Neutral Citation Number: [2024] EAT 146

Case No: EA-2022-000647-RS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 August 2024

**Before** :

**HIS HONOUR JUDGE BEARD**

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**Between :**

**MISS T AMBER** **Appellant**

**- and –**

**WEST YORKSHIRE FIRE AND RESUCE SERVICE** **Respondent**

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**MR JACK FEENY** (instructed by **Free Representation Unit**) for the **Appellant**
**MR DARREN FINLAY** (instructed by **Park Square Barristers**) for the **Respondent**

Hearing date: 14 August 2024

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# JUDGMENT

## SUMMARY

### PRACTICE AND PROCEDURE

### JURISDICTIONAL POINTS

A preliminary hearing to consider time limits was ordered with a Scott schedule to be prepared for the hearing. At that hearing the schedule was not in a readable format. The judge proceeded to attempt to elicit from the claimant the basis of her complaints striking out a claim of whistleblowing as being presented out of time. Further, the judge ordered deposits on aspects of discrimination claims.

The judge erred in respect of the strike out as the claimant's pleadings demonstrated claims that were in time. The judge erred as his approach contravened the guidance described in *Cox v Adecco and Others*[2021] ICR 130.

The guidance in *Cox* applies equally to consideration of deposit orders as it does not, in the main, relate to the strength of a claim but the process of analysing a claim. The judge erred in making deposit orders in a hearing which did not follow that guidance.

There were disputes of fact in respect of some aspects of the matters struck out and made subject to deposit orders and those matters need to be considered on remittal to the employment tribunal.

**HIS HONOUR JUDGE BEARD:**

1. This is an appeal against the decision of Employment Judge Lancaster. He struck out a claim of whistleblowing and ordered a deposit in respect of claims of race discrimination and harassment. I shall refer to the parties, as they were before the employment tribunal, as claimant and respondent. They are represented by Mr Feeney for the claimant and Mr Finlay for the respondent, both of counsel. The amended grounds of appeal permitted by his Honour Judge Auerbach are as follows. Ground 1:

> "In striking out the claim's complaints of whistleblowing detriment the Tribunal erred in overlooking the claimant's case and the disciplinary process did not conclude until 2nd June 2021 which would have meant that the whistleblowing detriment complaint was in time".

2. Ground 2:

> "The Tribunal also erred in overlooking the claimant relying on the deliberate act of making her private personal data publicly available on the internet on 19 August 2021 as a complaint of whistleblowing detriment, which would have meant that the whistleblowing detriment complaint was in time."

Ground 3:

> "The Tribunal erred in taking the wrong legal approach to the deposit order application in respect of the 19 August 2021 allegation for the Equality Act 2010 complaints in the absence of evidence either way about the reason for the data breach. The Tribunal could not be satisfied that the high threshold for a deposit order had been reached."

Ground 4:

> "The Tribunal erred in taking the wrong legal approach to the deposit order application in respect of the 3 August 2021 allegation for the Equality Act 2010 complaints. The Tribunal failed to have sufficient regard to the claimant's case that Mr Dixon was not an independent manager or, alternatively, was wrong to reject that case without hearing evidence on it.

3. The claim was presented on 22 September 2021, at which date the claimant was still employed by the respondent. The claimant identified three claims in the ET1 form but, at that time, did not, specifically, set out a claim of whistleblowing. However, in addition to her specific claims she also identified whistleblowing in the indications box at Part 10 of the ET1 form stating that she was relying on a protected disclosure.

4. Employment Judge O'Neill held a case management preliminary hearing on 25 November 2021, ordering the preparation of a Scott schedule. The claimant then attached what is accepted to be a lengthy and difficult to read document of 44 pages. This document set out the factual matters of her claim and it appears to be the reason for Employment Judge O'Neill's order that there ought to be a Scott schedule to clarify the claim. At that stage of proceedings the respondent had produced a holding response which only dealt with the matters related to a disciplinary hearing which formed part of the factual aspects of the case. The respondent was given permission to amend its response. Employment Judge O'Neill's order also set out that there should be a preliminary hearing to deal with the respondent's further contention that many of the claims appeared to be out of time. That hearing was held before Employment Judge Lancaster on 14 March 2022; the subject of this appeal.

5. At that hearing, it is common ground, that there was no bundle of documents prepared for the judge; neither were there written submissions from either party. No list of issues had been prepared for the judge and that the response had not been amended. It would also seem that at the hearing there was some difficulty with the Scott schedule. I understand that the Scott schedule had been prepared on an Excel spreadsheet which had been the format provided with Employment Judge O'Neill's order. The claimant had prepared her additional comments and/or explanations in that Scott schedule. That Scott schedule could either only be printed out in a format where not all of it was on the paper or printed out in a format where the size of font of the wording was too small for the judge to read. The judge then

engaged with the parties and attempted, in discussions with the claimant, to understand her claim.

6. At the end of the hearing an extempore judgment was handed down and deposit orders made. The claimant wrote to the employment tribunal on 25 March 2022. This was treated as an application for reconsideration. The application was refused and written reasons were produced. The reasons for the strike out were sent to the parties on 29 March, however the deposit order was dealt with on 15 March.

7. On 10 May 2022 the claimant lodged her appeal with the Employment Appeal Tribunal. Lord Fairley ordered a preliminary hearing to clarify the grounds of appeal. The preliminary hearing was heard by his Honour Judge Auerbach who permitted amended grounds of appeal to advance to this full hearing.

8. Dealing first with the strike out: Employment Judge Lancaster struck out all complaints of being subjected to detriment because of a qualifying disclosure. He did so on the basis that none of those claims were presented in time. The judge correctly identified, and it is common ground, that 1 June 2021 would be the date at which, counting back from the presentation of the claim, that time limits would begin to take effect.

9. In the claimant's claim documentation it is contended that the last four pages or thereabouts, although headed "Present situation" deal with, in narrative form, all the matters that the claimant was relying on. In particular those pages dealing with the period up to 2 June 2021. In respect of ground 2 within the Scott schedule (if the judge had been able to read that document) reference was made to 19 and 20 August 2021 as being relevant to matters which the claimant relied upon as detriment. In the first of those, the claimant refers to Mark Dixon. The claimant, within her original complaint, had indicated that he had made a decision in relation to a disciplinary process which, although no disciplinary charge was

found, had imposed an informal sanction of a performance improvement plan. That performance improvement plan remained a requirement until 2 June 2021.

10. On 19 August 2021, the Scott schedule sets out that details of a grievance had been published. That is, to some extent, foreshadowed at the last page of the claimant's original claim. In dealing with time limits, the judge came to the conclusion that none of the claimant's complaints of whistleblowing were in time. Having correctly identified the date at which the time would begin to run as 1 June 2021. In a short judgment the judge refers in paragraph 3 the conciliation period, in paragraph 4 to the date the claim was presented and in paragraph 5 he refers to the statutory ACAS provisions. At paragraph 6 he says this:

> "The alleged protected qualifying disclosure relates to an allegation that there had been in breach of a legal obligation to comply with a Freedom of Information request within the prescribed time limit".

That disclosure is said to have been made orally in or about January/February 2020 and is repeated in April 2020. He then goes on to say in paragraph 7 that the initially alleged detriment is the instigating of disciplinary proceedings which began on 25 February 2020. He refers to a disciplinary letter in September 2020. He then goes on to say that the disciplinary proceedings were not concluded until 15 April 2021 when it was determined that there would be no formal hearing. In paragraph 8 of the judgment the judge explains that the disciplinary process had been put in abeyance pending determination of the grievance and sets out:

> "In the course of this hearing the claimant has confirmed, however, that the detriment relied on for the purposes of the protected qualifying disclosure claim is the failure in the course of that grievance process to implement a recommendation that she be moved and come under different line management".

He then refers to that grievance outcome being given on 24 November 2020 with an appeal outcome on 9 February 2021. The judge then makes the calculation of when the claim

should have been presented. In the final paragraphs of the judgment the judge states that there is no indication of any basis which the claimant could argue that it was not reasonably practicable to present a claim.

11. The judgment as to the making of a deposit order deals with six claims, however only two of those orders are subject of this appeal. One relates to the claimant's allegation that she had been subjected to harassment on the grounds of race on or around 19 August 2021. This is in respect of the publication of the grievance on the internet. The other is that the claimant was subjected to harassment because of her race on 3 August 2021. In the reasons the judge says at paragraph 1 that the allegation of harassment on 19 August is in time and that the allegation was that the recently concluded grievance and disciplinary hearings were posted on the respondent's intranet without it being restricted to those with authority to view them. Paragraph 3 I should read as a whole:

> "Although I have not heard evidence, nor, therefore, made any decision on this matter, it is wholly plausible, as the respondent contends, that this was due to a software update which unexpectedly led to the removal of the necessary permissions from the system. The respondent says that the problem was rectified within 48 hours of it being discovered".

He goes on to say that it was a manager of the respondent who alerted the claimant to the issue in respect of personal data and that there was no evidence that it was seen by an unauthorised person. He then says this:

> "In the circumstances there is, in my view, at best little reasonable prospect of the claimant establishing that she was subject to any unwanted conduct nor that this was related to her race, let alone that Mr Stone did this deliberately, as she has asserted".

The judge then goes in paragraph 6 to deal the second of these matters, although the earlier in time where he says:

> "Following the conclusion of the disciplinary proceedings where there was no action taken against the claimant, Mark Dixon, who was a decision maker, concluded there should be

> team coaching involving the claimant and the claimant says that that was harassment because of race".

His conclusion was that because (a) the proposal came through the intermediary of an independent manager in the context of seeking to move forward and re-establish relationships and (b) that it was to be conducted by an external facilitator, that he considered that there was little reasonable prospect of success. He concluded that, objectively, there was little reasonable prospect that this would amount to conduct which could pass the threshold for harassment. It appears to me, therefore, that the judge was concentrating on the issue of team coaching and not the personal improvement plan. It is the latter which appears to be relied on in respect of this case, although, to be fair to the judge, it is buried in the detail. Yet it is clearly part of what the claimant complained of in the full claim.

12. Mr Feeny for the claimant, dealing with ground 2 first, argues that I should take account of the fact that, within both of the sets of reasons, no case law was cited, nor were tests that ought to be applied nor even. The judge did not set out the statutory section that was to be applied nor the relevant Employment Tribunal Rules. Mr Feeny argued that the appeal is in two parts, the first in relation to the strike out and the second in relation to the deposits. Ground 2 shows that there are detriments, clearly set out within the pleaded case, that were not dealt with by the judge. Therefore, he contends there is an error of law because there had been no withdrawal by the claimant of any part of the claim. Despite that the judge has limited the claimant to specific dates and these are not all of the dates of claimed detriments and, particular, dates which could bring her claims within time.

13. The claimant relies on *Cox v Adecco and Others*[2021] ICR 1307 with emphasis placed on paragraph 26 within that judgment. Importantly, in *Cox* it is made clear that a judge needs to identify the issues in order to be able to properly decide a case. Further, a legally represented respondent, needs to assist an Employment Tribunal in identifying the issues. It is contended that the claimant was placed in precisely the position which *Cox* says that she

should not be placed in. She was a litigant in person attempting to explain her case, in the phrase used within that judgment, as a "rabbit in the headlights". The judge had required the claimant to set out her position, there and then at the hearing. The judge should have considered, in depth, the pleaded case in order to reach the decision. The judge should approach matters considering what was said at the hearing along with the pleadings, and not was said alone.

14. Mr Feeny contends that the premise that the judge based his conclusion on was wrong. The judge did not take account of the 2 June date and the August dates in coming to his conclusion. He argues that the whistleblowing complaints should not have been struck out on the time limits basis and that is the only basis upon which this tribunal can deal with them.

15. In respect of ground 1, Mr Feeny refers to a factual dispute, the Judge's finding that the disciplinary process came to an end on 15 April 2020. That date must relate to the ET3 response. The grounds of resistance sets out 15 April as the date when the claimant was notified that the disciplinary process was not being pursued. The claimant does not accept that 15 April is the correct date for the end of the process. Relying on the decision in *Tait v Redcar and Cleveland Borough Council* [2008] UKEAT/0096/08/ZT the claimant contends that the process does not end because of the informal disciplinary result. The informal disciplinary sanction is set out to some extent in the ET3. The respondent's position was that there was insufficient evidence to take the matter to a formal hearing and that the claimant ad been told that no further action would be taken in connection with the allegations against her; however, the letter setting out the decision to the claimant adds this:

> "However, what is clear from the evidence I have seen is there are some clear relationship issues within the team which cannot be healthy for anyone in the team and also not conducive for the effective running of this small department"

The letter then endorses recommendations which include mediation being offered, a team coaching programme and an informal personal improvement plan to be developed in respect of communication which it is indicated was a form of support and not punishment. Then the further comment:

> "Whilst there is insufficient evidence to progress to a formal hearing, the evidence suggests some of your actions have not been conducive with the effective running of a small team".

16. Mr Feeny's argument in terms of ground 1 is that that this also falls within the *Cox v Adecco* approach. Additionally, that is reinforced as being an error of law because there is a factual dispute between the parties as to whether that process had been concluded or not.

17. With regard to the deposit allegations which were found to have little reasonable prospect of success, the claimant argues that the judge was drawing factual conclusions from disputed matters not taking the claimant's case at its highest. It is also argued that the judge's use of the word "plausible" does not follow any of the tests which would normally be expected to be applied in a claim of this nature. The test for unwanted conduct, it is argued, is not the same as the test for detriment and taking the factual case at its highest the disabling of permissions so that there could be access to the internet was sufficient to be unwanted conduct. In terms the test for unwanted conduct was not approached at all by the judge.

18. Ground 4, it is argued that this relates to paragraph 7 of the deposit reasons. once again, the contention is that there was a core dispute of fact. The claimant had pleaded that the manager in question, Mr Dixon, had been part of a group who had been conspiring together against the claimant. It was not appropriate for the judge to make a finding that Mr Dixon was an independent manager given that would be in dispute. Further, it is argued, that the judge's conclusion that this was not, objectively, conduct which passed the necessary threshold for harassment was wrong.

19. The respondent submitted that the judge was placed in a very difficult position. The judge did not have the material that it was expected he would have in terms of the Scott schedule. What the judge did, dealing with matters in the round and engaging in a long conversation with the claimant to obtain more details, was entirely appropriate. Paragraph 6 of the respondent's skeleton argument refers to the claims being presented and expanded upon in considerable detail. This was detail which the claimant, supported by a trade union representative, provided to the judge. Mr Finlay makes the point that, within the pleaded case certain allegations are put differently, it is on that basis that the judge was trying to clarify those allegations and whether they were set out correctly.

20. Mr Finlay approached matters in reverse and dealt ground 4 first. Publication of the grievance was on the intranet, the people that informed the claimant were her managers, it was suggested that there were multiple files upon the system, not just that of the claimant, finally that there was no indication that it had ever been seen by anyone. He gave the analogy of a HR room being unlocked but no one entering. He argued that it is implicit in the judge's reasons that given the way the issue was approached by the claimant at the hearing it was unlikely she would be able to prove that Ian Stone had published matters deliberately. The way matters were expressed by the claimant before the judge was that she was expressing a feeling that there was an act of hostility. What the judge found was related to what was being explained to him on the day. This was within his case management powers. there was little prospect of success given the way it was explained by the claimant during the course of the hearing. He accepted that it was understandable that, at the time the claim was presented, that the claimant might be suspicious. However, he argued that the claimant had an opportunity to pursue the case in any event, because a deposit of £50 had been ordered.

21. In respect of grounds 1 and 4 Mr Finlay referred to it being related to mediation and team building. Within the ET3 the informal process involves mediation, team building and the

informal performance improvement plan. When Judge Auerbach dealt with this at preliminary hearing he refers to the recommendation of mediation. It is clear that the respondent has approached this appeal on the basis that it is only mediation that was considered for the two grounds of appeal. Neither ground makes reference specifically to mediation. The grounds 1 and 4 do not reference either mediation or team building or the personal improvement plan and, as I have noted, in the judgment it is only the mediation element which is being considered. It seems also that the argument that the judge breached *Cox v Adecco* is contested by the respondent, arguing that it was an attempt by the employment judge to distil allegations which were formulated from the documents and in dealing with them to ensure that no bad points go forward.

22. In dealing with ground 2 the argument was made that it was clearly the case, as I have indicated, that the position was set out before the judge in such a way that it would be clear to the judge on a factual basis that it would be impossible for the claimant to demonstrate that this was detriment in respect of whistleblowing and the same is pursued in respect of ground 3 and in terms of the argument within ground 4 it was also set out that Mr Dixon was independent, he was someone who had been the manager dealing with the case, not someone involved in the complaints made as part of the grievance related to the disciplinary, for instance, and also that in terms the judge was taking account of the fact that an outsider will be operating the team coaching. In a memorable phrase, Mr Finlay said that the judge gave the claimant an opportunity to be clear about the matters and that gave him a helicopter view of the position.

23. In terms of the law, I begin with dealing with the Employment Tribunal Rules of Procedure 2013, Rules 37 and 39, which insofar as relevant provide at 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"

Amongst those grounds at 1(a) are "no reasonable prospect of success". Rule 39:

> "Where at a preliminary hearing"
> (that refers back to Rule 53 which means it does not have to be the open type of preliminary hearing for a deposit order to be made)
> "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 …. to pay a deposit".

24. Although these cases have not been specifically referred to in argument before me, nonetheless they are well-known and relevant, it seems to me, to the decisions that I am making today. In *Ezsias v North Glamorgan NHS Trust* [2007] 4 All ER 940 Maurice Kay LJ indicated that what needs to be in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. He gave indications within that judgment that there is a very substantial hurdle to cross for a strike out to be made, as only fanciful cases should be struck out. *Ezsias* also then demonstrates that matters of fact, including the provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike out is being considered. In *Van Rensburg v The Royal Borough of Kingston-upon-Thames and others* UKEAT/0096/07, although dealing then with the rules that preceded Rules 37 and 39, the then President of the Tribunal, Elias J, as he then was, saw no reason to limit matters which would allow a deposit to be made to lead on that as only looking towards *Ezsias* and saying essentially if factual matters can be taken into account for the more rigorous test of no reasonable prospect, then the test of little reasonable prospect should also, as it is not as rigorous, be given leeway to approach factual and legal matters.

25. I was referred to the case of *Hemdan v Ishmail and another* [2017] ICR 1307 before Simler J, as she then was. In particular I was asked to consider her analysis of the correct approach to deposit orders where at paragraphs 12 to 14 Simler J says this:

"The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example, as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where ethe Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

In terms, I understand Simler J to be setting that a tribunal has to be very careful about making findings, particularly findings of fact, or how a fact might be proved in dealing with deposits. This is particularly so in the case of parties with the potential for miscommunication, such as litigants in person or in cases where there are complex pleadings not pleaded by a lawyer.

26. The case of *Cox v Adecco Group* [2021] ICR 1307 his Honour Judge Tayler makes a thorough examination of the previous case law, drawing the threads of analysis together. In paragraph 28 of the judgement he sets out nine elements which should be taken account of by Employment Tribunals in dealing with strike out arguments. Mr Feeny contends these are equally applicable to deposit applications; I agree with that proposition. The case law relating to deposit applications demonstrates that a less rigorous test is to be applied as to threshold. That threshold relates to the strength of the case advanced. The nine elements set out in paragraph 28 by his Honour Judge Tayler are:

> "(1) No-one gains by truly hopeless cases being pursued to a hearing;
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
>
> (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
>
> (4) The Claimant's case must ordinarily be taken at its highest;
>
> (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.
>
> (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.
>
> (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
>
> (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances".

It appears to me that each of those elements could be applied to the case of whether a deposit should be ordered, apart from numbers 1 and 2 they do not touch upon the strength of a case but to the analysis of that strength and the procedures adopted.

27. In terms of a discussion and conclusions I begin by reminding myself of the function that an employment judge undertakes at an open preliminary hearing when dealing with Rules 37 and 39 of the 2013 Rules. They are required to decide, in relation to the specific statutory requirements of a claim or response, that a party has either no or, alternatively, little reasonable prospect of establishing claims or responses or parts of claims and parts of responses. The Judge will be considering a reasonably broad range of matters. For instance, in a claim of unfair dismissal a Judge would approach matters by, perhaps, examining the *Burchell*[1] guidelines. In claims of harassment, might require a judge to consider the process set out in the *Dhaliwal*[2] judgment which analyses the legislative steps.

[1] British Home Stores Ltd v Burchell [1978] IRLR 379
[2] Richmond Pharmacology v Dhaliwal [2009] IRLR 336

28. Such a hearing should not generally, as can be seen from the authorities, deal with significant disputed matters of fact. To do so would not be in keeping with the interlocutory nature of the procedure. Further, as has been pointed out in *Hemdan v Ishmail*, the preliminary process should deal with issues that can be resolved within a limited use of tribunal time. What such a process is to explore is whether a pleaded case cannot (strike out), or can only weakly (deposit), demonstrate a statutory requirement or a legal defence. This is not limited to legal issues, factual matters can be considered, but only in exceptional circumstances. Generally, this is a procedure that should not hear evidence from witnesses. However, contemporaneous documentary evidence can be considered in appropriate circumstances. A case advanced should be taken at its highest. That is a phrase regularly in use in courts and tribunals, but it does not mean, naively accepting the case advanced. At its highest requires the judge to test the factual account. This would include for example examining the case against basic logic, internal inconsistency or any contradiction by contemporaneous documentary evidence. Therefore, a claim or a part of a claim is not taken at its highest within its own terms, but is examined through the prism of reality. Thus a fanciful case is subject to strike out or if not quite so fanciful to a deposit being ordered. But it is important for me to remember in dealing with this that "realistic", as it was set out by Maurice Kay LJ, simply means "it could be the case"; it is not a substantial hurdle to cross.

29. I have considerable sympathy for the employment judge. What he was faced with, in a complex case, was made more difficult by being pleaded over 44 pages in a format which was not clear in its exposition. That it was not clear is made plain by the need to order a schedule. However, that schedule was of little use to the judge, because he could not physically read it. The judge, no doubt attempting to comply with the overriding objective, began the process of delving into the claimant's claim. That, however, in my judgment, is where the difficulty begins. It is where the *Cox* guidance comes into play.

30. Mr Finlay, in his submissions, described the judge dealing with matters in the round. The judge attempting to find if anything was missing from the schedule along with exploring allegations, made multiple times in the pleading, but expressed in different ways. In my judgment, that is precisely the kind of situation referred to by his Honour Judge Tayler in *Cox*. The "rabbit in the headlights" analogy is clearly applies here. The way in which the case was pleaded, on an in-depth analysis (I am very grateful to Mr Feeny for that analysis), it is clear that the case as pleaded gave a date that falls in August 2021. That date was well within the time limits. On that basis the appeal in ground 2 should succeed. The judge made no findings as to whether that claim should be struck out for any other reason than time limits. The claimant was trying to explain this claim at the hearing, in the pressure cooker, as it were. She was using a document prepared in an unreadable format. This replicates *Cox* in that the judge was simply relying upon the claimant's explanation without referring in detail to the documents and pleadings.

31. On that basis ground 1 does not need to be considered in depth as it is an event earlier in time but still within the time limit. In any event it appears to me there is a factual dispute in respect of ground 1 as to whether the disciplinary process came to an end. The claimant's contention that it was the imposition of a PIP which was not removed until 2 June needs resolution. This is an issue that should be properly decided by the Employment Tribunal and certainly cannot be decided by this tribunal. That ground of appeal is upheld for the same reasons as ground 2.

32. The deposit appeals in grounds 3 and 4 are subject to the same error as that I have described for ground 2. In my judgment, the *Cox* approach applies equally to the judges approach to making these decisions. I perhaps need not go any further and it is probably wiser not to go much further given that these are decisions again which the Employment Tribunal will need to make. I uphold the grounds of appeal but also indicate that the basis for that decision on appeal includes that there were disputed facts. Despite the eloquent arguments advanced by

Mr Finlay it is not clear to me that the judge was in a position to make findings of fact solely on the basis of submissions. There was no documentation and, indeed, no pleaded defence case beyond the holding grounds of resistance. I should make one point, having decided that *Cox* applies then perhaps I do not need to go any further. However, that said, there does need to be some clarity, it appears to me, as to which aspects of the letter from Mr Dixon sent on 15 April are relied upon by the claimant.

33. I would also make these general comments. There does not appear, from anything I have seen, to be any guidance connected to the online or paper forms as to how claimants should complete the Part 8 section of the ET1 (or any document that they attach to complete the section). Individuals will take very different approaches to completing that part. It is unsurprising, in those circumstances, that first time litigants in person will produce a document that will vary from the voluminous and confusing to that which is short and lacking in essential detail. Indeed, in some cases it will be voluminous but still lack essential information. That creates problems for a tribunal service under pressure, as Mr Finlay argued. Previous attempts have been made to deal with this by the production of Scott type schedules, however, that has proved in practice to create more problems than it solves and has been the subject of judicial disapproval.

34. It appears to me that there is no alternative at present to Employment Tribunal judges delving deeply in case management type hearings with parties. This would be to make sure that their cases are properly understood. In such hearings, the judge reducing that analysis to a list of issues, could ask the parties to consider it, giving time to respond if they disagree with the list. That will be time consuming and it could also lead, I am sure, to complaints that judges are taking sides in some way or other. However, there does not appear to me to be any useful alternative to that approach at present given the absence of any external guidance.

35. On that basis, I need to consider how to approach the remittal of this case to the Employment Tribunal. Submissions have been made within the skeleton arguments, but it seems to me appropriate that I should ask the parties given the way in which I have approached the judgment what they submit ought to be done.

36. Following discussion I have ordered that the matter be remitted to the regional Employment Judge for allocation of the case management for rehearing.