EMPLOYMENT TRIBUNALS

Claimant: Dr HUMBERTO JOSE MORAN-CIRKOVIC

Respondent: CORETHREE LTD

RECORD OF A PRELIMINARY HEARING

Heard at: Watford Employment Tribunal **On: 7 October 2021**

Before: Employment Judge Tuck

Appearances
For the claimant: In Person
For the respondent: Ms D Grennan, counsel.

PRELIMINARY HEARING

JUDGMENT

(1) The claimant's application for the response to be struck out because the application for extension of time to submit the ET3 was founded on fabricated email dated 12 December 2019, fails and is dismissed.
(2) The Respondent's application for strike out succeeds in relation to one allegation of harassment related to age (box 3 of the Scott Schedule annexed hereto). All other applications are dismissed.
(3) The Respondent's application for deposit orders succeeds in relation to one allegation of direct age discrimination, and one allegation of harassment related to age (boxes 1 and 2 of the Scott Schedule). All other applications are dismissed.
(4) Two deposits, each in the sum of £250 are herein ordered – a total of £500.

REASONS

History of claim to date:

1. By an ET1 presented on 12 November 2019, following a period of early conciliation between 19 September and 18 October 2019, the claimant

brought claims of discrimination because of age, sex and race, harassment related to age, sex and race, harassment of a sexual nature, and victimisation.

2. On 5 December 2019 the ET2 was sent by the tribunal to the respondent, it stated that a response was due to be sent to the tribunal by 7 January 2020.
3. On 2 December 2019 the Respondent had engaged a new member of staff to deal with HR matters, Ms Alex Matthews. The Respondent's case is that on 12 December 2019 Ms Matthews drafted an email seeking an extension of time to present the ET3 of some 3.5 weeks, to allow it to be filed by 31 January 2020. It is not in dispute that the email was is addressed to watford@justice.gov.uk, nor is in dispute that the correct email address for the tribunal is watfordET@justice.gov.uk, such that the email said to have been drafted by Ms Matthews was not received by the tribunal, and nor was any "bounce back" email generated. The email was cc'd to Ms Murdoch, the Respondent's Chief Operating Officer, who told me in her evidence that she received the email on the day it was sent. She said she did not notice the incorrect ET address.
4. The content of the email is as follows (having been "cut and pasted" by me from the copy of the email Ms McDermott sent to me by email in the course of today's hearing):

> *"To whom it may concern*
>
> *Further to my conversation with Watford Employment Tribunal this morning,* ***this is to request a time extension for Corethree Ltd to respond*** *(via the ET3 form) to the ET2 lodged by Mr H Moran-Cirkovic.*
>
> *We would respectfully request an extension of approximately 3.5 weeks, from the stated deadline of 7 January up to and including 31 January 2020. Our reasons are as follows:*
>
> *1. Corethree Ltd is a small limited company - headcount currently 26.6 FTE (27 members of staff employed and on the company payroll) with limited manpower capacity to respond to this lengthy complaint within the time frame set out.*
>
> *2. And because of the type of work Corethree Ltd undertakes, which is digital ticketing for national public transport carriers, in the main, operationally this is one of the peak times of year for the business's activities and a high workload period for its staff i.e. the before and after Christmas are periods are where a lot of public travel happens.*
>
> *3. In addition, between these two linked peak periods we are closed for three days between Christmas and New Year.*
>
> *Having spoken to one of your colleagues based with you at Watford Employment Tribunal today, i understand that once I have put this request in (as per this email) our 28 day response time is suspended until we receive a response from yourselves as to whether an extension will be granted and in any event, this is likely to be within 2-3 weeks. If this isn't the case please let us know by return, so that we can expedite matters at this end.*
>
> *Please do not hesitate to come back if you need any further information or have any queries regarding the above, I have copied on a colleague, Dawn Murdock, COO Corethree, as I am employed part time and therefore not always available to respond quickly if the need arises.*

Kind regards, Alex

Usual working days. Monday, Tuesday, Thursday each week.

corethree®

Alex Matthews
alex.matthewsi@corethree.net
Corethree Ltd "

5. The parties agree that the contention that time will be suspended while any application for the extension of time to present a response is considered, is clearly wrong.
6. On 12 December 2019 Ms Murdoch instructed Ms McDermott, a solicitor and partner of Keystone Law. They arranged a telephone conference call for 17 December 2019, and at that time Ms Matthews told Ms McDermott that she had sent an email to the Tribunal requesting an extension of time to file the Response. That day was in fact the final day of Ms Matthew's short employment with the Respondent and Ms Murdoch told me that the Respondent did not feel it was appropriate to 'reach out' to Ms Matthews and ask her to give evidence in these proceedings.
7. On 19 December 2019 Ms Murdoch told Ms McDermott that Ms Matthews had left; Ms McDermott asked for a copy of the email of 12 December 2019, and after their call Ms Murdoch forwarded the email of 12 December 2019, into which she had been cc'd, to Ms McDermott.
8. On 3 January 2020, Ms McDermott's first day back at work after the Christmas holidays, she telephoned the ET to ask whether the application for an extension of time to present the ET3 had been granted. She was told that the ET had not received any application, and during this call Ms McDermott saw the mistake in the email address. She therefore wrote making an urgent application for an extension of time, and referred to discovering that the email of 12 December 2019 had been wrongly addressed, and enclosing a copy of the email. In order to enclose a copy of the email, Ms McDermott cut and paste its contents into a word document – she did not forward the email as it was part of a chain of communications with Ms Murdoch containing privileged communications.
9. EJ Manley granted the application for an extension of time on 7 January 2020. The response was thereafter prepared within the extended time period, and sets out in detail the Respondent's replies to the detailed claim form, and denies any discrimination.
10. Thereafter correspondence was exchanged between the parties, starting with letters from the Claimant on 7 and 10 January 2020 in which he asked for the decision to grant an application for extra time to present the ET3 to be refused because having reviewed the email of 12 December 2019 he thought there were "several technical features" which were "unusual", and he said "whilst inconclusive, these features suggest that the Email in question may have been fabricated or forged so it was never sent on the 12 December 2019 as alleged by the Respondent". He asked for an electronic version of the email to be forwarded to him so that he could have the email analysed by an "expert witness" to "establish its authenticity". The Claimant repeated on 10 January

2020 that “I have reasons to believe that the Email in question has been fabricated or forged”, and again referring to the need for an “accredited expert witness of my choice” to verify its authenticity.

11. On 13 January Ms McDermott took instruction from her client, Ms Murdoch and asked to be sent the email in question. Ms Murdoch initially sent the email as a PDF file. Ms McDermott asked for it to be sent in another format. In her written witness statement Ms Murdoch wrote that she sent the message in response to that request, from the account of Alex Matthews; before confirming the truth of her statement she amended this and said, that having listened to submission from the claimant that the electronic version had been “sent” whereas if it had been from Alex’s account, it would not have been in the same format, she thought it might have been from her email account. From whichever account it was, Ms McDermott received the email in “msg/ eml” format and wrote to the ET and Claimant the same day, denying the alleged fraud or fabrication, and she said “a digital copy of the email is attached for clarification”.
12. The following day the claimant wrote saying that the email format version he received the day before had “raised more questions than it answered and further suggests that the email in question is a fabrication or format”. He asked that within three days the “incongruences and unusual features” he had identified be explained by the respondent, and for an order for an expert witness to examine computers of, inter alia, Ms Matthews and Ms Murdoch. In a further letter on 20 January 2020 the Claimant again said that the respondent was seeking to rely on “fabricated evidence to justify an undeserved and unneeded extension of time.”
13. On 10 April 2020 EJ Palmer wrote that the correspondence would be considered at the Preliminary Case Management Hearing.
14. On 17 June 2020, having received notification of a PH listed for January 2021, the claimant asked for a longer hearing and said that his evidence for the PH “includes reports from two accredited expert witnesses”. Ms McDermott replied on behalf of the Respondent the following day and said there were no reasonable grounds for the contention that the email was a forgery and that the application was considered to be vexatious. She asked that the claimant be ordered to disclose the expert reports and the respondent be permitted to adduce its own expert. On 21 June 2020 the claimant asked for further disclosure, and included quotes from his expert witnesses. One said that the word version of the email could potentially have been doctored, the second said he believed it to be “very dubious”.
15. EJ Lewis on 27 September considered the correspondence and refused the application for disclosure and to call expert evidence as they were “disproportionate and not in the interests of justice”.
16. The PH took place before EJ Quill on 14 January 2021, with the same representation as was before me today. As well as giving case management directions, he listed for determination at a one day PH the matters before me today, which are set out below. The full merits hearing is listed for six days, commencing on 24 January 2022.
17. Further correspondence was exchanged on 21 January (Respondent to ET attaching the email “properties”), 23 January (Claimant to ET asking for access to the Respondent computers) and 27 January 2021 (Claimant to ET). In the letter of 27 January the claimant said “I have expert evidence that

shows that this very email in digital format has a number of technical incongruences that strongly suggest that it is a fabrication …. . this is clearly a task for a qualified expert witness, not a task for the tribunal".

18. On 28 January 2021 Ms McDermott set out the Respondent's grounds for Strike out / Deposit order applications, and sent a judgment of London Central ET in a case the claimant has brought against the employer he joined after the respondent, dated 18 August 2020. The claimant replied on 31 January 2021 addressing both the Respondent's application and again asserting that "the email in question is forged, this has been confirmed by two accredited expert witnesses". On 23 February 2021 the claimant set out quotes from the expert witnesses, the first said of the word document that it "could potentially have been doctored or made up". The second, Mr Watts was quoted as saying that the email accounts of Ms Matthews and Ms Murdoch need to be examined to determine the provenance of the subject email". The claimant made an application for this access to be granted. On 1 March 2021 Ms McDermott replied to this letter saying that the claimant was "seeking to subvert the Order by introducing his own experts' evidence in contravention of the Order…"
19. EJ Quilll considered the correspondence on 23 March 2021. He wrote "the claimant does not have permission to instruct an expert and rely on that expert evidence. The hearing was granted on the basis that the Claimant stated that he already had evidence in his possession to prove that the Respondent had lied to the tribunal, not on the basis that the Respondent must (or the claimant could) obtain expert evidence to prove if /when the email of 12 December 2019 was sent". EJ Quill went on "if the Claimant is stating that he has already obtained expert evidence, then he will need to apply for permission to rely on that evidence that the preliminary hearing." He gave orders for that application to be made, and in compliance with the order, the claimant made this application on 5 April 2021. Therein, the claimant said "forged emails look totally authentic to the untrained eye. Only an expert can reliably ascertain the authenticity of an email". The respondent objected on 19 April. On 9 June 2021 EJ Quill ordered "The Claimant does not have permission to adduce expert evidence. If he has not done it already, he must supply copies of all his evidence in relation to his allegations of forgery to the Respondent by 16 June 2021".

Issues for determination today:

20. Against that lengthy background, the matters listed for determination today are as follows:
    a. Whether the response should be struck out in accordance with Rule 37(1)(b) or 37(1)(e) – the Claimant's allegation being that he has proof that the Respondent and /or its representatives submitted fraudulent documents in connection with an application for extension of time in which to present their response.
    b. Whether any part of the claim or response should be struck out in accordance with Rule 37(1)(a) – if it has no reasonable prospects of success.
    c. Whether there should be a deposit order in relation to any allegation or argument – if it has little reasonable prospect of success.

21. It was agreed with the parties to take the first of these issues at the outset, and thereafter to consider the respondent's applications.

Claimant's application for strike out:
Evidence.

22. The claimant prepared an electronic bundle consisting of 232 pages, and I read all the pages which I was taken to. Additionally I had witness statements and heard evidence (the witnesses having given an affirmation) from the Claimant, Ms Murdoch, COO of the Respondent and Ms McDermott, solicitor instructed by the Respondent. The claimant also provided me with written arguments which he prepared for today's hearing, and at my request I was sent the Scott schedule setting out the substantive issues in the case.

Application to exclude parts of the claimant's evidence:

23. Ms Grennan made an application that paragraphs 47-65 and 72-74 of the Claimant's witness statement be disregarded. The claimant is a computer engineer with an MBA and PhD and has over 34 years' experience in computer science and information technology. She submitted that those sections of the claimant's witness statement in effect amounted to expert evidence from him, and that this was not only in contravention of the ET orders, but that she was not in a position to cross examine on the technical points made without the benefit of an expert report.
24. The Claimant said that he understood EJ Quill's order to exclude his two expert witnesses, but that he could put forward his own evidence. He said that whilst some was technical in nature, a great deal was common knowledge to users of computers and email accounts. He initially said that he realised he "could not ask me to look at HTML properties of emails", but later said he ought not to have said that as it is obvious that emails have identities and properties.
25. I determined that it would read and consider the claimant's statement in its entirety. I would not however be in a position to make findings of fact in relation to matters where he had set out opinions based on his expertise, as he could not give expert evidence on his own account. Both parties confirmed they were content to proceed on this basis.

Facts.

26. In December 2019 when the Ms Murdoch received the ET1, she delegated to Ms Matthews, a new HR Manager, the task of asking the ET for an extension of time to respond to what is a detailed claim form. It consists of 15 pages of single spaced type with numerous causes of action. She knew that the Respondent's office would be closed from 20 December 2020 until the New Year, and that she then had a period of annual leave until 13 January 2021. She promptly instructed Ms McDermott to deal with the claim. There has never been any question of the Respondent failing to deal with this matter.
27. Ms Murdoch says that she received the email of 12 December 2019 on that day from Ms Matthews. This is consistent with both Ms Matthews and Ms Murdoch telling Ms McDermott on 17 December 2019 that an application for an extension of time "had been made" to the tribunal. The claimant has sought to persuade me that this simply cannot be true. He has looked at the properties of the email. As set out above, on 13 January 2020 Ms Murdoch

initially sent a copy of the 12 December 2019 email to Ms McDermott as a PDF file but was asked to send it in a different format. In her written witness statement Ms Murdoch wrote that she sent the email in response to that request, from the account of Alex Matthews; before confirming the truth of her statement she amended this and said, that having listened to submission from the claimant that the electronic version had been "sent" whereas if it had been from Alex's account, it would not have been in the same format, she thought it must have been from her email account. The claimant said that the "heading properties" suggest the email was sent (pg 116), whereas the formatting properties (pg 159) suggest that the email was not sent. He said that this inevitably meant that the evidence of Ms Murdoch was a lie. She could not have received the email on 12 December 2019 as she told me.

28. I am unable to make findings that Ms Murdoch was deliberately seeking to mislead the tribunal – either when instructing an extension of time for the presentation of the ET3 be made in December 2019 and January 2020, or today before me. I do not find it surprising that she was unable to recall today during cross examination, over 21 months after the email exchanges, exactly how she forwarded a particular email. Further, if the email had been fabricated, this must have been done by 17 December 2019 when it was forwarded to Ms McDermott – such that she had a copy to 'cut and paste' into a word document and send with her application on 3 January 2020. There is simply no rational explanation as to why Ms Murdoch or Ms Matthews would seek to fabricate an email between 12 and 17 December 2019. Had it been discovered that no email had been sent to the tribunal on 12th December, they could simply have sent one on that date. In fact, I consider it inherently more likely that if Ms Murdoch had discovered that her instruction to apply for an extension of time had not been carried out on or before 17 December, she would have repeated her instruction to Ms Matthews, or else (given that 17 December was Ms Matthews' final day of employment), instructed Ms McDermott to make the application. I find that Ms Murdoch was unaware that the tribunal had not received the email of 12 December 2019 until at the very earliest 3 January 2020 (and possibly not until her return from leave on 13 January). By this time, the text of this email was already in existence having been given to Ms McDermott on 17 December. Having considered all these factors, I accept the evidence of Ms Murdoch that she received an email on 12 December 2019, and that this caused her to tell Ms McDermott on 17 December 2019 that an application for an extension of time had been made.
29. Ms McDermott sought to find out whether the ET had considered the application for extension of time to present the ET3 on 3 January 2020; on discovering no such application had been received by the ET, she promptly made an application. She attached the email of 12 December 2019 to her application. The claimant accepted that Ms McDermott had been provided with this document from her clients, and did not allege that she had fabricated the email. In any event and for the avoidance of doubt, I unhesitatingly accept the evidence of Ms McDermott that she did not fabricate, or instruct to be fabricated, the email of 12 December 2019. This is an allegation which has at the very least been implied against her, and is a very serious allegation against a regulated professional. I further accept that she simply had no reason to do so. She was making an application for an extension of time before the applicable time limit had expired; it was clearly in the interests of

justice to allow additional time for a full response to be given to a detailed claim where it would cause no delay whatsoever in the progress of the case.

30. Thereafter, I am entirely satisfied that Ms McDermott sought to provide copies of the email of 12 December 2019 to the Claimant when he requested it, in the formats he was asking for. Whether she managed to do this is a different matter, but I accept that she was seeking to do so. Ms McDermott sent the email of 12 December 2019 to me in the course of the hearing today. She explained to me how she found 'properties' which she had cut and pasted into a word document and was at page 116 of the bundle before me. When I examined the "properties" tag, it displayed the same characters as those on page 116.
31. The correspondence which was exchanged after 3 January 2020 is set out above.

Submissions on 'forgery' issue.

32. Dr Moran submitted that computers are embodied in our everyday lives, as is the use of email, and that his evidence related to formatting tags which are supported and unsupported by Gmail. This he said, was a matter of common knowledge and not a matter of expert evidence. He said that the email properties of the 12 December 2019 email contained properties which could not be supported by Gmail. This is shown by the HTML. HTML is, Dr Moran explained, simply the way in which email properties are described. Gmail, he told me, does not support all formatting properties and there are unsupported properties shown on page 159. He has experimented by cutting and pasting the same message and then sending it, at which point in time the properties displayed look quite different – as show at page 160.
33. Dr Moran said that the "heading properties" suggest the email was sent (pg 116), whereas the formatting properties (pg 159) suggest that the email was not sent. He said that this inevitably meant that the evidence of Mrs Murdoch was a lie. She could not have received the email on 12 December 2019 as she told me.
34. Dr Moran highlighted the "change of story" of Ms Murdoch who in her prepared statement said that she had "managed" to access the email account of Alex Matthews to send the email of 12 December 2019 to Ms McDermott on 13 January 2020, whereas before confirming her statement as correct, she said that it had in fact been sent from her email account. He says this shows that this demonstrates that the properties of the email were incorrect and had been tampered with. His submission was that "someone on the respondent's side fabricated the email"; not Ms McDermott, but it must have been fabricated as it was not an email which "made it through the Gmail system".
35. Ms Grennan for the Respondent underlined that she was not in a position to address the technical accounts given, and said that if it was as simple as he now says, it is not clear why he sought permission to adduce expert evidence, and in fact neither expert could state categorically that the email was fabricated. She invited me to reject the contention that the only possible explanation was forgery, and invited me to accept the evidence of Ms Murdoch, along with the evidence of Ms McDermott (whose account is not now challenged as being untruthful).
36. Ms Grennan also invited me to step back and asked me to consider whether, to seek a delay of three weeks, the respondent would have gone to the lengths

the claimant has suggested. Ms McDermott had a telephone conference with the respondent on 17 December 2019 when she was told an application had been made for an extension of time. She was sent the email of 12 December 2019 on that day.

Conclusion on the Claimant's application for strike out.

37. The Claimant's application was that the conduct of the proceedings was scandalous, unreasonable or vexatious within Rule 37(1)(b) because the respondent had put before the tribunal a deliberately fabricated email, namely that of 12 December 2019.
38. The claimant in correspondence had stated that only an expert could reliably ascertain reliably the authenticity of this email. Nevertheless, a judicial decision was made by EJ Quill on 9 June 2021 that the claimant did not have permission to rely on expert evidence. This was from either the experts the claimant had approached, or by seeking to rely on his own professional expertise. Absent such evidence, I am not prepared to make findings that an email has been fabricated based on HTML properties. I do not accept that understanding these are a matter of 'common knowledge' or are a matter of which I can take judicial note.
39. There is no dispute of fact that the text of that email was in existence by 17 December 2019 when it was sent to Ms McDermott. I have set out in my findings why I fail to see any rationale for fabricating the email at this time. Regardless therefore of any anomalies in HTML or other properties, I do not accept, on a balance of probabilities, that the email in question was fabricated.

Respondent's applications for strike out / deposit orders.
Application:

40. In an attachment to an email from Ms McDermott sent on 28 January 2021, the Respondent set out in detail applications to strike out race and age discrimination claims, and for deposit orders in relation to the sex discrimination claim.

Legal Tests:

41. The applications are made under the ET Rules of procedure, Rule 37 for strike out – in relation to which the questions is whether there is no reasonable prospect of success, and Rule 39 for deposit orders - where the test is to ask whether an allegation has little reasonable prospect of success. It is well established that in considering such applications, it is appropriate to take the claimant's case at its highest. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute - *North Glamorgan NHS Trust v Ezsias* [2007] EWCA Civ 330*.*

Submissions:

42. Ms Grennan has highlighted contemporaneous documents (such as the claimant's email of 3 July 2019) in which he expressly stated that he was not claiming discrimination or harassment of a sexual nature in relation to particular events, which are now alleged to amount to such conduct. She said that there was considerable "mission creep". Insofar as the claimant relied on how he described matters within covert recordings, she placed some reliance (though by necessity a limited degree) on the judgment of EJ Hodgson in London

Central ET of 6 August 2020 in which comments are made that the claimant's contentions were not supported by recordings he adduced in those proceedings.

43. The claimant's response was that at the time of a key event of 20 June 2019, he "declined to speculate" as to whether this was harassment of a sexual nature, he just wanted it to stop. He said that in his grievance he described the approaches as being of a sexual nature. The claimant also said that he had covert recordings which supported his position where there were disputes of fact as to what had been said; as to the proceedings in London Central he said that the respondent's application for deposits had recently been rejected.

Conclusions in relation to the applications:

44. The parties have prepared a 19 page 'Scott Schedule' setting out the legal causes of action, where in the ET1 and ET3 the competing assertions are found, and summarising the positions of the parties. That document is annexed hereto. I have considered carefully each of the allegations within the schedule:
    a. The first head of claim is direct discrimination because of age, and there are complaints about cancelling "working from home". There is a dispute of fact as to whether Ms Hobbs said to the claimant "*"you have to come in person so you remember those times when people didn't use to work from home"* or, as she asserts, whether she said *"I remember the days when working from home from wasn't an option – we don't know how lucky were are".* Given the dispute of fact, I do not consider it is apt for strike out; if the claimant does indeed have a recording and can prove that this was said, he may be able to persuade a tribunal of a link between when he was permitted to work from home and his age. However, I accept Ms Grennan's submission that the quote set out by the claimant is inherently less likely than the one set out by Ms Hobbs, and it appears not to be in dispute that the number of days on which the claimant was permitted to work from home was in fact higher than any other developer (ET3 para 25). I am therefore persuaded that this matter has 'little reasonable prospect of success' and that it is appropriate to impose a deposit order. I deal below with the amount of that order.
    b. The second head of claim is harassment related to age, and essentially arises from and rests on the same comment. For the same reasons, again I consider this allegation apt for a deposit order.
    c. The third head of claim is for harassment related to sex and age. The claimant said he was unable to identify any link between his age and the alleged unwanted conduct of Erika Hobbs "putting pressure" on the claimant to deliver, or "staring into C's eyes with a hard face and interrogating him on the status of project tasks". I do consider that this allegation has no reasonable prospect of success as an allegation of harassment relating to age, in circumstances where the claimant was unable to make any link whatsoever. I accordingly do strike out this allegation as one of harassment relating to age. The complaint insofar as it is one of harassment related to sex I cannot say has no or little reasonable prospect of success because much is likely to depend on findings made in relation to other complaints of discrimination / harassment because of /related to sex, involving Ms Hobbs.

d. The fourth, fifth and sixth claims are for harassment by conduct of a sexual nature. Whilst Ms Grennan identified contemporaneous documents in which the claimant seemed to be at pains to point out that he did not consider the conduct to be sexual, such that it appears he may face some considerable difficulties during the litigation, the claimant told me that he had not, at the time of his employment, wanted to "rock the boat". I consider that the disputes of fact are such these complaints are not apt for a deposit order. (No strike out of this claim was sought).
e. The seventh claim is for victimisation, and I explained to the claimant that the first stage of this enquiry is whether he has carried out a "protected act". I do consider that Ms Grennan is correct in her submissions that the written documents may well fall short of being protected acts, but the schedule makes it clear that the claimant also relies on verbal complaints. I decline to either strike out or order a deposit in relation to this head of claim.
f. The eighth and ninth claims are for direct sex discrimination / harassment. These rely on disputes of fact which are best resolved at trial.
g. The tenth claim is of harassment related to race (the claimant is Spanish). He complains that during a meeting on 27 June 2019, the HR manager, Laura Clarke tried to confuse him as a non-native English speaker by mixing up the words "pointing" and "poking", and said words to the effect of "this is now how we do things here" when discussing an email in which the claimant used the word 'breast' in describing the part of her anatomy which he alleges Ms Hobbs was trying to use to touch him with (in circumstances where he was not alleging the contact was in any way sexual). Ms Grennan highlights that the ET1 at paragraph 186 says this is "***possibly*** a case of race discrimination because Laura would not try to do this to an English person". The claimant's submission was much more forceful today, that he did not consider the HR practitioner would have said this to a native English speaker. I cannot conclude that this is apt for a strike out. The claimant's case is dependant to an extent on not only proving the disputed fact, but also on questions of tone and intention which are best determined after hearing evidence. I have considered carefully whether this allegation should be the subject of a deposit order. Whilst I found the submissions of Ms Grennan very persuasive, and can see a number of significant difficulties for the claimant, again given the claimant's reliance on disputed factual evidence as to what was said, and also tone, I am unable to say it satisfies the criteria of having "little prospect of success".

45. In summary therefore, I strike out the claim of harassment related to age (box 3), and make deposit orders in relation to claims of direct age discrimination and harassment related to age (boxes 1 and 2).

Means and amount of deposits.

46. I asked the claimant about his financial means. He told me that he started new employment, earning £80,000 per annum, in January 2021. He said that he still has debts after his period out of work of about £20,000, which he is paying off at a rate of about £500 pcm. The claimant said that he has very

little left at the end of each month, but told me he does have savings of "maybe £10,000, here and there".

47. Doing the best I can on very limited information as to means, I consider that a proportionate amount for the claimant to pay to proceed with the claims in boxes one and two of the Scott schedule, is £250 for each allegation; a total of £500.

ORDERS

1. Bundle
   The bundle is to be agreed between the parties by **4 November 2021**.
2. Witness statement:
   a. The claimant shall send to the respondent his witness statement (and statements of any other witnesses on whom he seeks to rely) on or before **11 November 2021**. The claimant shall serve an updated schedule of loss at the same time.
   b. The Respondent shall send to the claimant the witness statement son which they seek to rely on or before **9 December 2021**.
3. Final Hearing
   The full merits Hearing will commence on **24 January 2022**, as previously ordered.

1.1 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

1.2 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

1.3 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

_____
Employment Judge Tuck; 8/10/21

Sent to the parties on:

17 November 2021

…….

For the Tribunal:

……..