EMPLOYMENT TRIBUNALS

Claimant: Mr. H Lally

First Respondent: CBRE Managed Services Limited
Second Respondent: Alan Warner

Heard at: London South, by video.

On: 19 February 2024

Before: Employment Judge Cawthray

Representation
Claimant: Mr. Banerjea, Counsel – pro bono
Respondent: Mr. Milsom, Counsel

RESERVED JUDGMENT

1. The Claimant's application to amend his claim is refused. The reformulated allegation of direct discrimination and harassment under allegations 33.3(i) and 33.4(i) will not continue.

2. The complaints of direct discrimination and harassment under allegations 33.3(ii), 33.3(iii), 33.4(ii) and 33.4(iii) were not presented within the applicable time limit. It is not just and equitable to extend the time limit. The complaints are therefore dismissed.

3. The complaint of unlawful deduction for wages under allegation 33.2.(ii) is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

4. The complaint of unlawful deduction for wages under allegation 33.2.(i) continues but is subject to deposit order.

5. The Claimant withdrew his unfair dismissal complaint.

REASONS

Introduction, Evidence and Procedure

1. The Claimant submitted a claim to the Employment Tribunal on 16 January 2023, following ACAS Early Conciliation between 12 and 16 January 2023.

2. A case management preliminary hearing took place with EmploymentJudge Burge on 17 October 2023. The Claimant did not have legal representation at that hearing, but the majority of the hearing was undertaken discussing and clarifying the basis of the Claimant's complaints. The complaints pursued by the Claimant were recorded in the Case Management Order & Summary sent to the parties on 18 October 2023.

3. The Case Management Order & Summary also set out the issues forconsideration at the public preliminary hearing today and set out case management directions.

4. The final hearing in this claim was listed to take place at the Employment Tribunal in Ashford on 18, 19, 22, 23 and 24 April 2024. The Respondent's Counsel is not available on 22 April 2024 and has requested that the case not be heard on 22 April 2024 but that 25 April 2024 be added.

5. I was provided with the following documents: an agreed bundle amountingto 158 pages, witness statement from the Claimant, witness statement from the Claimant's mother and written submissions from the Respondent. The Claimant's mother did not attend the hearing.

6. The Claimant gave oral evidence and was cross-examined by Mr. Milsomand I asked him questions in relation to his means to pay a deposit order. Both parties gave oral submissions.

7. No adjustments to the hearing were required by any attendee.

8. A detailed discussion took place at the start of the hearing regarding theissues to be considered today and the approach. This took significant time, despite the case management preliminary hearing on 17 October 2023. The Claimant was seeking to bring the following complaints: unfair dismissal, unlawful deduction from wages, associative direct disability discrimination and harassment related to disability.

9. At approximately 11.30am, in response to me asking for clarification of thetimeframe for allegations 33.3.(i) and 33.4.(i) Mr. Banerjea explained that allegations 33.3.(i) and 33.4.(i) were not correct and that instead of being *"the Respondent stopped giving him work (but was still paying him) because of or related to his mother's disability"* it should be *"The First*

Respondent knowing the Claimant's circumstances in relation to his mother's disability offered work to the Claimant that he was unable to take with the effect that it had stopped giving him work. The Claimant says this took place from 14 December 2021 until 5 January 2023". Mr. Milsom submitted that this was an entirely new allegation and was the opposite to the allegation set out at paragraphs 33.3.(i) and 33.4.(i) and that it required an application to amend and that any such application would be opposed.

10. Mr. Banerjea confirmed that the Claimant wished to make an application toamend, and the parties agreed the application should be considered today.

11. The Claimant had complied with directions in relation to the Claimant'smother's illness, and the Respondent does not accept that the Claimant's mother was disabled in accordance with section 6 of the Equality Act 2010. The hearing today had not been listed to consider whether or not the Claimant's mother's illness amounted to a disability or not. I discussed the situation with the representatives, and in view of the situation, they agreed that the other issues, as set out below, should be considered, and whether or not the Claimant's mother was disabled or not would, and the approach to that matter, would need to be revisited following determination of the issues. The parties agreed that for the purposes of determining the issues listed below, I should proceed on the basis that the Claimant's mother was disabled – but the Respondent made it clear this was not agreed.

12. The Claimant had sought to bring an unfair dismissal complaint butremains employed by the First Respondent and has not resigned. Mr. Banerjea confirmed that the unfair dismissal complaint was withdrawn. I have reflected and decided that, given the Claimant's remains employed, it is not appropriate at present to issue a dismissal upon withdrawal judgment.

The Issues

13. Set out below are the issues that I needed to consider.

Application to amend

14. The Claimant wishes to amend allegations 33.3.(i) and 33.4(i) to *"The First Respondent knowing the Claimant's circumstances in relation to his mother's disability offered work to the Claimant that he was unable to take with the effect that it had stopped giving him work. The Claimant says this took place from 14 December 2021 until 5 January 2023".*

Time limits – disability and harassment complaints

15. At the start of the hearing Mr. Banerjea stated that the Claimant did notaccept that allegations set out at paragraphs 33.3(ii), 33.3(iii), 33.4(ii)

and 33.4(iii) were out of time. He said the Claimant's position was that they were in time because they formed part of an ongoing flexible working

request process. Accordingly, the issues for determination in relation to time limits were:

a. Were the complaints set out at paragraphs 33.3(ii), 33.3(iii), 33.4(ii)and 33.4(iii) made within the time limit in section 123 of the Equality Act 2010? This requires deciding:

    i. Was the claim made to the Tribunal within three months(plus early conciliation extension) of the act to which the complaint relates? ii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

b. If not, were the claims made within a further period that the Tribunalthinks is just and equitable? This requires deciding:
    i. Why were the complaints not made to the Tribunal in time? In any event, is it just and equitable in all the circumstances to extend time?

Strike Out

16. Should the claim, or any part of it be struck out because it has noreasonable prospects of success?

Deposit Order

17. Does the claim, or any part of it, have little reasonable prospect ofsuccess?

18. If so, should the Claimant be ordered to pay a deposit of between £1 and£1,000 as a condition of continuing with it.

Rule 50 – request for anonymization

19. The Claimants wishes for the details regarding his mother to beanonymized throughout the proceedings and that specifically his mother is not referenced by name, and is simply referenced as the Claimant's mother and that no details of his mother's illness are referenced, and her condition is simply referenced as the Claimant's mother's illness.

20. Mr. Banerjea stated the Claimant was not seeking a restricted reportingorder.

Facts

21. I have sought to only make findings of fact that are necessary to determinethe issues for consideration.

22. The Claimant started employment with the First Respondent on 13 February 2017, and he remains employed as Space and Moves Manager although he is presently off sick.

23. As a result of the covid pandemic, the Claimant started working fromhome. During the pandemic the Claimant moved out of London and moved back in with his mother, and he worked from her home.

24. The Claimant provides support to his mother.

25. The Claimant's contract of employment records his place of work as: *"Your normal place of work is the Company's and Clients offices in London. We may ask you to change your work location from time to time where the business requires it, on either a temporary or permanent basis. You will not be required to work outside the UK for any period longer than a month at a time."*

26. Details in relation to holiday entitlement and arrangements are set out inclause 9 and schedule 1 of the contract of employment. Clause 9 also references a Holiday Policy. Clause 13 deals with absence from work and in relation to pay states *"… The company will pay you Statutory Sick Pay. Any further entitlement to Company sick pay is confirmed in your Table of Terms and will always be at the Company's absolute discretion."* Schedule 1 states that employees with 2 years plus service are eligible for 20 days enhanced sick pay.

27. The Claimant discussed and exchanged emails regarding workingarrangements with the Second Respondent in summer and autumn of 2021.

28. The Claimant made a flexible working request on 14 December 2021 asking *"to perform some or all of the work from the employee's home, a request to change accounts/site"*. The Claimant was living at his mother's house in Coventry. The Claimant did not provide significant information about his mother's illness in his request.

29. On 20 December 2021 a meeting took place to discuss the request, andthe Claimant said he wanted a change of account and to work from home. The Claimant indicated he would be flexible on travelling for work and emphasized that he did not want the Bank of America work.

30. On 23 December 2021, following the meeting, the First Respondent sentthe Claimant a letter noting there were not permanent remote/home working roles as all current roles would require travel across the UK. However, the letter proposed a three-month trial period work remotely from home on Bank of America project that enabled remote working. It was clear this was a temporary arrangement and that at the end the Claimant would revert to previous working arrangements. The letter scheduled a review meeting for 28 February 2021, and also set out the right to appeal. The Claimant accepted the trial, and this work ran until 31 March 2021.

31. Further meetings to discuss the flexible working request took place on 8 and 16 March 2022. The Respondent asked for clarification on the basis of his flexible working request and during the meeting on 16 March 2021 the Claimant said, as recorded in the meeting notes: *"Harmandeep confirmed he wanted to remain London based contractually with more flexibility for hybrid opportunity and homeworking".*

32. Following the meeting the Claimant was sent a letter on 24 March 2022. The letter was letter was headed "Outcome of Flexible Working

    Application". The letter noted the changes from the Claimant's original request and noted that the Claimant's preference at 16 March 2022 was to reman London based with some home working. It stated that as his current contractual location was London, no change was required to his working arrangement and that this *"concluded the flexible working request process and no permanent changes to your work location will be made, as per your preference."* It stated that they would continue to discuss alternative projects. The letter set out the Claimant's right to appeal.

33. The Claimant was moved to the Variable Team from 1 April 2022, whichmeans employees are assigned to various projects.

34. There are emails in the Bundle at the end of May and June 2022 regardingprojects that the Claimant was being asked to help support. The Claimant was being asked to support a four-week remote and variable project with Bank of England. The Claimant raised a complaint following this request. The Claimant did not want to work on Bank of America projects.

35. Documents in the bundle indicate the Claimant had discussions withSarah La Roche regarding work arrangements in June and July. There was also intermittent and ongoing correspondence regarding work arrangements. The Claimant's position on being willing to travel for work changed, and by October 2022 he appeared to be saying he did not wish to travel for work.

36. The Claimant started a period of sick leave on 9 November 2022. Thereare ft notes in the Bundle that certify the Claimant as being unfit for work until 23 December 2022. It is not clear what days the Claimant was absent from work due to sickness in the previous 12 months, but from appeal correspondence it appears he had taken 18 days sick leave.

37. On 3 January 2023 the Claimant wrote to Sarah La Roche with acomplaint about his treatment and working arrangements and made a further request to change his working arrangements. A dialogue followed this email.

38. The Respondent sent the Claimant a letter with proposed exit settlementarrangement on 5 January 2023.

39. The Claimant contacted ACAS on 12 January 2023 for the purposes ofEarly Conciliation and was issued with an Early Conciliation certificate on

16 January 2023. He submitted his claim to the Employment Tribunal on 16 February 2023. In his witness statement the Claimant said, *"I issued the claim on 16 February 2023 as I felt that the Respondent was not adhering to a clear process in considering my flexible working request*".

40. A meeting to discuss the Claimant's working arrangements took place on27 June 2023. The Claimant considers this was an appeal meeting. The Claimant was informed of the outcome, in writing, on 24 July 2023. The letter was headed: "Appeal for FWR Outcome".

Law

Application to Amend

41. I considered rules 29 and 34 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (**the ET Rules**), the Presidential Guidance on Case Management and the principles established in the leading cases including *Selkent Bus Company Ltd v Moore 1996 ICR 836, EAT, Chaudhry v Cerberus Security and Monitoring Services Ltd 2022 EAT 172, Vaughan v Modality Partnership UKEAT/0147/20/BA(V)* the cases referenced by the parties and the representations of the parties.

Time – whether just and equitable to extend the time limit allegations 33.3(ii), 33.3(iii), 33.4(ii) and 33.4(iii)

42. Section 123 of the Equality Act 2010 sets out the time limit for bringing harassment and discrimination claims in the Tribunal. It provides that complaints of discrimination should be presented within three months of the act complained of.

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which theproceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of theperiod.
(b) failure to do something is to be treated as occurring when the person inquestion decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P mightreasonably have been expected to do it.

43. Section 123(1)(b) provides that where a discrimination claim is prima facieout of time it may still be brought *"within such other period as the Tribunal thinks is just and equitable*". This provides a broader discretion than the reasonably practicable test for other claims.

44. The time for presenting a claim is extended for the duration of ACAS EarlyConciliation.

45. However, where the ACAS EC process was started after the primary timelimit had already expired the ACAS "freezing" of the time limits does not operate to assist a Claimant (Pearce v Bank of America EAT 0067/19).

46. Time limits should be adhered to strictly (relevant case being Robertson vBexley Community Centre 2003 EWCA CIV 576.)

47. The burden of proof is on the Claimant.

48. The case law on the application of the "just and equitable" extensionincludes British *Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble: -

"That section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

- *the length of and reasons for the delay. the extent to which the cogency of the evidence is likely to be affected by the delay.*
- *the extent to which the party sued had cooperated with any request for information.*
- *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.*
- *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.

49. In *Aberttawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194* the Court of Appeal noted that the tribunal has a wide discretion, and the Tribunal was not restricted to a specified list of factors.

50. The most important part of the exercise is to consider the length andreasons for the delay and balance the respective prejudice to the parties.

51. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]* the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said: -
"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the application convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

52. Subsequently in *Chief Constable of Lincolnshire -v- Caston [2010] IRLR 327* the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

53. In *Department of Constitutional Affairs -v- Jones [2008] IRLR 128* the Court emphasized that the guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Other factors may be relevant too. At paragraph 50 Hill LJ said: -
"The factors which have to be taken into account depend on the facts, and the self-directions which need to be given must be tailored to the facts of the case as found".

54. I considered the principles derived from case law in relation to the merits ofa claim.

<u>Strike Out</u>

55. Under Rule 37 a claim or part of a claim can be struck out on grounds thatinclude it has no reasonable prospect of success. A claim cannot be struck out unless the party has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

56. Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

***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 hasbeen 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 beenpresented, as set out in rule 21 above.

57. Operation of rule 37(1)(a) requires a two-stage test.

58. Firstly, has the strike out ground (here "no reasonable prospect ofsuccess") been established on the facts.

59. If so, secondly is it just to proceed to a strike out in all the circumstances(which will include considering whether other lesser, measures might suffice).

60. When assessing whether a claim has no reasonable prospect of successthe Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely *(Balls v Downham Market High School and College [2011] IRLR 217).* The Tribunal must take the allegations in the claimant's case at their highest. If there remain disputed facts, there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue, or the claim is fanciful or inherently implausible (*Ukegheson v Haringey London Borough Council [2015] ICR 1285; Merchkarov v Citibank NA [2016] ICR 1121).* In other words, a strike out application has to be approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact.

61. In *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330* the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in *Ezsias,* where the facts sought to be established by the claimant were *'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'* (para 29, per Maurice Kay LJ).

62. A strike out application succeeds where it is found that, even if all the factswere as pleaded by the claimant, the complaint would have no reasonable prospect of success. It was said by Underhill LJ in *Ahir v British Airways [2017] EWCA Civ 1392* that "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment… Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for making a deposit order, which is that there should be "little reasonable prospect of success."

63. There is a special need for caution in strike out discrimination casesbecause they are generally fact sensitive, because of the public interest in examining the merits at a final hearing, and because of the shifting burden of proof.

64. Where a litigant in person is involved, the tribunal should not simply askthe question orally to be taken to the relevant material in support of the claim but should also carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it*; Cox v Adecco Group UK [2021] 1CR 1307.*

65. If a strike out application fails the argument about the overall merit of theclaim is not decided in the claimant's favor. Both the claimant and the respondent argue their positions on the merits in full and afresh at the full hearing.

66. The EAT, in the case of *Mechkarov v Citibank NA [2016] ICR 1121*, summarized the approach to be followed by a Tribunal when faced with an application to strike out a discrimination claim as follows:

    a. Only in the clearest case should a discrimination claim be struckout.

    b. Where there are core issues of fact that turn to any extent on oralevidence, they should not be decided without hearing oral evidence.

    c. The Claimant's case must ordinarily be taken at its highest.

    d. If the Claimant's case is "conclusively disproved by" or is "totallyand inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.

    e. A Tribunal should not conduct an impromptu mini trial of oralevidence to resolve core disputed facts.

67. In *Yorke v Glaxosmithkline Serviced Limited*, at paragraph 51, HHJ Tayler states: *"Where the parties are represented it is the representatives that bear the principle responsibility for ensuring that the list of issues is up to the job".*

68. Although a poorly pleaded case presents difficulties for the tribunal,striking out the claim is rarely the answer. In case where there is a litigant in person, as established in *Mbuisa v Cygnet Healthcare Ltd EAT 0119/18* the proper course of action would be to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and make a deposit order if appropriate.

Deposit Order

69. The power to make a deposit order is provided by rule 39 of the ET Rules,as follows:

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 topay 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 theorder 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 specificallegation 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 decidesthe 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 orpreparation 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.

70. The test for the ordering of a deposit is therefore that the party has littlereasonable prospect success. It was said by the Employment Appeal Tribunal in *Hemdan v Ishmail [2017] IRLR 228* that 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" and it is" emphatically not…to make it difficult to access justice or effect a strike out through the back door."* A deposit order should be capable of

    being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise.

71. As for the approach the Tribunal should take, in *Wright v Nipponkoa Insurance [2014] UKEAT/0113/14 and Van Rensburg v Royal Borough of Kingston-Upon Thames and others [2007] UKEAT/0095/07* it was said, a Tribunal is not restricted to a consideration of purely legal issues; it 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. That said there is a balance to be struck as to how far such an analysis can go. It was also made clear in Hemdan that a mini trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merit hearing where evidence is heard and tested.

72. The Respondent pursues the application as an alternative to their strikeout application. The test is therefore one of "little reasonable prospect of success" as opposed to "no reasonable prospect of success" for a strike out application.

73. Rule 39 allows a tribunal to use a deposit order as a less draconianalternative to strike-out where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success.

74. In *Jansen van Rensberg v Royal London Borough of Kingston-uponThames UKEAT/0096/07,* the EAT observed: *"27. … the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

75. A deposit order application has a broader scope compared to a strike outapplication and gives the Tribunal a wide discretion not restricted to

considering purely legal questions. The Tribunal can have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it.

76. In a case where a Tribunal concludes that a claim or allegation has littlereasonable prospect of success, it does not mean that a deposit order must be made. The Tribunal retains a discretion in the matter and the power to make such a deposit order has to be exercised in accordance with the overriding objective and with having regard to all of the circumstances of the particular case.

Rule 50 – anonymization

77. Rule 50 of the Employment Tribunal Rules states:

50.— *(1) A Tribunal may at any stage of the proceedings, or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*

(2) In considering whether to make an order under this rule, the Tribunal shallgive full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, inwhole or in part, in private.

(b) an order that the identities of specified parties, witnesses or other personsreferred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record.

(c) an order for measures preventing witnesses at a public hearing beingidentifiable by members of the public.

(d) a restricted reporting order within the terms of section 11 or 12 of theEmployment Tribunals Act.

(4) Any party, or other person with a legitimate interest, who has not had areasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

(5) Where an order is made under paragraph (3)(d) above—

(a) it shall specify the person whose identity is protected; and may specifyparticular matters of which publication is prohibited as likely to lead to that person's identification.

(b) it shall specify the duration of the order.

(c) the Tribunal shall ensure that a notice of the fact that such an order has beenmade in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal, and on the door of the room in which the proceedings affected by the order are taking place; and

(d) the Tribunal may order that it applies also to any other proceedings beingheard as part of the same hearing.

(6)" Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.

78. I have also had regard to the Presidential Guidance on Vulnerable parties and witnesses in Employment Tribunal proceedings.

Other relevant legislative provisions

13 Direct discriminations

(1) A person (A) discriminates against another (B) if, because of a protectedcharacteristic, A treats B less favorably than A treats or would treat others.
(2) If the protected characteristic is age, A does not discriminate against B if Acan show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3) If the protected characteristic is disability, and B is not a disabled person, Adoes not discriminate against B only because A treats or would treat disabled persons more favorably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this sectionapplies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favorable treatment includessegregating B from others.
(6) If the protected characteristic is sex—
(a) less favorable treatment of a woman includes less favorable treatment of herbecause she is breast-feeding.
(b) i n a case where B is a man, no account is to be taken of special treatmentafforded to a woman in connection with pregnancy [F1, childbirth or maternity].
(8) This section is subject to sections 17(6) and 18(7).

26 Harassment
(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic,and
(b) the conduct has the purpose or effect of—(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that isrelated to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and(c) because of B's rejection of or submission to the conduct, A treats B less favorably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B.
(b) the other circumstances of the case.
(c) whether it is reasonable for the conduct to have that effect.
(5) The relevant protected characteristics are—

- *age.*
- *disability.*
- *gender reassignment.*
- *race.*
- *religion or belief.*
- *sex.*
- *sexual orientation.*

13 Right not to suffer unauthorized deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorized to be made by virtue of a statutoryprovision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to themaking of the deduction.
(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has giventhe worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, ifexpress, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to aworker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to anerror of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
(5) For the purposes of this section a relevant provision of a worker's contracthaving effect by virtue of a variation of the contract does not operate to authorize the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
(6) For the purposes of this section an agreement or consent signified by a workerdoes not operate to authorize the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
(7) This section does not affect any other statutory provision by virtue of which asum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.
(8) In relation to deductions from amounts of qualifying tips, gratuities and servicecharges allocated to workers under Part 2B, subsection (1) applies as if—
(a)in paragraph (a), the words "or a relevant provision of the worker's contract" were omitted, and
(b)paragraph (b) were omitted.

Conclusions

Application to amend

79. In terms of general conclusions, as noted above, the Claimant submitted his ET1 on 16 February 2023, at which point he was unrepresented. Appended to the ET1 was a five-page word document setting out the basis of his claim. A Case Management Preliminary Hearing took place on 17 October 2023 and Employment Judge Burge spent most of the hearing discussing and recording the basis of the Claimant's complaints with the Claimant. A Case Management Order and Summary was sent to the parties on 18 October 2023.

80. As se out above, it was only during the course of the hearing today that Mr. Banerjea stated that allegations at paragraphs 33.3(i) and 33.4(i) were incorrect and needed reformulating. Within the Case Management Order and Summary, the allegations state *"(i) the Respondent stopped giving him work (but was still paying him) because of related to his mother's disability."*

81. I note that paragraph 16 of the Case Management Order and Summary states: *"The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side within 14 days of receiving this Order. If you do not, the list will be treated as final unless the Tribunal decides otherwise."*

82. I gave Mr. Banerjea time to take instructions and he said the allegationsshould actually be:

"The First Respondent, knowing the Claimant's circumstances in relation to his mother's disability, offered work to the Claimant that he was unable to take with the effect that it had stopped giving him work. The Claimant says this took place from 14 December 2021 until 5 January 2023".

83. Mr. Milsom objected, and said this was a completely different, indeedopposite allegation, and was not set out in the ET1. He further submitted that this allegation remained vague, and that it was not clear who is alleged to have offered work that he was unable to take, what work was offered and when, and who knew what about the Claimant's mother's illness. He said the impact of allowing the application to amend would cause significant prejudice to the Respondent and would take further work to seek to clarify the allegation and those involved and would lead to a delay in the final hearing.

84. Mr. Banerjea said in the Claimant's mind he had considered theRespondent had stopped giving him work but only today realized that stopped was the wrong phrase and that it was only today that the Claimant had the opportunity to consider amending. He also referred to documents in the Bundle which he says show the Claimant was offered work in Wales, that he could not do.

85. I considered that the ET1 was not "something to get the ball rolling" butnote that often unrepresented parties do not have a clear understanding of the need for clear pleadings as they do not understand the Tribunal process. However, I have also kept in mind that a careful process of case management and seeking to clarify the complaints had already taken place, and at no point before the hearing today had the Claimant, or any representative assisting him, wrote to the Tribunal setting out any concerns regarding allegations 33.3(i) and 33.4(i).

86. In reaching my conclusions in relation to each application I have kept inmind the need to consider the ET1 as a whole, and I have given careful consideration to the ET1.

Nature of amendment

87. This is not a new head of complaint. The claim already containsallegations of direct disability discrimination and harassment.

88. The ET1 also contains general reference to a Ford opportunity, that theClaimant was keen to work on. There is also reference to *"Alan has directly stopped BT where there was remote working still available".* The ET1 also includes: *"Plus he has no reason not to give me work. I have provided Alan with flexibility on taking work by geographical location and remote working".*

89. However, nowhere in the ET1 does the Claimant reference being offeredwork that the Respondent knew he could not take. The claim

form does not include, on any reading, a reference to the new allegation.

Time limits

90. On face of it, as noted above the complaint is out of time as the Claimantmade his application to amend today. However, an application can be granted subject to time limits being determined at a final hearing.

Timing and manner of application

91. The Claimant made the application to amend orally today. Mr. Banerjeasubmitted that the Claimant had not had the opportunity to consider the allegation before today. He also said the "factual contradictions" had only become apparent now. I do not accept that to be the case.

92. The basis of his allegations was discussed with Employment Judge Burge.The Case Management Order & Summary was sent to the parties promptly and specifically stated that if a party thought the list was wrong, they should write to the Tribunal and the other side. The Claimant did not do this, either on receipt or when he passed the papers to Mr. Banerjea.

93. Indeed, this matter was not even flagged as an issue prior to or at the startof the hearing today. It followed a direct question from me asking what date the Claimant said work was stopped in relation to allegation 33.3(i) and 33.4(i).

Balance of injustice and hardship

94. Mr. Banerjea made no clear submission in relation to prejudice to theClaimant, other than to say not allowing would be very prejudicial to the Claimant. He acknowledged that there would be prejudice to the Respondent. Mr. Milsom's submissions on prejudice are noted above.

95. I have considered carefully the full context, the impact of refusing and/orallowing the application on both parties and the impact on the progression of the claim.

96. Taking all the factors into account I have determined that this is oneallegation, that the Claimant has had ample opportunity to clarify, and noting the close proximity to the final hearing and in particular that the allegation remains entirely vague with no clear specificity on the alleged work offered, by who or when, the Respondent would be put to more prejudice than the Respondent at this late stage in the proceedings.

The application to amend is refused.

Time Limits

97. As set out in the Issues above, at the start of the hearing Mr. Banerjeastated that the Claimant did not accept that allegations set out at paragraphs 33.3(ii), 33.3(iii), 33.4(ii) and 33.4(iii) were out of time. He said the Claimant's position was that they were in time because they formed part of an ongoing flexible working request process. Accordingly, the issues for determination in relation to time limits were:

98. Were the complaints set out at paragraphs 33.3(ii), 33.3(iii), 33.4(ii) and33.4(iii) made within the time limit in section 123 of the Equality Act 2010? This requires deciding:

    a. Was the claim made to the Tribunal within three months(plus early conciliation extension) of the act to which the complaint relates?
    b. If so, was the claim made to the Tribunal within three months(plus early conciliation extension) of the end of that period?

99. If not, were the claims made within a further period that the Tribunal thinksis just and equitable? This requires deciding:

- Why were the complaints not made to the Tribunal in time?
- In any event, is it just and equitable in all the circumstances to extend time?

100. For ease, I have set out the precise wording of the allegations below.

33.3(ii) Not being given a permanent remoted working contract (this being refused by Rosie Hutton in March 2022)

33.3(iii) Trying to make the Claimant work on the Bank of America account (the last date this happening being June 2022)

33.4(ii) Not being given a permanent remoted working contract (this being refused by Rosie Hutton in March 2022)

33.4(iii) Trying to make the Claimant work on the Bank of America account (the last date this happening being June 2022)

101. It is important to keep in mind the precise wording of the allegations, as clarified and recorded by Employment Judge Burge. I need to consider whether the specific allegations, as framed, are out of time and whether or not it would be just and equitable to extend time.

102. The key submission for the Claimant was that the complaints were in time as they formed part of an ongoing flexible working request. He said the dates in the allegations were key milestones.

103. Mr. Milsom, for the respondents, submits that the last act of discrimination was June 2022 and was a one-off decision with continuing consequences, and that is important to look at each allegation carefully. He says the facts that gave rise to the two allegations were known to the Claimant in March and June 2022. He says there was not an ongoing flexible working request, that was not how the allegations were framed, and the Claimant made a fresh application in January 2023. He says the Claimant has not demonstrated why it would be just and equitable to extend time.

104. Dealing firstly with whether the allegations were made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates, and also whether they were made within three months (plus early conciliation extension) of the end of that period.

105. I conclude that they were not. The allegations themselves contain a specific time point, the refusal being March 2022 and trying to make the Claimant work on the Bank of America account being June 2022. These are specific dates with standalone allegations, there is nothing to suggest that these factual events form part of an ongoing flexible working request, indeed such an allegation does not form part of the claim.

106. Accordingly, taking into account ACAS Early Conciliation stared on 12 January 2023 and ended on 16 January 2023, and that the claim was presented on 16 February 2023, I find that none of the four allegations were brought in time.

107. Accordingly, I have gone on to consider whether it was just and equitable in all the circumstances to extend time.

108. I considered a range of factors.

Length of delay

109. In relation to the allegations, the two specified dates were March and June 2022. Although no specific dates, taking a notional 31 March and 30 June 2022, this means that the primary limitation date of three months would have been 30 June and 29 September respectively. ACAS was not contacted within the primary time limit, indeed not till 12 January 2023.

110. The Claimant did not submit his claim until 16 February 2023, some eight and five months after the primary deadline. There is no explanation for the month delay between the end of ACAS Early Conciliation and submission of the ET1.

111. With a primary time, limit of only 3 months, plus any extension under the ACAS Early Conciliation provisions, a delay of a further five and eight months is very significant. This is not a case where the claim was just a few days late.

Reasons for delay

112. The Claimant was aware of the facts that gave rise to the claims in March and June 2022. Indeed, he raised his concerns and expressed his wishes in relation to work location and projects as they changed with the respondents.

113. As set out above, the Claimant only contacted ACAS after the First Respondent made an offer for employment to end.

114. The only explanation now provided for the delay was that there was continuing flexible working request.

115. There were no other reasons put forward by the Claimant. The Claimant had reasonable opportunity to research his legal rights. Indeed, he did take steps by contacting ACAS.

Prejudice to parties – cogency of evidence - impact on delay

116. In considering the balance of prejudice and hardship, it is the case the Claimant will not be able to continue with his discrimination and harassment claims, noting the application to amend was refused. However, the latest allegations are from March and June 2022.

117. The loss of the right to bring a claim is a consequence of the time limit provisions, which are intentionally short.

118. There were no submissions made regarding the ability to obtain evidence, but I note the events are from March and June 2022. The allegations are contained, and it appears there is some documentary evidence. It was not clear what witness evidence will be called. The final hearing is due to start in April 2024, on average two years after the allegations.

119. In my view, all witnesses, including the Claimant, will be negatively impacted by the delay and the ability to recall matters. I have no information on whether any of the witnesses for the Respondent are still employed.

Merits of case

120. The strength of a claim may be a relevant factor in deciding whether is it just and equitable to extend time, but even where a case is strong, time may not be extended. I have noted that there two allegations of direct discrimination that are also pleaded as harassment.

121. I have also noted that section 212 of the Equality Act 2010 says:
"detriment" does not …… include conduct which amounts to harassment.

122. The Explanatory Notes for Section 212 Equality Act 2010 in regards to the definition of detriment under the Equality Bill provide the background reason for the definition as follows:

"It is necessary to clarify in this clause that "detriment" excludes harassment, to make it clear that where the Bill provides explicit harassment protection, it is not possible to bring a claim for direct discrimination by way of detriment on the same facts."

123. In simple terms, the effect of section 212(1) is that harassment and direct discrimination claims are mutually exclusive, meaning that a claimant cannot claim that both definitions are satisfied simultaneously by the same course of conduct. A claimant must choose or run alternative claims.

124. On the face of it, considering the precise wording of the allegations, it is difficult to see any link with the Claimant's mother's illness. The documents in the bundle appear to provide explanations for the outcome of the flexible work request in March 2022 and the request for temporary work on a Bank of England project due to the Claimant being in the Variable Team.

125. It is for the Claimant to persuade the Tribunal that it would be just and equitable to extend time, on the evidence before me, he has not done so.

126. Putting matters together overall, and taking into account all these factors, and applying the test set out in the legislation, keeping in mind that the exercise of the discretion is the exception and not the rule, my judgment is that the Claimant, on the evidence presented, has failed to show it would be just and equitable to extend the time limit.

127. As I have concluded that the allegations are out time, they will not continue.

128. This means that, considering the outcome of the application to amend and the time limit point, no part of the direct discrimination or harassment complaints will continue.

129. As there was insufficient time during the hearing to hear submissions on the various issues in stages and for me to give my decision orally, it meant that I had to reserve my decision and consider the matters in order.

<u>Strike Out, and in the alternative Deposit Orders</u>

130. The Respondent has applied to strike out the entire claim on the basis of there being no reasonable prospect of success. As the discrimination and harassment complaints are not continuing, it was

not necessary for me to go on and consider whether or not they should be struck out.

131. However, I have gone on to consider where or not the unlawful deduction from wages complaint should be struck out.

132. Again, it is important to keep in mind the exact allegation pursued, and these are repeated below:

Unauthorised deductions from wages about the following:

(i) The Respondent did not have to pay him full pay in December 2022,January 2023 and February 2023 but he thinks they should have exercised their discretion to pay him full pay rather than SSP.

(ii) The Claimant did not request annual leave but was unable to take hisannual leave in the end of his leave year in December 2022 as he was off sick with covid. He says that the Respondent carried it over to his current leave year but instead he wanted to pay for the untaken leave.

133. The Respodents submit there is no entitlement to “wages” pursued and/or no sum which is readily calculable. The Claimant did not directly address this point.

134. I have reminded myself that I have to bs satisfied that there is no reasonable prospect of success. I have taken the Claimant’s case at its highest, based on the allegations as pursued by the Claimant. A mini-trial is not to be conducted. I have also kept in mind that the Claimant was a litigant in person when he submitted his claim and when he clarified his allegations at the last hearing. However, the Claimant has since obtained legal representation, and there has been no application to amend the unlawful deduction from wages allegations.

135. I have considered whether the claims are inherently plausible.

136. I have also kept in mind that test for making a deposit order is different to that where a claim is struck out. As set out in the summary of the law above, a deposit order can be made where it is considered there are little reasonable prospects of success.

137. Dealing first with allegation 33.2(i), I have kept in mind the precise way in which this allegation has been framed. On the Claimant’s own case he acknowledges that the Respondent did not have to pay him full pay. Indeed, on that basis it appears that the Claimant’s allegation undermines itself.

138. An unlawful deduction from wages complaint will only succeed where wages are properly payable. In this allegation, the Claimant is admitting that full wages were not owed to him. He says he thinks discretion should have been exercised.

139. The allegation remains unclear, the amounts he says were deducted in December 2022, January 2023 and February 2023 are not clear. I have no clear information on how discretion is exercised.

140. I consider it very unlikely that the Claimant will succeed in showing that wages were due. However, I cannot, on the information and arguments presented to me, say that there is no reasonable prospects of success.

141. For all the reasons set out above, I have not struck out the allegation, but I do consider there to be little prospects of success in relation to this allegation. I have considered the information available to me in regard to means to pay and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order. I have determined that is appropriate to make a deposit under in relation to allegation 33.2(i).

142. Dealing next with allegation 33.2(ii), on the way this allegation is put, it does not appear that a deduction has actually been made. It appears on the Claimant's own allegation that he made no request for annual leave and that unused holiday was rolled over to the next year. I do not consider this to fall within the remit of section 13 of the Employment Rights Act 1996. There has been no deduction of wages that were properly payable. The allegation is, in essence, that the Claimant did not want his annual leave to be carried over and instead he wanted to be paid for accrued but unused leave.

143. I do not see how such an allegation can succeed as an unlawful deduction from wages complaint. I consider there to be no reasonable prospect of success. Allegation 33.2(ii) is struck out.

Rule 50 – request for anonymization

144. The Claimant requested that his mother, whose impairment he relied upon under an associative disability discrimination and harassment complaint was not identified. He requested that she only be referred to as the Claimant's mother and no details of her illness be set out, and it simply be referenced as her "illness."

145. The Respondent did not oppose the application.

146. I considered Rule 50 of the Employment Tribunal Rules and the Presidential Guidance. I noted the Claimant's reasons for the request and kept in mind his mother was not a party to the claim. I considered all the factors and principles to be balanced (interests of justice, convention rights, the nature of the allegations, and the reason for request).

147. On balance, in relation to this hearing and the issues before me, I decided that it was appropriate to protect the Claimant's mother, who was

a vulnerable person that was not a party to the claim. It was not necessary in the interests of justice for her name to used or for details of her illness to be set out in the judgment. Accordingly, under Rule 50() of the Employment Tribunal Rules, I determined she should only be referenced as the Claimant's mother and no details of her illness have been set out in this judgment.

148. Only one unlawful deduction from wages complaint continues, subject to payment of a deposit order. I do not consider that information regarding the Claimant's mother will be needed at any final hearing to consider that complaint. However, whether anonymity should continue in any future judgments is a matter for the Employment Judge hearing the case.

_____

Employment Judge G Cawthray

_____

Date 25 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26 February 2024

FOR EMPLOYMENT TRIBUNALS

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/