Case No. 2402348/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr R Bryce

Respondent: Integrated Facilities Management Bolton Limited

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, and by consent, the reserved judgment sent to the parties on 16 April 2024 is corrected as follows.

For paragraph 60 of the reasons, substitute:

"From March 2016 onwards, a series of events happened in the claimant's personal life that the claimant describes as "exceptional personal constraints". These included allegations being made against him which he describes as "false", a dispute with another person identified by him, "several Employment Tribunals disputes" and the revocation of his security licence. In September 2022, his mother was diagnosed with a terminal illness."

A corrected copy of the order has been provided at the same time as this certificate.

Note that the correction does not affect any time limits which run from the date when the judgment, deposit order and reasons were sent to the parties. Those time limits continue to run from 16 April 2024.

Employment Judge Horne
10 May 2024

SENT TO THE PARTIES ON
17 May 2024

FOR THE TRIBUNAL OFFICE

EMPLOYMENT TRIBUNALS

Claimant: Mr R Bryce

Respondent: Integrated Facilities Management (Bolton) Ltd

Heard at: Liverpool

On: 17 November 2023 (CVP) and 5 April 2024 (in the absence of the parties)

Before: Employment Judge Horne

Representatives
For the claimant: in person
For the respondent: Mr J English solicitor

RESERVED JUDGMENT

The claim is not struck out.

REASONS

Scope of these reasons

1. These reasons explain why I did not strike out the claimant's claim.

2. Though not technically reasons for a judgment, these reasons also explain why I decided to make a deposit order. The deposit order itself is issued separately.

3. I have combined the reasons in the interests of proportionality. They both involve a detailed examination of various factors affecting the prospects of success of different parts of the claim.

The disputed decisions

4. By notice dated 21 September 2023, the parties were informed that there would be a preliminary hearing, and that one of its purposes would be "to consider the respondent's application to strike out".

5. The respondent's strike-out application was dated 31 March 2023. It asked the tribunal to make a deposit order if it did not strike out the claim.

6. The preliminary hearing took place on 17 November 2023. This is the reserved judgment from that preliminary hearing.

Delay

7. It is unusual, and almost always undesirable, for the tribunal to promulgate a reserved decision nearly 5 months after the hearing that was listed for the purpose of making that decision. In this case, the delay is explained by adjustments that I made to enable the claimant to have a fair hearing.

Tribunal adjustments

8. The preliminary hearing began with a discussion of the ground rules. The claimant told me, "I suffer from Asperger's and dyslexia". The agreed adjustments to the hearing were set out in my subsequent case management order.

9. Another adjustment proved to be more contentious. The respondent's solicitor had provided the claimant with written submissions three days earlier. The written submissions supplemented and supported the respondent's strike-out application. The claimant objected to the respondent's solicitor relying on those submissions. He also objected to the respondent making the same points in oral submissions at the hearing. His initial position was that, as an adjustment, the tribunal should restrict the respondent to the "four corners" of its written strike-out application.

10. At the preliminary hearing, the claimant also raised the question of whether he had mental capacity to pursue his claim. An issue over his mental capacity had arisen in unrelated proceedings between the claimant and his landlord. The claimant had known about this issue since 21 September 2023 (if not earlier). He left it until the week of the hearing to inform the respondent of this issue and the day of the hearing to inform the tribunal.

11. Following some discussion, the claimant indicated that, in the event that he was found to have capacity, he would be content for me to make a decision on the respondent's application without any further hearing. He no longer objected to my reading the respondent's written submissions, provided that he had the opportunity to make written submissions in reply. I made case management orders for the determination of the claimant's capacity to litigate. In the same document, I made orders for the claimant to make written submissions.

12. On 3 January 2024, having considered the expert's report of Dr Waheed, the claimant e-mailed the tribunal to say, "I am assured and satisfied that I do have capacity". He went on to add a "caveat" that "my disability may have infected [adversely affected] my ability to conduct proceedings".

13. The claimant provided his written submissions on 13 January 2024. Amongst the points he made was, "His disabilities impair his cognitive functions to make informed decisions amongst many other things." He also stated, "Coupled with his disabilities and legal rights, the Claimant has experienced exceptional personal constraints on his mental health and personal life, which would have affected his ability to formulate his claims."

14. Having read those submissions, I was concerned that these same factors might also have impaired the claimant's ability to make effective written representations. The claimant's written submissions had not engaged with some important considerations that might affect my decision. I caused a letter to be written to the parties on 23 February 2024, explaining my concerns about the prospects of success and giving the claimant a further opportunity to make submissions in writing. His submissions were received on 15 March 2024. The respondent had the opportunity to make written submissions in reply by 28 March 2024, but did not do so. I considered the claimant's further submissions on 5 April 2024.

The claim

The complaints

15. By a claim form presented on 23 March 2022, the claimant:

    15.1. Made a reference to the tribunal under section 11 of the Employment Rights Act 1996 ("ERA") to determine what written particulars of his employment with the respondent ought to have been included in a statutory statement under section 1 of ERA; and

    15.2. Brought a complaint under section 48 of ERA that the respondent had subjected him to a detriment on the ground that he had made a protected disclosure, contrary to section 47B of ERA.

16. The case came before Employment Judge Shotter at a preliminary hearing on 31 August 2022. At that hearing, the claimant applied to amend his claim to include a complaint of failure to make adjustments within the meaning of section 20 of the Equality Act 2010 ("EqA").

    (Breach of the duty to make adjustments is treated as discrimination under section 21 of EqA. Discrimination against an applicant for employment (including by failure to make adjustments) is a contravention of section 39(1) of EqA by the employer; where the employer breaches the duty in relation to an existing employee, the discrimination contravenes section 39(2).)

17. The respondent did not object to the application and EJ Shotter granted it. The complaint of failure to make adjustments was recorded in a written case management order ("the EJ Shotter CMO") sent to the parties on 7 September 2022.

18. The claimant also applied to introduce a complaint of discrimination arising from disability, but withdrew that application by letter dated 28 September 2022.

Employment status

19. The claimant has conceded that he was never an employee under a contract of employment within the meaning of section 230(1) of ERA.

20. It is common ground between the parties that, had the claimant actually done some work for the respondent, he would have been a "worker" within the meaning of section 230(3) of ERA and an "employee" within the meaning of section 83 of EqA. That eventuality never occurred. According to the EJ Shotter CMO, it is an undisputed fact that the claimant never worked for the respondent.

21. The claimant's case appears to be that he had become a "worker" and an employee (in the extended sense) at some point prior to 23 January 2021 when he complained about the failure to give him a statutory statement. It is not clear exactly when he says he first became a worker or employee. In his first written submissions, the claimant says that he "was offered employment and he accepted that offer". I assume that the "offer" to which the claimant was referring was the respondent's letter of 26 June 2021 (see below), although it is not clear what the claimant said, did or wrote to accept that offer. In his written submissions, the claimant was a worker "during the period he had been employed and was on the rota to work shifts". But the claimant's positive case is that he was never given a start date or offered any shifts, on a rota or otherwise. (This may possibly have been a cut-and-paste error. It refers to the definition of a worker under two statutory instruments that are irrelevant to his claim. By contrast, those two provisions are relevant to a claim that the claimant has brought against another employer.)

22. Alternatively, the claimant's case is that he was a person within the meaning of section 39(1) of EqA. The section heading describes such persons as "applicants".

23. The respondent has addressed the question of employment status in its strike-out application and written submissions. According to the respondent's written submissions, "the claimant's employment had not started" for the purposes of section 1 of ERA. Otherwise, the written submissions are silent about the claimant's employment status. If the claimant pays his deposit, the employment status issues will need to be clarified. But that is for another time. For the purposes of the strike-out and deposit order applications, the respondent does not appear to be denying that the claimant was a worker. Nor, for present purposes, is the respondent denying that the claimant was an employee within the meaning of section 83 of EqA, or an applicant within the meaning of section 39(1) of EqA.

<u>Section 11 reference</u>

24. It is common ground that the respondent never gave the claimant a written statement of particulars of employment.

25. There are two disputes:

    25.1. whether there was ever a "beginning of the employment" for the purposes of section 1(2)(b) of ERA; and

    25.2. what particulars ought to have been included in a statement so as to comply with section 1.

Protected disclosure

26. The claimant's case is that he made a protected disclosure to the respondent in a grievance letter dated 23 January 2022.

27. There is no dispute that he sent the letter, or as to how the letter was worded. This is what the grievance letter said:

> "Further to my offer of employment which I was offered by Jonathan Moore and accepted. I have not received my statement of employment particulars and I have not been contacted for any shifts. I have tried to regularly contact the company to establish what is exactly going on, but I keep getting promises to contact me back because no one is available.
>
> Please accept this as my grievance and to be dealt with under the companies' grievance policy."

28. In his "Particulars of Claim", the claimant summarised his grievance in this way:

> "The grievance complained of that he had not received his statement of particulars and not being able to fulfil his contractual obligations".

29. Under the heading, "Protected information disclosure", the claimant stated that his disclosure had "informed the respondent … that the claimant was complaining about the Respondent … failing to meet its contractual obligations".

30. In his second written submissions, the claimant asserted that he made this disclosure in the public interest. He argues that such a belief was reasonable, because:

> "•The Respondent is a contractor supplying security services to an NHS Hospital.
>
> •The Respondent had or did have legal obligations to ensure that they supply the NHS Hospital with enough Security staff.
>
> •That whilst the disclosure serves to assist the Claimant it was also an oblique motive to say to the Respondent that were not providing the NHS enough security staff, given the Claimant reasonably believed he was employed fill a void/vacancy and the Claimant was not able to 'work' because the Respondent was not engaging the Claimant.
>
> •The Claimant sent a grievance, and because of his disabilities it may not have been clear.
>
> •That disclosure of information was to the benefit of both public interest and private."

Detriment

31. The claimant's case is that, on the ground that he had made this disclosure, the respondent subjected him to a detriment (described as "dismissal") by the act of sending him a P45 tax form.

Duty to make adjustments

32. The EJ Shotter CMO recorded the claimant's complaint of failure to make adjustments at paragraph (19). I set it out here, with added emphasis:

> "By the 31 August 2021 the claimant had been unable to complete the online training modules. The respondent offered him face-to-face training which he was unable to take up due to the travelling required and asked if the training could be conducted through MS teams or distance learning. As a result of his [Asperger's] the claimant is unable to travel long distances to new places as this causes him anxiety, described by the claimant as his Achilles heel. The claimant accepts the respondent was not aware of this requirement specific to his disability, but it was aware he had a disability. The relevant date is 1 September 2021 when the claimant was asked by HR in an email sent at 11.48 to undertake face-to-face training, **the PCP is the requirement to undertake face-to-face training** and **the reasonable adjustment was for the claimant to undertake his training through MS teams or long-distance learning**."

Facts

33. When considering a strike-out application, it is not my task to make disputed findings of fact. The following summary is based on undisputed facts and assertions made by the claimant which I have assumed for present purposes to be true. I make occasional reference to contemporaneous documents provided by the respondent that the claimant does not appear to have challenged. These are not yet factual findings, but are relevant to the overall assessment of prospects of success.

34. The respondent is a facilities management company that, relevantly, provides security services to Bolton NHS Foundation Trust.

35. The claimant was diagnosed with dyslexia at age 11. He went on to obtain a law degree. In 2008 he was diagnosed with "Asperger's Syndrome".

36. At all times relevant to this claim, the claimant has lived in Stafford.

37. On 7 December 2020, the claimant applied for a job with the respondent as a Security Officer. The role was advertised as being under a "zero-hours contract".

38. At the time of applying for the role, the claimant was licensed by the Security Industry Authority to work as a security guard.

39. The claimant's job application indicated that he was disabled with dyslexia and Asperger's Syndrome.

40. An exchange of e-mails took place between the claimant and Mr Moores, the Head of Risk Management at the Trust. E-mails passed back and forth

on 7 and 8 December 2020. The claimant asked for "reasonable adjustments for my job application". Mr Moores tried to find out what those adjustments were. There was nothing in the exchange to suggest that the claimant had any particular anxiety over travelling. On 2 March 2021, the claimant e-mailed Mr Moores, attaching a generic publication called "Employing autistic people – a guide for employers". It was 15 pages long. It highlighted some of the benefits to an organisation of employing workers with autism. It also explained some of the disadvantages that people with autism might experience in recruitment and in the workplace. It made suggestions for training. There was nothing in the guide for employers that suggested that employees with autism generally experienced difficulty in travelling long distances, whether for training or otherwise.

41. The claimant was successful at interview. Following background checks, Mrs Sarah Curley of the Trust wrote to the claimant on 26 June 2021. Her letter confirmed the claimant's "appointment to the post of Bank Security within IFM Bolton." Mrs Curley informed the claimant that the respondent would contact the claimant shortly with an induction and start date.

42. It appears from an (as yet) unchallenged e-mail that, on 29 June 2021, Louise Ogilvie, the respondent's Human Resources Partner, e-mailed the claimant with some induction booklets, informing him that he would be required to complete compulsory online training.

43. The platform provided for delivery of the online training modules was called Moodle.

44. On 31 August 2021, the claimant sent an e-mail to Ms Ogilvie, stating,

> "I have tried to access the training modules but it will not allow me to complete the modules can you help?"

45. There was a brief exchange of e-mails in which the claimant clarified that he had not been able to complete any of the modules.

46. On 1 September 2021, Ms Ogilvie e-mailed the claimant to say,

> "Unfortunately Moodle is no longer available as we are moving to My ESR system which will not be available until the end of September. I will ask Lorraine Makinson (our Trainer) to confirm the next date she is doing face to face training so you can attend to complete the courses."

47. The claimant appears to have replied the same day, stating,

> "Because of the substantial distance (Manchester to Staffordshire) if it can be done by MS Teams or long distance learning that would be advantageous".

48. The e-mail did not mention any particular aspect of the journey between Manchester and Staffordshire that would put him at a disadvantage as a person with dyslexia and on the autism spectrum. The claimant has not suggested that he informed Ms Ogilvie of such a disadvantage in any separate communication.

49. From the respondent's disclosed e-mails, Ms Ogilvie then appears to have consulted by with colleagues, including Mr Moores. The conversation ended with Ms Ogilvie asking for the claimant's start date to be confirmed, and for the claimant to be booked on a "day's session". Ms Ogilvie appears to have confirmed to Mr Moores at 3.06pm that day that claimant would need to travel to Bolton for his training.

50. Later that day, the respondent's training officer, Lorraine Makinson, appears to have e-mailed the claimant to offer him a choice of training sessions on two dates in September 2021. It is unclear what the claimant's case is about whether he received that e-mail or replied to it or, if so, what his response was. In his second written submissions, the claimant put his case in this way:

> "The Claimant says he remembers that Ms Makinson told the Claimant that the face-to-face course would be available, but she would have to organise one and come back to the Claimant. No one did. The Respondent misled the Claimant."

51. The claimant made contact with Ms Ogilvie on or shortly before 4 October 2021, asking when his start date would be. Following that conversation, Ms Ogilvie appears to have e-mailed Mr Moores and Andrew Charkewycz (the Trust's Security Supervisor), asking them to agree a start date with the claimant, following which "I will give you a date for his training day".

52. On 14 October 2021, Ms Ogilvie appears to have e-mailed Ms Makinson, asking her to add the claimant to her "new starter training" the following Wednesday. It is not clear whether the claimant was informed of this or not.

53. The claimant was never given a date to start work. He never attended any training session.

54. On 23 January 2022, the claimant wrote a letter to the respondent headed, "Grievance". I have already set out the full wording of the letter.

55. On or about 27 January 2022, the respondent sent the claimant the tax form P45. The claimant interpreted this as a termination of his contract.

56. On 29 January 2022 the claimant notified ACAS of his prospective claim. An early conciliation certificate was issued to him by e-mail on 12 March 2022.

57. During the early conciliation period, Mr Charkewcyz had discussions with the claimant with a view to rearranging the claimant's training and giving him a start date. Ultimately these discussions failed to resolve the dispute.

58. It is virtually inevitable that the tribunal will find that the claimant's security licence was revoked in August 2021. In *Bryce v. Sentry Consulting Ltd* 2600411/2021, a tribunal ("the Nottingham tribunal") found that this had happened at that time. Dr Waheed's report refers to his licence having been "suspended". In his second written submissions, the claimant stated that he "may have had his licence revoked in August 2021; the Claimant would not have known that was going to happen". He relied on the finding of the Nottingham tribunal that his licence had been revoked at that time. These statements did not amount to an unequivocal acceptance that his licence

was revoked in August 2021. But they would be startling things for the claimant to say in written submissions if he believed that he still had a valid security licence from August 2021 onwards.

59. According to the Nottingham tribunal's findings, the claimant started a fixed-term contract with Staffordshire Council on 17 June 2021. The contract ended in June 2022. Whilst working for Staffordshire Council, the claimant did occasional security work for a nightclub business called Lion Heart. He did this work at weekends until the revocation of his licence.

60. From March 2016 onwards, a series of events happened in the claimant's personal life that the claimant describes as "exceptional personal constraints". These included allegations being made against him which he describes as "false", a dispute with another person identified by him, "several Employment Tribunals disputes" and the revocation of his security licence. In September 2022, his mother was diagnosed with a terminal illness.

61. The claimant is correct to say that he has been involved in several employment tribunal disputes. They are all claims presented by him against a variety of employers. Here are some of them:

    61.1. *Bryce v. AMS Securities Ltd* (2 claims, one of which presented in 2018)

    61.2. *Bryce v. Trident Security Ltd* (claim presented in 2018)

    61.3. *Bryce v. Dukes Bailiffs Ltd* (claim presented in 2018)

    61.4. *Bryce v. Birmingham City University* (claim presented in 2019)

    61.5. *Bryce v. Eagle Specialist Protection Ltd* (claim presented in 2019)

    61.6. *Bryce v. Elite Securities North West Ltd* (claim presented in 2019)

    61.7. *Bryce v. Nuneaton & Bedworth BC* (one claim presented in 2020 and 3 claims presented in 2021)

    61.8. *Bryce v. Sentry Consulting* (claim presented in 2021 – the Nottingham tribunal)

    61.9. *Bryce v. Active Security Solutions Ltd & others* (claim presented in 2021) and

    61.10. This claim.

62. It is important to be clear why the claimant's other claims are relevant. It is not my function to decide whether they demonstrate vexatious behaviour or not. The respondent has not applied for the claim to be struck out on the ground that the claim is vexatious or that the claimant has conducted the proceedings vexatiously. In my view, their relevance is:

    62.1. The claimant positively relies on his other claims as an explanation for his delay in adding his complaint of failure to make adjustments; and

62.2. The claimant's extensive prior experience of tribunal litigation makes it more likely that he was able to formulate his claims, understand the importance of time limits, and to articulate grievances in a way that reflected his understanding of the legal obligations he thought had been breached.

63. Many of these cases involved preliminary hearings and/or final hearings and, in at least one case, an appeal to the Employment Appeal Tribunal. I have not been provided with a detailed timeline of when all these hearings took place. It is likely that the claimant was busy preparing for and attending hearings for much of the period between October 2021 and 31 August 2022.

64. The claimant has been prescribed anti-depressant medication in the past.

65. I have already referred to the report of Dr Waheed on the question of mental capacity. Dr Waheed's report was based, in part, on a review of the claimant's general practitioner records. There are multiple entries related to the claimant's mental health between March 2016 and October 2020. There appears to have been nothing of note between October 2020 and the end of June 2022.

66. According to Dr Waheed's report, "At the end of June 2022 he asked if his antidepressant medication could be restarted. He said that there was a lot of stress due to [redacted] and that at times he was feeling suicidal and low. He said that he was trying to distract himself but needed medication while there was an ongoing [redacted]. It was agreed that medication could be restarted".

67. Dr Waheed's report also relates that in July 2022, the claimant "said that he was depressed and suicidal… he saw a mental health practitioner on 14 July 2022. He said that he felt very stressed, anxious and unable to sleep. He was worried about his financial situation and employment. He said he did not feel fit to deal with [redacted] or court…. He wanted some time away from the court proceedings to allow for recovery…"

68. The claimant has told Dr Waheed how his legal disputes interact with his Asperger's. He said that he tends to interpret the law "over-rigidly" and "take things literally". He can misunderstand verbal communication. He finds it difficult to "give in". He is not sure whether this is related to his health conditions, but, in the claimant's words, "I tend to think I am always right, I tend to be right". I mention these traits because every autistic person is different, and the claimant's particular needs in this claim may well be different from the needs of other claimants with autism in other claims.

69. The claimant has obtained an individual cognitive profile from the Autism Centre for Research on Employment. The profile was completed, in part, based on a questionnaire completed by the claimant himself. In that questionnaire he was asked to describe his communication preferences. Under the heading, "e-mail communication", he stated that he never found the content of e-mails confusing and that he often felt comfortable answering e-mails.

Relevant law

70. The claimant's first written submissions referred to 20 reported cases. Many of them were relevant to the issues I had to decide, but I do not think it is proportionate to mention each one by name. Some of the claimant's legal materials were irrelevant. As an example, the claimant cited three cases on the question of whether to strike out a claim where a party has failed to comply with a case management order. He also cited statutory provisions (for example, sections 100 and 103A of ERA) that do not relate to the legal complaints I have to consider.

Overriding objective

71. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective of dealing with cases fairly and justly. The overriding objective includes, where practicable, placing the parties on an equal footing and dealing with cases in ways that are proportionate to the importance and complexity of the issues.

Striking out and deposit orders

72. Rule 37 provides, so far as is relevant:

> (1) At any stage of the proceedings…. on the application of a party, a Tribunal may strike out all or part of a claim … on any of the following grounds-
>
> (a) that it … has no reasonable prospect of success;
>
> …
>
> (2) A claim … may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

73. Rule 39 governs the making of deposit orders. Relevantly, the rule reads:

> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim…has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit…"

74. Whistleblowing complaints are highly fact-sensitive. There is a strong public interest in such claims proceeding to a final hearing so that the evidence can be properly examined. Striking out such a claim on the ground that it has no reasonable prospect of success is reserved for the clearest of cases. The alleged facts must be taken at their highest unless there is some particularly compelling reason for thinking that the tribunal will reject them. Where there is a central core of disputed fact, it is highly unlikely that should strike it out. See *Eszias v. North Glamorgan NHS Trust* [2007] EWCA Civ 330 as authority for these propositions.

75. Broadly the same principles apply to the question of striking out a complaint of discrimination. Such cases are also fact-sensitive and will generally require an examination of the evidence. It will only be in a plain and obvious case that it is appropriate to strike out a complaint of discrimination at a preliminary hearing on the ground of its prospects of success: *Anyanwu v. South Bank Student Union* [2001] UKHL 14.

76. The claimant cites this case and others as authority for the proposition (with the claimant's bold type) "in cases of discrimination, that an application for a strike out **should not be granted**". That is not what the cases say and it is not the law. In *Ahir v. British Airways* [2017] EWCA Civ 1392, Underhill LJ stated at paragraph 16:

> "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 for liability being established, and also provided they are keenly aware of the danger of reaching such 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, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for making of a deposit order, which is that there should be 'little reasonable prospect of success'."

77. To put it another way, "the need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit": *Kaul v. Ministry of Justice & others* [2023] EAT 41.

78. Before striking out a claim, or ordering a deposit, the tribunal must first make reasonable efforts to understand the complaints and allegations. This includes carefully considering the claim form and supporting documentation that the claimant has provided: *Malik v. Birmingham City Council* UKEAT 0027/19 at para 50-51. "Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is": *Cox v. Adecco* UKEAT 0339/19.

79. It is desirable for employment tribunals to provide such assistance to litigants as may be appropriate in the formulation and presentation of their case. The fact that the litigant is self-represented is a factor relevant to what level of assistance is appropriate. When deciding how much assistance to afford a self-represented party, the tribunal must try to achieve the overriding objective and must avoid stepping into the arena: *Drysdale v. Department of Transport* [2014] IRLR 892.

80. The following principles should be followed when considering whether or not to make a deposit order:

80.1. The purpose of a deposit order is "to identify at an early stage claims with little prospect of success and 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". It is not the purpose of deposit orders "to make it difficult to access justice or to effect a strike out through the back door": *Hemdan v. Ishmail* [2017] IRLR 228 per Simler J at paras 10-11.

80.2. Evaluating the likelihood of success for these purposes entails a summary assessment intended to avoid cost and delay and a mini-trial of the facts is to be avoided: *Hemdan* at para 13.

80.3. If the tribunal considers that an allegation has little reasonable prospect of success, the making of a deposit order does not follow automatically, but involves a discretion, which is to be exercised in accordance with the overriding objective, having regard to all the circumstances of the particular case: *Hemdan* at paragraph 15.

80.4. Because of the access to justice implications, tribunals should take particular care before making a deposit order, and give sufficient reasons before deciding that an allegation or argument has little reasonable prospect, particularly where core facts are in dispute: *Sami v. Avellan* [2022] EAT 72.

80.5. It is legitimate to have regard to the claimant's prospects of successfully proving the facts that are essential to their case. This may include forming a provisional view as to the credibility of the assertions being put forward: *Van Rensburg v. Royal Borough of Kingston-upon-Thames* UKEAT 0095/07.

80.6. As with striking out, the tribunal must engage with, and make a reasonable attempt to understand, the basis of the claim before assessing its prospects of success: *Wright v. Nipponkoa Insurance (Europe) Ltd* UKEAT/0113/14.

81. The financial enquiry in rule 39(2) is an important step and failure to take it may be an error of law. The purpose of a deposit order is to make parties "stop and think" prior to pursuing a claim or case further, but not to prevent the party from pursuing it altogether. A judge who is considering making a deposit order should find out how much money is coming in and how much money is going out in respect of that party's finances. Having come to a conclusion about that, the judge will have a view as to the disposable income available within a particular period. In summary, the judge should "attempt to create a balance sheet which will relate to the amount of the deposit and when a party would be able to pay that deposit": *Carryl v. Governing Body of Manford Primary School* [2023] EAT 167.

<u>Right to a statement of initial employment particulars</u>

82. Section 1 of ERA provides, relevantly:

"

(1) Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.

(2) …(b) the statement must be given not later than the beginning of the employment."

83. A "worker", is defined by section 230(3) of ERA, which reads, with my editing and emphasis:

> "…an individual **who has entered into or works under**… (b) any other contract … whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any … business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly."

84. This limb of the definition of "worker" has three elements:

"

> (1) a contract whereby an individual undertakes to perform work or services for the other party;
>
> (2) an undertaking to do the work or perform the services personally; and
>
> (3) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual."
>
> (*Uber BV v. Aslam* [2021] UKSC 5 at para 41)

85. It is important to apply the statutory test. Concepts such as "mutuality of obligation" are tools that assist in that application, but no more than that: *Seipal v. Rodericks Dental Ltd* [2022] EAT 91.

86. Section 230(5) defines "employment" in relation to a worker, as "employment under his contract".

87. In section 230(3), the phrase, "who has entered into or works under" is disjunctive. A worker may enter into their contract and start work on the same day. But he may not. Where there is a gap between his entering into the contract and his starting work, he became a worker on the earlier of the two events, provided that the contract contained an undertaking by him to perform personal work. In that scenario, the "beginning of the employment" would be the beginning of the "employment under his contract", which would be the date when the worker entered into the contract whereby he undertook to do personal work.

88. It may be that the undertaking to do work is subject to some prior condition which must be satisfied before the undertaking has any legal effect. The prior condition might be satisfactory completion of induction training. Arguably, under a "bank" contract, there may be a prior condition that the employer offers a particular assignment and the worker agrees to accept it. If that is the correct analysis, "the beginning of the employment" may be delayed until the prior condition is satisfied. But whether that analysis is correct or not will depend on the context. The tribunal will need to apply the statutory definition of "worker" to the facts of the case.

Protected disclosure

89. So far as it is relevant, section 43B(1) of ERA provides:

> "(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show … (b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject."

90. A worker may have a reasonable belief that information tends to show breach of a legal obligation, without the need for the worker to point to an actual legal obligation that could have been breached. A mistaken belief as to the existence of a legal obligation may nonetheless be reasonable: *Babula v. Waltham Forest College* [2007] EWCA Civ 174.

91. When evaluating the reasonableness of a worker's belief in what disclosed information tends to show, the tribunal should have regard to the worker's expertise in the subject, or lack of such expertise: *Korashi v. Abertawe Bro Morgannwg University Local Health Board* UKEAT 0424/09.

92. What amounts to a reasonable belief that disclosure was in the public interest was considered by the Court of Appeal in *Chesterton Global Limited v Nurmohamed* [2018] ICR 731. The Court of Appeal considered that a disclosure could be in the public interest even if the motivation for the disclosure was to advance the worker's own interests. Motive was irrelevant. What was required was that the worker reasonably believed disclosure was in the public interest in additional to his own personal interest. Underhill LJ, giving the leading judgment, refused to define "public interest" in a mechanistic way, based merely on whether it impacted anyone other than the claimant or whether it impacted those beyond the workforce. Rather a Tribunal would need to consider all the circumstances, although the following fourfold classification of relevant factors was potentially a "useful tool":

    (a) The **numbers in the group whose interests the disclosure served** – although numbers by themselves would often be an insufficient basis for establishing public interest;
    (b) The **nature and the extent of the interests affected** – the more important the interest and the more serious the effect, the more likely that public interest is engaged;
    (c) The **nature of the wrongdoing** – disclosure about deliberate wrongdoing is more likely to be regarded as in the public interest than inadvertent wrongdoing;
    (d) The **identity of the wrongdoer** – the larger or more prominent the wrongdoer, the more likely that disclosure would be in the public interest.

93. The necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it.

If he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all, but the significance is evidential, not substantive: *Nurmohamed* at paragraph 29.

94. The tribunal must be satisfied that the worker genuinely did believe that he was making his disclosure in the public interest. At this stage of the analysis, the focus is on the worker's "subjective belief at the time": *Ibrahim v. HCA International Ltd* [2019] EWCA Civ 2007 at para 26. If, at the time of making the disclosure, the worker failed to mention anything about the public interest, "that is a point to be made against the claimant's case on subjective belief", but "it does not dispose of it altogether" (also at para 26).

95. There may be more than one reasonable view as to whether a particular disclosure was in the public interest: *Nurmohamed,* restated in *Dobbie v. Felton* UKEAT 0130/20.

Protection from detriment

96. Section 47B(1) of ERA provides:

> "(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

97. An employer's act, or failure, is done "on the ground that" the worker made a protected disclosure if that disclosure influenced the employer's motivation to an extent that was more than trivial: *NHS Manchester v. Fecitt* [2011] EWCA Civ 1190.

Burden of proof - detriment

98. Section 48 of ERA provides, relevantly:

> "…
>
> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
>
> …
>
> (2) On a complaint under subsection (1A), it is for the employer to show the ground on which any act, or deliberate failure to act, was done…"

An employer's duty to make adjustments

99. Section 20(3) of EqA sets out the relevant requirement of the duty to make adjustments. I have incorporated the relevant provisions of Schedule 8 of EqA and added emphasis to make it easier to follow.

> "…a requirement, where a **provision, criterion or practice** of [the employer's] puts a disabled person at a **substantial disadvantage** in relation to [employment or deciding to whom to offer

> employment] in comparison with persons who are not disabled, **to take such steps as it is reasonable to have to take to avoid the disadvantage**."

100. The Equality and Human Rights Commission's *Code of Practice on Employment* at paragraph 6.28 lists factors which "might be taken into account when deciding what is a reasonable step for an employer to have to take". These include "whether taking any particular steps would be effective in preventing the substantial disadvantage".

101. The claimant need not show that the step would have prevented the disadvantage altogether: *Noor v. Foreign and Commonwealth Office* UKEAT 0470/10. Nor is it necessary for the claimant to show that the step would have been guaranteed, or even likely, to avoid the disadvantage. There must, however, be at least some prospect that the making of the adjustment will avoid the disadvantage: *Leeds Teaching Hospital NHS Trust v. Foster* UKEAT 0552/10.

102. The claimant has helpfully drawn my attention to the remarks of Elias LJ in *Griffiths v. Secretary of State for Work and Pensions* [2017] ICR 160, CA, that, "so far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness".

103. The purpose of the legislation is to assist disabled people to obtain employment and to integrate them into the workforce: *O'Hanlon v. Commrs for HM Revenue & Customs* [2007] EWCA Civ 283. The duty does not extend to matters which would not assist in preserving the employment relationship: *Tameside Hospital NHS Foundation Trust v. Mylott* UKEAT 0352/09.

104. An employer is not under a duty to make adjustments where the employer does not know, and could not reasonably be expected to know, that an employee, or applicant, is likely to be placed at a substantial disadvantage caused by the provision, criterion or practice: Paragraph 20(1), Schedule 8 of EqA.

105. What an employer could reasonably be expected to know will include what the employer would know if they made reasonable enquiries. The *Code of Practice* at paragraph 6.19 states:

> "The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy…"

106. The employer must disprove knowledge (actual or constructive) of "the disadvantage" that is caused by the provision, criterion or practice. The knowledge defence is not defeated by the employer's awareness of some other substantial disadvantage to the claimant as a disabled person. Thus, in *Glasson v. The Insolvency Service* [2024] EAT 5, what mattered was the employer's constructive knowledge "the particular disadvantage to which the

claimant claimed … the PCPs put him" or, to put it another way, "the substantial disadvantage relied upon" (the claimant's tendency to go into restrictive mode in interview because of his stammer) and it did not matter that the respondent knew of other disadvantages caused by the same PCPs (for example, the claimant's need for additional time in interview).

107. When making the objective assessment, the tribunal must strike a balance. It is undesirable that an employer should be required to ask intrusive questions of a disabled person about whether he or she feels disadvantaged, merely to protect themselves from liability: *Ridout v. T C Group* [1998] IRLR 628, recently approved in *AECOM v. Mallon* [2003] EAT 104.

Time limits for complaints of failure to make adjustments

108. Section 123 of EqA provides, so far as is relevant:

> (1)…proceedings on a complaint [of discrimination] may not be brought after the end of-
>
> > 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.
>
> …
>
> (3) For the purposes of this section:
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

109. Where it is reasonably arguable that conduct extended over a period, the tribunal should not generally try to determine that question until it has heard the evidence: *Hendricks v. Metropolitan Police Commr.*

110. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

111. In *Matuszowicz v. Kingston on Hull City Council* [2009] EWCA Civ 22, the Court of Appeal held:

111.1. that an ongoing failure to make adjustments is not an act "extending over a period"; it is a "failure to do something", the date of which is to be

determined according to the statutory provisions (now in section 123 EqA);

111.2. if the respondent does not assert that the time limit started to run from a date earlier than that put forward by the claimant, the tribunal should proceed on the basis of the claimant's alleged date; and

111.3. that where confusion over the time limit provisions causes an unwary claimant to delay presenting the claim, the confusion can be taken into account as a factor making it just and equitable to extend the time limit.

112. It follows from *Matuszowicz* and section 123(4) that, where an employer acts inconsistently with the duty to make adjustments, the time limit runs from the date of the inconsistent act. If there is no such act, time begins from when the date on which claimant contends a reasonable period of time expired for the making of the adjustment, unless the respondent argues – and the tribunal accepts - that the reasonable period in fact expired sooner.

113. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

114. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

114.1. the length of and reasons for the delay;

114.2. the effect of the delay on the cogency of the evidence;

114.3. the steps which the claimant took to obtain legal advice;

114.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

114.5. the extent to which the respondent has complied with requests for further information.

115. In *Adedeji v. University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal warned against using section 33 as a checklist. The statutory test is whether or not the extension is just and equitable.

<u>Effect of amendment on time limit</u>

116. Where a complaint is introduced into a claim by way of an amendment to the claim form, the granting of permission to amend does not have the effect of back-dating the presentation of the new complaint to the date of

presentation of the original claim form. The tribunal may grant the amendment and leave the issue of time limits to be dealt with at a later stage: *Galilee v. Commissioner of Police of the Metropolis* UKEAT 0207/16.

117. The tribunal must be careful to distinguish between complaints that were introduced by amendment (on the one hand) and complaints that were included in the claim form, with further detail provided later. As to that distinction:

117.1. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole.

117.2. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA*,* HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

117.3. In relation to unrepresented claimants, tribunals must not be overly technical. Where the claim form is capable of being read as including allegations (for example of constructive dismissal, or of dismissal on a different day), and the parties have attended the hearing prepared to deal with those allegations, the tribunal should ordinarily permit those allegations to be argued (*Aynge v. Trickett t/a Sully Club Restaurant* UKEAT/0264/17 at paras 10 and 13). If the claim form cannot bear that interpretation, consideration should be given to an amendment (para 14).

117.4. The claim form should not be interpreted in a vacuum. When deciding what complaints it raises, the tribunal is entitled to have regard to any clarification provided by the claimant subsequently: *MacFarlane v. Commissioner of Police for the Metropolis* [2023] EAT 111.

<u>Adjustments to tribunal procedure</u>

118. It is a fundamental right of a person with a disability to have a fair hearing in which they can participate effectively.

119. A tribunal should pay particular attention to the *Equal Treatment Bench Book* when dealing with a party with a disability, especially a mental disability: *Galo v. Bombardier Aerospace UK* [2016] NICA 25.

120. Tribunal procedures can cause disadvantages to participants with neurodivergent disabilities. The tribunal may need to take a modified approach to taking evidence from people with mental health disabilities (see *Galo,* above). It is likely that a similar approach is needed where the disability stems from the autism spectrum or a specific learning disability such as dyslexia.

121. It is important to respect individual autonomy. This includes respecting the wishes of the individual participants themselves. A disabled party or witness is usually best placed to know what adjustments they need: *Rackham v. NHS Professionals Ltd* UKEAT 0110/15.

122. Tribunals should not take a rigid or mechanistic approach to the making of adjustments for disabled participants. A separate "ground rules" hearing is unnecessary, provided that the judge considers the matters that a ground rules hearing would normally cover: *Anderson v. Turning Point Eespro* [2019] EWCA Civ 815.

123. Rule 7 of the Employment Tribunal Rules of Procedure 2013 states:

> "The Presidents may publish guidance for England and Wales … as to matters of practice and as to how the powers conferred by these Rules may be exercised… Tribunals must have regard to any such guidance, but they shall not be bound by it."

124. *Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings* states, so far as it is relevant:

> 11. … Vulnerability can be both cause and/or effect in understanding questions asked during a hearing – for example, in cross-examination. This can impact negatively upon their conduct and demeanour in the hearing room and to their exclusion and disadvantage.
>
> …
>
> 14. When deciding whether to make appropriate directions or orders to facilitate participation in Employment Tribunal proceedings regard may be had in particular to:
>
> • the impact of any actual or perceived or potential intimidation of a party or witness
>
> • whether the party or witness has or may have a mental disability…
>
> …
>
> • the nature and extent of the information before the tribunal (including any medical or other evidence)
>
> • the issues arising in the proceedings
>
> • whether a matter is contentious
>
> • any questions which the tribunal will put (or cause to be put) to a witness
>
> …."

125. Appendix B of the *Equal Treatment Bench Book* includes guidance about tribunal participants who are on the autism spectrum. The following appears to be relevant:

"Autism is a spectrum condition and although autistic people will share certain characteristics, everyone will be different. To have a diagnosis of autism a person will have difficulties with social communication and integration, and will demonstrate restricted, repetitive patterns of behaviour, interests, or activities. Many autistic people will have difficulties with the following areas, although this is not a definitive list:

• Literal interpretation of language.

• Unclear, vague and ambiguous instructions.

…

Difficulties with the legal process

Autistic parties and witnesses, depending on the nature of their autism, may have these difficulties in court:

…

• Difficulty answering hypothetical questions. This includes difficulty with a question such as 'What adjustments would you find helpful?' An autistic person may be unable to envisage how he or she would feel if certain adjustments were made.

• Difficulty with chronology and time-scales

…

Reasonable adjustments

The following steps may be helpful but every autistic person is different. Always ask the individual.

Prior to the hearing

• Give very explicit instructions on all case management directions, including precise details regarding who documents should be sent to and when.

• Try to keep the same judge in all preliminary hearings. • Explain in advance what the hearing procedure will be like. Send a written time table.

• Explain at the outset in detail the hearing procedure including length and timing of breaks.

• Give regular breaks, eg 10 minutes after every 40 minutes in court to prevent anxiety escalating and other symptoms developing as a result.

In relation to communication:

• Prior to the hearing, get the other party to prepare and send to the person a clear and uncontroversial chronology.

> • Give precise instructions, setting out apparently obvious follow-up steps (eg 'Write out your statement, then photocopy it and send a copy to the respondents' solicitor, ie (name and address) by first class post').
>
> • Give reasons for any order or rule.
>
> • Establish rules at the outset.
>
> …
>
> • Avoid hypothetical questions, both regarding the substance of the person's evidence and regarding court procedure.
>
> • Avoid legal or management jargon.
>
> …
>
> • Many people with autism have had a lifetime of difficulties interacting with others which can negatively impact on their self-worth and self-esteem. Be patient, consistent and wherever possible positive."

Conclusions – reasonable opportunity to make representations

126. I am satisfied that both parties have had a reasonable opportunity to make representations.

127. The claimant indicated to me orally at the hearing that he would be content to make representations in writing. His ability to put his case in written form is consistent with his questionnaire answers in support of his individual cognitive profile.

128. When considering his representations, or any other written document produced by him, I must be alive to the possibility that it may have been influenced by literal or over-rigid thinking on the claimant's part. I should take that possibility into account before reaching any conclusions based on what the claimant either stated, or failed to state, in a document he has written. I also take into account, however, the claimant's extensive prior experience in employment tribunal litigation and the fact that he has a law degree.

129. The claimant has had a further opportunity to make written representations in order to deal with points that he had failed to address first time around.

130. For its part, the respondent has made written representations in its original strike-out application and in Mr English's written submissions provided a week before the preliminary hearing. The respondent has had a further opportunity to make written submissions to deal with any points that the claimant has made since the preliminary hearing.

Conclusions – section 11 reference

131. In my view, the claimant has a reasonable prospect of successfully arguing that "the beginning of the employment" was 26 June 2021 when his appointment to the post was confirmed. Alternatively, he has a reasonable prospect of successfully arguing that this letter was an offer, which the claimant accepted in his subsequent communications with the respondent. The letter was not expressly subject to any prior conditions.

132. Under a zero-hours "bank" contract, neither party was committed to any particular working assignment on any particular date. But that does not necessarily mean that the employment had not begun. By the contract, the claimant may have undertaken to do at least *some* personal work, albeit on an unspecified date.

133. I therefore decline to make a deposit order in respect of the section 11 reference.

134. If this is the sole complaint that goes forward, the tribunal will allocate a proportionate share of its resources to the determination of the issues. The tribunal would need to be persuaded that anything more than three hours would be proportionate. There is only limited value to either party in a judgment setting out what the written particulars would have been of an employment in which no work was done and which ended more than two years ago.

Conclusions – protected disclosure detriment

Overall conclusion

135. My headline conclusion is that the claimant has little reasonable prospect of succeeding in his section 48 complaint, but I cannot say that there is no reasonable prospect. I do not therefore strike it out.

Protected disclosure

136. I start by assessing the claimant's prospects of successfully arguing that he made a protected disclosure.

Disclosure of information

137. It is common ground that the claimant made a disclosure of information to his employer. The disclosed information was that the claimant had not been provided with a statement of employment particulars and he had not been contacted with any shifts.

Reasonable belief – breach of obligation to provide statutory statement

138. The claimant has a reasonable prospect of successfully demonstrating that he reasonably believed that the information in his grievance letter tended to show that the respondent had breached its legal obligation to give him a written statement of particulars of employment.

139. The respondent says that there is no such prospect, because:

    139.1. "The Claimant simply states that he has not received his written statement of employment particulars. He does not state that he should

have received it by that date, or that the Respondent was in breach of any legal obligation in failing to do so."

139.2. "Even if he had done so, he would not have had a reasonable belief that this was the case. Although he is a litigant in person, as the holder of a law degree and being familiar with employment law and legal proceedings, the Claimant would have sufficient knowledge and experience to understand that as he had not yet commenced employment, and that his employment was conditional on completing the training, the obligation to provide a written statement had not arisen. In addition, he had sufficient expertise to understand that such a mistaken belief would not have been reasonable."

140. I am not persuaded by either submission. Dealing with each one in turn:

140.1. The fact that the letter was expressed to be a grievance made it obvious that the claimant was complaining about the respondent's failure to do something that (in his view) should have been done. It was expressed in the language of section 1 of ERA. The claimant has at least a reasonable chance of successfully arguing that he reasonably thought that he was conveying a message that section 1 had been breached.

140.2. The tribunal is likely to find that the claimant believed his employment had begun and that such a belief was reasonable. The respondent is, of course, correct to point out that what was reasonable for the claimant to believe has to be judged against the standards of a law graduate with extensive experience of employment tribunal proceedings. But, for the reasons I have already given, there was not an obvious answer to the question of when the claimant's employment had begun, even for a person with knowledge of the subject. It was reasonable (or at least arguably reasonable) for the claimant to believe that he had already become entitled to a statutory statement, and accordingly that his letter tended to show that the respondent was in breach of a legal obligation by its failure to give him a statutory statement.

Reasonable belief – breach of obligation to provide shifts

141. The claimant's case is that he also believed that the information in his grievance letter tended to show that the respondent was in breach of its contractual obligation by failing to provide him with shifts.

142. In my view, whether the claimant held that belief or not is a fact-sensitive question which (if it were the only issue in the case) should be tested at the final hearing.

143. There is, of course, the issue of whether such a belief was reasonable, even if it was genuinely held. At this stage, in my opinion, it is premature to predict the tribunal's conclusions on the reasonableness of the claimant's belief. It is common ground that the contract was "bank" and "zero hours". But, as I have stated, it does not necessarily follow that the respondent was entitled, under the contract, to delay the claimant's start indefinitely, or to decline to offer the claimant any shifts at all. To assess the reasonableness of the claimant's belief, the tribunal would need to see the detail of the role as advertised, the reality of working arrangements concerning bank security

staff at the hospital, and may need to make findings about what was discussed orally.

Reasonable belief – breach of minimum staffing obligation

144. The claimant now appears to be saying that he had a third belief about what the information in his grievance tended to show. In his second written submissions, the claimant says that the respondent had "legal obligations to ensure that they supply the NHS Hospital with enough Security staff". It is hard to imagine the tribunal accepting that the claimant believed that the information in his grievance tended to show that this obligation was likely to be breached. His grievance did not mention anything about staff numbers, or the respondent's service level agreement with the Trust, or even hint that under-staffing was any part of his concern. Nor did the "Particulars of Claim" or the claimant's first written submissions.

145. This prediction makes full allowance for the effect of the claimant's autism and dyslexia. The claimant believes that he can communicate by e-mail without difficulty. His grievance letter has every appearance of being carefully drafted. It was written with the discipline of a law graduate and the experience of bringing several claims in the employment tribunal. Moreover, the claimant has not suggested that he knew how many bank security guards the respondent was legally obliged to provide to the Trust, or how many bank security guards the respondent would be left with if the claimant was not given any shifts.

Reasonable belief - disclosure made in public interest

146. The claimant will struggle to show that he really believed that he was making his disclosure in the public interest.

147. The claimant did not mention anything to do with the public interest in his grievance letter, or in any communication near the time of sending it. Nor did he mention any concern about staffing levels. Neither of those things are determinative of what the claimant believed, but they will undermine his evidence that he had the public interest in mind: see *Ibrahim,* cited above.

148. The claimant argues that his disability may have caused him to express his grievance in unclear terms. That explanation is unlikely to be accepted by the tribunal, for the reasons I have given in paragraph 1450.

149. As recognised in *Nurmohamed,* it is possible that the claimant may have been motivated by his own private interests and have simultaneously believed that he was making a disclosure in the public interest. In this case, it is unlikely that the tribunal will find that that was what was really going on in the claimant's mind. If that is what he thought, I would expect him to have said so in his grievance or during the two years that followed it.

150. If I am wrong about that, I would in any case assess only a small prospect of the claimant successfully showing that his belief was reasonable. It may be said that the provision of security cover at a hospital is of greater public interest than in other settings. But the claimant had no way of knowing how the delay in offering him shifts, or the failure to provide him with a statutory statement, would impact on the overall security staffing provision at the hospital. It is unlikely to be of any help to him to say that he was recruited to

fill a vacancy. A "bank" role, by its nature, will have unpredictable hours. The fewer security guards there were on the bank, the more shifts each guard would have to work in order to meet the respondent's service standards. But that does not mean that there was any risk of the respondent failing to provide adequate security cover if the start date for one guard was delayed.

151. For these reasons my view is that the claimant has little prospect of successfully arguing that his disclosure was protected.

152. The respondent argues that I should go further. It is the respondent's submission that, on the issue of belief in the public interest, the claimant has no reasonable prospect of success. I do not go that far. The lack of any contemporaneous reference to a public interest matter, although damaging to the claimant's case, is not determinative. The issue is still fact-sensitive. The same is true for the reasonableness of the claimant's belief. Before concluding that the claimant's case is hopeless, the tribunal would need to examine the claimant's evidence of what he believed, in the context of the factors outlined in *Nurmohamed.*

Detriment

153. If the claimant made a protected disclosure, the tribunal will need to decide whether the respondent subjected the claimant to a detriment by an act done on the ground that the claimant made that disclosure.

154. If these were the only issues in the case, I would not make a deposit order or strike out the complaint.

155. The parties have made submissions about whether the issuing of the P45 was a dismissal or not. In my view, these arguments are a distraction from the statutory test. The respondent did an act, namely sending the P45. The doing of that act would subject the claimant to a detriment if he reasonably understood the P45 to put him at a disadvantage. Regardless of the strict legal position, it is not uncommon for a casual worker to think that the receipt of a P45 means that they are no longer on the payroll. Even with a law degree and employment tribunal experience, the claimant could reasonably think that he was in a worse position than had been before the P45 was issued.

156. The respondent argues that the P45 was not detrimental to the claimant because he had prevented the respondent from giving him any shifts by failing to complete the mandatory training. There are two difficulties with that argument. First, the tribunal would need to hear the evidence before deciding who bore the responsibility for the claimant not having done the training. Second, even if the failure to complete the training was the claimant's responsibility, he might still reasonably understand the respondent's actions in taking him off the payroll to be disadvantageous to him.

On the ground that the claimant made a protected disclosure

157. If the P45 was detrimental to the claimant, it will be for the respondent to prove that the issuing of it was not materially influenced by the claimant having made a protected disclosure.

158. In its strike-out application, the respondent has explained why the P45 was issued. That explanation may well be believed. In a large organisation, the people who operate and audit the payroll, and issue the tax forms, tend to be different from the people who make decisions about termination of employment. But I cannot say that such a conclusion is inevitable, or even that the claimant has little reasonable prospect of rebutting it. The P45 was only a few days after the claimant sent his grievance letter. I have not been shown any documents relating to the payroll audit.

Conclusions – failure to make adjustments

Overall conclusion

159. The claimant's complaint of failure to make adjustments has little reasonable prospect of success, but I cannot say that it has no reasonable prospect of success.

160. The complaint is not, therefore, struck out.

Time limit

161. The first factor affecting prospects of success is the statutory time limit.

When did the time limit start to run?

162. The starting point is the complaint as formulated by EJ Shotter. This is the amendment that EJ Shotter permitted the claimant to make to his claim.

163. The complaint is that the respondent breached the duty to make adjustments by failing to take the step of providing training "through MS Teams or long-distance learning". The claimant says that it was reasonable for the respondent to have to take this step to avoid the substantial disadvantage at which he was placed by the requirement to undertake face-to-face training.

164. This is a complaint about the respondent's failure to do something. The time limit started to run when the respondent decided not to do it.

165. It is highly likely that the tribunal will find that Ms Ogilivie made that decision on 1 September 2021. The e-mail exchanges do not appear to be disputed. Based on those e-mails, it appears that Ms Ogilvie knew that the claimant had expressed a preference to get his training online. In that knowledge, she nevertheless informed Mr Moores on 1 September 2021 that the claimant would have to travel to Bolton for his training. The claimant was then informed of two dates for face-to-face training, with no online option provided.

166. Even if this was not evidence of a decision, it would be evidence of Ms Ogilvie acting inconsistently with providing training through MS teams or long-distance learning.

167. The e-mails are likely to demonstrate a further inconsistent act, occurring on 14 October 2021. Ms Ogilvie's reference "new starter training" the following Wednesday. This was almost certainly a reference to a further opportunity for face-to-face training. The claimant's own case is that the only training

that was offered to him after August 2021 was face-to-face (and indeed that he was misled about when those face-to-face training sessions would be).

168. There is no evidence in the disclosed e-mails to suggest that the question online was ever reviewed or reconsidered after 1 September 2021. If (which I think is unlikely) there was a fresh decision not to provide online training on 14 October 2021, it was the last such decision.

169. The claimant says that the statutory time limit did not begin to run until 27 January 2022. He describes this date (in his first written submissions) as "the last date of favourable treatment". As he puts it in his second written submissions, "there was no 'less favourable treatment' on 14 October 2021. Therefore the less favourable treatment must run from "dismissal". For the purposes of this argument, the claimant asks the tribunal to consider "whether the claimant was, for the purposes of the EqA, an applicant and whether the respondent discriminated against the claimant when deciding to whom to offer employment or by not offering him employment pursuant to section 39(1) EqA."

170. I do not find this argument easy to follow. This is not a complaint of less favourable treatment. Nor, in my view, does it matter whether it is a complaint of a contravention of section 39(1) or 39(2) of EqA. The prohibited conduct complained of is a failure to make reasonable adjustments. Section 21 treats such a failure as discrimination by the employer. That discrimination would contravene section 39(1) if the claimant was an applicant and the failure to make adjustments was part of an omission to offer employment, or a decision about to whom to offer employment. The same discrimination would contravene section 39(2)(d) if the claimant was an employee and the failure to make adjustments was detrimental. But either way, the alleged prohibited conduct was the failure to take the step of providing online training.

171. The likely conclusion of the tribunal, therefore, is that the statutory time limit started to run on 1 September 2021 or, at the latest, 14 October 2021. That would make the last day for presenting the complaint either 30 November 2021 or 13 January 2022. The deadline would be unaffected by early conciliation, because the claimant did not notify ACAS until two weeks later.

When was the complaint presented?

172. My assessment is that the tribunal will almost inevitably find that the complaint of failure to make adjustments was presented on 31 August 2022.

173. In coming to this view, I have taken into account that, in his "Particulars of Claim", the claimant stated that he had informed the respondent of his dyslexia and Asperger's Syndrome, and that he had made a request for reasonable adjustments. Where a claimant is self-represented, the tribunal must be alive to the possibility that their claim form may have raised a vague claim with details and clarification to be provided later.

174. Nevertheless, on a fair reading of the claim form as a whole, the tribunal is highly unlikely to conclude that it raised a complaint that the respondent had contravened the Equality Act. This is because:

174.1. The claimant had legal knowledge and was experienced at formulating his claims;

174.2. The claimant did not tick the box to indicate a complaint of disability discrimination;

174.3. The "Particulars of Claim" very clearly stated what the complaints were, using headings, legal terminology and citing precise statutory provisions; and

174.4. According to the EJ Shotter CMO, the claimant "acknowledged that this was a new complaint" and asked for "leave" to amend his claim form.

175. If that is correct, the complaint was presented when the amendment was sought and granted. The granting of permission did not back-date the presentation of the new complaint to the date of the original claim form.

176. On that analysis, the claimant would need an extension to the statutory time limit of somewhere between 7.5 and 9 months.

Extension of time

177. In my view, the claimant has little reasonable prospect of persuading the tribunal that such a long extension period would be just and equitable.

178. The tribunal would, of course, take into account the claimant's reasons for delay. It is unlikely that the tribunal will find them convincing. Dealing with each one in turn:

178.1. The "false" allegation would undoubtedly have been deeply troubling to the claimant, but it was made in 2016 and did not prevent the claimant from bringing at least 8 tribunal claims since that date;

178.2. The claimant's mental health took a turn for the worse in or around June 2022, but there were no general practitioner entries between 2020 and June 2020 sufficiently noteworthy for Dr Waheed to include them in the psychiatric report;

178.3. The claimant's other tribunal claims meant that the claimant must have been busy between October 2021 and August 2022, but there is a limit to how much weight the tribunal can place on this factor. It was up to the claimant to decide how many claims to bring.

178.4. The sad news about the claimant's mother came in September 2022. By then, the amendment had already been granted.

178.5. It is unlikely that the tribunal will find that the claimant's disability substantially contributed to his omission to include the complaint in his original claim form. His "difficulty filling in complex forms" has to be seen alongside his experience, his legal knowledge, and the fact that his "Particulars of Claim" document was free-text document in his own words. It was as simple or complex a form as he wanted it to be.

179. There is likely to be some disadvantage to the respondent if the time limit is extended. When assessing the magnitude of the disadvantage I have borne

in mind that the respondent could have objected to the amendment, and raised such a disadvantage in the context of their objection. Nevertheless, the conclusion that there is *some* disadvantage seems to me to be inescapable. This is not a case where the tribunal's factual findings will be based solely on the contemporaneous e-mails. The claimant proposes to give evidence of oral conversations that he had with people at the respondent in August to October of 2021. Memories of those conversations are bound to have faded.

180. The prospects of obtaining an extension of the time limit are further damaged by weaknesses in the complaint on its merits (see below).

181. I have considered whether the prospects of an extension of time are so poor as to enable me to strike out the complaint. Having regard to the merits, the likely disadvantage, and the claimant's explanations, the respondent has not persuaded me that this high bar has yet been reached. The claimant has not yet given oral evidence. There are some points relevant to the balance of disadvantage that work – just – enough in his favour to say that there is some prospect of success.

<u>Merits – knowledge of disadvantage</u>

182. It is common ground that the respondent did not know that the claimant was likely to be placed at a substantial disadvantage by the requirement for face-to-face training.

183. The respondent will attempt to prove that it could not reasonably have been expected to know of the likely substantial disadvantage. If the respondent succeeds, the duty to make adjustments would not arise at all, and the complaint would fail.

184. It is likely that the respondent will succeed on this issue. Conversely, the claimant has little reasonable prospect of success.

185. Again, it is important to remember the starting point. The claimed disadvantage caused by the requirement for face-to-face training was identified by EJ Shotter. She put it this way: "As a result of his [Asperger's] the claimant is unable to travel long distances to new places as this causes him anxiety, described by the claimant as his Achilles heel". This is **not** a claim about any other disadvantages that face-to-face training may present to a person with autism, for example, difficulty in being physically present in a room with others.

186. From the claimant's e-mails on 7 and 8 December 2020 and on 2 March 2021, the respondent also knew that the claimant was disabled with dyslexia and Asperger's Syndrome and would require adjustments of some kind. But there was nothing in those communications to suggest that the claimant would be disadvantaged by a requirement to travel.

187. The respondent knew that the claimant would prefer to do his training online because of the travel involved in face-to-face training. Ms Ogilvie did not ask the claimant why travel was difficult for him. The likely finding of the tribunal is that she could not reasonably have been expected to ask him that question. This is for four reasons:

187.1. First, there would have appeared to be a natural explanation for the claimant's preference. That explanation would have seemed to be unconnected to the claimant's autism. It would be inconvenient for him to have to travel from Stafford to Bolton for a training session. A preference for the more convenient option of remote training would not generally alert an employer to the likelihood of a substantial disadvantage in comparison with non-disabled people.

187.2. Second, the tribunal will have to consider the claimant's previous communications with the respondent. These are relevant to the objective assessment of what enquiries the respondent reasonably ought to have made. Up to August 2021, the claimant had been pro-active in asking for adjustments if he thought he would be at a disadvantage. He had done so twice before. On neither occasion had the claimant pointed out any difficulties with travel.

187.3. Third, the claimant had applied for a role that would necessarily involve travelling from Stafford to Bolton. Otherwise, he would not be able to work any shifts at the hospital. Ms Ogilvie knew that he was not planning to move home. A worker who has chosen to travel long distances for work would, in general, objectively appear to be less likely to be substantially disadvantaged by a requirement to travel the same distance for training.

187.4. Fourth, it is not always beneficial to ask a disabled employee about disadvantages they face, and sometimes it may be harmful. That is why the tribunal must strike a balance. In this case, the respondent had to be mindful of the opportunity to reduce barriers by finding out about potential disadvantage, but also had to bear in mind the undesirability of asking potentially intrusive questions about disadvantage for the sake of it.

188. I have considered whether these four reasons weaken the claimant's case on knowledge so fundamentally that the complaint should be struck out. In my view they do not quite get that far. Employers can reasonably be expected to know that every autistic employee is different, and will face their own individual disadvantages that cannot be readily identified by reading a generic publication. It is just about arguable that the respondent could have been reasonably expected to find out about the claimant's travel anxiety by asking him why he preferred not to travel.

<u>Merits – whether reasonable to have to make the adjustment</u>

189. There is no duty to make pointless adjustments. Before the tribunal can conclude that it was reasonable for the respondent to have to take the step of providing remote training, the tribunal must find that there was at least some prospect that the step might avoid the disadvantage caused by the PCP of requiring face-to-face training.

190. My initial impression had been that this issue, by itself, would be fatal to the claim. This was because the claimant's security licence was revoked in August 2021, and the offer of online training would not therefore have enabled the claimant to work any shifts.

191. Having considered the agreed facts, and the claimant's second written submissions, however, I would not consider the claimant's prospects on this

issue so weak as to order a deposit or a strike-out. It is arguable that the training had an intrinsic value, even if it could not ultimately lead to any paid work. This argument will take the claimant only so far – after all, he had already worked in a number of security jobs for which he would undoubtedly have received separate training. The respondent's training would have been unlikely to teach him much that he did not already know. But it does appear that the claimant tried to do the training after his security licence had been revoked. He contacted Ms Ogilvie at the end of August 2021, saying that he had been unable to access the training modules. This strongly suggests that he had tried to complete them. It is an agreed fact that Moodle had become unavailable. The claimant would have had no way of knowing that unless he had made some attempt to gain access to the platform.

192. It is possible, of course, that the tribunal will find that the claimant never really thought that the training would be of any benefit to him. He may, for example, have been going through the motions of training so as to find an opportunity to bring a claim once he had started employment. But it is premature to estimate the likelihood of such a finding. The evidence would need to be considered.

193. At this stage, I consider that there is a reasonable prospect of the claimant showing that the offer of remote training might have resulted in him getting the benefit of the training without having to go through the anxiety of travelling to Bolton. There was some prospect of it making the claimant eligible for work with the respondent if and when his security licence was reinstated. It is arguable, in my view, that that prospect was sufficient to make it reasonable for the respondent to have to provide the training online.

Deposit order

194. Rule 39 gives me the power to make a deposit order. For the reasons I have explained, the complaints of protected disclosure detriment and failure to make adjustments have little reasonable prospect of success.

195. It does not automatically follow that I should make a deposit order. But in this case, I am satisfied that a deposit order would help to achieve the overriding objective. It helps to save expense and avoid delay. These aims are achieved by giving the claimant a chance to stop and think. The reasons for the deposit order will help him to understand the problems with his case and to consider seriously whether he thinks he can overcome them. If he accepts that he has little reasonable prospect of doing so, he can save himself and the respondent the time and cost of litigating them at a final hearing. A deposit order also helps to put the parties on an equal footing. The claimant is not legally represented. He is less likely than the respondent to be expected to know a weak case when he sees one. There is less expectation on him than on a legally represented party to know the risks he runs by pursuing a claim that has little reasonable prospect of success. These risks include the risk of having to pay the other party's legal costs. One of the purposes of a deposit order is to make it clear to all parties what the likely outcome is going to be and what the costs consequences may be if the claim is pursued. That way, if the claimant pursues the case and loses, he is prepared for the costs application that may follow.

Amount of the deposit

196. The tribunal has specifically asked the claimant for information about his ability to pay a deposit. The enquiry was expressed in these terms:

> "The amount of a deposit can be anything up to £1,000 per allegation or argument. If Employment Judge Horne decides to make a deposit order, he must take account of the claimant's ability to pay the deposit. The claimant has not given any information about his finances. He has not made any representations about his ability to pay."

197. In reply, the claimant stated:

> "I am on Universal Credit, and I am no longer working. If you have more questions, please ask."

198. The claimant's assertion appears to be consistent with the other information available to me. In April 2023, the claimant told a mental health practitioner that he was unemployed and looking for work. He was still unemployed at the time of speaking to Dr Waheed in October 2023.

199. Universal Credit is means tested. This means that the claimant is unlikely to have more than £6,000 in money, savings and investments.

200. The claimant has not told me which elements of Universal Credit he receives. I assume for present purposes that he receives the basic element of just under £400 per month.

201. The claimant appears to owe substantial rent arrears and is involved in litigation with his landlord. He does not have anybody who depends on him financially.

202. I considered whether to ask further questions of the claimant about his outgoings, savings and debts. In my view, such questions would not help to achieve the overriding objective, because they would increase the delay before this judgment is sent. It is more proportionate to require the claimant to pay a small deposit which I am satisfied that he can afford, based on the information that I have.

203. Doing the best I can, I am satisfied that the claimant will be able to save £20 per week from his benefits. I assume for present purposes that he does not have any savings. This means that, over the next 10 weeks, the claimant can afford to save £200.00. This amount should be sufficient to make the claimant think long and hard before he continues, but it is not so much as to stifle his ability to continue the claim altogether.

204. The amount of the deposit will therefore be £100 for each complaint.

Next steps

205. I will wait until the deadline for paying the deposit before deciding what to do next.

206. If the claimant pays the deposit, I will re-list the case for a final hearing. Subject to the parties' representations, I propose to list the hearing for four days.

207. If the claimant does not pay the deposit, I will list the case for a short final hearing to determine what particulars (if any) should have been contained in a statement of employment particulars. I have in mind 3 hours for such a hearing.

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Employment Judge Horne

11 April 2024

SENT TO THE PARTIES ON
16 April 2024

FOR THE TRIBUNAL OFFICE

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