EMPLOYMENT TRIBUNALS

Claimant: **Mr H Amin**

Respondents: **(1) Manchester Airports Group PLC**

(2) Catherine Harris

and :

Claimant: **Mr H Amin**

Respondents: **(1) Manchester Airports Group PLC**

(2) Francesca Abbott

Heard at: Manchester , by CVP **On:** 24 February 2023
24 March 2023
(In Chambers)

Before: Employment Judge Holmes (sitting alone)

Representatives

For the claimant: Mr M Broomhead, Non – practising Solicitor
For the respondents: Ms K Barry, Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that :

1. Claims nos. 2402853/2021 and 2402854/2021 are struck out as having no reasonable prospects of success.

2. The Tribunal makes deposit orders in respect of claim no. 2400799/2022 as set out in the Deposit Order promulgated under separate cover.

POSTPONEMENT OF HEARING AND CASE MANAGEMENT ORDERS

1. Postponement of hearing

The hearing listed for 12 – 15 June 2023 is postponed. The parties are to provide the Tribunal with their revised estimated length of hearing, and dates to avoid for the re-listed hearing by **14 June 2023.**

2. Additional information

The claimant shall by **31 May 2023** provide to the respondent and the Tribunal further information about his claims, specifying what "other payments" are claimed, and on what basis.

3. Schedule of loss

3.1 The claimant must provide to the respondent and to the Tribunal by **31 May 2023** a document – a "Schedule of Loss" – setting out how much in compensation the Tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints. It must explain how the amounts have been calculated. Further information about remedies can be found in Guidance Note 6 attached to the Presidential Guidance on General Case Management.

3.2 Because it may be necessary for the Tribunal to consider what part of any award may be taxed (as what HMRC terms "Post Employment Notice Pay"), the Schedule of Loss must specify the following information:

3.2.1 The pay period – e.g. weekly, four weekly or monthly;

3.2.2 The basic gross pay for the last full pay period before notice to terminate the contract was given;

3.2.3 The date employment ended;

3.2.4 The notice period the employer was required to give under the contract;

3.2.5 Whether the employer gave that notice or not, and if not, how much notice was given;

3.2.6 The amount of any payments received from the employer upon termination of employment, and what they were for.

3.3 If there is a claim for earnings lost because of dismissal, the Schedule of Loss must also include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

3.4 If the claimant is claiming for loss of pension, the Schedule of Loss must identify whether the claimant will seek a simple assessment of losses based on loss of the employer's contributions, or whether a complex actuarial approach may be needed. The different approaches are explained in the Presidential Guidance on Pension Loss and accompanying Principles document.

4. Disability Issue

In the event that the claimant proceeds with any disability discrimination claims that require him to establish that he was a person with a disability:

4.1 The claimant says the impairments are extreme stress, serious anxiety and depression and vestibular migraines ;

4.2 The claimant must provide to the respondent by **14 June 2023** a signed disability witness statement (sometimes called an "impact statement") with the following information about each impairment:

(a) How long has the claimant had the impairment?

(b) What are/were the effects of the impairment on the claimant's ability to do day-to-day activities between 28 January 2021 and 7 November 2021? The claimant should give clear examples from the time of the events the claim is about. The Tribunal will usually be deciding whether the claimant had a disability at that time.

(c) Give the dates when the effects of the impairments started and stopped. If they have not stopped, say how long they are expected to last.

(d) If the effects lasted less than 12 months, why does the claimant say they were long-term?

(e) Has the claimant had medical treatment, including medication, or taken other measures to treat or correct the impairment? If so, what and when?

(f) What would the effects of the impairment have been without any treatment or other measures? The claimant should give clear day-to-day examples, if possible.

(g) Any other information the claimant relies on to show that s/he had a disability.

4.3 The claimant must also by **14 June 2023** send to the respondent:

(a) copies of the parts of his GP and other medical records that are relevant to whether he had the disability at the time of the events the claim is about. He may blank out anything that is clearly not relevant;

(b) any other evidence relevant to whether he had the disability at that time.

4.4 The respondent must by **12 July 2023** inform the Tribunal and the claimant of the extent to which the disability issue is conceded, and if it is not conceded in full, the reasons why. A concession that the claimant was a disabled person is not a concession that the respondent knew or ought to have known this at the material time.

4.5 If disability remains in dispute and either side considers that expert medical evidence would assist the Tribunal to determine that issue, an application for the appropriate case management orders should be made.

5. Documents

5.1 By 4.00pm on **16 August 2023** each party must have provided to the other a list of all the documents it already has or can reasonably obtain relevant to the issues in the case together with copies of the documents listed. Electronic copies may be provided at this stage. This includes documents that are relevant to compensation only. A document must be included whether it supports or hinders a party's case. A party must make a reasonable search for documents not immediately to hand. Documents possibly relevant to the case must not be destroyed. Further information can be found in Guidance Note 2 attached to the Presidential Guidance on General Case Management.

5.2 Any audio recordings (or video recordings with audio) held by either side which are relevant must be disclosed as a "document" at the same time. The person disclosing the recording should prepare a typed transcript of the recording and provide that to the other side with a copy of the recording itself. The parties should agree the transcript and that can be included in the bundle if it is relevant. Where any part of the recording is disputed the alternative versions shall be included and highlighted for ease of reference in the transcript. In general terms the Tribunal will only view and/or listen to the recording itself (or the relevant part of it) if the parties have been unable to agree in the transcript what words were actually used, or if the tone of voice is thought to be significant. It is up to the party asking the Tribunal to view and/or listen to the recording to bring the equipment (e.g. a laptop) so it can be played during the hearing if the Tribunal agrees.

6. Final hearing bundle

6.1 The respondent is responsible for putting together a file containing those documents disclosed by the parties and required at the final hearing (the "hearing bundle"). The parties must cooperate with each other in assembling and agreeing the hearing bundle contents and index to the bundle.

6.2 By 4.00pm on **6 September 2023** the respondent must have provided to the claimant a draft index to the hearing bundle. That hearing bundle must be agreed, and one hard (paper) copy supplied by the respondent to the

claimant by 4.00pm on **20 September 2023**, unless the claimant has confirmed that no paper copy is required.

6.3 The respondent must also ensure that the claimant and the Tribunal have an electronic version of the hearing bundle in a form which complies with paragraph 24 of the Presidential Guidance on Remote and In-Person Hearings issued on 14 September 2020. Hearing bundles should be sent to the tribunal as a PDF. The index to the bundle should sent separately, or as the final pages of the bundle, so that the page numbers of the hearing bundle align with the automated PDF page numbering. Any late additions to the bundle must be inserted at the end of the bundle so the pdf numbering is not disturbed. Witness statements should be in a separate PDF bundle.

6.4 Bundles which do not conform to the Presidential Guidance (paragraph 24) will be returned to the party providing it, so that they can be formatted correctly.

6.5 Large document files (exceeding 25mb) must not be sent by email to the Tribunal as they will be rejected. Parties should instead request a link to the Document Upload Centre.

6.6 The hearing bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put at the start of the bundle, in chronological order, with all the other documents after them;

- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the hearing bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle

- the documents in the bundle must follow a logical sequence which should normally be simple date order

- handwritten documents which are not easily legible (such as notes of meetings) should be transcribed into typed format by the party producing the document, and an agreed typed version included in the bundle. Only if the parties are unable to agree the accuracy of the typed version should the handwritten version be included too.

7. Witness statements

7.1 By 4.00pm on **11 October 2023** each party must have provided to the other a written statement from every person that it is proposed will give evidence at the final hearing. This includes anyone who is also a claimant or a respondent. The witness statements must be typed in numbered paragraphs and signed by the witness. They should set out in logical order the facts about which the witness wishes to tell the Tribunal. Legal arguments or submissions to the Tribunal should not be included. There should be no reference to "without prejudice" discussions or exchanges without the agreement of the other side. Where reference is made to a document the page number from the hearing bundle must be included. There is no need to reproduce lengthy passages from documents in the bundle which the Tribunal will read. The claimant's witness statement must address remedy by including a statement of the amount of compensation or damages claimed, together with an explanation of how it has been calculated.

7.2 Unless the Tribunal hearing the case directs otherwise, the witness statements will be read by the Tribunal and stand as the evidence of each witness before that witness is questioned by the other parties. It is important that the statements contain all the facts which the witness can provide which are relevant to the case.

7.3 For the avoidance of doubt this order does not require simultaneous exchange of witness statements, but the parties are free to proceed on that basis if they so wish. However, any witness statements disclosed after this date may not be relied upon at the final hearing without permission from the Tribunal.

7.4 Further information about witness statements can be found in Guidance Note 3 attached to the Presidential Guidance on General Case Management.

7.5 If either party hopes that a witness may be permitted to give evidence from abroad, the Tribunal must be notified as soon as possible. The procedure by which consent from the country concerned is obtained is set out in paragraphs 9-18 of the Presidential Guidance on Taking Oral Evidence by Video or Telephone From Persons Located Abroad. The Guidance can be viewed at Presidential-guidance-evidence-from-abroad-revised-July-2022.pdf. It is important that the Tribunal is given the information specified in paragraph 13 as far in advance of the hearing as possible. Failure to obtain the relevant consent may lead to the hearing being adjourned, or may mean that the evidence of that witness cannot be heard. Consent is not needed if the evidence is in written form only, or if the person abroad is participating in the hearing but not giving evidence.

8. Cast list / chronology

8.1 Not less than five working days before the first day of the final hearing the respondent must have provided the claimant with drafts of the following:

(a) a neutral chronology, listing the key events and when they happened. The chronology should refer to page numbers from the file;

(b) a list of people involved in key events and their job titles;

(c) a list of the key documents in the file, with the page numbers, that the Tribunal needs to read at the start of the hearing.

8.2 These documents must be agreed for the final hearing. They are not evidence but a tool to help the Tribunal read into the case before the oral evidence starts.

9. Final hearing preparation

9.1 The schedule of loss must be updated and sent to the respondent and to the Tribunal not less than seven days before the first day of the final hearing.

9.2 At least two days before the first day of the final hearing the claimant must have provided to the Tribunal **five** copies of the claimant's witness statements, and the respondent must have provided **five** copies of the respondent's witness statements and the agreed hearing bundle, together with the cast list/chronology. These must be provided as paper copies unless the Tribunal has confirmed that only electronic bundles are required.

9.3 These copies are for the use of the Tribunal, the witness table and (if appropriate) any members of the public who attend the final hearing.

9.4 The claimant and the respondent must each bring their own copies of the witness statements and hearing bundle to the hearing as well.

REASONS

The procedural history

1.This preliminary hearing arises out of four claim forms which the claimant had presented to the Tribunal. They were:

Case No. 2402111/2021

This was presented to the Tribunal on 24 February 2021. It was brought against two respondents . Lesley Hall, and Manchester Airports Group PLC. The claim made , set out in “Schedule A” is of victimisation , arising out of a meeting held with the claimant on 28 January 2021 , in which it is alleged that the respondents sought to intimidate the claimant into withdrawing another claim of race discrimination which he had proceeding before the Employment Tribunal. The claim against the second respondent, however, was rejected, as the claimant had not obtained an early conciliation certificate in respect of that respondent. That claim was struck out by Employment Judge Shotter , following a hearing on 16 December 202, in a reserved judgment sent to the parties on 22 February 2022.

Case No. 2402759/2021

This claim was presented to the Tribunal on 6 April 2021. It was brought against only one respondent , Manchester Airports Group PLC, and replicates the same claim that the claimant sought to make against that respondent in the first claim, which had been rejected. This claim too was struck out by Employment Judge Shotter in the same reserved judgment.

Case No.2402853/2021

This claim was presented to the Tribunal on 14 April 2021. Only one respondent is named, Manchester Airports Group PLC. This claim relates to a grievance that the claimant raised about the conduct of Lesley Hall in the meeting on 28 January 2021, and the dismissal of that grievance by Catherine Harris, who investigated it. The response to this claim was due by 18 May 2021. No response was received until 22 July 2021.

Case No. 2402854/2021

This claim was also presented on 14 April 2021, and is made against only one respondent, Catherine Harris. This claim is made against her personally for victimisation of the claimant in her dismissal of the claimant's grievance. It is the same claim as is made against Manchester Airports PLC in the other claim form presented the same day. The response to this claim was due by 18 May 2021, and was received by the Tribunal on 17 May 2021.

Case No. 2400799/2022

This claim was presented on 4 February 2022, and is made against only two respondents, Manchester Airports PLC and Francesca Abbott. This later claim is made against both respondents for (in the case of the first respondent) constructive dismissal, disability and race discrimination, including claims of victimisation

2. There are thus three extant claims proceeding before the Tribunal, which have (by reason of there also having been a previous claim in 2019) have been enumerated 4,5 and 6 in the correspondence, which enumeration the Tribunal will maintain for consistency.

The applications before the Tribunal.

3. By letter dated 6 September 2022 the respondents made application to the Tribunal that claims 4 and 5 , which relate to the claimant's grievance about the conduct of Lesley Hall in a meeting on 28 January 2021 (or 11 February 2021, there have been issues about the correct date) , be struck out. The basis upon which they did so was :

(1) The facts that the claimant was seeking to rely upon were found to be without prejudice and therefore were inadmissible;

(2) The claims were untenable on the basis of the claimant's own evidence and admissions;

(3) The claims were an abuse of process and an attempt to reopen an issue already decided by Employment Judge Shotter.

Further, there was an application for an order striking out, or for a deposit order, in respect of claim 6.

4. The applications were listed for a preliminary hearing which was held on 24 February 2023. Judgment was reserved. The Employment Judge , however, requested further material from the parties, and any further submissions upon that material, which was considered further by the Employment Judge in chambers on 9 March 2023. Further deliberations were held on 24 March 2023, and this reserved judgment is now promulgated, with apologies for the delay occasioned by the need to consider the further material provided, and pressure of judicial business.

5. The claimant was represented at the hearing , as he has throughout the proceedings, by Mr Broomhead, a non – practising solicitor. The respondents were represented by Ms Barry of counsel. There was a hearing bundle, and references to page numbers are to that bundle. The claimant was present for the first part of the hearing, but had to leave partway through it , which was, of course, perfectly acceptable , given that he was represented and was not required to give evidence.

6. Additionally, the Tribunal was subsequently provided with:

The claimant's grievance email of 15 February 2021

Notes of the grievance investigation meeting held by Catherine Harris with the claimant on 26 February 2021

Notes of an investigation meeting held by Catherine Harris with Lesley Hall on 2 March 2021

Notes of an investigation meeting held by Catherine Harris with Frankie Abbott on 3 March 2021

Grievance outcome letter from Catherine Harris to the claimant dated 19 March 2021

7. At the outset of the hearing Mr Broomhead made an application the Employment Judge recuse himself from this hearing. The basis upon which he did so was that the Employment Judge had knowledge of the case, because he had had prior involvement in it. It was not immediately apparent what Mr Broomhead was referring to, but reviewing the file it was correct that the Employment Judge had conducted a preliminary hearing on 23 August 2021, in respect of four claims, including claims 4 and 5, and had directed that the first two claims (in fact claims 2 and 3) be the subject of an open preliminary hearing to determine the issue of the admissibility of the allegedly without prejudice material, and the potential striking out of the two claims which relied upon it. That became the hearing held by Employment Judge Shotter.

8. Whilst Mr Broomhead had opposed the holding of such a preliminary hearing, all the Employment Judge did on that occasion was to make a case management order for the determination of those issues, nothing more. That was not, by any stretch of the imagination, a ground for the Employment Judge now recusing himself from hearing these applications. Employment Judges, particularly salaried ones, will see and deal with cases at several points during their journey from presentation to final hearing, and the mere conduct of some case management , without , even , any form of contentious adjudication is no basis for recusal. The application did not begin to satisfy the tests set out in ***Locabail (UK) Ltd v Bayfield Properties Ltd [2000] IRLR 96***, and was refused.

The applications : claims 4 and 5:

9. Ms Barry made the application for the respondent. She took the Tribunal through the two claim forms and the claims made in Schedule A to each of them, which were identical. Claim 4 (2402853/2021) was brought against Manchester Airports Group plc ("MAG"), and was for race discrimination. In Schedule A the claimant set out the previous proceedings he had brought, and the meeting held on "28 January 2021" between the claimant and Frankie Abbott and Lesley Hall of the respondent. He goes on to allege that during this meeting Lesley Hall made threats against the claimant , which were the subject of what are now the two struck out claims. The claimant then sets out how he instigated a Stage 1 grievance concerning the conduct of Lesley Hall in this meeting, which was investigated by Catherine Harris. She reported back to the claimant on 19 March 2021. She did not uphold his grievance. He complains that her conduct in doing so was an act of victimisation , that Catherine Harris did not act in good faith, and she had no intention of making any finding that would not defend Lesley Hall. He claims against MAG as the employer of Catherine Harris. In claim 5 (2402854/2021) the claimant makes the same claims against Catherine Harris personally. Neither of these claims pursue any allegations against Lesley Hall.

10. Ms Barry submitted that the claimant will not be able to adduce any evidence of what was said in the without prejudice meeting, in the light of the finding by Employment Judge Shotter that it was indeed a without prejudice meeting, and hence inadmissible. The claimant will be unable to prove these claims without making reference to what was said in that meeting, which has been ruled inadmissible. As it was this meeting that Catherine Harris was investigating, the claimant will not be able to bring this claim without making reference to it, which he cannot do. These claims therefore have no reasonable prospects of success.

11. Secondly, and alternatively, Ms Barry submitted that the claimant had no reasonable prospects of success in these claims in any event. She referred to the findings of Employment Judge Shotter at para. 28 of her judgment (page 9 of the bundle) that the claimant had "no issues with her body or facial expressions, but her tone was in a condescending way." In the ensuing paragraphs the claimant's only real complaint was that he was taken by surprise, but he had no other concerns.

12. She referred the Tribunal to the findings in paras. 57 and 58 of the judgment, in which the Employment Judge rejected any allegations of improper conduct by Lesley

Hall. She also rejected the contention put forward by Mr Broomhead that her conduct had been comparable with an employer telling a black employee in a without prejudice meeting that that he was not wanted because he was black. At para. 58 she found that there was no evidence before her that Lesley Harris had made any discriminatory remarks during the course of the discussion. In the light of her findings it was hard to see what evidence the claimant would be able to adduce in these claims which would undermine these findings, and hence what evidence he could rely upon to sustain his claims arising out of the grievance.

13. Her third point was that to seek to re-open these matters would be an abuse of process. The claimant would be inviting the Tribunal to decide matters that had already been decided. The claimant's own admissions had undermined his previous claims, and would do again.

14. The notes of the claimant's grievance meeting with Catherine Harris on 26 February 2021 were before Employment Judge Shotter. She refers to them in paras. 27 to 31 of her judgment. It was difficult to see what else could be placed before the Tribunal in these claims which was not previously before it.

15. Although the reversal of the burden of proof may apply, the claimant did not have any reasonable prospects of success. Whilst the claimant had pleaded lack of good faith, he had not specified how Catherine Harris had so acted, there were no details, no explanation of what the claimant meant. The respondent does not know the basis for this allegation. This claim was the very definition of a fanciful claim. For the respondents to defend it , they would have to refer to the without prejudice material, and are therefore prejudiced if these claims proceed.

Application for Strike Out or Deposit Order – Claim 6

16. In this claim , the claimant brings claims of constructive unfair dismissal, wrongful dismissal, race discrimination, disability discrimination, and "any other payments found to be owing to him". (Paragraph 14 at Page 55 of the Bundle.)

17. The claimant claims that the respondent referred him to Occupational Health, the "intention being that this would lead to the claimant's dismissal on the grounds of capability". So far as the respondents understand, the claimant relies on this as the "last straw" for the purposes of his constructive unfair dismissal claim, and as the act of race discrimination and disability discrimination, and the act of victimisation.

18. On 6 October 2021, the claimant e-mailed the Respondent to confirm there had been some deterioration in his health. He also said "I am seriously thinking if I can commit myself to keep working" and "Also you are more than welcome to refer me back to OH or they can consult my GP regards my condition I don't have any issue". (Page 57 of the Bundle). As referred to by the claimant in his ET1 Claim Form (page 54 - 56 of the Bundle), the claimant and respondent had a meeting on 6 October 2021. During this meeting, the claimant stated "I don't have a problem if you wish to refer back to OH" (page 60 of the Bundle). Following this, the claimant was sent an Occupational Health referral form which he duly signed and returned to the respondent on 10 October 2021 (Page 63 - 64 of the bundle).

19. The respondent submitted that the claimant has disclosed no reasonable grounds that would enable an Employment Tribunal to conclude that by referring the claimant to Occupational Health with his consent was the "last straw" for the purposes of his constructive unfair dismissal claim, a form of victimisation, an act of disability discrimination, and/or an act of race discrimination.

20. The limited contemporaneous documents, it was argued, starkly contradict the claimant's ET1 claim form. Ms Barry referred the Tribunal to pages 57 and 58 of the bundle, an email exchange between the claimant and Frankie Abbott on 4 and 6 October 2021 in which the claimant expressly stated that the respondent was more than welcome to refer him back to OH, or to consult his GP, he did not have "any issue". He repeated this in a meeting with Frankie Abbott later that day, noted at page 60 of the bundle, where he is recorded as saying that he did not have a problem if she wished to refer him back to OH. The claimant went on to sign the consent form for a referral to OH on 10 October 2021 (page 64 of the bundle).

21. It was therefore hard to see how the claimant could now possibly be relying upon his referral to OH as the last straw in is constructive dismissal claim. To the extent that the claimant was claiming that the respondent had failed to make reasonable adjustments, it was also hard to see how the referral to OH could possibly amount to such a failure. At the point that the claimant resigned he had not attended OH. His claim however rests upon this referral. The reasonable adjustments claim had no reasonable prospects of success, and should be struck out. The same contention is made in respect of the claims of victimisation, or harassment. In the alternative a deposit order or orders should be made.

The claimant's submissions in reply.

22. Mr Broomhead initially made reference to the provisions of rule 37(1)(e) and requirement that a fair trial was no longer possible. The respondent had not made any reference to any caselaw. There was a two stage test under rule 37(1)(a), firstly whether any of the specified grounds had bene made, and the second was a matter of discretion. He referred to (but without giving the citation, as with all of his references to caselaw, so this is assumption on the part of the Tribunal)) ***Aziz v FDA [2010] EWCA Civ 304*** and ***Anyanwu v South Bank Students' Union [2001] IRLR 305*** to the effect that striking out applications in discrimination claims had to surmount a very high hurdle. He referred to the EAT judgment in ***Sajid v Bond Adams plc UKEAT/0196/15*** in which HHJ Richardson said that such orders should only be made when there had been a written admission by the claimant or the respondent's case was so obvious.

23. He referred to the judgment of Simler ,P. in ***Hemdan v Ishmail [2017] IRLR 228, EAT*.** The Tribunal should not consider striking out a case where the facts were in dispute, and here the respondent was trying to have the case tried without the evidence. The Tribunal on such an application should take the claimant's case at its highest, without hearing any evidence. These claims did reasonable prospects of success.

24. There was an application before Employment Judge Shotter to strike out all the claims, but she only struck out those which relied upon the material which was ruled to have been without prejudice. This Tribunal was bound by her judgment on those applications.

25. The claimant has reasonable prospects of success on the reasonable adjustments and unfair dismissal claims. In ***Aziz*** the Court of Appeal had said there should be no striking out of claims where the facts were in dispute , and it would exceptional for this to be done when the evidence was untested, such as where there could be dispute on the facts. This cannot be done in a case where there is "no meat on the bones", the test has to be higher than that. The claims clearly establish arguable issues, but the claims are not being tried in this application.

26. The Court of Appeal have recognised that this is a "draconian power" , and the same goes for rule 37(1)(e) grounds as well. He cited ***Balls v Downham Market High School [2011] IRLR 217*** , which held that the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. No reasonable prospects of success means that, nothing less. This is a high test. There had been two sets of proceedings involving the same personnel of the respondent. There was something to answer.

27. When asked by the Employment Judge what was the "something more" that the claimant was relying upon to reverse the burden of proof , Mr Broomhead said that "off the top of his head" he could not give one, but that all the evidence should be heard.

28. Turning to the application in the alternative for deposit orders, he referred the Tribunal to the financial statement that the claimant had provided to the Tribunal. Mr Broomhead went on to cite ***Sharma v New College Nottingham UKEAT/0287/11*** , which held that a Tribunal should approach deposit orders in discrimination claims in the same way as strike out applications , especially when the facts are in dispute.

29. He referred (without citing as such) the Tribunal to ***Hemdan v Ishmail [2017] IRLR 228,*** where Simler . P said:

The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

30. Mr Broomhead also referred to ***Sami v Avellan; Sami v Nanoavionics UK Ltd [2022] IRLR 656***, a judgment of the EAT, in which Michael Ford QC emphasised the need for caution when considering a deposit order. Whilst the Tribunal has more scope to look at the overall merits on the facts , than when considering strike out, it

remains the case that such an order still has an effect on access to justice and so must have a proper basis; this is particularly so where key facts are in dispute. He submitted that the facts were in dispute here.

31. The respondent had not satisfied the high hurdle necessary. The Tribunal had not heard the claimant's evidence, no grounds for a deposit order had been established. Whilst the claimant had provided evidence of his means in a Financial Statement dated 24 February 2023, Mr Broomhead made reference to it in relation to the amount of any deposit orders that the Tribunal should make, if against him on the principle of whether any should be made at all.

The respondent's reply.

32. Ms Barry responded. Firstly, Mr Broomhead was incorrect in stating that the previous preliminary hearing had heard and determined any application to strike out these claims. She referred to the last paragraph of the Reserved Judgment (page 18 of the bundle) in which these claims are expressly referred to, and how an application in these cases may be made. These applications, therefore, had not been previously dismissed.

33. She took the Tribunal through the test for no reasonable prospects of success, and rule 37. There was no definition of the term, but the prospects have to be realistic, and not fanciful.

34. In relation to claim 6, the claimant had not explained why he had reasonable prospects of success. It is claimed that the facts are in dispute , but the claimant has not identified what that dispute is. He has not explained how having agreed to the referral to OH, and said he had no problem with it, he now relies upon it as his final straw. He has to point to the facts in dispute, and he has not done so.

35. In relation to claims 4 and 5, all he has pleaded is that the grievance was not conducted "in good faith", but has not said why.

36. She referred back to Mr Broomhead's response in respect of the need for a "something more" , that he could not "off the top of his head" come up with anything, which she pointed out rather revealed the weakness of the claimant's position. Whilst it is suggested that Frankie Abbott "had it in for" the claimant , she does not feature in claims 4 and 5. In relation to claim 6, the claimant has adduced nothing to support that allegation.

37. After 5 months the respondent still does not know what the disputed facts are. In short these claims were a try – on.

38. There was a lower bar for deposit orders, and in the alternative the respondent invites the Tribunal to make such orders.

Discussion and rulings.

Claims 4 and 5.

39. At the heart of these claims are the discussions held on 11 February 2021 which were held by Employment Judge Shotter to be without prejudice, and hence inadmissible. She did so in the context of the claimant's previous claims. The question in these applications therefore is what is the effect of this ruling upon these two claims.

40. The basic legal position is as follows. The rule of evidence that 'without prejudice' communications are privileged from disclosure, and inadmissible in evidence, applies just as much to proceedings before employment tribunals as it does to proceedings in a court of law (***Independent Research Services Ltd v Catterall [1993] ICR 1, EAT***; ***BNP Paribas v Mezzotoro [2004] IRLR 508, EAT***). The public policy behind the rule is the desirability of encouraging litigants to settle their disputes by agreement rather than litigate them to a finish and, to this end, of ensuring that their negotiations are not trammelled by the fear that what is said will be used in evidence.

41. The question arises, however, of whether in subsequent proceedings, which were not the subject matter of the without prejudice discussions , but are presented on the grounds that in the course of these discussions further allegedly discriminatory conduct on the part of the respondent occurred, the Tribunal can admit the evidence of the previously found to be without prejudice discussions. This point was raised by the ***Mezzotoro*** case , and is of potentially wide importance in discrimination cases. It suggests that the availability of the without prejudice rule in such cases may be limited. Because of the difficulty of proving discrimination claims, whether it is a question of drawing inferences or applying the burden of proof under s.136 of the Equality Act 2010, such claims, as the courts have repeatedly stated, can only properly be determined after full consideration of all the facts. What then is the position where an employee seeks to rely on something communicated in a without prejudice negotiation as either indicating a discriminatory attitude or giving rise to a separate claim of discrimination or victimisation? An overtly discriminatory remark (such as in the example given in ***Mezzotoro*** : 'we do not want you here because you are black', referred to by Mr Broomhead), will clearly fall within the rubric of 'unambiguous impropriety' and will be admissible. But what about other, less obviously discriminatory, remarks? According to Cox J, it is an 'impermissible approach' to attach 'different levels of impropriety to fact-sensitive allegations of discrimination' (at [38]). On the facts of that case, she suggested that, even if there had been a genuine attempt to settle a dispute, the fact that the employers sought at the meeting to persuade the employee to terminate her employment constituted an unambiguous impropriety which fell within the exception to the rule. Although Cox J stressed that the exceptions to the without prejudice rule will always fall to be determined within the particular factual context of the case, the question whether discrimination and victimisation cases are to be treated as falling outside the general principles of the rule, or whether a lower threshold of impropriety applies in such cases, is a controversial one.

42. This question whether discrimination cases should provide a further exception to the without prejudice rule was addressed directly in the later case of ***Woodward v Santander UK plc (formerly Abbey National plc) [2010] IRLR 834***, where the EAT ruled firmly against the contention that they should do so. Having considered the ***Mezzotoro*** case and concluded that it did not establish any such exception, Judge

Richardson, presiding, held that such an exception would not be consistent with the policy behind the rule. He stated that not only does the rule apply with as much force to discrimination cases as it applies to any other form of dispute, but it 'may be said to apply with particular force in those cases where the parties are seeking to settle a discrimination claim' (at [60]). This is because such claims often place 'heavy emotional and financial burdens' on both parties, and it is 'important that they should be able to settle their differences (whether by negotiation or mediation) in conditions where they can speak freely'. Judge Richardson acknowledged that there are limits to the application of the rule but held that these fall within the existing exception of unambiguous impropriety, which applies 'only in the very clearest of cases' (at [62]). On the facts of ***Woodward***, which concerned claims of victimisation and sex discrimination, there was held to be no such impropriety. The claimant had sought to adduce evidence that, in the course of negotiations to settle an earlier sex discrimination case, the respondents had refused to give her a reference, which she alleged was central to her claims in the current case. The evidence was, however, ordered to be excluded on the ground that, as there was no basis for contending that the refusal to give a reference fell within the exception of unambiguous impropriety, and no other exception being specifically applicable in discrimination cases, the without prejudice rule applied.

43. All this, of course, was, in essence, the issue that Employment Judge Shotter determined. It cannot be re-litigated. The question for this Tribunal, therefore is where does that leave the without prejudice discussions in the context of these claims?

44. To answer this question, some analysis is required of the original claims (i.e Nos. 2 and 3) which were struck out by reason of the Tribunal's ruling that the discussions on 11 February 2021 were without prejudice, which included a finding that they were not vitiated by "unambiguous impropriety".

45. The basis for the claimant's claims nos. 2 and 3 was the conduct of Lesley Hall, the second respondent in those claims, in the meeting. In the schedule to his claim form no. 2 (pages 89 to 90 of the bundle) the claimant set out , at para. 5 , what he claims she told him in that meeting. At para. 6 he goes on to contend that these comments were improper, amounted to blackmail , misrepresentation , undue influence, and defamation , thereby depriving the discussions of "without prejudice" status. He goes on to plead (para. 8) that these comments amounted to harassment, and acts of victimisation, the claimant having done the (conceded) protected act of bringing proceedings for race discrimination against the first respondent.

46. The claims that this Tribunal is considering (nos.4 and 5) arise from the claimant's grievance about Lesley Hall's conduct in the meeting, the claims being brought against the first respondent, in no.4, and Catherine Harris, who heard it, in no.5.

47. The claims against both respondents are set out in Schedule A to each claim form, in these terms:

"4. It was during this meeting that the said Lesley Hall made certain threats against the Claimant which are now the subject of proceedings in the Employment Tribunal at Manchester Claim numbers 24021 11/2021 and 2402759/2021 in which the Claimant

has brought proceedings against both Lesley Hall and the Respondents as her employer.

5. As a consequence the Claimant instigated a Stage 1 Grievance concerning the conduct of the said Lesley Hall, the investigation of which was carried out by one Catherine Harris who reported back to the Claimant on 19 March 2021 by letter with her findings.

6. By the said letter she did not uphold the Claimant's grievance. Furthermore, she found no evidence

- *that would suggest inappropriate behaviour*
- *of inappropriate use of words, tone of voice, facial expression, or body language.*
- *that would suggest that the said Lesley Hall tried to negatively impact the Claimant's confidence or take advantage of his current poor mental health.*

7. She concluded the letter by stating that when discussing financial settlements, there will always be an 'air' of authority. These discussions, whilst necessary, can often be very difficult and she believed that the said Lesley Hall had the Claimants best intentions at heart.

8. The conduct by the said Catherine Harris in investigating the Claimant's grievance amounted to an act of victimization itself. It not being in good faith in that she had no intention of making any finding which would not defend the said Lesley Hall and exculpate her (Lesley Hall's) conduct.

9. The Claimant is therefore entitled to have a justified sense of grievance in the way that she conducted the investigation of the said grievance and brings these proceedings against the Respondent as employer of the said Catherine Harris.

10.The Claimant claims damages for race discrimination and or victimization."

47. The important point to note is that the claimant's grievance related to the same conduct of which he complained in claims no. 2 and 3, i.e that of Lesley Hall in the without prejudice meeting. Paragraphs 4 and 5 make it clear that the matters that were the subject matter of the grievance were the same as were relied upon in the previous two claims dismissed by Employment Judge Shotter.

48. This has, in the view of the Employment Judge two consequences. The first is that if the claims against the respondent and Catherine Hall in relation to the manner in which the grievance was dealt with involve an examination of Catherine Hall's investigation into the conduct of Lesley Hall in that meeting , it will be very difficult , if not impossible , to do so without hearing evidence of what occurred in that meeting. That evidence, however, will be inadmissible unless the Tribunal can circumvent the previous ruling that it was without prejudice.

49. This Tribunal cannot see any prospect of the Tribunal admitting this evidence. That is because the grounds advanced upon which it would be invited to do so, unambiguous impropriety, have already been considered, and rejected by Employment Judge Shotter. That gives rise to an issue estoppel , which means that 'where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties' (***Virgin Atlantic Airways Ltd v Zodiak Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46*** per Lord Sumption*).*

50. It would not be open to another Tribunal , in the face of that finding, to hold otherwise. Therefore, another Tribunal could not find that Lesley Hall had been guilty of the conduct which was the subject matter of the two previous, dismissed claims.

51. It is that conduct that the claimant complains of in these claims, save that he does not complain of it directly, he complains that Catherine Hall's investigation into that conduct in furtherance of the claimant's grievance was discriminatory. He claims that it was an act of victimisation, and pleads , at para. 8 of Schedule A, that it was not carried out in good faith, and that Catherine Hall had no intention of making any finding which would not defend and exculpate Lesley Harris.

52. That begs the questions of what Lesley Harris needed defending for, and from what she needed to be exculpated. That can only be her conduct in the course of the meeting which the claimant had previously alleged against her in the dismissed claims.

53. That leads to the second consequence. Quite apart from the admissibility issue, there is another. In order to succeed, the claimant will surely have to persuade the Tribunal that Catherine Hall's investigation and outcome was wrong, that Lesley Hall's conduct had been of the nature he alleged in the previous, dismissed , claims. Employment Judge Shotter has determined that it was not. If it was not, the Tribunal can see no basis upon which the claimant can have any reasonable prospect of successfully arguing that Catherine Hall's determination of the claimant's grievance the same way, (i.e reaching the same conclusions as Employment Judge Shotter) can be any form of discrimination.

54. Indeed, the claimant's claim is put (it seems, Mr Broomhead did not say otherwise) as a claim of victimisation, notwithstanding the ambiguous wording of para. 10 of Schedule A. The protected act is alleged to have been the bringing of the proceedings in 2019.

55. The claimant has done nothing to suggest why Catherine Hall's conduct of his grievance was an act of victimisation. Clearly, the bringing of the claims of race discrimination in 2019 is the context in which the meeting with Lesley Hall was being held, and her alleged conduct was against that background, but to succeed in a claim of victimisation based on Catherine Hall's investigation into Lesley Hall's conduct, context is not enough, there has to be a causal connection between the protected act and the treatment. Further, as with direct discrimination, a claimant needs to show more than the unfavourable treatment and the protected act . In ***Greater Manchester Police v Bailey [2017] EWCA Civ 425*** Underhill LJ held that 'it is well-established

that there is no change in the meaning [i.e with the passing of the Equality Act 2020] and it remains common to refer to the underlying issue as the "reason why" issue'. Any suggestion that this could be answered by applying a 'but for' test was firmly debunked by the Court of Appeal in that case. The Court held that 'It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act: see ***Madarassy*****, *[2007] ICR 867*** per Mummery LJ at paras. 54-56 (pp. 878-9). The lack of any pleading of what the "something else" is, and Mr Broomhead's inability to come up with anything "on the hoof" indicates that there is considerable Micawberism here – the claimant is simply hoping that something will turn up.

56. Thus , quite apart from the admissibility issue, the Tribunal considers that the claimant will face considerable difficulty in establishing this claim, against the employer or the individual respondent.

57. Whilst not a basis for striking out the claims , in themselves, these matters do remove any hesitation that the Tribunal may have had in doing so. There is no good reason why these weak claims should be allowed to proceed to a hearing, and they are struck out.

Claim no. 6.

58. In this claim, the claimant claims unfair constructive dismissal, and for notice pay. He also claims race and disability discrimination, against the first respondent as the employer, and Francesca (Frankie) Abbott. Both claims are advanced on the basis of victimisation , and harassment . The protected act for the purposes of the race claim is identified, again, as the issuing of the proceedings in 2019, which were for race discrimination. No such protected act, however, is identified in relation to the victimisation claim in respect of disability.

59. There is an additional disability discrimination claim of failure to make reasonable adjustments. The disability relied upon comprises of three impairments, extreme stress, serious anxiety and depression, and vestibular migraines. The PCP relied upon is the first respondent's "deployment process", and the reasonable adjustment that the claimant contends the respondent should have made was to suspend the process until the claimant was in a fit state to engage with it.

60. Additionally, the claimant contends that the respondents directly discriminated against him on the grounds of his disability.

61. The basis of the respondents' application here is a little different, as the claimant may not need to refer to or rely upon the inadmissible material for these claims. The respondents' application centres primarily upon the alleged last straw, and how the claimant's case is inconsistent with other evidence of how he viewed the proposal to send him to OH.

62. The respondent, however, also points out that the claimant has relied upon in paras. 3 to 6, and part of 7, of Schedule A to this claim form (pages 54 to 56 of the

bundle) the without prejudice meeting, relied upon for these purposes as amounting to breach of the implied term of trust and confidence.

63. The respondent contends that the claimant cannot do so, and for the reasons given above in respect of claims 4 and 5, evidence of this meeting is inadmissible, and must be redacted from the claims.

64. Turning to the last straw, the Tribunal accepts that the claimant's case as pleaded is at odds with the evidence it has seen of what the claimant has previously said, (and not disputed to have been said). Quite, therefore, how the claimant will seek to square this circle was not apparent, and remains so.

65. The Tribunal considers, therefore that the claimant's complaint of constructive unfair dismissal (and thereby also his claim for notice pay) has no reasonable prospects of success, entitling the Tribunal to strike it out.

66. Turning to the disability and race claims, the respondents' position is that these have no, or little, reasonable prospects of success. Whilst the application majors on the constructive dismissal element, the respondents do also (in their letter of application dated 6 September 2022) seek to strike out the whole claim, or, in the alternative , they seek deposit orders.

Discussion and ruling – Claim 6.

67. Whilst the Tribunal agrees that the claimant is likely to have some difficulty in relying upon a referral to occupational health as a "last straw", in response to which he resigned, when there appears to be evidence of him agreeing to and welcoming such an expedient, the Tribunal cannot say that such a claim has no reasonable prospects of success. As cases such as ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833*** and ***London Borough of Waltham Forest v Omilaju [2005] IRLR 35.*** demonstrate , the last straw need not be a breach of contract in itself, it must contribute, however, slightly to the fundamental breach relied upon.

68. That said, given the evidential difficulties he is likely to face, the Tribunal is satisfied that the claimant has little reasonable prospects of success in his constructive dismissal claim, and the Tribunal considers that a deposit order should be made in respect of this claim.

69. Turning to the other claims in claim no. 6, starting with the claim of victimisation for having done a protected act relating to disability, the claimant has failed to specify what protected act he is relying upon. The previous claims related to his race, not any disability. This claim too has little reasonable prospects of sucess.

70. In relation to the claim of failure to make reasonable adjustments, (assuming for these purposes that the claimant will be able to establish that he was a person with a disability) the Tribunal considers that this is a weak claim. The rather terse pleading does not specify any details of the effects of the alleged disability, or how the PCP of the first respondent's redeployment process put the claimant at a disadvantage when

compared to persons who did not share his disability. The implication is that the claimant was not "in a fit state" to go through this process, but no details are provided.

71. Whilst the Tribunal process does provide for the service of a Reply to a response, the claimant has not responded in this application to the response document, where at paras. 10 to 21 the respondents set out their factual case, and paras. 46 to 51 their legal case, in answer to these claims.

72. In terms of direct disability discrimination, the claimant has identified no actual comparator, nor has he set out his case on why any hypothetical non – disabled comparator would have been treated more favourably.

73. The harassment claim, of course, is an alternative to any direct claim.

74. Turning to the race claims, whilst the protected act has been pleaded, it is of some antiquity, going back to 2019. Those claims have been heard, and the claimant lost them. The claimant has pleaded nothing to suggest what the "something more" required for victimisation claims (see ***Bailey*** above) may be, and the Tribunal considers that this claim too has little reasonable prospects of success.

75. The same applies to the harassment claim. The claimant has pleaded nothing to support a contention that his treatment at this stage was related to his race. Indeed, as he has cast this claim also on the basis of harassment related to his disability, he rather undermines his race case. This claim too has little reasonable prospects of success, the Tribunal considers.

76. The claimant has not made it totally clear which claims he makes against which respondent. The unfair dismissal and notice pay claims, of course, can only be maintained against the employer, the first respondent, and the claimant has so pleaded .

77. The claimant , in para. 14.2 of Schedule A claims against both respondents damages for "race and disability discrimination, harassment and victimisation. The claim of failure to make reasonable adjustments is (presumably) maintained against the first respondent only, but this is not expressly pleaded. The direct race and disability discrimination claims can, and presumably are, maintained against both respondents, as are the alternative claims of harassment. The claimant accordingly brings 10 claims in total.

The amount of the deposit orders.

78. The Tribunal has considered the claimant's financial statement. He is in work, and has some , if limited, disposable income. As deposit orders will be made against specific claims, the Tribunal bears in mind the totality when assessing how much to order.

79. The amounts payable in respect of each claim are £25 per claim, as follows:

i) The claim that the claimant was unfairly constructively dismissed;

ii) The claim that the claimant was wrongfully constructively dismissed:

iii) The claim that the claimant was directly discriminated against or harassed by the first respondent on the grounds of his disability;

iv) The claim that the claimant was directly discriminated against or harassed by the first respondent on the grounds of his race;

v) The claim that the claimant was directly discriminated against or harassed by the first respondent on the grounds of his disability;

vi) The claim that the claimant was directly discriminated against or harassed by the second respondent on the grounds of his race;

vii) The claim that the claimant was victimised by the first respondent for having done a protected act in relation to disability;

viii) The claim that the claimant was victimised by the second respondent for having done a protected act in relation to race;

ix) The claim that the claimant was victimised by the second respondent for having done a protected act in relation to disability;

x) The claimant that the first respondent failed to make reasonable adjustments for the claimant's disability;

Further case management, and postponement of the final hearing.

80. Claim no.6 does not appear to have been case managed. In particular, and most pressingly, disability will require concession or determination. If the claimant pays the deposits, or some of them, and this includes that payable for his disability discrimination claims (save for those relating to victimisation for which he need not actually have a disability) , this matter will require attention.

81. It would be premature to require the claimant to take those steps if he is not to proceed with the claims for which disability is a pre-requisite. The Tribunal accordingly proposes to allow time for the deposits to be paid, and, in the event that the claimant does wish to proceed with the relevant disability discrimination claims, for him then to provide the necessary medical records and impact statement.

82. That will mean that the hearing listed for 12 to 15 June 2023, which was the date originally listed for the claimant's other , now struck out, claims, with which this one was combined. It now stands alone, but, in its present state of readiness, it cannot proceed, and will be re-listed.

83. Whilst case managing this claim , the Tribunal will require the claimant to provide further details of the "other payments" that have been pleaded on the ET1.

Employment Judge Holmes
DATE: 4 May 2023

ORDER SENT TO THE PARTIES ON
5 May 2023

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.