EMPLOYMENT TRIBUNALS

Claimant: Mr Pa Edrissa Manjang

Respondents: (1) Uber Eats UK Ltd.
(2) Uber Portier BV
(3) Uber London Ltd.

Heard at: East London Hearing Centre (by CVP)

On: Thursday 19 May 2022

Before: Employment Judge A Frazer (sitting alone)

Representation:
Claimant: Mr C Milson (Counsel)
Respondent: Mr T Coghlin QC (Counsel)

JUDGMENT AND REASONS

JUDGMENT

1. The Respondent's application for a strike out and/or deposit order is dismissed.

2. The Third Respondent shall remain as a party to the proceedings.

3. The Claimant's amendment application is allowed.

REASONS

The hearing

1. Before commencement of the hearing I had a bundle of documents, written submissions and a draft list of issues from Mr Milsom. On behalf of the Respondent I received a skeleton argument, a witness statement of Carlo Bruschetti dated 19th May 2022, an authorities bundle and a bundle of documents for the hearing. I was provided with the Respondent's application for strike out and/or deposit dated 29th November 2021.

2. I also had an email application from the Claimant's representatives dated 16th May 2022 to amend his claim and a response from the Respondent dated 18th May 2022.

3. Following the preliminary hearing I received a letter from the Claimant's representatives dated 23rd May 2022 which provided additional submissions in writing. The Respondent objected to the Claimant providing any further submissions that day. The Tribunal then wrote to the parties saying that it would take into account the letter of the Claimants dated 23rd May 2022 but only to the extent that it addressed the contents of the witness statement referred to in that letter. Permission was given to the Respondent to file a response to that letter on or before 27th June 2022. The Respondent provided a response dated 27th June 2022 and a response that it had sent into the Tribunal on 24th May 2022.

The Issues for the Hearing

4. By the Notice of Hearing dated 11th February 2022 the list of issues to be determined at the preliminary hearing were:

    1) *Whether or not to strike out the claims under Rule 37(1)(a) of the ET Rules on the basis that the claim has no reasonable prospects of success because the Claimant has no reasonable prospect of showing that he was subject to less favourable treatment because of his race.*

    2) *Whether or not to make a deposit order of £1, 000 in respect of the Claimant's discrimination claim under Rule 39(1) of the ET Rules on the basis that the claim bas little reasonable prospects of success for the same reasons.*

    3) *Whether to dismiss the claim against Uber London Limited on the basis that Uber London Limited is not involved in the day- to-day operations of the Uber Eats business in the UK and has had no involvement with the Claimant's work as a courier at the relevant times.*

    These issues are in addition to the original reasons from the notice of preliminary hearing sent 7 December 2022, which stated the issues to determine were:

    (1) *Was the complaint(s) presented outside the prescribed three month time limit (as extended by any relevant ACAS early conciliation period) and if so:*

        (a) *should the complaint(s) be dismissed on the basis that the Tribunal has no jurisdiction to hear it;*

(b) because of those time limits (and not for any other reason), should the complaints be struck out under Rule 37 on the basis that they have no reasonable prospects of success and/or should one or more deposit orders be made under Rule 39 on the basis of little reasonable prospects of success?

1) Dealing with these issues may involve consideration of subsidiary issues including the date from which the time limit began to run, whether it was 'not reasonably practicable' for a complaint to be presented within the primary time limit and whether it was presented within a reasonable time thereafter.

Limitation

5. Mr Milsom queried the basis for why the Tribunal had raised limitation and it was also confirmed by Mr Coghlin that no time limit issues arose. It appeared to me that there were no limitation issues in respect of the claim as originally presented. The date of deactivation was 30th April 2021. The EC notification was made on 28th July 2021 and the certificate was issued on 8th September 2021. The extended deadline would have been 8th October 2021 but the date on which the claim was presented was 28th September 2021.

Employment Status

6. It is agreed that the issue over the Claimant's employment status will need to be determined as a preliminary issue but it was agreed that this was not for determination today.

Amendment Application

7. The Respondent objected to the Claimant's amendment application being considered today on the basis that he had only given two clear days' notice but that in the event the Tribunal decided to address that issue Mr Coghlin said that he would respond in oral submissions, which he did.

The Claims as Originally Pleaded

8. The claims are for harassment related to race under s.26 Equality Act 2010, victimisation under s.27 Equality Act 2010 and indirect race discrimination under s.19 Equality Act 2021. The Claimant is a black male of African descent. He advances his race complaints by reference to colour (both black and/or non-white) and national/ ethnic origin (African).

9. The Claimant commenced work as a driver for Uber's Ubereats food delivery service on 29th November 2019. The claim is about the introduction by the

Respondent(s) of Microsoft facial recognition software. This requires drivers to take a real time photograph of themselves (a 'selfie') for verification when using the app. The photograph is then checked against the driver's account profile picture. Access to the app is a pre-requisite to accessing work and consequently remuneration.

10. At paragraph 6 of the grounds of complaint it is asserted that facial recognition software places people from ethnic minority groups at a disadvantage in that false positive and false negative results are greater in individuals from ethnic minority groups. At paragraph 8 there is a reference to specific individual disadvantage brought about by the software.

11. The facts relied upon relate to an incident on 30th April 2021. At paragraph 9 the Claimant says that at 9.13pm on 30th April 2021 he received an email from UberEats notifying him of his permanent suspension from the platform. He says that the reason he was given was that this was '*after receiving information that you have shared your Uber Eats delivery partner account on multiple occasions'.* At 11.56pm the Claimant says that he received a message to say that he had failed the facial recognition check. The Claimant says that he was informed that the Respondent could not verify that the photo that he had submitted was actually him. The Claimant responded to say that the suggestion that he had been sharing his account was false. Amongst other things he said *'your algorithm by the looks of things is racist and this needs to be addressed as it is not able to recognise and verify my photos which is probably why I get asked to take photos of myself multiple times a day.'* The Claimant says that this is the first protected act for the purposes of his victimisation claim. On 1st May the Respondents replied restating their decision to end their partnership with the Claimant. The Claimant responded to say that it would only take a human being to respond. At 0101 he was told that his request was sent to the relevant team. At 0858 the Respondents reiterated the decision to terminate the relationship because of continued mismatches. The Claimant replied requesting a human reviewed the photos and stating that the algorithm was racially biased. This is relied upon as the second protected act. At 1058 on 1st May an agent named Ken got in touch with the Claimant to assure him that the Respondents would never discriminate. The Claimant was informed that he would not now receive a phone call and that the decision to deactivate his account was maintained.

12. At paragraph 16i. of the claim form in respect of the message dated 1st May *'it is wholly unclear what 'review' process was undertaken by the Respondents and the extent to which the review involved a human comparison between the submitted photograph and the image of the Claimant on their records'.*

13. The particulars of the claims for harassment, victimisation and indirect discrimination are set out at paragraphs 18 to 23 of the grounds of complaint.

14. The conduct relied upon for the harassment claim is set out at paragraph 18 and comprises 1) the fact and/or manner of the dismissal/ deactivation 2) the false accusation of dishonesty-related sharing of the app and 3) the communications set out at paragraphs 9, 12 and 15 of the grounds of complaint.

15. At paragraph 19 the basis for the harassment claim is said to be the '*inherently racial features of the facial recognition software which were known to the Respondents both more widely and in the Claimant's immediate case having regard to his responses on 30th April – 1st May 2021.'*

16. The victimisation claim is set out at paragraph 20. It is pleaded as premised on the protected acts actually made or in the alternative that he may make a further protected act. The detrimental treatment is listed as the denial of a telephone call; the denial of a 'human review', the failure to investigate the discriminatory consequence of the Real Time ID Check; the failure to reconsider the Claimant's dismissal and the Claimant's deactivation/ dismissal on 1st May 2021.

17. The indirect discrimination claim is at paragraph 21. The PCPs listed are as follows:

    1) The requirement or practice of accessing the application via the Real Time ID check;
    2) The need to undergo facial recognition checks in general and/or by way of the software adopted by the Respondent;
    3) Deactivation and/or dismissal;
    4) The practice and/or requirement of deactivation without a human review of submitted photographs;
    5) The practice and/or requirement of communication via message and without a telephone consultation with drivers prior to deactivation/ dismissal.

18. At paragraph 22 it was asserted that the PCPs put black/ non-white people and/or people of African descent or origin at a particular disadvantage in that they are less likely to pass the facial recognition test and thus more likely to face the consequences of being barred from the app and/or employment with Uber.

The Response

19. At the time of filing its response the Respondent sent a letter dated 29th November 2021 to the Tribunal requesting a strike out/ deposit. In particular it asserted the following:

'…the Claimant's Claims are based on fundamental factual errors such that they cannot succeed. In particular, the Claimant alleges that his agreement with the Uber Portier BV ('the second respondent') was terminated and he was otherwise subjected to discrimination on grounds of race because he failed an automated facial verification check. In fact, the Claimant lost access to the App only temporarily following a human error in a human facial verification check and a separate flagging of unusual use of the Respondent's systems as set out in more detail in the Respondent's Grounds of Resistance (see in particular paragraphs 28 and 29 of the Grounds of Resistance). The Claimant's access to the App was restored on 16 September 2021.

Our client appreciates that prior to the filing of the Grounds of Resistance, the Claimant and his representatives were not aware of the full reasons behind the Claimant's temporary deactivation from the App due to miscommunications relating to the Claimant's deactivation (which are fully explained in paragraphs 33 to 36 of the Grounds of Resistance). But the Claimant is now aware of the reality of the situation, and it is a reality that the Respondents will be able to demonstrate to the necessary standard for a strike out (and certainly for a deposit order) by reference to a small number of documents which the Claimant is unlikely to be able to dispute.'

20. At paragraphs 16 to 25 of the Grounds of Resistance the Respondent describes its 'Hybrid Real-Time ID' checking process ('HRTID Process'). It states that the process was rolled out in August 2020 and that its purpose is to ensure the correct person is using the app and that if not, the correct details of any substitute are provided. In short, the response is that there is provision for couriers to select how the photo identification takes place, either by computer review or human review. A 'verification failure' is logged if either the selfie is determined not to match the Courier's profile photo or the selfie is determined to be a photo of a photo or similar. At paragraph 21 it says that in circumstances where the courier opts for a human review a verification failure is logged where at least two out of three specialists determine that the selfie does not match the profile photo or that it is a photo of a photo. If the courier opts for a computer review and there is a failure then it is sent to a team of three reviewers for a human review. If a courier has a 'first verification failure' they will be contacted and instructed to notify the team if they were using a substitute. If they have a substitute it will be assumed they will be using the substitute and no failure will be recorded. If a courier then successfully registers a substitute following a first verification failure, a note remains on the file, but any subsequent verification failure will be treated as a first (not a second) verification failure.

21. At paragraph 24 the Respondent says that at the time to which the Claimant's claims relate, the consequence of a subsequent HRTID failure at any time after a first verification failure was deactivation subject to a successful appeal. A courier can request a review from the Incident Response Team (paragraph 25).

22. At paragraph 26 and 27 the Respondent asserts that during the period between 10th September 2020 and 27th April 2021 the Claimant completed 43 HRTID processes. He selected the computer process for 36 processes and he passed these without issue. He selected human review for the others and passed all but one. The Respondents assert that the Claimant's account was deactivated because of repeated flagging for unusual use of the App. At paragraph 28 the Respondent says that on 1st December 2020 the Claimant submitted a selfie for a human review. The reviewers decided it did not match the photo on file. On 5th December 2020 the Claimant was requested to register a substitute but he failed to do so. On that basis the Claimant received a first verification failure.

23. At paragraph 29 the Respondents say that on 28th and 29th April 2021 unusual activity was detected in the account. In particular on four occasions a person attempted to log into the app in circumstances where the combination of their location and the time of attempted log in was treated by the Respondent's systems as suggesting that more than one person was, or may have been, attempting to use the Claimant's account. This triggered the deactivation of the Claimant's account on 30th April 2021.

24. At paragraph 30 the Respondent states that the Claimant's case was subsequently reviewed and his account was reactivated on 16th September 2021. The Respondent's case is that it reviewed the verification failure in December but that this could not be verified because the selfie was no longer available to view due to privacy reasons. As a result it was determined that the first verification failure could not be confirmed and the account could be reactivated. After the reactivation the photo was recovered and reviewed. It was determined that while the photo was dark it likely did match the photo of the Claimant on his account.

25. At paragraph 33 the Respondents accept that there were some inconsistencies in the way the Claimant's case was handled. His complaint was not referred to the independent review team but instead referred to the level 2 support team who in turn did not refer it to the independent review team. The Respondents say that this was down to human error. At paragraph 35 the Respondents assert that the consequences were that the Claimant was never informed that he had failed a computer review as he was only given standard responses. The support team does not have access to the facial verification records. The Claimant was told by an agent ('Ken') that the Respondents had reviewed his account but it was not possible to determine what if any review had taken place. The Claimant

was not sent a message informing him that his account had been reactivated. Following the decision, it is said, there was a delay communicating this to the Claimant because of staff absences and internal confusion about which team within the Respondents was responsible for notifying the Claimant. The decision to reactivate the account came to the attention of the Respondents because the Claimant's intention to bring legal proceedings was reported in the press. This then prompted the Respondents' investigation into the deactivation and reactivation more closely.

26. At paragraph 36 the Respondents assert that the unfortunate shortcomings in the way the Claimant's case was handled are completely unrelated to the Claimant's race or his protected acts.

27. At paragraphs 38 to 40 the claims of harassment are denied in their entirety. At paragraph 41 onwards it is admitted that the Claimant's communications at paragraphs 11 and 14 are protected acts. However at paragraph 42 it is denied that the Claimant was subjected to detriment because of the protected acts or because of a suspicion he may do a protected act. At paragraph 42 it is asserted that the allegation of victimisation is logically flawed because the Claimant says that he was treated the same way both before and after the protected acts and that the Claimants say that the Respondents failed to take corrective action despite him raising protected acts not because he had done so. To that extent it was said that his complaint of victimisation was circular. The specific factual responses are set out at paragraph 43.

28. The defence to the indirect discrimination claim is set out at paragraphs 44 onwards. Insofar as it was understood that PCP1 was referring to a computer review it was denied that this was imposed as couriers were never required to undertake a computer review. The PCP 2 is denied in that there is a distinction drawn between facial verification and facial recognition technology. Again, it is confirmed that there was no requirement for the Claimant to undergo a computer review. It is said that the phrase 'deactivation and dismissal' does not amount to a PCP. It is admitted that the Claimant was temporarily deactivated but not dismissed for the purposes of s.39 Equality Act 2010. PCP4 is denied on the basis that the Respondents did not impose a computer review. In respect of PCP5 the Respondents say that the Respondents do not have any prohibition against telephone consultation regarding deactivation but it is admitted that the Respondents generally communicate with couriers via email and that only a few teams make outbound calls about matters relating to a courier's account.

29. At paragraph 52 no admissions were made as to particular disadvantage. In any event it was restated that the Claimant's case rested on a mistaken premise

that failing the computer review led to deactivation. The Respondent then went on to set out its defence of objective justification at paragraphs 56 onwards.

The Amendment Application

30. On 16th May 2022 the Claimant's representative wrote to the Tribunal attaching Amended Grounds of Complaint and applying to amend the claim. The Respondents' representatives were copied into the application. The basis for the application was that the reason for deactivation which was given in April was inconsistent with the reasons advanced in the Grounds of Resistance; that the Claimant had been investigated twice but the contents of that investigation had been withheld and that since 15th February 2022 the Respondent had been seeking clarity on the issues that were central to his case. The Claimant asserted that the application fell into three broad categories:

    1. *Matters that were not known to the Claimant when he submitted his claim and have only become apparent on receipt of the GOR and through subsequent correspondence;*

    2. *An alternative pleading which reflects the fact that Uber has been fundamentally inconsistent in its explanations for terminating the Claimant's employment (and reflecting the reality that facial verification processes (both human and AI) frequently have indirectly discriminatory effects;*

    3. *Allegations relating to aspects of the Respondent's facial recognition processes which the Respondent has elected not to mention in their pleadings and/or correspondence which mean that black/ non-white couriers are required to undergo heightened and excessive identity verification checks as compared to white colleagues.*

31. The amended Particulars of Claim contain an added paragraph 9 that human verification checks give rise to indirect race discrimination and research is cited. At paragraph there is an additional statement which reads 'as a consequence of his unjust dismissal the Claimant has been deprived of continued employment'. Between paragraphs 19 and 25 there are amendments relating to 'events subsequent to the presentation of the ET1'.

32. The amended pleadings are as follows:

    Harassment

    26.iv 'the continued failure to provide a full account as to the process applied to verification and investigation(s) including most recently the Respondent's letter of 6th May 2022'

26.v 'the requirement to undergo heightened and excessive identity verification checks (including but not limited to the requirement to repeatedly submit photographs) as compared to white colleagues, which are inexplicably rejected

Victimisation

28.vi The failure to communicate the fact of, or outcome(s) of the investigation(s) to the Claimant;
28vii. The uncommunicated reactivation of the Claimant;
28viii. The continued failure to provide a full account as to the process applied to verification and investigation(s) including most recently in the Respondents' letter of 6th May 2022.

Indirect Discrimination

There is an addition to the PCP at 29.1. of 'submitting photographs'. There is also the proposed addition of the following PCPs:

29.vi. Alternatively to (ii) and (iv) and to the extent that the Respondent's account of the recognition process is well founded:

a) The requirement and/or practice of human verification checks;
b) The application of the verification checks as described by the Respondent;
c) The application of any process or checks conducted in or around the time of the 'usual activity' in late April 2021.

33. By email of 18th May 2022 the Respondent opposed the amendment application. It was submitted that the Claimant had deliberately waited until the eleventh hour to amend when the last communication referred to was 6th May. The Claimant asserted that the safety lens data was incomplete because it was missing photograph submissions he made on 4th April 2022 and that he had also asserted that he was subjected to heightened and excessive identity checks specifically on 4th April 2022. The Respondents submitted that they were trying to conduct investigations into the new factual matters but they would not be able to be completed in time.

Respondent's Submissions

34. Mr Coghlin introduced his submissions by reference to some fundamental principles on strike out from the relevant case law.

35. The key principles on strike out were summarised by Mitting J in **Mechkarov v Citibank NA [2016] ICR 1121** as follows: *'(1) only in the clearest case should*

a discrimination claim be struck out; 2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing the oral evidence; 3) the Claimant's case must ordinarily be taken at its highest ; 4) if the Claimant's case is 'continuously disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out; and 5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputes of facts.'

36. Mr Coghlin submitted that Mitting J's first point about discrimination claims was underpinned by the well-known authority of **Anyanwu v South Bank Students' Union [2001] IRLR 305** where Lord Steyn at paragraph [24] said:

'For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest of cases. Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.'

37. He then referred to Lord Hope's dicta at paragraph 39:

'Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunal ought not to be taken up by having to hear evidence in cases that are bound to fail.'

38. The test for strike out is whether the claim has a real as opposed to merely fanciful prospect of success: **Eszias v North Glamorgan NHS Trust [2007]** ICR 1126 per Maurice Kay LJ at [26]. According to [25] the Respondents do not need to show that the claim is 'frivolous' or has 'no prospects of success'. At paragraph 29 it was stated *'It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.'*

39. In order to pass the threshold the claim must 'carry some degree of conviction' and must be 'a case which is better than merely arguable': **ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ** 472 per Potter LJ at [8].

40. Where there are no key disputes of fact the Tribunal is likely to be more willing to strike out (for example) legally misconceived claims: **Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR** per Underhill LJ.

41. If the power to strike out is engaged on the ground that the tribunal is satisfied that the claim (or part of it) has no reasonable prospects of success, the tribunal has a discretion as to whether to exercise that power. However, if the case has been found to have no reasonable prospect of success, then the discretionary decision will usually only have one possible answer: **Hobden v ABN Amro Management Service Limited UKEAT/ 0266/ 09/ DM**.

42. In relation to the making of deposit orders the following principles were extricated from the case law.

43. In **Jansen van Rensburg v Kingston upon Thames UKEAT/0096/ 07 EAT (Elias P)** adopted the reasoning of the Court of Appeal in **Ezsias** and added that as with the jurisdiction to strike out, tribunals were entitled to take a view as to factual disputes when ordering a deposit and the test of 'little reasonable prospect of success' was plainly not as rigorous as the test for strike out.

44. The purpose of the deposit order regime was explained by the EAT (Simler P presiding) in **Hemdan v Ishmail [2017] IRLR 228** at [10]:

'The purpose of a deposit order is to identify at an early stage claims with little reasonable prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.'

45. In respect of s.19 Equality Act 2010, the Claimant bears the burden of proof. In particular the Claimant must prove the PCPs and the particular disadvantage.

46. In **Essop v Home Office [2017] ICR 640** at paragraph 32 Hale LJ held that '*in order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for a particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group but also by the individual.'*

47. Mr Coghlin submitted that the Respondent was now able to show by way of documents that could not be disputed that the Claimant did not fail a computer-

based test and there was no causal connection between the PCP and the disadvantage relied upon. At paragraph 40 he submitted that the thrust of the case within the particulars of claim was that it was the computer algorithm that had caused the deactivation and that the denial of a human review was the detriment. Mr Coghlin referred to p.195 of the bundle and the press article where the Claimant's representative was quoted to refer to the effects of AI and automated decision making having a discriminatory impact. At p.196 there was a crowdfunding site which refers to facial recognition software. At p.200 there was an interview with the Claimant in which he said that the deactivation of his account was based on the Respondents' use of facial recognition software which could not recognise or identify his face. Mr Coghlin explained the basis for deactivation which was in the grounds of resistance and which was that at the time the Claimant had been given a series of incorrect messages about the deactivation and his challenge was not reviewed by the correct team. The safety lens data show that the HRTID process which led to his first verification failure was conducted by a human (p.122). By contrast the document shows that between 10th September and 2020 and 27th April 2021 the Claimant underwent 43 HRTID processes and the Claimant selected the computer review for 36, which he passed. For the documents not to be taken into account there would need to be an allegation of bad faith or forgery or an assertion that the facial recognition was incomplete.

48. The Claimant asserts that not all selfies are referred to safety lens and that the record is incomplete. It is said by C that if you fail you are asked to resubmit a selfie and the record does not show the failed attempts. The witness statement of Carlo Bruschetti dated 19th May 2022 establishes that such instances are not failures such as would lead to deactivation but rather instances when the checks have not worked.

49. The PCP 3 should be struck out as a matter of logic as it is not a valid PCP. It cannot be said that dismissal will make it more likely that he will fail the check that comes before dismissal: **Fox v British Airways plc UKEAT/0315/14/RN** at [78].

50. In relation to PCP 5 there is no causal connection between the PCP and the alleged disadvantage. Whether or not someone receives a telephone consultation prior to deactivation cannot put people who share C's race or put C to the disadvantage of being more likely to fail the computer verification process. In any event the Claimant's case is that he was deactivated before the PCP was applied to him (particulars of claim paragraphs 11, 13 and 15).

51. In terms of the harassment allegation the Claimant's case is to demonstrate that the alleged acts of harassment were related to his race praying in aid the inherently racial features of the facial recognition software. Therefore the

Claimant's claim is parasitic on the indirect discrimination claim. The second act of harassment did not occur because the Respondent did not allege dishonesty against the Claimant and at its highest the Claimant does not plead this.

52. As for victimisation claim, the Claimant relies upon the messages that he sent the Respondent on 30th April and 1st May 2021. His case is that he was denied a phone call because of the protected acts or suspicion that he would make a protected act. However the initial offer of a phone call was made after his first protected act. This illustrated the inherent plausibility of the victimisation claim.

53. The Claimant's case is premised on an assertion that the Respondents did not make a call because of a wish to avoid a difficult conversation regarding the allegations of racial bias. The Respondent's case is that the support agent would not be the same person to have made the call to the Claimant since only specially trained support agents were permitted to make calls to couriers.

54. The Claimant says that he was denied a human review. The allegation proceeds on the incorrect assumption that he was deactivated because he failed a computer review in April 2021. This was not the reason for the deactivation. The claim is circular. His complaint is that he was not given a human review despite him challenging the deactivation as discriminatory not because he did so. The same point arose in **Brooks v Nottingham University Hospitals NHS Trust** **UKEAT/0246/18** where the Tribunal had held that the Claimant's case of whistleblowing was fatally weakened since he had perceived the same treatment both before and after his protected disclosures. In any event the Claimant was subject to a human review which led to his reactivation so there was an improvement.

55. The Claimant has no reasonable prospect of showing that the Respondents failed to reconsider the Claimant's dismissal because of his protected acts or because of a suspicion that he may do a further protected act. His deactivation was reconsidered in September 2021 so the alleged detriment did not occur. This is shown by the contemporaneous documentation. Similar to detriment 2, the claim is circular. Detriment 5 is unsustainable as a matter of chronology as the Claimant did his protected acts after he received notification that his account was deactivated.

56. In respect of the amendment application Mr Coghlin submitted that the amendments were new factual claims. They were completely different allegations which were directly contradictory. By leaving the amendment to two days before the hearing the Claimant has brought about real prejudice by the Respondent who is responding 'on the hoof'. The factual allegation is a complete u turn on the pleaded case. The assertion about the responses from

the Respondent's solicitors at paragraph 26.iv would be protected by privilege under judicial proceedings immunity. There is no reason why the Claimant could not have pleaded the requirement to undertaken heightened and excessive identity checks first off. The amendment is not curative of gaps or errors such that it would affect the strike out application. Given the timing and manner the application should be refused. If the application is allowed the Respondent is likely to wish to strike it out down the line so it would not be in line with the overriding objective given the lateness of the application.

The Claimant's Submissions

57. On behalf of the Claimant Mr Milsom submitted that the test under Rule 37 was a high one. The Respondent must persuade the Tribunal that it can conduct the exercise at this stage and that it can reach a positive finding of 'no reasonable prospects of success.' The same principles applied to Rule 39 and whether the claims had 'little reasonable prospects of success'. In **Hemden** the EAT concluded that notwithstanding determinations on prospects of success the Tribunal must have regard to all features including the public interest. In this case the Claimant has the support of the Equal Opportunities Commission. There are arguable matters of public interest.

58. It was submitted that the Claimant understands that the Real Time ID check process comprises three stages: a trigger event; the requirement to upload photos via the safety lens process and a computer or human review.

59. Facial recognition software is recognised in a plethora of research as placing people from ethnic minority groups at a disadvantage in that false positive and false negative results are greater in individuals from ethnic minority groups. Such is the discriminatory impact of the facial recognition process that large organisations including Amazon, IBM and Axon have reviewed their practices.

60. It was submitted that there was similarly supportive evidence of human verification checks giving rise to racial bias, examples of which were cited in the proposed amendment application.

61. On the basis of the information provided to him at the time the Claimant's understanding at the point of deactivation was that he had failed to pass digital verification checks. His continued request for a human review was met with no substantive response. The Claimant was not informed that his account had been reactivated.

62. Mr Milsom referred to the *inter partes* correspondence. On 15th February 2022 the Claimant indicated via his representatives that he was in no position to

uncritically accept the ET3. He requested: records as to the pass rates of HRTID checks (both computer and human); an explanation of the trigger event that aroused suspicion on 1st December 2020; a breakdown of the ethnic makeup of the identity verification specialists in general and those who were said to undertake checks on the Claimant's photograph on 1st December; details as to the training received by such specialists; details as to the measures taken to mitigate the discriminatory effects of the verification process; an explanation of the unusual activity said to trigger deactivation on 28th and 29th April 2021; the identity of the decision makers and their rationale for the deactivation in April 2021; the rationale for reactivation six months' later and the identity of the decision makers; the reason why the outcome of the investigation was not communicated to the Claimant and a copy of the investigation reports and an account as to the role played by ULL in the Uber Eats business in view of the pleading that it was not '*generally* involved in day-to-day operations'. On 23rd March 2022 the Respondents provided some measure of response and disclosed material which it stated supported its pleaded case that no automated verification was used. The Respondent had submitted that there was no duty of disclosure in this case and that anything disclosed was the Respondent taking 'a generous view'. It was submitted that the Respondent's response was 'at best selective'. On 8th April 2022 the Respondents purported to provide all photographs collated during HRTID checks from 2020 to date.

63. On 20th April 2022 those acting for the Claimant wrote to the Respondent with further concerns, namely: i) there was an apparent disconnect between the Claimant being notified that there were 'continued mismatches' of photographic ID as at the date of the deactivation (May 2021) and the pleaded defence that the reason for deactivation was based on 'separate flagging of unusual use' of the app; the opacity as to the initial deactivation and continued failure to disclose the catalyst and outcome of the September 2021 investigation meant that the Claimant was simply in no position to accept the contents of the ET3; iii) that it was not fair for the Respondents to present the Claimant with contradictory reasons for his dismissal and incomplete information and then seek to have the claim struck out on the basis that he is confused and mistake and iv a further suite of carefully tailored questions as to the role of safety lens, the grounds for the trigger, the basis for the deactivation and investigation process were all asked for together with a reiteration of those matters unanswered from the letter of 15th February 2022. A response followed on 6th May but it did not substantially advance matters as its position was that the grounds of resistance contained everything that should trouble the Claimant and the Tribunal.

64. Mr Milsom submitted that the Respondents' process required the uploading of a photo. The point was that whether or not there was verification by human or software there was scope for racial disadvantage. At various stages whether

initial safety lens or human review the Claimant's face was rejected in circumstances where there is considerable material to suggest there is a racial barrier in verification checks. The Respondent makes the point that there was no allegation of dishonesty but the Claimant was faced with an allegation that someone was uploading photos of someone else so this is an attack on his probity.

65. It was submitted that the facts were that in December 2021 the Claimant uploaded a photo of himself and the human review failed. In April 2021 there is then a spike in the number of verification checks requested of the Claimant. This is a case which is ill suited to providing answers on the Respondent's best case scenario. The case begs the question as to why the Claimant was asked to provide so many photos and why he was informed there were mismatches. If there was a human review there is a question as to what race training of those verifying is and what is their demographic? There are known difficulties with recognising other race faces. There is a direct contradiction between what the Claimant was told in April 2021 and what was put before the Tribunal. It was submitted that in respect of the victimisation claim, having seen publicity regarding this litigation the Respondent undertook its own investigations and reactivated the account but didn't actually tell the Claimant. Now they were using the clandestine reactivation as a point against him in the victimisation claim. It was submitted that this was a case that raised important matters by reference to the Commission's involvement and was about the Claimant's access to work, which felt 'Kafkaesque'.

66. In respect of the amendment application Mr Milson invited the Tribunal to have regard to the EAT's guidance in **Vaughan v Modality Partnership [2021] ICR 535**. And provided the full citation in his written submissions. He argued that the balance of justice weighed in favour of the Claimant. The proposed amendments were principally as a consequence of matters which the Claimant was not aware of at the time of presentation of the claim and which were matters which could form the basis of a fresh in time claim. There are no new claims but reformulation of existing claims already pleaded based on matters not known at the point of presentation. Focus on the time limits is likely to prove a distraction post Vaughan but any delay was attributable to reasonable efforts on the part of the Claimant to seek clarity from the Respondents as to the matters which remain opaque. The amendment was pursued at the first hearing before directions were given. There is no material prejudice to the Respondent in granting the amendment. The prejudice to the Claimant was 'exponential' in that it has real merit; it obviates the merits of the Respondent's strike out applications; even if the Respondent's case at trial is successful on the claim as originally pleaded the amendment nonetheless raises questions as to the discriminatory consequences of a human review which have real prospects of

succeeding at trial. Barring the amendment would lead to an unreal trial and place an unnecessary fetter on the Claimant's prospects at trial.

67. Most of the proposed amendments were freestanding claims or exercises in relabelling. The disadvantage remained the same and related to the same question: why did the Claimant face deactivation in 2021 for submitting a perfectly valid ID of himself. Whether it is human or computer the balance of prejudice tips in the Claimant's favour. The Claimant first became aware of the safety lens data as a consequence of the correspondence between the parties. In **Street v Derbyshire** threats in litigation founded an arguable claim.

Post Hearing Submissions

68. On 23rd May 2022 the Claimant's representatives emailed the Tribunal. The submission was in respect of the witness statement of Carlo Bruschetti that was disclosed by the Respondent approximately two hours before the hearing. It was said that this 'safety lens data' did not in fact capture all the photos submitted by the Claimant, and processed by the Respondents, for the purposes of the verification checks. On behalf of the Claimant it was submitted that the statement highlighted the combined effects of the use of artificial intelligence in the processes of the Respondent and that in addition the images contained in the safety lens data were an incomplete picture. This reinforced the need for the Tribunal to consider the evidence as a whole. The Claimant's representatives also made submissions about a deactivation that occurred on 17th May 2022 which is covered by Mr Bruschetti's statement. There were also submissions made about the Respondent's inconsistency in answering questions about the part that Uber London Ltd plays in the overall Uber day to day process.

69. On my direction the Tribunal then wrote to the parties to say that the contents of the letter would be taken into account but to the extent that they addressed the subject matter of the witness statement.

70. The Respondent responded by way of a letter dated 27th June attaching a response that it had sent dated 24th May which it attached to its letter. The Respondent submitted that the late production of the witness statement was as a consequence of the Claimant's late amendment application. It was submitted that the letter sought to introduce matters which were unrelated to the pleaded case or was an attempt to restate what had been said at the hearing. The letter then went on to address the witness statement, the deactivation from May 2022 and the points made about Uber London Limited.

Decision

Amendment Application

71. I have considered the test in **Selkent v Moore [1996] ICR 836** and the full citation of paragraphs 12 to 21 of **Vaughan v Modality Partnership [2021] ICR 535 EAT** set out at paragraph 49 of Mr Milsom's skeleton argument. I have headlined my decision by reference to the guidance in **Selkent**.

Timing and Manner of Application

72. I decided to proceed to hear this application. I heard submissions from both parties. The application was made on 16th May, only two working days' clear of this hearing. I have carefully considered the Respondents' objections to the amendment application proceeding. The Respondents have had limited time to investigate the assertions made by the Claimant in respect of the photographs and the allegation of heightened checks.

73. However I was satisfied that both parties were able to address me on the application. In particular the Respondents are aware of the impetus for the amendments as concerned indirect discrimination on the basis that they flow from the grounds of resistance insofar as concerns the processes utilised in the lead up to the Claimant's deactivation. Rather than being an 'ambush' I take the point advanced by Mr Milsom that this is an evolution of the claim which is premised largely on the reasons being advanced in the grounds of resistance and information coming to light as the case has unfolded.

74. In respect of the matters relating to the 4th April allegations the Respondent will have the opportunity to provide an amended response in due course, which will allow them time conduct any necessary investigations.

75. The proceedings are at their infancy. This is the first hearing. The Tribunal has not made any directions as yet. It is an appropriate time to make an amendment application as it gives the parties sufficient time to prepare and for initial case management.

Nature of the Amendment

76. I considered it necessary to have regard to the background in this case. The Claimant's originally pleaded case rested upon an assumption that the rejection of his photograph and subsequent deactivation was a consequence of an algorithm or other AI process. The process is app based and the Claimant's case is that there was some opaqueness surrounding the reason.

77. At the point of presentation there was a lack of clarity about what the processes were which had led to the deactivation. These were only brought to light in the grounds of resistance. At that point in time the reasons advanced by the Respondent for deactivation were inconsistent with the reasons that were actually given to the Claimant at the time, which the Respondent says was a result of human error.

78. I accept that the amendment concerns reformulation of claims already pleaded based on information provided by the Respondent and on the way information has come out as the case has progressed. The indirect discrimination claim is brought on the alternative basis that a human and not computer review and there is a different species of disadvantage claimed. Paragraphs 4 and 5 of the harassment claim are different sorts of claim although they stem from the same subject matter. The additional victimisation detriments at 28.6, 7 and 8 are facts which are or ought to be within the knowledge of the Respondent and which have arisen during the unfoldment of the litigation. The claims are expanded but the essential facts from which the claims stem remain the same (i.e. the deactivation and the processes surrounding facial recognition).

Time Limits

79. The harassment and victimisation claims/ detriments are pleaded as continuing acts and appear to be in time. It is proportionate for the Claimant to bring these additional claims as amendments rather than presenting an entirely new ET1.

80. The PCPs relate to 30th April 2021 but are dependent on how the case has evolved by reference to the grounds of resistance and information provided to the Claimant about the Respondent's processes. The claim as originally pleaded was in time.

Balance of Hardship

81. The core aspect of the Claimant's complaint revolves around the reason for his deactivation from the Uber app in circumstances where he felt that the reasons given at the time were unjust. The case essentially concerns facial recognition, its consequences on an individual's access to work and whether the processes engaged by the Respondent create racial disadvantage.

82. The claim was premised on the assumption that the verification had been done by an automated process. The Claimant's case rested on this assumption. Some months down the line and in the process of the litigation the Respondent asserts that the reasons given to the Claimant at the time were incorrect and that the Respondent's policies build in a human review process with checks in all cases of verification failures and deactivation. The Claimant does not accept

this version of events uncritically. He maintains that there has been inconsistency or inadequacy in the provision of information. The case is in its early stages. There has not been an order for disclosure or exchange of witness evidence save for the statement of Mr Bruschetti.

83. Given the alleged lack of clarity and the inconsistency in the reasons advanced by the Respondent for deactivation (albeit with some apparent contrition by the Respondent) it is fair for the Claimant to be able to put his whole case on alternative bases based on what information he has received about the rationale for his deactivation. It would seem unjust if he were not allowed to advance his alternative pleading when the information on which it was based had only become known through the defence of the original claim. This is particularly the case given that the case is at the stage where no trial directions have been given. The Respondents will have the opportunity to defend the case fully whereas the Claimant will have lost any opportunity to bring his whole claim. The more recent allegations are in time and the Claimant would have been able to bring them by way of a claim form in any event. It is proportionate to do so by way of an amendment.

84. I therefore grant the amendment application. I have directed that the Respondent has permission to file an amended response within 28 days.

Strike out/ Deposit

Striking out

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

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

(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Deposit orders

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.

85. I am grateful for Counsels' submissions on the law which I have recorded above and which I have taken into account in approaching this application.

86. Paragraph 16i. of the claim form in respect of the message dated 1st May states; *'it is wholly unclear what 'review' process was undertaken by the Respondents and the extent to which the review involved a human comparison between the submitted photograph and the image of the Claimant on their records'.* I take this into account because on the Claimant's case at its highest there is a lack of clarity about the Respondent's photo verification process relating to his deactivation.

87. The contemporaneous documentation that has been provided by the Respondents in respect of the Claimant's selfie uploads is the safety lens data. This shows whether or not the Claimant had a manual or technical review and what the result of that review was. It shows that he had a review on 1st December 2020 which was a fail. It shows that this was a human review. It shows the remainder of the Claimant's photo submissions to have been successful including those which have been subject to a technical review. There is data going up to 29th April 2021. The Respondents say that this is the only photo review that was relevant to the deactivation on 30th April and therefore the Tribunal should have regard to it as it contradicts the way that the case has been put.

88. At paragraph 30 of the response it says that there was a review of the circumstances surrounding the failure on 1st December. It would appear from

this that there is some measure of acceptance that the failure may have been based on an error in recognition of the photo. The Respondents say that the response in respect of the deactivation on 29th April is not based on any rejection by the software of the Claimant's photo but on the basis that unusual account activity was detected on 28th and 29th April. There is no documentary evidence before me that speaks to this.

89. At paragraph 33 there is also some acceptance by the Respondent that its standard procedures were not applied at the time of the Claimant's deactivation. The Respondents outline their standard procedures in its response. There is also some reference to them in the statement of Mr Bruschetti. I did not have any written policies or procedures.

90. It is accepted by the parties that this is a case where the correct reasons for the Claimant's deactivation were not given to him at the time of his deactivation. The Claimant's case is that he received a message on 30th April at 1156 to say that he had failed a facial recognition check. There is no evidence before me of a verification failure which relates to that date and time or to 1st December so there is a lack of clarity as to what it relates to. While there have been assertions in the response as to what was the correct process in my finding there will need to be full disclosure of documents or evidence which provide full clarity over what actually happened.

91. In conclusion, the safety lens data is only one piece of the puzzle in this case and the Claimant is saying that the process is not clear and that that document does not provide the full picture. It will be necessary for the Tribunal to make a holistic assessment of the evidence.

92. In those circumstances it would not be fair for there to be a summary conclusion drawn about the application of any PCP or the causal connection between any PCP and the disadvantage without full disclosure. Similarly there will need to be disclosure to allow a fair assessment to be made on the harassment and victimisation claims.

93. This is a case for race discrimination which will necessarily be fact sensitive and dependent on evidence. I consider that the dicta of Lord Steyn in **Anyanwu** is particularly relevant in this case. Given the Claimant's asserted lack of clarity surrounding the reasons for the deactivation process it would be necessary for there to be full disclosure on this issue before any determinations of the claims can be made.

94. In the circumstances I do not consider that I am able to say that the claims have little or no reasonable prospects of success and for that reason I make no order for strike out or a deposit in this case.

Uber London Limited

95. I do not consider how I would be able to determine the involvement of Uber London Limited in the day-to-day operations of the Ubereats business without disclosure and evidence. I have had regard to **Uber v Aslam [2021] ICR 657** and that it was necessary for there to have been a careful factual enquiry to determine who the employer was. While the Respondent asserts that the arrangements are different – and that could well be the case – findings will need to be made on the evidence. Therefore I do not dismiss this respondent from the proceedings.

Employment Judge A Frazer
Dated: 9th July 2022