time, the tribunal must have regard to all the circumstances. It must take account of the fact that the time limits are expected to be exercised strictly. Consideration of the merits

of the claim is relevant if time is to be extended, as claims ought to have at least some basis for proceeding. The claimant has provided no explanation for the delay, which is in the order of eight years. In considering the assertions she made in the ET1, at paragraph 29, referring to the termination of her contract in September 2009, she already felt that there was something suspicious.

23. Further, at paragraph 46, the claimant recounts her email of 10 April 2011, to the second respondent. In that she says that it is formal notification that you will be seeking legal advice regarding this issue, which she says was the second respondent being, "deliberately malicious and misleading when information regarding me has been requested". It was submitted that, whether she did or did not take such legal advice, she was of the view that something had happened that she considered was unlawful and about which she wanted to do something.

24. At paragraph 80 (h) of the ETI , the claimant states that when she wrote a second formal grievance to the first respondent, on 10 September 2017, she made the following points which included that she had sought legal advice as well as advice from ACAS and other, "employment rights entities".

25. The claimant invoked ACAS Early Conciliation on 5 October 2017, and the ETI was issued on 3 December 2017.

26. Even though therefore, the claimant believed something suspicious had occurred as early as 2009 and then again in 2011, and felt the need to take legal advice, she did not do anything to pursue a claim until she embarked upon Early Conciliation on 5 October 2017.

27. The claimant is a very intelligent woman and is well able to access sources of information which are widely available on the internet. She refers to ACAS and other sources and should have taken advice far sooner.

28. There is significant prejudice to the respondent if the claims are permitted to proceed. There has been a delay of up to eight years taken from the first act relied upon, and that will probably be nine years by the time of any trial date. Mary Griffin died approximately four years ago and her successor has also died. The second respondent is unable to recall various interactions and that is pleaded in the respondent's response at paragraph 20. With the time delay, it is likely other witnesses' memories will be faulty and that situation is far worse than if proceedings had been issued promptly.

29. There is further prejudice to the respondent as it has a policy of deleting records that are no longer required. Reference was made to the respondent's statement of Records Management Policy and Master Records Retention Schedule. In relation to personnel matters, for example and unsuccessful applicants, the retention period is the closing date for the vacancy plus one

year; annual appraisals, the end of employment plus six years. It is only through the Subject Access Request that the claimant submitted that the respondent discovered how little information was left. All emails were deleted within 30 days of the email account of the claimant being deleted. There is no paper trail.

30. Various witnesses have left, and although it may be possible to get in touch with them, and they have got in touch with Angela Pollentine, a number have left and indeed are no longer in the country. Of those mentioned in the Scott Schedule:

- Dirk Palm - was made redundant in 2010;
- Dr Kosinski is now in the US;
- Sinead Rooney - left in 2012;
- Shining Li - left;
- Andrew Wilson - left in 2010;
- Pauline Mason - has retired.

These are the persons the claimant says were personally involved. Even if they can be found, their memories are likely to be faulty.

Merits / Reasonable Prospect

31 .Each of the issues in the Scott Schedule was taken in turn.

32. Item 1 15 September 2009, complaint to Dr Mary Griffin.

It was submitted this is not actually a claim at all in the way that this is phrased. The claimant says she complained to someone about what was done to her. She seems to be saying her report to Mary Griffin, was race discrimination and not a protected act. There is nothing within this that would amount to a breach of the Equality Act 2010.

33. This is dealt with at paragraph 27 of the ET1. In that the claimant said that she made a complaint against the second respondent to Dr Griffin: -

> "Accusing him of bullying, subjecting her to an unpleasant and toxic work environment, aggressive and unprofessional behaviour and treating her unfairly. The claimant described an incident whereby, in the presence of others, (Anji Wilson and Sinead Rooney), the second respondent yelled and cursed vulgarly at her. The claimant further relayed to Dr Griffin that there were previous incidents that she had brought to the attention of Dr Griffin's predecessor, Angela Pollentine, and had arranged a meeting with Dr Griffin on the recommendation of Miss Pollentine. During the meeting, the claimant instructed Dr Griffin to make a record of her complaint on her file. "

It was submitted there is nothing in that paragraph that could amount to a protected act and there is no reference to any protected characteristic.

34. In the Scott Schedule, the claimant has stated that her comparators are Anji Wilson and Sinead Rooney. They are female and therefore in relation to a claim of direct sex discrimination the claim must be misconceived.

35. Item 2 25 September 2009, the claimant was informed that her contract would not be extended past 31 December 2009.

The claimant compares herself to Tomoya Okubo and Anji Wilson. The respondent submits he was an unpaid worker and therefore not an appropriate comparator as there was a material difference between him and the claimant. This is set out at paragraph 21 (a) of the response, which describes him as an unpaid academic visitor from the Japanese University entrance examination office in Tokyo.

36. Anji Wilson was dismissed in 2010 within a few months of the claimant. Her background was very different to that of the claimant. She had great experience in testing in a school environment. The role that she continued was a special project undertaking testing in schools which shows the material difference between her and the claimant. In paragraph 41 of the claim form, this was relied upon as a direct act of victimisation stemming from the claimant's complaints about the second respondent. In the Scott Schedule it appears as direct race and / or sex discrimination. If that is now the claimant's case, she is again relying upon a female comparator, Dr Wilson and there is no evidence to suggest any link between her race and / or gender and the decision to terminate her employment. If, as was pleaded, this is only relied upon as an act of victimisation, there had been no protected act by this date.

37. Item 3 The claimant's profile was deleted from the Psychometrics Centre's website.

Item 5 The claimant wrote a complaint to Angela Pollentine re the removal of her details from the Centre's website.

The respondent says these are the same matters and that item 5 relates to the complaint the claimant raised and is not an act of discrimination in itself. They are the same act.

38. The respondent pleads at paragraph 18 of its ET3, that the website for the centre contained three sections, one for current staff, consultants, students and visitors; one for alumni, (the former students of the first respondent); and one for, 'associates', meaning academics who are expected to work on publications / collaborations with the Psychometrics Centre in the future. It is the respondent's case the claimant did not fall into any of these categories and a decision to remove her details was a one-off decision pursuant to that approach.

39. Reference was made to an email exchange between the second respondent and City University, enquiring about the claimant's PHD, when the second respondent can be seen writing to Mary Griffin, "I now have all the information I need to complete Paula's entry on our alumni web pages." That is the very person that the claimant alleges was deleting her details and it is an authentic

communication between colleagues long before her claim or grievance. There is nothing to link the deletion of the claimant's details to race or gender or retaliation for any protected act, which in any event, the respondent says had not occurred by this date. Again, the claimant relies upon female comparators which is misconceived for her claim of sex discrimination.

40. Item 4 15 January 2010, R2 allegedly led the BPS to believe that he knew nothing of a piece of work the claimant says they had agreed to collaborate on.

From the respondent's perspective, the claimant had left by this time. It is not in dispute that after that time, she submitted this application in her own name, without liaising with the second respondent. The information that the second respondent supplied was entirely true and there was nothing unfair about it. Again, the claimant relies upon female comparators and that is misconceived so far as her sex discrimination claim is concerned. There is nothing to link this to any protected act or to race.

4 1 . Item 6 January / February 2010, R2 was allegedly rude and unprofessional in the manner in which he informed Agnes Gabriel, that the claimant no longer worked at the centre. Agnes Gabriel had called the centre and asked to speak to the C. C learned of this during a telephone discussion with Agnes Gabriel.

It was submitted this is based on hearsay from third parties. When the claimant wrote to the second respondent on 10 April 2011 in connection with this, he stated, "No one has contacted me asking for information about you He had not realised she was still in Cambridge and had believed she had left. He had no recollection of any discussions even that close to the time. The emails appear to be quite cordial and it seems to go against the view of the claimant that she believed there was discrimination being perpetuated by the second respondent for a few years by this time. The second respondent stated, "I hadn't realised you were still in Cambridge. We are doing some really exciting things in the Centre at the moment. Why dont you drop round and see us?" The claimant replied this was the first invitation to the Centre he had extended since she left, and she would, "Be delighted to stop by" and would do so when she next got the opportunity. The claimant did not, it was submitted, link this to race and / or sex at the time and there is no evidence from which that inference can be drawn. The respondent again says there was no protected act by this time.

42. Item 7 March 2010, Dirk Palm contacted the claimant seeking assistance. The claimant contends she should have been offered this work instead of him.

The respondent referred to page 257 of the bundle, which was an email from Dirk Palm dated 18 January 2010 and her reply. Dirk Palm had

been made redundant in 2009, and in this email states that the second respondent was looking for someone to help him with delivering the course and he had been suggested to help take on the task. There is no link to race or gender or protected act by this date.

43. Item 8 The claimant's duties regarding BPS level A and B course stripped.

This is the reference in paragraph 42 of the ET1. In that paragraph the claimant states, "15 March 2010, the claimant received an email from the Administrator of the Psychometrics Centre, asking her not to get involved in marking the level A and B portfolios delegates send her as, "it's John's job now"", this was sent by an administrator, not the second respondent. It was submitted there is nothing unfavourable given that her employment had terminated and that was why she was no longer required to supervise students. Again, she relies on female comparators and there is no evidence to suggest a link to race or gender and there was still, on the respondent's case, no protected act by this stage.

4-4. Item 9 April 2010, R2 allegedly sent a sexist and patronising email to the claimant telling her to, "calm down".

The email was in the bundle at p130. The claimant had written to the second respondent stating it had been brought to her attention that the Psychometrics Centre had been contacted and that, "You have been deliberately malicious and misleading when information regarding me has been requested". The second respondent replied:-

> "Hi Paula — no one has contacted me asking for information about you so please do calm down. I would be only too happy to give you references but I am never asked.
>
> I hadn’t realised you were still in Cambridge. We are doing some really exciting things in the Centre at the moment. Why don’t you drop round and

It was submitted on behalf of the respondent that that falls short of being detrimental. Again, the respondent says there was no protected act, but in any event, there is no link to any protected act or any protected characteristic. There is no assertion there was anything discriminatory about this at the time.

45. The claimant's response to the email, it was suggested, is enlightening as it suggests she was not offended by the communication, when she replied:

> "Hi John
>
> I guess they must just have been lying.
> This is the first invitation to the Centre that you have extended to me since leaving. I would be delighted to stop by.

I will do so when next I get an opportunity.

Good to hear that great things are happening.

Best
Paula"

46. Item 10 Early 2012, PHD student M Kosinski, named on the website as a Deputy Director of the Psychometrics Centre, whereas the claimant had never been given such a role or title.

The respondent submitted that the difference between Mr Kosinski and the claimant was that he had gained his PHD at Cambridge and was considered an exceptional student. His work involved a wider contribution to the world of psychometrics. As set out at paragraph 21d of the ET3, the job titles of people

subsequently working at the Centre, when it had expanded to 15 employees and students, were not comparable to the claimant's job title in 2009, at a time when the team had only five employees and students and the claimant had not yet completed a PHD.
There is no evidence of a link to gender or race and this matter is not relied upon as an act of victimisation.

47. Item 11 March / July 2012, M Kosinski allegedly informed the claimant that she was really missed and talked about her all the time.

Item 12 6 March 2013, R2 allegedly informed Dr Sara Baker, the course convener, "how great it would be to have the claimant around Cambridge more".

These are relied upon as acts of victimisation and harassment. They are, it was submitted, third party comments to the claimant which she must assert had emanated from the second respondent. The allegations are set out at paragraph 52 of the ET1. The claimant there asserts that when Mr Kosinski stated the claimant was really missed, and talked about her all the time, it made her feel, 'threatened and hounded, unable to escape the clutches of the second respondent. The claimant remained deleted from the Centre's website and she believed Mr Kosinski was aware of this. It was also obvious that the second respondent was actively tracking her career movements despite claiming to her, and others, that he did not know where she was. "

48. There is, it was submitted, nothing unfavourable about these comments. With regard to the alleged comment by Dr Baker, there is again nothing offensive in it. The claimant is again relying on two female comparators. There is no link to any protected characteristic or protected act.

49. Item 13.1 11 September 2013, the claimant was informed that her supervisory services would no longer be needed.

This, it was argued, was done by the Faculty of Education and therefore, for there to be some form of conspiracy it would have required collaboration between the second respondent and that Faculty. The clear, non-discriminatory reason for this, is set out in an email from Sara Baker of the 5 November 2013, when she stated:-

> "Other arrangements have been made as we are being encouraged to employ people within the Faculty or within the University...."

Further, it is submitted there is no protected act by this date.

50 Item 13.2 31 January 2014, the claimant allegedly applied for a role and was advised by a Laura Whitehead on 13 February 2014, that the role was deferred due to institutional changes. The claimant

asserts this to be direct race and / or sex discrimination, victimisation or harassment.

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This the respondent submits came from an entirely separate department. The claimant's only narrative in the Scott Schedule is that the role was deferred to make institutional changes and that was the reason she was not considered. There is no evidence of a link to any protected characteristic.

51. The prejudice to the respondent is that all of these applications have been deleted. There is no evidence from the respondent's side of notes, for example, as to why the claimant got no further.

52. Item 14 3 May 2015, the claimant applied for a role and received an email on 14 May 2015, thanking her but stating they would not be taking the application any further. The reply to her was that this was due to the volume of job applications received.

There is no evidence to suggest that the second respondent was involved regarding the claimant's application at this stage. Further, her case has materially changed. In the ETI she said she made the application and did not get a response. However, she did get one, but did not like it. The wording in the ETI was that, 'barring the automated email receipt, there was no acknowledgement feedback or follow up".

53. Item 15 21 May 2015, a further application, the claimant received an automated reply.

There was no involvement by the second respondent as this was a separate department, the Faculty of Education. Again, the claimant's case has changed from that in the ET1, paragraph 63. If she is trying to suggest victimisation or a continuing act, she would need to demonstrate some form of collusion.

54. As stated before, the claimant is relying on female comparators and therefore the claim of sex discrimination has no reasonable prospects of success.

55. Item 16 24 July 2017, the claimant's university email account was deleted.

Item 17 15 September 2017, RI informed the claimant that it would not conduct a full grievance investigation because she had not been an employee for some time.

Under Item 16 the claim of unfair dismissal has been withdrawn. The claimant does not assert a case in relation to this matter against the second respondent in the Scott Schedule. In paragraph 26 of its response, the respondent explains that the deletion of the email account was conducted by the IT department. It had found that allowing people to self-certify, presented a risk of its email accounts being used illegitimately. As part of the annual certification process, in 2017, the requirement for additional written

confirmation that those who were self-certified were in fact acting as supervisors, was required. Several people, including the claimant did not, or could not, provide any such confirmation and the first respondent therefore closed their accounts. This was an administrative act by the first respondent's IT team.

56. There is no evidence this is linked to race or gender, or even that the person who did this knew of the claimant's race. There had been no protected act. There is clearly a non-discriminatory reason given. An email was referred to of 17 May 2017, (page 152), when, "UIS User Administration", wrote to the claimant thanking her for her email and stating that, "In order to extend your account as a supervisor, we will require an email confirming your status from the College for which you will be supervising." There is a clear non-discriminatory reason for the deletion of the claimant's account. Others were treated in the same way as the claimant. Males and females were being asked the same as the claimant.

57. In relation to Item 17 in the light of the claimant's concession that she was not employed from 2013 onwards, it was questioned what employers would be likely to undertake a full grievance process for someone who had left some years previously? In any event, it was the HR department that took that decision. It was taken without reference to the second respondent. This is a decision taken before any protected act. There is nothing to suggest it is linked to any earlier complaint the claimant may have raised.

58. The respondent then accepted, that this issue does postdate the protected act, but the HR action was taken without reference to the second respondent. The second respondent was not even aware of a complaint that could be a breach of the Equality Act 2010, until after the decision not to investigate.

59. The tribunal was taken to the respondent's grievance procedure, (page 116) which provides at section 4, that the grievance procedure applies to, "every member', having the right to raise grievances relating to matters of employment or appointed effecting the member as an individual. Member is referred to in 1.1 under the disciplinary policy, where it says that the procedure sets out the action to be taken when the conduct of a member, "of the unestablished research and academic related staff, thereafter referred to as a member, is unsatisfactory". The claimant had not been an employee, the respondent says, for eight years. There was a clear non-discriminatory reason for only doing a short grievance. There is nothing to link the second respondent to this. The claimant is asking the tribunal to accept that HR took umbrage with this grievance and decided not to investigate because it was a grievance.

Fair trial

60. It was further added that a fair trial is no longer possible. There has been a death of two witnesses, a considerable passage of time and when the second respondent is asked to reply to allegations or accusations, he will be unable to recall the specifics. This had been set out in Counsel's

written submissions. This is not a case where witness statements were taken nearer the time. It is not as if such statements can be relied upon, and documents have been deleted.

Claimant's Submissions

Relevant Law

61. The respondent is endeavouring to get the tribunal to adopt the wrong approach. The claimant's Counsel accepted that the tribunal must consider the ET 1, but when it comes to examining the prospects of success the tribunal is not confined to the pleadings. It is not a simple assessment of whether the allegations are so outlandish they cannot proceed. The tribunal should take account of the claimant's evidence. It is a two stage process on strike out, even if there are no reasonable prospects, the tribunal has to consider if, at a later stage, the case might have some merit. It is not as simple as looking at the Scott Schedule and stating that this claim will not succeed. The tribunal must look at what the claimant is arguing.

62 . These are the dangers of striking out a discrimination complaint. The tribunal will be familiar with claims that look improbable, but when heard, nuances of behaviour become clear. There may be no overt evidence, but inferences can be drawn from the facts. In a case like this, over the years there is bound to be considerable factual dispute.

63. The two witness statements the respondents have produced, show the dispute on the facts. The primary position of the claimant is that the tribunal should not entertain an application to strike out at this stage. There is a public interest in examining this case. The claimant's case is that over a sustained period of time, because of complaints of discrimination of sex and race, she was effectively prevented from participating fully in the life of Cambridge University. Yes, she has taken time to bring her claim, but that shouldn't be a bar.

The Scott Schedule

The items in feint type

64. The respondent's Counsel has missed out the first four matters in feint type which the claimant wishes to be considered. These relate to matters which many tribunals would describe as background. It is accepted, the first few are not specifically set out in the ET1, but that is irrelevant as they are background matters that the tribunal can draw inferences from.

65. paragraph 1, early 2008, R2 informed the claimant that he was pleased that she was working in the Centre because he said that it helped the Centre look international and gave it a, "distinct international brand". It was submitted that this made the claimant feel uncomfortable that she was from abroad. The same month the second respondent said that if it was not for him, the claimant would not be in the UK.

Note from Mary Griffin 20 May 2009

66. Reference was made to a document in the bundle at page 212. This is said to be a note from Mary Griffin dated 20 May 2009, referring to the claimant coming to see her the day before. It was produced through a Subject Access Request after the ETI was filed early in 2018. The claimant had been seeking this document and had written to the Employment Tribunal about it. On receipt of this document the claimant conducted a search of her hard drive and discovered the letter which appears at page 215-216 of the bundle. This was a document addressed to, 'Dear John', the second respondent. It is alleged that this is about the relationship with the second respondent and talks about an unsatisfactory relationship and importantly, in the second paragraph that this was sexist and racist. It states:-

'My previous interactions with clients and senior managers in organisations, of which are crucial to my career, have also been positive as mutual respect was maintained regardless of whether or not view points were shared. In addition, as my track record speaks for itself, speaking to me in such a manner cannot be justified on the grounds of under performance. I therefore consider your behaviour to be both sexist and racist. "

67. Reference to the meeting with Dr Griffin is relayed in paragraph 27 of the ETI. The account of the May 2009 letter, is in the claimant's witness statement. She refers to how it came about. There is undoubtedly going to be a dispute about whether the second respondent saw it. This is an important question in this case. The second respondent can give evidence about it. The claimant argues this is the very outset of the events leading to this claim and the first in a series of complaints by the claimant.

68. It was submitted that the document at page 130 of the bundle, the letter from the claimant to the second respondent of 10 April about misleading references, and his reply, was evasive in the nature. It is one of the acts in the Scott Schedule. The former Prime Minister used that phrase in parliament in telling a female MP to 'calm down' and was widely castigated. The second respondent chose a stereotypical attitude to black women as aggressive and disrespectful and requires an explanation. It cannot be said there is no evidence of a discriminatory nature, or that there has not been a complaint about prejudice or that the second respondent was entirely ignorant about such a complaint.

69. It is known that there is a form of words used by the second respondent when he meets the claimant and expresses to her that he is unhappy that she made a complaint. This is admitted at paragraph 32 of the ET3, in which it is pleaded, "He did say that he had not forgiven her for forwarding her email of April 2011 to Angela Pollentine, but was referring not to his content, but to the fact that it has left Miss Pollentine visibly upset." This is quite surprising when according to Miss Pollentine's witness statement, there was nothing particularly striking about the complaint. Again, there needs to be an explanation. What was there to forgive?

70. The respondent wants the tribunal to compartmentalise all these allegations. That is not how discrimination works. The tribunal can draw an inference from the interactions between the second respondent and the claimant (that do not seem to

be disputed) that there was indeed an improper reason for the treatment. If there was, that can be used in relation to other allegations. It cannot be said there is no reasonable prospect of this claim succeeding.

Item 2

71 . The claimant says there were several things about the failure to extend her contract that concerned her. The timing for example, she put in a complaint and was then, "out on her ear". She also refers to a comparator Tomoya Okubo, whose employment continued.

72. The respondent says there was a small department back then and that it has grown from five to fifteen but none of those positions were offered to the claimant. It is interesting that Dr Okubo is described in paragraph 21a of the ET3, as an unpaid academic visitor from Tokyo. It is important to remember that the first respondent is an academic institution and the most important thing for it is to further research. Also, the environment within which there are often external bodies that can fund that research. The claimant was not given the opportunity of conducting unpaid research within the department. She was not offered that position and in that regard the comparison is enlightening.

73. The respondent says, Anji Wilson, was dismissed in 2010, but as far as the claimant is concerned, she is still employed in the Faculty of Neuroscience. It is said she is experienced in education, but if the claimant's witness statement, paragraph 18, is considered, her grant to do that work was written by the claimant.

74. The respondent further says that she is a woman and therefore not an appropriate comparator. She is not however, a black woman. In that regard the comparator could be another woman. The tribunal will need to examine the reasons for the treatment by the second respondent to assess whether it was because of the claimant's race, and / or sex.

75. In relation to Michal Kosinski, referred to at paragraph 21 c of the response, as an exceptional Cambridge PHD student, there is a danger of trying to determine this case before the parties have shaken out the issues and allowed the tribunal to grapple with the detail. It is suggested he is not an appropriate comparator as he had done his PHD at Cambridge. Page 246 of the bundle states, that he would not finish his PHD until 2014. That is not a dispute of fact that this tribunal can resolve at this preliminary stage.

Items 3 and 5 — the Website

76. The claimant disputes that her details were ever placed back on the website. Also, it is disputed there was any reason to distinguish others from the way the claimant was treated. A large part of progress is that you have an attribution for your work. This website issue clearly put the claimant at a detriment.

77. Page 296 of the bundle was referred to in connection with the biography of Sinead Rooney, but it is not known when that print out was made. It is assumed it was recently. She was the administrator. She did not do a PHD at Cambridge. She

had a career change. If it is alleged that only students are put on the website as alumni then that is incorrect. There is no reason for her to be put on it, or indeed Shining Li, who appeared on the page opposite. Her position was indistinguishable from the claimant's. Neither of these two comparators are black women.

Item 4 BPS

78. Counsel referred to correspondence the claimant had with Angel Pollentine in relation to this in January 2010. She refers to, "a deliberate attempt to bully me and affect my income stream". She believed she was being treated unfairly. It was submitted that for the second respondent to say that he did not know anything about this, was another attempt to undermine the claimant as a black woman.

Item 6

79. This is the allegation that the second respondent was allegedly rude and unprofessional in the way he informed another that the claimant no longer worked at the Centre. The respondent demonstrated clear misunderstanding by saying this was hearsay. The claimant intends to call witnesses in connection with what was said. It is a remarkable presumption by the respondent to say this is hearsay.

80. Counsel then went to emails between the second respondent and Dr Charles Lee of Felstead School, asking if the claimant was a member of his department, to which Professor Rust said, 'no'. When asked 'any idea where she is now?' he replied, 'absolutely none'. Counsel submitted this was a very curious exchange. These emails were obtained through a Subject Access Request and require some explanation. The exchange starts from Felstead School without any background at all. The second respondent is terse in his reply and provides no information to assist the claimant. He says he has no idea where she is, but he has been emailing the claimant and seen from the signature to her emails where she is. Again, this requires an explanation.

81 . As set out in paragraph 32 of the claimant's witness statement, she will ask the tribunal to look carefully at two references provided, seen at pages 204 and 199 of the bundle. The pre and post complaint references are different. That

on p204 is much less helpful and positive than the previous one. There are nuances that show matters to be explained.

Item 7 — Dirk Palm

82. The respondent says he was made redundant. That does not answer the question why a former student of the claimant was offered the work when the claimant was not.

Item 8 - BPS Level A and B Course

83. This is a similar complaint. The claimant says her duties were stripped from her and she was told it was John's job to do. The fact they asked someone else to do this was detrimental to the claimant.

Items 9 and 10

84. These have already been touched on.

Items 13.1 and 13.2

85. The Scott Schedule refers only to RI, but that is clearly an error and it was made clear in the ETI that these allegations are made against the second respondent as well.

86. The claimant will assert that the second respondent's interaction with others, and the way he talked about her, caused her career harm. The claimant was not offered any of these positions. It is open to a tribunal to draw an inference that the second respondent was undermining her abilities to get work. The same applies to Items (14) and (15).

8 February 2016

87. This is in the feint type and refers to the claimant emailing the second respondent about a former level A and B delegate's request for a reference, (paragraph 70 and 71 of the ET1). The documentation is not in the bundle but the claimant has a copy.

Items 16 and 17 - 24 July and 15 September 2017

88. These issues are in time if treated as separate incidents. Counsel accepted that the respondent's attack on the deletion of the email, could be understood. However, it is a combination of the detriment the claimant suffered at the hands of the second respondent. As a result of the second respondent putting people off engaging with the claimant, she gradually had her ability to participate in the Academy reduced. In 2017, the claimant was unable to get work supervising students. That resulted in the detriment of her not being able to participate in the academic life of the University, culminating in her email account being deleted. That is what led to the claim being made. Counsel accepted he had to recognise the decision in a Canada Life (CLFIS

(UK) Ltd v Reynolds [20151 IRLR 562) But even so, it could be said, the second respondent directed the deletion.

89. The claimant asserts that this is the detriment and crystallises the cause of action. The claimant does not accept what has been said about the definition of a 'member', such as to give rise to the duty to investigate her grievance. There is a difference between the disciplinary procedure and the grievance procedure. In the grievance procedure it says, "every member". The claimant submits there is going to be a dispute as to whether she was a member of the University at that time, irrespective of her employment status. There are, for example, members who are visiting academics but are still classed as members of the University. It was unfair to exclude the claimant from that process.

90. Counsel for the claimant said he could only give the tribunal a flavour of the case at this preliminary hearing but would ask the tribunal to take account of all of the documents referred to which might support the allegations of discrimination. The claimant submits there is a much better prospect than little reasonable prospects and this matter should go to a full merits hearing.

Time Limits

91. It is important to distinguish whether there was a single act which was out of time, or whether there was a course of conduct over a period of time. The Equality Act 2010, makes a specific distinction between the act and whether there was continuing conduct. The claimant submits there was continuing conduct. This tribunal is unable to come to a fair decision on whether that is right or not without having a final hearing. The claimant submits there is a thread to the second respondent's attitude.

Fair Trial

92. No witness statement evidence has been produced for this tribunal with regard to the availability of witnesses, and therefore no evidence before the tribunal. It is miraculous that one witness was contactable for the witness statement. There is no evidence about others and the efforts to contact them. The one witness whom might have been able to say something was Mary Griffin. She could have said if the information was passed to the second respondent. He himself can give evidence about this. If there are serious problems of any of the witnesses remembering matters, they should have provided witness statements.

93. The respondent is an organisation with significant resources. There is no reason why they could not have contacted witnesses if they wanted to do so.

94. There is not a witness statement about disclosure. There is only the statement of Angela Pollentine and Emma Mason. We do not really know however, what Angel Pollentine has been shown.

95. There are some redacted documents in the bundle but no explanation for the redaction. We do also think, in the circumstances of this case, that the number of applications the claimant has made for work, given her qualifications, give the indication something untoward has occurred.

96. Counsel for the claimant then clarified that the first four matters in the Scott Schedule in feint type are said to be background but can still add to the course of conduct. It does not matter if they are discreet acts or not.

97. Counsel for the respondent said that was a surprise and it needed to know if they were discreet claims. The tribunal is only required to make findings on the claims.

98. There was then a debate about the claimant's evidence and the fact that in the skeleton argument, there was an application for an extension of time, but no evidence from the claimant on this. The Judge queried why this was not covered in the witness statement when that was exactly what Employment Judge Sigsworth had requested. Reference was made to paragraph 35 of the witness statement. That however, did not appear to cover the point.

99. It was agreed, that if the claimant wanted to give evidence on that paragraph only, then Counsel for the respondent would cross examine on that, but otherwise she would object to any supplemental questions. The claimant had been represented by solicitors and counsel since at least July and the respondent should not now be ambushed with any reasons advanced for a just and equitable extension that had not been put in writing previously. It was agreed that there would be further submissions and then the claimant would be called to give evidence just on that paragraph.

The Respondent's Submission in Reply

100. It was submitted, on the authority of Chandhok v Tirkey UKEAT/0190/14, paragraph 16-18, that it is the pleadings that are important. The first four issues jn the Scott Schedule in 2008 are not in the ET1, they should be disregarded. The task of this tribunal is to consider the claim and whether the claim should be struck out and these are not in the claim form.

Protected Act

101 . The respondent claims that there is no protected act alleged in paragraph 27 of the ET1. There are no words along the lines of sex or race discrimination. In the claimant's own pleading, she does not advance words or anything that could amount to a breach of the Equality Act 2010. The ETI was carefully set out and paragraphs 86 and 88, clearly set out the grievance and the appeal. There is a very clear structure that the claimant intended to rely on as protected acts and she does not articulate any others in the claim form. There is therefore, no pleaded protected act before September 2017. Reference was made to the cases of Durrani v London Borough of Ealing EAT 0454/12,

and Fullah v Medical Research Council EAT 0586/12. The claimant was quite able to link the acts to gender and race in her formal complaint of 9 October 2007, (page 170), There was nothing before 10 September 2017, that is capable of being a protected act.

The meeting with Mary Griffin and letter now relied upon

102. The letter now relied upon at page 215, in view of the penultimate paragraph where the claimant alleges behaviour to be both sexist and racist, could indeed be a protected act if it had been shared and pleaded. The respondent however, has concerns about this document.

103. There was no reference to this at the preliminary hearing in May 2018. This document was only produced after the Subject Access Request. It was submitted there had been no fewer than four different versions of this document:-

103.1 Page 215-217, was a PDF, but there is no way of verifying that the document that appears at pages 215-216 is what was included in the email on page 217. That email is dated 19 May 2009. The claimant's case is

that she handed a hard copy to Mary Griffin, not that she ever emailed it to anyone.

103.2 On page 215, there is a gap after the words, "sexist and racist". On page 217, it says that it is an enclosure of a 4kb document and not a PDF. The respondent asked for it as a Word document and that appears at page 221.

1 04. The respondent's Counsel, when challenged by Counsel for the claimant, stated she was not asserting fraud, but that the respondent had grave reservations about the document. The next version at page 221-222, the critical sentence there is at the foot of the page and is in a different place to the earlier version.

105. On page 224, when the properties of the document were provided, the title is different, and it is described as 15.3 kb, so larger. It says it was modified on 31 July 2018 by the claimant.

106. The respondent then asked for the original email to be forwarded without being opened. Page 224 is the respondent's data.

107. On page 229, the critical sentence is at the top of the page with no gap between this and the next paragraph. This document, it does state, was created on 18 May 2009, but last modified in August 2018.

108. It was submitted there had been many attempts from the respondent's instructing solicitor to obtain from the claimant, the original email so they could know for sure what the attachment was without anyone opening it. That it was

argued, had not been done. They had since received a fourth version last Friday and the properties were different.

1 09. There is a question mark over this document. The claimant made a series of complaints after 2009, and in those there is no link to race or sex. That is quite striking. If, as now alleged, it dawned on the claimant that this is sexist and racist, she did not make the link at that time. In none of those complaints does she refer to this complaint.

1 10. Counsel for the respondent then went through other documents received in 2010 and 2011 where she submits there was nothing raised about race or sex discrimination.

1 1 1 . Even if the claimant can show the authenticity of the document, it is still not disputed there was a meeting that day with Mary Griffin and her file note exists. There is nothing to suggest that this version now produced by the claimant was that which was handed to Mary Griffin as a hard copy. The file note makes no mention of race or sex but does refer to the second respondent's wife and various other matters. There is no way now of verifying what was handed to Mary Griffin.

1 12. The respondent is not asking this tribunal to decide on this document, but to note that nothing was pleaded relying on a May 2009 protected act. There is a question mark over the documents authenticity.

113 With regard to the suggestion made by the claimant's Counsel, that the claimant relies on the combined protected characteristics of race and sex, the combined discrimination provisions have not been brought into force. The law only requires the reason to be partly because of the protected characteristic. If race or gender forms any part, the claims will succeed. There is no need for combined discrimination. The respondent still argues that reliance on female comparators undermines the sex discrimination claim.

The claimant's application to amend

1 1 4. In view of what was argued, the claimant sought leave to amend to rely upon the document she drafted as a protected act. The claimant did not have her hands on that document when the ETI was drafted, but at paragraph 27, she gives an account of her complaint. It was only after the Subject Access Request that the claimant received Dr Griffin's note and this led her to looking for the document and that is what she came across. If the respondents suggest it is fraudulent, that needs to be explored properly. The claimant argues it was a protected act.

115. The claimant does not accept that the pleadings do not advance earlier complaints of sex and race.

116. With regard to the 2009 letter, the tribunal cannot draw any conclusions from the computer file sizes. The claimant sent a PDF and was then asked for a Word document. There were formatting changes. There is no evidence from

the respondent to deal with these issues. The tribunal should not attempt to make findings at this stage.

1 17. The respondent has elected not to cross examine the claimant, they cannot do that and then seek to go behind that and disagree with her paragraph 35 in her witness statement. The tribunal is now obliged to accept paragraph 35, that because of the seniority of the second respondent, she felt compelled not to pursue this.

1 18. It is a matter of public interest that the case should be heard. Discrimination is a pernicious course of conduct. On the claimant's case there has been a long attempt to damage her career, which is something the claimant argues should be addressed and dealt with.

1 19. The respondent's most significant argument is that Dr Griffin cannot give evidence. The importance of that is however marginal. The important question is whether the second respondent saw the complaint and became aware of it. He can give evidence about that. There is no evidence from the respondent of the difficulties they are going to labour under if this case is allowed to proceed. It would have been expected there would have been comprehensive witness statements explaining the difficulties they faced regarding documents, witnesses and memory, but there has been nothing along those lines.

| 20. The claimant states that the Scott Schedule should be allowed to stand as the claim with the first few matters in feint type as background. Leave to amend is sought to rely upon the May 2009 letter.

The respondent's response to the amendment application

121 . This matter has not been pleaded. There is no reference to such a letter.

122. The claimant had legal advice before submitting her final grievance. She has done a lot of research in putting together her ET1. She clearly understood the significance of saying that she complained of race or sex. At the preliminary hearing on 3 May 2018, the claimant sought to add two protected acts, but not that of May 2009. The first Scott Schedule was from the claimant and she did not rely upon a May 2009 complaint. She referred to a discussion with Angela Pollentine but states that 'race was not explicitly stated'. She did not relay facts that would be a protected act when referring to the claim that she submitted to Mary Griffin.

123. It has already been submitted, that the claims are significantly out of time and allowing a protected act which allegedly occurred in 2009, would be further out of time. There are no cogent reasons to extend time. It would be adding to a chronology already going back significantly in time. The second respondent is unable to respond about the meeting with Mary Griffin. The precise date of her death is not known but her obituary appeared in the Annual Report 2014-2015 for the Sociology Department.

Relevant law

124. The respondents seek strike out of the claims. This is provided for under Rule 37 of the Employment Tribunal Rules 2013 which provides:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds— (a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

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

125 Application is also made for a deposit order. This is covered by Rule 39 as follows:

(1) Where at a preliminary hearing (under rule 53) the Tribuna! considers that any specific a legation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party') to pay a deposit not exceeding El ,OOO as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order— (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

126 There are also arguments that the claims have not been submitted in time. S123 of the Equality Act 2010 provides:

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable ...

(2) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it ...

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

127. It will be an exceptional case where the tribunal will determine that the claim has no reasonable prospects of success without hearing all of the evidence. In Ezsias v North Glamorgan NHS Trust [2007] IRLR 603 the Court of Appeal stated that:

It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence ...It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.

128. The Court of Appeal referred to Anyanwu v South Bank Students) Union (20011 IRLR 305 in which Lord Steyn said at paragraph 24:

For my part such vagaries in discrimination jurisprudencc underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in

our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or demerits of its particular facts is a matter of high public interest.'

Lord Hope of Craighead added at paragraph 37:

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

129. In Chandhok v Tirkey [20151 IRLR 195 the EAT upheld the Employment Judge's decision not to strike out at a preliminary stage an amended race discrimination claim alleging discrimination on the grounds of caste. Langstaff J, as he then was stated:

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It was, however, argued that those occasions on which a strike out should succeed before the full facts of the case struck-out had been established in evidence were rare. This is particularly so where the claim is one of discrimination. Such a claim will centrally require a tribunal to establish why an employer acted as it did. That will usually require an evaluation of the reasons which the relevant decision-maker(s) or alleged discriminators had for acting as they did. Such an evaluation depends, often critically, upon what may be inferred as well as proved directly from all the surrounding circumstances, including evidence of the behaviour (whether by word, deed, or inaction) of such individuals not only contemporaneously to the events complained of but also in the past and, sometimes, even since the events on which the claim was founded; and it may include an assessment, in the light of the evidence that was called, of whether the failure to call other evidence was of significance. These can often be challenging assessments, all the more so where there are complications of language and culture. Considerations such as these led Lord Steyn in Anyanwu v South Bank Students' Union and South Bank University [2001] IRLR 305 HL to express the view at paragraph 24 (echoed by Lord Hope in his paragraph 37) as follows:

'In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.'

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This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out — where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery lJ at paragraph 56 of his judgment in Madarassy v Nomura International plc [20071 IRLR 246 CA):

'... only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

> Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision.

130. In the more recent decision of the EAT in Kwele-Siakam v The Co-Operative Group Ltd UKEAT/0039/17 Slade DBE J referred to Chandhok and stated at paragraph 24:

> What is at the heart of the claims is the reason for the Respondent's actions. That requires a finding of fact... Such claims as this where a fact at the heart of the claim is in issue would be most unlikely to be susceptible to decision on a strike out application.

131 With regard to strike out under sub paragraph (e) of Rule 37(1) the tribunal must carefully analyse the reasons why it js alleged that a fair trial is not possible and ensure that there is proper factual justification for those reasons. Tribunals should not conclude too readily that a fair trial is no longer possible.

132 It is also argued that the claims are out of time. That requires consideration to be given to whether there was 'conduct extending over a period'. In Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548 the Court of Appeal clarified that the correct test is that set out in Commissioner of Police of the Metropolis v Hendricks [20031 ICR 530 CA when it was stated that

> The focus should be on the substance of the complaints . . . was there an ongoing situation or a continuing state of affairs in which officers . . . were treated less favourably? question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

133. In both Lyfar and a later case of Aziz v FDA [20101 EWCA Civ 304 CA, the court considered the procedural issue of how employment tribunals should approach the question of whether the claim js time barred at a preliminary hearing. Aziz approved the test that the tribunal must consider whether the claimant has a 'reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'

134. The claimant has sought leave to amend her claim at this hearing. The tribunal must therefore consider the guidance in Selkent Bus Co Ltd v Moore [19961 IRLR 661 and take account of all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The following were indicated to be relevant considerations:

1.The nature of the amendment

Amendments range from the correction of clerical errors, the addition of factual details to existing allegations and the addition or substitution of other labels to facts already pleaded to the making of entirely new factual allegations which change the basis of the existing claim.

2. The applicability of time limits

3. The timing and manner of the application

An application should not be refused solely because there has been delay in making it. No time limits are laid down for the making of such applications. It is however relevant to consider why the application was not made earlier. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered are relevant.

Conclusions

135. The detail of the submissions, heard over two days, has deliberately been set out to show the extent of the disputes between the parties and to demonstrate why this tribunal has had to conclude that it cannot determine at this preliminary stage that the claims have no, or little, reasonable prospect of success.

136. The claimant has clarified at this hearing that she does bring the two latest claims against the second, as well as the first respondent. She relies upon a course of conduct since 2009. This tribunal cannot determine whether there has been such a course of conduct within the meaning of section 1230f the Equality Act 2010 without hearing all of the evidence. The claimant is clearly stating there has been a long and sustained campaign against her by the second respondent. As was stated in Hendricks it will be for the claimant to establish such and if she cannot her claims, or some of them will fail. That determination cannot however be made at this preliminary stage.

137. The respondent argues that a fair trial is no longer possible. It has submitted two witness statements. Angela Pollentine and Emma Mason. Ms Pollentine gives evidence of her recollection of matters before she left the Faculty in September 2008. She can be cross examined on that. Ms Mason has been employed since January 2011 and again gives an account of her recollections. She too can be cross examined on that. The Response states that the second respondent has little recollection of some of these matters. Although it is said that with the passage of time some documents have been destroyed, there is some documentation. This tribunal had a bundle of 450 pages just for this hearing. The witnesses can be taken to contemporaneous documents some of which will have been written by them. It is known that sadly Dr Mary Griffin has died. That appears to have occurred in approximately 2014. Even therefore if the claimant had commenced these proceedings some years ago the respondent would have been faced with the same difficulty of Dr Griffin not being available to give evidence. Much of the claimant's case however is based on the actions of the second respondent

and he can give evidence. There was no other evidence before this tribunal of difficulties that the respondent would face if the matter proceeds.

138. As a result of a Subject Access Request (SAR) in early 2018 after the issue of proceedings, the claimant has located a document on her computer which is p215 of the bundle and is referred to in these reasons as the 'Dear John' letter. This tribunal cannot determine the provenance of that document at a preliminary hearing. A lot of work has been done by the representatives on the respective file sizes of this documents in Word or PDF format but as evidence has not been heard this tribunal cannot determine anything about it. It has always been the claimant's case that she made a complaint to Dr Griffin and it is the first item in the original Scott Schedule pleaded as direct race or sex discrimination. The claimant seeks leave to amend to rely on the letter as a protected act. Leave is granted. Although that adds a new claim of victimisation in respect of that alleged protected act, victimisation had always been one of the claims. The claimant has only recently found her letter following the SAR, the respondent has always had to deal with what was raised at that time and the tribunal is satisfied that greater prejudice will be caused to the claimant in not being able to rely on this letter than to the respondent. It will be for the full merits hearing to make findings on that letter.

139. It follows that the claims proceed as set out in the Scott Schedule. The tribunal is satisfied that the first four matters added in feint type, which it was accepted were not in the ETI , should form part of the background but not be included as discreet acts of discrimination.

140. Although not struck out at this stage the claimant's claim of sex discrimination where she relies upon female comparators is not clear. Counsel stated that she

claims she was treated less favourably as a 'black woman'. Section 14 of the Equality Act 2010 — 'combined discrimination: dual characteristics' has not been brought into force. A case management order has been made as set out below for the claimant to clarify the legal basis of these claims. Failure to do so satisfactorily could result in consideration being given to striking out some or all of the sex discrimination claims as disclosing no cause of action.

141 . The parties are reminded of all aspects of the overriding objective and the words of Lord Justice Mummery in Hendricks:

> Before the applications proceed to a substantive hearing, the parties should attempt to agree a list of issues and to formulate proposals about ways and means of reducing the area of dispute, the number of witnesses and the volume of documents. Attempts must be made by all concerned to keep the discrimination proceedings within reasonable bounds by concentrating on the most serious and the more recent allegations. The parties' representatives should consult with one another about their proposals before requesting another directions hearing before the chairman. It will be for him to decide how the matter should proceed, if it is impossible to reach a sensible agreement.

CASE MANAGEMENT ORDER

1 . Within 14 days of the date on which these reasons are sent to the parties the claimant is to provide to the Employment Tribunal and the respondent the following further information:

With regard to each and every issue identified as an act of sex discrimination in the Scott Schedule and where reliance is placed only on female comparators the legal basis for those claims when the chosen comparators hold the same protected characteristic as the claimant.

2. Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Laidler

Date: ...22 October 2018

Sent to the parties on: .14 November 2018

For the Tribunal Office