EMPLOYMENT TRIBUNALS

Claimant: **Mr T. Azam**

Respondent: **IBM United Kingdom Limited**

Heard at: **Birmingham** **On:** **20,21 and 22 February 2023**
By CVP

Before: **Regional Employment Findlay**

Representation
Claimant: In person
Respondent: Mr A Edge, Counsel

JUDGMENT

The following allegations (numbered as set out in the order dated 22 November 2022 (as corrected) and the attached List of Issues are struck out:
That part of 3.2.4 relating to the claimant being asked to join calls when they are "of no benefit to him";
3.2.5; 5.1.3; 5.1.4; 5.1.5; 5.1.6; 5.1.7; 5.1.8; 5.1.13;5.1.14;5.1.15;5.1.16; 5.1.17; 5.1.18;5.1.20;6.2.2;6.2.5; 6.2.6 in respect of the allegation that Delia Abel told the claimant that promotion is not guaranteed;6.2.8.; and the allegations so struck out are totally without merit.
The remaining allegations may proceed to final hearing subject to the deposits ordered by separate Order.

Reasonable Adjustments for the Hearing: I checked with the claimant at the start of the hearing and regularly throughout whether he needed a break, and breaks were permitted as necessary. The claimant said, at the start of the hearing, that he did not think that the tribunal lighting would affect him adversely. Again, I checked with him various points and he confirmed that there was no need to adjust them.

Issues

1. This Hearing was listed following a 1 day Case Management Hearing on the 9 November 2022 to consider the Respondent's applications for strike-out Orders/deposit Orders contained in a letter dated 3 November 2022. The applications were clarified, in accordance with my directions, in a letter from the respondent dated 20 January 2023. The applications are made on the alternative bases that the complaints in question are scandalous or vexatious (on the basis that they are an abuse of process) or alternatively, that the complaints identified have no reasonable prospects of success or have little reasonable prospects of success. If I find that any of them have little reasonable prospects of success I can order a deposit to be paid. I have considered both parties' submissions (for which I am very grateful) and have taken a step back and considered matters in the round before reaching my conclusions.

The Law

2. **Rule 37** of the Employment Tribunal Rules 2013 provides that at any stage of the proceedings, either on its own initiative or on 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…

3. **Rule 39** of the 2013 rules provides that, (1) where at a preliminary hearing… 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… to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument. (2) the tribunal shall make reasonable inquiries into the paying party's ability to pay the deposit and shall have regard to any such information when deciding the amount of the deposit. The Tribunal has, on more than one occasion (the most recent being on the 9 November 2022) given the Claimant the opportunity to provide evidence of his means (on the last occasion by the 7 February 2023). The Claimant has chosen, as he may do, not to provide that evidence.

4. Abuse of process such that all or part of a claim is scandalous or vexatious: The relevant law is set out in the case of **Virgin Atlantic Airways -v- Zodiac Seats UK Ltd 2014 AC 160** in the Supreme Court. At paragraph 17, Lord Sumption set out the general principles which apply when an issue has previously been litigated, including the following:

   i. Once a cause of action has been held to exist or not, that cannot be challenged by either party in subsequent proceedings.

   ii. In respect of issue estoppel, even if the cause of action is not the same (for example it involves the same facts, but a different legal label) if the same issue necessarily arises in both sets of proceedings (for example, whether some interaction did or not take place) if it is decided in the first litigation between the same parties in one way or another, it is binding on them.

   iii. If a matter both could and should have been raised in previous proceedings, it cannot then be raised in later proceedings. This is called the rule in **Henderson v Henderson [(1843) 3 Hare 100, 115]**. If a point properly belonged to the subject matter of the first litigation, to use Lord Sumption's words, and the parties (using reasonable care and diligence) could and should have raised it at the time, it cannot be raised in later proceedings.

   iv. This rule is based on the public interest in finality of litigation, and the saying is that a party "should not be twice vexed or harassed in the same matter". The basic question is whether the raising of the matter subsequently amounts to unjust harassment of a party. The fact that the matter simply **could** have been raised previously is not enough, the public and private interests involved must be balanced and a decision taken, based on all the relevant facts, as to whether a party is misusing or abusing the process of the Court or Tribunal by raising an issue which could have been raised before. Quoting Mr Justice Pepperall in the High Court, in the **Mansing Mooorjani** case, **[2019] EWHC 1229 (TCC)** the onus is on the applicant, here the Respondent, to establish an abuse of process and the simple fact that the Claimant could have taken the point in the first action is not conclusive in itself, there has to be some abuse or "unjust harassment" involved.

   v. In **Attorney General v Barker [2000] 1 FLR 759**, Bingham LCJ described **vexatious** proceedings as having "little or no basis in law (or at least no discernible basis), that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment, and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of process of the court, meaning a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

5. So far as the question of **reasonable prospects of success** is concerned, the case of **Eszias v North Glamorgan NHS Trust** [2007] IRLR 603 is an employment case in the Court of Appeal where it was held that the Tribunal should consider whether the prospects of success are **realistic as opposed to fanciful**, and that it would be **exceptional** for a case to be struck out where a relevant dispute of fact exists. In those exceptional cases, it would depend on the nature of the factual dispute in question, for

example whether facts alleged are inconsistent with undisputed contemporaneous documentation or not.

6. I remind myself that striking out a case is a draconian step and that the Claimant's case must, at all times at this preliminary stage, be taken at its highest. I have also considered whether any relevant amendment would give any of these allegations realistic prospects of success. the claimant did not apply to amend, but where appropriate I asked him for further details in order to properly understand his allegations.
7. In reaching my decisions on these matters, and exercising my powers under the Rules, I must seek to give effect to the overriding objective set out in Rule 2, to deal with this case fairly and justly, including with regard to the matters set out at Rule 2 (a) to (e).
8. In relation to the substantive law, the claimant's claims were substantially clarified at the preliminary hearing on 9 November 2022. This identified allegations of direct race or religious discrimination, failure to make reasonable adjustments contrary to sections 20 - 22 of the Equality Act 2010, harassment related to disability and race and of victimisation under section 27 of the 2010 Act.
9. The strike out applications relate to specified numbered allegations of direct discrimination, harassment and victimization (the numbering relates to the corrected numbering in the November 2022 Order), and to claim 15, where the claimant asserts he is claiming in respect of race, disability, religion or belief discrimination, victimization, harassment and "bullying" and is making claims under sections 6, 9, 19, 20,21, 26 and 27 of the 2010 Act. Section 19 is obviously a reference to indirect discrimination.
10. I have referred myself to the legislative provisions cited. So far is relevant, section 13 of the 2010 Act deals with **direct discrimination** and paragraph (1) provides that a person ("A") discriminates against another ("B") if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
11. The claimant alleges that his protected characteristics are that he is Asian, and he relies upon his colour in respect of race; that he is Muslim in respect of religion or belief. The previous tribunal found that the claimant was a disabled person as a result of anxiety and depression between the 23rd of June 2020 and the 5th of August 2020. In its most recent combined response (dated the 20th of January 2023) the respondent accepts that the claimant was a disabled person from the 23rd of June 2020, and that it had constructive knowledge of his disability from that date (paragraph 133 of grounds).
12. The claimant mentions indirect discrimination in claim 15, in box15 "The issue is they were openly humiliating me about my education and that it is worthless, and how they were better than me. The conversation was directed to me. I believe the employees of this company to be in breach of confidentiality, breach the equality Act section 6,9, 19, 20, 21, 26 and 27. They used this behaviour to indirectly discriminate me and felt it to be discriminative [sic]".
13. Section 19 provides: "A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
    (a) A applies it, or would apply it to persons with whom B does not share the characteristic;
    (b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
    (c) It puts, or would put B at that disadvantage, and
    (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Section 6(3) of the 2010 Act provides that " In relation to the protected characteristic of disability, (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability and (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability."

14. Section 26 of the Equality Act 2010 provides that a person (A) harasses another (B) if: (a) A engages in unwanted conduct related to a relevant protected characteristic; and (b) the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. (4) in deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account : (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.

15. Section 27 of the 2010 Act provides that a person (A) victimises another person (B) if

A subjects B to a detriment because B does a protected act. In paragraph 153 of its grounds of resistance, the respondent accepts that the claimants previous claims amount to protected acts.

16. Section 23(1) of the 2010 Act provides that on a comparison of cases for the purposes of certain sections (including section 13, direct discrimination, and 19, indirect discrimination) there must be no material difference between the circumstances relating to each case.

17. I have referred myself to the provisions regarding the burden of proof in section 136(2) of the 2010 Act, so that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold the contravention occurred. Subsection 3 provides, however, that subsection 2 does not apply if A shows that A did not contravene the provision. I also remind myself of the case of the principles in the case of **Madarassy** that a mere difference in status and a difference in treatment only indicates the possibility of discrimination, and is not sufficient in itself for an inference of discrimination to be drawn.

18. After I had delivered judgment in respect of the strike and deposit applications, Mr Edge asked me to make findings about whether any of the complaints made by the claimant were totally without merit. He cited the case of **Nursing and Midwifery Council and another v Harrold (no. 2) [2016] IRLR 497.** In that case, Elisabeth Laing J suggested, in paragraph 139, that, now that the High Court had recognised that the power to make CROs under the inherent jurisdiction extends to orders to protect the process of the ET from abuse, it would be desirable for ETs, when they make decisions in weak claims, expressly to consider, and to make a finding on, the question of whether the claim (or application) is totally without merit ("TWM").

19. Mr Edge also referred me to the case of **Sartipy v Tigris Industries Inc. [2019] 1 WLR 5892.** At paragraph 27, Males LJ says that a claim or application is totally without merit if it is bound to fail, in the sense that there is no rational basis on which it could succeed. He goes on to say that the claim or application need not use if, made in bad faith, or supported by false evidence or documents in order to be totally without merit, but if it is, that will reinforce the case for a civil restraint order.

Procedural Background facts

20. In January 2022, the Claimant's first 6 claims were heard by Judge Flood and Members(claim 1306715/2020 and others). There were 11 days of evidence. Before that Hearing, there had been three Preliminary Hearings before me to determine the issues to be dealt with in the first 6 claims received in the Tribunal. The other claims, that is claims 7-19, were stayed pending that Hearing and the ensuing judgment. The preliminary hearings in respect of claims 1-6 resulted in an agreed List of Issues setting out allegations of direct race discrimination, direct disability discrimination, direct religion or belief discrimination and race related harassment and victimisation. The Tribunal, in a judgment running to 95 pages, dismissed the claims.

21. I need to consider the position relating to any appeal from that judgment: the Claimant had, in previous correspondence, indicated an intention to appeal, but as far as I can ascertain Midlands West Employment Tribunal has not to date received notice that an appeal has been accepted by the Employment Appeal Tribunal, and nor has the Respondent. The Claimant, upon further questioning, said that he had appealed to the Appeal Tribunal in London within the 42 days allowed, but had been told that his appeal was not properly instituted. As a result he had to send in more documents (which he believes were copies of the Respondent's responses in the various claims). He did so but has not yet received confirmation that his appeal has been accepted. The reasons for the judgment in claims 1-6 were sent to the parties on the 21 June 2022, so that the appeal would have needed to be lodged by early August 2022.

22. On the morning of the second day of the Preliminary Hearing, the Claimant applied (before replying to the Respondent's submissions) to postpone this Hearing pending the outcome of any appeal. After hearing both parties and considering the overriding objective, I refused the postponement for reasons I gave at the time; these included that there was no evidence that an appeal has yet been accepted and that the Respondent's

application is not solely based on the judgment in question.

23. There is a Table showing the claims covered by this judgment attached.

Application of Law to Facts

24. So the first basis of the Respondent's application is abuse of process. As indicated at page 18 of the Respondent's skeleton argument, this relates to issues 5.1.3, 5.1.4, 5.1.5, 5.1.6, 5.1.7, 5.1.8 and 5.1.16 and some associated allegations of victimisation. By way of context, claims 1-6 were issued between the 22 July and the 25 October 2020, and the allegations in the first 6 claims covered the period December 2016 – October 2020. Claims 3, 4 and 5 were all issued on the same date, the 19 October 2020. Claim 8 was actually issued before claim 6, claim 8 being issued on the 20 October 2020, but was issued in Bristol and transferred to Midlands West, hence was received by the respondent after claim 7 was issued on the 7 December 2020.

25. **Allegation 5.1.3:** this is the claim in claim 7, described as disability related harassment, and involves the Claimant being asked to join a call first, before other colleagues, so that, he alleges, he could be questioned, and then others were given credit for his ideas. At the initial Preliminary Hearing, the Claimant accepted this "may" have been covered by claims 1-6. This is a general undated allegation in the claim made on the 7 December 2020.

26. The general complaint of the Claimant not being given credit for his work was considered in the first claim and goes back as far a 2017 – see paragraphs 1.25, 9.27, 9.33, 9.43, 9.59, 9.70, 9.81 and 9.98 in the judgment on the first 6 claims, characterised as direct discrimination and victimisation. At paragraph 9.99, the Tribunal accepted the outcome of an internal report looking into an example of the Claimant allegedly not being given credit (and others being given credit) for his work. The Tribunal agreed with the outcome of the investigation on which the internal report was based, that the Claimant believed that anything that did not go as he would like was an example of discrimination. The Tribunal did not agree with his viewpoint. Although these findings are not in the context of disability related harassment, they do deal with and reject the Claimant's contention that others were being given credit for his work.

27. Allegation 5.1.3 in the current claims is very vague and general, and the Claimant has not provided further details beyond saying that Delia Abel's attitude to him changed following a situation which arose with Paul Briscoe. Mr Briscoe is mentioned in the previous judgment at paragraph 9.66, where the Tribunal found that the Claimant was not making a genuine complaint of discrimination against him (in a situation where Mr Briscoe had not given him feedback). It is clear that this relates to events in 2019.

28. It could be argued that the Tribunal found that Mr Briscoe had not discriminated against the Claimant, but I do not need to go that far. Applying the rule in Henderson that I have described earlier, the Claimant was plainly aware of the relevant issues regarding Mr Briscoe and Delia Abel's subsequent alleged change of attitude when the first 6 claims were made. In response to the Respondent's allegation that he could have brought any complaint involving Mr Briscoe (or about others getting credit for his work) earlier, the Claimant simply said that he "could have had I known that I could". However, the Claimant was plainly aware of the factual basis of his allegations in his previous claims, which he had expressed to include claims both of disability discrimination and of harassment, yet he chose not to characterise this particular complaint (regarding credit being given to others) as disability related harassment at the time.

29. As the general issue was widely canvassed and rejected in claims 1-6, I do consider that it would be an abuse of process to allow the Claimant to raise this again in such a broad and unparticularized fashion at this point. He was not able to clarify the allegation further at the hearing. There is a strong public interest in finality of judgments; the claimant has already had ample opportunity to air his grievances about this matter, and they were rejected by the Flood Tribunal. He was clearly aware that he could bring claims of disability related harassment at the time he brought his first six claims, but chose not to. If the respondent has to defend these claims again, it will involve some of the same witnesses giving the same (or very similar) evidence to that which they gave before, which was accepted by the previous Tribunal. It will cause significant disruption and expense to the respondent and further cost to the public purse, out of all proportion to any potential benefit to the claimant. This allegation is also so vague and general that, taking account of the Tribunal's decision in claims 1-6 and the lack of anything to

distinguish this claim, and the balancing the interests of the public, respondent and claimant, I consider it should be struck out as scandalous and vexatious (as an abuse of process) or alternatively as having no reasonable prospects of success given the findings of the Flood Tribunal.

30. For the reasons given above, I also consider that there is no rational basis upon which this complaint could succeed, and therefore it is totally without merit.

31. Regarding issues **5.1.4 and 5.1.6** "the silent treatment, mind games and generally delaying responses", characterized as complaints of disability related harassment, the Claimant again accepted he may have raised these allegations in earlier proceedings. Indeed, a very similar allegation is to be found in claim 5, lodged on the 19 October 2020. The allegations I am considering are made in claims 7 and 8, lodged in December and on the 20 October 2020 respectively. Given the proximity in time between claims 5 and 8 (1 day) it is highly likely that these refer to the same matters. The previous Tribunal did not accept that the Claimant's managers Mr McGlone and Ms. Abel played "mind games" with him. Further, even if the previous Judgment does not dispose of these issues, following the rule in Henderson, the Claimant clearly **could** have raised these matters before; this is so even if they cover anything significantly different, which on the face of it, they do not. in considering whether the claimant should have raised these matters, if indeed they are different to those raised in the first six claims, I do not consider that it is in the public interest for the Claimant to have a further opportunity to pursue these matters in a Tribunal of parallel jurisdiction. Within the first six claims he did assert that he was making complaints of disability related harassment, and if he chose not to characterise these complaints in that way that is his responsibility. The Respondent (and indeed the public purse) would be put to additional expense and trouble if he was given that opportunity. The Claimant had every opportunity to raise these matters in the first 6 claims relating to a nearly identical time period and in my view, it would unjustly harass the Respondent to permit him to raise these matters again now, in separate proceedings. I therefore strike out allegation 5.1.4 and 5.1.6 (on the basis either of Issue Estoppel or alternatively the rule in Henderson) and as being an abuse of process.

32. For the reasons given above, I do not consider that there is a rational basis upon which these allegations could succeed, and I therefore consider them to be totally without merit.

33. Regarding the Mentor Badge, this is allegations **5.1.5 and 5.1.16**, these are now put as disability, (or, in respect of 5.1.16) racial, or religious harassment. These are again raised in claim 8 made on the 20 October 2020 (that is, within the period covered by the first 6 claims) and in claim 12 made on the 17 March 2021. Insofar as the Mentor Badge was delayed by Delia Abel up until the 20 May 2020, the Tribunal (in the first 6 claims) found that Ms. Abel was not in a position to sign off the Mentor Badge (for non-discriminatory reasons), see paragraphs 30-31 and 9.113.

34. In issue 5.1.5 the Claimant refers to further delay in the period May – September 2020 and, by inference, continuing to the 17 March 2021. It was apparent from what the Claimant said on the second day of the Preliminary Hearing that he does not accept Judge Flood's Tribunal's findings about this, but neither does he give any new reasons or information as to why this continued delay amounted to discrimination. In the circumstances, I conclude that these complaints, based as they are on material before (or which could have been before) the first Tribunal, are an abuse of process (for the same reasons as apply to 5.1.4 and 5.1.6), are therefore scandalous and vexatious and/or have no reasonable prospect of success and are dismissed.

35. For the reasons given above, I do not consider that there is a rational basis upon which those allegations could succeed, and they are therefore totally without merit.

36. Regarding allegations **5.1.7 and 5.1.8 :** this relates to claim 8 and delay in carrying out a "checkpoint" meeting up to the 24 September 2020, and Ms. Abel failing to invite Sarah Shirley to the meeting when it was held. It is now put as disability related harassment. The Claimant could have characterised in this way in the first 6 claims, in which he had indicated he was claiming disability related harassment, but instead, he chose to characterize it as direct race discrimination. The factual basis was before the first Tribunal and they made findings at paragraph 9.117 of their judgment, finding that the burden of proving discrimination did not shift, and accepting Ms. Abel's reasoning. As before, the Claimant had claimed disability discrimination and related harassment in

claims 1-6, but did not characterise this allegation in that way. In my view, there is issue estoppel due to the findings of the first Tribunal, but even if not, the rule in Henderson applies as the Claimant had claimed disability discrimination and harassment but chose not to apply that description to this allegation. In my view, therefore, it would be unjust harassment of the Respondent to allow this to be pursued now – this is a matter in respect of which not only the factual allegation but also the cause of action (disability related harassment) had been referred to in previous proceedings. In my view there is therefore a very strong argument for saying that not only could the claimant have proceeded on that basis, when he knew that a hearing lasting many days had been listed, but that he should have done so. The reasoning for striking out allegations 5.1.4 and 5.1.6 also applies. I also find there is no reasonable prospect of success given the findings of the Tribunal in the first 6 claims and these allegations are struck out.

37. Again, I do not consider that there is a rational basis upon which these allegations could succeed, and they are therefore totally without merit.

38. **Allegation 6.2.2** is a victimisation claim based on the factual background to allegations **5.1.5 to 5.1.8**, all of which have been struck out as an abuse of process and/or as having no reasonable prospect of success. The claimant did claim victimisation within the first 6 claims and could have characterised most of these matters in that way in those proceedings had he chosen to do so. Insofar as there is an overlap with the first six claims, I consider it would be unjust harassment of the respondents to allow these claims to proceed now for all the reasons given above. I also consider, given the findings of the previous tribunal, that the claimant has no reasonable prospects of successfully establishing that a reasonable person in his circumstances would consider themselves to have been placed at a disadvantage/detriment. For those reasons this allegation is also struck out. As with the other underlying allegations, I consider that there is no rational basis upon which this allegation could succeed, and that it is totally without merit.

39. Regarding allegations **3.2.2, 3.2.6, 6.2.7, 3.2.10 and 6.2.6,** (direct race discrimination and victimization) these collectively refer to a failure to promote the claimant or to give him a pay rise. The Claimant agreed that he had raised this general theme in his previous claims, but says that there have been 2 further incidences of white colleagues being promoted. In claim 12, lodged on the 17 March 2021, he says that colleagues AF, AB and NM were promoted and the Claimant was not, in circumstances of direct discrimination. He also says this amounted to victimisation. In that claim, he also says that Ms. Abel said that his promotion is not guaranteed and that she has ignored requests for promotion, and he characterises this as victimisation, allegation 6.2.6.

40. Finally, he also says that a person called “Sam”, or Norma Southam, discouraged him from applying for a “Band 8” job between the 26 and 28 April 2021; this is allegation 3.2.10. He alleges that this was direct race or religious discrimination. The Respondent points to the findings in the previous judgment about the Respondent’s promotion process, and the findings that the Claimant was at the time in question not prepared or ready for it in any case. The Flood Tribunal made findings that under the respondent’s processes, employees can only be promoted one band at a time.

41. Regarding the allegations re: the colleagues AF, AB and NM, I recognise that these situations are fact sensitive, but the findings made by the previous Tribunal, especially regarding the Claimant’s eligibility for promotion and the steps he had, or had not taken to pursue it, persuade me that the Claimant’s complaints 3.2.2, 3.2.6 and 6.2.7 have little reasonable prospects of success so that a deposit should be ordered if the Claimant wishes to pursue those. I have dealt with this in a separate order.

42. Likewise, regarding the allegation 3.2.10 and what is said to have happened with Sam or Norma Southam, discouraging the Claimant from applying for a Grade/Band 8 job, whilst I do not feel able to say this has no realistic prospect of success, I consider that, for all the reasons given in the original judgment, that it must have little reasonable prospect of success, so a deposit has been ordered in respect of that allegation also. Reasons for making the deposit orders have been given in a separate order.

43. Regarding **6.2.6**, this is an allegation of victimisation by Delia Abel made in claim 12, lodged on the 17 March 2021, regarding her alleged comment about promotion not being guaranteed. I find that complaint has no reasonable prospect of success and it is therefore struck out, partly due to the findings in the previous judgment but also because

it is simply a statement of fact, rather than capable of being a detriment in the circumstances of this case – taking account of the findings in the previous judgment, promotion is never guaranteed under the respondent's processes. In those circumstances, a reasonable employee in the claimant's situation would not consider themselves to be placed at a disadvantage by the comment.

44. I do not consider that there is a rational basis upon which the complaint about the comment regarding promotion not being guaranteed could succeed, and I consider that this particular allegation is totally without merit.

45. Regarding ignoring requests for promotion, that is **the particular allegation in 6.2.6 that Ms. Abel, after the period of time covered by the first 6 claims, continued to ignore the Claimant's request for promotion**. Due to the findings in the previous judgment, (e.g. at 9.3-9.6, 9.22- 9.25, 9.62, 9.76 and 47/8) this has little reasonable prospect of success and so a deposit has been ordered in respect of that argument, also.

46. Any other allegations referring to the failure to promote **during the period of the original judgment** should be struck out as having no reasonable prospect of success for the reasons given in the original judgment of the Flood Tribunal. I do not consider that there is any rational basis upon which any such allegations could succeed and they are therefore totally without merit.

47. Regarding **claim 15**, this is claim number **1304669/2021**, which was issued on the 31 October 2021. This relates purely to two separate conversations on the Respondent's "Slack" direct messaging system, which are replicated at pages 685 and 686. The first (short) conversation took place on the 6 September 2021, the second just under a month later, on the 5 October 2021. In the first, the Claimant's colleague George Bucklow-Hebbard asked if the degree level certificate requirement has been "waived" in connection with a Saudi project for which documentation was required. Ian Tyrrell replies on the same date, "no, George, but they are trying". The context was that Mr Bucklow-Hebbard did not have a degree level qualification.

48. On the 5 October 2021, on the next "slack" message, the Claimant says that he is waiting for his Master's degree to be attested. About 2 hours later, in the same chain, Mr Bucklow-Hebbard asks if he can proceed with getting other documents on the basis that the degree certificates will be waived. Ian Tyrell says they are arguing that degrees are irrelevant for this purpose. Martin Mitchell then says he taught pen-testing in Universities and would take Mr Bucklow-Hebbard over any of those students, that is the students he had taught, "even the good ones". This is obviously meant to be a compliment to Mr Bucklow-Hebbard. The Claimant may have been copied into this slack exchange, but there is no indication he was actively involved in the discussion at the time when Mr Bucklow-Hebbard raised a query, as opposed to 2 hours earlier when the Claimant had mentioned what he was doing. Martin Mitchell's comment is clearly directed at Mr Bucklow-Hebbard and the students he had taught, not the Claimant.

49. The Claimant has claimed that this amounts to racial and/or religious or disability discrimination, harassment and victimization and also indirect discrimination. He mentions sections 20 and 21, failure to make a reasonable adjustment also, in box 15 of the claim form. There is no indication on the face of the exchange itself that it was directed at the Claimant, or indicated that his education was "worthless" or that it was an attempt to humiliate him. The claimant's Masters degree was not discussed by those involved at all. There is nothing in the exchange to suggest that Mr Mitchell or Mr Bucklow-Hebbard knew about the claimant's claims to the Employment Tribunal. It is difficult to see how the comments could be construed as having the relevant purpose or effect in respect of the harassment claims.

50. When asked by me, the only additional information the Claimant could give me about Mr Mitchell, who is senior to him in the organization, is that he felt "uncomfortable" around Mr Mitchell and that Mr Mitchell had once said "pass the popcorn" when the Claimant was about to commence a presentation. The Claimant had felt this was demeaning of him and designed to undermine him. In my view, on any objective reading, it is difficult to see how that could be a derogatory comment or that it could be seen as having placed the claimant at a disadvantage by any reasonable person. If anything, possession of a

Masters degree, in a situation where degree level qualification was required was an advantage over individuals like Mr Bucklow Hebbard who do not have a degree level qualification and were dependent upon the respondent obtaining a waiver to participate in the project. I consider that the victimisation claim has little realistic prospects of success.

51. I find it difficult to understand how the claimant says he was placed at a particular disadvantage, or that persons sharing his protected characteristics were placed at a particular disadvantage in the context of the indirect discrimination claim. If the provision criterion or practice is, for example, flattering those without degree level qualification, it is difficult to see how those sharing the claimant's protected characteristics, whether of race religion or disability would be placed at a particular disadvantage by such a provision criterion or practise. At a later point in the hearing, after I had ruled on the respondent's application as to whether, in principle, allegations should be struck out or a deposit ordered, the claimant said that he was not making an indirect discrimination claim within claim 15.

52. Likewise, insofar as the claimant is attempting to make a complaint of failure to make a reasonable adjustment, In my view the claimant will struggle to establish but he was placed at a substantial disadvantage by the comments made in comparison to persons who are not disabled. At a later point in the hearing, after I had given my decision on the principle of whether the various allegations should be struck out or whether a deposit should be ordered, the claimant said that the provision criterion or practise for the purposes of the reasonable adjustments claim related to making him work with Mr Bucklow Hebbard and Mr. Mitchell, because he had previously complained about them. as his previous complaints have been rejected by Judge Flood's tribunal, it's just difficult to see it is difficult to see, again, how such an allegation can succeed.

53. In all the circumstances, I consider that these complaints have little reasonable prospect of success, that is those in claim 15, and therefore a deposit has been ordered. Reasons are given in the separate deposit order.

54. At allegation **3.2.5 and 5.1.14**, these relate to Rhonda Childress, who is a Vice President and "IBM Fellow" based in the United States, and is said to amount to direct race or religious discrimination and racial and disability harassment. The allegation in claim 11 is that Rhonda Childress has blamed the Claimant for "missing something" and has been influenced by Charles Henderson to do so. The emails in relation to this are provided by the Claimant and are on pages 637-645 of the bundle. On page 640 Rhonda Childress said to Kelly Malone, another IBM employee (Penetration Testing Quality Assurance Lead) in the US: "Kelly, can you see if this was tested and how the heck we missed this (or did we?)". Looking at this document objectively, Rhonda Childress is not accusing anyone of missing the issue; she qualifies what she means when she says "or did we?". In other words, she is simply raising the question of whether or not someone (unidentified) on the part of the Respondent had missed the issue in question. The Claimant referred me to page 646, where Kelly Malone, having investigated the matter, tells the Claimant "that the team changed the code, big devsecops miss, I defended you to Rhonda and Jack STSM". She goes on to compliment the Claimant saying, "I let them know that you're one of the more experienced testers, and wouldn't miss this."

55. So, taking the Claimant's case at its highest, looking at the documents he was never directly accused by Rhonda Childress of missing anything, his colleague Kelly made it plain to the others involved that it was very unlikely the claimant would miss the issue, and within days it was identified that the fault lay elsewhere. I cannot see how this could amount to a detriment, direct racial or religious discrimination, or racial or disability harassment and for those reasons, I consider this allegation has no reasonable prospects of success and it is struck out. I do not consider that there is any rational basis upon which this allegation could succeed, and therefore it is totally without merit.

56. Allegation **5.1.15** regarding Alex Montaire, racial and religious harassment. The allegation made by the Claimant was that Alex Montaire included Scott Brink and Daniel Pagan on an email chain to humiliate the Claimant by suggesting there was no issue when the Claimant said there was, and when the true situation was that Alex Montaire simply could not replicate the issue. The Claimant subsequently provided the relevant email chain. At page 631, Kelly Malone sends the Claimant an email on the 23 October 2010 asking him to listen to a recording where Alex "describes why the dangerous HTTP

verbs found by the Claimant may not be a finding" and asks the Claimant "for his feedback" so they can "open" or "close" the issue. The Claimant said during his submissions, although it does not appear in his claim and was not particularised previously, that on the recording Alex Montaire laughed and said "he would not have raised this himself" or words to that effect. The Claimant said that "no one else laughed" in response. After the Claimant provided a further explanation on the 25 October 2020 and set out his reasons in detail (page 630-631) Alex Montaire says "I agree with Tayyib, delete is a dangerous verb and they should have used something else.". He also said he thought the issue "had now been remediated".

57. Taking this issue at its highest, even if Mr Montaire did initially disagree with the claimant's view that the issue was significant, and whether or not he appeared to laugh about it on the call, I do not consider that, looked at overall, there is anything to suggest that this one-off incident amounted to any kind of discriminatory harassment. In my view, it cannot objectively be said to have the necessary purpose or effect. The Claimant makes no other complaint about Mr Montaire, who, within a short space time agreed with the Claimant. This allegation is therefore struck out as having no reasonable prospect of success. I also consider that there is no reasonable basis upon which this allegation could succeed, and it is there for totally without merit.

58. Allegations **5.1.18 and 6.2.8,** Delia Abel complaining that the Claimant was late for a meeting. This is set out in claim 13, the allegation being that Delia Abel contacted the Claimant at 12.01 saying that she had him down for a meeting at 11.30am and, the Claimant alleges, she was complaining that she had been waiting since then. He alleges that this is race and disability harassment and also victimisation. The "Slack" conversation is at page 655. In my view, taken at its highest, the tone of this exchange is, looked at objectively, anything but harassing, On 23 March 2021, Delia Abel observes that she assumes the Claimant is "busy with project work, Webex [a communications system used by the respondent] was open for the 121@ 11.30 the time we discussed last week in terms of catching up on the checkpoint, promo slides that you had put together and were going to share, admin activities." She also asks "how is your week is going, have you now seen your GP given what you shared with me, have they provided support/guidance to you" and she asks if there is "anything else the Respondent can do" to help him? She also asks if Medigold (Occupational Health provider) had come back to him or discussed the reasons why they need a consent form from him. The Claimant then, in writing, accuses Ms. Abel of not sending the invite or stating the meeting time, only the day. He says that his GP is going to "get in touch with someone for further help/support", and that he is still waiting for Medigold to get back to him. Ms. Abel replies saying that she has another slot later that day and has "no idea why the invite did not arrive, sending a screenshot [to show the meeting invite existed]".

59. Read objectively, she makes no complaint about waiting for the Claimant to join, and she does not adversely react to his accusation that "she has not sent him the invite", she simply observes that as far as she's aware, it has been sent. Reading this objectively and taking at its highest, despite the claimant's negative perception there is no complaint about her having to wait for the Claimant to join the call and it would not be reasonable for her actions to be perceived as having the required purpose or effect.

60. Regarding **allegation 6.2.8**, an allegation of victimization based on the same underlying facts, I do not consider that the claimant has any reasonable prospects of showing that a reasonable person in his circumstances would consider themselves to have been placed at a disadvantage or subjected to detriment. In these circumstances, I consider these allegations have no reasonable prospect of success and they are struck out. Likewise, I do not consider that there is any rational basis upon which these allegations could succeed, they are therefore totally without merit.

61. **Issues 5.1.17 and 6.2.5**: these relate to Delia Abel calling the Claimant without warning "late in the day" and are said to be disability related harassment and also victimisation in the claim brought on the 17 March 2021. This relates to a "Slack" conversation on the 17 March 2021 at 5.08pm, in other words, it is recorded in writing. The Claimant did not answer a call, and Ms. Abel left a message saying, "hello we need to catch up with you, appreciate it if you could give me a call on Slack or on mobile please". The Claimant called her back about 5 minutes later. Ms. Abel was the Claimant's line manager. The call was within working hours. There is no requirement for her to give notice of her calls.

62. I consider, taking account of the findings of the previous Tribunal, that this allegation has no reasonable prospect of success; and in addition, whatever the claimant's perception, in my view it would not be reasonable to regard it as having the required purpose or effect for harassment taking account of the surrounding circumstances and allegation 5.1.17 is struck out. The tone of the message is polite and it is not unreasonable for a manager to want to keep in touch with someone they are managing. Taking all of these circumstances into account, I do not consider that a reasonable person in the claimant's circumstances would consider themselves placed at a disadvantage/subjected to detriment by Ms Abel's actions in this respect. The victimization allegation (6.2.5) therefore, taking the claimant's case at its highest, has no reasonable prospects of success. I can see no rational basis upon which these allegations could succeed and they are therefore totally without merit.

63. Allegation **5.1.20**, Delia Abel trying to obtain the Claimant's medical records and then pretending Medigold had asked for them. This is an allegation of disability related harassment and relates to a report from Medigold (an Occupational Health provider used by the respondent) dated 30 November 2020 which was handed up to me with the Claimant's agreement, and is labeled "R2". In it, Doctor Weadick says, "It would also seem helpful to seek information from (the Claimant's) General Practitioner, regarding the awaited intervention. As and when such a report is received, it would seem prudent to review Mr Azam again". In my view, in this report Doctor Weadick is clearly inferring, at the very least, that information should be sought from the Claimant's GP, so that the Doctor can review Mr Azam again. The Claimant also points in that letter to a suggestion made by the Doctor about mediation, which he says the Respondent did not take up, but this has not been put forward to the Tribunal as a matter of discrimination of any kind in relation to the claims or allegations which are subject to this application.

64. On the 25 January 2021, Ms. Abel contacted Medigold (page 695 of the bundle) and asked Medigold to get the Claimant's consent so that Medigold could obtain the necessary documents from the General Practitioner. She actually quotes from Dr Weadick's letter. So the medical information would have gone straight to Medigold (as is usually the case with OH providers) in the first instance. Ms. Abel authorised Medigold to review the Claimant further once the information was received, **if Medigold deemed it prudent**. By the 27 April 2021 (so 3 months later) Ms. Abel sent the Claimant a message (at page 661) saying that , as agreed with the claimant following a 1 to 1 discussion she had previously held with him, she had checked with Medigold regarding the consent form. Medigold said they had not received it from the claimant. She sent a blank consent form for the Claimant to use. The claimant replied "Please can you ask them to get in touch with me directly. I hardly know you as my manager and this is my medical records, this is very personal information. So am a wary and concerned about this [sic]. Not sure why they are liaising with you and not me. Makes this even more suspicious for me. Worried that they have not even spoken to me. I am very concerned why they are emailing you about this."(p662/3).

65. Ms. Abel made it clear in her reply that, as she had apparently discussed with the claimant before, that neither she nor the Respondent would be able to see or receive the Claimant's GP records. She said "Medigold would like to see the medical records this was in the OH report they sent". The claimant replies, despite the material in Dr. Weadick's report: "This was not a request from them, You requested this, not medigold [sic]. They provided their report. You wanted further evidence and proof."

66. Ms Abel responds "We have discussed this before as per the OH report Medigold advised they needed my consent to approach you so that they could send you the consent form." Presumably, this was because it was the respondent who was paying for Medigold's work. The claimant says, in an apparent reference to the suggestion of mediation ; "They had already advised third party intervention, but you wanted it to remain internal, you were requesting this. You also mentioned that IBM don't do that and wanted to deal in-house." Ms Abel confirms that she gave her consent [for the further report] "and then they would contact you which is what they have done. I or IBM do not see your medical records. Medigold would like to see them so they can have a further discussion with you and this should then provide further guidance to you and IBM." She asked the Claimant to contact Medigold directly. She concludes "Take care and have a good evening". This is at pages 663-664.

67. So it is clear from the documentation that Delia Abel was not pretending Medigold had asked for the medical information, they (in the form of Dr. Weadick) had asked for a

report from the claimant's GP and would need the claimant's consent to get it. On the face of it, she was simply trying to facilitate the process by authorizing Medigold's work and following up to ensure that the claimant gave the necessary consent. She made it clear that she would not see the records herself. Taking the claimant's case at its highest, it was the claimant who was combative and accusatory to his manager, Ms Abel, in his messages about this. Ms Abel remained calm, reiterating that it was Medigold (via Doctor Weadick) who had suggested the further enquiries. She attempted to reassure the claimant and expressed concern for him, despite his tone towards her.

68. For all of those reasons I consider that despite the claimant's perception, Ms Abel's messages (and her behaviour as evidenced by them) could not reasonably be regarded as having the requisite purpose or effect, taking account of all the circumstances. This complaint of disability related harassment has no reasonable prospects of success and it is struck out. For the same reasons, I cannot see any rational basis upon which this allegation could succeed, and it is therefore totally without merit.

69. Next, regarding **Allegation 5.1.13** Team Meetings – this is characterised as calling the Claimant to meetings with people he has complained about when the meetings are of no benefit to him and is said to be racial harassment; and **3.2.4** failing to sanction colleagues who swear and talk over the Claimant at Friday meetings and asking the Claimant (again) to join calls which are of no benefit to him, which is said to be direct race discrimination. It is common ground that the meetings referred to are simply regular team meetings, relating to the "Team" of colleagues that the Claimant is part of. Whether the Claimant thinks they are of benefit to him or not is not the issue. They are meetings which all colleagues are expected to attend to discuss matters of relevance to that "Team". Taking it at its highest, simply calling the Claimant to join Team meetings, to which all team members are invited, including colleagues he has complained about, has no reasonable prospect of being established to be direct race discrimination or racial harassment. Everyone in the team is being treated in the same way by being invited to the meeting because they are members of that team, not because of race. There is no realistic or reasonable prospect of establishing the necessary purpose or effect for harassment – despite the claimant's clearly negative perception of this, in my view just calling a Team member to a Team meeting, to discuss matters of relevance to the Team and provide a forum for discussion, could not reasonably be regarded as having the statutory purpose or effect (even though the claimant has made complaints about some of the other Team members). It is intrinsically reasonable for an employer to wish to get members of the same team together to discuss matters of common interest, share mutually relevant information and build positive relationships. For that reason also, taking the claimant's case at its highest, I do not consider that a reasonable person in the claimant's circumstances would consider simply being called to participate in Team meetings to be a disadvantage/detriment and the relevant part of allegation **3.2.4** is struck out also as having no reasonable prospect of success.

70. So I consider that there is no rational basis upon which allegation 5.1.13 and, so far as it simply relates to calling the claimant to team meetings, allegation 3.2.4 could succeed, and to that extent they are totally without merit.

71. Regarding the allegation or complaint of failing to sanction a colleague (called Ryan Ward) for swearing, however, the Claimant explained that he considers that Mr Ward has been treated more favourably (when he behaves in an inappropriate manner by repeatedly swearing in these meetings) than the Claimant has been treated for behaviour that has been characterised as inappropriate by his managers. This part of Allegation 3.2.4 will depend on the evidence and facts found, and can proceed to Final Hearing.

72. Regarding **Allegation 5.1.11** delay in carrying out the 2021 "checkpoint" assessment, this is referred to in Claim 10 and is characterised as disability related harassment. The allegation is more specifically said to be delay in getting it ready for submission to the "upline" manager, and is again an allegation against Ms. Abel. Again, this is recorded in a "Slack" conversation at page 647 dated 25 February 2021. The Claimant starts by saying "My checkpoint is still sitting with you, when will this be completed. Not sure why this is still sat at your desk, [sic] surely this should have moved onto up-line manager. Please can you give me an update." Ms. Abel replies that "all checkpoint discussions were completed and direct reports aware of dimensions outcomes in January", this being February. She continues "I have received a new laptop this week and this is the first day I am now running with all tools/accesses and not off my phone." She said that she intended to complete those checkpoints not yet completed in the next few working days

"work diary allowing" and thanked the claimant for his understanding with this.

73. This suggests that it was not merely the Claimant's checkpoint report that was awaiting transfer to the "upline" manager, but those of some of Ms Abel's other direct reports also. The claimant does not dispute that others, too, had their checkpoints delayed, but continues: "Why would Brian share those results if your my manager" [sic]. Although accepting that he *is* aware of the outcomes, he continues "This needs to be shown as complete in the checkpoint tool…". Ms Abel reiterates that she has not had access to "IBM Tools" and just needs to complete the "Tool" steps for some of her team due to not having a laptop, and expects to have done this in the next few days.

74. Given the fact that the claimant was not the only person whose checkpoint had not been transferred to the upline manager, the relatively short period of the delay and the previous findings by the Flood tribunal regarding the Claimant's interactions with Ms. Abel, I consider this allegation has little reasonable prospect of success and a deposit has been directed in that regard.

75. So, I believe that covers all of the allegations which were the subject of this application. I just want to recap on the issues for which deposits were ordered and also to note that I have not taken any action in respect of 3.2.4 so far as it relates to treatment of Ryan Ward which can go forward to the final hearing.

Signed by the Judge electronically:

Regional Employment Judge Findlay

Date: 20 March 2023

SCHEDULE OF CLAIMS

1311073.2020	claim 7;
1405631.2020	claim 8;
1300452.2021	claim 9;
1300542.2021	claim 10;
1300675.2021	claim 11;
1300857.2021	claim 12;
1301367.2021	claim 13;
1301368.2021	claim 14;
1304669.2021	claim 15;
1304670.2021	claim 16;
1404230.2021	claim 17;
1303599.2022	claim 18;
1303607.2022	claim 19.