EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Olatunde	**v**	**Viewber Ltd**

Heard at: Watford (by CVP) **On**: 6 December 2021
14 January 2022

Before: Employment Judge R Lewis (sitting alone)

Appearances

For the Claimant: In person
For the Respondent: Mr J Feeny, Counsel

JUDGMENT

1. The claimant's claim of breach of contract is dismissed on withdrawal.

2. The claimant's claims under the Equality Act 2010, whether brought as claims of direct discrimination, harassment, or victimisation, have no reasonable prospect of success and are struck out.

3. The claimant's application to introduce a claim for the national minimum wage (NMW) by amendment is refused.

4. The claimant's application to introduce a claim for holiday pay by amendment is refused.

5. Accordingly, the proceedings are dismissed in full.

REASONS

1. These reasons were requested by the claimant after judgment had been given orally. This was the continuation part heard of the hearing which began on 6 December 2021, from which my Case Management Order was signed on 7 December and sent to the parties on 23 December 2021.

2. In accordance with my order, the respondent had sent a written skeleton; the claimant had replied. Both parties had in accordance with paragraph 5 pointed out factual errors in the summary of events which I had attempted to set out at paragraphs 7 and 12 of the December order. I apologise for any error and I thank them for their assistance.

3. In addition to the December bundle, I have today a supplemental bundle. Page numbers in this Judgment refer to the December bundle; any reference to the supplemental bundle is prefaced with S, so that S62 is page 62 in the supplemental bundle.

Order of hearing

4. The December hearing had mostly been taken up with the claimant's submissions. I had therefore taken the opportunity to ask Mr Feeny to help the claimant prepare by preparing written submissions. Mr Feeny addressed the Tribunal for about an hour; following a break, the claimant replied for just over one and a half hours. Mr Feeny replied briefly after the lunch adjournment, and I then adjourned for about an hour, with a view at the end of the afternoon to telling the parties either that I had reserved judgment or to giving an outline oral judgment. At that stage, technical difficulties with the claimant's CVP access led to a long delay, at the end of which I gave oral judgment in outline and the claimant requested written reasons.

5. At the start of the day I raised the question of whether as a matter of formality I should first decide on the application to strike out (following which the application to amend would fall away, as there were no live proceedings to amend); or first decide the application to amend, and then go on to consider strike out. Mr Feeny preferred the former, the claimant the latter. Although the former seemed to me correct logically and chronologically, in the event, I have decided all points. The claims of discrimination have been struck out, and I have simply disregarded the nicety of whether there are live proceedings to amend, by dealing with the applications to amend separately on their merits. For the avoidance of doubt therefore, the effect is that even if I had not struck out the discrimination claims in their entirety, I would in any event have refused leave to amend.

The legal framework

6. The strike out application was brought under Rule 37 of the Tribunal Rules of Procedure, which provides that a claim may be struck out if it has no reasonable prospect of success.

7. I heard no evidence and I can therefore make no findings of fact. I have taken the claimant's case as I have understood it, and as he has repeatedly set it out in writing, giving him the benefit of any reasonable doubts at any point. I have accepted all documents produced by the respondent as authentic. I have interpreted them by giving an ordinary and natural meaning to the words. I have also tried to apply common sense to a factual

matrix which presents as simple, well documented, and limited to a handful of incidents in a period of about 24 hours.

8. Mr Feeny applied in the alternative for Deposit Orders in accordance with Rule 39. The claimant had provided (but not documented) a list of welfare benefit payments which he stated constituted the entirety of his resource and income since 23 July 2020. As Mr Feeny pointed out, however, the claimant's income from the respondent was on the claimant's account about £115.00 per month, so loss of this work did not make a significant impact on his economic position.

9. If the claim had not been struck out, I would, on the material before me at this hearing, have ordered deposits in relation to each of the following arguments: that the claimant was an employee of the respondent; that he was discriminated against contrary to each of sections 13, 26 and 27 Equality Act; and that he was entitled to the minimum wage for keyholding duties. I am unable to say how much each deposit would have been, but my approach would have been to set the same amount of each deposit, while reminding the claimant of the impact of Rule 39(5) on each deposit individually.

Strike out principles

10. The Tribunal recognises its particular role and responsibility in contributing towards the objectives of workplace equality and the elimination of discrimination. The Tribunal should be cautious to strike out claims of discrimination, and such an outcome is likely to be unusual, if not exceptional.

11. In his skeleton, Mr Feeny set out an observation of the Court of Appeal in Ahir v British Airways [2017] EWCA Civ 1392:

> "Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact, if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context… If the hurdle is high, and specifically… it is higher than the test for making a Deposit Order."

12. I respectfully add the further observation that the Tribunal should have regard to the inequality of submission between experienced counsel on one hand, and a lay litigant on the other. That is particularly so where, as in this case, the claimant has some legal background, but shows two forms of disadvantage. They are that emotion has clouded his analysis of his own experience, and that his understanding of the specific area of law falls short of one which would enable him to analyse his own case and do justice to it.

The respondent's operation

13. The respondent provides a service to estate agents and letting agents. As its corporate name indicates, it combines the business model of Uber drivers with the function of property viewing of letting and estate agents.

14. The respondent offers estate agents and letting agents individuals who show prospective buyers or tenants around available property. It was not necessary for me to go into the detail of its interface with agents: it largely stands to reason that agents register properties with the respondent and provide it with information about access and with keys. The respondent states that it operates nationally. (I comment that this case should have been heard in the London South Tribunal, the workplace jurisdiction for the claimant's work, which was home based; and not in this region, which was the home of the respondent's registered office: it made no difference in this case, but the same point will apply to any other claim in any region of the Tribunal against the respondent).

15. The bundle contained a volume of documentation about the interface between the respondent company and its staff, whom it designates as individual viewbers. An individual registers with the respondent and obtains access to its IT system through an individual dashboard. The individual must give certain details, in many cases undergo DBS vetting, and out of a range of 21 time slots (morning, afternoon and evening, seven days a week) must tick those for which he is available to work. The claimant ticked 19 out of the 21 (78). He was not available on Sunday mornings or evenings.

16. Broadly, the respondent's operating system was that when the respondent had a property available for viewing in a particular postcode, it emailed an offer of the opportunity to all the viewbers who its system showed had offered to be available at the viewing time slot in that postcode area. If a customer wanted to view a property in WD17 on a Wednesday evening, the offer of the opportunity to carry out that work was therefore emailed to viewbers who had offered Wednesday evening availability in WD17. Acceptance was on a first come first served basis, and once a viewber had accepted a viewing, it ceased to be available to any other viewber. The speed and competitiveness of the system were demonstrated in this case: the bundle showed (117) that the respondent sent an offer to 14 individuals (167) at 10:16am on 22 July 2020, and the claimant's acceptance was logged at 10:17am (118). On the respondent's case, the offer then ceased to be available to any other viewber.

17. The respondent's manual contained two provisions of particular interest to this case (79). The first was that if a new booking was added to an existing booking, they could be amalgamated into a single, extended booking: that provided for exactly the circumstances which arose on 22 July 2020. The second was that a viewber's arrangement could be terminated in the event of a single failure to attend an arranged booking without having given notice of non-attendance.

18. The respondent's manual set out (90) its expectations in the event of a viewing being rejected, or, after acceptance, cancelled. Its language on both was relevant:

> 'When you receive appointment requests that you are unable to facilitate, please always reject the appointment as this alleviates the Client Support team from making an unnecessary phone call to you …
>
> If you are unable to undertake the appointment once you have accepted it, please decline it via your Dashboard and provide us with a reason for your cancellation ..'

19. The respondent had systems for payment of a fee, automatic invoicing and payment, and for payment of travel expenses. The respondent's IT system calculated the distance between the viewber's home base and the property to be viewed and offered travel expenses at a set rate for that distance. The bundle contained a number of invoices paid to the claimant. The claimant wrote that he had had an income of over £2,600 from the respondent between his start in August 2018 and July / August 2020. Although he declined to agree the total number of viewings which he had carried out, my estimate, on the basis of the claimant's own figures, when taken with the level of fees recorded (eg invoices at 114-116) was that the claimant must have undertaken at least 150 viewings, and probably more. I was not told of any issue or problem or question arising out of any of those, which I take to be a powerful indication that the system worked satisfactorily.

20. In the course of these proceedings, the claimant raised a question about ethnic composition of the respondent's workforce. The respondent does not maintain ethnic records. It does have ID photographs for security purposes. On that basis, it drew up schedules at pages 167 and 168. For the purposes of this claim, the respondent divided its staff, on the basis of its photographs, into two categories: black and not black/white. I accept that the respondent was doing what it thought was best to answer a question for the purposes of this litigation. I record my concern: ethnic identification is a matter for the individual and goes far beyond two binary categories identified from photographs. That said, accepting the honesty of the perceptions recorded at 167 and 168, the viewber workforce in the region where the claimant worked was ethnically diverse, and appeared broadly to be equally divided between persons of colour and white people.

21. The respondent produced a number of manuals for viewbers. Although I did not in the event need to make any decision on employment status, the manuals emphasised that the respondent was under no obligation to provide viewbers with any assignment or number of assignments; and that individuals were at liberty to refuse or accept any assignment or number of assignments which they were offered. The respondent's procedures allowed for the situation where a viewber might hold a key or keys in order to gain access to a property. When applying to amend, the claimant submitted that he was entitled to be paid NMW for all time during which he held a key which might still be operational.

Events of 22 July 2020

21.1 In this section of the reasons, any inconsistency with anything written in my order of December is resolved in favour of what is said here. There was no dispute before me about the great majority of the factual points which now follow.

21.2 The claimant had, by close of business on 21 July 2020, been a viewber for about 23 months. He had carried out at least 150 viewings. No issue or difficulty had arisen.

21.3 At 10:16am on Wednesday 22 July 2020 the respondent offered a viewing to be undertaken at *** 5XH at 6pm that evening (117 and 167). The claimant did not dispute that the offer was sent to a group of 14 viewbers, of whom the respondent later (167) identified seven, including the claimant, as black.

21.4 At 10:17am the respondent confirmed that the claimant had accepted the viewing and it was not available to anyone else (118).

21.5 As I understand it, there were in fact two customers to be seen in short order. The viewing was for 30 minutes. The fee was £18 plus travel expenses.

21.6 At 12:38 the respondent sent the claimant another email (120). It was perhaps the single most important document in the bundles and needed to be considered carefully. Using coloured font and strike through, it notified the claimant that the request for viewing later that day had been changed from 30 minutes to 1 hour. Although the notification did not say so, the reason was that another customer wanted to see the property. It stood to reason that as the claimant was already going to be at the property, he should be offered the opportunity to show it to another customer at about the same time. This is the procedure referred to at paragraph 17 above.

21.7 The email said:

> "ACTION REQUIRED – This appointment has been changed. Please follow this link to the appointment details. Please review the details and accept if you are still able to attend. Please reject the changes if you can no longer attend."

21.8 That had the look of template wording, applying standard practice quoted from the manual at paragraph 18 above, to a routine, everyday event.

21.9 I accept that the task of accepting or rejecting was straightforward. It involved no more than clicking on the link and then following a menu of options. I accept that that was the form of procedure with which the claimant was entirely familiar.

21.10 The claimant could not undertake the extended viewing. He had the right to reject it.

21.11 The claimant however did not respond in accordance with the respondent's procedure quoted above. The respondent's IT recorded that he had seen the email at 1:20. The claimant agreed that he had seen it. He did not click on the link. He did not click acceptance or rejection. He did neither.

21.12 Repeatedly the claimant said to me that by doing so, he exercised his right to reject an offered viewing. Without hesitation, I accept that the claimant had the unqualified right to reject the viewing. It is common sense to say that the claimant's failure to accept or reject the altered viewing left the respondent not knowing if the claimant would undertake any of the three viewings that evening. It is difficult to avoid the observation that this failure was unhelpful and possibly unreasonable in the context of the existing relationship between the parties.

21.13 The respondent's staff noted in the afternoon of 22 July that they had customers who were due to attend the property that evening, and they were not sure if the claimant would attend any of the viewings. They made a number of attempts to contact him by phone or text during the afternoon. He did not answer or return any calls.

21.14 Mr Feeny commented that the respondent had two reasons for trying to contact the claimant: one was concern about the welfare of a colleague who appeared to be behaving wholly out of character; the other because they wanted to be sure that the company would provide the service to the customers that evening. Both those points seemed to me common sense.

21.15 In accordance with the normal agreed procedures, the claimant's contact details had been passed to the customers. At least two customers attended the property as arranged that evening. They contacted the claimant (S62 and S63). The claimant was not there. He did not attend any viewing that evening, including the two which he had accepted at 10.17am.

21.16 I did not ask the claimant at this hearing why he declined to make contact with the respondent that afternoon. It did not seem to me relevant for present purposes.

21.17 On the morning of 23 July, the respondent sent out a request for viewbers to carry out the three viewings which the claimant had not undertaken the previous afternoon. I accept that that request was sent to an ethnically diverse group, and that the respondent's records show that it was accepted and fulfilled by a black viewber (122-124, 168).

21.18 As a result of not keeping an appointment, the claimant's account was reviewed. I accept that two consequences followed. One was that it was realised that he still retained a set of keys which had not been in use for some months, and that he was instructed to return them (126).

21.19 The second was that an email was sent (125) which said:

> "Hello [claimant's name] Your services are no longer required for this viewing appointment request. Please remove it from your calendar."

21.20 The email gave the address in 5XH of the 22 July viewing. It stated the date of the cancelled viewing as 22 July. It was sent at 12:39 on 23 July. It was headed (bold font in original):

> "You have been removed from this viewing appointment request."

21.21 Mr Feeny explained that the reason why a retrospective cancellation was sent was to create a record within the respondent's IT systems to show that the claimant should not be paid for the viewing which he had not attended the day before. That seemed like operational common sense.

21.22 The claimant was not offered any further viewings for three weeks when on 13 August 2020 he wrote at length to the respondent. The letter was not in the bundle but I asked for it to be provided. It used the language of a constructive dismissal resignation. Although it did not matter for this hearing, I accept that it gave a strong indication that the claimant understood his relationship with the respondent to be at an end without expressly saying so.

Discussion of direct discrimination and harassment

Specific and factual points

22. I start with a number of specific points, including factual points, about the claims. The claimant has brought claims of direct discrimination under s.13 and harassment under s.26. He has set them out in a number of documents. I understand him to complain that each of the following was an act of direct race discrimination. I paraphrase, although words in parenthesis are quotations from the claimant's written submission.

23. They were, first that the respondent did not permit him 'to refuse a booked assignment as performed by his white counterpart viewbers;' and secondly that the respondent 'imposed or forced' the amended viewing on him 'contrary to his refusal with his white counterparts'. The third was that the respondent 'separated the claimant from the white counterparts.'

24. The heart of the first complaint, which the claimant has expressed in a number of different ways, is that having accepted the 30 minute assignment for 22 July, the claimant was within his contractual rights to reject an

extension to one hour; and that the respondent refused to allow him to exercise that right; and that its refusal was done on grounds of his race, and was therefore an act of direct race discrimination. The documentation, which I understood not to be in dispute, indicated that that did not happen. The claimant did not take up the 12.38 amended booking, but he never in terms refused it, and his actions on 22 July were not challenged by the respondent. It did not cancel the first two appointments (as evidenced by the arrival of both customers, S62-63). There was a related allegation, which was that the respondent was at fault by rolling up the third appointment with the first two into a single, extended viewing. I note that that step was common sense, as well as being expressly provided for in the manual (paragraph 17 above). In the event, the respondent's records were that the extended viewing was performed the next day by a black viewber: I appreciate that I did not have evidence of this, but I add that if evidence to that effect is given by the respondent, the claimant is highly unlikely to be able to refute it.

25. The same reasoning indicates that the second event also did not happen: the 12.38 proposal was not forced or imposed; it was offered, and it was common ground that the claimant neither accepted nor refused it.

26. The wording of the third event may reflect the claimant's misunderstanding of s.13(5) Equality Act: I read the word 'segregation' to mean physical separation, although I am not aware of any authority on the sub-section. It is not apparent how that concept would apply in practice to home-based viewbers working individually. If the claimant meant by 'segregation' some form of office-based racial categorisation, I note that (1) there was no evidence of that having happened; and (2) I do not accept that that is capable of falling within the framework of s.13(5). There was in any event no evidence of any white counterpart who refused the amended viewing.

27. Mr Feeny submitted that each of these events was not a detriment. I accept that as pleaded, each, if proven as alleged, was capable of constituting a detriment; but that the question for the tribunal will be what in fact happened.

28. Although the claimant freely used the phrase 'white counterparts' there was no indication of any actual comparator who would fulfil the requirements of s.23, ie a person of a different race who had done what the claimant did: accepted a 30 minute viewing; been offered a one hour viewing; failed to accept or reject; failed to respond to contacts; and failed to attend for the initial agreed 30 minute viewing. The absence of a comparator would require the tribunal to hypothesise on how the respondent would have treated a white viewber in all of those circumstances. There were at least three factors which would weigh against the claimant in that hypothesis. The first was that the respondent appeared, throughout this episode, to follow the standard procedures set out in its manual; a second was that its approach appeared to embody sensible problem solving; and the third was that the assignment was in the event fulfilled by another black viewber.

29. I understand that the claimant claims in addition that each of the following was an act of harassment related to race: first, each of the calls or texts or other attempts by the respondent to contact the claimant during the afternoon of 22 July; secondly, that it passed his contact details to third parties (whom I understand to be the estate agent(s) and the customers who had booked to view that day); and thirdly that the third parties also attempted to contact the claimant.

30. The first point would be a matter of evidence: the tribunal would hear from the respondent about the reason(s) why its staff had tried to phone or text the claimant on the afternoon of 22 July. While I cannot make a finding, I accept the common sense in Mr Feeny's submission: it must have been to find out if the claimant was going to cover that evening's viewing; and, to check that he was alright. It is difficult to see how the claimant will show on evidence that any call may have been related to race.

31. The second and third points give rise to the difficulties for the claimant first that he had, when joining the respondent, consented to his contact details being shared (105) with customers, as had probably happened on at least 150 previous occasions. Passing on a viewber's contact details was therefore a standard operating procedure, without reference to race. Secondly, the contacts from the disappointed customers (S62, S63) were on record: they were no more than polite inquiries, unrelated to race, to the effect of 'I am here, where are you.' Thirdly, as a matter of law, the claimant would have difficulty in persuading the tribunal that the respondent is liable for harassment by its customers.

General points

32. I now turn to a number of general points. I must bear in mind that I have not heard evidence, and that my task is confined to points on which I can properly adjudicate on paper and in light of submissions.

33. This was at heart an everyday sequence of work events. Viewing appointments were made and not kept. An arrangement was made for them to be fulfilled the next day. The context in which these events took place was provision of the property viewing service to customers from the public. The claimant had delivered this service many times over the previous two years.

34. I see the question of strike out in a number of overlapping strands. They are not exhaustive or set out in order of priority. They are:

    (1): Consistency: all paperwork which I saw was consistent with the respondent's case; none was consistent with the claimant's.

    (2) Case at its highest: I agree with Mr Feeny that there is no prospect of the claimant being able to produce evidence which would make his case appear stronger at a final hearing.

(3) Simplicity and common sense: the respondent's case was objectively explicable and made sense; the claimant's was not.

35. I take the first two strands first, together. The bundles contained records of the respondent's operating systems; of the claimant's initial engagement with the respondent; and some record, through past invoices, of how the systems had worked in the past. When I was shown documents between 22 July and 13 August, they were all presented as agreed items, and I found them clear and mutually consistent. By 'mutually consistent' I mean that the record of how the respondent managed events on 22 and 23 July was internally coherent, and in keeping with its own procedures. The documentation was all fully consistent with the respondent's case. I saw no document which was consistent with the claimant's case, or which cast doubt on the respondent's case.

36. It is sometimes said in submission, although I accept it was not said in this case by the claimant, that in a fact sensitive case strikeout is not appropriate because the claimant's case will be proved on disclosure and/or in cross examination. Mr Feeny pre-empted those points in submission, by commenting that there was no reason to believe that the claimant's case could be improved between this hearing and trial. I agree, because I can envisage no evidence which the claimant could produce of how and why matters were managed as they were by the respondent or how and why they came to be documented within the respondent's systems. I note and respectfully adopt the observation of the EAT in Patel v Lloyds Pharmacy UKEAT/0418/12:

> 'In a case that otherwise has no reasonable prospect of success it cannot be right to allow it to proceed simply in the basis that 'Something will turn up'.'

37. I now turn to what I have called above the third strand. My starting point is that this case arose from a routine, everyday event. Operationally, on 22 July, a problem arose which was to be solved by the respondent. Throughout, the respondent's interpretation and behaviour appeared to be common sense problem solving, using its established IT and written procedures. As a result, its explanations, which stood wholly apart from race, sounded simple and plausible. By contrast the claimant's behaviour on the day was inexplicable to the point of irrational, and his subsequent analysis sounded complex and unlikely. He had used the respondent's appointments IT countless times, and even after a second day of hearing, I could not understand why he had not clicked on Accept or Reject after 12.38 on 22 July, or why, at the time, he failed to answer the contacts from the respondent. Any of those steps was the work of a moment, which the claimant would only need to do once.

38. When the respondent sent out the multiple request to many local viewbers, it had no control over which viewbers replied to accept, or the ethnic composition of the responders. As Mr Feeny pointed out, the viewings at 5XH were carried out the next day by another black viewber (168).

39. The claimant's case, which was that race was a material factor in the management of the situation from 12:38 on 22 July onwards, fundamentally made no sense. It made no sense that having engaged the claimant at 10:17, the respondent at 12:38 began to discriminate against him. It made no sense that having offered the claimant more work, (ie the additional assignment on 22 July) the respondent in some way discriminated against him by depriving him of work. It made no sense to suggest that while the respondent could see that the claimant had received the amended offer at 12:38, it was to make its own conclusions about whether he had accepted or rejected, because he had failed to say which he had intended to do. All the documentation was consistent with the respondent's attempts to manage the situation as it presented on 22 July; to deliver the service to its customers; and to establish if everything was alright with a respected and experienced colleague who had simply dropped out of contact inexplicably.

40. The claimant complained of a factual matter that he was denied the right to refuse an assignment. It seems rather that the respondent sought to manage the situation, consistent with its obligations to the claimant, its agent customers, their customers, and other viewbers. The claimant had the right to refuse the extended assignment and exercised it.

41. The claimant complained that he was imposed upon. But the email of 12:38 made very clear that his assignment had been extended, but that he had the right to refuse the extension. Why was the assignment extended? As a matter of sheer common sense. If the same property were to be viewed by a number of individuals on the same afternoon, it made complete common sense for all the viewings to be done by the same viewber. It made no sense for the same property to be shown by two viewbers in the space of one hour.

42. The claimant took issue with the respondent's attempts to make phone contact with him during the afternoon of 22 July. Again, it makes perfect sense that the respondent was trying to achieve different objectives. First, it wanted to know if the claimant had accepted or rejected the extended assignment. Secondly, if not, it needed to make arrangements for the viewings. Thirdly, I accept the likelihood (mentioned by Mr Feeny but to be given in evidence in due course if the matter proceeded) that it was noted that the claimant, after two years' service, was behaving strangely and out of character, and that there may have been a concern about his personal welfare.

43. Drawing together all the points set out at paragraphs 22-42 inclusive above, I conclude that the claims under s.13 and / or s.26 Equality Act have no reasonable prospect of success, and are all struck out.

Discussion of victimisation

44. The starting point of the claimant's allegations of victimisation was that he did the protected act of declining to accept the 12.38 variation of the viewing on 22 July. His failure to respond to various contacts that afternoon from the respondent constituted a repeat or continuation of the same protected

act. He claimed that he was victimised by being contacted by the respondent on 23 July; being sent the cancellation email at 12.39 (125); and by being asked to return a set of keys (126).

45. My starting point is to analyse the protected act relied on for the purposes of s.27 Equality Act 2010. The claimant relied on s.27(2) (c) which is a wide provision, giving statutory protection to any act undertaken under or for the purposes of the legislation. I understand the protection to apply, in the broadest and most purposive sense, and whether or not legal or technical language is used or used correctly.

46. The claimant's argument was that the protected act was his conduct on the afternoon of 22 July in not accepting the extended viewing. His argument ran that that was an exercise of his contractual rights with the respondent: I agree. As he was exercising a right under a contract, he was exercising a right protected by s.39(2) Equality Act 2010, which prohibits discrimination in access to contractual terms. Therefore, his actions were protected for the purposes of s.27(2)(c) because they were the exercise of a contractual right, and because the legislation prohibits discrimination in access to contractual rights or benefits.

47. I disagree. The threshold of protection under s27(2)© is, as it should be, a low one. However, a protected act must, in the objective analysis of the tribunal, in some way engage the Equality Act. I do not accept that the claimant's inactions on the afternoon of 22 July did so, or were capable of doing so. The purpose of the sub-section is to protect an individual who has in some way engaged with the Equality Act against retaliation. A protected act may be in loose, non-legal language. I accept that a protected act may be non-verbal (although realistic examples are not easy to imagine). The retaliation may take any form, provided that it is a detriment.

48. The insuperable problem for the claimant is that the test of whether there has been a protected act is the objective analysis of the tribunal. In this case, even if there were some form of retaliation, there was nothing which objectively could link it with the Equality Act. As the respondent did not know that the claimant was acting (or not acting) for that reason, the reason cannot have been retaliation. In the great majority of cases, the question, has there been a protected act, is straightforward. Where the alleged protected act consists of saying and doing nothing, and there has been no prior reference to discrimination, I cannot envisage how a protected act can have arisen.

49. The claimant's approach is wrong in principle for a number of reasons. It would expose the respondent to liability by virtue of the claimant's unspoken, and wrong, understanding of the law. That could not be right. The claimant's proposition would mean that anything done by anybody under any provision of their contract of employment would automatically be a protected act; that cannot be right.

50. The claim under s.27 Equality Act is struck out because the claimant has no reasonable prospect of demonstrating that the matters relied upon constituted a protected act for the purposes of the section.

51. As I have found that there was no protected act, I do not need to make any decision on whether or not the matters relied upon as acts of victimisation were likely to be proved to be detriments. If I were asked to rule on the point, I would find that none of the matters complained of constitutes a detriment, in the sense of Shamoon v RUC 2003 UKHL 11. My reasoning briefly is: (1) I can see no detriment to the claimant in being included in group emails offering work appointments; (2) I can see no detriment in being instructed to return keys which the claimant told me were no longer useable (as the property locks had, the claimant told me, been changed the previous April); and (3) I can see no detriment in the 'cancellation' email of 23 July. It did no more than create of a record to ensure that the claimant was not paid for the assignments which he had failed to carry out the day before.

Discussion of amendments

52. I now turn to the applications to amend. As set out in my December order, it is to be inferred from reading drafts of the schedule of loss that in March 2021 the claimant applied to add a claim for the NMW; and that in June 2021, he applied to introduce a claim for holiday pay. Neither of these claims was referred to expressly or by implication in his ET1. Both were made several months out of time. Neither application has been made formally or correctly; I do not in principle accept that by adding un-pleaded allegations for the first time to a schedule of loss as a head of damage, a claimant has thereby made an application to amend.

53. The claimant's introduction of a claim for National Minimum Wage would be an extensive recasting of the claim. Clearly the claimant had been paid NMW for the time undertaken on his assignments (I note the rates set out in the invoices at 109-116 and the offer of payment for the assignment of 22 July at 117).

54. With reference to the respondent's manual, the claimant claimed in the amendment to be entitled to the NMW for all keyholding time. His claim was initially for 24 hours a day every day of the year, subsequently reduced (following Judgment in Royal Mencap Society) to a claim for 12 hours a day for every day of the year. I note that even this lesser calculation produced a schedule of loss which totalled a sum in excess of 100 years of actual earnings.

55. The point has not been fully argued, and I need only express my scepticism that keyholding time constitutes working time, or that there is any sensible analogy to be drawn between keyholding for property viewing, and night work (including sleeping-in times) of those responsible for the care of vulnerable people.

56. The claimant explained the delay in applying by submitting that the events in question took place at a time of lockdown when legal advice was difficult to

obtain; that he was suffering ill-health; and that he was experiencing family difficulties at the same time. With all respect to the claimant, Mr Feeny answered the last three points comprehensively by pointing out that the events in question took place between lockdowns; and that at the same time, when the claimant experienced health and personal difficulties, he nevertheless engaged with Acas and presented his ET1, setting out what he undertook to be the legal claims at length.

57. The application to amend is an extensive recasting of the claim. It has been made significantly out of time in circumstances in which it has not been shown that it was not reasonably practicable for it to have been brought within time.

58. I do not accept that the claimant was unable to undertake legal research in the third quarter of 2020: there is and has been a substantial amount of legal information available online. Furthermore, although the formal time limit may have run from termination of the engagement, the underlying concern (namely the simple question, have I been paid what I am entitled to?) is one asked by many workers throughout their work, and was available to the claimant to research after he started in 2018.

59. Similar points apply in relation to holiday pay, save that the claimant had before him on the ET1 a box for holiday pay, which he did not tick, and that he delayed another three months before adding holiday pay to another draft of the schedule of loss. I repeat the same points, adding that the claimant's position deteriorated with the additional passage of time.

Discussion of notice pay

60. When the claimant submitted his ET1, he claimant ticked the box for notice pay. In the 'another type of claim' box he wrote that he brought a claim for damages for breach of contract. At the hearing on 6 December, and in writing, the claimant has stated that the claim for breach of contract has been withdrawn. The claimant was and is bound by that withdrawal in accordance with rule 51. Claims for notice pay are conventionally brought as claims for breach of contract, and to the extent that a claim for notice pay was a claim for breach of contract, it has been disposed of upon withdrawal.

61. At the December hearing, and in light of the claimant's disadvantage as a litigant in person, I said that he could pursue a claim for notice pay as a claim for unlawful deductions. At this hearing however, the claimant made submissions to the effect that he was an employee and therefore entitled to bring a claim for notice pay as a claim for breach of contract. I disregard those submissions.

62. The claim for notice pay as a claim for unlawful deductions has no reasonable prospect of success because the claimant was, at the highest, a zero hours worker and therefore cannot demonstrate that any sum was due and payable to him in respect of an unworked notice period. Furthermore, although his letter of 13 August 2020 is indeed ambiguous, it gives no indication whatsoever that the claimant was then willing and

available to undertake work after the date of the letter. On the contrary, its language is entirely consistent with acceptance of the breakdown of the relationship.

63. If the claimant's claim was intended to be a claim for pay for assignments which he was not offered between 23 July and 13 August, no such claim may be pursued as a claim for unlawful deductions, in light of the zero hours nature of the relationship.

64. I record for complete avoidance of doubt that I have made no adjudication on Mr Feeny's submission that the claimant's relationship with the respondent did not meet any of the potentially applicable definitions of employee or worker. In discussion, I commented on the apparent factual similarity with Carmichael v National Power 1999 UKHL 47. While I can see the strengths of Mr Feeny's points, I accept that the question of employment status may be fact-sensitive, and therefore might require evidence and full submission.

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Employment Judge R Lewis

Date: 25/1/2022

Sent to the parties on:2/2/2022

N Gotecha
For the Tribunal Office