Case No: 1303721/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr R J Bryce**

Respondents: **(1) Active Security Solutions Limited**
(2) Stonegate Pub Company Limited

Heard at: **Birmingham (via CVP)** **On:** **23 January 2023**

Before: **Employment Judge Edmonds**

Representation
Claimant: In person
Respondents : First Respondent: Mr T Lang, solicitor
Second Respondent: Miss G Rezaie, counsel

PRELIMINARY HEARING RESERVED JUDGMENT
STRIKE OUT AND DEPOSIT ORDER

1. The claimant's claim for unlawful deduction from wages and/or breach of contract against the first respondent (this claim only being against the first respondent) in respect of the sum of £176 is struck out for having no reasonable prospect of success.

2. The claimant's claim for discrimination arising from disability is struck out against both respondents for having no reasonable prospect of success.

3. The claimant's claim for detriment due to carrying out designated health and safety activities is struck out against the first respondent (the claimant only having brought this claim against the first respondent) for having no reasonable prospect of success.

4. The claimant's claim for detriment due to making a protected disclosure is struck out against both respondents for having no reasonable prospect of success.

5. The claimant's claim for unlawful deduction from wages and/or breach of contract in respect of an alleged weekly deduction from salary of £3 has little reasonable prospect of success. The claimant is ordered to pay a deposit of **£5** not later than **10 March 2023** as a condition of being

permitted to continue to advance those allegations or arguments again the first respondent (this claim being against the first respondent alone). The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

6. The claimant's claim for failure to make reasonable adjustments has little reasonable prospect of success. The claimant is ordered to pay a deposit of **£50** in respect of each respondent (so, if the claimant wishes to continue his claim against both respondents, he would need to pay £100) not later than **10 March 2023** as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

7. The claimant's claim for holiday pay will proceed in relation to the 2021 holiday year against the first respondent alone.

REASONS

Background

1. The claimant was employed by the first respondent as a licensed door supervisor, and at the time of the relevant incident which led to the issues in this case (1 August 2021) was assigned to perform his duties at the second respondent's premises.

2. The claimant has brought a number of claims in relation to the incident on 1 August 2021 and what happened subsequently, originally against all four respondents, however the claims against the third and fourth respondents were struck out following a previous preliminary hearing which took place on 6 September 2022.

3. This is a separate application from both the first and second respondents for the claimant's claims against them to be struck out on the basis that they have no reasonable prospects of success under Rule 37(1) of the Employment Tribunal Rules of Procedure (but relying on separate grounds to those put forward by the third and fourth respondents). In the alternative, both respondents seek a deposit order under Rule 39 of the Employment Tribunal Rules of Procedure. Whilst the applications were submitted separately, they raise similar points and so I deal with them together.

4. The claimant says that he is disabled by reason of Asperger's Syndrome and dyslexia. As a result of this, I discussed with the claimant at the start of the hearing any reasonable adjustments that he may require, such as breaks. After hearing the respondents' detailed submissions the claimant requested to submit his submissions in writing and said that he needed to do this as a reasonable adjustment because of the impact of his conditions on his memory. He also asked that the respondents be required to send their submissions in writing as he said they were more detailed that those submitted prior to the hearing, and he had not taken a note during the hearing. He referred me to some documents in the file which related to his

medical conditions, although not specifically in relation to his ability to make oral submissions. The respondents objected to this. Having considered the claimant's request, I declined to order that the respondents provide additional written submissions or that the claimant could do so after the hearing. This was for the following reasons:

a. The claimant had been informed in advance of the hearing (in the Case Management Order issued following the hearing on 6 September 2022) that I intended to make my decision at the hearing today. He was specifically invited to prepare any written submissions in advance and had chosen not to do so.
b. He had also been asked in that same Case Management Order to let the Tribunal and the respondents know by 16 December if he felt he would need to make written submissions after the hearing, along with medical evidence to support this. He did not do so and did not provide relevant medical evidence.
c. The respondents had provided written grounds for their application a number of months earlier so the claimant had advance notice of what was being said. Whilst additional detail was provided orally, the essence of the application and the grounds for it were unchanged. The only wholly new matters were around financial means, but the respondent could not prepare submissions on that in advance because the claimant had not provided his evidence (contrary to my Case Management Order which required him to do so by 16 December 2022). The claimant was capable of understanding the nature of the application and the points he would need to make in advance.

I was however prepared to grant the claimant an additional break in which to prepare any submissions he wished to make. Therefore, instead of a short break for lunch, we had a break from 12.48 to 2.30 which gave the claimant sufficient time to put together what he wanted to say. I also reassured the claimant that I did not mind what structure or language he used and that I did not mind whether or not he provided me with any case authorities.

5. The claimant is a litigant in person, however he has a law degree, and is well versed in Tribunal practice and procedure from previous claims that he has brought. He is not however a lawyer and I bear this in mind when reaching my decision.

6. I was provided with a file of documents amounting to 317 pages, and I heard evidence from the claimant in relation to his financial means. During the course of his evidence, the claimant indicated that he had other documents relating to his financial means but had not provided them in advance of the hearing. Given that the claimant had been clearly ordered to provide such documentation in advance, I declined to allow the claimant to submit them separately as to have done so would have meant that we would have then needed to invite further comment from the parties on the contents of those documents and it would not have been in the interests of justice or the Overriding Objective to avoid delay and save expense to do so.

7. In reaching my decision I took into account that I had not seen or heard all the evidence in the case and therefore, where there were factual disputes, I took the claimant's case at its highest. That does not mean that I accept the claimant's case as being correct, simply that the evidence has not yet been analysed.

The claimant's claims

8. The claimant's claims, which are all subject to the respondents' application for strike out and/or deposit order are:

    a. Unlawful deduction from wages / breach of contract, against the first respondent only, in relation to:
        i. An alleged failure to pay £176;
        ii. An alleged deduction from salary of £6;
    b. Failure to pay holiday pay, against the first respondent only;
    c. Failure to make reasonable adjustments, against both respondents;
    d. Discrimination arising from disability, against both respondents;
    e. Detriment due to carrying out designated health and safety activities, against the first respondent only; and
    f. Detriment due to making a protected disclosure, against both respondents.

9. I deal with each in turn in my conclusions below.

Facts

10. The claimant worked for the first respondent on a zero hours contract as a door supervisor. Although the claimant had been employed by the first respondent for some time, 30 July 2021 was the first occasion on which the claimant worked for R1 since the end of 2019, due largely to the covid pandemic. The second respondent is a pub company who engaged the claimant's services through the first respondent.

11. I was shown an unsigned copy of the claimant's contract of employment dated 20 August 2019 with the first respondent. The claimant denies having seen this before or having signed it. As this is a factual dispute on which I did not hear evidence, I make no finding as to whether or not the claimant did in fact ever see or sign that contract of employment, as that would be a matter to be determined at a final hearing (although I would note that it appears surprising that a detailed contract would have been prepared in respect of the claimant but never sent to him). That contract stated that:

    a. Clause 6.2: "*You will not be paid your normal basic remuneration during such holidays as you will receive holiday pay as part of your wages. Part of your wages is in relation to holiday pay and is clearly identified on your payslip. You agree that the Company will be entitled to credit for these payments in relation to outstanding holiday pay*."
    b. Clause 6.4: "*Holiday entitlement unused at the end of the holiday year cannot be carried over into the next holiday year*".
    c. Clause 12.1: "*The Company shall be entitled to deduct from your wages or other payments due to you any money which you may owe to the Company at any time*."

d. Clause 12.4: "*The Company shall deduct £3 per week from your wages or other payments due to you to cover the costs of personal accident and other insurances*."
e. Schedule: "*Your gross wage is £10.50 per hour. This includes £9.23 basic wage and £1.27 holiday pay*."

12. There was a condition imposed on the claimant's license by the Security Industry Authority ("SIA") on 9 June 2020, that he must not carry items while deployed as a security operative that are designed for physical intervention (e.g. handcuffs or sprays) unless explicit permission has been provided by the employer or venue management to do so at that deployment location. Whether or not the claimant had such permission is a matter of contention in this case and I make no finding in that regard given that I have not heard all the evidence. It is worth noting that it is the claimant's submission that such items are used by others in the industry and are sometimes encouraged.

13. The claimant worked without incident on the night of 30-31 July 2022. The incident which led to this claim occurred during the night of 31 July – 1 August 2022. In the early hours of 1 August 2021 an incident occurred between the claimant and a member of the public who was seeking entry into the second respondent's premises. During this incident the claimant activated a CCTV body camera and sprayed a UV/Smart spray at the member of the public. The police attended the incident, and it was reported to the SIA, who then suspended the claimant's license on 9 August 2021.

14. On 1 August, following the police attending the incident, the claimant was sent home on full pay. He subsequently worked another shift for the respondent at a different premises on 7 August 2021. Due to the suspension of the claimant's license on 9 August 2021, the claimant did not work for the respondents again. It was not clear to me from the evidence I heard whether the claimant was then subsequently dismissed by the first respondent or whether his employment continues under that zero hours contract, but without the claimant doing any actual work since 7 August 2021.

15. The claimant was paid fortnightly and on 30 August 2021 his payslip shows that he received £176 less deductions for PAYE, National Insurance and an insurance scheme (detailed on his payslip as PA Insurance, for which a £6 deduction was made) in respect of his work as a door supervisor. The payslip details that the total net payment to the claimant was £134.80. An extract from the claimant's bank statement shows that this sum was paid to the claimant on 27 August 2021.

16. Although the claimant has not worked for the first respondent since 7 August 2021, the claimant also worked for Staffordshire County Council on a fixed term contract between around June or July 2021 and June or July 2022, as a door supervisor on a part time basis. However his license was suspended by the SIA on 9 August 2021 and so he could not work in the security industry from that point onwards. The claimant did not provide any specific documentary evidence showing what income he had received during that period.

17. At the time of this hearing the claimant was not working. Whilst he did not provide documentary evidence showing this, he confirmed that he is however in receipt of universal credit payments amounting to approximately £600 per month, along with a personal independence payment ("PIP") of approximately £600 per month. Therefore he has a total income of approximately £1,200 per month. He said in evidence that he has no savings and whilst he did not provide any documentary evidence to demonstrate this, I accept what he said.

18. Out of that £1,200 the claimant spends £80 per week on his rent, which amounts therefore to around £320 to £350 per month. In some months the housing element of his universal credit payment would be paid directly to his landlord and the remainder to him, and in other months he would receive the full amount and have to pay the landlord himself. Either way, the claimant would have about £850 to £880 left to spend after rent it paid.

19. Out of this, the claimant needs to pay for his utilities, including gas, water, mobile phone (he does not have a landline) and TV licence. He also said he has a credit card bill which he pays for each month as he is in arrears by about £3,000, costing around £90 per month minimum. Taking the £90 from the £850-£880, this would leave the claimant with £760-790 per month to cover utilities and personal expenditure including food. The claimant could not recall specific amounts but said that he is left with about £12 per month once all of his expenditure is taken into account. Whilst I do not doubt that the claimant does have debts to pay and accept that in the current financial climate utility bills are far higher than has previously been the case, the claimant did not provide evidence showing that he was only left with £12 per month surplus and based on the information provided I find that he would be able to put aside more than £12 per month if he wished/needed to do so.

The law

20. Rule 37(1) of the Employment Tribunal Rules states:

> "(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 prospects of success;*
>
> *……."*

21. It will generally not be appropriate to strike out a claim where there are disputed facts that have not yet been determined, particularly where the claimant is a litigant in person (see, for example *Cox v Adecco and ors 2021 ICR 1307*). Tribunals should be cautious about striking out a claim brought by a litigant in person on the grounds that it has no reasonable prospects of success (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*): strike out should only be taken in exceptional cases.

22. Section 39 of the ET Rules states:

> *(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.

23. The amount of the deposit order should reflect the party's means, but also should be high enough to warn the party that the claim has little reasonable prospect of success. The Tribunal must give reasons for setting the deposit at a particular amount.

24. Section 13 of the Employment Rights Act 1996 states:

"(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract"

(b) ….

25. Section 13 of the Working Time Regulations 1998 states:

"*(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but –*

…..

(a) [subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and

(b) It may not be replaced by a payment in lieu except where the worker's employment is terminated.

26. Section 20 of the Equality Act 2010 states:

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage;

……

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons

who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

27. Section 15 of the Equality Act 2010 states:

(1) A person (A) discriminates against a disabled person (B) if –
a. A treats B unfavourably because of something arising in consequence of B's disability, and
b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

28. Section 44 of the Employment Rights Act 1996 states:

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that –
a. Having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities;
……
e. In circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

29. The fact that an employee has some health and safety duties as part of their role does not mean that they have been designated to carry out health and safety activities (*Castano v London Central Transport Services Ltd 2020 IRLR 417, EAT*).

30. Section 47B of the Employment Rights Act 1996 states:

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure."

Conclusions

Unlawful deductions / breach of contract

31. The claimant says that there are two aspects to this claim and I deal with them in turn below.

Unpaid wages of £176

32. The claimant sets out this allegation in paragraphs 6 and 10.1 of his Particulars of Claim, specifically valuing this claim at £176. He says that this relates to unpaid wages in respect of the work he did on 30 July, 31 July and 7 August 2021. The first respondent says that the claimant was paid for 16 hours, which is all that he was scheduled to work and in fact more than he did work given that he was sent home on the night of the incident. Having seen the claimant's payslip and entry from his bank account, it is clear that the exact amount which the claimant is claiming was in fact paid

to him, less deductions, and therefore I cannot see any basis on which the claimant could show that this money remains owing to him.

33. Therefore, I strike out this element of the claimant's claim on the basis that it has no reasonable prospect of success.

Insurance deductions

34. The claimant says that a £6 deduction was taken from his pay in respect of insurances which he never authorised. This deduction is evidenced on the payslip which was provided to me.

35. The claimant's contract specifically says that the first respondent will deduct £3 per week from his wages in respect of personal accident or other insurances, and that the first respondent is authorised to deduct any sums owing by the claimant from time to time. The £6 deduction on his payslip dated 30 August 2021 is in respect of this insurance, and given that he is paid fortnightly the £6 deduction would represent two £3 weekly payments as set out in the contract.

36. If the claimant had accepted that the contract of employment in the file of documents before me was an accurate contract of employment reflecting the terms agreed between him and the first respondent, I would have had no hesitation in concluding that this claim would have no reasonable prospects of success. However, I must take the claimant's claim at its highest at this stage and he says that he did not receive that contract. If that were the case, I cannot say that his claim would have no, or little, reasonable prospects of success.

37. However, that is not the end of the matter. I must also consider whether this actually forms part of the claimant's pleaded claim. Having reviewed his particulars of claim, it does not. In fact, in his further particulars which were provided at an earlier stage in these proceedings, the claimant in fact specified that he did not receive the payslip until February 2022 and that he was "now" aware of the £6 deduction. It therefore cannot have been part of the pleaded claim which was submitted months in advance of February 2022. Therefore, he would need to apply to amend his claim in order to include a claim relating to a deduction from wages.

38. At this point, the claim would be out of time and that would be part of the assessment as to whether to allow him to amend his claim. In addition, there was a gap between 2019 and 2021 during which no deductions were made and therefore any claim for unlawful deduction from wages in respect of the period prior to 2021 would also have been potentially out of time at the point at which he brought his claim.

39. The claimant has also brought this head of claim as a breach of contract claim. For that claim to have any prospects of succeeding, the claimant would need to show that his employment has ended. As outlined above, it is not altogether clear to me whether the claimant's employment with the first respondent had in fact ended when he brought his claim or whether the claimant remains on a zero hours contract, albeit with no work. In the latter scenario, a claim for breach of contract would necessarily fail.

40. Factoring in all of the above, whilst I cannot say that this claim has no reasonable prospects of success, it does appear to me that the claimant has a number of difficulties with this claim and it has little reasonable prospects of success.

41. It is therefore open to me to consider requiring a deposit order be paid in order for the claimant to continue with this aspect of his claim. In considering this I have taken into account the claimant's ability to pay any deposit, including the fact that he is not currently working and the evidence he gave on his monthly expenditure. However, with an income of £850 approximately after rent has been paid, I am confident that the claimant has the ability to pay a deposit. The respondents have sought a deposit order of £50 to £100 per allegation. Whilst that may be an appropriate figure for some of the claimant's claims, I have also taken account of the low value of this particular aspect of the claim and conclude that it would be disproportionate to require the claimant to pay that level of deposit for a claim that may only be worth £6 if he succeeds.

42. Therefore, factoring in all of the above, I order that the claimant is required to pay a deposit of £5 if he wishes to continue with this aspect of his claim, failing which it will be stuck out.

Holiday pay

43. Again, this is a claim against the first respondent alone. The claimant did not work for the first respondent between the end of 2019 and July 2021 and therefore this claim can only realistically relate to the period starting on 30 July 2021, the claimant not having submitted at any point that any specific agreement was reached to enable him to carry forward unused holiday from 2019 into the 2021 holiday year.

44. The claimant's claim form is silent as to the nature of his claim for holiday pay, however he has since explained that his concern relates to the wording used in his contract of employment (albeit that he says that he did not see or sign this at the time his employment commenced). This is because the schedule to his employment contract stipulates that his gross wage of £10.50 per hour (as it was at the time he was first employed) was made up of £9.23 of basic wages and £1.27 of holiday pay. This appears to be a form of "rolled up holiday pay".

45. Rolled up holiday pay is a complex topic and I cannot say that a claim on the basis that rolled up holiday pay is unlawful in this context has no, or little, reasonable prospects of success. However, given that the claimant only worked between 30 July and 7 August, and given the lack of any right to carry forward holiday, I can say that the value of this claim is necessarily limited to the specific time period from 30 July 2021 onwards. I would also add that, for this claim to have any prospects of success, the claimant's employment would need to have ended, given that there is no right to payment in lieu of holiday unless employment has ended.

46. I therefore allow this claim to proceed, but only in relation to the 2021 holiday year.

Failure to make reasonable adjustments

47. At this stage, both disability and knowledge of disability remain in dispute, although the respondents have not sought to argue that the claim should be struck out on this basis.

48. The claimant's case for reasonable adjustments is formulated on the following grounds:

    a. That the respondents were under a duty to provide the following auxiliary aids to him:
        i. CCTV/body camera
        ii. Handcuffs/leg restraints
        iii. Smart water / UV spray

    b. That the respondents had a provision, criterion or practice ("PCP") of "*working in an environment that is high risk to health and safety with multiple factors or contributors that would contribute or amplify risks*".

49. Regarding CCTV/body camera and handcuffs/leg restraints, there is no assertion made that the incident on 1 August (or any other incident) occurred because the claimant was not provided with those items.

50. In relation to the smart water / UV spray, the claimant did have a UV spray at the time the incident occurred: in fact the core matters in this claim surround the fact that he used that spray. The claimant cannot therefore succeed in any argument to the effect that there was a failure to make reasonable adjustments due to him not having these items.

51. In relation to the PCP identified above, that is not in reality a PCP at all: it is just a statement of the working environment as he sees it. Having said that, I am mindful that we have not yet identified the list of issues and therefore, whilst the claimant has so far failed to identify a PCP, that can sometimes happen as the issues are discussed at a case management preliminary hearing. I therefore give the claimant the benefit of the doubt that he may just have mis-pleaded what the PCP is that he relies on.

52. However, whether pleaded as a PCP or as an auxiliary aid, there also needs to be a substantial disadvantage suffered in the absence of the adjustment in order for a claim for reasonable adjustments to succeed. In relation to the auxiliary aids, if the claim is that the respondents failed to provide these, then he nevertheless had them in his possession and therefore there can have been no substantial disadvantage. In addition, I also think the claimant will have difficulties in showing any substantial disadvantage in comparison with non-disabled persons. The claimant says that they help with his memory and communication difficulties, however in his pleaded claim he does not rely on those factors to justify the use of his UV spray, but instead refers simply to trying to de-escalate the situation by withdrawing his spray and then using it when the individual refused to leave. There is no suggestion that his disability meant that he had to take that action whereas non-disabled persons would not. I

53. In relation to the PCP, I find it difficult again to see how this would put the claimant at a substantial disadvantage in comparison to non-disabled persons, or what steps the respondents could reasonably have taken to avoid any such disadvantage. I note also that the claimant has refused to provide any details of what adjustments he thinks the respondents should have made, despite having been asked to do so by the Tribunal, on the basis that he believes it is not for him to suggest adjustments but for the respondent to make them. Whilst the claimant is correct that the duty to make reasonable adjustments falls on the respondents, it would have been helpful for him to provide that information.

54. In relation to the claimant's claim for reasonable adjustments as pleaded, I would strike this claim out for having no reasonable prospects of success. However as outlined above I recognise that the PCP relied upon might be refined into something that is an actual PCP at a case management hearing. That said, given that the claimant had the equipment available to him that he says he needed, given that the claimant was sent home on full pay and not formally suspended or dismissed on the night in question, and given that the nature of the claimant's role involved being trusted to interact with members of the public who might be aggressive or drunk on occasion, I find it highly unlikely that the respondents could be found to have failed to make a reasonable adjustment in sending the claimant home on full pay following an incident where the police were called (and, ultimately, although not known to the respondents at that time, the claimant's SIA license was then suspended).

55. In conclusion, I therefore find that the claimant's claim for reasonable adjustments has little reasonable prospect of success. Again, I have considered whether it would be appropriate to issue a deposit order and I conclude that it is, for the same reasons as set out above in relation to the claimant's income. However, whereas I reduced the amount of the deposit order in respect of the holiday pay claim because of the low value of that claim, in this case the value of the claim would be higher and therefore I see no need to reduce the proposed deposit on that basis. Taking into account the claimant's financial means and the need to set the deposit at a level which indicates the limited prospects of the claim, I order that the claimant be required to pay a deposit of £50 to continue this claim against the first respondent, and a further £50 to continue this claim against the second respondent. If he fails to do so, then the claim will be struck out against one or both respondents as applicable.

<u>Discrimination arising from disability</u>

56. Again, at this stage, both disability and knowledge of disability remain in dispute, although neither respondent sought to argue that the claim should be struck out on that basis.

57. Discrimination arising from disability occurs where:

    a. Something arises in consequence of the claimant's disability;
    b. The claimant is treated unfavourably by the respondent(s) because of that; and
    c. The respondent(s) cannot show that the treatment is a proportionate means of achieving a legitimate aim.

58. The claimant says that the something that arose in consequence of his disability was that he used PPE equipment (specifically the UV spray). As outlined above, I think this will be difficult for him to show. However, even if he does, he would need to show that he was treated unfavourably because he used the PPE equipment. The two elements of "unfavourable treatment" that the claimant relies upon are (a) sending him home after the incident on 1 August and (b) the suspension of his license by the SIA. In relation to the latter, the SIA is not party to these proceedings although I note in his further particulars he refers to "aiding" the suspension of his license which could theoretically relate to the respondents.

59. In relation to sending him home after the incident, I cannot see that this can realistically amount to "unfavourable treatment". He was sent home on full pay, without suspension and in fact was permitted to work only the following week again, showing that this was not a permanent state of affairs. To the contrary, sending an individual home who has been in an altercation with a member of the public which has led to the police attending the incident, whether or not that member of staff was at fault in any way, seems sensible and in the interests of all concerned, including the claimant. The respondents have clear legitimate aims in order to protect the public, clients, the business and the claimant himself, and I cannot see him showing that sending someone home in this situation on full pay was anything other than a proportionate response.

60. In relation to the suspension of his license, clearly the first and second respondents did not do that. To the extent that the claimant seeks to argue that they in some way facilitated that, this claim is also bound to fail. In circumstances where the SIA is investigating an incident, it is incumbent upon the first and second respondents to assist in that investigation. I believe the claimant says that he was permitted to wear the PPE and that it was falsely reported to the SIA that he was not, however for that claim to succeed the claimant would need to show that (a) he used the PPE because of his disability (as outlined above this is inconsistent with what his claim form says), (b) that the respondents made a false report to the SIA because he had used his PPE, and (c) that this was not a proportionate means of achieving a legitimate aim. In relation to point (b), I cannot see how he will be able to show that the reason for any false reporting (if indeed there was any, I understand the respondents do not accept this) was that he had used the PPE that he says he was permitted to have. The claimant's case is also inconsistent with his claim for reasonable adjustments which is based on him not being allowed PPE, in contrast to this claim which appears to be on the basis that he was allowed the PPE.

61. It is worth adding that, subsequent to his claim form, the claimant has also referred to events which occurred prior to 2021. For the avoidance of doubt, these are not part of his pleaded claim and I have not considered them here. They would of course also be out of time in any case.

62. I conclude that the claimant's claim for discrimination arising from disability has no reasonable prospects of success and I strike out that claim against both respondents.

Detriment under section 44 Employment Rights Act 1996 (health and safety)

63. I consider first whether the claimant was designated by either respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. I conclude that he was not. It is certainly true that the nature of a door supervisor's role means that from time to time they will come across situations where they have to consider health and safety when determining how to deal with those situations. That is not the same as being designated to carry out activities in connection with preventing or reducing risks to health and safety, in the same way that a health and safety representative is.

64. The detriment on which the claimant relies is
    c. Being sent home early on the night of 1 August
    d. Being investigated by the third and fourth respondents
    e. A suspension of his license by the fourth respondent

65. In his further particulars the claimant specifically states that detriments (b) and (c) above are against the 3rd and/or 4th respondents, and given that they are not party to this claim, those claims must fail.

66. In relation to being sent home early, for all the reasons set out above, I cannot see that the claimant will be able to show that this was a detriment.

67. Insofar as the claimant also claims that, in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger, again the claimant's claim is bound to fail. He will need to show that he suffered a detriment because he took those appropriate steps. The appropriate steps he will rely on are using PPE, and again the relevant detriment relied on is being sent home (the others having fallen away given the other respondents are no longer party to the claim). As outlined above, being sent home on full pay in these circumstances is not a detriment. In any case, I would add that again there is an inconsistency in the claimant's argument in that on the one hand he argues that the reason for having the PPE (and therefore for having to use the PPE) is because of his disability to help communication and with memory issues, and on the other hand for the purposes of this claim he argues that the use of the PPE was to protect himself and others from circumstances of danger (which is unrelated to his disability).

68. The claimant's claims under section 44 of the Employment Rights Act 1996 are struck out for having no reasonable prospects of success.

Detriment under section 47B Employment Rights Act 1996 (protected disclosure)

69. The claimant says that his protected disclosures were reporting a crime and/or health and safety breaches. Although he focuses heavily on reporting matters to the fourth respondent, taking his evidence at his highest he has also said that he reported it to the first and second respondents so I consider this application on the basis that this happened and proceed on the assumption that he made a protected disclosure (albeit that I make no finding as to whether he in fact did or not as this would be a matter for evidence).

70. To succeed in his claim, he would need to show that he suffered a detriment on the ground that he made that protected disclosure. Again the detriment relied on is being sent home on full pay and/or the suspension of his license / provision of information which led to the suspension of his license. In relation to the former, again I do not see that this can amount to a detriment. In addition, for both alleged detriments he would need to show that the reason for being sent home and/or a disclosure being made to the third or fourth respondent which led to his license being suspended, was on the ground of him having made a protected disclosure: it was plainly not, it was because he had sprayed someone in the face with UV spray and the police had been called.

71. This claim against both respondents is struck out for having no reasonable prospects of success.

Next steps

72. Once it is clear which elements of the claims will proceed (depending on whether or not the claimant pays the required deposits), the Tribunal will consider whether it is necessary to list any further preliminary hearings or whether a final hearing can be listed (and if so the duration of such hearing). In addition, if the claimant does pay a deposit in order to continue with his claim for reasonable adjustments, orders will be sent requiring the claimant to provide an impact statement and/or additional information regarding his disability, however this is not required unless and until the claimant has paid a deposit in order to continue with this aspect of his claim.

73. I was also asked to consider a document which had been redacted at page 183 of the file used at the hearing on 6 September 2022, as the respondents were concerned that the redacted section may contain relevant information. The claimant had submitted on 6 September 2022 that it was irrelevant and not related to his disability. Having reviewed that wording, I conclude that (a) it is related to his potential disability and (b) it is relevant and should be disclosed (and should have been disclosed in full prior to the hearing on 6 September 2022). This is on the basis that it refers specifically to an example of where the author believes that the claimant appears to struggle to understand social situations and respond appropriately, which is related to his disability and also relevant to these proceedings. When sending the document to the Tribunal, the claimant indicated that he felt it was not part of his disability but perceptions, views or opinions which were out of proportion and lacking insight into the individual incidents. The claimant would be free to make those observations as part of any future hearing and the fact the claimant does not agree with the comment made in the document does not mean that it is not relevant. The claimant is therefore required to provide an unredacted copy of this page to the respondents as part of his disclosure in these proceedings (and please note that this should form part of disclosure whether or not the claimant decides to proceed with his claim for disability discrimination).

Case No: 1303721/2021

Employment Judge Edmonds

7 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

.....
FOR EMPLOYMENT TRIBUNALS

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3033. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: **HMCTS Finance Support Centre**
Temple Quay House
2 The Square
Bristol
BS1 6DG

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order