



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr T Ikeda

**Respondent:** (1) Misuho Bank Ltd  
(2) Mr N Shirasaki  
(3) Mr S Butcher

**Heard at:** London Central

**On:** 17 February 2022

**Before:** Employment Judge A.M.S. Green

## Representation

Claimant: Miss A Robinson - Counsel

Respondent: Mr N Roberts – Counsel

# RESERVED JUDGMENT ON PRELIMINARY MATTER

The following claims are struck out under rule 37(1)(a):

1. Direct age discrimination under the Equality Act 2010, section 13.
2. Direct race discrimination (unilaterally terminating the claimant's employment during his period of sick leave) under the Equality Act 2010, section 13.
3. Constructive unfair dismissal.

The following claims are struck out under rule 37(1)(a) on the grounds that the claim is out of time and the Tribunal has no jurisdiction to hear them:

4. Direct race discrimination (for failing to pay the claimant a bonus between July 2013 and June 2016 for completing Inflation Linked Swap deals) under the Equality Act 2010, section 13.
5. Direct race discrimination (for failing to increase the claimant's remuneration or changes job title to reflect the additional quantitative analysis work that he took in April 2012) under the Equality Act 2010, section 13.

# REASONS

## Introduction

1. This preliminary hearing was listed to determine the respondents' applications to strike out parts of the claim and to make a deposit order and also for the purposes of further case management. For the purposes of clarity this preliminary hearing has been convened under rule 53 (1) (c) to consider whether a claim or any part should be struck out under rule 37.
2. The claimant is a Japanese national. He was employed by the first respondent, an international bank, as a Lead Business Analyst from 4 May 2010 until 3 December 2019. He has claimed:
  - a. constructive unfair dismissal;
  - b. direct discrimination based on age;
  - c. direct discrimination based on race.
3. He presented his claim form to the Tribunal on 3 March 2020 following a period of early conciliation with each of the three respondents which commenced on 8 January 2020 and ended on 8 February 2020. The respondents deny liability.
4. On 16 December 2021, the respondents' solicitors applied for strike out/deposit orders in the following terms. The application was prepared on the basis of the respondents' draft list of issues [139] which had been prepared on the basis of the claims pleaded by the claimant in his particulars of claim dated 3 March 2020 and further and better particulars dated 15 November 2021. The respondents expressed concern that they believed that the claim was entirely manufactured by the claimant as a consequence of his tactical resignation having "backfired". The respondents say that the claimant resigned on 4 November 2019 not for the purpose of terminating his employment but to obtain more favourable employment terms from the first respondent. His resignation was accepted and he instructed solicitors. The respondent says that through this litigation, the claimant has raised several highly tendentious and stale allegations of discrimination (despite being vocal in his complaints) he had never raised them before it became clear that his attempt to leverage more favourable employment terms had backfired. All of the allegations are apparently aimed at causing maximum inconvenience to the respondent
5. The grounds for strike out are as follows:

***a. Rule 37(1)(a) of The Employment Tribunal Rules of Procedure 2013:***

i. Age discrimination (headcount reduction): It was intimated by the Claimant at the Preliminary Hearing that the Claimant may not wish to pursue any claim of age discrimination. Insofar as any claim is pursued, it should be struck out. In his Further and Better Particulars, the Claimant alludes to the fact that he was selected for a headcount reduction because of his age, but it is not clear when he says he was selected for the headcount reduction, by whom, the act or omission that forms the basis of his age discrimination claim, the comparator(s) relied upon and/or the detriment suffered. He has failed to properly particularise this claim, either in his Particulars of Claim, in his Further and Better Particulars or at the Preliminary Hearing when questioned by Employment Judge Glennie. On that basis, the Respondents apply for strike out on the grounds that this claim lacks essential particulars and coherence and therefore has no reasonable prospect of success.

ii. Race discrimination (unilaterally terminating the Claimant's employment during his period of sick leave): In his Further and Better Particulars, the Claimant alleges that "Mizuho unilaterally terminated my employment during my sick leave alleging that I resigned normally. I believe this incident is clearly...Race Discrimination". The Respondents did not unilaterally terminate the Claimant's employment during his sick leave, because of his race or otherwise. The Claimant resigned on 4 November 2019. He went on sick leave on 14 November 2019. His employment terminated at the end of his notice period on 3 December 2019. On that basis, the Respondents apply for strike out on the grounds that this claim has no reasonable prospect of success.

iii. Constructive unfair dismissal: On his own case, the Claimant resigned to "force the situation". He expected that the Second Respondent would "delete [his] short resignation email and would start to listen to my grievance about my project assignment". The Respondents' position is that the Claimant cannot sensibly allege that (a) there was a repudiatory breach of the Claimant's contract of employment; (b) that he did not affirm the contract prior to its termination; and/or (c) that he resigned in response to that breach when, on his own case, his intention was not to end his contract. Rather, his case is that he sought to continue in employment and to use his resignation effectively as a bargaining tool. On that basis, the Respondents apply for a deposit order on the grounds that this allegation has no reasonable prospect of success.

**b. The following claims are out of time and the Tribunal has no jurisdiction to hear them:**

i. Race discrimination (failing to pay the Claimant a bonus between July 2013 and June 2016 for completing Inflation Linked Swap deals): In his Further and Better Particulars, the Claimant alleges that, between June 2013 and June 2016, "ETD...decided not to pay me any extra bonus [on Inflation Swap Deals] because I am not white". This claim is over three years outside the primary time limit set out in section 123(1)(a) of the Equality Act 2010. It would not be just and equitable for the Employment Tribunal to extend the primary time limit under section 123(1)(b) of the Equality Act 2010 in the circumstances.

ii. Race discrimination (failing to pay the Claimant a bonus between June 2011 and June 2019 for writing computer programmes): In his Further and Better Particulars, the Claimant alleges that, between June 2011 and June 2019, he was not paid an additional bonus for writing computer programmes because he was not white. This claim is outside the primary time limit set out in section 123(1)(a) of the Equality Act 2010. It would not be just and equitable for the Employment Tribunal to extend the primary time limit under section 123(1)(b) of the Equality Act 2010 in the circumstances.

iii. Race discrimination (failing to increase the Claimant's remuneration or change his job title to reflect the additional quantitative analysis work he took on in April 2012): In his Further and Better Particulars, the Claimant alleges that in April 2012 he was assigned quantitative analysis work. He states that his request for a "pay rise or extra bonus for this highly technical role at the performance review of FY13" (on 12 April 2013) was denied and that "this is clearly a failure to remunerate me in recognition of my additional skills because I am not white". He also alleges that the Second and Third Respondent deliberately failed to change his job title to reflect the additional responsibilities he took on in April 2012. This claim is outside the primary time limit set out in section 123(1)(a) of the Equality Act 2010. It would not be just and equitable for the Employment Tribunal to extend the primary time limit under section 123(1)(b) of the Equality Act 2010 in the circumstances.

iv. Race discrimination (failing to reflect his skills, experience and contributions when reviewing his remuneration): In his Further and Better Particulars, the Claimant alleges that the First Respondent failed to remunerate him in recognition of his "additional skills that had been

*used for ETD business for years" and his "Tier 1 banks career experience" "because I am not white". The Claimant's last remuneration review took place in or around May 2019. The outcome of the remuneration review was communicated to the Claimant in June 2019. This claim is therefore outside the primary time limit set out in section 123(1)(a) of the Equality Act 2010. It would not be just and equitable for the Employment Tribunal to extend the primary time limit under section 123(1)(b) of the Equality Act 2010 in the circumstances.*

*The Respondents would have very significant problems in answering the allegations levelled by the Claimant. The four sets of allegations above relate to alleged omissions (i.e. failure to pay a bonus or award a pay rise) which themselves relate to matters going back multiple years. It is highly likely that relevant witnesses and documents will not be available and/or that they will not be able to give full cogent evidence.*

*If the Claimant wants to rely on any evidence that his claims are not out of time, or that it would be just and equitable for the Tribunal to extend time, he should produce it in advance of the Preliminary Hearing.*

6. In considering the strike out order application as applied to time limits, I must determine whether the claimant has no reasonable prospect of success in establishing his claim or the relevant parts of his claim have been brought within time.
7. The grounds of the deposit order are as follows:

*The following allegations or arguments have little reasonable prospect of success under Rule 39(1) of The Employment Tribunal Rules of Procedure 2013:*

*a. Race discrimination (failing to offer the Claimant a voluntary redundancy package): By his case, the Claimant was extremely busy throughout his employment, including in the period April 2019 to 3 December 2019. There is nothing to suggest that Claimant's role was ever at risk of redundancy within the meaning of section 139 Employment Rights Act 1996. On that basis, the Respondents apply for a deposit order on the grounds that this allegation has little reasonable prospect of success.*

8. In considering the application for a deposit order, I must determine whether the claim or the relevant parts of the claim have little reasonable prospect of success.
9. At the beginning of the hearing we established that the claimant would not be giving evidence as to his means. He had provided a witness statement that Mr Roberts indicated that he did not intend to cross examine the claimant.

Part of the witness statement is a response to the application for the strike out/deposit orders and these would be considered as part of my determination.

10. I clarified with Miss Robinson whether the claimant was continuing with his claim for age discrimination. At the earlier preliminary hearing before Employment Judge Glennie there was a suggestion that he would not be pursuing his age discrimination claim. Miss Robinson confirmed that the claimant was continuing with his age discrimination claim.
11. Mr Roberts confirmed that if a deposit order was made in respect of some or all of the claims then the respondents would be content for a global figure of £1000 being awarded and apportioned amongst the different claims. I have made deposit orders in respect of some of the claims. These are set out in a separate Deposit Order.
12. We worked from a digital bundle comprising 223 pages. Mr Roberts and Miss Robinson made oral submissions.

#### The respondents' submissions

##### *The procedural history*

13. Mr Roberts took me through the procedural history of the claim. I was taken to the latest draft list of issues [139] which the respondents had prepared based on the original pleadings together with further and better particulars submitted by the claimant but only insofar as they provided greater particularisation of the originally pleaded claim.
14. The original particulars of claim [18] comprise of an introduction and then headings for each of the individual claims being made. They set out a long chronology of the claimant's employment and it was unclear how much of this was background or the alleged repudiatory breach of contract causing the dismissal. The narrative relating to the constructive dismissal claim continued over several pages. It then moves on to the discrimination claims [34] each of which have headings. Once again there was an issue of how much was narrative and how much was background. In the section headed "Major Discrimination Topics" only paragraph 1 was specifically cited as age discrimination. The remaining numbered paragraphs in the section related to race discrimination. These related to historic acts. The claimant then provided his further and better particulars which had been requested by the respondents' solicitors 6 October 2021 [73]. This letter had been written because the respondents were unclear if the claimant was pursuing a claim of age discrimination. If he was, he was asked to provide further particulars of that claim. Regarding the allegations of race discrimination, the claimant was asked to provide a table setting out:

- a. each alleged act of discrimination;

- b. the date it occurred;
- c. the detriment suffered; and
- d. the comparators the claimant was relying upon and their protected characteristics.

15. In requesting these further and better particulars, the respondent said:

*Please note that this is not an opportunity to plead further alleged acts of discrimination, but rather to clarify the allegations set out in your Particulars of Claim. All entries should therefore be referable to claims already pleaded in your claim form. Please indicate to which claim you are referring when you are providing this information. The Respondents reserve the right to update the Grounds of Resistance in response to the further information provided.*

16. The claimant responded with what Mr Roberts described as a very long and discursive document bordering on being a witness statement [79]. It was not what the respondents had really been looking for. At the same point, the claimant made an application to amend to include a victimisation claim which the respondents resisted. The claimant's application was refused by Employment Judge Glennie at a private preliminary hearing on 2 December 2021 [152]. During that hearing, Employment Judge Glennie recognised that there was a dispute between the parties over the scope of the claims and listed this hearing to determine the application for a strike out order/deposit order.

17. Mr Roberts submitted that there was no dispute between the parties that the list of issues [139] were an accurate characterisation of some of the claims. However, what was not certain is whether this comprised all of the claims being advanced by the claimant. Should further claims be advanced, it would be necessary to have another hearing to deal with these.

18. I was then taken to each of the separate claims.

#### *Constructive unfair dismissal*

19. In Mr Roberts' submission, the claimant had provided a lengthy narrative and it was unclear what repudiatory breach of contract he was relying upon. I was taken to the claimant's witness statement in reply to the application [159] where the claimant sets out the reasons for his resignation in paragraph 13 & 14 as follows:

*On 2 October 2019, the 2nd Respondent handed over my third Mizuho CEO Award Certificate (Attachment 4) without notifying the team or other ETD staff. He handed it over to me as if it was just a piece of paper rather than one of the most valuable awards at Mizuho.*

*In mid-October 2019, I complained to the 3<sup>rd</sup> Respondent about my unfair workload when compared to my white colleagues, i.e., the numbers of projects I was assigned to (12 projects to me, only a few projects to my white peers) and extremely tight project deadlines that he deliberately moved to Christmas and New Year Holiday period (Please see **Attachment 5 – BSG Team Project Sheet** and **Attachment 6 – My Project Sheet**). Attachment 5 was provided with me by the Respondents after I submitted my DSAR and I had never seen this BSG Team Project Sheet at Mizuho before. It seems the percentages in “Time” column in the sheet are just guess-work of the Respondents and quite inaccurate. For example, the Respondents put 0% on my projects that had been already started in order to make my total percentage smaller. They also mentioned my white colleagues’ same projects “LINKS II” and “Brexit: Phase 2” in multiple lines as if they were assigned to several different projects. However, it is still clear that the number of the projects I was assigned was excessive given that there are 6 staff in the sheet.*

20. In summary, the only reasons for the resignation are that his award was not notified to other team members and that he had a heavy workload from October 2019.
21. In Mr Roberts’s submission this claim had no reasonable prospects of success given the circumstances of the resignation. There was no dispute between the parties that the email of 4 November 2019 [25] was sent. In his pleaded case, the claimant had resigned not to end his employment but to force management to respond to the issues that they otherwise would have ignored. The claimant wanted to get more favourable employment conditions and had no intention of leaving. He wanted something else but was shocked that his resignation was accepted. The first respondent was entitled to do this.
22. After the claimant submitted his resignation email on 4 November 2019 it is not disputed that Mr Butcher asked the claimant to submit a letter of resignation. What is disputed are the circumstances of the discussion giving rise to that request. However, the effective resignation was the email of 4 November 2019. It was not intended to be a resignation.
23. Mr Roberts then referred to the threefold test required by the claimant to establish constructive dismissal. There had to be a repudiatory breach of contract. The claimant had to accept the breach (i.e. not affirm it) and the repudiatory breach of contract must have been the reason for the resignation.
24. The respondents’ position is that the claimant had submitted a tactical resignation and, consequently, could not meet the threefold test to establish constructive dismissal. He did not intend to bring the contract to an end. He could not be said to have resigned for a repudiatory breach of contract when he intended to continue his employment. He could not tactically resign and then complain that he had been constructively dismissed.



25. I was reminded that it was not for me to decide whether there had been a constructive dismissal. It was submitted that the resignation had backfired. The claimant did not get more pay and less work as he intended when he sent the 4 November 2019 email. The first respondent accepted his resignation which had triggered the unleashing of an ever-growing claim of all sorts of discrimination claims. The claimant had instructed solicitors from early December 2019 who had assisted him in his grievance and the grounds of complaint. The claim had evolved with further and better particulars deluging the respondents with information to make the litigation as difficult as possible. This was not the basis of the application being made today but provided background.

*Age discrimination*

26. The respondents do not understand this claim. They are unable to comment on its strengths or weaknesses. As previously mentioned, there was only one specific reference to age discrimination in the originally pleaded claim [35]. There was no clarification. Furthermore, the alleged act of age discrimination did not sit well with what was subsequently pled in paragraph 10 [36] where redundancy packages are alleged to have been offered to the claimant's white ex-colleagues except those under disciplinary proceedings and this created a hostile environment and was harassing until the claimant resigned. This was a race argument not an age argument. Matters were not improved upon by the further and better particulars [79]. This was simply a narrative of people who were made voluntarily redundant who were of a certain age. It did not identify the detrimental treatment that the claimant alleges to have suffered. It might be evidence of motivation for age discrimination but it was unclear how it amounted to age discrimination. The claimant was not made voluntarily redundant. He was not part of the group that had been targeted for voluntary redundancy. It was unclear what detriment he had suffered. Mr Roberts told me that this had been discussed at length at the previous preliminary hearing before Employment Judge Glennie because he was unsure what the claim truly was. At that point, the claimant had suggested that if it was not a good claim, he would not pursue it. The opportunity to provide further clarity had now passed and it was now appropriate to consider striking out the claim or ordering the payment of the deposit.

*Race discrimination*

27. I was taken to the draft list of issues [140]. Paragraph 4 deals with the claim for direct discrimination on the grounds of race and sets out the following allegations of unfavourable treatment:

- a. failing to pay the claimant a bonus between June 2013 and June 2016 for completing Inflation Linked Swap deals;
- b. failing to pay the claimant a bonus between June 2011 and June 2019 for writing computer programmes;

- c. failing to increase the claimant's remuneration or changes job title in April 2013 to reflect the fact that he took on additional quantitative analysis work in April 2012;
- d. failing to reflect the claimant's skills, experience and contributions when reviewing his remuneration between April 2012 and June 2019;
- e. failing to offer the claimant a voluntary redundancy package between 1 April 2019 and 3 December 2019; and
- f. unilaterally terminating the claimant's employment during his period of sick leave which commenced on 14 November 2021.

28. Mr Roberts admitted that these examples of alleged unfavourable treatment were sufficiently pleaded. The only thing that was disputed was whether the claimant was relying upon any other detriments. The only allegation forming the subject matter of an application for strike out on the merits was that of unilaterally terminating the claimant's employment during his sick leave. The remaining allegations were challenged on the basis of time bar.

29. Regarding the allegation concerning unilaterally terminating the claimant's employment during his period of sick leave Mr Roberts submitted that the claimant had resigned on 4 November 2019. The notice that he gave was that his employment would end on 3 December 2019. This is not disputed. His notice period was in fact four weeks [170] but he gave longer notice which was accepted. The claimant went on sick leave in November 2019 and his employment terminated on the agreed date of 3 December 2019. Mr Roberts submitted that it was misconceived to describe a decision to terminate employment as race discrimination. The fact that the claimant was unwell did not change the termination date. It did not change the fact that his termination date had been agreed. The claimant's sickness absence it could not be considered reasonable to be a detriment. His employment terminated on an agreed date. There was nothing in the pleadings to say why implementing the agreed date of termination amounted to race discrimination.

30. The remaining grounds for applying for the strike out order related to those claims which the respondents consider to be out of time.

31. The first allegation was race discrimination for failing to pay the claimant a bonus between July 2013 and June 2016 for completing Inflation Linked Swap deals. The timing of this was three years before termination of employment and four years before the claim. The start point was almost 7 years earlier. In paragraph 32 of the grounds of resistance [72] the respondents had set out the applicable dates to the effect that any claim arising before 9 October 2019 was outside the primary limitation period. The claimant would have to establish that there had been continuing acts of discrimination or that it was just and equitable to extend time.

32. The second allegation is for failing to pay the claimant a bonus between June 2011 and June 2019 for writing computer programmes. This extended over an even longer period and the end of this was well before the time that the claimant brought his claim in March 2020. The claim was nine months out of time.
33. The third allegation of race discrimination was failing to increase the claimant's remuneration or changes job title to reflect the additional quantitative analysis work that he took in April 2012. A decision to promote is referred to in April 2012 which did not come to fruition in April 2013. The claim is nine years out of time.
34. The fourth allegation of race discrimination was failing to reflect the claimant's skills and contributions when reviewing his remuneration. In Mr Roberts' submission this was a nebulous complaint about failing to increase remuneration. It was not disputed that pay was reviewed annually. This claim was brought at least one year for the claim was brought to the Tribunal.
35. In Mr Roberts' submission all of the alleged detriments were out of time and there were no obviously continuing acts. Consequently, I had to consider whether it would be just and equitable to exercise discretion to accept the claims. I would have to consider the length of the delay which varied between nine months and nine years. I would also have to consider the reasons for the delay. None had been provided. I also had to have regard to the claimant's circumstances. He is a highly capable person who had been highly remunerated. He had been represented by solicitors at an early stage. He did not issue his claim for three months after the grievance. He was financially and intellectually able to take advice and was aware of his rights.
36. The balance of prejudice was obviously in favour of the respondents. The claimant was not complaining about discrete and well-documented matters. He was presenting very broad complaints about general decisions relating to his work over eight years which were about whether he was sufficiently recognised by unidentified managers and whether he had been properly remunerated. It is not disputed that he did not make race claims at the time which could help to refresh memories now. These were stale claims with unidentified discriminators stretching over a long period of time. It would be very difficult for the respondent to remember what happened and to produce the evidence. There was no prospect of the claimant establishing continuing acts or that it would be just and equitable to extend time to accept the claims.
37. If I was not minded to make strike out orders in respect of the application, I was invited to make deposit orders instead.
38. Mr Roberts then addressed me on the freestanding deposit order application. The claimant had never been offered a voluntary redundancy package. That fact was not in dispute. I was taken to paragraph 21 to 24 of the grounds of resistance [70]. I was taken to the first resignation letter [179]. I was taken to the second resignation letter [189]. The first and second letters were verbatim except for the titles. The title of the first letter was "resignation letter". The title

of the second letter was “voluntary redundancy resignation letter”. The first respondent did not choose to convert the claimant’s resignation to a voluntary redundancy. It was accepted that the claim was in time and the claimant could pursue the matter before the Tribunal. However, in Mr Roberts’ submission it would be very hard for the claimant to establish that if the first respondent had a resignation on file it would convert to a redundancy. There was nothing to suggest that the request for voluntary redundancy had been refused because of the claimant’s race.

The claimant’s submissions

39. Miss Robinson referred me to the claimant’s witness statement [157].

40. Regarding the application to strike out the age discrimination claim, I was referred to paragraph 6 of the witness statement [158]. This states:

1. Strike out (i) Age discrimination (headcount reduction):

*As there was no official announcement of headcount reduction from ETD, it is impossible for me to identify the exact timing when I was selected as a target of headcount reduction started in April 2019. However, given that the harassment became extreme and unbearable in October 2019 after the 2nd and 3rd Respondents got rid of another person in his 40s in the team in September 2020, it is highly likely that I was selected as the next target of headcount reduction by the 2nd and 3rd Respondents in October 2019. There were 2 staff in their 30s in the team and some other staff in their 30s in other teams in ETD, and they did not become a target of headcount reduction. In fact, between April 2019 and my termination date of 3 December 2019, no one in their 30s lost their job in ETD. It is clear that one of the selection criteria for headcount reduction was age. My financial detriment is quite obvious, which was that I suddenly lost my monthly income (£8,583.33) and my next expected bonus (£38,000.00) in June 2020. I was also out of work for 8 months although I went to Jobcentre Plus in the month I was terminated. Losing a job suddenly and unexpectedly in my 40s ruined my career path as well.*

41. Regarding the application to strike out the claimant’s claim for race discrimination based on unilaterally terminating his employment during his sick leave, I was referred to paragraph 7 [158]. Of the claimant’s witness statement which states:

1. Strike out (ii) Race discrimination (unilaterally terminating the Claimant’s employment during this period of sick leave):

*On 19 November 2019 I was notified by my previous lawyer that she submitted my Fit- Note from my GP (**Attachment 2**) to Mizuho. The GP clearly stated the reason of my sick leave was “**Stress**” in her Fit-Note. The Respondents did not address my “Stress” at my workplace at all, rather they were just waiting for my termination date. I claim that this is a **Violation of Duty of Care, Health and Safety** because my “Stress” was*

*caused by the harassment started from the 2<sup>nd</sup> and 3<sup>rd</sup>. Respondents. When my white colleague suddenly went on mental sick leave, the Respondents did not terminate his employment. The Respondents treated my white colleague with a lot of care and he could come back to the office after almost 2 years of absence. However, the Respondents terminated my employment without any discussion with me in such a short time or less than 2 weeks. The treatment of my sick leave and my white colleague's sick leave by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were totally different.*

42. Miss Robinson conceded that it was difficult to argue the point that was being made by the respondents in this respect.

43. Miss Robinson referred me to paragraphs 8 and 9 of the claimant's which responded to the application to strike out is constructive dismissal claim as follows:

1. Strike out (iii) Constructive unfair dismissal:

*The Respondents' lawyer is mixing 2 different resignation documents into 1 resignation in order to simplify the argument. The unofficial resignation email was submitted @9:20am in the morning and the official resignation letter was submitted in the afternoon on 4 November 2019. I made the difference between these 2 resignations clearly in my "List of Issues" document. These 2 resignation documents have different backgrounds and reasons behind them.*

*9. As in the second email from the bottom of **Attachment 3**, both the 3<sup>rd</sup> Respondent and I had a common understanding that my resignation email was not enough to resign according to my Employment Contract at Mizuho.*

44. I was also referred to the particulars of claim [18-22] which describe the build up to what happened to the resignations.

45. Turning to the strike out application based on time bar, Miss Robinson accepted that these did relate to historic pay issues. If the Tribunal took the view that historic acts are not in time from 2018 onwards would be difficult to separate what was happening. In respect of that, I was invited to extend time on the basis that it would be just and equitable. On the question of cogency of evidence, Miss Robinson submitted that the first respondent would have kept pay records, details of pay scales and bonuses and salary grades. It was conceivable that these might not be kept as far back as 10 years but records were customarily kept for at least seven years. On that basis, there would be an evidence trail. Ultimately, the decision to grant a strike out order depended on whether a fair trial would be possible. I was invited to avoid making a strike out order if a fair trial could be conducted. Regarding the application for the deposit order, if I was minded to make one it should be no more than £1000 in total which also corresponded to what Mr Roberts had submitted.

Applicable law

46. Rule 53 (1) (c) of the Rules of Procedure confirms that a Tribunal has the power to consider the issue of strike at out a preliminary hearing. Rule 37 sets out the grounds on which a Tribunal can strike out a claim or response (or part). A claim or response (or part) can be struck out on a variety of grounds including that it is scandalous or vexatious or has no reasonable prospect of success (rule 37 (1) (a)).

47. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**, discrimination cases are generally fact sensitive, and any issues should usually only be decided after all the evidence has been heard. However, in that case, Lord Hope observed:

*The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail*

48. In **Chandhok v Tirkey [2015] ICR 527** Langstaff P cited **Anyanwu** and went on to say at paragraph 20:

*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 in Madarassy v Nomura International plc [2007] ICR 867 , para 56):*

*“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.*

49. The Tribunal must take a view on the merits of the case and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out.

50. In **Ahir v British Airways plc 2017 EWCA Civ 1392, CA**, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been

explored. The Court accepted that the test for strike-out on this ground with its reference in rule 37(1)(a) to 'no reasonable prospect of success' was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having 'no prospect of success'. In this case, the Court upheld an employment judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. His claims were based on allegations that six managers who had each separately considered the admitted misconduct of the employee during the disciplinary process had allowed their decisions to be tainted by the protected acts of the employee even though there was no evidence to suggest that they were aware of those protected acts. The Court concluded that the employment judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success.

51. In **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA**, Lord Justice Underhill reiterated the sentiment he had previously expressed in **Ahir** when concluding that an employment judge had correctly struck out a constructive dismissal claim based on a final straw incident on the basis that it had no reasonable prospect of success. His Lordship observed: '

*Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case, no relevant issues of primary fact. Had the matter proceeded to a full hearing the job of the tribunal would not have been to decide the rights and wrongs of the [final straw] incident of 22 April, and it would not have heard evidence directly about that question. The issue would have been whether the disciplinary processes were conducted seriously unfairly so as to constitute, or contribute to, a repudiatory breach of the Appellant's contract of employment. The evidence relevant to that question in substance consisted only of the documentary record. It is true that if there were any real grounds for asserting actual bad faith on the part of the decision-makers that could not have been resolved without oral evidence; but that was not the pleaded case, and the employment judge was entitled to conclude that there was no arguable basis for it.*

52. In **E v X, L and Z UKEAT/0079/20 (10 December 2020, unreported)** the immediate point in this appeal was that a second Employment Judge had erred in overturning a case management decision of the first Employment Judge without these being a change in circumstances. However, of more general importance is the context, namely a striking out of a claim raising the always difficult area (on time limits) of whether the claimant can rely on the concept of 'acts extending over a period'. The judgment of Ellenbogen J in the EAT at [50] subjects this question to lengthy guidance in the light of six leading cases, namely **Sougrin v Haringey Health Authority [1992] IRLR 416**, **Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14 (30 July 2015, unreported)**, **Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20 (21 July 2020, unreported)**, **Caterham School Ltd v Rose UKEAT/0149/19 (22 August 2019,**

unreported), Lyfar v Brighton & Sussex University Hospitals NHS Trust [2006] EWCA Civ 1548, and Aziz v FDA [2010] EWCA Civ 304. The guidance is lengthy, but is important and is set out here in full:

- a. In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: Sougrin.
- b. It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: Robinson.
- c. Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: Sridhar.
- d. It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue: Caterham.
- e. When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: Lyfar.
- f. An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: Aziz; Sridhar.
- g. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: Aziz.
- h. In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading: Caterham.
- i. A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: Robinson.



- j. If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: **Caterham**.
- k. Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: **Caterham**.
- l. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: **Caterham**.
- m. If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham**.

53. I now turn to consider time limits. EQA, section 123(1) provides that proceedings of this nature 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.

54. EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

55. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. Where the act complained of is a single act of discrimination, this will not usually give rise to any problems. A dismissal, for example, is considered to be a single act and the relevant date is the date on which the employee's contract of employment is terminated. Where dismissal is with notice, the EAT has held that the act of discrimination takes place when the notice expires, not when it is given (**Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT**). Rejection for promotion is also usually considered a single act. In this case, the date on which another person is promoted in place of the complainant is the date on which the alleged discrimination is said to have taken place (*Amies v Inner London Education Authority 1977 ICR 308, EAT*).
56. The question of when the time limit starts to run is more difficult to determine where the complaint relates to a continuing act of discrimination, such as harassment, or to a discriminatory omission on the part of the employer, such as a failure to confer a benefit on the employee. EQA, section 123(3) makes special provision relating to the date of the act complained of in these situations. It states that:
- a. conduct extending over a period is to be treated as done at the end of that period (section 123(3)(a));
  - b. failure to do something is to be treated as occurring when the person in question decided on it (section 123(3)(b)). In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it (section 123(4)).
57. The leading case is **Barclays Bank plc v Kapur and ors 1991 ICR 208, HL**, which involved a pension scheme that allegedly discriminated against a group of Asian employees. The argument on time limits centred on whether the operation of the pension scheme was a continuing act that subsisted for as long as the employees remained in the bank's employment (in which case their complaints were presented in time) or whether it was a single act that took place when the bank decided not to credit the employees' service in Africa for the purpose of calculating pension entitlement (in which case their complaints were time-barred). The House of Lords found in favour of the employees and ruled that the right to a pension formed part of their overall remuneration and, if this could be shown to be less favourable than that of other employees, it would be a disadvantage continuing throughout the period of employment. It would not be any answer to a complaint of race discrimination that the allegedly discriminatory pension arrangements had first occurred more than three months before the complaint was lodged.
58. Crucially, their Lordships drew a distinction between a continuing act and an act that has continuing consequences. They held that where an employer

operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time. Thus in **Sougrin v Haringey Health Authority 1992 ICR 650, CA**, the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. There was no suggestion that the employer operated a policy whereby black nurses would not be employed on a certain grade; it was simply a question whether a particular grading decision had been taken on racial grounds. That case can, however, be contrasted with the case of **Owusu v London Fire and Civil Defence Authority 1995 IRLR 574, EAT**, in which an employee complained that he was discriminated against by his employer's refusal to award him promotion. While the EAT agreed that a specific failure to promote or shortlist was a single act — despite its continuing consequences — it drew a distinction with the situation where the act (a failure to promote) took the form of 'some policy, rule or practice, in accordance with which decisions are taken from time to time'. Accordingly, the tribunal did have jurisdiction to decide whether there was in fact such a discriminatory practice.

59. In **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA**, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. In that case the claimant, who was a female police officer, claimed, while on stress-related sick leave, that she had suffered sex and race discrimination throughout her 11 years' service with the police force. She made nearly 100 allegations of discrimination against some 50 colleagues. In determining whether she was out of time for bringing complaints in respect of these incidents, the EAT upheld an employment tribunal's ruling that no 'policy' of discrimination could be discerned and that there was, accordingly, no continuing act of discrimination. However, the Court of Appeal overturned the EAT's decision, holding that it had been side-tracked by the question whether a 'policy' could be discerned in this case. Instead, the focus should have been on the substance of the claimant's allegations that the Police Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. The question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

60. In **Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16** an employment tribunal found that the decision to commence a disciplinary investigation against H was an act of discrimination, but it was a

'one-off' act and was therefore out of time. H appealed, arguing that the tribunal had been wrong to treat the decision to instigate the disciplinary procedure as a one-off act of discrimination rather than as part of an act extending over a period ultimately leading to his dismissal. Referring to Hendricks (above), the EAT observed that the tribunal had lost sight of the substance of H's complaint. This was that he had been subjected to disciplinary procedures and was ultimately dismissed – suggesting that the complaint was of a continuing act commencing with a decision to instigate the process and ending with a dismissal. In the EAT's view, by taking the decision to instigate disciplinary procedures, the Trust had created a state of affairs that would continue until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences. Once the process was initiated, the Trust would subject H to further steps under it from time to time. The EAT said that if an employee is not permitted to rely on an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. In order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage of a lengthy procedure, an employee would have to lodge a claim after each stage unless he or she could be confident that time would be extended on just and equitable grounds. However, this would impose an unnecessary burden on claimants when they could rely upon the provision covering an act extending over a period. The EAT therefore concluded that this part of H's claim was in time.

#### Discussion and conclusion

61. For the reasons given by Mr Roberts, I am satisfied that the claim for age discrimination has no reasonable prospect of success. The explanation provided by the claimant does not, in my opinion, detract from the strength of the argument put forward by Mr Roberts. Consequently, the application to strike out the age discrimination claim (headcount reduction) is allowed.
  
62. For the reasons given by Mr Roberts, I am satisfied that the claim for race discrimination (unilaterally terminating the claimant's employment during his period of sick leave) has no reasonable prospect of success. The parties had already agreed that the claimant's employment would end on 3 November 2019. The claimant had resigned and his resignation had been accepted. The fact that he went on sick leave is irrelevant. Consequently, the application to strike out the race discrimination claim (unilaterally terminating the claimant's employment during his period of sick leave) is allowed.
  
63. For the reasons given by Mr Roberts, I am satisfied that the claim for constructive unfair dismissal has no reasonable prospect of success. I disagree with the claimant's assertion that the email of 4 November 2019 could be construed as an unofficial resignation. He resigned and, his resignation was accepted. He appears thereafter to have attempted to justify the resignation not for the purposes of terminating his employment but to negotiate more favourable terms and conditions of employment. That does not indicate an intention to leave his employment.

64. I now turn to the strike out application based on time bar. The first allegation was race discrimination for failing to pay the claimant a bonus between July 2013 and June 2016 for completing Inflation Linked Swap deals. I agree with Mr Roberts that the timing of this was three years before termination of employment and four years before the claim and the start point was almost 7 years earlier. Any claim arising before 9 October 2019 was outside the primary limitation period. This is a significant delay. The claimant would have to provide evidence of continuing acts to bring the claim into time. He has not done that. In considering whether to extend time on the basis that it would be just and equitable to do so, I would have expected the claimant to provide an explanation for the delay in bringing the claim. His response in paragraphs 48 and 49 of his witness statement [164] does not do this. The respondent will suffer significant prejudice if the claim is accepted. It will have to investigate historic allegations stretching back up to 7 years ago. This claim is struck out.
65. The second allegation for failing to pay the claimant a bonus between June 2011 and June 2019 for writing computer programmes. This extends over an even longer period and the end of this was well before the time that the claimant brought his claim in March 2020. The claim was nine months out of time. In his witness statement, there is some evidence of continuity between FY2010 and FY2016 [164]. However, no explanation is given for the delay and the claimant appears to be asking the respondents to provide further information paying a £10,000 and why he never received a bonus. This has the hallmarks of a fishing exercise. However, I am persuaded by Miss Robertson's argument that the respondents ought to have financial records in this regard. I am not persuaded to strike out this claim. However, I believe that it has little reasonable prospect of success and the claimant will be required to pay a deposit of £333.
66. The third allegation of race discrimination was failing to increase the claimant's remuneration or changes job title to reflect the additional quantitative analysis work that he took in April 2012. A decision to promote is referred to in April 2012 which did not come to fruition in April 2013. The claim is nine years out of time. This is very significant. In paragraph 51 of his witness statement [165], the claimant responds to the application. He has provided no explanation for the delay in making his claim. It relates to a one-off act of discrimination. Given the length of time that has elapsed, the balance of prejudice favours the respondent. The claim is struck out.
67. The fourth allegation of race discrimination was failing to reflect the claimant's skills and contributions when reviewing his remuneration. This claim was brought at least one year for the claim was brought to the Tribunal. In his witness statement in response in paragraph 52 [165] the claimant provides more detail which detracts from Mr Roberts' submission that the claim is nebulous. The claimant refers to his qualification and his experience. He refers to his base salaries for 2018 and 2019. The allegation appears to refer to continuing acts as pay reviews were conducted annually. No explanation has been given for the delay. However, I am not persuaded to strike this out. I am however minded to make a deposit order of £333.

68. I now turn to the application for the free-standing deposit order. I agree with Mr Roberts' submissions on this. It is difficult to see any why the refusal to offer the claimant a voluntary redundancy package would be made in circumstances where his resignation had been accepted and how this could be connected to his race. The claimant is only indicating a possibility of discrimination without more. I made a deposit order of £333

69. Regarding the deposit orders, I have considered the claimant's means as set out in his witness statement. He states that he can afford to pay a deposit order of £1000. I am satisfied that he has sufficient means to pay the order. I will issue a Deposit Order separately.

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Employment Judge Green

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Date 17 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 February 2022

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FOR EMPLOYMENT TRIBUNALS