EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106865/2020 (V)

Held by Cloud Based Video Platform on 30th July 2021

Employment Judge O'Donnell

Mr K McCall	**Claimant** **In Person**
RNIB	**Respondent** **Represented by:** **Mr Hay (Counsel)** **instructed by** **Thrings, Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The Tribunal grants the Respondent's application under Rule 37(1)(c) to strike-out the claim of victimisation. The claim of victimisation is hereby struck out.
2. The Tribunal refuses the Respondent's applications under Rule 37(1)(a) to strike-out the claims that the Claimant was not placed on the work rota from June 2020 onwards and that Janice Bain refused to speak to him for a period of a month.

3. The Tribunal grants the Respondent's application under Rule 39 in respect of the claim as a whole and the Claimant is ordered to pay a deposit of £1000 in order to proceed with his claim.

REASONS

Introduction

1. The Claimant has brought complaints of disability discrimination and victimisation against the Respondent who resists those claims.

2. The present hearing has been listed to determine a number of applications made by the Respondent in the course of the case management of the claim:-

   a. For the claim of victimisation to be struck-out under Rule 37(1)(c) on the basis that the Claimant had failed to comply with an Order of the Tribunal to provide specification of that claim.
   b. For the claims of disability discrimination in relation to specific factual matters to be struck out under Rule 37(1)(a) as having no reasonable prospects of success. The factual averments in question are:-

      i. That the Claimant was not put on the work rota for a period from June 2020 to present.
      ii. That Janice Bain refused to speak to the Claimant for an unspecified period of a month.

   c. In the alternative, for the Tribunal to make a Deposit Order under Rule 39 in the sum of £1000 on the basis that these claims have little reasonable prospects of success.
   d. A freestanding application under Rule 39 for the Claimant to proceed with his claim as a whole on the basis that it has little reasonable prospects of success.

3. The Tribunal did not hear evidence at the hearing and made no findings in fact regarding the substantive issues of the Claimant's case.

4. There was an agreed bundle of documents prepared by the parties and a reference to page numbers below are a reference to pages in this bundle.

5. At the outset of the hearing, counsel for the Respondent sought to add documents amounting to 5 additional pages. The Claimant objected to these on the basis that he had been seeking case management orders since April and nothing had been produced. He considered that it was strange that these documents were being produced now. In response, it was accepted by Mr Hay that these documents were late but that certain of them go to one of the allegations subject to the application and show the Claimant being listed to work shifts which he would be within his knowledge.

6. Given that this was a strike-out application and no findings of fact would be made, the Tribunal allowed these documents to be added and will assess the weight to be given to those once submissions are heard.

7. There was also an issue that a skeleton argument for the Respondent had been emailed to the Tribunal and the Claimant but not received. This was re-sent but to avoid delay, the Tribunal proceeded to hear oral submissions. The skeleton argument was received and passed to the Tribunal during the hearing.

<u>Respondent's submissions</u>

8. The Respondent's agent produced written submissions and supplemented these orally.

9. The submissions start by setting out the Respondent's understanding of the claims against it; direct disability discrimination, victimisation and a breach of the duty to make reasonable adjustments, all under the Equality Act 2010. It was noted that there were also allegations of "bullying" but the Respondent

does not consider that this is a claim which the Tribunal has the power to hear.

10. Reference is made to a table of the factual allegations being made by the Claimant (pp127-129). This has been prepared by the Respondent and sent to the Claimant for comment on two occasions, 29 January and 19 February 2021 (pp105-109 and pp123-129, respectively) but there has not been a great deal of input from the Claimant.

11. The Respondent has also prepared a draft list of issues which cross-refers with the table of allegations. The strike-out applications are directed to issues 3, 5 and 6 of the list of issues with a Deposit Order being the fallback position. There is also a freestanding application for a Deposit Order relating to issue 7.

12. The claims have been the subject of previous case management and the focus in this hearing is on the Orders made on 8 January 2021 (pp40-50).

13. It was noted that the Respondent has conceded that the Claimant is a disabled person in respect of an injury to his right leg and ankle impairments.

14. Mr Hay went on the set out what he considered to be the relevant legal principles relating to the Respondent's applications:-

    a. It is recognised that the power to strike-out is a draconian one.
    b. The Tribunal is not to conduct a "mini-trial" in considering the applications but it is not restricted to a simple analysis of the pleadings and even where there are disputed facts then the Tribunal may be able to assess the prospects of success. This will depend on the nature of any disputed facts (*Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126). The Tribunal may be able to form a view as to the factual assertions being made from material put before it (*ED&F Mann Liquid Projects Ltd v Patel* [2003] EWCA 472).

c. Tribunals should be slow to strike-out discrimination claims (*Anyanwu,* below) but should not be deterred from doing so, even if there are disputed facts, if they are satisfied that there are no reasonable prospects of success (*Ahir v British Airways plc* [2017] EWCA 1392).

d. When dealing with party litigants, strike-out may only be appropriate after a reasonable attempt has been made by the Tribunal to identify the claims and issues (*Cox v Adecco & ors* UKEAT/0339/19).

e. In relation to non-compliance with Orders, the Tribunal needs to address the magnitude of the non-compliance and whether strike-out is a proportionate response to that (*Baber v Royal Bank of Scotland plc* UKEAT/0301/15).

15. Turning to the applications themselves, Mr Hay addressed the strike-out of the victimisation claim first. He made reference to Order (Fourth) made at the January hearing (p43) and, in particular, the reference to the Claimant responding to questions regarding the victimisation claim raised in the letter from the Respondent dated 1 December 2020 (p39). These questions sought detail of the protected act(s) as defined in s27 of the Equality Act relied on by the Claimant, the dates on which they occurred and the detriments which the Claimant alleges he suffered as a result of any protected act(s).

16. It was submitted that the Claimant responded to the January Orders by an email dated 22 January 2021 (pp87-95) but that this provided no response to the questions raised in relation to the claim of victimisation. This was raised with the Claimant by letter dated 29 January 2021 (pp106-107) to which the Claimant responded by email dated 9 February 2021 (pp110-113) but, again, there was no response to the relevant questions. In particular, there was no specification of the protected act(s) relied upon by the Claimant.

17. In these circumstances, Mr Hay submitted that there had been no compliance with Order (Fourth). The Tribunal and the Respondent had made

reasonable attempts to understand the basis of the victimisation claim. It was said that there had been no explanation for this non-compliance.

18. It was submitted that this non-compliance was substantial; the starting point of any victimisation claim is the identification of the protected act from which any detriments are said to flow. No detriments have been identified and the Respondent is unable to understand which of its staff have been motivated by any protected act and has no understanding of what protected act took place. It was submitted that the Respondent could not prepare any defence to these claims, it could not even identify if the claim is in time. In these circumstances, strike-out is proportionate; the Claimant has been given ample opportunity to state his claim and has not done so. The Respondent could not prepare for a Final Hearing in relation to these claims and cannot fairly defend any factual allegations that might arise.

19. It was also submitted that the complete absence of specification of the victimisation claim means that it can be legitimately concluded that the Claimant will be unable to establish facts necessary to uphold his claims and, therefore, the claim has no reasonable prospects of success.

20. Turning to the application relating to issue 5, Mr Hay confirmed that this relates to claims based on a factual assertion that the Claimant was not placed on the work rota and submitted that this was demonstrably false. Reference was made to the documents at p216 and p218 which shows the Claimant being rostered to work various shifts from July 2020 onwards. It was submitted that he worked shifts during this period and his position was far from clear. In these circumstances, it was submitted that the claim based on this factual assertion did not have reasonable prospects of success.

21. Mr Hay then turned to the application in relation to issue 6 which is an element of the claim arising from the factual allegation that a member of staff, Janice Bain, refused to talk to the Claimant for a month. It was submitted that the date of the alleged detriment is important as it assists the Respondent in preparing its defence and identify whether any issue of time

bar arises. Mr Hay's instructing solicitor has made enquiries with Ms Bain who does not know to what the allegations relate. Identification of the date is fundamental and if the Claimant cannot identify this then it goes to the prospects of success.

22. In these circumstances, Mr Hay submitted that these claims have no reasonable prospects of success and should be struck out. In the alternative, the claims have little prospects of success and that a Deposit Order is appropriate.

23. Mr Hay went on to make general observations in relation to the claims. He indicated the Respondent's view that certain aspects of the claim at issues 5-7 are out of time as may be issue 9.

24. In relation to the allegation that the Respondent failed to make reasonable adjustments, it was submitted that the Claimant has not set out what adjustments should have been made and reference was made to *RBS v Ashton* [2011] ICR 632 for the necessity for a claimant to identify the adjustments should have been made for the Tribunal to be able to determine if those were reasonable. Mr Hay argued that this was a fundamental shortcoming in the Claimant's case and the Respondent does not have fair notice of this claim.

25. In terms of the general application for Deposit Order, Mr Hay relied on the submissions made already and submitted that the Respondent has identified fundamental difficulties in the claims from which the Tribunal could legitimately conclude that the claims had little prospects of success and grant the Order.

26. The Tribunal sought Mr Hay's comments on the question of whether, if it was minded not to strike-out but make a Deposit Order instead, granting that Order took the case forward if the Claimant paid the deposit. Would the Respondent not then find itself in the same position as now of having what it considers to be insufficient specification of the case it had to meet?

27. In response, Mr Hay submitted that the purpose of deposit orders is for a claimant to reflect on whether they wish to pursue that aspect of their claim. He agreed that more case management would be needed and that the issue of fair notice still applied. In relation to further orders, he drew attention to the Overriding Objective and the expense to which the Respondent had already been put in trying to get the claim into a state which can be understood. He suggested that it may be that an Unless Order would be appropriate and that the Tribunal needs to consider what efforts have been made to obtain this information and the additional expense involved in having to ask again.

28. In rebuttal of issues raised in the Claimant's submissions, Mr Hay made the following submissions:-

a. In relation to the reference to Janice Bain at p92, it was noted that the Claimant accepted no date was given and said that this was because he was not asked for one. Mr Hay referred to the letter from the Respondent at pp38-39 and made the point that the numbers in the Claimant's email of 22 January refer back to the numbering in that letter. It was submitted that the letter from the Respondent includes a request for dates.
b. Nothing identified by the Claimant amounts to a protected act as defined in the Equality Act.
c. In relation to points 4 and 8 at p111 being said to be protected acts, Mr Hay referred to p39 and made the point that the questions regarding protected acts were separate. It was submitted that the content to which the Tribunal had been directed at the hearing does not show compliance with the Order.
d. The Respondent would question the effectiveness of any case management step to get the missing information which has not been presented given the discussion at the hearing.

e. In relation to matters which the Claimant referred in his submissions that occurred after the claim was lodged, it was submitted that these were not part of the claim.

Claimant's submissions

29. The Claimant made oral submissions in response. Much of the submissions made by the Claimant were not relevant to the issues being determined at the hearing but, rather, were directed to the substantive issues of his claims that were not being decided at the present hearing. In particular, his submissions did not respond to the points being made by Mr Hay on behalf of the Respondents regarding the failure to reply to the January Order or specify his claims and, rather, he would seek to set out why he considered he had been discriminated against by the Respondent.

30. Recognising that the Claimant is a litigant in person, the Tribunal was concerned that he may not have appreciated what was being determined at the hearing. The Tribunal, therefore, intervened during the Claimant's submissions in an effort to ensure that it had given him the opportunity to respond to the submissions being made on behalf of the Respondent. However, even when the Tribunal intervened to ask the Claimant to respond to points made by Mr Hay, the Claimant would return to setting out the reasons why he considered he had been discriminated against by the Respondent.

31. The Claimant began his submissions by addressing the allegation that Janice Bain had refused to speak to him for a month. He explained that he had contacted her on 7 June 2020 because he had been told to do so by Karen Leonard but that Ms Bain had not been willing to speak to him and he had to contact Helen Griffiths. He then began to set out the sequence of events relating to these matters.

32. The Tribunal intervened at this point to explain to the Claimant that it was not hearing evidence at this hearing and would not be making findings of fact as to what did (or did not) happen. The Tribunal set out the Respondent's

position that the Claimant had not specified the dates on which Ms Bain had refused to speak to him and asked what his response was to that assertion.

33. The Claimant replied that he had provided this date and the Tribunal asked him to identify where this information had been provided. After looking through the bundle and his emails, the Claimant directed the Tribunal to his email of 22 January 2021 and, specifically, p92 and the section headed 9.

34. This does set out the allegation regarding Ms Bain but does not set out any date. The Tribunal pointed this out to the Claimant and he responded that he was not sure and tried to do this to the best of his ability.

35. The Claimant then went to say that he had asked for numerous case management orders for information. The Respondent had said that they could not furlough him because of Fife Council. The Tribunal asked what the relevance of this was to the issue of specifying the dates when Ms Bain allegedly refused to speak to him or any other issue being determined at this hearing. The Claimant replied that the contract from Fife Council which he had been seeking is the main part and he had been asking for this. The Tribunal indicated that it was struggling to see the relevance of this to the issues at this hearing. The Claimant replied that the contract would prove otherwise and that he had been treated differently from others. The Tribunal, again, indicated that it could not see the relevance of this to the issues to be determined at the present hearing and suggested that the Claimant may wish to focus on responding to the submissions made by Mr Hay.

36. Turning to the application relating to the victimisation claim, the Tribunal asked the Claimant whether it was his position that he had identified the protected acts he relied on. He replied that he had and went on to say that it all came down to victimisation and discrimination; he had been a permanent member of staff; due to an operation he had asked to be excused from driving duties; his surgeon had to write a letter saying that he could not do driving; if the Respondent had made a reasonable adjustment to remove driving duties then he would not have gone down to being a casual worker;

he had been told it would affect his attendance; if he had remained a permanent member of staff then he would have been paid during the pandemic.

37. The Tribunal intervened and explained to the Claimant that this had not addressed the question of whether he had identified the protected acts he relied on in his victimisation claim. The Tribunal asked him to take it to where he had done so.

38. The Claimant again referred to his email of 22 January and specifically p89 and the section headed 3. This refers to the Claimant emailing managers who did not reply to him and him then contacting a more senior manager, Anne McMillan, and telling her what he considered his "status" to be (the Claimant clarified this was a reference to his employment status).

39. The Tribunal asked what category of protected act the Claimant asserted this was and read through the definition of "protected act" in s27 of the 2010 Act. The Claimant replied that it was an allegation that the Respondent had contravened the Equality Act because he thinks he should have been told earlier what his status was. He confirmed that his contact with Anne McMillan was on 24 April 2020.

40. The Tribunal asked whether the Claimant had identified any other matter which he said was a protected act. The Claimant made reference to p90 and section 4 of his email of 22 January 2021; he stated that he just felt under victimisation; he had been treated badly and not put on the rota. He was treated differently; an email was sent on 9 April 2020; another worker refused to cover shifts; from June 2020 to present day, shifts have been available; he had no shifts for 5 weeks. He was made to feel differently. Shifts were made available to others, some who were not qualified, and not him.

41. The Claimant submitted that he has made to feel different. He contacted Matt Stringer but no-one came back to him about his status. He mentioned his mental health to the Respondent. He asked if there was a risk

assessment and was told yes but when he asked for it he was told there was none.

42. The Claimant stated that he ended up in an extremely dark place and the Respondent's response was to go to REAP (which is an employee assistance programme) and he did not believe that anyone else would be treated in the same way.

43. He had not done shifts but had popped in and was ignored by managers who spoke to others.

44. He had been off for 10-11 weeks and during that time HR had not contacted him at all.

45. Not one person has asked him why he is doing this (a reference to the claim) and it was because the Respondent had let him down. He wanted to be treated equally and he feels he has been discriminated against. He just thinks all employees should be treated equally. He has never asked for anything and all he asks for is equality.

46. He has been a loyal member for 5 years. He only asked to be taken off driving duties.

47. He has always tried to respond to the Tribunal and the Respondent to the best of his ability.

48. He has been asking for case management orders since March and he should have been given the contract with Fife Council and this is why other members of staff have been part-paid. He wants the paragraphs from the contract that show that Fife Council have refused to pay him and considers that this is no justification for the Respondent not to pay his wages.

49. In terms of means to pay any deposit, the Claimant confirmed that he was working earning approximately £200-250 a month. He also received a

service pension and war disablement pension totalling £1000 a month. He did not have any rent or mortgage but does have council tax of £100 a month and gas/electricity of £200 a quarter. In terms of capital, there was money in his wife's account which she had inherited.

Relevant Law

50. The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

51. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18) given the draconian nature of the power.*

52. Similarly, In *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally

fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

53. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume he will make out the facts he offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

54. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37was summarised by Burton J, in *Bolch v Chipman* [2004] IRLR 140:-

a. The Tribunal must reach a conclusion as to whether the relevant ground under Rule 37 has been made out.
b. Even the relevant ground is made out, the Tribunal must decide whether a fair trial is still possible.
c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.
d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

55. The Tribunal has the power to make a deposit order under Rule 39:-

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

56. In *Hemdan v Ishmail* [2017] IRLR 228, it was confirmed that the purpose of the rule was to identify claims with little prospect of success at an early stage and discourage those but was not intended to act as a barrier to access to justice or to "*strike-out by the back door*".

57. In determining an application for a deposit order, the Tribunal is entitled to have regard to the prospects of any party making out any factual assertion on which the claim is based as well as purely legal issues (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07). However, the

Tribunal "*must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response*" (*Van Rensburg* para 27) although this should not involve a trial of the facts as this would defeat the purpose of the Rule (*Hemdan*).

Decision

58. The Tribunal will address each of the applications in turn and starts with the application to strike-out the claim of victimisation.

59. It is quite clear to the Tribunal that the Claimant has not complied with Order (Fourth) made in January 2021 in respect of specification of his victimisation claim. The Claimant's email of 22 January 2021 (pp87-95) does not set out any express reference to the protected acts relied upon by the Claimant in advancing his victimisation claim and neither has any subsequent correspondence. The terms of the information which the Claimant was to provide was clear and he has not done so.

60. To the extent that it might be said that the Claimant's correspondence could be read in a way in such as to identify what the protected acts may be, there are two points that the Tribunal took into account in relation to such an argument.

61. First, the Tribunal does not consider that it is for the Tribunal and the Respondent to seek to guess at what the Claimant seeks to rely on as protected acts from correspondence which does not set that out in clear terms. It is for the Claimant to set this out in terms which can be clearly understood and give the Respondent fair notice of his claim.

62. Second, having read the Claimant's correspondence of 22 January 2021 and his subsequent correspondence of 9 February 2021 (pp110-113), the Tribunal considers that, even on the most generous interpretation of this correspondence, neither of these emails sets out anything which could be interpreted as describing a "protected act" as defined in s27 of the Equality Act.

63. The Tribunal is, therefore, satisfied that the Claimant has not complied with the Order made on 8 January 2021.

64. The next question is whether a fair trial is still possible even with that non-compliance. The Tribunal accepts the submissions made on behalf of the Respondent that a fair trial is not possible.

65. The identification of the protected acts relied on as founding a victimisation claim is fundamental to that claim and the lack of any notice, let alone fair notice, of such matters goes to the heart of the victimisation claim. The Claimant's failure to specify the protected acts he relies on means that the Respondent is prejudiced in defending that claim. They cannot, for example, confirm whether they accept that the protected act(s) took place as alleged, whether what was done amounts to a protected act or whether decision-makers who are alleged to have victimised the Claimant knew of these alleged acts.

66. The Tribunal considers that there could not be a fair trial of the victimisation claim if it proceeded to a final hearing as it is currently specified. The Respondent would be going to such a hearing with no idea of the case it had to meet, particularly in relation to the issue of the matters alleged to be protected acts.

67. The Tribunal's consideration, therefore, turns to the question of whether strike-out would be proportionate and, in particular, whether a less draconian step could be taken.

68. The obvious alternative is an Order for the Claimant to disclose this information but that has already been done in January 2021 and the Claimant failed to respond to this.

69. The Tribunal also notes that the Claimant has been on notice regarding his failure to comply with the January Order since 29 January when the

Respondent first raised this. The Claimant has certainly been on notice that this failure could have serious consequences to his claim (that is, it could be struck-out) since March when the Respondent made the applications which are the subject of this hearing. However, in all that time, the Claimant has taken no steps to provide the specification sought. Given that such a step would have effectively short-circuited the Respondent's application, the Claimant's failure to do so adversely impacts on the Tribunal's view of whether it could have confidence that any further Order would be met.

70. Indeed, at the hearing, the Tribunal asked the Claimant to identify the protected act(s) and where they were set out in his correspondence but he struggled to do so and, rather, he would make reference to how he believed he had been treated less favourably. The fact that the Claimant himself could not immediately identify the protected act(s) he relies on also adversely affects the Tribunal's view of whether any further Order would be met.

71. The Tribunal did identify a contact he had with Anne MacMillan about his employment status as amounting to a protected act but, when the Tribunal asked him how it was said that this fell within the definition of "protected act" in s27, the Claimant could not do so. On a plain reading of what was said about the contact with Ms MacMillan in the Claimant's correspondence does not set out anything which could, even on the most generous interpretation, fall within the definition of "protected act" in s27.

72. The Tribunal found it difficult to resist the conclusion that the Claimant was using the term "victimisation" in the colloquial sense rather than the strict legal sense of the definition in the Equality Act. This would explain why he struggled to identify any protected acts and why he was focussed on how he believed he had been treated unfavourably rather than on the strict legal question of showing that he was treated unfavourably because he had done a protected act.

73. The Tribunal considers that the Claimant has had ample opportunity to provide the specification of his victimisation claim; he was asked for this on a

voluntary basis before the January Order was made; he was ordered to provide the information in January; he has been put on notice that he had not complied with the terms of the Order in January and March 2021 but did not seek to remedy this; he was given the opportunity at the present hearing to provide the specification but could not do so.

74. Further, in light of those opportunities and the Claimant's failure to provide the specification sought, the Tribunal considers that a further Order (even an Unless Order under Rule 38) would not resolve this matter. The Tribunal has no confidence that the Claimant would respond to such an Order in circumstances where he has failed to do so to date.

75. The Tribunal, in considering whether strike-out is proportionate, has taken account that each alleged act of victimisation is also said to amount to an alleged act of direct discrimination. If the victimisation claim is struck-out then the Claimant would not be prevented from seeking a remedy in relation to these alleged acts as he would still be able to pursue the direct disability discrimination claim in relation to these matters.

76. The Tribunal, therefore, considers that, given the lack of any alternative and the limited prejudice to the Claimant in striking out the victimisation claim, granting the Respondent's application would be a proportionate remedy.

77. In light of the Tribunal's determination that the Claimant has failed to comply with the January Order, that such failure means that it is not possible to have a fair trial of the victimisation claim and that strike-out is a proportionate remedy, the Tribunal grants the Respondent's application under Rule 37(1)(c) to strikeout the claim of victimisation. The claim of victimisation is hereby struck out in relation to all the factual allegations which are said to amount to victimisation.

78. The Tribunal now turns to the application to strike-out the specific allegation that the Claimant was not put on the work rota from June 2020 onwards and that this amounts to direct disability discrimination. This application is made

under Rule 37(1)(a) on the basis that this specific element of the claim has no reasonable prospects of success.

79. The Respondent's application is fundamentally based on the documents added to the bundle at the outset of the hearing (pp216-221) which are internal emails between employees of the Respondent showing dates on which it is said that the Claimant was placed on the work rota. On the face of these documents, the Claimant was being placed on the work rota on a regular basis from July 2020 to February 2021 and it certainly does not show that he was not being placed on the work rota at all from June 2020 onwards as alleged by the Claimant.

80. The Claimant did not dispute the accuracy of these documents other than to say that some of these shifts were not worked. The Tribunal does note that these documents were only produced on the morning of the hearing so the Claimant had not had the opportunity to check the dates given against his records. However, if the dates were wholly inaccurate (that is, that he was not rostered to work any of these shifts) then the Tribunal would expect him to have been able to point this out.

81. The Tribunal does bear in mind that it is not hearing evidence or making findings in fact. However, although it should proceed from the basis of taking the Claimant's case at is highest, it can take account of the likelihood of the Claimant making out those facts.

82. The Tribunal does take into account the fact that the Claimant is a party litigant and so does not expect the same degree of precision in drafting his ET1 and subsequent specification. However, the ET1 (at p10), which was lodged in October 2020, is very clear in stating that the Respondent "refused" to give the Claimant hours or shifts; the longer narrative attached to the ET1 (pp17-19) does not qualify this as being for a particular period or, for example, that he was offered less shifts than others and the plain reading of the ET1 as a whole is that the Respondent has not given the Claimant any

shifts up to the date of the ET1, something which is not borne out by the Respondent's documents.

83. In his email of 22 January 2021 at p92, the allegation regarding shifts is set out more narrowly than in the ET1. The Claimant, in this document, makes specific reference to a rota produced on 4 June 2020 on which he was not included. He says that he was not included "again" which suggests that there were earlier rotas on which he was not named but does not specify these. In his submissions at the hearing, the Claimant indicated that he was not rostered for a period of five weeks.

84. In the same section of the January correspondence, the Claimant makes reference to not being included on the rota "recently" but does not specify any date. The Tribunal agrees with Mr Hay that any matter which occurred after the ET1 was lodged cannot be founded upon as a cause of action in these proceedings in the absence of any application to amend the ET1 to add new causes of action or the lodging of a fresh ET1 pleading acts which have occurred after the original ET1 was presented.

85. Taking account of all of these matters, the Tribunal, with some reluctance, is not prepared to strike-out the claim relating to the allegation that the Claimant was not placed on the work rota.

86. Whilst the material before the Tribunal does suggest that the Respondent will be able to produce evidence that rebuts the broad allegation that the Claimant has not been rostered for work at all since June 2020 and so that broad allegation may have no reasonable prospects of success, there is within that allegation a more focussed issue that there was a period of time during which the Claimant was not rostered for work around June 2020 and the Respondent's documents do not disclose that he was placed on the work rota during this period.

87. The Tribunal, bearing in mind that the Claimant is a party litigant, does not consider that it would in the interests of justice to strike-out the claim relating to this allegation as a whole in such circumstances.

88. However, it does consider that the claim, as pled in the broad terms which it is, does have little prospects of success as a whole in light of the evidence which the Respondent is going to produce to rebut the assertion that the Claimant was not provided with any hours or shifts at all from June 2020 onwards and so this would be appropriate for a Deposit Order. It will return to this point below where it considers the separate application for a Deposit Order.

89. The Tribunal would hope that what it says above would prompt the Claimant to pause and give consideration to what claim he is actually seeking to advance in relation to being rostered to work especially in light of the evidence which the Respondent has indicated it will produce to show that he had been rostered to work. Ultimately, it is for each party to set out the case they are offering to prove but they do need to give consideration as to whether it is in their own interests to advance a claim on a basis which may not be supported by the evidence.

90. The Tribunal turns to the final application for strike-out which relates to the allegation that Janice Bain refused to speak to the Claimant. This is also made under Rule 37(1)(a) that this specific claim has no reasonable prospects of success given that the Claimant has not identified the date or dates on which Ms Bain refused to speak to him.

91. The narrative attached to the ET1 at p18 is the source of this specific allegation in which the Claimant states that the “Centre Manager” refused to speak to him or contact him for a month. The Respondent sought specification of this in their letter of 1 December 2020 (pp38-39) asking both for the relevant dates and persons involved in all the matters which amount to alleged acts of discrimination including the allegation that the centre manager refused to speak to the Claimant. The Claimant, in his email of 22 January

2021 at p92, identifies the manager in question as Janice Bain. He goes on to identify that Ms Bain did have a meeting with him via Microsoft Teams at which Sade Fabusiyi was a witness.

92. At the present hearing, the Claimant, in his submissions, stated that he first contacted Ms Bain on 7 June 2020 and that she refused to meet with him.

93. Whilst it would have been more straightforward for the Claimant to have provided the relevant dates in his response to the January Order, the Tribunal considers that the Respondent does now have sufficient information to be able to identify the period to which this allegation relates; it starts on 7 June 2020 when the Claimant contacted Ms Bain as stated in his submissions and ends when the meeting between the Claimant and Ms Bain (at which Sade Fabusiyi was in attendance) took place. The Respondent can presumably identify the date of that meeting from the recollection of either of those individuals or any minutes or correspondence relating to that meeting.

94. In these circumstances, the Tribunal does not consider that this specific element of the claim has no reasonable prospects of success and so the Respondent's application to strike-out this claim is refused. Further, the Tribunal does not consider that this element of the claim can be said to have little prospect of success, in and of itself, and so refuses the specific application for a Deposit Order in respect of this element of the claim.

95. The Tribunal now turns to the application for a Deposit Order. For the reasons set above, the Tribunal does consider that the claim relating to the alleged refusal to put the Claimant on the work rota would have little reasonable prospects of success and so would exercise its powers under Rule 39 to require the Claimant to pay a deposit in respect of that specific allegation.

96. However, the Respondent also applies for an Order under Rule 39 in respect of the claim as a whole and so the Tribunal requires to consider whether it will exercise its power under Rule 39 for the Claimant to pay a deposit to proceed

with the whole claim or just in relation to the specific allegation of the Respondent's alleged refusal to place him on the work rota.

97. The Tribunal notes that in the list of issues (pp151-153), the Respondent asserts that many, if not all, of the alleged acts of discrimination are out lodged out of time. This, of course, can very much go to the prospects of success; if the Tribunal does not have jurisdiction to hear a claim because it was lodged out of time then the claim could be said to have very poor prospects. On the other hand, the Tribunal has a discretion to hear discrimination claims out of time where it is just and equitable to do so. Ultimately, this will be a question for another hearing to determine and all that can be said at this point is that there is the potential that the claim may not proceed if the time bar issue is resolved against the Claimant.

98. One particular issue of note is that the central pillar of the Claimant's case is the allegation that he was forced to move on to a casual contract some years ago when he asked to be excused driving duties due to the effects of his disability and that if this had not occurred then the issues which arose in 2020 relating to whether he would be furloughed, continue to receive pay or be placed on the work rota would not have arisen. In addition to any time limit issue which will arise if the Claimant seeks to include the decision for him to move to a casual contract as a cause of action, this also raises difficult questions of causation for the Claimant involving the distinction between the act of discrimination and the effects of the act.

99. The Tribunal also agrees with the submissions by Mr Hay that the Claimant's inability to specify what adjustments the Respondent should have made goes to the prospects of success in the claim that the duty to make reasonable adjustments was breached by the Respondent. If there is no evidence before the Tribunal that there were adjustment which it would have been reasonable to make to overcome the disadvantage to the Claimant then it will be very difficult for the Tribunal to conclude that the duty was breached.

100. Taking all of these matters into account (including the specific issue relating to the claim relating to the work rota), the Tribunal does consider that the claim as a whole has little reasonable prospects of success and so grants the Respondent's application under Rule 39.

101. The question then is the amount of any deposit. Taking account of the Claimant's earnings and outgoings, balancing this against the need for the sum to reflect the Tribunal's view on the prospects of success, the Tribunal does consider that £1000 (as sought by the Respondent) is an appropriate sum for the Deposit Order.

Employment Judge: **P O'Donnell**
Date of Judgment: **09 August 2021**
Date sent to parties: **26 August 2021**