



EMPLOYMENT TRIBUNALS

Claimant: Ms Ashanti Amponsah

First Respondent: The Estate of Dr O'Connell

Second Respondent: Beatrix Schmidt

Heard at: London Central

On: 16 September 2020

Before: Employment Judge Wisby (Sitting Alone via CVP)

Representation

Claimant: Mr M Shephard, counsel

First and Second Respondents: Mr A Barnes, counsel

JUDGMENT

The respondents' application for strike out is denied.

Employment Judge Wisby

Date 06/10/2020

JUDGMENT SENT TO THE PARTIES ON

06/10/2020

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FOR THE TRIBUNAL OFFICE –

REASONS

Evidence before the Tribunal

1. The tribunal was presented with:
 - 1.1. A pdf bundle of documents;
 - 1.2. Skelton arguments on behalf of the claimant and the respondents

Issues

2. The preliminary hearing was listed to consider the following issues:
 - 2.1. Whether the claim against the first respondent should be struck out under Rule 37(1)(e) because it is no longer possible to have a fair hearing of the claim.
 - 2.2. Whether the claim against the first and second respondents should be struck out under Rule 37(1)(a) because it is scandalous or vexatious or has no reasonable prospect of success.
 - 2.3. Whether the claims against the first and/or second respondents have little reasonable prospect of success such that the claimant should be ordered to pay a deposit not exceeding £1,000 on each claim as a condition of being able to advance any such allegation or argument (Rule 39).

Preliminary Matters

3. Before being able to consider the above matters the list of issues to be considered at any final hearing was discussed.
4. The representatives agreed that they had sent an agreed list of issues to Employment Judge Elliott however the list in the Order did not contain detriment complaints related to an alleged protected disclosure. The respondent's representative said that as a result of this he proceeded on the basis that these complaints had been dropped. He accepted however that he did not recall the claimant stating that those complaints had been withdrawn at the last case management discussion. There is no record of withdrawal. It appears an admin error had therefore occurred when the issues were added to the Case Management Order.
5. The parties clearly had not reviewed the list of issues in the Order in advance of today's hearing.
6. In the process of examining the list of issues the claimant's representative also stated that the direct discrimination complaints were alleged to be because of both race and sex and the victimisation complaint did not reflect the position in the ET1.

7. The original agreed list of issues provided to Employment Judge Elliott by the representatives in accordance with her Order of 19 May 2020 was sent to me during the hearing. The protected acts stated in the Order did reflect how they had been expressed by the parties in that document however I accept that the ET1 was drafted in different terms and therefore have amended the list as set out below.
8. The list of issues in the Order of 23 June 2020 also did not identify which allegation was made against which respondent (the original agreed list was colour coded and Orders use just black and white). Complaints regarding the allegations defined below as Allegations, 4, 5, 7 and 8 are made against the first respondent only, the, complaints regarding the other allegations are made against both the first and second respondents.
9. All of the matters related to the list of issues could have been usefully addressed by the parties prior to the hearing today. The consideration of the strike out and deposit order applications requires a clear list of the issues to be decided at any final hearing.
10. When challenged by the respondent's representative on the chronology of events during the hearing the claimant withdrew the allegation that the difference in pay was a detriment as a result of a protected disclosure.
11. I asked the claimant's representative to review the list of issues during a 30-minute break and if there were any other matters that needed changing to raise them. He informed me after the break that he was satisfied with the list as amended.
12. The following is taken from the record of the case management discussion before Employment Judge Hodgson on 20 January 2020:
 - 12.1. *It was agreed that Dr David O'Connell was a sole trader. The claimant was an agency worker supplied and employed by TPP (who are not a respondent). The claim is brought against the first respondent pursuant to sec 41 Equality Act 2010.*
 - 12.2. *The second respondent also undertook work for the first respondent and is said to be an agent of the first respondent who acted as principal. It is said the principal is responsible for the second respondent's actions pursuant to section 109 and that the second respondent is personally responsible pursuant to section 110.*
 - 12.3. *There is reference to the claimant being paid less than the second respondent. It is accepted that this is not an equal pay claim. It is accepted that no equal pay claim has been brought.*
13. Direct sex discrimination on the basis the claimant was paid less than the second respondent (who is a woman) however remains in the agreed list of issues I was presented with.
14. The revised list of issues provided by the representatives for today's hearing was as follows:

Direct race and/or sex discrimination - section 13 Equality Act 2010

15. Did the respondent treat the claimant less favourably as follows:
 - 15.1. Ms Schmidt's comment in interview (words to the effect of 'between you and me we just had to get rid of her, we had to interview on her days off and use a separate email so she didn't know. Really she had way too much attitude, you know what some of these young black girls are like'). (**Allegation 1**)
 - 15.2. September 2018; the decrease and subsequent increase of Ms Amponah's brother 's medical. (**Allegation 2**)
 - 15.3. Ms Schmidt indicating that Dr O Connell thought the claimant's brother would be unable to afford a full medical. (**Allegation 3**)
 - 15.4. December 2018 Dr O Connell asking the claimant to work on a specific date. (**Allegation 4**)
 - 15.5. December 2018 Dr O Connell saying words to the effect of 'if she sees a black girl here she won't think I'm a racist'. (**Allegation 5**)
 - 15.6. From February 2019 onwards making the claimant work in an office which dripped mouldy water. (**Allegation 6**)
 - 15.7. April 2019 Dr O Connell told a racist joke to the claimant. (**Allegation 7**)
 - 15.8. May 2019 Dr O Connell mimicked a Jamaican accent to the claimant. (**Allegation 8**)
 - 15.9. Being paid less than Ms Schmidt. (**Allegation 9**)
 - 15.10. Being prevented from working any further from 30 May 2019 onwards. (**Allegation 10**)
 - 15.11. Being provided misleading documents and/or narrative as part of the response to her data Request. (**Allegation 11**)
 - 15.12. Not being provided all the requested information in response to her Data Request (**Allegation 12**)
 - 15.13. Not receiving a response to the claimant's subsequent emails relating to her Data Request. (**Allegation 13**)
 - 15.14. The respondent failing to investigate the claimant's grievance (**Allegation 14**)
 - 15.15. The respondent failing to respond to the claimant's grievance (**Allegation 15**)
 - 15.16. The respondent failing to respond to the claimant's email of 24 July 2019 (**Allegation 16**)

16. Did any of these acts happen as alleged or at all? (Is any treatment agreed?)
17. Was any of it less favourable treatment? The claimant relies upon a hypothetical comparator.
18. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race and/or her sex?
19. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

20. Harassment - section 26 Equality Act

21. Did the respondent engage in unwanted conduct, namely:-

- 21.1. Ms Schmidt's comment in interview (words to the effect of 'between you and me we just had to get rid of her, we had to interview on her days off and use a separate email so she didn't know. Really she had way too much attitude, you know what some of these young black girls are like').
- 21.2. September 2018; the decrease and subsequent increase of Ms Amponah's brother 's medical.
- 21.3. Ms Schmidt indicating that Dr O Connell thought the claimant's brother would be unable to afford a full medical.
- 21.4. December 2018 Dr O Connell asking the claimant to work on a specific date.
- 21.5. December 2018 Dr O Connell saying words to the effect of 'if she sees a black girl here she won't think I'm a racist'.
- 21.6. From February 2019 onwards making the claimant work in an office which dripped mouldy water.
- 21.7. April 2019 Dr O Connell told a racist joke to the claimant.
- 21.8. May 2019 Dr O Connell mimicked a Jamaican accent to the claimant.
- 21.9. Being paid less than Ms Schmidt.
- 21.10. Being prevented from working any further from 30 May 2019 onwards.
- 21.11. Being provided misleading documents and/or narrative as part of the response to her data Request.
- 21.12. Not being provided all the requested information in response to her Data Request
- 21.13. Not receiving a response to the claimant's subsequent emails relating to her Data Request
- 21.14. The respondent failing to investigate the claimant's grievance

- 21.15. The respondent failing to respond to the claimant's grievance
- 21.16. The respondent failing to respond to the claimant's email of 24 July 2019
22. Did that conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?
23. In consider whether the conduct had the relevant effect, the tribunal will take into account: the claimant's perception, the circumstance of the case and whether it was reasonable for the conduct to have that effect.
24. If so, are there facts from which the tribunal could properly conclude that any treatment established was related to the claimant's sex or her race?
25. If so, has the respondent proved that the treatment was not so related?

26. Victimisation - section 27 Equality Act

27. Did the claimant do a protected act? The claimant relies on:
 - 27.1. The respondents thought she was going to make a protected act;
 - 27.2. Starting Early Conciliation proceedings on 21 June 2019; and
 - 27.3. Lodging a formal grievance on 25 July 2019.
28. Did the above matters happen as alleged or at all
29. Does it amount to a protected act?
30. Was the following treatment a detriment because the claimant did a protected act?
 - 30.1. September 2018; the decrease and subsequent increase of Ms Amponah's brother 's medical.
 - 30.2. Ms Schmidt indicating that Dr O Connell thought the claimant's brother would be unable to afford a full medical.
 - 30.3. December 2018 Dr O Connell asking the claimant to work on a specific date.
 - 30.4. December 2018 Dr O Connell saying words to the effect of 'if she sees a black girl here she won't think I'm a racist'.
 - 30.5. From February 2019 onwards making the claimant work in an office which dripped mouldy water.
 - 30.6. April 2019 Dr O Connell told a racist joke to the claimant.
 - 30.7. May 2019 Dr O Connell mimicked a Jamaican accent to the claimant.
 - 30.8. Being paid less than Ms Schmidt.
 - 30.9. Being prevented from working any further from 30 May 2019 onwards.
 - 30.10. Being provided misleading documents and/or narrative as part of the response to her data Request.
 - 30.11. Not being provided all the requested information in response to her Data Request
 - 30.12. Not receiving a response to the claimant's subsequent emails relating to her Data Request
 - 30.13. The respondent failing to investigate the claimant's grievance
 - 30.14. The respondent failing to respond to the claimant's grievance

30.15. The respondent failing to respond to the claimant's email of 24 July 2019

31. Public interest disclosure (PID)

32. Did the claimant make one or more protected disclosures as set out below. The claimant relies on subsection(s) (b), (d), (e) of section 43B(1).

33. Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

34. If so was this done on the ground that s/he made one or more protected disclosures?

35. The alleged disclosures the claimant relies on are as follows:

35.1. The claimant said: “ There is mouldy water dripping, it’s an unsafe working environment and it is making me feel sick” twice to the first respondent and once to the second respondent between 11- 13 February 2019 and once to the first respondent between 18 – 22 February 2019.

36. The alleged detriments the claimant relies on are as follows:

- 36.1. April 2019 Dr O Connell told a racist joke to the Claimant.
- 36.2. May 2019 Dr O Connell mimicked a Jamaican accent to the Claimant.
- 36.3. Being prevented from working any further from 30 May 2019 onwards.
- 36.4. Being provided misleading documents and/or narrative as part of the response to her data Request.
- 36.5. Not being provided all the requested information in response to her Data Request
- 36.6. Not receiving a response to the Claimant’s subsequent emails relating to her Data Request
- 36.7. The Respondent failing to investigate the Claimant’s grievance
- 36.8. The Respondent failing to respond to the Claimant’s grievance
- 36.9. The Respondent failing to respond to the Claimant’s email of 24 July 2019

37. If so was she subjected to all or any of those detriments on the grounds that she had made a protected disclosure?

38. I have summarised the current complaints and allegations in the following table, Y indicates a complaint is being pursued in respect of that allegation, X that no complaint is pursued.

Allegation (as defined above)	Claim against R1	Claim against R2	Direct Race	Direct Sex Discrimination	Harassment related to sex and/or race	Victimisation	Detriment Protected disclosure
1 (interview comment)	Y	Y	Y	Y	Y	X	X
2 (cost of	Y	Y	Y	Y	Y	Y	X

brothers medical)							
3 (view unable afford medical)	Y	Y	Y	Y	Y	Y	x
4 (request work on specific date)	Y	x	Y	Y	Y	Y	x
5 (comment would not be viewed as racist)	Y	x	Y	Y	Y	Y	x
6 (continue working in office)	Y	Y	Y	Y	Y	Y	x
7 (racist joke)	Y	x	Y	Y	Y	Y	Y
8 (mimic accent)	Y	x	Y	Y	Y	Y	Y
9 (paid less)	Y	Y	Y	Y	Y	Y	X
10 (preventing working)	Y	Y	Y	Y	Y	Y	Y
11 (provided misleading documents)	Y	Y	Y	Y	Y	Y	Y
12 (not receiving all information)	Y	Y	Y	Y	Y	Y	Y
13 (not receiving a response to emails)	Y	Y	Y	Y	Y	Y	Y
14 (failure investigate grievance)	Y	Y	Y	Y	Y	Y	Y
15 (failure respond grievance)	Y	Y	Y	Y	Y	Y	Y
16 (failure to respond to email of 24 July 2019)	Y	Y	Y	Y	Y	Y	Y

The Law

Continuation of the claim against first respondent

39. This issue was dealt with by Employment Judge Elliott on 19 May 2020:

“(10) Section 206 of the Employment Rights Act 1996 makes provision for the continuance or defence of particular types of proceedings and provides in those circumstances that the proceedings may be defended by a personal representative of the deceased employer. There are similar provisions under the Trade Union and Labour Relations Consolidation Act 1992 at section 292 which do not apply in this case.

(11) There is no such specific provision in the Equality Act 2010 empowering the tribunal to appoint anyone to continue or defend the proceedings. At common law when a defendant to a civil claim dies, the right to defend those proceedings passes to the personal representatives of the estate of the deceased. The claims identified at the hearing on 20 January 2020 were direct discrimination, victimisation, harassment and possibly whistleblowing.

(12) Section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 (LR(MP)A 1934) provides that "on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of, his estate."

(13) In his skeleton argument Ordered by Judge Hodgson, the claimant's counsel drew the tribunal's attention to the case law (initially identifying the name of the EAT authority and during this hearing identifying the relevant Court of Appeal authority) of *Harris v Lewisham and Guy's Mental Health NHS Trust v 2000IRLR 320 (CA)*. This holds, over turning the EAT, that causes of action based on statutory rights (such as discrimination claims) survive under section 1 (1) of LR(MP)A 1934 unless the statute concerned provides otherwise. The claimant has a claim of whistleblowing claim under the ERA1996 and it was submitted that these are claims based on statutory rights . The case said that the claim survives for the complainant. It did not refer specifically to the respondent.

(14) Counsel for the respondent said that this case did not help the claimant and the point had been made at the last hearing. Neither counsel could find a decision relating to a deceased respondent.

(15) The claimant relied upon section 1 of the LR(MP)A, on the basis that all causes of action survive as the wording of the section states "all causes of action subsisting against or vested in him shall survive against" on the basis that the word "against" is used and therefore a claim can survive "against" a deceased respondent.

(16) Counsel for the respondent said that statute appeared clear, but it may not have been designed for this type of case. It was submitted that any hearing has to be fair to both sides and this is a "he said I she said case" and that the respondent cannot defend himself and that lack of being able to provide a defence does not make for a fair hearing.

(17) This was a separate point to whether the claim could survive. Counsel for the respondent agreed that on a reading of the statute the claim did appear to survive against the respondent. The claimant also said that the fairness of the hearing was a separate issue. For these reasons I ordered the continuation of the claim against the Executors of the late Dr David McConnell who are his sister and brother, Ms Orla McMahan and Mr Daniel McConnell.”

40. Today's hearing concerns deposit order and strike out applications only.

41. Rule 37 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 states:

Striking out

37.—(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

42. Rule 39 of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 states:

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation 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 £1,000 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.

43. As set out by Mr Shephard on behalf of the respondent, the legal position in respect of striking out discrimination complainants on the grounds of no reasonable prospects of success can be summarised as being:
- 43.1. Discrimination claims should not be struck out as an abuse of process for having no reasonable prospects of success, except in the plainest and most obvious cases. It was a matter of public interest that tribunals should examine the merits and particular facts of discrimination claims (*Anyanwu & another v South Bank Students' Union and South Bank University* [2001] IRLR 305 the House of Lords).
- 43.2. Only in the clearest case should a discrimination claim be struck out. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence. The claimant's case must ordinarily be taken at its highest. If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts (*Ezsias and Tayside Public Transport Company Ltd (t/a Travel Dundee v Reilly* [2012] IRLR 755 (CS)).
44. The position in respect of striking out whistleblowing complaints is similar.
45. The law in respect of striking out a claim on the basis that it is no longer possible to have a fair hearing has been less well ventilated. The representatives stated the case law that does exist relates to situations where there had been a delay in proceedings, which they did not consider could assist in this case (as this claim can proceed to a hearing in an appropriate time frame). I was also informed that the representatives had not been able to identify relevant case law or guidance from other jurisdictions that would assist with the issue of whether a fair hearing can be achieved despite the death of a respondent accused of discrimination.
46. In respect of deposit orders, as set out in the case of *Hemdan v Ishmail* [2017] IRLR 228, the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails' (para 10). The purpose 'is emphatically not ... to make it difficult to access justice or to effect a strike out through the back door' (para 11).
47. When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case, and, in doing so, to reach a provisional view as to the credibility of the assertions

being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07, [2007] All ER (D) 187 (Nov)).

48. Facts not in dispute:

- 48.1. The first respondent was a sole practitioner in a medical practice in Chelsea.
- 48.2. The second respondent was engaged by the first respondent to undertake work for him.
- 48.3. The claimant was an agency worker assigned to work for the first respondent from 28 June 2018 to 30 May 2019 by TPP Recruitment.
- 48.4. The claimant raised a formal grievance on 25 July 2019 after her assignment had terminated. The first respondent received that grievance.
- 48.5. The claimant filed her ET1 on 16 August 2019.
- 48.6. The first respondent died as a result of cancer on 9 October 2019, following a short illness.
- 48.7. ET3s and grounds of resistance on behalf of both respondents were filed on 11 November 2019. Since instructions on the allegations had been taken from the first respondent before he died it was possible to state in the first respondent's ET3 that the allegations were 'denied' rather than 'not accepted'.
- 48.8. Revised grounds of resistance were submitted on behalf of both respondents on 3 February 2020.

Submissions

On behalf of the Respondents

49. In summary Mr Barnes on behalf of the respondents referred the tribunal to the practices in the criminal courts and Article 6 of the Human Rights Act 1998. He also referred the tribunal to the cases of:
 - 49.1. *Harris v Lewisham and Guys Mental Health NHS Trust* [2000] IRLR 320 (CA);
 - 49.2. *Turk v R* [2017] EWCA Crim 391; and
 - 49.3. *Shamima Begum and Special Immigration Appeals Commission & Ors* [2020] EWCA CIV 918
50. It was submitted that:
 - 50.1. It is impossible to have a fair hearing, when the accused is completely unable to defend himself at any hearing.
 - 50.2. The claimant's case is that various things were said to her during the course of her employment, there is no evidence to back this up. We have

a situation where it is one word against another, but where one party cannot give evidence or be put to proof on any evidence.

- 50.3. The lack of physical evidence to back up the claims made by the claimant and the somewhat nonsensical claims must also be considered. Each of the Claims are labelled as Race Discrimination, Harassment and Victimisation, but a quick look at the alleged claims shows them to be nothing of the sort.
- 50.4. No exact date is given for any of the alleged acts of discrimination, harassment or victimisation. It is difficult to see how offering her brother a reduced rate for his medical can be considered an act of racism or a detriment, it is quite the opposite. How can being paid less than someone with considerably more experience and responsibility be racism or harassment, or even victimisation. The same can be said for almost all of the accusations, none of which received any complaint during the claimant's time at the medical practice. Suggestions that a perceived failure to provide information in a Subject Access Request are in some way racist, or harassment or victimisation are ludicrous and, in any case, complaints with regards to SAR should be made to the Information Commissioner's Office rather than to an employment tribunal. Each of the allegations have been presented in an attempt to throw mud in the hope that something sticks.
- 50.5. The claimant worked for an agency with a clear grievance policy, yet she made only one complaint (25/04/19), after being prompted by the agency, when she was docked money for leaving work early. The fact that she made such a complaint clearly shows that she knew how to complain to the agency, however, instead she chose to try to raise a grievance with someone who was never her employer.
- 50.6. The respondents believe that, the death of the first respondent means that it is no longer possible to have a fair hearing and would request that the case against the first respondent is struck out.
- 50.7. The respondents further believe that the claims against them are vexatious and have no reasonable prospect of success and would request that the case against both respondents is struck out.
- 50.8. In the alternative the respondents would suggest that the claimant's case has little chance of success and she should be ordered to provide a deposit for costs.

On behalf of the Claimant

51. In summary Mr Shephard submitted that:

- 51.1. The respondent is trying to re-litigate matters which have already been decided. The argument, again made by the respondent, as to whether the claim could survive against a deceased party was decided on 19 May 2020 by EJ Elliot.

- 51.2. In respect of Article 6 it was submitted that: The respondents also cite Article 6 Human Rights Act. The respondents will have a public hearing in an Employment Tribunal within a reasonable time frame. The respondents will be able to challenge evidence, there has been disclosure by the claimant of documents, and there will be reasons given for the decision. There is no breach of Article 6 and nor can it be seen how there could be.
- 51.3. A claim cannot be defeated on the basis that a party has died. There will always be a party who cannot give evidence in circumstances where a claim survives under s1(1) LR(MP)A 1934. It was plainly Parliament's intention for claims to be able to continue against (or by) the estates of a deceased party and that is why there is express provision for this.
- 51.4. There are three issues which currently rely principally on the evidence of the claimant and matters which she indicates were said by the deceased party:
- 51.4.1. In May 2019 Dr O Connell mimicked a Jamaican accent to the claimant.
 - 51.4.2. In December 2018 Dr O Connell saying words to the effect of 'if she sees a black girl here she won't think I'm a racist'.
 - 51.4.3. In April 2019 Dr O Connell told a racist joke to the claimant.
- 51.5. The respondents, in their amended defence, denies these incidents ever occurring. The key element of contention is whether these things were said at all. The reality is that the tribunal only needs to ascertain whether or not the matters were actually said to decide these aspects of the claim. This is the claimant's burden to bear to the requisite standard. The claimant is the one who must substantiate these claims. The respondent can challenge the claimant in cross examination. On any viewing, there is nothing unfair about it.
- 51.6. The only points expressly named in the respondents' skeleton argument, regarding this strike out application, rely on the evidence of Ms. Schmidt too. Ms. Schmidt can assist the Tribunal with each of the matters expressly named.
- 51.7. There is also documentary evidence to support the claimant's case. The first respondent's position is that there will be an inability to 'defend himself at any hearing'. With respect, this is plainly untrue as Mr Barnes and Premier Legal LLP have been instructed since mid 2019 in this matter. They continue to be instructed by both Respondents. As such the first respondent has counsel and a firm representing it and defending its interests.
- 51.8. In conclusion Mr Shephard states:
- 51.8.1. There can of course be a fair trial following the death of a party. The entirety of the respondents' skeleton argument is misconceived.
 - 51.8.2. There is a significant amount of other evidence in this case, including Ms. Schmidt who can attest to practically all aspects of all claims.
 - 51.8.3. There is a plethora of documentation in this case that supports the

Claimant's claim. The claims are well founded.

Discussion and Conclusions

Strike out under Rule 37 (a) - that the complaints are scandalous or vexatious or has no reasonable prospect of success

52. I have not been persuaded that the complaints should be struck out for being vexatious. In terms of the complaints having no reasonable prospects of success I am mindful of the legal position that: (i) discrimination claims should not be struck out as an abuse of process for having no reasonable prospects of success, except in the plainest and most obvious cases; (ii) only in the clearest case should a discrimination claim be struck out; (iii) the claimant's case must ordinarily be taken at its highest; (iv) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (v) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts
53. Based on the information before me today I cannot conclude the high bar, that the complaints have no reasonable prospects of success, has been met. There are no undisputed contemptuous documents that conclusively disprove the claimant's case and it is not open to the tribunal to carry out a mini trial of evidence.

Strike out under Rule 37 (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).

54. It has already been decided during the case management hearing before Employment Judge Elliott that the claim can continue against the first respondent's estate. To an extent therefore I agree with the claimant that the respondents are trying to re-litigate matters that have already been decided in that regard. The first respondent's estate, if the claimant is successful, will be liable (potentially jointly with the second respondent) for any compensation awarded by the tribunal. It appears that the real issue therefore is not that the claim should be struck out because one of the respondents is deceased but whether it should be struck out because a relevant individual directly accused by the claimant of discrimination has died and cannot therefore give evidence in person. The position would be similar if an employee of a corporate employer accused of discrimination had died and could not give evidence to rebut the allegations made against them for which the employer would be liable.
55. I am conscious of course that the first respondent cannot be a witness at the hearing. However, in relation to the allegations that have been raised against him, the first respondent was aware from the 25 July 2019 grievance of Allegations 1- 5, 7, 8, 10 and allegations concerning race discrimination and victimisation in respect of the data subject access request ("DSAR") response. There is also correspondence with the claimant's representative prior to this date concerning the allegations and early conciliation commenced on 21 June 2019. The first respondent was able to provide instructions to his legal representative on the ET1 and particulars of claims, such that a specific denial of the allegations could be made in the grounds of resistance. Although a

witness statement was not drafted for the first respondent by his legal representative, appropriate consideration can in the circumstances be given to the grounds of resistance that were produced based on the instructions given by the first respondent.

56. Evidence before the tribunal is often incomplete and the tribunal has to assess the factual matrix before it. Although not an ideal situation the tribunal would still be able to do this in this case by considering contemporaneous documentation, the evidence of the second respondent, the evidence of other individuals who had relevant interactions, hearsay evidence could be adduced as well as circumstantial evidence. The grounds of resistance, for example, cite interactions with the agency that supplied the claimant about which evidence could be given, for example: "The reasons for no longer wanting the Claimant's service were set out to her agency. In practice the agency had been told since January that the Claimant was not working out and that there were too many mistakes. Dr O'Connell agreed to try retraining, but in the end there were just too many errors which were having a negative effect on patient care, patient confidence and the practice's reputation". It is also, for example, accepted by the respondents that the first and second respondents discussed the need to advise the agency that the claimant's services were no longer needed as the level of mistakes were still too high. The respondents' position is that the pay differential was because the second respondent was a practice manager and more experienced than claimant, evidence about this could be presented by the second respondent and potentially others. In relation to the allegation at paragraph 7 of the particulars of claim that around 11 December 2018, there was a visit scheduled by Susan George of the Care Quality Commission and that Dr O'Connell said that Susan George thought he was racist, consideration, for example, could be given to whether relevant evidence could be obtained from Susan George or the other business colleagues who the respondent states attended that meeting that were black and Asian. I raise these matters by way of example not as an exhaustive list.
57. Employment tribunals are often in the position of having to consider allegations about what has been said or not said on a particular occasion where there is no documentary evidence of the discussion, where no witnesses were present and where the witnesses hold the line to very different versions of events under cross examination. The first respondent specifically denied the allegations of discrimination that have been made, including a specific denial that he made a racist joke, mimicked a Jamaican accent and that in relation to the visit in December 2018 said words along the lines of "if she sees a black girl here she won't think I'm racist". It could be taken that were he to give evidence to the tribunal in person he would also deny the allegations before the tribunal. It was submitted that without the first respondent being present to be cross-examined his credibility/demeanor could not be assessed however the judiciary are properly warned about demeanour assessments and the unreliable nature of body language, eye contact etc. whilst witnesses give evidence. As submitted by the claimant's representative it is the claimant's burden to substantiate her claims to the requisite standard and although I do not pretend it will be an easy task, the likelihood of the alleged comments/actions having taken place can be assessed by the tribunal in light of all of the evidence presented.
58. On the basis of the above I have concluded that it would not be appropriate to

take the draconian action of denying the claimant a hearing by striking out the claim on the basis that a fair hearing cannot be heard. It is important that the tribunal takes all steps it can to keep proceedings alive if it is reasonably feasible to do so in a way that provides a fair hearing. Although this is a difficult situation I have not been persuaded that it is truly the case on the facts of this matter that a fair hearing cannot be heard. I have considered whether part or parts of the claim should be struck out rather than the whole claim but the allegations are interwoven such that I do not consider that this would be the right approach in this case.

Deposit Order - 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation 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 £1,000 as a condition of continuing to advance that allegation or argument.

59. As set out above the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success. The purpose is not to make it difficult to access justice or to effect a strike out through the back door. The test for a deposit order is where a specific allegation or argument in a claim or response has little reasonable prospect of success rather than no reasonable prospect of success. The tribunal should have regard to the likelihood of the party being able to establish the facts essential to their case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward.
60. Having considered the complaints alleged and allegations made I have decided to make the deposit orders in respect of the following complaints on the basis that they have little reasonable prospects of success:
 - 60.1. **Allegation 4** against the first respondent amounts to direct sex discrimination or harassment related to sex on the basis that the motivation alleged was to show the first respondent was not racist as opposed to not sexist;
 - 60.2. **Allegation 5** against the first respondent amounts to direct sex discrimination or harassment related to sex on the basis that the motivation alleged was to show the first respondent was not racist as opposed to not sexist;
 - 60.3. **Allegation 6** against the first respondent amounted to sex and/or race discrimination, harassment and/ or victimisation on the basis that the second respondent continued working in the same room as the claimant, the second respondent is not black, the second respondent is a woman and did not consider the situation was direct sex discrimination and there is documentary evidence that on the face of it indicates the first respondent knew about and was trying to resolve the leak and building issues;
 - 60.4. **Allegation 6** against the second respondent amounted to sex and/or race discrimination, harassment and/ or victimisation on the basis that the second respondent continued working in the same room as the claimant, the second respondent is not black, the second respondent is

also a woman and there is documentary evidence that on the face of it indicates the first respondent was trying to resolve the leak and building issues;

- 60.5. **Allegation 7** against the first respondent amounts to direct sex discrimination or harassment related to sex on the basis that the joke was alleged to be racist not sexist;
- 60.6. **Allegation 8** against the first respondent amounts to direct sex discrimination or harassment related to sex on the basis that why the alleged action of mimicking a Jamaican accent is said to be because of or related to sex as opposed to race has not been pleaded and is unclear;
- 60.7. All complaints of discrimination against the second respondent in respect of **Allegation 9** on the basis that the claimant was engaged via an agency by the first respondent not the second respondent;
- 60.8. **Allegation 9** amounts to direct sex discrimination and/or harassment related to sex as against the first respondent on the basis that: (i) the claimant's stated comparator is the second respondent; (ii) an equal pay claim is not being pursued; and (iii) the basis of any allegation of a free standing sex discrimination complaint has not been pleaded;
- 60.9. All complaints against the second respondent in respect of **Allegation 10** on the basis that the claimant was engaged via an agency by the first respondent not the second respondent and therefore the termination of the contract with the agency was by the first respondent;
- 60.10. All complaints against the second respondent in respect of **Allegation 11** on the basis that the DSAR was directed to the first respondent who was responsible for the response;
- 60.11. All complaints against the second respondent in respect of **Allegation 12** on the basis that the DSAR was directed to the first respondent who was responsible for the response;
- 60.12. All complaints against the second respondent in respect of **Allegation 13** on the basis that the DSAR was directed to the first respondent who was responsible for the responses;
- 60.13. All complaints against the second respondent in respect of **Allegation 14** on the basis that the grievance was directed to the first respondent who she had been engaged by via an agency;
- 60.14. All complaints against the second respondent in respect of **Allegation 15** on the basis that the grievance was directed to the first respondent who she had been engaged by via an agency; and
- 60.15. All complaints against the second respondent in respect of **Allegation 16** on the basis that the email of 24 July 2019 was directed to the first respondent not the second respondent.

61. Points raised by the respondents' representative regarding the suggested link between the alleged protected disclosures and alleged detriments in light of, amongst other matters, the correspondence about actions to remedy the situation and office space available are not without merit. The same can be said about submissions made by the respondents' representative about the allegations against the first respondent in light of the submission that he took action in the context of legal advice on: (i) how to respond to a DSAR; and, (ii) the first respondent's obligation to respond to a grievance when engaging an individual through an agency. Those points may well yet sink the claimant's case on those matters however I have concluded that on the basis of matters before me today it is not appropriate to make a deposit order in respect of those matters.