EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Singh	**v**	Harrods Ltd

Heard at: London Central (By CVP) **On**: 21 October 2022

Before: Employment Judge B Beyzade

Representation

For the Claimant: In person
For the Respondents: Ms A Greenley, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1. the respondent's application to strike out the claimant's claim of constructive unfair dismissal pursuant to Rules 37(1)(a) and 37(1)(c) or alternatively for a deposit order under Rule 39 of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* is dismissed. The claimant's clam for unfair constructive dismissal shall be considered at a Final Hearing and a 2-hour Preliminary Hearing for case management purposes be listed before an Employment Judge

sitting alone by Cloud Video Platform on the first open date after 30 November 2022.

2. the claimant's claim of religion or belief discrimination submitted on 03 June 2022 was presented outside the time limit set down in s123 of the *Equality Act 2010*. In the circumstances, the Tribunal does not have jurisdiction to hear the claimant's claim and it is dismissed.

3. The claimant's claim for unlawful deduction from wages (in relation to a 2% pay increase in 2019) submitted on 03 June 2022 is struck out pursuant to Rule 37(1)(a) of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* on the ground that it has no reasonable prospect of success.

4. The claimant's claim for breach of contract (in relation to an alleged non-payment of an enhanced pension) submitted on 03 June 2022 is struck out pursuant to Rule 37(1)(a) of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* on the ground that it has no reasonable prospect of success.

REASONS

Introduction

1. By an ET1 Form dated 03 June 2022 the claimant presented a complaint of constructive unfair dismissal, religion or belief discrimination, unlawful deduction from wages (in relation to a 2% salary increase in 2019), and breach of contract (in relation to an alleged non-payment of an enhanced pension), which the respondent denied.

2. An Open Preliminary Hearing took place on 21 October 2022. This was a hearing held by CVP video hearing pursuant to Rule 46 of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules"). I was satisfied that the parties were content to

proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

3. The parties prepared and filed a Joint Bundle of documents in advance of the hearing consisting of 67 pages, to which reference was made.

4. At an earlier Preliminary Hearing on 19 August 2022 before Employment Judge Grewal this Preliminary Hearing was listed to determine whether the Tribunal has jurisdiction to consider the claimant's discrimination complaint and any strike out or deposit order application made by the respondent.

5. At the outset of this hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

(a) Any application to strike out any of the claims or for a deposit order made by the respondent: and
(b) Whether any of the discrimination claims were presented in time;
(c) If not, whether it would be just and equitable to consider them;
(d) If some were presented in time, whether those that were not are capable of amounting to an act extending over a period ending with the claims that were presented in time;
(e) If they are not capable of amounting to such a continuing act, whether it would be just and equitable to consider them.

6. The respondent's application dated 30 September 2022 sought an order to strike out the claimant's claims or alternatively a deposit order in the amount of £1000.00. The respondent asserts that the religion or belief discrimination claim was not presented within 3 months of the acts and omissions complained of. Furthermore the respondent contends that the constructive unfair dismissal, religious discrimination, unauthorised deduction from wages and breach of contact claims have no reasonable prospect of success (Rule 37(1)(a) of the ET Rules), or that the claimant had failed to comply with an order of the Tribunal (Rule 37(1)(c) of the ET Rules). The respondent's representative asserts the claimant failed to properly plead his claims, that he had not provided key details relating to his constructive unfair

dismissal claim, and that he is in breach of the Tribunal's order of 19 August 2022. The claimant did not send any written reply to the application.

7. Both parties made oral submissions. The respondent's representative provided a Skeleton Argument, to which reference was made.

Claims and Issues

8. In the ET1 Form the claimant had ticked the relevant boxes to indicate that he is bringing a claim for unfair dismissal (including constructive), religion or belief discrimination, arrears of pay and other payments, and he attached a Word document to his ET1 Form providing some further information. The claimant confirmed during this hearing that in addition to his constructive unfair dismissal claim, he pursued claims in respect of religion or belief discrimination, unlawful deduction from wages (in relation to his 2% salary increase), and breach of contract (in relation to an alleged non-payment of an enhanced pension).

9. He also asserted that he claimed a statutory redundancy payment. However the claimant did not tick the relevant box or provide details of this claim in his ET1 Form. In any event he accepted that he was not dismissed due to redundancy. Therefore there was no claim for a statutory redundancy payment before the Tribunal.

10. The respondent's representative confirmed that the respondent did not assert that the constructive unfair dismissal claim was presented outside the statutory time limit.

11. There was no list of issues in relation to the claimant's claims. The claimant provided the following further information about his claims during this hearing:

11.1 The claimant confirmed that his religion or belief claim was set out in paragraph 1 of the additional document attached to his ET1 Form. He said

that there was one instance of discrimination, but that this conduct had occurred since the start of his employment. He said that all the managers concerned were no longer employed by the respondent (apart from the last manager referred to at paragraph 1).

11.2 He also said that the comment at paragraph 1 was made to him in 2016. This was why he left his department in 2016 and joined another department in the business. He raised the fact that the comment was raised with Mr S Delmo on the same day it was made to him. There were no further comments of the same or similar nature made to him after 2016. There were no other specific references to religion or belief discrimination in his claim. The remainder of the events he describes in his claim related to general unreasonable treatment he says he suffered.

11. 3 The claimant averred that a 2% pay increase was awarded to him in relation to the role he undertook in June 2019 (this was given to him after 2-3 months of joining). He joined Distribution on 24 June 2019, but the pay increase was awarded a month or two after. He says that his employment contract provides that there will be an annual pay review, but this did not state how much any pay review would be. The pay review is normally negotiated by his trade union representatives and all employees would receive the agreed pay increase. A 2% pay increase was agreed in respect of 2019. It is the claimant's case that he did not receive the 2% pay increase in 2019.

11.4 In relation to his claim for enhanced pension contributions, the claimant contends that his Store Services Contract states that he is eligible to an enhanced pension. He received the contract three months after he joined the new department on around 09 February 2017 (he says he should have received this on 11 October 2016). However by that time the three months window within which he had to apply for the enhanced pension had closed. He was not aware of either his entitlement or the 3-month timescale to apply as the relevant contractual document was not given to him in time. There were email correspondences between the parties up to 15 February 2017 in relation to this issue.

11.5 In relation to his constructive unfair dismissal claim, the claimant confirmed that he relied on the respondent's alleged breach of the duty of

trust and confidence. The first incident he relies on in respect of this claim took place on 14 August 2020 which was the date the respondent held a redundancy consultation meeting (see paragraph 6 of his details of claim at page 14 of the Hearing Bundle). The claimant confirmed that the matters in paragraphs 1 to 5 are included as background information only and do not form part of his constructive dismissal complaint.

11.6 The claimant also advised that he is relying on all the events he describes from paragraphs 6 to 9 as forming part of his constructive dismissal complaint.

11.7 He complains that the respondent gave his colleague a manager role in around December 2020 in another department and they neglected him. He said he was one of the eligible candidates for that role and he was not given an interview. The job was almost given to his colleague and there was no opportunity for the claimant to compete for the role. The claimant says he was also given shifts that were not assigned to anybody else. Once his colleague departed (although this occurred since June 2019 it became worse from December 2020 when the claimant's colleague left his role) the whole variety of shifts fell on him (4 or 5 shifts including late and early shifts). He said he had no proper rest; he could not sleep and nobody else tried to help him. His other colleagues had fixed shifts. He states that he was suffering as consequence (he suffered from depression and anxiety).

11.8 He consulted the respondent's Occupational Health advisor on 12 August 2021 about his deteriorating mental health. The claimant said he was getting sick, his anxiety and depression continued, he developed stage 2 diabetes, and he could not sleep or eat. He was dreading going to work every day. The claimant decided to give notice of his resignation on 20 January 2022 via the respondent's work day system also (which he confirmed in an email dated 27 January 2022) and his last day of employment was on 21 February 2022. In his resignation email he listed 10 points relating to his concerns.

11.9 He states that in the first week of January 2022 he asked Andrew, a Senior Manager if he could move to another department to continue working without any ongoing pressure from Mr Newton, but his request was refused. This was, he says, the last event which led him to resign. However he also

points out that after he resigned he was offered an interview for the same job he previously expressed an interest in, but the respondent appointed Mr Newton as the manager who would hold the interview (he says that Mr Newton had been calling him paranoid, setting up the rotas and he was responsible for many of the matters set out in his resignation email).

Evidence

12. The claimant was ordered to provide a witness statement setting out why it would be just and equitable for the Tribunal to consider any claims that it finds were not presented in time. However the claimant failed to send a witness statement to the respondent and the Tribunal pursuant to paragraph 5 of Employment Judge Grewal's Case Management Orders.

13. I reviewed the claimant's ET1, the respondent's response, the claimant's further particulars provided pursuant to paragraph 1 of Employment Judge Grewal's Case Management Orders (pages 28-30 of the Hearing Bundle), and the respondent's amended Grounds of Resistance (pages 31-37 of the Hearing Bundle). I was mindful that in terms of assessing whether the claimant's claims had a reasonable prospect of success on a strike out application I am required to take his claims at their highest.

14. As a result of the claimant representing himself at today's hearing, I also asked the claimant the reasons why he presented his discrimination and unauthorised deduction of wages claim late. I have set out his answers below in my conclusions.

15. The claimant also provided details at my request relating to his income (he earns £33,300 gross per annum from his new role) and his monthly expenditure in order to allow me to assess his means for the purposes of the deposit order application. Although an opportunity was afforded to the respondent's representative to ask questions about these matters, the respondent's representative confirmed she did not wish to ask any questions to the claimant.

16. I record that the claimant's expenses are as follows:
    - Rent £625 per month
    - Council Tax £135
    - Electricity £160
    - Travel £150 per month
    - Utilities internet, TV about £40 a month (£20 each)
    - Sundry expenses out of pocket and lunch at work £50-60 a month
    - Loan £1500 (he pays £170 a month towards this)
    - Supporting his family who are overseas: he gives them £150 – £200 (2 monthly basis).

17. A copy of the claimant's employment contract for the Help Desk Operator role dated 09 January 2015 was available at pages 52-64 of the Hearing Bundle and the claimant's resignation email dated 27 January 2022 was at pages 65-67 of the Hearing Bundle.

18. In addition the respondent presented copies of Excel spreadsheets during the hearing. The respondent's representative said that these were obtained from the respondent's payroll department, and they showed the claimant's salary being updated in October 2019 (and that he received) back pay. The claimant objected to these documents being included in the Hearing Bundle. He said that no pay rise was given to him until the next financial year and that the 2% uplift they gave him was his truck allowance (£533). He added that on 24 September 2019 his salary was paid correctly and £533 was added in August 2019 when the claimant passed his PPT license. He said the Assistant Manager pay increase took effect on 01 May 2019 (but his pay increase took effect from September or October 2019).

19. The respondent's representative said that the respondent had not received details of the amounts that Mr Singh is claiming until this hearing. Her instructing solicitor provided this document to her during this hearing, and it is clearly relevant and in the interests of justice for the Tribunal to consider this. In light of this and the overriding objective (Rule 2 of the ET Rules) I gave permission for the respondent to rely on this document and I advised

both parties that I will hear any oral submissions they wish to make about the spreadsheets. I advised I will also consider what the claimant has to say taking into account that he has only been provided with the document today.

20. I proceeded to hear oral submissions from both parties, and the respondent provided its submissions first.

Respondent's submissions

21. The respondent's representative's oral submissions were delivered in the same order as her Skeleton Argument, to which reference was made. She sets out the procedural history to date including the fact that there had already been a case management hearing on 19 August 2022 before Employment Judge Grewal who went through the claimant's claims and set out clearly the process that had to be followed in the lead up to this hearing, bearing in mind that the claimant is a litigant in person. Employment Judge Grewal summarised the discussions held with parties and sets out her orders in the Preliminary Hearing Summary and Case Management orders. The Employment Judge made clear what the claimant needed to do including setting out a number of questions (which appear at page 44 of the Hearing Bundle) which the respondent's representative says the vast majority of have not been answered or addressed by the claimant.

22. During today's hearing the respondent's representative said that the Tribunal tried to go through the claimant's claim with him again. The respondent's representative submitted that they have now put forward a Grounds of Resistance and an amended Grounds of Resistance. Even at this hearing the respondent's representative says that the respondent still does not have clarity in terms of the claimant's claims and particulars in respect thereof. She points out that the claim under s 13 of the Employment Rights Act 1996 ("ERA 1996") is supposed to be for a defined amount of money. However she says in relation to the claimant's claim for his 2% salary uplift it is still not clear what amount of money the claimant is claiming and when he says any sum was deducted from his salary.

23. The respondent's representative said that the last straw the claimant relies on in terms of his constructive unfair dismissal claim was revealed today and that this was not mentioned in his Claim Form. Although the respondent's representative suggested that the claim may now require amendment, following discussions, the respondent's representative clarified that this information should have been particularised when the claimant was asked to specify what he says the final straw was in Employment Judge Grewal's orders. She submits that the claimant failed to comply with Employment Judge Grewal's order in that respect.

24. The respondent's representative submitted that the claim should be struck out due to the claimant's non-compliance with the Tribunal's orders pursuant to Rule 37(1)(c) of the ET Rules. I raised with the respondent's representative whether any previous case law requires the Tribunal to consider the question of whether a fair trial is impossible in an application made under Rule 37(1)(c) of the ET Rules. The respondent's representative said she was seeking a strike out on the basis of non-compliance with the Tribunal's orders, and it was within the Tribunal's discretion to issue a strike out order. I asked the respondent's representative if there was any authority or case law to show whether the Tribunal had to consider if a fair trial was impossible. The respondent's representative said that there was no authority she relied upon.

25. I also queried whether the respondent's representative submitted that the information supplied by the claimant was sent to the Tribunal outside the period of compliance and the effect of the late delivery of this. The respondent's representative submitted that the information was delivered late. The respondent's representative said the Tribunal was invited to exercise its discretion based on the facts as they appeared, that were a wide variety of examples of non-compliance, and that the EAT rarely interferes with the Tribunal's exercise of its discretion. She pointed out that the claimant had had multiple opportunities to comply and to provide information. She stated that as a litigant in person the non-provision of information may have been excusable in August 2022, but then the

claimant was set a deadline by which to provide information by 02 September 2022 and he failed to comply, which entitles the Tribunal to exercise its discretion to strike out the claim. The respondent made a strike out application as there had been no response or further evidence produced by the claimant and it should not, the respondent says, have taken another hearing to clarify the claimant's position.

26. The respondent's representative submitted that the claimant's religious discrimination claim was dealt with in one paragraph only and that later in his Further and Better Particulars of claim the claimant did not state which incidents related to his religious discrimination claim. He asserts that certain comments were made verbally, and she confirmed it is correct that the manager specified in the Grounds of Claim had left the business. She contended that the claim is obviously out of time in terms of the events referred to at paragraph 1. The respondent's representative says it is 6 years out of time, that the burden of proof is on the claimant in terms of seeking a just and equitable extension, and no evidence was led by the claimant in relation to this (who could not even recall the precise dates of the events relied upon). The respondent's representative says the relevant manager having left the business, it is deeply prejudicial for that matter to now be brought before the Tribunal (disclosure is almost impossible and no witness evidence can be led by the respondent). Moreover she submits that there is no basis upon which an extension of time can be granted.

27. The respondent's representative contends that the claimant had only at this hearing outlined the events that he says led to his resignation. She submitted that putting the claimant into a redundancy process is not a fundamental breach of contract and in any event the claimant was not made redundant. It was hard to see from the respondent's perspective on what basis he can make out that something that happened 15 months before his dismissal could amount to a fundamental breach and in any event he waived any such breach at that time. The respondent says that the claimant worked according to a shift pattern, and he has not said what in relation to that shift pattern amounts to breach of trust and confidence. It

is argued that the claimant cannot say in general terms he had to work a bad shift pattern and it was also not clear over what period it is alleged he had to work the shift pattern in question. It is also not clear to the respondent why it is said that it is a clear breach of contract to be referred to Occupational Health. The respondent submits that the claimant only at this hearing raised the issue of the interview and the job he wanted to be considered for. The respondent points out that the claimant is not entitled to just be moved into another job simply because he wishes. The respondent asserts that he was offered an opportunity to work with another manager and that he went on leave after he resigned. It was during his notice period that it became clear that the claimant had obtained a better paid job with another employer. The respondent's representative suggests that it is going to be very hard for the claimant to show the reason why he resigned was in connection with the respondent's conduct – the real reason he left was that he was going into another role working for a different employer.

28. In terms of the unfair dismissal claim, the respondent's representative invites the Tribunal to consider that the claimant had obtained a better job. If he is successful, he would not be entitled to a compensatory award. This claim would be limited to potentially a basic award only. The respondent submits that it is not proportionate for the claim to be pursued.

29. The respondent's representative maintains that the claimant's claim for unfair constructive dismissal is fatally misconceived, and it has no reasonable prospects of success. Alternatively the respondent's representative says it has little reasonable prospects of success, so the Tribunal is invited to make a deposit order of up to £1000.00.

30. In relation to the 2% salary uplift claim, the respondent's representative points out that a wages claim should be presented in a straightforward way. This should include specification of the amount of money claimed. It is still unclear to the respondent how much money it is alleged is outstanding and over what period of time. The respondent's representative

referred to a 2-year backstop under legislation. Therefore, the respondent says any outstanding amount from before 2019 cannot be claimed. Depending on when the claimant was saying that any alleged deductions were made it is also out of time on the basis of the 3 months' time limit. The respondent's representative says that the burden is on the claimant to show that where any deduction he claims was made is out of time that it was not reasonably practicable for him to have presented the claim within the 3-month time limit. The respondent's representative says that there is no evidence to justify an extension of time on the basis that it was not reasonably practicable to have presented the claim within the time limit. On that basis she invites the Tribunal to find it was reasonably practicable for him to do so and the claim has no reasonable prospect of success.

31. The respondent says the claimant was given a new contract in June 2019 and the change to the terms in the new Team Leader contract was effective from 24 June 2019 (which states that his salary was £26,038.40). The respondent says that three months later pay negotiations had concluded and it was determined that the claimant was to be awarded a 2% pay rise. His salary from September 2019 is lower than his salary was from October 2019 onwards. The respondent's representative said that his annual salary from June to September 2019 was paid as normal because their system backdates it (it is apparent the respondent says that this was 102% of contractual amount when it rounds up to £26,559.00). The difference in July, August, and September between what he was due and what he was actually paid in total the respondent has calculated amounts to £118.06. His salary was therefore correct going forwards and then he had some further pay rises after that. Therefore the respondent says that even if the backstop was not there, and the claim was in time, the Tribunal is invited to strike out the claim as it has no reasonable prospects of success.

32. In relation to the enhanced pension claim, the respondent's representative says this relates to October 2016 when the claimant started working in his new role. The respondent says it is still unclear what the breach of contract

is. Furthermore the respondent says it can be seen that issues were raised by the claimant at the time, it was clarified he had access, he was told about this before he started the job, and he was given plenty of notice. If the contractual term which it is alleged the respondent breached is that he had access to a pension, it is the respondent's position that he did have access. The respondent's representative said that limitation started to run at the time of the alleged breach (and not at the time of damage) and that this claim is severely out of time (it is now 6 years ago).

33. The respondent's representative clarified that the statutory provisions relied upon in terms of the respondent's out of time points are s 23(2) of the ERA 1996 and Regulation 7 of the 1994 Order, respectively. She confirmed that the time limit for the religious discrimination claim was set out in section 123 of the Equality Act 2010. In terms of the backstop provisions referred to for the unlawful deduction of wages claim, these were set out in Regulation 2 of *The Deduction from Wages (Limitation) Regulations 2014*. I pointed out that in relation to the breach of contract claim and the claimant's pension, Regulation 3 (c) of the 1994 Order sets out that a claim for breach of contract can be brought if it is outstanding at the date of termination of employment. The respondent's representative confirmed that the respondent does not contend that the claimant is not entitled to bring his breach of contract claim but the Tribunal's jurisdiction in relation to this is limited to £25,000.00.

34. The claimant says that there is a contractual duty requiring the respondent to inform him when his entitlement to his enhanced pension arose. The respondent says he was notified just before he started and there was a reference to the meeting that took place before he started his new role in the documents.

35. The respondent's representative also said that the claimant had a £500.00 truck allowance, and this was an annual payment. The respondent submitted that the claimant has made oblique references to two periods (separated by more than three months and not, it is submitted, part of a

series) when this was not paid – August 2019 and then February 2021. The respondent's position is that these are both severely out of time and in any event the respondent has paid all truck allowances owing (nor has the claimant pointed to the term of the contract he relies upon).

36. The respondent's representative invited the Tribunal to take the view that the claimant's claims have no reasonable prospect of success. The claims for breach of contract and unauthorised deductions are a matter of numbers, and it is not proportionate, the respondent submits, for the Tribunal to consider these further.

Claimant's submissions

37. The claimant submitted that it was not reasonably practicable for him to bring his unlawful deduction of wages and breach of contract claims within the 3-month time limit and that the respondent had changed their position.

38. The claimant said that in relation to his unlawful deduction of wages claim in respect of his 2% salary increase, this was awarded prior to him joining a higher-level job with higher pay (and joining store distribution). He said that there were green card holders and white card holders. White card holders received a pay rise on 01 May whereas green card holders received their pay increase in October or November (after his new contract was provided to him). He also said that he was entitled to a further £500.00 which was his truck allowance (this was from August 2017, and it was an additional amount he should have been paid on top of his pay increase).

39. He stated that in relation to his breach of contract claim relating to an enhanced pension payment, he would not know about this unless his employer provided him with a contract. He said there was no evidence of any email or other evidence that he was given a contract within three months of starting his new role. The respondent, he says, did not give this to him within three months and therefore he did not know that he was eligible to receive an enhanced pension or able to apply within the relevant timeframe.

The only time he found out about this was when one of his colleagues joined and he discovered that she was in receipt of an enhanced pension (the claimant could not recall the date of this). He said that any meeting that the respondent refers to in respect of being provided with his new contract and/or details about his enhanced pension entitlement within the relevant timeframe did not take place.

40. The claimant submitted that in relation to the allegations of non-compliance, it should be considered that he is not a lawyer or legal professional. He referred to the fact that he made a statement, which he believes was sent to the Tribunal and received. He said the email was not sent until 2 or 3 days after. He acknowledges that 02 September 2022 was the deadline for sending this to the Tribunal and it was in fact sent on 05 or 06 September 2022. He said he had particularised any relevant dates to the best of his ability and knowledge.

41. The claimant submitted that the last day when he handed his resignation in coincided with his holidays. His last day on site was 05 February 2022. Within 10 days of that date he says he found another job. The claimant says he was technically employed by the respondent in February 2022, and he was still on holiday for a period. He confirmed that he secured his new job a week before he completed his employment with the respondent. However he submitted that this did not mean to him that all those things that happened in the past did not matter or did not happen. He also said that the respondent's suggestion meant that if he had obtained a lower paid job he would have had a better chance to sustain his claim.

42. The claimant also wanted to address the respondent's representative's submission that a job interview for the other role within the respondent was not an entitlement. Although he agreed with this statement, it is clear he was not provided with any such opportunity or interview until he resigned from his employment. He said that the respondent gave him an interview to show that they supposedly care. Regarding his shift pattern, the claimant submitted that his shift pattern was different from any colleagues

working on his level. He stated that he was singled out for any random job (this did not happen with anybody else).

43. He said that the respondent failed to provide him with a contract on two occasions (when he joined facilities services and then when he joined store services). He said this shows that the respondent has a problem with their HR team.

44. The claimant also said in relation to the last straw, that he felt that the respondent are fixated on what the last straw was. However the claimant says it was cumulative. He said it was a combination of his delayed monies, delayed contract, and the differential treatment he has referred to in his claim and the details he provided at today's hearing.

45. However if he had to say what the final event was that led him to resign, he said this took place when he was unable to move to any other department (during 2021). He referred to a risk assessment being conducted by Occupational Health but that he was put through a process again with the same manager who had created the past situations.

46. Having enquired with the claimant as to the reasons why he brought his discrimination claim after the expiry of the time limit in section 123 of the Equality Act 2010, he said the reason why he did not pursue this earlier was because he had decided to move to another department instead of challenging it. He says he did not have enough courage to challenge this at the time, so he decided to move from that department. He also asserted that legal processes are time consuming and require knowledge, and he did not have sufficient funds to pursue this at the time. He stated that he was also busy focussing on earning a living.

47. I then enquired why the claimant had not brought his unauthorised deduction of wages claim within the 3-months' time limit. In relation to his claim in respect of a 2% pay increase, the claimant said that within a month of this occurring he raised the issue with his manager and payroll.

The matter was not resolved. He said the respondent was now saying that he was given backdated pay. He explored all the avenues within the company, and this had been denied to him. He said the amount was £500.00 but he did not pursue this further, and he continued with his job. He accepted that this was not worth pursuing at the time.

48. In relation to why the claimant did not bring his pension claim in 2016/2017, the respondent's representative conceded that as long as the claimant brought his claim within 3 months of his termination date, his breach of contract claim relating to his pension was not out of time. However although the respondent did not take any time point, the respondent maintained that there was a lack of detail in terms of any contractual term that the claimant relied on or how such contract term might have been breached. The respondent says the claimant's claim for breach of contract has no reasonable prospect of success on that basis.

49. The claimant replied that in his submission it is a breach of duty for an employer not to tell him what he was entitled to. He did not know that he had any entitlement other than in relation to his basic pay. He only knew what his basic pay entitlement was as he had been receiving his payslips regularly.

50. I asked the claimant for details of the contractual term and details of the breach of the contractual term he is relying upon in respect of his claim for an enhanced pension payment. He says he is not sure what the specific law on that is. I asked what the claim was based on, and he replied that the information was not made available to him by the respondent.

51. I enquired with the respondent's representative in terms of what the impact would be if it were determined at a Final Hearing that the claimant was not provided with a contract until 09 February 2017 (the respondent says this contract was provided earlier). The respondent's representative said that at best the claimant would have shown that he did not receive particulars of employment until 09 February 2017 and that that is different from

showing that he had a contractual entitlement to enter into an enhanced pension scheme (which the respondent says he did have, and he failed to apply for the same within the relevant timeframe).

52. I asked the claimant if he wished to reply or comment on the respondent's position. The claimant replied that he had no knowledge of any entitlement. He said this only applied to green and orange card holders (that is, only at low levels of employment). Whether this would be a breach of contract claim or negligence, he was not sure. His case was that any enhanced pension entitlement was never offered to him.

53. I also asked the claimant if he wanted to comment upon the respondent's position in relation to proportionality and any likely compensation relating to his claims. The claimant submitted that he did not claim a substantial amount and he only asked for his redundancy pay and an amount of money in respect of his unpaid 2% pay increase. If the Tribunal considered that that was a suitable remedy, he said he would be agreeable with this.

Relevant law

Constructive unfair dismissal

54. The claimant claims constructive unfair dismissal. Section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") relates to constructive dismissal claims and provides as follows:

"95 Circumstances in which an employee is dismissed.
(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—
…….
(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

55. If the claimant can show that he was dismissed in accordance with section 95(1)(c) of the ERA 1996, the Tribunal will proceed to consider whether there was a fair reason for dismissal under s 98(2) and s 98(4) in terms of whether in the circumstances (including the size and administrative

resources of the respondent) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant.

56. In terms of compensation s 119 of the ERA 1996 provides that a successful claimant in an unfair dismissal claim may be awarded a basic award. In addition a successful claimant can also receive a compensatory award if the Tribunal considers this to be just and equitable under section 123 of the ERA 1996 albeit this is subject to any duty to mitigate the claimant's losses.

Unlawful deduction from wages

57. Section 23 of the ERA 1996 relates to a complaint made relating to deduction from an employee's wages in contravention of section 13 of the ERA 1996 and it provides as follows:

*"(2)Subject to subsection (4), an **[**employment tribunal**]** shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
(3)Where a complaint is brought under this section in respect of—
(a)a series of deductions or payments, or
(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
[**(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).**]
*(4)Where the **[**employment tribunal**]** is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable."*

58. Regulation two of the *Deduction from Wages (Limitation) Regulations 2014* states:

"Amendment to the Employment Rights Act 1996
2. In section 23 of the Employment Rights Act 1996(c) (protection of wages: complaints to employment tribunals) after subsection (4) insert— "(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction

where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint. (4B) Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j)."

Breach of contract

59. Under Articles 3 and 7 of the *Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order")*:

"3. Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b)the claim is not one to which article 5 applies; and
(c)the claim arises or is outstanding on the termination of the employee's employment."

"Time within which proceedings may be brought
7. An employment tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—
(a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
(b)where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
(c)where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

Unfair dismissal – time limits

60. Section 111 (1) of the ERA 1996 sets out that a claim may be made to a Tribunal against an employer by any individual that he was unfairly dismissed by his employer.

61. Section 111 (2) of the ERA 1996 provides that "*an employment tribunal shall not consider a complaint under the section unless it is presented to the tribunal –*
(a) before the end of the period of three months beginning with the effective date of termination or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

62. Section 97 (1) (b) of the ERA 1996 identifies the “effective date of termination” in relation to an employee whose contract of employment is terminated without notice, as meaning the date on which the termination takes effect.

Burden of proof – time limits ‘not reasonably practicable’

63. The burden rests on the claimant to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time *(Porter v Bandridge Ltd [1978] ICR 943, CA) at 948*).

64. The Tribunal will often focus on the 'practical' hurdles faced by the claimant, rather than any subjective difficulties such as a lack of knowledge of the law or an ongoing relationship with the employer. In the case of *Dedman v British Building and Engineering Appliances [1973] IRLR 379*, per Scarman LJ who held that practicability does not always mean "knowledge". Where a claimant states a lack of knowledge as to the time limits, Scarman LJ found that the Tribunal should ask *([1974] ICR at 64*): *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.*"

65. In *Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10* Mr Justice Underhill, the then EAT President, commented (at para. 16) that the question of whether the period between expiry of the time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances for a claim to be presented.

Religion or belief discrimination claim

66. Section 123 of the Equality Act 2010 ("EA 2010") provides for time limits in respect of the presentation of complaints by reference to the protected characteristic of religion or belief.

67. I had regard to the provisions of Section 123 and taking into account the provisions of Section 140B of the EA 2010 which serve to extend the time limit under Section 123 to facilitate conciliation before institution of proceedings.

68. Subsection (1)(b) of Section 123 of the EA 2010 provides that notwithstanding not being within the three-month time limit stipulated in Subsection (1)(a) a complaint may be presented within "*such other period as the employment tribunal thinks just and equitable.*"

69. The Tribunal has reminded itself of the developed case-law in relation to what is now Section 123 of the EA 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and Tribunals.

70. Particular attention has been paid to the historical line of cases emerging in the wake of the case of *Hutchinson v. Westwood Television, [1977] ICR 279*, the approach adopted by Smith J. in *British Coal Corporation v. Keeble, [1997] IRLR 336*, the comments in *Robinson v. The Post Office, [2000] IRLR 804*, the detailed consideration of the EAT in *Virdi v. Commissioner of Police of the Metropolis et al, [2007] IRLR 24*, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in *Chikwe v. Mouchel Group plc, [2012] All ER (D) 1*.

71. The Tribunal also notes in passing the guidance offered by the Court of Appeal in the cases of *Apelogun-Gabriels v. London Borough of Lambeth & another, (2002) IRLR 116, Robertson v. Bexley Community Centre (t/a Leisure Link), [2003] All ER (D) 151* (in particular by reference to the

comments made by Auld LJ), and observations made by Mummery LJ in the case of *Ma v. Merck Sharp and Dohme, [2008] All ER (D) 158*.

72. The Tribunal has additionally taken note of the fact that what is now the modern Section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "*the just and equitable power*" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

73. In relation to the circumstances of the present case a basic starting point is the important proposition that time limits in employment matters (especially those concerning discrimination) are matters which normally are exercised strictly. Authority to that effect is to be found in the judgment of Auld LJ in the Court of Appeal case of *Robertson v. Bexley Community Centre (t/a Leisure Link), [2003] All ER (D) 151*. That case was decided shortly after Lindsey J, the then President of the EAT, had observed in the case of *Robinson v. The Post Office, [2000] IRLR 804*, at paragraph 32, that: "*It is to be borne in mind that time limits in employment cases are in general strictly enforced*". In other words, the time limit provisions are there for a purpose, so that it is the exceptional case, rather than the normal case, that they will be departed from.

74. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case. That obligation is not just a matter of the burden of proof. It also raises the question of what the standard of proof is to be established in order to persuade the Tribunal that a period other than the normal three months should be applicable.

Strike out

75. Rule 37 of *ET Rules* deals with the circumstances in which a Tribunal can issue a strike out order:

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).

76. In *Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684*, the Court of Appeal stated that when determining the proportionality of the response for non-compliance with procedural orders, the Tribunal is required to make a structured examination in order to see whether there is *'a less drastic means to the end for which the strike-out power exists*'. As Sedley LJ stated (at [21]): *'Proportionality … is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences*'.

77. The practice of applying to the Tribunal for a strike out order for every perceived breach of the rules of procedure or Tribunal order is to be deprecated: such applications are rarely successful. Plainly, it is disproportionate to strike out for a one-off minor breach. Indeed, in *Ridsdill v D Smith and Nephew Medical UKEAT/0704/05*, *[2006] All ER (D) 228 (Jul)* it was held to be disproportionate to have struck out a claim for failure to provide witness statements and schedules of loss where a less drastic means of dealing with the non-compliance was available, such as unless orders and costs orders.

78. The guiding consideration, when deciding whether to strike out for non-compliance with an order, is the overriding objective (*Weir Valves and*

Controls (UK) Ltd v Armitage EAT/0296/03, *[2004] ICR 371*). This requires the Tribunal to consider all the circumstances, including 'the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is possible' (at [17], per Judge Richardson).
In *Harris v Academies Enterprise Trust [2015] IRLR 208*, the EAT (at [26]) referred to the fact that '*A failure to comply with orders of a tribunal over some period of time, repeatedly, may give rise to a view that if further indulgence is granted, the same will simply happen again. Tribunals must be cautious to avoid that*', but the EAT noted that if the failure were an '*aberration*' and unlikely to re-occur, that would weigh against a strike out.

79. Consideration of a striking out order under r 37(1)(c) must include consideration of whether a fair hearing is still possible. The purpose of the rule is to achieve compliance with the order, the basic question to be asked is whether there is a real or substantial or serious risk that, as a result of the default, a fair trial will no longer be possible (*Landauer Ltd v Comins & Co (1991) Times*, *7 August, CA*; *National Grid Co Ltd v Virdee [1992] IRLR 555, EAT*).

80. Once a claim (or an amended claim, as the case may be) has properly been identified, the power to strike it out under Rule 37(1)(a) of the ET Rules on the ground that it has no reasonable prospect of success will only be exercised in rare circumstances (*Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46*, *[2012] IRLR 755*, at [30]). In particular, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute (see *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*, *[2007] IRLR 603*, *[2007] ICR 1126*). At a strike out hearing the Tribunal is in no position to properly weigh competing evidence.

81. 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 (at [14])*:*

"(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."

Deposit orders

82. Rule 39 of the ET Rules deals with deposit orders:

"(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."

83. Rule 39(1) therefore provides a power for targeted case management that is likely to discourage parties (i.e. the claimant in this case) from pursuing weak claims or weak elements in their case.

84. The threshold for making a deposit order is that the Tribunal (i.e. me) must be satisfied that there is 'little reasonable prospect' of the particular allegation or argument succeeding. This is different from the criterion for striking out a case under rule 37(1)(a) on the ground that the proceedings have 'no reasonable prospect of success'.

85. In considering whether to make a deposit order, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential

to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames [2007] UKEAT/0096/07*, Elias P held: "*…the test of little prospect of success…is plainly not as rigorous as the test that the claim has no reasonable prospect of success… It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response*."

86. In *Hemdan v Ishmail [2017] IRLR 228*, Mrs Justice Simler, as she then was, described the purpose of a deposit order as being: "…*to identify at an early-stage claims with little 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 was legitimate policy, because claims or defences with little prospect caused unnecessary costs to be incurred and time to be spent by the opposing party. They also occupied the limited time and resources of Tribunals that would otherwise be available to other litigants. However, the purpose was not to make it difficult to access justice or to effect a strike-out through the back door. Indeed, the requirement to consider a party's means in determining the amount of a deposit order (at rule 39(2)) was inconsistent with that being the purpose. It was essential that when a deposit order was deemed appropriate it did not operate to restrict disproportionately the fair trial rights of the paying party or impair access to justice. Accordingly, an order to pay a deposit had to be one that was capable of being complied with. A party without the means or ability to pay should not be ordered to pay a sum that he was unlikely to be able to raise.

87. In *Adams v Kingdom Services Group Ltd EAT 0235/18* the EAT held that the Tribunal must give reasons for setting the deposit at a particular amount. In the EAT's view, the requirement to give reasons for 'making' the deposit order under rule 39(3) includes a requirement to give reasons not only for making the order at all but also for the particular amount to be paid.

Discussion and decision

88. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Constructive unfair dismissal

89. In relation to his constructive unfair dismissal claim, the claimant provided some initial particulars in his original claim (see pages 14-15 of the Hearing Bundle, as indicated above the claimant relies on paragraphs 6 onwards) and further particulars (see pages 28-30 of the Hearing Bundle). He has taken some steps to comply with Employment Judge Grewal's orders dated 19 August 2022. I accept that not all the information provided by the claimant was clear, and the claimant had not identified the totality of the acts he were relying on clearly (including the last straw which led to his resignation, or indeed the nature of the fundamental breach of contract he relied upon).

90. In a detailed judgment on striking out, the EAT in *Cox v Adecco UKEAT/0339/19*, *[2021] ICR 1307* stressed the crucial importance of understanding a claim before it is possible to consider a strike out on the basis of the claim having no reasonable prospect of success. HHJ Tayler said (at [28](5)): *'You can't decide whether a claim has reasonable prospects of success if you don't know what it is*.'

91. The claimant also made further attempts at this hearing to clarify his claim (please see paragraph 11 above) having been provided with the opportunity to do so.

92. Considering the particulars provided by the claimant (including the particulars provided today that are recorded at paragraph 11 above), it is clear that there is a crucial core of disputed facts, and it will not be possible for this claim to be resolved without a Final Hearing. I took into account that it would not be appropriate for me to conduct a mini trial at this hearing.

93. By way of example the events that the claimant relies on begins with the redundancy process conducted in August 2020 in relation to which he says was the whole process was not correct, it was based on incorrect information, and he was upset and anxious as a result of this. The respondent's representative says that putting the claimant into a redundancy process is not a fundamental breach of contract and in any event the claimant was not made redundant, and the events in question occurred 15 months prior to the claimant's dismissal. I am not in a position to assess the witness evidence or to hear full argument at this hearing in relation to this matter. Moreover the claimant has confirmed that he relies on a number of events and their cumulative effect on him, and he has clarified what he says is the last straw (please see paragraph 11 above).

94. In the circumstances it is not possible for me to determine at this stage of the proceedings that the claim for constructive unfair dismissal should be struck out on the basis that it has no reasonable prospect of success under Rule 37(1)(a) of the ET Rules.

95. For the reasons stated above I am not satisfied that the constructive unfair dismissal claim has little reasonable prospect of success and therefore it is not appropriate to make a deposit order in the circumstances. Therefore I decline to make a deposit order pursuant to Rule 39 of the ET Rules.

96. I also considered whether the claim should be struck out under Rule 37(1)(c) of the ET Rules. I was concerned in relation to whether a strike out order would be appropriate and proportionate in the circumstances. I reminded myself that in *Blockbuster v James* (above) the Court of Appeal emphasised the need to consider proportionality where the Tribunal is required to consider making a strike out application. I also considered the overriding objective and the express requirement to consider proportionality (Rule 2 of the ET Rules). There are alternative powers available including the use of unless orders and costs orders (if necessary). In this instance the respondent has not applied for any orders other than strike out and deposit orders. In any event the claimant has provided the details required in relation

to his constructive unfair dismissal claim as indicated above (albeit he took the opportunity to provide further information during this hearing).

97. I have considered the respondent's submissions in relation to proportionality and the provisions at Rule 2(b) of the ET Rules in terms of *"dealing with cases in ways which are proportionate to the complexity and importance of the issues."* Although I have taken into account that the claimant may only receive limited compensation including a basic award of just over £3000 (subject to satisfying the relevant statutory provisions) if he is successful in his constructive unfair dismissal claim, this matter alone does not form a sufficient basis for me to strike out the claimant's claim. However this clearly means that parties will need to cooperate to ensure that any Final Hearing can be conducted efficiently and in accordance with the overriding objective. The claimant has clarified his claim at this hearing, and his claim is now significantly clearer.

98. However it is important that the claimant complies with any further Tribunal orders and that he meets any deadlines that are set. If the claimant fails to comply with any subsequent orders of the Tribunal, the respondent could well make an appropriate application (including an application for an unless order, costs order, or an order that the claimant's claim be struck out). The onus is now on both parties to work together to ensure that any preparation for a Final Hearing is conducted expeditiously (including that any relevant documents are exchanged, a joint Hearing Bundle is prepared, Witness Statements are exchanged, and that any other necessary preparation can be conducted in accordance with the overriding objective).

99. I consider that it is possible using the information provided by the claimant in his Claim Form, further particulars and at this hearing for a Final Hearing to take place and for both parties to prepare for the same fairly and justly in accordance with the overriding objective (Rule 2 of the ET Rules).

100. I therefore decline to issue a strike out order pursuant to Rule 37(1)(c) of the ET Rules relating to the claimant's constructive unfair dismissal claim.

101. I also decline to strike out the claim pursuant to Rule 37(1)(a) of the ET Rules on the basis that the claim has no real prospects of success or to issue a deposit order in relation to this claim. It is not possible on the basis of the material before me at this hearing to conclude that the constructive unfair dismissal claim has no or little reasonable prospects of success. This would involve making findings of fact on disputed evidence and hearing detailed argument which is an inappropriate exercise for me to conduct at this hearing.

Religion or Belief discrimination claim

102. The claimant indicated at paragraph 1 of his particulars of claim that he was told by the Facilities Manager that he had hearing issues because he wore a turban, that the same person threw a telephone onto a wall and tried to intimidate staff. The claimant says that he complained about this treatment verbally to another senior manager, Mr S Delmo at the time this had happened. No other claims were made relating to religious discrimination on his ET1 Form and he did not provide any further particulars about this claim in his further particulars.

103. In his further particulars he stated:

"I was made aware that my claim about religious discrimination may be out of date, and a question was raised as to why I did not raise this formally as a grievance. My response to this question is that I did raise this with my line manager. If this is not sufficient, I would like to redact this claim. I have no other witnesses or pieces of evidence as the issue was raised verbally. All of the relevant managers in the facilities department left the business."

104. The claimant advised me that the incident he complains of in relation to this claim is contained within paragraph 1 of his particulars of claim which took place in 2016. He could not provide further details in relation to the date that the incident took place. He confirmed that he reported the matter to his line manager on the same date. There are no complaints of religious discrimination after this incident so there are no relevant acts to consider that could amount to a connected act within the meaning of s 123(3)(a) of the EA 2010.

105. This meant that the claim was lodged substantially outside the 3-months' time limit. I considered s 123 of the EA 2010 and whether to extend time on a just and equitable basis. The claimant did not provide a witness statement explaining the reasons why his claim was not presented in time despite Employment Judge Grewal's order that he should do so by 14 October 2022 (paragraph 4 of Employment Judge Grewal's orders). The claimant did not provide any reason why he did not submit a witness statement.

106. The claimant's further particulars referred to above simply said he raised the issue with his line manager. He did not proffer any reason for not presenting his claim within the time limit under s 123 of the EA 2010.

107. In any event I asked the claimant to explain why he did not present his claim within three months from the date of the event in 2016. He said this was because he had decided to move to another department instead of challenging it and he did not have enough courage to challenge this at the time. I did not accept that those reasons were sufficient for me to grant an extension of time in the circumstances on a just and equitable basis.

108. He also said he did not have the required legal knowledge and that the processes required to bring a claim were time consuming. It was not clear why the claimant did not seek advice or undertake any research to inform himself in terms of the relevant time limit, and accordingly to start his claim within the 3-month deadline. The claimant could have conducted research on the internet for example by using the ACAS website or the Citizens' Advice Bureau website to inform himself about the relevant time limits.

109. The case law emphasises that the burden of proving it is just and equitable to extend time is on the claimant. The claimant has failed to satisfy this burden of proof.

110. I considered the balance of prejudice between the parties. The respondent's key witness was no longer employed by the respondent. The claimant acknowledged in his further particulars that the relevant managers in the

facilities department had left their employment with the respondent. The respondent's representative said that the respondent would find it difficult to tender any evidence or to undertake the disclosure process given the circumstances. The prejudice to the respondent was therefore significant.

111. I concluded that the cogency of the respondent's evidence is likely to be affected by the period of delay. The respondent's key witnesses have left their employment. The claimant did not act promptly once he knew of the facts giving rise to any cause of action, he did not contact ACAS until 2022, and he failed to provide any satisfactory explanation for not seeking advice sooner.

112. The Tribunal balanced the prejudice that would be suffered by the respondent and its witnesses in relation to the delay in terms of the claimant bringing the proceedings. The events complained of relate to events in 2016. The claimant could have presented his claims earlier thereby obviating any prejudice to the respondent and the respondent's witnesses.

113. I considered that the claimant has a claim of constructive unfair dismissal that he is able to pursue at a Final Hearing following the particulars provided both prior to and at this hearing.

114. For these reasons, the Tribunal considered that it was not just and equitable to extend time. The claimant's claim for religion or belief discrimination is dismissed as it was presented outside the statutory time limit and the Tribunal does not have jurisdiction to hear the claim. I declined to extend the time limit as I did not consider it was just and equitable to do so. The Tribunal does not have jurisdiction to hear the claim.

Unlawful deduction from wages

115. The respondent states that in his relation to the claimant's claim for his unpaid 2% salary uplift, the claimant has not pointed to the contractual term or other basis upon which he relies in respect of this claim nor the amount or the period of the claim. The claimant stated during his submissions that

the salary increase was due to be paid in September or October 2019. He was unable to provide a specific date or any documentation showing his contractual entitlement to the pay increase (and when this took effect).

116. The respondent avers that the claimant received his 2% salary uplift to which he was entitled following conclusion of the required union negotiations.

117. The claimant did not provide any particulars or any sufficient particulars in relation to this claim in his ET1 Form or in his further particulars. His further particulars state: "*I contacted HR on 26/09/2019 when I didn't receive a 2% salary uplift which was awarded to all employees except me. On 22/10/2019, I was advised by HR that the 2% pay rise was already included in his base salary when I signed my contract. According to my contract, my salary was £26559.17, and at the time of signing my contract, the company was still doing pay negotiating with the union, so it was not true, but I had no redress*." The claimant says what the respondent told him was not true, but he fails to set out his position in terms of what he says he was owed and which period this related to in his further particulars.

118. The claimant did not address in his further particulars the information he was required to provide pursuant to paragraph 1.2 of the orders of Employment Judge Grewal. He also did not provide me during this hearing with those details. Without this information, it is difficult for the Tribunal to determine the claimant's claim and for the respondent to investigate and to enter a response to the claimant's claim in any detail.

119. Furthermore the respondent's representative submits that pursuant to s 23(2) of the ERA 1996 the claimant was required to bring his claim before the end of a period of 3 months beginning with *"(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made."* His claim relates to the period in September or October 2019 (he joined Distribution on 24 June 2019, but the pay increase was awarded to take effect from September or October 2019). Assuming any payment was due to be made to the claimant by 31 October

2019, the claimant claim (which was presented on 03 June 2022) has been presented significantly outside the time limit in section 23(2) of the ERA 1996. I considered whether it was reasonably practicable to extend time. I did not consider that based on the material before me (including the ET1 Form, the further particulars and the oral submissions provided at this hearing) that it was not reasonably practical for the claimant to present his claim within three months from 31 October 2019. I therefore declined to extend time to enable the claimant to bring any part of his complaint that was lodged outside the statutory time limit. I also considered that the additional time taken by the claimant to present his claim was not reasonable in all the circumstances. The Tribunal does not have jurisdiction to hear the claimant's claim and it is therefore dismissed.

120. Alternatively, for the above reasons, there is no reasonable prospect of a Tribunal at a Final Hearing granting an extension of time to enable the claimant to present his claim to the extent that this is out of time.

121. It was not clear whether the claimant also pursued any claim in respect of not receiving his purported 2% salary increase entitlement after 31 October 2019. The claimant has failed to specify the dates on which he states he was not paid the correct salary uplift and the amount of any alleged shortfalls. Pursuant to section 4A of the ERA 1996 the Tribunal can only consider a complaint where it relates to a deduction where the date of payment of the wages from which the deduction was made was before the end of a period of two years ending with the date of presentation of the complaint. Therefore, as the complaint was presented on 03 June 2022, any part of the claimant's claim that relates a period that is greater than 2 years prior to that date the claim was started cannot be considered by the Tribunal.

122. I also considered the basis of the claimant's claim based on the information before me in the event that I was wrong in relation to my conclusion on whether the claim was presented outside the statutory time limit. Firstly the claimant has failed to set out the factual and legal basis of his claim in any

or any sufficient detail. It is not possible to discern the factual or legal (or contractual) basis of the claimant's claim in the circumstances.

123. In any event I also considered that even if the claim were presented in time (or if the time limit should be extended to allow the claimant to present all or part of his claim), it appears from the information contained on the respondent's Excel spreadsheet that the claimant's pay was increased in October 2019, and he was paid the correct pay thereafter. The respondent says that the claimant was also paid back pay. There is no evidence before me that the claimant raised a complaint or pursued the matter further in or around October 2019. The claimant did not provide his own computation to show a breakdown and the amount claimed in respect of this claim. He did not provide any supporting documents such as his payslips to evidence any errors that were allegedly made and the period of time these related to.

124. In those circumstances taking the claimant's case at its highest and considering all the materials and available information that is before me, I concluded that there is no reasonable prospect of the claimant's claim for unlawful deduction of wages succeeding under Rule 37(1)(a) of the ET Rules. I therefore strike out the claimant's unlawful deduction from wages claim.

Breach of contract claim – enhanced pension

125. The respondent conceded that the claimant's breach of contract claim in respect of an alleged enhanced pension entitlement was brought within 3 months of the claimant's effective date of termination. Therefore there are no limitation issues that arise pursuant to the 1994 Order. The claimant's claim was brought within the relevant time limit, that is, within three months from his effective date of termination and including an extension of time as a result of the claimant engaging in ACAS Early Conciliation (thus taking into account that the claimant said his employment with the respondent ended on 21 February 2022 and the period of time spent in ACAS Early Conciliation between 23 March 2022 and 04 May 2022).

126. The claimant said he was entitled to an enhanced pension, and he was not told about this until 09 February 2017. He said he was provided with his contract relating to his new role that started on 24 October 2016 on that date. The respondent's representative said that the claimant was informed about his entitlement in advance, that there was a meeting with the claimant's line manager, Mr M Richard on 11 October 2016 (this meeting is referred to in the email correspondence dated 15 February 2017, although the claimant says the meeting never took place) and that the claimant never applied to opt into the enhanced pension scheme. The respondent stated that the opt in window had passed and the claimant did not opt in. Taking the claimant's case at its highest and assuming he will be able to establish at a Final Hearing that he was not aware of his entitlement to opt-in to the respondent's pension scheme until 09 February 2017, I asked the claimant to indicate how the breach of contract arose or to take me to the details of the contractual entitlement which he says was not made available to him.

127. The claimant was unable to provide any details during this hearing in relation to any contractual obligation to provide an enhanced pension scheme on the part of the respondent. The legal (or contractual) and factual basis of his claim was not set out in his ET1 Form or further particulars in any or any sufficient detail. He also did not provide any documentation which set out any details or terms of the scheme. In any event it was not clear how the claimant put his case and the claimant did not seek to quantify any losses that he claimed in respect of this. The only information about any alleged losses provided in the claimant's ET1 was that he "…*lost almost £1400-£1500 annually*." There is no information before me in relation to how this amount has been calculated, and over what period it is claimed.

128. The respondent's representative said in her submissions that the claimant had not shown that any breach of contract had taken place. It was submitted that at best the claimant was claiming that he was not provided with details about his ability to opt-in for the respondent's scheme for an enhanced pension entitlement, but that there was no claim relating to the failure to provide employment particulars before the Tribunal.

129. The claimant also could not provide information in terms of the nature of any breach of contract he says took place and when the alleged breach of contract occurred. This information was not provided in his Claim Form, or in the further particulars relating to his claim (despite paragraph 1.2 of Employment Judge Grewal's order requiring the claimant to provide details of the payments which the respondent was contractually obliged to make to him and when such payment should have been made), or indeed, during the course of this hearing.

130. Having considered all of the above circumstances and taking the claimant's claim at its highest, I am satisfied that the claimant's breach of contract claim has no reasonable prospects of succeeding at a Final Hearing and accordingly I strike out the claimant's breach of contract claim pursuant to Rule 37(1)(a) of the ET Rules.

Strike out of unlawful deduction of wages and breach of contract claims Rule 37(1)(c) of the ET Rules

131. Alternatively, I also considered the claimant's failure to provide the information required pursuant to paragraph 1.2 of Employment Judge Grewal's order (this information was not included in the claimant's ET1 Form). Furthermore the claimant did not provide this information either in the documents included in the Hearing Bundle or during his oral submissions at this hearing. In those circumstances, and in the alternative, I strike out the claimant's unlawful deduction from wages and breach of contract claim pursuant to Rule 37(1)(c) of the ET Rules for non-compliance with paragraph 1.2 of Employment Judge Grewal's order. I am satisfied that the claimant has had ample opportunity to provide the required information, that he has failed to do so, and that the respondent had not been able to properly investigate or respond to the issues raised in the complaint as a result (despite having already had to amend their claim on one occasion as a result of the further particulars provided). I was not satisfied that the claimant would be able to clarify his claim further if an unless order was made. I considered whether a fair trial was possible and proportionality pursuant to the overriding objective (Rule 2), including the potential value of

the claim and resources, and I concluded that in the alternative, it was appropriate to strike out the claimant's breach of contract and unauthorised deduction from wages claim pursuant to Rule 37(1)(c) of the ET Rules.

Deposit order – Rule 39 of the ET Rules

132. If I were wrong to conclude that the claimant's claim for breach of contract and/or unauthorised deductions from wages should be struck out pursuant to Rule 37(1)(a) of the ET Rules, I would have ordered the claimant to pay pay a deposit as a condition of being able to pursue those complaints on the basis that they have little reasonable prospect of success pursuant to Rule 39 of the ET Rules. A deposit order can be set at any amount up to £1000.00. Considering the claimant's income and expenditure information provided during the hearing (please see above) which was not challenged by the respondent's representative, and in terms of assessing the claimant's means, I would have ordered the claimant to pay a deposit of £500.00 in relation to each claim (£500.00 relating to the breach of contract claim within 28 days and £500.00 regarding the unauthorised deduction from wages claim within 56 days) from the date of this Judgment as a condition of pursuing his claim. I am satisfied that these are amounts that the claimant could afford to pay taking account of his means and the specified timescales for payment.

Conclusion

133. The claimant's claim for religion or belief discrimination is dismissed as it was presented outside the time limit set out in section 123 of the EA 2010 and accordingly the Tribunal does not have jurisdiction to hear the claim. The claimant's claims for unlawful deduction from wages and breach of contract are struck out pursuant to Rule 37(1)(a) of the ET Rules on the basis that they have no reasonable prospects of success.

134. In relation to the claimant's claim for constructive unfair dismissal pursuant to section 95(1)(c) of the ERA 1996, the respondent's application for a strike out order or a deposit order is dismissed.

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Employment Judge Beyzade

Dated: 08 November 2022

Sent to the parties on:

09/11/2022

For the Tribunal Office