EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4114986/19

Held on 25 January 2021

Employment Judge N M Hosie

Mr I Dyjas	**Claimant** **Represented by** **Mr L Werenowski - Solicitor**
Arnold Clark Automobiles Limited	**First respondent** **Represented by** **Ms R Smith - Solicitor**
William MacKenzie **C/O Arnold Clark Automobiles Limited**	**Second Respondent** **Represented by** **Ms R Smith - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claimant was not 'disabled' in terms of the Equality Act 2010;

2. the discrimination complaints, on the ground of the 'protected characteristic' of 'disability', are dismissed;

3. the application by the respondents to strike out the discrimination complaints, on the ground of the 'protected characteristic' of 'race', is refused; and

4. the applications by the respondents for Deposit Orders in respect of the complaints of race discrimination and constructive unfair dismissal are refused.

REASONS

Introduction

1. The claim in this case comprises complaints of constructive unfair dismissal; race discrimination (direct discrimination in terms of s.13 of the Equality Act 2010 ("the 2010 Act"); and harassment in terms of s.26); and disability discrimination (direct discrimination in terms of s.13; discrimination arising from disability in terms of s.15; a failure to make reasonable adjustments in terms of s.20; and harassment in terms of s.26).

2. The respondents denied the claim in its entirety and the respondents' solicitor raised various preliminary points. This case came before me, therefore, by way of a Preliminary Hearing to consider the following preliminary issues:-

- **Disability status**

- **Time bar**

- **Whether the discrimination complaints should be struck out in, terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure, as having "no reasonable prospect of success"**

- **Whether the discrimination complaints and the complaint of constructive unfair dismissal have "little reasonable prospect of success" and, if so, whether the claimant should be required to pay a deposit as a condition of continuing to advance these complaints in terms of Rule 39**

The Evidence

3. I heard evidence from the claimant in relation to the issue of disability status and whether the time limit should be extended on the basis that it was "just and equitable" to do so, if the discrimination complaints were out of time.

4. A joint bundle of documentary productions was also lodged ("P").

Disability Status

5. The 2010 Act defines a 'disabled person' as a person who has a 'disability' (s.6(2)). A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on [his or her] ability to carry out normal day-to-day activities' (s.6(1)). The respondents disputed that the claimant was 'disabled'. The burden of proof was on the claimant to show that he or she satisfied this definition.

6. Langstaff J, when President of the EAT, said this in ***Aderemi v London and South Eastern Railway Ltd*** [2013] ICR 591, about the definition:-

> "*It is clear first from the definition of section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-*

day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect and those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other".

7. The respondents' solicitor also reminded the Tribunal, with reference to ***Cruickshank v Vaw Motorcast Ltd*** [2002] ICR 729, that the claimant's alleged disability required to be considered when the claimant worked for the respondent. He worked for the respondent from 27 November 2017 until 3 October 2019. She submitted that was the "*span of the discriminatory acts in the claim form*".

8. The respondents' solicitor expressed surprise that no medical evidence had been produced to support the claimant's evidence, especially as at a case management Preliminary Hearing on 10 March 2020 the Employment Judge had identified that a Preliminary Hearing on disability status was likely to be required.

9. The claimant's solicitor responded by explaining that the claimant was not in a position to afford to pay for a medical report from his GP. He suggested that it was normal to have a joint report but the respondents' solicitor said that this had never been suggested to her. In any event, the onus was on the claimant to produce sufficient evidence to establish that he was disabled in

terms of the 2010 Act. She submitted that the claimant had failed to discharge that onus.

10. When considering this issue, I was also mindful of the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" (2011); and the "EHRC Code of Practice on Employment (2011)", which has some bearing on the meaning of "disability" under the 2010 Act. While the Guidance and the Code do not impose legal obligations, a Tribunal must take into account any part that appears to be relevant to the issue of disability status.

11. The different factors involved in the definition of 'disability' need to be looked at separately. In doing so, it is necessary to bear in mind that the relevant point in time to consider whether a person was disabled is the date of the alleged discriminatory act. It was common ground in the present case that the claimant started his employment with the first respondent as a Valeter/Driver on 27 November 2017; the second respondent became his line manager in February 2019; the claimant left work on 3 October 2019 and never returned; the claimant resigned on 31 December 2019.

12. The "impairments" relied upon by the claimant were "back pain" and "depression".

Back pain

Physical or mental impairment

13. I was satisfied that the claimant suffered back pain at the relevant time which is a physical impairment. That was not disputed by the respondent's solicitor. He said he had a "prolapsed disc" but no medical evidence to that effect was produced and I was unable to make such a finding.

Substantial adverse effect on day-to-day activities

14. I accepted the claimant's evidence that his back pain was exacerbated at work if he had to bend down a great deal, that he often had to lie down when he returned home and he had a problem, *"getting up and down to go to the toilet".* He was prescribed *"standard painkillers"* (paracetamol) at first by his GP and then *"something stronger".* He was given a *"sick line"* by his GP but that was not one of the documentary productions. The claimant thought that the sick line was, *"maybe for a week or two".*

15. The claimant's solicitor submitted that the claimant had established the "adverse effect" of his back pain. He submitted that the medication he took should be disregarded when assessing the effect.

16. The respondents' solicitor submitted that the claimant had failed to discharge the burden of proof and that, *"this has been impacted by the lack of medical evidence".* While she accepted that the claimant suffered from back pain, she submitted there was *"only anecdotal evidence of the impact on his day-to-day activities"*. The main activity relied upon by the claimant was washing and valeting cars at work. She submitted that was not a "day-to-day activity".

17. In any event, she submitted that any adverse effect was not "substantial". While it was accepted that the effect had to be considered if the claimant had not taken any medication, no medical evidence had been produced to support the assertion that stopping the medication would have a substantial adverse effect. In support of her submission she referred to ***Woodrup v London Borough of Southwark*** [2002] EWCA Civ 1716 and submitted that *"clear medical evidence is necessary".*

18. I found favour with the submissions by the respondents' solicitor in this regard. Lack of evidence including medical evidence of the so-called "deduced effect" was a problem for the claimant and the onus was on him to prove he was "disabled". Although normal work-related activities require to be taken into account, the test for determining whether a person has a disability relates to the person's ability to carry out "normal day-to-day activities" which

are things people do on a regular basis. As I understand it, the claimant was required to valet many cars each day and it is averred he was required to clean thousands of alloy wheels in a twelve month period. These are not normal day-to-day activities. The Guidance also makes it clear that the term 'normal day-to-day activities' does not include work of a particular form because no particular form of work is 'normal' for people in general.

19. The Court of Appeal also said in ***Woodrup*** that "*In any deduced effects case of this sort the claimant should be required to prove his or her disability with some particularity. Those seeking to invoke this peculiarly benign doctrine ….should not readily be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary".*

20. While there is no need for a person to establish a medically diagnosed cause for their impairment (Appendix 1 of the EHRC Code), in the present case, no medical evidence whatsoever was produced to support the contention that the claimant was disabled, in terms of the 2010 Act, let alone the "deduced effect".

Substantial

21. Also, while I was mindful that *'substantial'* is defined in s. 212(1) of the 2010 Act as only meaning *'more than minor or trivial',* on the evidence I was unable to find that the effect was *'substantial'*. In arriving at that view, I was mindful of the examples of *"substantial effects"* in the Guidance and ***Aderemi***.

Long-term

22. Although, for the reasons given above, I was of the view that the claimant's back pain was not a 'disability', for the sake of completeness, I also addressed this issue. The substantial adverse effect of an impairment has to be 'long-term' to fall within the statutory definition. Under para 2(1) of Schedule 1 to the 2010 Act , the effect of an impairment is long-term if it: -

- has lasted for at least 12 months
- is likely to last for at least 12 months, or
- is likely to last for the rest of the life of the person affected

23. On the basis of the claimant's evidence, which was not at all clear, and in the absence of any medical evidence, I was unable to find that any of these three alternative grounds had been satisfied. Further, as I understand his position, this impairment was exacerbated by the way he was treated by the second respondent and he was only his line manager for approximately eight months.

24. For all these reasons, therefore, I arrived at the view that the claimant had failed to satisfy the definition in s.6(1) of the 2010 Act in respect of his "back pain" as he was required to do.

Depression

Physical or mental impairment

25. The claimant's solicitor submitted that, *"the threshold to establish disability status is relatively low. He only needs to establish a prima facie case".*

26. He submitted that, *"it's plain that in addition to the physical impairment he suffered from a progressive and worsening depression that affected his normal day to day activities as did his back pain".* As far as the claimant's home life was concerned, he submitted that, *"he used to have a happy disposition but that changed. As a consequence, his relationship with his wife and children suffered".*

27. The claimant's solicitor submitted that when all this information was, *"put together"*, the claimant had established that all the criteria in the section 6 definition had been met and that he was a disabled person.

28. However, I also found favour with the respondents' submissions in this regard. Medical evidence always plays an important role in Tribunal

proceedings involving a disability discrimination complaint. That is particularly so in cases involving depression or similar mental impairment. That was precisely the difficulty in ***Royal Bank of Scotland Plc v Morris*** UKEAT 0436/10, to which I was referred by the respondents' solicitor. The medical evidence in that case not only related to the nature of the claimant's impairment but also as to its effects and its likely duration. Albeit with some hesitation, absent medical evidence, I found that the claimant suffered from what he described as "depression" which is a mental impairment. However, on the basis of his own evidence, this only started when the second respondent became his Line Manager in February 2019.

Substantial adverse effect on day - to- day activities

29. The only evidence I heard from the claimant about the effect on his day to day activities related to his demeanour: that he was not as cheerful as he had been previously and that this *"impacted on his family".* No further details were provided.

30. I accepted that the claimant had consulted his doctor. He had had one session with a psychologist but no medication had prescribed.

Substantial

31. On the evidence and having regard to the definition of "substantial", I was of the view that the effect was "minor or trivial" and not substantial.

32. I was unable to conclude, therefore, that the claimant's depression had a *"substantial adverse effect on his ability to carry out normal day-to-day activities".*

Long Term

33. Nor was I persuaded that this "impairment" was long term. As I recorded above, as I understood the claimant's evidence his "depression" only started in February 2019, caused by the conduct of the second respondent and he left the first respondent's employment on 3 October 2019.

34. The claimant failed to establish, therefore, that this alleged impairment had lasted for 12 months. Nor, in the absence of any medical evidence did I find that it was "likely" to last for 12 months or for the "rest of his life".

35. I had little difficulty, therefore, in arriving at the view that, so far as the claimant's "depression" was concerned, he had failed to establish that he was disabled in terms of s.6(1) of the 2010 Act.

36. Further, even if the effect of the two "impairments" were considered together, the s.6 test was still not satisfied.

37. I decided, therefore, that the claimant was not a disabled person in terms of s.6(1) of the 2010 Act.

38. That being so, his complaints of disability discrimination are dismissed.

Time-Bar

Respondents' Submissions

39. The respondents' solicitor submitted that some of the discrimination complaints were out of time and that it would not be "just and equitable" to allow them to proceed.

40. She referred to s.123(1)(a) of the 2010 Act and the general rule that a claim concerning work-related discrimination must be presented to the Employment

Tribunal within the period of 3 months beginning with the date of the act complained of.

41. It was common ground between the parties that the claimant *"walked out"* from his employment with the respondent on 3 October 2019. Accordingly, the 3 months' time limit started to run from that date at the latest.

Continuing acts of discrimination

Respondents' submissions

42. The claimant avers in the claim form that the discriminatory acts complained of, *"are evidence of a discriminatory state of affairs amounting to a single act of discrimination extending over all this period and ending when C left work for R1 on 3 October 2019"* (P27, para 54).

43. This was disputed by the respondents' solicitor who submitted that the alleged acts of discrimination were, *"isolated incidents or an isolated collection of incidents with their own time limits".*

44. For the avoidance of doubt, the respondents' solicitor advised that it was accepted that the alleged incident on 3 October 2019, the allegations relating to the grievance process and the unfair dismissal complaint were all presented within the time limit.

45. In support of her submission that the discriminatory acts complained of were not a continuing act, she referred to the following cases:-

Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548

Aziz v FDA [2010] EWCA Civ 304

46. On the basis of ***Lyfar***, she submitted that it is "*not necessary to take an all or nothing approach to continuing acts. Some acts can be continuing whereas others are unconnected".*

47. In ***Aziz*** the Court of Appeal said that the "***Lyfar*** test" could be applied at a preliminary stage as, *"the claimant must have a reasonably arguable basis for establishing a continuing act or a continuing state of affairs".*

48. The respondents' solicitor submitted that the claimant had failed to establish that the totality of his allegations of discrimination amounted to a continuing act. She then went on in her submissions to refer to a number of specific allegations, most of which related to the disability discrimination claim, which she submitted were out of time. As I decided that the claimant was not disabled in terms of the 2010 Act, the complaints comprising this claim fall to be dismissed. However, I still considered the submissions in this regard, for the sake of completeness.

"Requiring the claimant to do gardening work unsuitable for an employee with a slipped disc" (P15, para 12 (i))

49. It was averred in the claimant's Further and Better Particulars that this occurred on 7 September 2018 (P72).

"R2 advised C that if C took time off work for such reason (being required to do physical work) he would be dismissed" (P18, para 15).

50. In the claimant's Further and Better Particulars it was averred that this occurred on 22 August 2019 (P72).

"During one such break in July 2019, R2 questioned C, who is a Pole, asking why C was in Inverness and not in Poland" (P18, para 18)

"R2 has repeatedly made C unblock a buried pipe, located near the wash bay, physically with his hands to remove silt and filth" (P15, para 12 (ii))

51. It was submitted while further specification was required, that this was a separate allegation which ended in September 2019.

"*R1 uses a corrosive acid to clean alloy wheels of the cars C cleans for R1. R2 ensured that only C cleaned alloy wheels with the acid used until C informally complained about this to R2"* (P15, para 12(vi) - P17, para 13 (vi))

52. The respondents' solicitor submitted that, *"subject to clarifying the exact dates, these are isolated allegations and can't be said to comprise one overarching continuing act".*

53. Further, and in any event, the claimant last worked for the respondent on 3 October 2019 and the claim form was not submitted until 31 December 2019.

Claimant's Submissions

54. The claimant's solicitor submitted that these were *"continuing acts".* The main allegation is that the second respondent, on a daily basis, divided work in a discriminatory manner between the claimant and Alan Malcom who is the named comparator in the pleadings.

55. Both the claimant and Mr Malcolm were employed as valeters and car cleaners during the time that the second respondent line managed both of them. The second respondent gave the claimant the *"vast bulk of car cleaning and gave Mr Malcolm driving which is much preferable to car cleaning and this happened daily".*

56. It was submitted, therefore, that the relevant dates were from February 2019, when the second respondent became the claimant's line manager, and 3 October 2019 when the claimant left. That was the period when the second respondent line managed both the claimant and Mr Malcolm.

57. The claimant's solicitor then went on to refer to the particularisation of some of the "incidences" at para 12 in the "Particulars of Claim" (P15/16). It was submitted that, despite the claimant complaining to the second respondent, the claimant continued to be allocated this *"dirty work".* It was averred that, *"he was required by R2 to clean approximately 15,400 alloy wheels in a 12-month period".*

58. The claimant's solicitor submitted that these incidences were linked and were continuing acts for the following reasons:-

- **They related to the same matter: an employee being required to clean cars and the other employee being required to drive them**
- **It was the same individual who allocated this work, namely Mr MacKenzie, the second respondent. "*It was not several employees but one*"**

59. In support of his submission in this regard, the claimant's solicitor referred to the following passage from the Judgment of the Court of Appeal in ***Aziz*** at para 33:-

> "*33 In considering whether separate incidents form part of "an act extending over a period" within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see British Medical Association v Chaudhary, EAT, 24 March 2004 (unreported), UKEAT/1351/01 DA & UKEAT/0804/02 (DA) at paragraph 28".*

60. The claimant's solicitor also referred to the following passages from the Judgment of Lord Justice Mummery in ***Hendricks v Commissioner of Police for the Metropolis*** [2002] EWCA Civ 1686:-

> *"**47***
> ***Continuing act: conclusion and case management***
>
> *On the crucial issue whether this is a case of 'an act extending over a period' within the meaning of the time limits provisions of the 1975*

Act and the 1976 Act, I am satisfied that there was no error of law on the part of the Employment Tribunal.

48

On the evidential matter before it, the Tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the Commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed from the Service. She remains a serving officer entitled to the protection of Part II of the Discrimination Act. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the Service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. ***She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutional racism', 'a prevailing way of life', a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination.*** (my emphasis):

51

In my Judgment the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on 'continuing acts' was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case see ***Owusu v London Fire & Civil Defence Authority*** *[1995] IRLR 574 at paragraphs 21-23;* ***Rovenska v General Medical Council*** *[1997] IRLR 367 at p.371;* ***Cast v Croydon College*** *[1998] IRLR 318 p.322 (cf the approach of the Appeal Tribunal in* ***Derby Specialist Fabrication Ltd v Burton*** *[2001] IRLR 69 at p.72 where there was an 'accumulation of events over a period of time' and a finding of a 'climate of racial abuse' of which the employers were aware, but had done nothing. That was treated as 'continuing conduct' and a 'continuing failure' on the part of the employers to prevent racial abuse and discrimination, and as amounting to 'other detriment' within s.4(2)(c) of the 1976 Act).*

> ***52***
> *The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side tracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed".*

61. The claimant's solicitor submitted that the same person, namely Mr MacKenzie, was responsible for allocating work between two employees: one was the claimant who is Polish and is disabled; the other, Mr Malcolm, is a Scot and is able bodied.

62. It was submitted that, on a daily basis, the claimant was required to clean cars, despite complaining that the work was unsafe and the allocation was unfair, whereas Mr Malcolm was given the preferable task of simply driving cars.

63. The claimant's solicitor also referred to the "restatement of the law" in ***Aziz***, starting at para 30 of the Judgment of LJ Jackson. This included a reference to ***Hendricks*** at para 30 and at para 33 a reference to the relevance of whether the same individuals or different individuals were involved in the incidents relied upon.

Just and Equitable Provision

64. The claimant's solicitor also submitted that were I to find that any of the discrimination complaints were out of time, I should still allow them to proceed on the basis that it is "just and equitable to do so". I heard evidence

from the claimant in this regard. He gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. On the basis of his evidence, I was able to make the following findings in fact relevant to the issue of the Tribunal's exercise of the just and equitable discretion.

65. The claimant said that the second respondent, Mr MacKenzie, had ignored his "informal grievance" about the work that he was being asked to do and threatened him with dismissal if he took time off work (P18, paras 14/15). He said he was worried that he would lose his job if he raised an *"official grievance".* He claimed that he was threatened with dismissal *"nearly every day".* He had asked to be moved to the first respondent's Transport Department but got no response. Eventually, his only option was to raise a formal grievance with the first respondent, despite his concern that he would lose his job. He said when he raised his formal grievance, on 13 October 2019, he had not considered obtaining legal advice as he had confidence in the first respondent's management and was hopeful of a satisfactory outcome. However, It was not until 23 December 2019 that the claimant received a response to his grievance. He was not satisfied with the outcome and it was only at that stage, he decided to take advice. He was still unaware of Employment Tribunal procedures and time limits at that time.

66. He decided to instruct a solicitor, Mr Werenowski, as his preference was to communicate in Polish. Despite the time of the year, he was able to contact Mr Werenowski and very soon after that Mr Werenowski travelled from his home in Essex to meet the claimant in Inverness. He took instructions and the claim form was submitted, within a week, on 31 December 2019.

Claimant's Submissions

67. The claimant's solicitor submitted that, "*clearly something significant must have happened for a man with a family to support to walk out on 3 October*".

68. The claimant had been concerned that if he raised a formal grievance he would lose his job but had done so eventually, as he had faith in his employer's management. However, he was not advised of the outcome until 23 December, over 9 weeks later, and his concerns had not been properly addressed. At that time the claimant was unaware of any time limit for submitting his claim. It was submitted that as a Polish national it was unlikely that he would be familiar with, *"the vagaries of Employment Tribunal proceedings in Scotland".*

69. The claimant's solicitor submitted that, were I to find that any of the complaints were out of time, it would be just and equitable to allow them to proceed. If not, there would be a risk of injustice.

Respondents' Submissions

70. The respondents' solicitor submitted that the claimant could have raised his claims in time as he could have established his position after he left on 3 October 2019. The delay in raising the claim was, *"not insignificant and he could have taken steps to address his concerns sooner".*

71. Further, if the situation was as bad as he maintained, for example in July 2019 he alleges that Mr MacKenzie asked him why he *"was in Inverness and not in Poland*", she submitted it was not credible he would not have included that in his *"extensive grievance".*

72. It was also submitted that, *"witness evidence was crucial as far as the various allegations are concerned".* A further delay, it was submitted, would impact on the cogency of the evidence.

Discussion and Decision

Continuing acts of discrimination

73. I found the guidance of the Court of Appeal in ***Hendricks***, ***Lyfar*** and ***Aziz*** to be of assistance when considering this issue. The test set out by LJ Mummery in ***Hendricks*** at paras 47-52, in particular, was approved in ***Lyfar***. Also, ***Hendricks*** was cited with approval by the Court of Appeal in ***Aziz*** where the Court noted that in considering whether separate incidents form part of an act extending over a period, '*one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.*

74. This was the thrust of the submissions by the claimant's solicitor which in my view were well founded. While it will be necessary to hear evidence and make findings in fact that the various incidents occurred, it is alleged that the same individual, namely Mr MacKenzie, the second respondent, was involved in all those incidents.

75. I was also of the view, with reference to the approach laid down in ***Lyfar***, that, if he proved all he averred, the claimant would be likely to establish a *prima facie* case: *"the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs".*

76. I arrived at the view, therefore, that what was alleged were continuing acts of discrimination which ended on 3 October 2019 when the claimant left work that day, never to return.

77. Accordingly, as the claim form was presented on 31 December 2019, it was in time.

Just and Equitable Extension

78. Further, and in any event, even if any of the discrimination complaints had been out of time, I would have exercised my discretion and allowed the complaint to proceed on the basis that it was "just and equitable" to do so.

79. The 3-month time limit for bringing a discrimination claim is not absolute: Employment Tribunals have discretion to extend the time limit if they think it "just and equitable" to do so – s.123(1)(b) of the 2010 Act. Tribunals have a broader discretion under discrimination law, therefore, than they do in unfair dismissal cases as the Employment Rights Act 1996 provides that the time limit for presenting an unfair dismissal claim can only be extended if the claimant shows that it was '*not reasonably practicable'* to present the claim in time.

80. In arriving at this view, I had regard to the recent Court of Appeal Judgment in ***Adedeji v University Hospital Birmingham NHS Foundation Trust*** [2021] EWCA Civ 23. In that case, the Court reviewed a number of recent cases, involving the list of Limitation Act 1980 factors, cited in ***British Coal Corporation v Keeble and ors*** [1997] IRLR 336: -

> *"The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking".*

81. The length of delay was not significant. A material factor was the time that it took the first respondent to deal with the claimant's grievance. It was clear and understandable, that the claimant was most reluctant to give up his job and although fearful of the consequences of raising a formal grievance, he was hopeful that by doing so his concerns would be satisfactorily addressed.

It was understandable, therefore, that he would await the outcome of his grievance. This took an inordinate amount of time and when the outcome proved to be unsatisfactory, the claimant took advice immediately and his claim form was submitted in just over a week, despite it being during the Christmas holiday period,

82. I was also mindful, that the claimant is a Polish national, that English is not his first language and that he was unwell, suffering from “depression”, when he left his work on 3 October. It was also very clear that, with a family to support, he was very anxious about losing his job. He was not aware of Employment Tribunal procedures or time limits until he consulted his solicitor. However, once he did, his solicitor acted with alacrity and the claim form was submitted without delay.

83. So far as any prejudice and hardship is concerned, were I not to exercise my discretion to extend the time limit then the claimant will be prejudiced as the discrimination claims will be dismissed. However, he would still be able to pursue his constructive unfair dismissal claim. On the other hand, were I to allow the discrimination claims to proceed, then the respondent will be prejudiced in having to defend these claims and expense will be incurred. However, they would still have to defend the constructive unfair dismissal claim. While the issue was finely balanced, in my view, the balance of prejudice and hardship favours the claimant.

84. Also, I was not persuaded that any delay would affect the cogency of the evidence.

85. For all these reasons, therefore, had I been required to do so, I would have exercised my discretion and extended the time limit on the basis that it was just and equitable to do so.

"Prospects"

Respondents' Submissions

86. The respondents' solicitor submitted that the disability and race discriminations claims have *"no reasonable prospect of success"* and should be struck out in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure. Alternatively, she submitted that these claims have *"little reasonable prospect of success"* and that the claimant should be required to pay a deposit as a condition of continuing to advance them in terms of Rule 39.

87. She also submitted that a Deposit Order should be made in respect of the constructive unfair dismissal complaint as it has "*little reasonable prospect of success*".

88. The respondents' solicitor referred to the "particulars of the claim" (P13 - 29) and the "Further and Better Particulars" (P69 – 74).

Direct Discrimination

89. In support of her submissions in this regard, the respondents' solicitor referred to the following cases:-

Shamoon v RUC [2003] UKHL11
Madarassy v Nomura International Plc [2007] EWCA Civ 33

90. So far as the comparator, Alan Malcolm, was concerned, the respondents' solicitor referred to the following passage from the Judgment of the House of Lords in ***Shamoon***:-

> "*110 In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case,*

> *are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim".*

91. She also referred to s.23(1) of the 2010 Act that, "*There must be no material difference between the circumstances relating to each case".* She submitted that there were *"material differences"* between the claimant and Mr Malcolm who only worked part time.

92. Further, as the claimant maintained that his treatment by the second respondent led to his disability, that alleged unfavourable treatment could not have been "because of his disability" (P18, paras 14 and 21; P20, para 29(iii)).

93. So far as the race discrimination claim was concerned, she submitted that the only relevant averment was that:-

> "*18 During one such break in July 2019, R2 questioned C, who is a Pole, asking why C was in Inverness and not in Poland" (P18, para 18).*

94. The respondents' solicitor submitted that there were insufficient factual averments to suggest that disability or race might have been the reason for his alleged less favourable treatment. There is no reasonable prospect of these claims succeeding, therefore, and they should be struck out.

Harassment

95. The respondents' solicitor submitted that although it was alleged that all of the treatment amounted to "unwanted conduct" (P26, paras 48 and 49) there were no factual averments as to why this related to disability or race.

96. That was also so with regard to the incident on 3 October 2019 which led to the claimant "walking out". It is alleged that the second respondent shouted at the claimant but not explained how this related to his disability or race.

97. It was submitted that without such a *"connection"* these claims *"have no reasonable prospect of success"* and should be struck out.

Discrimination arising from disability

98. So far as this complaint was concerned (P24, para 47(ii)), the respondents' solicitor referred to the "2-step test" in ***Basildon and Thurrock NHS Foundation Trust v Weerasinghe*** [2016] ICR 305.

99. The first step is that, "*disability must have had the consequence of something*"; the second step is that there "must be some unfavourable treatment because of that *'something'*.

100. The respondents' solicitor submitted that there was no further elaboration of this complaint other than set out in the "Particulars" (P24, para 47(ii)).

101. She submitted that this complaint also had *"no reasonable prospect of success"* and should be struck out.

Failure to make reasonable adjustments

102. The claimant referred to the "particulars" at P25, para 47(iii) and at P73/74. She submitted that the claimant had failed to establish that this duty arose. In particular, no "provision, criterion or practice" ("PCP") had been identified. She submitted that the claimant, *"seeks to rely on 'one off acts' as the "PCP"* and referred to: ***Ishola v Transport for London*** [2020] EWCA Civ 112.

103. She submitted that although the PCP should be widely construed, it cannot be interpreted to mean a "one off".

104. She submitted that much of this complaint related to the grievance procedure which cannot be a PCP, unless it is averred that this was done *"routinely".*

105. She also submitted that the alleged failure to contact the claimant promptly after he had walked out and the failure to refer him to Occupational Health more quickly were also *"one off acts".*

106. Further, it was submitted that even if the claimant had established a relevant PCP he had failed to establish that he was placed at a *"substantial disadvantage",* compared with people who did not have his disability. For example, being required to clean alloy wheels and other alleged health and safety breaches would place *all* employees at a substantial disadvantage.

107. Also, so far as the allegation that the claimant was required to "*unblock a buried pipe, located near the wash bay*" was concerned (P15, para (ii)), it was submitted that, *"would have disadvantaged disabled and non-disabled employees alike*". The same applied to the alleged failures with the grievance procedure and nor were there any averments of a "*particular advantage"*.

108. For all these reasons, the respondents' solicitor submitted that this complaint has, *"no reasonable prospect of success and should be struck out".*

109. In the alternative, the respondents' solicitor submitted all of the discrimination complaints had *"little reasonable prospect of success*" and that a Deposit Order should be made in terms of Rule 39.

Constructive Unfair Dismissal

110. The respondents' solicitor submitted that this complaint has *"little reasonable prospect of success"* and that a Deposit Order should be made, in terms of Rule 39.

111. She referred to the "*implied term",* relied upon by the claimant (P27/28, para 58).

112. She submitted that the claimant had continued to work for the respondent for almost two years and that it was *"not credible"* that he would keep working if the conditions were as bad as he alleged.

113. She also submitted, so far as the grievance was concerned, that the outcome the claimant was seeking was a, *"transfer to another branch of the first respondent in Inverness"* (P20, para (v)) and in the outcome of the grievance there was a suggestion that steps be taken to consider a transfer.

114. It was submitted that the claimant, *"will have difficulty establishing he was entitled to resign".*

115. It was submitted, therefore, that this complaint has *"little reasonable prospect of success"* and a Deposit Order should be made.

Claimant's Submissions

Direct Discrimination

116. The claimant's solicitor stressed that the claimant is Polish and his comparator, Mr Malcolm, is Scottish. Their jobs were the same: to valet cars and drive them. However, the claimant was requested to, *"do all the dirty work"* which included cleaning car wheels with acid in premises that were unsuitable. The claimant was given *"97% of this cleaning work".*

117. In any event, the claimant's solicitor submitted that it was not essential to have a *named* comparator. In this connection, he referred to the following passage from the Judgment of the House of Lords in ***Shamoon***:-

> "*116 In the absence of any evidentially valuable comparators, was there any other material that the Industrial Tribunal majority might have had in mind as constituting the "sufficient material" to which they referred? I would readily accept that it is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator. I respectfully agree with Lord Hope that the contrary opinion expressed by Carswell LCJ in* ***Chief Constable of the Royal Ulster Constabulary v A*** [2000] NI 261 cannot be accepted (paras 46 and 47 of Lord Hope's opinion). But in the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with the unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some cases suffice. But there is nothing of that sort in the present case, or, at least, no reference to anything of that sort was made by the Industrial Tribunal.

"Material Difference"

118. So far as the contention by the respondents' solicitor that there was a "material difference" between the claimant and Mr Malcolm, was concerned, although Mr Malcolm worked part-time, both started work at 8 am. Mr Malcolm finished at 1 pm and the claimant finished at 5.30 pm. They had the same work duties. However, the claimant was given, *"all the dirty work at the sole discretion of the second respondent".*

119. In any event, the claimant's solicitor submitted that although it was not essential to identify a comparator, he had identified Mr Malcolm. However, even if he was not a suitable comparator, a hypothetical one can be constructed: what would the position be if Mr Malcolm worked full-time to 5.30 pm as the claimant did. The claimant's solicitor submitted that there would still be a "disparity".

120. The respondents aver that, "*The claimant expressed discontent to the second respondent at being required to carry out driving duties (even though this was a core requirement of his role as a valeter/driver) and made it clear to the second respondent that he preferred to focus on washing and cleaning cars"* (P49, para 6.2). The claimant's solicitor advised that those averments were denied. "*This is a factual issue which must be heard at trial. Why would the claimant choose to do the dirty unsafe work?"*

121. The fact that the claimant was *"given dirty work every time"* was sufficient to establish a *prima facie* case requiring a response, he submitted.

122. He referred to the guidance in **Madarassy** and the *"revised Barton guidance"* as set out from para 76 and the "Annex" in ***Igen Ltd v Wong*** *[2005]* EWCA Civ 142 . He submitted that *"each case turns on its facts*".

123. He submitted that the basis for the discrimination claims was, *"the significant disproportionate allocation of work and the proper place to deal with this was at trial".*

Harassment

124. The claimant's solicitor submitted that he was only relying on the incident on 3 October 2019 as constituting harassment.

Discrimination arising from disability

125. The claimant's solicitor submitted that the basis for this complaint was set out in the particulars at P18, paras 14 and 15:-

> "*14 In addition to the above, C advised R2 informally that much of the work given to C by R2 such as gardening or the cleaning of blocked drains was causing C back pain and that C would need to take time*

off work as a result if C was further required to do such physical work.

15 In response, R2 initially ignored such informal grievance, but when C persisted in raising such issue because of his pain, R2 advised C that if C took time off work for such reason he would be dismissed".

Failure to make reasonable adjustments

126. The claimant's solicitor clarified that this related to the manner in which the first respondent dealt with the claimant's grievance and a failure to provide him with alternative work, in particular a move to the first respondent's Transport Department, *"or at least work for R1 away from R2"* (P25(iii)).

127. The claimant's solicitor challenged the assertion by the respondents' solicitor that a PCP could not be a "one off act". In support of his submission he referred to para 6.10 of the EHRC Code of Practice on Employment which he submitted *"says the opposite"* and further, a PCP *"can be widely drawn".*

128. The claimant's solicitor submitted that a phased return to work was a reasonable adjustment and *"a move away from the second respondent"* would also have been.

129. Although the claimant was not prepared to engage in mediation with the first respondent, if he had done he would have been outwith the 3 month time limit for bringing his claim.

130. In any event, *"he'd lost all hope that the first respondent would have engaged in mediation with any real intent".*

Constructive Unfair Dismissal

131. The claimant's solicitor clarified that the allegations in respect of this complaint only related to the period from February 2019, when the second respondent became the claimant's Line Manager, until 31 December 2019 when he resigned.

Conclusion

132. The claimant's solicitor referred to: ***Anyanwu v Southbank Students' Union and others*** [2001] ICR 391 and the *"fact sensitive"* nature of discrimination cases.

133. He submitted that, "*the Tribunal won't have the full flavour without a trial and this case is very fact sensitive"*.

134. The issue is why one employee was given all the dirty work to do than another who was not disabled and of a different nationality.

135. He submitted that, *"the proper place to deal with this is a trial when evidence can be cross examined and checked".*

136. Accordingly, the claimant's solicitor intimated that none of the discrimination complaints should either be struck out and that there should not be a Deposit Order, *"otherwise an injustice may take place".*

Discussion and Decision

137. Although I decided that the claimant was not disabled, in terms of the 2010 Act, which meant that the complaints of disability discrimination fell to be dismissed, for the sake of completeness, I addressed the prospects of the disability discrimination complaints succeeding on the basis that the claimant was disabled at the relevant time.

138. The following Rules, in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"), were relevant to the issues with which I was concerned:-

> "***37 Striking out***
>
> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –*
>
> *(a) That it is scandalous or vexatious or has **no reasonable prospect of success** (my emphasis);*
>
> ***39 Deposit orders***
>
> *(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has **little reasonable prospect of success** (my emphasis), 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".*

Burden of Proof

139. Each of the discrimination complaints requires a claimant first to establish facts that amount to a *prima facie* case. S.136 of the 2010 Act provides that, once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove a non-discriminatory explanation.

140. ***Igen*** remains one of the leading cases in this area. In that case, the Court of Appeal established that the correct approach for an Employment Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage, the claimant has to prove facts from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e. on the balance of probabilities), is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove –

again on the balance of probabilities – that the treatment in question was *"in no sense whatsoever'* on the protected ground.

141. The Court of Appeal in ***Igen*** explicitly endorsed guidelines previously set down by the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205. Although these cases concerned the application of s.63A of the Sex Discrimination Act 1976, the guidelines are equally applicable to complaints of disability and race discrimination. Indeed, they apply to all forms of discrimination. They can be summarised as follows: -

- **It is for the claimant to prove, on the balance of probabilities, facts from which the Employment Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination.**

- **If the claimant does not prove "such facts", the claim will fail.**

- **In deciding whether the claimant has proved such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that "he or she would not have fitted in".**

- **The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.**

- **The Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination – it merely has to decide what inferences could be drawn from them.**

- **In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.**

- **These inferences can include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information.**

- **Inferences may also be drawn from any failure to comply with the relevant Code of Practice**

- **When the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent**

- **It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act.**

- **To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.**

- **Not only must the respondent prove an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was not any part of the reason for the treatment**

- **Since the respondent would generally be in possession of the facts necessary to prove an explanation, the Tribunal would normally expect cogent evidence to discharge that burden – in particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice**

142. The guidelines in ***Igen***, ***Barton*** and other cases clearly require the claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer.

143. That point was further emphasised by LJ Mummery giving the Judgment of the Court of Appeal in ***Madarassy***:-

> "*For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination, nothing more. So, the bare facts of the difference in his status and the difference in treatment – for example, in a direct discrimination claim evidence that a female claimant had been treated less favourably than a male comparator – would not be sufficient material from which a Tribunal could conclude that, on the*

balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of".

144. In arriving at my decision, I also had regard to what LJ Maurice Kay said in the Court of Appeal in ***Ezsias v North Glamorgan Trust*** [2007] EWCA Civ 330:-

"***[29]*** *It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error in law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words 'no reasonable prospect of success'. It would only be in an exceptional case that an application to an Employment Tribunal would be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts thought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level".*

145. Also, in ***Anyanwu***, to which I was referred by the claimant's solicitor, Lord Steyn said that if a case is *"fact sensitive"* (and discrimination cases are) a strike-out should only be ordered: *"in the most obvious and clearest cases".* Lord Hope also said in that case that, *"discrimination cases … should, as a general rule, be decided only after hearing the evidence"*.

Present Case

146. For the purpose of determining the issues with which I was concerned in the present case, I took the claimant's averments in the claim form (P13–29) and the "Further and Better Particulars of the claim" (P69 – 74) at their highest value. In other words, I proceeded on the basis that the claimant would be able to prove all the facts he avers.

Direct Discrimination

147. S.13 of the 2010 Act is in the following terms:-

> *"**13 Direct Discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

Comparator

148. Although the two-stage shifting burden of proof applies to all forms of discrimination, it probably has the greatest impact in complaints of direct discrimination, where it is necessary to establish that the claimant has been treated less favourably than another because of a protected characteristic.

149. The comparator, hypothetical or actual, has to be *"like for like*". S.23(1) of the 2010 Act provides that, "*there must be no material difference"*.

150. In the present case, the claimant had identified an actual comparator, namely "Alan Malcolm". Mr Malcolm, like the claimant, was a Driver/Valeter. The only difference between Mr Malcolm and the claimant was that Mr Malcolm worked part-time from 8 am to 1 pm, whereas the claimant worked from 8 am to 5.30 pm but their duties were exactly the same. I was satisfied that there was *"no material difference between the circumstances relating to each case"*. I was satisfied, with reference to ***Shamoon***, that the comparator was "*in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class"*. If it is established that there was a disproportionate allocation of work and the claimant was given all the *"dirty jobs"* there may be a satisfactory explanation for that, but that is a matter which can only be properly and justly determined by hearing evidence. It is in the interests of justice to hear all the evidence.

151. In any event, as the claimant's solicitor submitted, even if I am in error with that conclusion, it would have been possible to construct a hypothetical comparator.

Direct Disability Discrimination

152. The contention of course, is that the second respondent allocated work between the claimant and Mr Malcolm unfairly because the claimant was disabled; the claimant was treated *"less favourably"* as he was given all the "*dirty jobs*", whereas Mr Malcolm, for the most part, was allocated driving duties.

153. However, even taking the claimant's averments in this regard at their highest and even assuming that the claimant was disabled, I was not persuaded that the claimant would be able to establish that he was subjected to less favourable treatment "*because of*" his disability.

154. With reference to ***Madarassy***, all that is averred is a "*difference in status and a difference in treatment"* and that is insufficient to establish a *prima facie* case.

155. All that is alleged is unreasonable treatment. That is insufficient to establish a causal link between the way the claimant was treated and his disability. In ***Bahl v The Law Society and others*** [2004] IRLR 799, the Court of Appeal upheld the reasoning of the EAT and emphasised that unreasonable treatment of a claimant cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof, the principle is still valid. In other words, unreasonable treatment is not sufficient in itself to raise a *prima facie* case requiring an answer. As the EAT said in ***Bahl*** at para 89: *"… merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct".*

156. Had I been required to do so, therefore, I would have struck out this complaint on the basis that it has *"no reasonable prospect of success".*

Direct Race Discrimination

157. Unlike the disability discrimination complaint, I was satisfied that a causal link between the way in which the claimant alleged he had been treated compared with Mr Malcolm and his race had been established. Not only is there an alleged difference in treatment (the claimant was given all the "dirty jobs, whereas Mr Malcolm was not); and a difference in race (the claimant is Polish whereas Mr Malcolm is Scottish); but also, there are the following relevant averments at paras 18 and 19 of the particulars of claim (P18):-

> "*18. During one such break in July 2019, R2 questioned C, who is a Pole, asking why C was in Inverness and not in Poland.*
>
> *19. The tone and tenor of such questioning gave C the reasonable impression that R2 did not believe that C should be living and working in Inverness or in Scotland. Rather, C justifiably felt R2 was inferring that C should return to his native Poland and live and work there".*

158. I was satisfied that, if proved, when taken with all the other relevant averments, this was likely to be sufficient to establish a *prima facie* case of direct race discrimination and would have the effect of "shifting" the onus to the respondent to provide an explanation for the claimant's treatment which was, *"in no sense whatsoever"* on the protected ground of the claimant's race.

159. Accordingly, the respondents' application to have the direct discrimination complaint, on the ground of the 'protected characteristic' of 'race', struck out or for a Deposit Order, is refused.

Harassment

160. S..26 of the 2010 Act is in the following terms:-

> "***26 Harassment***
>
> *(1) A person (A) harasses another (B) if –*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of –*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B*"

161. The claimant's solicitor advised that he was relying solely on the incident on 3 October 2019. The relevant averments are to be found at para 47(d) and (e) in the Particulars of the claim (P26):-

> "*(d) On 3rd October 2019 R2 vocally admonished C in front of numerous of C's work colleagues for leaving work earlier the previous day. This was in circumstances where C had properly obtained and complied with R2's oral permission to leave early, and where C had completed all of his necessary tasks by 4.45pm that day.*
>
> *(e) C was so affected by such humiliating and degrading treatment that he left work with R1 at noon on that day and has not returned to work for R1 since such time"*.

162. As with the complaint of direct disability discrimination, and even taking the claimant's averments at their highest value, I was not persuaded that this alleged conduct was *"related to"* the claimant's disability. This complaint has *"no reasonable prospect of success",* therefore, and I would have struck it out on this basis, had I been required to do so.

Race Discrimination

163. Having regard again to the averments referred to above at P18, paras 18 and 19 (P18), I arrived at the view that, if proved, along with the other averments, the claimant was likely to be able to establish a *prima facie* case that the alleged conduct of the second respondent on 3 October 2019 related to the claimant's race and that this would have the effect of "shifting" the burden of proof to the respondent to provide an explanation that the claimant's race was no part of the reason for this treatment.

164. Accordingly, the application by the respondents' solicitor to have this complaint struck out or for a Deposit Order is refused.

Discrimination arising from disability

165. S.15 of the 2010 Act is in the following terms:-

> "***15 Discrimination arising from disability***
>
> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Sub-section (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."*

166. "Knowledge" was not an issue in the present case.

167. In his submissions, the claimant's solicitor advised that averments to support this complaint were at paras 14 and 15 of the particulars of the claim (P18):-

> "*14 In addition to the above, C advised R2 informally that much of the work given to C by R2 such as gardening or the clearing of blocked*

drains was causing C back pain and that C would need to take time off work as a result if C was further required to do such physical work.

15. In response, R2 initially ignored such informal grievance, but when C persisted in raising such issue because of his pain, R2 advised C that if C took time off work for such reason he would be dismissed".

168. I agree with the submission by the respondents' solicitor in this regard that, *"this is more aptly a direct discrimination complaint".*

169. Further, in ***Basildon and Thurrock***, to which I was referred by the respondents' solicitor, Mr Justice Langstaff explained that there is a need to identify two separate causative steps in order for a claim under s.15 to be made out. The first is that the disability had the consequence of 'something'; the second is that the claimant was treated unfavourably because of that 'something'. I found favour with the submission by the respondents' solicitor that the claimant had failed to identify the 'something'.

170. Accordingly, I arrived at the view that this complaint has "*no reasonable prospect of success"* and I would have struck it out on that ground, had I been required to do so.

Failure to make reasonable adjustments

171. S.20 of the 2010 Act is in the following terms:-

"***20 Duty to make adjustments***

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following 3 requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial

disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is the requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take includes steps for ensuring that in the circumstances concerned the information is provided in an accessible format ….."

172. It was s.20(1)(3) on which the claimant relied in the present case. This complaint was based on allegations about the manner in which the respondent had dealt with the claimant's grievance and the claimant, *"not being permitted to move to another Transport Division or Department"*, where he would not have had to work with the second respondent. It also appeared that a *"phased return to work"* was being suggested as a reasonable adjustment.

173. Once again, I found favour with the submissions by the respondents' solicitor. In particular, I was satisfied that the claimant had failed to identify a "PCP". What was being alleged, in my view, were "one off acts". In arriving at this view, I had regard to the case of ***Ishola*** to which I was referred. I was also mindful that the PCP should be widely construed. In arriving at this view I was mindful of para 6.10 of the EHRC Code of Practice on Employment to which I was referred by the claimant's solicitor.

174. Nor was I persuaded that even if this was a relevant PCP, he was placed at a *"substantial disadvantage*", compared with others who did not have his "disabilities".

175. Accordingly, I arrived at the view that this complaint also has *"no reasonable prospect of success"* and I would have struck it out on that ground, had I been required to do so.

Constructive Unfair Dismissal

176. Having regard to the averments in support of this complaint, I was unable to conclude that it has *"little reasonable prospect of success"*, as the respondents' solicitor submitted. In arriving at this view, as with the discrimination complaints, I took the claimant's averments at their highest. I also had regard to, ***Logan v Commissioners of Customs and Excise*** [2004] ICR 1 in which the Court of Appeal observed that it would be, *"rare for the submission (of "no case to answer") to be made and rare for the submission to succeed"*, without all the evidence being heard and the complaint being considered in the round.

177. Further, in ***Wiggan v RN Woller and Company Ltd*** EAT0542/06 the EAT recognised that the same substantive considerations apply to a submission of *'no case to answer'* as to an application for strike out.

178. It is in the interests of justice to only determine this complaint once all the evidence has been heard.

179. Accordingly, the application by the respondents' solicitor for a Deposit Order is refused.

Employment Judge **Nick Hosie**

Dated **17th of March 2021**

Date sent to parties **17th of March 2021**