EMPLOYMENT TRIBUNALS

Claimant: **Mr G Daley**

Respondent: **Royal Mail Group Ltd**

CORRECTED JUDGMENT

1. The complaints of victimisation is struck out save for item 16 in the table of victimisation claims attached to Judge Moore's orders dated 26 August 2022.

2. The complaints of direct disability discrimination by association and perception are struck out.

3. The complaint of direct age discrimination is struck out.

4. The remaining claims of unfair dismissal, wrongful dismissal, direct sex discrimination will be heard on 13, 14, 15, 16, 17, 20 March 2023

REASONS

1. By an order dated 26 August 2022 (sent to the parties on 6 September 2022) and a notice of a preliminary hearing dated 27 September 2022, the Tribunal gave the claimant an opportunity to make representations or to request a hearing, as to why the above complaints should not be struck out because:

a) They have no reasonable prospect of success.

b) It is no longer possible to have a fair hearing of the complaint of victimisation.

2. The Claimant submitted two letters dated 7 and 10 September 2022 in which he makes representations as to why the claims should not be struck out. The Claimant requested a hearing which was listed today and he had

the opportunity to make any further comments as to why the claims should not be struck out.

3. I was unable to give Judgment at the hearing due to the disruptive behaviour of the Claimant and the hearing was brought to an end.

Background to the strike out hearing

4. The ET1 was presented on 17 May 2021. The claimant was employed as a postman from 31 January 2005 until 6 April 2021. The claimant is a litigant in person. There have been three preliminary hearings to try and clarify the claimant's claims. The first took place on 31 August 2021 before Judge Jenkins who clarified most of the claims in a case management order dated 2 September 2021. A further hearing took place on 18 March 2022 before Judge Sharp. A third preliminary took place before Judge Moore on 24 August 2022 which led to the listing of the preliminary hearing today.

5. In the Claimant's ET1 he admits:

a) On Christmas Eve the Claimant brought undelivered mail home and placed them in his shed.

b) On 27 January 2021 he came across that mail in his shed (paragraphs 24 and 25). The reason he did not immediately report this to his employer was his leg was in pain and he looked for a postman but could only see agency staff delivering parcels and decided against handing the mail to them.

c) The claimant had no means of contacting the delivery office as he had no telephone or Internet and the same factual scenario applied on 28 January 2021 with both his leg and ability to contact any managers. (Paragraph 26)

d) On 29 January 2021 police discovered the mail during an unrelated search of the Claimant's property.

6. The following is not admitted in the ET1 but is not in dispute: The claimant was arrested in connection with that mail and whilst not charged at the time has subsequently been charged. The criminal proceedings have been adjourned and not yet heard. The Claimant was summarily dismissed on 6 April 2021 for gross misconduct on three counts; wilfully delaying mail, tampered with mail by opening items of addressed mail and removing contents and stealing mail.

Direct disability discrimination by association and perception

7. I have had some difficulty in deciphering the origins of these claims. In the ET1 form, the claimant had not ticked the "disability" box under section 8 of the ET1. In the box where narrative can be written under Section 8 the claimant had written "discrimination by association / perception". There was an 17 page typed attachment to the ET1 form. The claimant states:

"My claim is one that is for unfair dismissal, (employment act 1996) wrongful dismissal, and due to the nature of the circumstances of my dismissal and the improper motivations of my manager leading to acts that set out his path to find an exit for my

dismissal, which was discriminatory acts towards my character continuously throughout my conduct which has led to myself being directly discriminated against due association and perception
age discrimination
protected acts, disclosures
and under EQ act 2010 has been victimised discriminated against due" (sic)

Association

8. The only other mention of the claimant's partner's disability in the attachment to the ET1 was at paragraph 8 as follows (apart from mentioning how the loss of the mobility car would impact the claimant's partner):

December 11th 2020

I sent my line manager grant harrington a message saying i was going to have to go sick or take unpaid leave as my partner had suffered a flare up due to her rheumatoid arthritis and i could not attend work due to my children, which grant harrington my line manager kindly swapped my day off for me instead of me taking sick leave, (photo) (sic)

9. At the preliminary hearing on 31 August 2021 Judge Jenkins records that a large part of the preliminary hearing was spent in trying to clarify the claims and issues, he set out this particular claim in his order dated 2 September 2021. The claim was that claimant's dismissal (the less favourable treatment) amounted to direct disability discrimination by association. The premise of the claim is that the claimant says his partner is a disabled person by reason of fibromyalgia and / or rheumatoid arthritis and that his dismissal was because of his association with his disabled partner.

10. If the claimant did not agree with how this claim had been described he had the opportunity to challenge this and he did not. As such I have proceeded to consider this claim on the basis of Judge Jenkin's order.

11. The claimant was ordered to provide an impact statement regarding the claimant's partner's impairments and the effects of the impairments on her ability to do day to day activities and provide all relevant medical records on or before 15 October 2021. The claimant duly sent in the impact statement in a letter dated 10 October 2021 and some limited documents. The respondent confirmed on 1 November 2021 they did not consider the claimant's wife was disabled.

12. In Judge Moore's order dated 26 August 2022 the claimant's partner was directed to send a letter confirming the letter dated 10 October 2021 was her evidence in respect of her disability. This was because the claimant confirmed to the Tribunal that he had written the letter on her behalf.

13. The claimant's partner has not provided any statement in accordance with that order. In the claimant's letter dated 10 September 2022 the claimant states that the Tribunal should not be asking for this statement in any case. The claimant takes issue with the respondent not accepting his partner is disabled. He takes the view that his letter of 10 October 2021 and the documents provided should be sufficient. The claimant informed me his partner would not be attending any hearing to determine if she was disabled. This means that the position at the final hearing, as it currently stands is that

the disability in respect of the association claim is contested and the claimant intends to lead no evidence from the person who is said to have the disability other than a letter he has written and limited documents and no medical records.

Perception

14. The ET1 set out the following particulars in respect of this claim:

Paragraph 77: *" On the 10th march i said it[1] took 12 days to pass up when it should be 3 days, to which josh replied and said "we were waiting for evidence, then we had to look at the evidence, and we had to work out what we were charging you for" (GDT) (Discrimination by association perception)";*

Paragraph 78: *"On the 10th march joshua nawrocki said "in cases where we got evidence like this, we don't need to seek an explanation, as rm procedure says you should"(GDT)*
PERTINENT (Discrimination by aasociation perception)" (sic)

Paragraphs 80 and 81: *On the 10th march I told josh he did not have to suspend me as suspending me didn 't change the situation, due to me not being around any staff or mail.*

82. In reply to the above joshua nawrocki said, "No it didn't change What You Had Done" (GDT) PERTINENT (Discrimination by perception)

15. There were other allegations regarding discrimination by perception but this was based on where the Claimant lived (a particular area of Cardiff) and they are not relevant for the purpose of this judgment.

16. Judge Jenkin's order clarified that the less favourable treatment relied upon for the perception claim was the refusal of the Claimant's request for time off on 22 December 2020 and on 7 January 2021 and the dismissal. The reason for the treatment was a perception that the Claimant was disabled by virtue of a mental health condition and a knee condition.

17. The Respondent's amended response accepted they had refused the Claimant's request to use annual leave as sickness absence due to a high number of absences at that time and it was not related to any perception that he had a disability, indeed there was no such perception. He was advised if he was unwell he should take sick leave.

18. The only mention of the 22 December and 7 January leave in the ET1 was as follows:

December 22nd 2020

11. On the 22nd december i asked joshua nawrocki if i could take my day off due to me being physically and mentally shattered, to which he replied was the monday just gone. (Photo)

[1] This appears to be a reference to a file the police were waiting for from the claimant's manager

January 7th 2021

18. 1 messaged my line manager on my boys phone to see if I could bring my annual leave forward that was due on the 18th january due to my leg giving way, but despite myself being very flexible over Christmas le.my request was not possible (photo)

Age discrimination claim

19. The ET1 set out the age discrimination claim as follows.

AGE DISCRIMINATION

In recent disciplinary cases i have a comparator that i share the same sex, race, but glyn has passed retirement age, and has been treated better than me i believe due to his age.

Glyn have had a lump sum paid and would only realistically cost the business very little in comparison to myself.
- I have over 25 years left in service, which includes holiday, pay bonuses, pension, and wages and have them terms applied in respect of my employment
for as long as a mortgage normally is paid over, being a lifetime.
- Recently and over the 2nd half of 2020 royal mail have been hiring staff who have all been in previous employment, and would suggest they have already been in receipt of lump sums paid that they are entitled, to due to retirement age.
This age group are less money to keep employed, with less problems, and are
there due want of being there and not because of the necessity of a young family to raise, and have been able to do more easier being employed, unlike myself.

- At 42 yrs old now my age would give me extra rewards in regards to being made redundant, or if i resigned under constructive dismissal.
This would make considerable savings if glyn remained employed and i was dismissed, as the nature of the job and what your body is capable of, would surely see glyn not staying employed very much longer in comparison to myself.

I believe due to the above and protected acts I have been dismissed due to a protected characteristic being my age.

20. Judge Jenkin's order clarified that the claim was a direct age discrimination claim. The less favourable treatment was the dismissal and this was because of the Claimant's age. At the time of the Claimant's dismissal he was 42 and one of the comparators was in his 50's and the other over 65.

21. The respondent's response stated that the two comparators did not have circumstances materially similar to the claimant as neither comparator had had undelivered mail discovered at their premises.

Victimisation claims

22. The claimant was directed to clarify his victimisation claim by Judge Jenkins by providing further information as set out in Judge Jenkin's order dated 2 September 2021 at paragraph 10. It specified he needed to set out the protected acts and detriments and importantly that he explain the wording in each document which he says amounted to a protected act under section 27 (2) Equality Act 2010.

23. The claimant provided information about each protected act and the detriments in two separate letters received by the Tribunal on 20 and 22 September 2021. The letter received on 20 September 2021 set out the detriments and the letter of 22 September 2021 set out the protected acts.

24. Whilst attaching no criticism to the claimant and recognising he is a litigant in person, the two documents did not explain which protected act was said to have caused which detriment. As they were in separate documents, handwritten, it was impossible to marry them. The respondent then noted in its amended response that many of the alleged detriments are said to have happened before the protected act and also some of the protected acts did not meet the legal requirements under S27 (2) EqA. For example, complaining about not being paid a night allowance (without any information as to why that might be discriminatory treatment) is not capable of falling under S27 (2) as it is not a complaint about matters protected by the Equality Act. The Equality Act is concerned with prohibiting discrimination.

25. Judge Sharp therefore directed the respondent to prepare a table incorporating the protected acts and detriments as set out in the claimant's letters received by the Tribunal on 20 and 22 September 2022. A blank column was to be left in the table to allow the claimant to specify which alleged detriments he alleges was because of which alleged protected act. This was to be done by 20 May 2022.

26. The claimant wrote to the Tribunal in a letter dated 17 May 2022 and advised he had not received the table from the respondent. This had been sent to the claimant by post by the respondent on 6 May 2022 and was sent again on 26 May 2022. The Tribunal also sent a copy to the claimant on 14 June 2022 and he was ordered to complete and return it within 14 days.

27. On 22 June 2022 the Tribunal received a letter and a number of copy documents from the claimant but did not provide the table. These were the documents relied upon by the claimant as containing the protected acts and were referenced by letters "A – U". On 29 June 2022 Judge Harfield ordered that the claimant had a further 14 days to renew and submit a new table if he misunderstood the task.

28. By a letter dated 6 July 2022 the claimant sent a new table of protected acts and detriments. This was handwritten with lines drawn to show which protected acts caused which detriments. The protected acts were dated and described in summary format but did not set out the wording in each document which he says amounted to a protected act under section 27 (2) Equality Act 2010.

29. The respondent wrote to the Tribunal on 15 July 2022 alleging that the claimant had changed his allegations and they were unable to decipher the claimant's claim. They requested a preliminary hearing which was listed before Judge Moore on 24 August 2022.

30. At the preliminary hearing on 24 August 2022 I took some time to discuss the victimisation claim with the claimant. I explained what section 27 of the Equality Act 2010 says and in particular that in order for something to qualify as a protected act the claimant must have done one of the protected acts. I set out what these were (bringing proceedings under the Equality Act, giving evidence or information in connection with proceedings under the Act, doing any other thing for the purposes of or in connection with the Act, making an allegation (whether or not express) that the person was said to have victimised the claimant or another person has contravened the Act). I was frank with the claimant that many of his protected acts did not appear to fall under these definitions but I could not take any action to strike out those claims as that hearing had not been listed to deal with a strike out.

31. I explained to the claimant that if he pursued claims that had no reasonable prospect of success, the respondent could decide to make an application for costs in the event he does not go on to win those claims.

32. I saw little merits in trying to ask the claimant to try again to set out information in relation to his victimisation claims given the delay in trying to establish them using this approach thus far. I therefore determined that using the information provided by the claimant in his ET1, letters dated 20 and 22 September 2021 and his table provided 6 July 2022 that I would set out the victimisation claims as I have understood them to be. The claimant then had 28 days to review the table of victimisation claims and comment on whether he agrees that they contain the protected acts and detriments and if not why not. If he does not he was directed to explain why not.

33. The claimant wanted to know if I would read the letters he sent referenced in paragraph 26 above. I told the claimant that I would be assessing the claims based on his claim, further particulars in the letters dated 20 and 22 September 2022 and his table dated 6 July 2022. It is not a function of this Tribunal to read the documents and try and guess what sentences are relied upon as protected acts. Some of the letters are pages long. That is why the claimant was ordered to set out the words used by Judge Jenkins.

34. The claimant initially agreed with my suggested way forward but became later concerned that I would "water down" his claims. I explained a number of times that I would not be solely using his table dated 6 July 2022 but be referencing the information he sent in September 2021 where he was required to set out the wording in each document which he says amounted to a protected act under section 27 (2) Equality Act 2010. The claimant wanted to refer to the whole of the documents he was referencing. There were some documents that were relatively short such as a message but others that were long letters. The claimant has now had 4 opportunities to clarify his victimisation claim. The letters dated 20 and 22 September 2021

set out the extracted words the claimant said at that time amounted to the protected act and I concluded that these had to be the documents, as well as the ET1 on which the claim should be assessed.

35. The claimant indicated he would be sending a further table of protected acts stapling a separate paper setting out the correlating detriments. I explained he was free to do this but that I would not have regard to any further such document as he has already had provided the further information directed by Judge Jenkins in his letters dated 20 and 21 September 2021 as well as his ET1. The Tribunal could not permit the Claimant to keep lodging different hand written tables to clarify the victimisation claim.

36. The victimisation claims were then clarified in a table drafted by Judge Moore and attached to the case management order dated 26 August 2022. Having undertaken this exercise (which took one day of judicial time), I did refer to some of the claimant's documents where I was unable to understand what had been pleaded by the claimant. I indicated where in the attached table. This was a complex exercise. The problem was that the claimant sought to introduce new complaints that were not set out in his ET1 in his letters dated 20 and 22 September 2021 and then further new matters in his table produced dated 6 July 2022. Further, the table dated 6 July 2022 did not include all of the matters that had been set out in the letters dated 20 and 22 September 2021.

37. Following my review of the claimant's victimisation claim, of which I have reviewed the ET1, letters dated 20 and 22 September 2021 and the table of 6 July 2022 I was of the view that save for item 16 in the table, the claims did not have any prospect of success. My order dated 24 August 2022 set out that I proposed to strike out those claims (Rule 37 Employment Tribunal Rules of Procedure 2013) and / or order the claimant to pay a deposit (Rule 39) as a condition of being permitted to continue to being the claims on the basis the claims have no or little reasonable prospects of success. I set out my reasons in the final column of the table.

38. I also reached the view that the claimant's claims for direct disability discrimination by association had no or little reasonable prospects of success. It is inherently unlikely that the claimant was dismissed because of his association with his disabled partner, given that the police discovered items of mail in the claimant's shed following a police search at the claimant's property. For the same reasons I considered the claimant's direct disability discrimination claim by perception has no or little reasonable prospect of success. I proposed to strike out that claim or order the claimant a deposit as a condition of being permitted to proceed to advance that claim.

39. I further reached the view that the claimant's claim for direct age discrimination had no or little reasonable prospects of success. I understood that this claim was based on an allegation that two older employees were treated more favourably in that they were not dismissed for misconduct because it would have been more expensive to dismiss older employees. The problem with this argument is that as the respondent points out, if an

employee is dismissed for gross misconduct, there are no costs or expenses involved because those employees are dismissed without notice. The Claimant has subsequently disputed this is the basis for his claim. I discuss how this claim is pleaded in my conclusions below.

40. In the Claimant's letter dated 7 September 2022 he set out the following objections to the way the victimisation claims had been summarised by Judge Moore in the table attached to my order dated 26 August 2022. I have summarised the objections as the letter was 21 pages long and handwritten.

a) The Case Management orders and table produced by Judge Moore were at best mis communicated or set out to help the respondent dismiss the claim;
b) Judge Moore had cherry picked from the ET1, protected acts document and detriments document of September 2021, amended protected acts in 2022[2]and coversely (sic) amended detriments in 2022;
c) The table was different to all previous tables and to be frank was an embarrassment on Judge Moore's part;
d) The table was a patchwork quilt which is clearly unable to be deciphered with detriments predating protected acts, cancelling out the mistake once already corrected previously by the claimant;
e) There appears to be an allegation that the respondent and the tribunal have edited some of the claimant's documents by blocking or redacting paragraphs;
f) The claimant has not said his claims fell under section 27 (2) Equality Act and has made a claim referencing section 27 Equality Act 2010 which he maintains is broader than section 27 (2);
g) It was untrue that the respondent and the tribunal received the detriments before the protected acts[3];
h) The respondent and the tribunal have been provided with all of the protected acts, letters and messages between himself and managers and emails to HR;
i) Judge Moore was lying and the whole purpose of the hearing was to strike out the most damaging and liable parts of the claimant's claim and the tribunal cannot and will not do this;
j) Judge Moore was acting as the claimant's representative by producing the table and this was not impartial, further the claimant will not allow transparency to confuse the claimant with trickery;
k) The table is an embarrassment, if any table is going to be used it will be the claimant's own. If the claim fails then it will be on the claimant and it will not be down to an individual (assuming this refers to Judge Moore) who has no care for the claimant's future standard of life and has already formed thoughts on an individual through other parties;
l) The table was not worth the paper it was written on, it is not the claimant's table and the undertaking of the exercise mentioned was spent constructing a table that is set up to make the acts fail;
m) The complaints and correct complaints were such that the claim has provided to the tribunal and the respondent in September 2021;
n) Judge Moore should have read the claimant's letters which were pertinent to the claims.

[2] (This may be a reference to the 6 July 2022 table)
[3] (I have understood this to mean that the claimant does not accept the Tribunal received the 20th and 21st of September 2021 document separately)

41. On 28 August 2022 the Claimant sent in a further document setting out the protected acts and detriments which would have been a fifth attempt to clarify the victimisation claims.

42. At the hearing today, the Claimant repeated to me today that he would not look at the table, it made no sense and he would use no table except his own. It was unclear which of the five attempts to clarify the victimisation claim that the Claimant intended to use at any subsequent hearing.

The Law

43. Section 27 Equality Act 2010 provides as follows:

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(*a*) B does a protected act, or
(*b*) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(*a*) bringing proceedings under this Act;
(*b*) giving evidence or information in connection with proceedings under this Act;
(*c*) doing any other thing for the purposes of or in connection with this Act;
(*d*) making an allegation (whether or not express) that A or another person has contravened this Act.

44. Rule 2 of the Employment Tribunal Rules of Procedures 2013 sets out the following:

(2) Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

45. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the

46. Employment Tribunals must deal with cases fairly and justly. This applies to all cases not just the Claimant's case. The impact on other cases must be considered when exercising any power given under the rules.

47. Rule 37 of Sch 1 of the Employment Tribunal Constitution (Rules and Procedure) Regulations 2013 provides:

"Striking out
37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
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 r 21 above."

48. In **Malik v Birmingham City Council UKEAT/0027/19,** Choudhury J summarised the law on strike out:

"It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121, which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.

[31] In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:

(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."

[32] Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Community Law Clinics Solicitors Ltd &

Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."

49. The EAT gave recent guidance regarding the power to strike out claims in **Cox v Adecco & Others UKEAT/0339/19.** Steps must be take to identify claims and issues before considering a strike out or deposit order. With a litigant in person this requires more than just requiring a claimant at a preliminary hearing to say what the claims and issues are and requires reading the pleadings and core documents that set out the claimant's case.

50. In **Abegaze v. Shrewsbury College of Arts & Technology [2010] IRLR 238** the Court of Appeal considered a strike out under the former provisions in the 2004 Rules (under 18 (7) (b) where it is no longer possible to have a fair hearing). The relevant sections are as follows (per Lord Justice Elias):

Paragraph 17:

"The strike out for failing actively to pursue the case raises some different considerations. In Evans v Metropolitan Police Commissioner [1992] IRLR 570 the Court of Appeal held that the general approach should be akin to that which the House of Lords in Birkett v James [1978] AC 297 considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents. "

The Tribunal must engage on a proper analysis of why a fair trial is no longer possible and ensure there is a factual basis for such a conclusion.

51. In **Blockbuster v James [2006] IRLR 630** the Court of Appeal held as follows (regards proportionality) :

"It is not only by reason of the Convention right to a fair hearing vouchsafed by art 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, 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."

52. The Employment Appeal Tribunal recently considered the power to strike out under Rule 37 in **Emuemukoro v Croma Vigilant (Scotland) Ltd and another UKEAT/0014/20/**

53. In this case the Tribunal had struck out the response on the first day of a five day hearing on the basis that the Respondent's failures to comply with the case management orders meant it was impossible for the trial to proceed within the five day window. Choudhury J reviewed the authorities and rejected the proposition that the power to strike out can only be triggered where a fair trial is rendered impossible in an absolute sense. (This case was about a strike out under Rule 37 (1) (b)). The factors relevant to a fair trial (set out by the Court of Appeal in Arrow Nominees) include the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court.

54. Section 13(1) of the Equality Act 2010 ("EQA 2010") provides that direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic of sex than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

55. Under s136 EQA 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). The Tribunal must approach the question of burden of proof in two stages.

56. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act if the complaint is not to be upheld. To discharge the burden of proof "it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex," (per Gibson LJ).

57. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

58. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal**

Ulster Constabulary [2003] IRLR 285 this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

59. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

Conclusions

Victimisation claims

60. Victimisation claims are concerned with the Equality Act 2010. S27 (2) sets out the definition of protected acts and is widely defined. However there must be a link between the protected act itself and the Equality Act. In all of the claimant's victimisation claims, even if his claim was taken at its highest, the protected act relied upon simply did not amount to a protected act under S27 (2).

61. All of the protected acts included in the table of victimisation claims were drawn from the ET1 claim form, the further particulars dated 20 and 21 September 2021 and the Claimant's 6 July 2022 table. Where there was doubt about the words used, I also referred back to the copy letters the Claimant asserted his protected act emanated from.

62. I have set out the reasons why each protected act relied upon do not amount to a protected act in the attached table. I consider this to be a proportionate way of setting out my judgment given the number of separate victimisation claims advanced and that the conclusions are set out already in a table. By way of explanation and example, in my judgment, leaving a note for a manager about not completing a postal round due to tiredness has no reasonable prospect of amounting to a protected act. The same reasons apply to the victimisation claims set out in the table numbered 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 23, 24 and 25.

63. Item 16 is not struck out. This is relating to a letter sent by the claimant dated 16 March 2021. Item 22 is subject to a deposit order set out in a separate case management order.

64. I further conclude that it is not possible to have a fair hearing in respect of the claimant's victimisation claims. There have been four attempts to clarify the victimisation claims and three preliminary hearings. The respondent was directed to put together a table incorporating the claimant's claims and that failed as the claimant would not agree that table.

65. The claims remained utterly indecipherable set out in a patchwork of handwritten tables which differed each time and did not correlate. In accordance with the overriding objective the Tribunal sought to discuss the claims with the Claimant at the preliminary hearing on 24 August 2022, review the ET1 and further particulars and try and capture the claims and issues in the order. The Claimant was given the opportunity to review those claims and issues and comment if he did not agree. The Claimant then had 28 days to seek advice and was directed to the sources of advice that are available to review the table and indicate the reasons if he did not agree. The Claimant's subsequent reasons for disagreeing (set out at paragraphs 39 (a) to (n) were not reasonable or sensible reasons explaining where there were errors but amounted to an offensive attack on the Judge.

66. The Claimant has stated that he will refuse to accept any document seeking to clarify his victimisation claim except his own. Even now it is unclear which document he says he will rely upon. This would make a hearing of the victimisation claims impossible. The Claimant would be referring to a document that would be inadmissible. The Respondent would not be able to prepare their defence and would be put to the cost of defending a claim without knowing what evidence to call or which documents to produce. A claim cannot be permitted to proceed in these circumstances when the basis for it is uncertain and even chaotic. This undermines the overriding objective and respect for the Tribunal proceedings.

67. In my judgment, there is no possibility that anything further can be done to understand the Claimant's victimisation claims. The Claimant has in breach of an order failed to sensibly comply with an order seeking to clarify his claims. For these reasons also, I strike out the victimisation claim except for item 16 and 22 (subject to a deposit order).

Direct discrimination claims

68. In my judgment the Claimant's claims even taken at their highest do not set out facts capable of establishing a difference in treatment in status and treatment.

Direct disability discrimination by association

69. See paragraphs 7 - 13 and 37 above. In regards to the claim of direct disability discrimination in my judgment this is a case where it is appropriate to strike out the claim on the basis is has no reasonable prospect of success. Taking the Claimant's claim at its highest, in the claim form the Claimant says his manager had *"improper motivations leading to acts that set out his path to find an exit for my dismissal, which was discriminatory acts towards my character continuously throughout my conduct which has led to myself being directly discriminated against due to association and perception…"*

70. This claim was clarified by Judge Jenkins at the preliminary hearing on 31 August 2021. The order records that the claimant says his dismissal was because of his association with his disabled partner. Other than these particulars, there is no basis to understand how or why the claimant's dismissal was because of his association with his partner's disability. Indeed

as I observed at paragraph 9 above, the only other mention of the claimants partners disability in the ET1 is a favourable discussion regarding his line manager agreeing to swap a day off following a request to take leave due to a flareup related to her disability. He describes that as "kindly agreeing". In my judgment there is simply no basis from the pleaded claim from which, even taking the claim at its highest there is any ground to say there are any prospects of success in this particular claim. The police located items of mail on the claimant's property following a search of that property. The claimant was dismissed in April 2021 for gross misconduct relating to the mail found in his shed. It is not in dispute that the items of mail were found at his home. It is inherently more plausible that the claimant's line manager would be motivated to dismiss the Claimant for this reason rather than the Claimant's partner's disability. There are no particulars why the Claimant's manager would be so motivated.

Direct disability discrimination by perception

71. The Respondent must know the case they are facing and on the face of the claim as pleaded, they do not. There are no particulars of claim setting out any facts from which it would be possible to conclude, even taking the claim at its highest, that the Claimant was refused leave or dismissed as the Respondent perceived he was disabled.

72. In respect of his requests for leave, there are no grounds advanced to explain how or why a refusal of leave was because the manager perceived the Claimant to have a disability.

73. For these reasons, in my judgment this claim has no reasonable prospect of success and is struck out.

Direct age discrimination

74. Following the order dated 26 August 2022, the Claimant set out grounds as to why his age discrimination claim should not be struck out, in his letter dated 10 September 2022, paragraph 2. The Claimant asserted that he had never claimed it was more expensive to dismiss older employees. On the contrary, the claim appears to be that it would be the Claimant that would be more expensive to keep employed than the two comparators as he has at least 27 years left in employment.

75. This still suggests that the Claimant's case for age discrimination is based on the less favourable treatment (his dismissal) being motivated by the costs of dismissing a younger employee against the costs of dismissing an older employee. However as the Respondent points out, if someone is dismissed for gross misconduct, there are usually no age related costs that could differ as the employee is dismissed without notice.

76. Further, in my judgment it is again inherently more plausible that the reason for the dismissal was due to items of mail being found in the claimant's home rather than it being more expensive for the Respondent to dismiss the Claimant than two other employees', whose circumstances were completely unrelated to the Claimant's dismissal in any event.

77. Even if this claim is taken at its highest there are no reasonable prospects of success. The claim does not make any sense logically legally or factually. For these reasons it is struck out.

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Employment Judge S Moore
2 November 2022

JUDGMENT SENT TO THE PARTIES ON 9 January 2023

FOR THE TRIBUNAL OFFICE Mr N Roche