EMPLOYMENT TRIBUNALS

Claimant: Mr S Boros

Respondent: AAH Pharmaceuticals Ltd

Heard at: Manchester (by CVP) **On:** 6 January 2023 and 16 February 2023 (in Chambers)

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Litigant in person
Respondent: Mr S Singh Maini-Thompson (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of breach of contract is dismissed on withdrawal.

2. The claimant's claim of race-related harassment is dismissed on withdrawal.

3. The respondent's application to strike out the claimant's claims of direct race discrimination and victimisation is refused.

REASONS

Introduction

1. On 6 January 2023 I conducted an open preliminary hearing in this case. It was conducted remotely by CVP. Mr Boros represented himself and was supported and assisted by his wife. The respondent was represented by Mr Maini-Thompson of Counsel. There was a respondent's preliminary hearing bundle and a smaller claimant's preliminary hearing bundle. I have explained more about those bundles in my case management order of today's date.

2. Employment Judge Doyle dealt with the previous case management hearing on 27 July 2022. He had listed the hearing which took place on 6 January 2023 to

determine the respondent's application to strike out the claim or any part of it on the ground that it had no reasonable prospect of success; and alternatively, that the claim or any part of it should be made subject to a deposit order on the ground that it had little reasonable prospect of success. By an email dated 26 November 2022 the claimant applied to amend his claim to add 3 allegations of victimisation in breach of s.27 of the Equality Act 2010. The Tribunal directed that that application also be considered at the preliminary hearing.

3. I decided that the application to amend should be granted. I gave oral reasons for that decision which the claimant requested in writing. They are set out in Annex B to my case management order of today's date.

4. I then heard the respondent's application for strike out/deposit orders and the claimant's submissions in response. I heard from the claimant about his financial circumstances so I could take those into account if I decided to make a deposit order. I made case management orders but there was not time to deliberate and give my decision on the strike out/deposit applications. I reserved my decision in relation to those applications and considered them in chambers on 16 February 2023, giving the parties an opportunity to make written submissions.

5. After granting the amendment, the claimant's claim consists of 11 allegations. I have set them out in the Annex to this judgment. There are the 8 allegations of direct race discrimination identified at the preliminary hearing which Employment Judge Doyle conducted (allegations RD1 to RD8) and the 3 allegations of victimisation which I allowed by way of amendment (allegations V1 to V3).

6. Employment Judge Doyle recorded that at the preliminary hearing on 27 July 2022 the claimant had confirmed he was not pursuing his claims of breach of contract and race-related harassment. I have confirmed the dismissal of those claims on withdrawal in my judgment.

Summary of the Case

7. The claimant is Romanian. He has been employed by the respondent as a warehouse operative and Forklift Truck Driver ("FLT") since 26 April 2015, based at its Warrington branch. There were three 8-hour shifts per day: 6.00am. to 2.00pm ("the morning shift"); 2.00pm to 10.00pm ("the afternoon shift"); and 10.00pm to 6.00am ("the night shift"). The hourly rate for each shift was different. The claimant worked the afternoon shift but sometimes worked extra hours, e.g. finishing at 11.00pm.

8. In August 2021 the respondent announced increased hourly rates for each shift. The new afternoon shift rate was £11.75 per hour. The night shift rate was £12.90 per hour. The claimant's case is that he understood that that was a change to the basic hourly rate for each shift. However, although his September 2021 payslip showed his basic rate as £11.75 per hour, his October and November 2021 payslips showed his basic pay at £9.17 per hour (i.e. the old hourly rate).

9. The respondent says that although the post-September 2021 payslips showed the claimant's basic rate at £9.17 per hour he was paid an FLT allowance which effectively "topped up" his pay to £11.75 per hour. The claimant disputes that the allowance meant that he received £11.75 per hour. He also says the respondent

employed white British workers on a basic rate of £11.75 per hour (allegations RQ2 and RD3).

10. The claimant queried this issue with his Branch Manager, Ms Holding. On 15 December 2021 she told the claimant that the £11.75 was a "trial rate" rather than a permanent change to his hourly rate. The claimant says that is the first time he was aware that it was a "trial rate". This is the basis for the allegation that he was enrolled into a trial without his consent (RD1).

11. In January 2022 the claimant qualified for a new role as an FLT Trainer. Ms Holding wrote to the claimant congratulating him and offering him the position of "warehouse FLT driver/trainer" starting on 24 January 2022 at the basic hourly rate of £9.17 plus an FLT allowance plus an additional supplement of £1,200 per annum to be paid monthly from that date. The claimant says the basic hourly rate should have been £11.75 (RD2). He also says the respondent withheld his trainer ID and certificate (RD4).

12. The claimant wrote twice to the respondent's UK Compliance Team asking, amongst other things, why the claimant and his colleagues had never been told that the new hourly rates were a trial and why colleagues who had joined the company in September 2021 had been employed on the new hourly rates as their basic rate. He says he received no reply (allegation RD5).

13. On 16 February 2022 the claimant lodged a formal grievance. It referred to the queries he had previously raised about the "trial rate". The claimant says he was sent two different grievance policies by the respondent (RD6) which they then failed to follow. The claimant says that the manager who dealt with the grievance was not "independent and impartial" because he was a manager from a different branch of the respondent's (instead of someone from outside the respondent) (RD7).

14. The claimant's grievance was upheld. The respondent found:

- That a colleague of the claimant had been issued a contract detailing the new FLT pay rate at £11.75 with no mention of it being a trial period. The respondent accepted that there was no trial rate specified in the advertisement or contract so this point was upheld, but on investigation said "this was an oversight".

- When it came to the claimant being misinformed about the FLT driver trainer pay rate by the letter dated 24 January 2022, this part of the grievance was also upheld. The respondent accepted that the claimant had reason to believe the rate would be £11.75 and due to the extension of the "trial rate" until the end of pay negotiations the correct rate at that point would have been £11.75. On that basis it was accepted that the offer letter that was provided to the claimant was incorrect based on the extension of the trial rate.

- In terms of the grievance that the trial rate was only for a trial period, the respondent accepted there was no written correspondence to confirm that the rate was for a trial period and so this part of the grievance was also upheld.

15. On 8 February 2022 Ms Holding wrote again to the claimant to say that the "trial rates" which had originally been intended to carry on until December 2021 had "been extended" until the end of pay negotiations the respondent was currently having with the unions. She accepted that there "appears to be a lot of confusion around pay and payslips". She said that once that trial was over the payslips would revert to basic pay and FLT allowance. The claimant was asked to sign that letter to confirm his acceptance and understanding of the position. Instead of signing it, the claimant and five of his colleagues sent a letter to Ms Holding on 10 February 2022 saying that they were not aware that they were taking part in a trial.

16. On 9 June 2022 Ms Holding wrote to the claimant to confirm that following the outcome of the collective pay bargaining agreement between the respondent and USDAW and Unite the Union, the claimant's rate of pay was not affected and would remain unchanged at £11.75 per hour. That rate was higher than the agreed collective bargaining rate. His pay was "red circled" until the agreed collective bargaining rate caught up. The claimant says this meant he was withheld a pay rise and a night shift allowance (RD8).

17. The claimant says each of allegations RD1 to RD8 is an act of direct race discrimination. He says he was treated less favourably than a white British worker was or would have been because of race. He names five actual comparators. The respondent's application to strike out his claim is based partly on saying that the comparators were not in the same material circumstances as the claimant.

Relevant Law

18. The respondent's application to strike out the claimant's claims is based on those claims having no reasonable prospect of success. To assess those prospects of success it's necessary to take into account what the claimant will have to prove for his claims to succeed. In this section I first set out the law on striking out and then what the Equality Act 2010 says about discrimination and victimisation claims and the burden of proof in such cases.

Striking out

19. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim on the grounds it has no reasonable prospect of success.

20. Rule 37(2) says that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

21. Caselaw provides guidance on the exercise of this power:

a. It will only be in an exceptional case that a complaint will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation (**Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1122, Court of Appeal**).

b. A Tribunal should not be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person (**Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA EAT**).

c. The Tribunal should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents (**Mbuisa**).

d. Discrimination issues should, as a general rule, be decided only after hearing the evidence. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence (**Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**).

e. Whether the necessary test is met in a particular case depends on an exercise of judgment. It may not be assisted by attempting to gloss the language of the rule by reference to other phrases found in the authorities such as 'exceptional' and 'most exceptional'. However, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success' (**Ahir v British Airways Plc [2017] EWCA Civ 1392)**.

22. The principles from the case-law are helpfully summarised in **Mechkarov v Citibank NA [2016] ICR 1121** which Mr Maini-Thompson referred to in his written submissions:

a. Only in the clearest case should a discrimination claim be struck out.

b. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.

c. The claimant's case must ordinarily be taken at its highest.

d. If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.

e. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

Discrimination and victimisation claims under the Equality Act 2010 (“the 2010 Act”)

Direct Race Discrimination

23. The claimant’s allegations RD1 to RD8 are of direct race discrimination. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as relevant to this case reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of [race], A treats B less favourably than A treats or would treat others".**

24. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

25. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken.

Victimisation under the 2010 Act

26. S.27 of the 2010 Act makes victimisation unlawful:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."**

27. This means that for a victimisation claim to succeed, the claimant has to show three things. First, that they did a protected act; second, that they were subjected to a detriment; and third that they were subjected to that detriment because of the protected act. The claimant does not have to show "less favourable treatment" so there is no absolute need for a tribunal to construct an appropriate comparator in victimisation claims.

Detriment

28. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**, established that a detriment exists if a reasonable worker would or might take the view that the

treatment was in all the circumstances to his or her disadvantage. It does not require a quantifiable economic loss.

The burden of proof in discrimination and victimisation cases

29. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) 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 that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

30. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

31. In **Royal Mail Group v Efobi [2021] UKSC 33**, the Supreme Court confirmed that under the 2010 Act the claimant has the burden of proving, on the balance of probabilities, those matters which they wish the Tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. Along with those facts which the claimant proves, the Tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. The initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent.

32. It is well established that the bare facts of a difference in status (e.g. race) and a difference in treatment only indicate a possibility of discrimination - they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

33. The guidance in **Igen Ltd v Wong** was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37; [2012] ICR 1054**.The **Igen** guidance states when the burden has passed, not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic, e.g. race, was no part of the reason for the treatment. However, that explanation need not be "adequate" in the sense of providing a reason which satisfied some objective standard of reasonableness or acceptability – it does not matter if the employer has acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic (**Efobi** at para 29).

The respondent's strike out application

34. The respondent applied to strike out the allegations on the basis that they had no reasonable prospect of success. As I explain in Annex B to my case management order, in deciding to grant the amendments to add allegations V1-V3, I decided that those 3 allegations did have some reasonable prospect of success. If I had decided that they had <u>no</u> reasonable prospect of success I would not have allowed them to be added. I refuse the application to strike out allegations V1-V3.

35. I set out below my conclusions in relation to the application to strike out allegations RD1 to RD8. They take into account the oral submissions I heard from the parties at the preliminary hearing and the written submissions which they provided subsequent to the hearing. The respondent's written submissions dated 3 February 2022 were an updated version of the written submissions produced by Mr Maini-Thompson for the hearing. As the claimant pointed out in his written submissions, the information the respondent provided in its updated written submissions about the comparators named by the claimant differed from that in the respondent's original written submissions dated 6 January 2022.

36. The respondent relied on two main submissions.

37. First, that regardless of any failing on the respondent's part in communicating the pay position, the claimant had not actually suffered any financial detriment. That was because he had in fact been paid at £11.75 per hour since August 2021 regardless of what his pay slips recorded as his basic rate. I will call that the "no detriment" submission. That submission applies to allegations RD1-RD3.

38. Second, even if the claimant could show a difference in treatment, there was no evidence to suggest that difference was on the grounds of his race. I will call that the "no discrimination" submission. That submission applies to all the allegations RD1-RD8.

<u>The "no detriment" submission</u>

39. The respondent's case is that the claimant has been paid at the hourly rate of £11.75 since August 2021 including after the pay negotiations in June 2022. It says that the claimant has suffered no material detriment because he has not lost out financially even if there was a breakdown in communication about whether that hourly rate was a permanent change to his basic hourly rate; a "trial rate"; or the hourly rate when basic pay plus FLT allowance was taken into account.

40. The claimant makes two submissions in response. First, he says that as a matter of fact he was not paid at the equivalent of £11.75 per hour from August 2021. He says he <u>has</u> lost out financially. The claimant's payslips in the respondent's preliminary hearing bundle for October 2021 onwards set out basic pay at £9.17 per hour x a number of hours worked. However, they then add various "top ups" and "adjustments". It is not clear without hearing evidence what each one is and whether it should be counted in working out the claimant's hourly rate including allowances. It is also not clear whether when the appropriate allowances or top-ups are taken into account, the claimant's pay equals £11.75 per hour as the respondent submits. That is a dispute which will have to be determined at the final hearing by the Tribunal hearing evidence.

41. Second, the claimant says that even if he is wrong, and he has not lost out financially because he has been paid at the equivalent of £11.75 per hour since August 2021, he has still suffered a detriment. That is because his pay slips show a basic hourly rate of £9.17. He says that any allowances used to "top up" his pay to £11.75 per hour would not be counted in calculating benefits such as sick pay and holiday pay. He says a bank or building society would also not take those allowances into account in calculating how much money he could borrow because they are not guaranteed allowances. That was relevant because the claimant was in the process of trying to get a mortgage to buy a house.

42. I prefer the claimant's submissions on this point. The definition of detriment applied by the courts in the context of the 2010 Act does not require there to be a quantifiable economic loss. The claimant would instead have to satisfy the Tribunal at the final hearing that a reasonable worker would or might take the view that the treatment accorded to him had in all the circumstances been to his detriment. Even if, as the respondent says, the claimant was paid the equivalent of £11.75 per hour, I cannot say there is no reasonable prospect of the claimant satisfying the Tribunal at the final hearing that he had suffered a detriment by his basic pay being stated to be £9.17 rather than £11.75 per hour.

The "no discrimination" submission

43. This submission was made in relation to allegations RD1 to RD8. However, Mr Maini-Thompson focussed his arguments on allegations RD1 to RD3 and, in particular, on the comparators named by the claimant. He submitted that they were not in the same material circumstances as the claimant. I can see that it is arguable that an employee might not be in the same material circumstances as the claimant if they were a new employee or had been appointed to a new post as the respondent says some of the comparators were. The respondent's case was not helped, however, by the inconsistencies between the two versions of its written submissions when it came to whether the comparators were new or existing employees; whether they had been informed that the hourly rate change was on a trial basis (relevant to RD1); and what documentation they had been given relating to the new pay rates (relevant to RD2 and RD3).

44. The claimant in his written submissions (at page 13-14) disputed some of the information included in the updated written submissions, in particular the statement at para 25(d) and (e) that Robert Bailey and Dave Cunliffe were treated in the same way as he was. He relied on Ms Holding's email of 27 January 2022 (p.19 of the claimant's preliminary hearing bundle) as evidence that they had been told by the morning shift manager that the new hourly rates were a trial rate. There may be an argument that the fact that they were on a different shift from the claimant was the reason they were told about the trial rather any difference in race.

45. The difficulty for the respondent is that there is an absence of undisputed contemporaneous documentation which "conclusively disproves" or is "totally an inexplicably inconsistent" with the claimant's case when it comes to the named comparators being in the same material circumstances. Given the respondent's shifting position on who was a new and who an existing employee; who was told what and when; and who was provided with what documentation about the pay rates and when it seems to me that the appropriateness and relevance of the comparators

is something which can only be decided by the Tribunal at the final hearing after hearing evidence. That is particularly so where the respondent's own grievance outcome letter seems to suggest the granting of a contract to Mr Jones with the new hourly rate but no mention of it being a trial rate was an "oversight" rather than down to a material difference in their circumstances. It cannot be said on the limited documentation I saw that there is no reasonable prospect of the claimant being able to establish they were relevant comparators who were treated differently to him.

46. When it came to allegations RD4-RD8, Mr Maini-Thompson submitted that there was no evidence to support the claimant's argument that an employee in the same circumstances as the claimant apart from his race would have been treated any differently. I have to take the claimant's case at its highest. As I understand it, the respondent does not dispute that the things set out in allegations RD4-RD8 factually happened, e.g. that the claimant was sent 2 different grievance policies as alleged in RD6. Instead, it says that there are non-discriminatory explanations for what happened. In the absence of undisputed contemporaneous documentation which "conclusively disproves" or is "totally an inexplicably inconsistent" with the claimant's case, it seems to me that whether there was less favourable treatment and whether that was because of race can only be decided by the Tribunal at the final hearing after hearing evidence and drawing inferences from the findings of fact it makes based on that evidence.

47. In those circumstances, I refuse the respondent's application to strike out the claimant's claims. I emphasise that in doing so, I am not saying that the claimant will succeed in showing the Tribunal at the final hearing that allegations RD1 to RD8 amount to less favourable treatment because of race. What I am saying is that on the limited documents before me the respondent has not shown that the claimant has no reasonable prospect of doing so.

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Employment Judge McDonald

Date: 12 April 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
14 April 2023

FOR THE TRIBUNAL OFFICE

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Annex
List of Discrimination and Victimisation Allegations

1. Enrolment in a trial without any form of consent. (RD1)

2. Breached the contract twice. Firstly, in October 2021 when the hourly rate on my payslips reverted to the old hourly rates. They breached the verbal contract agreed in August and instead of having an increase like I was told in August (and reflected on my September payslip) I was told I was on a trial rate which could have ended at any time (I found out in December 2021). Secondly, in January 2022 when I finished the FIT trainer course and they failed to offer the contract we agreed upon. (RD2)

3. They employed white British workers who didn't take part in the trial, yet they were offered contracts with increased rates. Upon completion of the FLT trainer course in January I was meant to train a worker (Jonathan) who was freshly hired on a contract with the right rates. (RD3)

4. Withholding my trainer ID and certificate. (RD4)

5. Ignoring my first two grievance emails sent to the company's compliance advisor in which I raised my concerns and made them aware about what impact this Issue had on my life. (RD5)

6. They sent me two different Grievance Policies which themselves failed to follow. (RD6)

7. The company stated that an independent and impartial hearing manager will hear my grievance, yet they later offered me a manager from a different branch. They referred to him as being independent. (RD7)

8. Withholding scheduled pay rise in April/future pay negotiations and night shift allowance. (RD8)

9. The respondent making a deduction from the claimant's pay on 24 October 2022. That deduction was of the difference between a payment at the rate of £12.90 for the hours worked between 8 and 10 pm and the pay rate of £11.75 which the claimant was otherwise entitled to. (V1)

10. Refusing to provide employment details direct to the claimant rather than to his bank in connection with a mortgage application. That was on 6 October 2022. (V2)

11. Requiring that there be a note taker present at a welfare meeting, that being said to take place on 2 November 2022. (V3)