EMPLOYMENT TRIBUNALS

Claimant: Mr Derrick Creed

Respondent: National Union of Rail, Maritime and Transport Workers

Heard at: Liverpool **On:** 23 June 2022

Before: Employment Judge Aspinall

REPRESENTATION:

Claimant: In person
Respondent: Ms Hart

JUDGMENT was given orally on 23 June 2022, and prepared in writing to be sent to the parties that day. A request for written reasons was made on 25 June 2022 and came to the attention of EJ Aspinall on 6 July 2002. The short form written judgment was sent to the parties on 14 July 2022. In response to the request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a Claim Form dated 26 June 2020 the claimant brought complaints of age and disability discrimination and unfair dismissal. They related to his removal as a Trustee of the NURMT pensions board.

2. By a second Claim Form dated 10 June 2021 the claimant added to his age and disability complaints a further complaint that he had been blocked from reappointment to that board.

3. His claims were transferred to the North West Region of the Employment Tribunals and listed for a preliminary hearing for case management.

4. EJ Buzzard conducted the preliminary hearing for case management. The claims were combined by Employment Judge Buzzard with the consent of the parties but this had not been recorded in his Case Management Summary. I am grateful to the parties for confirming this to me orally and to EJ Buzzard for agreeing that I may record it today.

5. EJ Buzzard spent some time with the parties clarifying the complaints and explaining the relevant law. The claimant's position was that he had been removed from the board and blocked from reappointment because of his age and disability.

6. The respondent defended the complaints saying that all board members had been removed as a requirement of its Regulator and only those who accepted the findings of the Drake Report could be reappointed.

7. The short background was, and the claimant agreed these to be the facts, that the whole board had been removed in response to an instruction from the Pensions Regulator, following a report by Baroness Drake that had recommended removal of all incumbent board members and a bar on their reappointment. The respondent had found the bar on reappointment onerous and had gone to the Pensions Regulators Determinations Panel (The Panel). The Panel adjudicated that the bar was onerous and that members could be reappointed on the strict condition that they accepted in full the criticisms and recommendations made by the Drake Report.

8. The claimant accepted that the whole board had been removed including people younger than him and people without, so far as he was aware, his disability. The claimant conceded that he did not accept all of the criticisms and recommendations of the Drake Report. Following discussion EJ Buzzard listed a preliminary hearing on strike out or deposit for the discrimination complaints and dismissed the unfair dismissal complaint as the claimant accepted he was not an employee of the respondent.

9. The case before me on 23 June 2022 was the respondent's application to strike out the claimant's complaints for age and disability discrimination in their entirety and in the alternative to have a deposit order made.

10. The claimant is a litigant in person. I referred to guidance in the Equal Treatment Bench Book on supporting litigants in person. I asked the claimant the purpose of the hearing and he was able to explain to me that his case might be struck out if I didn't think it would be strong enough to succeed later and that if it was struck out that would be the end of his claims. At this point, before any submissions had been made, the claimant asked about appeal and made it clear that he would appeal if his complaints were struck out as he is so aggrieved at the way he has been treated. I outlined the grounds for an appeal of a tribunal decision to the Employment Appeal Tribunal.

11. At the outset we agreed an agenda and timetable for how we would manage today. We checked that we all had the same documents and after some further documents were provided we each had a bundle of 300 pages which included some emails from the claimant dated 19, 20 and 22 June 2022. I did not hear oral

evidence today. We agreed that the claim would proceed by way of submission only.

12. In order to assist the claimant as a litigant in person, at Ms Hart's suggestion we agreed to proceed chronologically on the facts so that the respondent would make its submissions on strike out relating to the claimant's removal as a trustee, and then we would hear from the claimant in response to the strike out application about his removal as a trustee. We would then take a break and move on to deal with the respondent's strike out application in relation to the claims that rely on the factual allegation that the claimant's reappointment as a trustee was blocked, that the interview decision making process was flawed and that the respondent had failed to reasonably adjust in relation to the interview process for reselection. On each of those the respondent made its submission, and the claimant made a response.

13. At the close of the claimant's submission I then worked with the claimant to formulate some additional submissions. This was because during the course of the day he showed his strength of feeling at the injustice he perceives he has suffered at the hands of the respondent. I had outlined to the claimant the relevant law and in particular the two stage test on strike out, so the "no reasonable prospect of success" hurdle and even if no reasonable prospect is established, the further stage of considering *whether or not to exercise a discretion* to strike out. I assisted the claimant to formulate submissions in relation to the exercise of that discretion, and Ms Hart had an opportunity to respond to those submissions.

14. I adjourned to make my decision. We agreed at the outset of this morning that if there was a decision not to strike out but that the claims had little reasonable prospect of success we would then reconvene to take oral evidence from the claimant in relation to a potential deposit application. If the claims were to proceed without a deposit order then we would convert to a private hearing and case manage the claims to prepare them for final hearing. In the event the complaints were struck out so I did not need to hear a deposit application or consider case management.

Complaints and Issues

15. Prior to any submissions being made we again spent time clearly identifying the complaints that were the subject of the strike out application. We did this together by reference to the claim forms in the separate but combined case numbers, the response forms, the Case Management Order of Employment Judge Buzzard and ancillary correspondence and documentation.

16. Relying on the claims as formulated before Employment Judge Buzzard after what had been a long case management hearing the complaints were numbered 1 – 7.

17. I have dealt with them by way of age discrimination first (complaints 1, 2 and 3), direct disability discrimination next (complaints 4, 5 and 6) and then complaint 7, the reasonable adjustment complaint.

18. We also spent time this morning prior to any submissions clarifying which conditions or impairments were relied upon as disabilities in relation to which

alleged acts of less favourable treatment or failure to reasonably adjust. The respondent conceded that the claimant's conditions of hiatus hernia, heart condition and groin mesh were disabilities, and it put the claimant to proof of the application of the definition in section 6 of the Equality Act on disability, for the conditions or impairments of hearing loss and blurred vision (blurred vision being relied on in relation to the second claim form, that is the blocking reappointment, interview decision making process and failure to reasonably adjust issues alone).

19. The respondent did not accept knowledge of any disability at the material times.

Relevant Law

20. The power to strike out all or part of a claim is contained in Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

> **37 Striking out**
>
> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—**
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success**
> **(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.**

21. The power to strike out is discretionary and is to be applied in a two stage test. **HM Prison Service v Dolby [2003] IRLR 694, EAT**. At the first stage the tribunal must find that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim or response. Failure to exercise the discretion at the second stage may lead to the strike out decision being overturned. In **Hasan v Tesco Stores Ltd UK EAT/oo98/16,** Lady Wise found that the second stage is *'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit'.*

22. The EAT in **Cox v Adecco UKEAT/0339/19, [2021] ICR 1307** considered striking out with complaints brought by litigants in person. HHJ Tayler said *'You can't decide whether a claim has reasonable prospects of success if you don't know what it is.'* There has to be a reasonable attempt at identifying the claims and the issues before considering strike out. Reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case'. As HHJ Tayler observed: 'When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights

and fail to explain the case they have set out in writing'. They judge, whilst remaining impartial, will assist a litigant in person in articulating his complaints.

23. The power to strike out on the grounds of no reasonable prospect of success will only be exercised in rare circumstances **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**,

24. In particular, cases should not be struck out on this ground when the central facts are in dispute **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] IRLR 603** and *a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts* **Mechkarov v Citibank NA UKEAT/0041/16, [2016] ICR 1121.**

25. A claimant's case must ordinarily be taken at its highest. In **Odukoya v Wandle Housing Association Limited UKEAT/0093/15** it was made clear that it was not satisfactory for a Tribunal "to accept major parts of the respondent's case without a trial at which the respondent's witnesses would be heard and cross examined about it.

26. In **Anyanwu and Another v South Bank Student Union and Another and Commission for Racial Equality [2001] UKHL 14** a case which addressed an appeal against a strike out application of race discrimination claims brought under s33 of the Race Relations Act 1976, Lord Steyn at paragraph 24 underlined "*the importance of not striking out such claims……..except in the most obvious and plainest cases".* He continued, "*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 then bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."*

27. Lord Hope in **Anyanwu** added "*the risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The Tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence"*

28. In some cases the assessment on strike out can be made on the documents alone. In **Shestak v The Royal College of Nursing and others UKEAT/0270/08** the EAT set out that where the facts sought to be established are totally and inexplicably inconsistent with undisputed contemporaneous documentation it may be appropriate to strike out.

29. In **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,** the issue was whether the way in which the disciplinary processes were conducted constituted, or contributed to, a repudiatory breach of the contract of employment. The Court of Appeal held that the employment judge was entitled to conclude having considered the documentary evidence of the disciplinary record that there was no arguable basis to the claim that there had been a repudiatory breach of contract.

30. In **Hawkins v Atex Group Ltd [2012] IRLR 807** the EAT upheld the decision of an employment judge to strike out a discrimination complaint. The then President of

the EAT Underhill J, said *'Judges should not be shy of making robust decisions in a case where there is realistically only one possible outcome even if the issue is formally one of fact'.*

31. In **Ezsias**, the decision to strike out was upheld where the facts sought to be established by the claimant were *'totally and inexplicably inconsistent with the undisputed contemporaneous documentation'.*

32. In suitable cases an application for strike out may save time expense and anxiety to all parties, but in cases that are heavily fact sensitive the circumstances in which a claim will be struck out are likely to be rare**. Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108 EAT.**

33. **In Xerox (UK) Ltd and others v Jahan Zeb ([2017] EWCA Civ 2137** a tribunal judge struck out part of a claim on the basis that there was no reasonable prospect of the claimant successfully establishing that the reason for his dismissal was his race when his entire team had simultaneously been made redundant due to an offshoring of roles from the UK to the Philippines. In the Court of Appeal Underhill LJ considered it was impossible to see how putting the claimant at risk of redundancy could be by reason of any of the protected factors in circumstances where everyone in the department was affected equally and the Court found that the employment judge was right to have struck out that complaint as having no reasonable prospect of success.

34. Again in the Court of Appeal, Underhill LJ in **Ahir v British Airways plc [2017] EWCA Civ 1392,** said *" where there is on the face of it a straightforward and well documented explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."*

35. Harvey on Industrial Relations and Employment Law in Division P on Practice and Procedure notes that discrimination cases commonly turn on matters such as the mental processes of decision makers and inferences to be drawn from behaviour, as well as credibility of witnesses, and may involve a reversal of the burden of proof, all of which makes them particularly unsuitable for resolution at a preliminary stage on a strike out application.

36. In **Mechkarov v Citibank NA UKEAT/0041/16, [2016] ICR 1121,** by reference to the decided cases, Mitting J summarised the approach that should be taken in a strike out application in a discrimination case 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 oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is “conclusively 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 disputed facts."

37. Langstaff J in **Chandhok v Tirkey [2015] ICR 527** said that there is no blanket ban on the power to strike out in discrimination cases but that the discretion should be exercised with greater caution than in other less fact-sensitive cases. The exercise of the discretion should be sparing and cautious.

38. **E v X, L and Z UKEAT/0079/20 (10 December 2020, unreported***)* the EAT considered the striking out of a claim in the context of an argument that the conduct complained of constituted 'conduct extending over a period'. The judgment of Ellenbogen J gave detailed guidance on considering a strike out application where some of the matters complained of may be out of time. If a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: However, caution should be exercised having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case.

39. The decision of a tribunal to strike out, or not strike out, all or part of a claim or response, will only be disturbed on appeal if there is an error of legal principle in the tribunal's approach, the tribunal has failed to take into account a relevant factor or has taken into account an irrelevant factor, or the decision is perverse **(see Riley v Crown Prosecution Service [2013] IRLR 966.**

Submissions

40. Having clarified the seven complaints relied upon we then moved to hear submissions. I heard submissions from each side to the timetable that we had agreed and in the format that we had agreed. I adjourned to make my decision having had a helpful submission of law from Ms Hart which was explained to the claimant in full.

41. That legal submission included references to key authorities such as the **Anyanwu** case, the **Bexley** case, the **Ezsias** case, **Cox v Adecco** and a recent EAT decision of His Honour Judge Taylor in **Bahad v HSBC**. Turning to my decision on the particular complaints, and I will go through them numbered 1-7.

<u>Section 13 complaints – direct age discrimination</u>

(1) Removal as a trustee

42. I deal first with the section 13 complaint of direct age discrimination as set out in number 2201038/2020, dealing with the claimant's removal as a trustee. This is the factual allegation that the claimant suffered less favourable treatment because of his age in being removed as a trustee.

43. My decision on this is to strike out this complaint as having no reasonable prospect of success. I make this finding because the claimant has failed to establish that he was treated less favourably than any other trustee at that time. There had been a

report by Baroness Drake. The recommendations of that report went to the Regulator. The Regulator required the respondent to remove all the incumbent trustees at that time. The claimant readily admitted that all incumbent trustees, irrespective of protected characteristic, were removed at that time. In fact, the claimant was the last of them to receive notification of his removal, but all trustees went irrespective of their age. The claimant accepts that all incumbent trustees were removed because of the Regulator's requirement. The claimant pointed out that he thinks that he was the oldest of the trustees. The claimant's case was a mere assertion that his removal must be discriminatory because he was older than the other trustees.

(2) Blocked from reappointment

44. This relies on the factual allegation that the claimant was blocked from reappointment as a trustee. This is in case number 2203671/2021. The claimant says that he was treated less favourably because he was blocked from being reappointed, whereas comparators Mr Peter Hall and Mr David Douglas (both of whom the claimant thinks were younger than him and he thinks in their 60s and, so far as he is aware, not disabled) were allowed to go through to appointment.

45. This complaint is struck out. The claimant accepts that there was a precondition to reappointment which was accepting in full the findings of the Drake Report and he accepts he did not accept in full the findings of the Drake Report. The respondent could establish on the face of the documentation alone the prerequisite for reappointment, that did not relate to a protected characteristic, that was met by Mr Douglas and Mr Hall and not met by the claimant.

46. We spent some time in submission and in scrutiny of the documents and I supported the claimant, as a litigant in person, to go to his own documentation at that time to see what he had said to the respondent prior to the interview and after the interview about his position in relation to the Drake report. The claimant's own contemporaneous documentation, his email to the respondent, shows him describing the report as not independent and a report that should be "null and void in its entirety".

47. The claimant invited me to interpret that correspondence as meaning null and void in relation only to one part of the report (an allegation that the claimant had breached confidentiality made in an email by a Mr McGurk). I do not accept that interpretation of the document. The claimant had written cleanly and in clear English at the time and I see no reason other than to give the words their clear meaning at that time, which was at that time of reappointment decision making the claimant was challenging the report and saying it should be null and void. This was prior to the interview. The claimant then attended interview. After the interview he sent another email which again challenged the findings of the Drake report.

48. On the face of the documentation the claimant did not accept the findings of the Drake report. He was not saying that he was treated less favourably than someone else who challenged the Drake report, that is to say that he could not show that it was because of his age that he was not reappointed. The respondent could show a non discriminatory reason applied to all three candidates (the two who went forward and the claimant) that did not relate to his age. It seemed to me that this

claim was a mere assertion that it must be because of his age that he did not go forward for reappointment. The claimant was informed of the reason in the letter telling him he had not gone forward and he did not at that time say anything at all about it being related to his age. Even if I accepted that he only challenged the report in part, that does not help him. He did not meet the precondition for reappointment. This complaint has no reasonable prospect of success and is struck out.

(3) Direct age discrimination complaint

49. This was a direct age discrimination complaint in relation to the interview decision making process, and this was set out clearly in Employment Judge Buzzard's Order at paragraph 16(a)(i) and (ii). It related to the claimant saying that he had not been told at the end of the telephone interview whether or not he was going forward, and that he had not been told at the end of the telephone interview when he might know the outcome of that interview. The claimant on his own admission was not able to say what kind of interview anyone else had had. He was not able to say what anybody else had been told during the interview or at the end of the interview, and he accepted that the potential comparators, Mr Hall and Mr Douglas, were not told at the end of the interview that they had got their jobs; he admitted that they were told by letter (like him) following the interview.

50. The claimant accepted that the Regulator had required the respondent to not put forward anyone who had not accepted the findings of the Drake report in full. Even today he was adamant that he could not and did not accept the Drake Report in full. He accepts he did not meet the non discriminatory precondition for reappointment. That claim is struck out.

(4) Disability complaints

51. Before we discussed the disability complaints today we clarified the conditions relied on. They were hiatus hernia, heart condition, groin issue (surgery to insert mesh), hearing loss and blurred vision. In relation to complaint number (4) the claimant relied on the first four of those conditions.

52. Complaint number (4) relied factually on the claimant's removal as a trustee, so this was the earlier period of time if we were looking at it chronologically, and the claimant says that "I was treated less favourably than people who were not disabled when I was removed as a trustee". The claimant was not able to point to an actual comparator and had admitted, as at complaint number (1) above, that all the trustees were removed at the same time. The claimant was the last of them to be removed, but all in the same round of removals, and the claimant accepts that the Regulator in response to the Drake report had required the respondent to remove all of the trustees. Because of that admission, that everybody was removed on the instruction of the Regulator, the claimant cannot succeed in establishing less favourable treatment because of disability.

53. There was some discussion about the articles of association of the RMT having been changed to give the Board authority to remove the claimant, who was a pensioner nominated trustee. His appointment had been different from those of the other trustees because he was put there by the pension members themselves.

The claimant was aggrieved by the change in articles and argued that it went to the respondent's motivation to remove him. I found nothing in the change of the articles of association to remove the claimant that concerned me or that needed factual findings so as to preclude a decision on strike out today. It seemed to me that the parties agreed that the change in articles was the mechanism by which the respondent implemented the actions required of it by the regulator. The claimant's arguments about how that change in articles was effected did not detract from his acceptance that the removal of all incumbent trustees (irrespective of protected characteristic) was required of the respondent by the Regulator. The complaint is struck out.

(5) Direct disability discrimination on the blocking of reappointment

54. Mr Hall and Mr Douglas had also been former trustees who were subjected to the compulsory removal but, the claimant submitted, somehow Mr Hall and Mr Douglas were allowed to be reappointed and the claimant was not.

55. The respondent in submission took me to documentation that showed that the determination panel which had resolved conflict between the RMT and the regulator had had an assurance given to it by the respondent that it would only consider suitable for reappointment any former trustees who accepted the findings of the Drake report in full.

56. There was a complication here, because the claimant would have me believe today that he accepts the findings of the Drake report save for the position at the Mr McGurk email. I do not find that credible today. I have not heard oral evidence but I have listened very carefully to submission, I have looked at the pleadings and the important contemporaneous document, the email that the claimant sent to the decision panel before the interview, and the email that went after interview and before they made their decision. In neither of those does he carve out that he accepts what Baroness Drake says *except for the false allegation made against him that he had breached confidentiality*, and today I have given him the benefit of the doubt and taken his claim at its highest and I accept for the purposes of today that even if he did not breach confidentiality, and Mr McGurk's email should not have been included in Baroness Drake's report because the claimant had not had an opportunity to refute it, it is not credible that the claimant was saying to the respondent at the time that he accepted the findings of Baroness Drake. For the record, that is not what the claimant has said today. He did not then, and does not today accept the findings of the Drake report in full.

57. In relation to this complaint the claimant relied on all of his health conditions, including his hearing loss and his blurred vision. They were contained in case number 2203671/2021 and I looked carefully at that pleading, the other pleading, the response and the contemporaneous documentation. I looked at the letter from the respondent to the claimant explaining why he had not been put through for reappointment when the other two gentlemen had, and the reason given there relates to this prerequisite of acceptance of the findings of the Baroness Drake report in full. The respondent's position has been consistent, is credible and is entirely apparent from the face of the documentation without the need for further findings of fact. There is no factual dispute here. Complaint number (5) is struck out.

(6) Direct age discrimination in relation to the interview process

58. This is the part from Judge Buzzard's Order at 16(a)(i) and 16(a)(ii) about the claimant not being told the outcome at the end of the telephone interview, and not being told when he would get an outcome.

59. For the reasons I gave above, the claimant cannot establish less favourable treatment in this case because by his own admission he cannot say if Mr Douglas or Mr Hall were told at the end of the interview what the outcome was. In fact his submission to me was that that they were told, like him by letter, afterwards. The claimant cannot show that he was treated any differently than anyone else and has made a mere assertion that there was different treatment and that it was because of age.

60. I accept the submissions of the respondent in relation to this complaint and the section 13 direct age discrimination complaint is struck out.

(7) Reasonable adjustments

61. Turning now to the reasonable adjustment complaint. The claimant told me that he had his interview by telephone and that he does not do his best on the telephone because of hearing issues.

62. In order to succeed in a failure to reasonably adjust complaint the claimant must first show that he had a disability. The respondent concedes that he had a hernia, the groin mesh issue, the heart issue, and it puts him to proof on the hearing loss and blurred vision issue. Assuming he succeeds in establishing those as disabilities, and today I take his case at its highest and assume that he was disabled, he would then need to go on and show a PCP (provision, criterion or practice) which was applied and put him at a substantial disadvantage.

63. He does not say that he was required to have a telephone interview. The claimant accepts that he had initially been offered a video interview but at his request it had been converted to telephone. The timing of the interview is significant because this was in early January 2021 during a period of national pandemic lockdown due to the COVID-19 virus. He could not point to anyone who had an in person face to face interview.

64. The respondent further submitted that even if there had been a PCP of requiring the claimant to attend a telephone / remote interview or denying him a face to face interview, this does not put the claimant at a substantial disadvantage, and I accept this to be the case. He could not, irrespective of the format of his interview or its impact on his ability to perform at interview, have been appointed because he did not accept Baroness Drake's findings in full.

65. For those reasons I find that the failure to reasonably adjust complaint has no realistic prospect of success.

66. That means that all seven of the complaints are struck out, and I want to just comment on the second stage of the test that I have applied today.

The exercise of discretion

67. I assisted the claimant to make submissions on the exercise of my discretion point. He cares passionately about the interests of the membership. He is someone who has served historically as a seaman and then as a member of the Board for over ten years and who believes himself to have been acting in the best interests of the membership and who continued to be motivated to do so. He told me that he has a good history of standing up for the seamen and achieving the backdated credits for them in relation to a 1978 pay issue. He described himself as a member of integrity and says he has pursued this complaint (and will continue to do so) so as to achieve what he perceives to be justice because he feels he has not had a chance to properly clear his name and to refute allegations that were made against him both individually and collectively in the Baroness Drake report. He seeks reappointment to the board.

68. I heard the submission of the respondent. Ms Hart submitted that none of the matters at paragraph 67 were matters for this claim. I have looked very broadly in the exercise of my discretion, using rule 2 of the Employment Tribunal Rules of Procedure and considering the just and equitable test.

69. I do not exercise my discretion in the claimant's favour because his complaints have no realistic prospect of success and the matters that have aggrieved him so deeply (the Drake Report and Regulator and Panel decisions) would not be matters for this Tribunal.

70. The Tribunal would be looking only at section 13 and sections 20/21 of the Equality Act 2010 to decide whether or not he had made out his complaints under those sections, and if he had on first look (prima facie) then the burden of proof would shift to the respondent. I find that this is one of those rare cases where all it amounts to is a mere assertion of discrimination. Bearing in mind the time and cost and delay involved in litigation, and the work that would have to go into defending claims of this nature, I find that it is not in the interests of justice to exercise my discretion in the claimant's favour, so this will be the end of all the claimant's complaints in case numbers 2201038/2020 and 2203671/2021.

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Employment Judge Aspinall

Date: 5 August 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 August 2022

FOR THE TRIBUNAL OFFICE

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