EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F Shina	**- V -**	Rendall & Rittner Ltd

Heard at: London Central (CVP) **On**: 9-16 May 2023

Before: Employment Judge Baty
Ms S Dengate
Mr M Taj

Representation:

For the Claimant: Representing himself
For the Respondent: Mr S Joshi (counsel)

JUDGMENT

1. The claimant's claims are both dismissed pursuant to rule 47 of the Employment Tribunal Rules 2013 ("the Rules"), following the claimant's failure to attend on the sixth day of the hearing.

2. If the claimant's claims had not been dismissed for the reason in the paragraph above, they would have been dismissed pursuant to rule 37(1)(b) of the Rules on the basis that the manner in which the proceedings have been conducted by the claimant was unreasonable.

3. If the claimant's claims had not been dismissed for either of the reasons set out in the two paragraphs above, they would have been dismissed pursuant to rule 37(1)(a) of the Rules on the basis that the complaints brought had no reasonable prospect of success.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 25 March 2021 (2201406/2021 ("the first claim")), the claimant brought complaints of direct race discrimination and harassment related to race. The respondent defended the complaints.

2. By a further claim form presented to the employment tribunal on 10 April 2022 (2201797/2022 ("second claim")), the claimant brought complaints of unfair dismissal, victimisation, for unpaid holiday pay and for breach of contract in relation to alleged unpaid employer pension contributions. The respondent defended the complaints.

3. In its response to the second claim, the respondent brought an employer's contract claim in relation to an alleged overpayment of wages to the claimant. The claimant defended this complaint.

4. The two claims and the employer's contract claim were consolidated and listed to be heard together.

5. This hearing was conducted remotely by Cloud Video Platform ("CVP"). It was originally listed for 10 days from Monday 8 - Friday 19 May 2023. However, the first day was lost as a result of the additional bank holiday for the Coronation on Monday, 8 May 2023. The listing was, therefore, for nine days, starting on Tuesday, 9 May 2023. As we shall come to, the hearing did not run the full course, with the tribunal striking out the claims on the sixth day of the hearing, Tuesday, 16 May 2023.

The Issues

6. The claims had been case managed over a number of preliminary hearings. A list of issues had been agreed in relation to the first claim. Following the presentation of the second claim, that list of issues was updated and agreed at a preliminary hearing on 25 July 2022 before Employment Judge Norris. The agreed list of issues was appended to the note of that preliminary hearing. At the start of this hearing, the judge asked the parties whether or not that remained the agreed list of issues for the combined claims. Both the claimant and Mr Joshi confirmed that it was. That agreed list of issues is appended to these reasons.

7. The judge explained that these were the issues which the tribunal would determine and no others.

8. The judge asked the claimant whether the claimant would like the judge to spend some time running through the law in relation to each of the complaints brought in the list of issues. The claimant said that this was not necessary and the judge did not therefore do so.

9. It had been envisaged that this hearing would deal with all of the issues in the list of issues, in other words issues of liability and those of remedy. However, as noted, one day of the original 10 day listing had already been lost because of the additional bank holiday for the Coronation, thereby reducing the hearing to a nine-day hearing. Furthermore, it appeared from the indicative timetable discussed with the parties that there may not be time to deal with remedy at the hearing. The judge therefore agreed with the parties at the start of the hearing that, if it turned out that there was time, the hearing would deal with remedy whilst noting that, if the indicative timetable was adhered to and time was not made up during the hearing, there was every likelihood that there would not be time to deal with remedy at the hearing.

Adjustments

10. The judge had noted from his reading into the case before the hearing started that the claimant had alleged that he had mental health issues which were caused by the respondent's alleged treatment of him. In the light of that, the judge asked if there were any adjustments which the tribunal needed to make in order to enable the claimant properly to participate at this hearing. The claimant said that there were none.

11. The judge nevertheless for the claimant's benefit went through how a typical tribunal day would run, starting at roughly 10 AM and ending at roughly 4:30 PM, with an hour's break for lunch and a short break mid-morning and mid-afternoon. He said that, however, if the claimant needed further breaks beyond those, he should ask and this could be accommodated. The claimant occasionally asked for an extra break and, on each occasion, this was allowed.

Claimant's strike out application at the beginning of the hearing

12. In correspondence prior to the hearing, the claimant indicated that he sought to make an application to strike out the response in both claims. This was left to be determined at the start of this hearing.

13. The judge explored with the claimant at the start of this hearing what the basis of his strike out application was. The claimant informed the tribunal that the application was made under rule 37 of the Employment Tribunal Rules 2013 ("the Rules") on the basis that the respondent had failed to comply with orders of the tribunal and had conducted the proceedings unreasonably, each in relation to a failure to comply with orders made by EJ Norris at the 25 July 2022 preliminary hearing. These were specifically an order that by 11 April 2023 the respondent should produce a *"provisional timetable for the hearing"* which was *"to be agreed with the claimant if possible"* (order 3(d)); and an order that by 20 April 2023, the respondent should email the tribunal, amongst other things, *"the hearing timetable,…, any chronology or cast list…"* (order 1). To be clear, EJ Norris had not made an order that the respondent should specifically prepare a chronology or a cast list; however, she had ordered that, if the respondent chose to do so, any such documents were to be sent to the tribunal by 20 April 2023.

14. It is not in dispute that Mr Joshi sent a "proposed running order" (effectively a draft timetable for the hearing) to the claimant on 2 May 2023, which he then sent to the tribunal on 8 May 2023, along with a draft chronology and cast list. Mr Joshi acknowledged that this was in breach of the dates set out in EJ Norris' orders.

15. The tribunal heard submissions from both parties and then adjourned to consider its decision. When it reconvened, the judge informed the parties of the tribunal's decision and gave its reasons at the hearing. The tribunal refused the application to strike out the responses and did so for the following reasons.

16. The judge noted that the tribunal had sympathy for the frustration which the claimant felt at the breach of the tribunal's orders. This was particularly so as this was not the first time that the respondent had breached orders of the tribunal and, indeed, at one stage earlier in the proceedings, the tribunal had had to issue an unless order for the respondent to provide a bundle. The tribunal therefore considered that not only had the respondent breached EJ Norris's orders in these respects but that its conduct was unreasonable in doing so.

17. The tribunal (at that point) considered that the claimant was prejudiced as a result of these breaches. The main cause of prejudice was that the claimant had not, as a result of the late proposed timetable, been able to agree with his two witnesses (his wife and Mr Bayer) when they should take time off to attend the tribunal (and he said both needed to gain permission to take time off work in order to attend). That prejudice appeared, therefore, to be real. However, as the judge explained, the tribunal was extremely flexible as to witness running order and it would be possible to interpose the evidence of the two witnesses at whatever point over the next seven days was convenient. This prejudice was not, therefore, by any means insurmountable. Furthermore, any prejudice in not receiving a cast list and a chronology (which were short documents which were not agreed) was very small.

18. Furthermore, the tribunal noted that Mr Joshi had become involved in the proceedings at a relatively late stage (he came on the record on 2 May 2023, well after the deadlines on the orders had expired) and that his attempts to produce a proposed running order, chronology and cast list were designed to assist the tribunal and the claimant. We were not, therefore, critical of him for doing so.

19. Most significantly, striking out the response would be an extremely draconian sanction, with huge prejudice to the respondent. The parties were otherwise prepared and, subject to some applications about documents which we refer to below (which should have been capable of being (but, as we shall see, were in the end not) dealt with swiftly), the parties were ready for the nine-day hearing. It was certainly the case that a fair trial was still possible. It would, therefore, be completely disproportionate to strike out the response and would not be in the interests of justice to do so.

20. The claimant's application for strike out was therefore refused.

The Evidence

Witnesses

21. Witness statements were produced to the hearing for the following (one witness statement per witness except where otherwise stated):

For the claimant:

The claimant himself (four witness statements);

Ms Aura Cristea, the claimant's wife; and

Mr Elliott Bayer.

For the respondent:

Ms Gemma Riley;

Ms Victoria Arnold;

Mr Lewis Green;

Ms Shaista Gill (two witness statements);

Mr Andy Soteriou;

Mr Denzil Baisden;

Mr Robert Pearson;

Mr Andrew Morgan;

Ms Eulalia Cardoso; and

Mr Jason Grieve.

22. The respondent was proposing to call all of these witnesses except for Ms Cardoso and Mr Grieve, whom Mr Joshi said had left the respondent's employment. The judge informed the parties that the tribunal would read their witness statements but that, as they would not be at the tribunal to be cross-examined on their evidence, the tribunal may give less weight to their witness statements. As we shall see, whilst Ms Riley and Ms Arnold's evidence was completed in full and part of Mr Green's evidence was completed, the tribunal did not in the end hear oral evidence from the remaining witnesses of the respondent.

23. As noted, the claimant had placed a great deal of emphasis on the attendance of his two witnesses in the course of his strike out application. In the context of the tribunal trying to agree a timetable for the hearing with the parties,

the claimant informed the tribunal that he would liaise with his two witnesses to ascertain the time for them to attend the tribunal (by CVP) to give their evidence. The judge reiterated that the tribunal was entirely flexible as to the point in the next seven days at which they gave their evidence and the judge also said that, if there were any problems with their employers releasing them, the tribunal could grant witness orders compelling them to attend. Each of these witnesses was giving self-contained evidence and would not be required to attend the online hearing for a great deal of time (Mr Joshi said that, for example, he had only 5 to 10 minutes of questions for the claimant's wife).

24. When the hearing reconvened on the second day (after the tribunal had done its preliminary reading), the judge asked the claimant if there was any update as regards his witnesses. The claimant indicated that his wife would be able to attend the following day. However, when that day came, he explained that she could not take the time off work and he also said that Mr Bayer could not take the time off work and as a result they would not be able to attend at all. He again stressed the terrible prejudice which he said this would cause him.

25. The judge again reiterated how flexible the tribunal could be as to when the witnesses attended and specifically asked the claimant twice whether he wanted a witness order in relation to each of them. However, the claimant on each occasion told the tribunal that he did not want the tribunal to make a witness order in relation to either of them. This was very surprising, in view of the amount of emphasis the claimant had previously placed on the attendance of these two witnesses, which was the main basis for why he said he was prejudiced by the respondent not producing its proposed timetable on time; and in view of the fact that very little time would be needed for them to give their evidence. The dates of the hearing had been known to the parties for a long time, since the July 2022 preliminary hearing, and there was no reason why the claimant should not have been able to arrange with his witnesses for them to be available for at least one day over the course of that long listing (even without a proposed timetable first having been agreed between the parties). The claimant's reluctance at this stage to accept the tribunal's assistance by means of witness orders for his witnesses was therefore very surprising and cast doubt on whether this was really an issue which had caused him prejudice (in the context of his earlier strike out application) and indeed on whether or not he wanted to or had intended to call them at all.

26. As it was, neither the claimant's wife nor Mr Bayer attended the tribunal to give evidence and, of the claimant's witnesses, it was only the claimant himself who did give oral evidence. The tribunal had, however, read all of the witness statements, including those of the claimant's wife and Mr Bayer, in its preliminary reading.

Documents

27. Two bundles were originally produced to the tribunal, a main bundle numbered pages 1-285 (which broadly contained documents relevant to the complaints under the first claim), and a supplemental bundle numbered pages 1-313 (which broadly contained documents relevant to the complaints under the

second claim). These were subject to the applications about documents referred to below, as a consequence of which a third bundle (the "claimant's bundle") was also produced to the hearing.

28. As noted, Mr Joshi also produced a cast list, a chronology and a proposed running order, none of which were agreed. The proposed running order was in any event swiftly superseded by a timetable agreed between the tribunal and the parties at the start of the hearing.

29. The tribunal read in advance the witness statements and any documents in the bundle to which they referred. As the first morning of the hearing had been taken up with applications, the tribunal spent the afternoon of the first day of the hearing and the morning of the second day of the hearing doing this reading, with the hearing reconvening at 2 PM on the second day.

Applications regarding documents

Pages 299-313 supplemental bundle

30. At the start of the hearing, the claimant made various objections in relation to the documents for the hearing. This was to be a repeated theme during the hearing.

31. First, he objected to the inclusion of pages 299-313 in the supplemental bundle on grounds that they have been produced late. Secondly, he claimed that the respondent had deliberately not included roughly 30 pages of documents which he said that he had. The judge tried to persuade the parties to take a pragmatic approach and agree the matters between themselves, particularly given that the documentation in question was not extensive.

32. The claimant emailed the tribunal and respondent at 22:30 on the evening of the first day of the hearing, stating that he was no longer seeking to add the extra 30 pages to the bundle but that he objected to the inclusion by the respondent of pages 299-305 of the supplemental bundle (he was silent as regarded pages 306-313). Mr Joshi duly emailed in response, attaching a file containing a number of documents relating to the production to the claimant in advance hearing of pages 299-313 of the supplemental bundle.

33. When the hearing reconvened at 2 PM on the second day, the tribunal heard applications regarding these documents. The claimant confirmed he in fact objected to the inclusion of all of pages 299-313 of the supplemental bundle. The tribunal heard submissions from both parties and adjourned briefly to consider its decision. When the hearing reconvened, the tribunal informed the parties that it had decided to allow all of pages 299-313 to be included and gave its reasons for doing so, which are set out in the paragraph below.

34. All of these documents were relevant and all related to issues contained in the agreed list of issues which the tribunal had to determine. It was of no consequence, as the claimant submitted, that those issues were referenced in other areas of the evidence; the question was whether the documents were

relevant to the issues. As excluding them would give an incomplete picture, we considered it was necessary that they should be included. The tribunal acknowledged that these documents should have been added to the bundle at a far earlier stage (it was another example of Mr Joshi, who came to be involved in the case at a late stage, ensuring that relevant documents were (quite rightly) put in the bundle, albeit that should have been done earlier). However, there were only 15 pages in total; all of the documents were either written by the claimant himself or sent to the claimant, so he was fully aware of them, or they were uncontroversial documents such as the claimant's sick notes. Furthermore, all bar three pages had been in the claimant's possession for well over a week. There was no prejudice at all to the claimant in terms of his preparation. Indeed, it was hardly reasonable of him to object to their inclusion.

Reconsideration

35. The claimant then immediately objected to the tribunal's decision regarding these documents. The judge asked the claimant if he was asking the tribunal to reconsider the decision it had just made and again, as he had done previously, exhorted the claimant to take a pragmatic view as regards the documents. However, the claimant continued to object. The judge asked if he was asking the tribunal to reconsider its decision. The claimant said that he was.

36. The only basis for the claimant's request for reconsideration was that, as he had decided not to pursue seeking to include his 30 pages of documents, he did not think it was fair that the respondent should be allowed to add pages 299-313 of the supplemental bundle. The tribunal also allowed Mr Joshi to make very brief submissions and then adjourned briefly to consider its decision. When the hearing reconvened, the judge informed the parties that the tribunal had decided to reject the claimant's reconsideration application. This was because it did not consider the claimant's basis for that application as having any merit. The judge stated that the tribunal had to, and did, consider the respondent's application to include documents 299-313 of the supplemental bundle on its merits (as was entirely right and proper), as opposed to because the claimant had decided not pursue an application of his own.

37. It had been intended that the claimant would start giving evidence at 2 PM that afternoon. However, considering and determining these applications took up a substantial part of the afternoon of the second day of the hearing. Rather than start the claimant's evidence late that afternoon, it was agreed that it should commence the following morning and the hearing finished that day at 3:45 PM.

"Claimant's bundle"

38. At 9.05 on the third morning of the hearing (11 May 2023), the claimant emailed the tribunal and Mr Joshi attaching roughly 30 documents, all as individual attachments rather than as a single paginated bundle. His covering email stated, wrongly, that the tribunal had directed that the claimant could also add 30 documents. This was a typical example, evident throughout these proceedings and indeed throughout the events to which these proceedings

related, of the claimant misrepresenting or at best misconstruing things that had been said to him by others.

39. When the hearing recommenced on the third day, Mr Joshi said he would try and take a pragmatic view of the new documents but, as he had only just received them, he needed a bit of time to look through them. That was entirely understandable. Mr Joshi said that, in relation to one of these documents, which he had had the chance to look at, he would not object to its inclusion provided that the full email thread of which that document was a part could be disclosed so as to give the full context.

40. The tribunal was keen, particularly in light of the delays the previous day, to start hearing the evidence. The judge also noted that, in the form provided by the claimant, the documents were unmanageable because it would involve having to open a new document every time one of these documents was referred to. It was therefore agreed that, after the hearing had finished for the day, the claimant would put into one PDF and paginate those documents and send a copy to Mr Joshi and to the tribunal; that Mr Joshi would confirm to the tribunal the following morning whether he had any objection to these documents being added; and that, assuming that he had no objection, he would indicate whether he needed to refer the claimant to any of them in cross-examination (it was assumed, at that point, that the claimant's evidence would most likely be completed by the end of that day (the third day) (although it subsequently became clear that it would take longer than that and it indeed did take longer than that)).

41. The claimant then emailed the tribunal at 6:10 AM on the morning of the fourth day of the hearing (Friday, 12 May 2023), attaching a zip file. This did not include a single paginated bundle of those documents but rather included all of the same documents in individual form again, so did not help.

42. When the hearing recommenced that day, Mr Joshi said that he took a pragmatic view and was happy for the claimant's documents to be produced to the tribunal, again on the proviso that the full thread of the email exchange of which one of the claimant's documents was part could be disclosed. The judge asked the claimant if he was happy with that. The claimant said no. The judge asked why. The claimant said that he objected on the basis that documents 299-311 of the supplemental bundle, which the tribunal had decided should be admitted, contained threads of emails too. The judge said that that was unreasonable and that it was only fair that the full email thread should be included to give context and that the tribunal was therefore going to allow it to be included.

43. As the claimant had for a second time been unable to provide his documents in a manageable form, the judge asked Mr Joshi if he could assist the claimant by putting all of the claimant's documents (including the email thread referred to) into a single paginated PDF to send to the tribunal and the claimant later that day. Mr Joshi duly did this and sent it later that day, Friday, 12 May 2023. This "claimant's bundle" was therefore before the tribunal in addition to the main bundle and the supplemental bundle.

Timetabling, management of the hearing and the claimant's various issues

44. As noted, a timetable for cross-examination and submissions was agreed between the tribunal and the parties at the start of the hearing. However, this was delayed over the course of hearing for a number of reasons.

45. The first of these was the large number of applications referred to above and the case management regarding documents. That so much time was necessary on these issues was primarily as a result of the claimant's unreasonable attitude in dealing with these issues, as described above.

46. The second was that the claimant's internet connection frequently failed. To be clear, the claimant could for the most part log into the hearing; however the strength of his internet connection was such that his voice frequently broke up such that he was no longer comprehensible or, on occasion, the picture froze entirely. In the circumstances, it normally helped if he went out of the hearing room and logged back in again, which he did on a number of occasions; that tended to restore the signal quality for a while but it frequently deteriorated again. There did not appear to be a problem early on in the hearing. However, it became particularly bad on the fourth day of the hearing (Friday, 12 May 2023) and the fifth day (Monday, 15 May 2023).

47. Thirdly, the claimant's evidence took far longer than anticipated. Mr Joshi indicated that, depending on the way the questions were answered, he anticipated that the claimant's evidence should be completed within a day. However, the claimant frequently went off on a tangent when he gave his answers; often did not answer the question that he was asked (even in the case of very simple questions); and often sought to include things he wanted to tell the tribunal about in an answer even when he was not being asked about that matter. This meant that Mr Joshi's cross-examination of the claimant, through no fault of Mr Joshi, took a lot longer than anticipated.

48. It became clear as the third day of the hearing (Thursday, 11 May 2023) went on, that the claimant's evidence would extend to the following day. Mr Joshi informed the tribunal that the respondent's first witness, Ms Riley, who was due to give her evidence the following morning, needed to be away on annual leave in the afternoon. As the tribunal could not be sure that the claimant's evidence would be completed in order to enable this to happen, the tribunal decided that the safest thing was to interpose Ms Riley's evidence first thing the following morning and complete the claimant's evidence after that. There were no objections to this and that is what happened. It was just as well that this decision was taken because, although the claimant had indicated he would need no more than an hour with Ms Riley, he needed roughly double that time with her and her evidence in fact lasted until almost midday.

49. The tribunal then took a break before continuing with the claimant's evidence. The claimant at this point asked whether the hearing would be finished by 4:30 PM that day as he needed to speak to his GP then, although he did not at that point say why he needed to speak to his GP. The judge told him that the

hearing would finish by 4 PM and that that would then give him plenty of time to speak to his GP at 4:30 PM.

50. It was at this point that the claimant started to have particularly bad problems with his internet connection. At one point, after his connection froze again and he didn't come back into the hearing room for a long time, the tribunal decided to take an lunch early and return at 1:30 PM (the judge asked Mr Joshi to email the claimant to let him know this, which Mr Joshi duly did). The tribunal was concerned at this point as to whether, due to the ongoing internet issues, it would be practicable to continue that day. When the hearing reconvened at 1:30 PM, the claimant indicated that he was keen to finish his evidence. Mr Joshi said that (if he got clear answers to the questions he had to ask) he thought that he would only need another 10 minutes or so.

51. The claimant then got emotional and said *"My health has deteriorated. I am not going to lie to you. I don't want to die. I may decide to call it a day. It's too much. I may just call it a day."* He referenced wanting to speak to his GP. He referenced his *"blood pressure"*. He was emotional and tearful at this point.

52. The tribunal was very concerned about him and about whether it was appropriate to continue that day. The claimant insisted that he wanted to continue. Mr Joshi expressed his concern as to whether it was appropriate to continue given the state of the claimant. The tribunal took a very brief break to consult and when it returned, the judge informed the parties that the tribunal had taken the decision that it was in everyone's best interests, but especially the claimant's, that the hearing should adjourn for the day and continue after the weekend because it did not consider that the claimant was at that point in a fit state and it was concerned about him. The hearing adjourned.

53. The hearing reconvened the following Monday, 15 May 2023. At the start, the judge asked the claimant if he was okay health wise and if he was okay to continue. The claimant said that he was. However, he said that he was expecting a call from his GP at some point and wanted to keep his phone on vibrate so that he could pick it up if and when that call came. The judge said that that was fine. Whilst the claimant's phone vibrated on occasion that day (none of the calls, apparently, being from his GP, as the claimant did not pick them up), that did not interfere with the conduct of the proceedings.

54. The claimant's evidence was duly completed that morning. Ms Arnold's evidence was then heard. Again, contrary to what the claimant had indicated, he actually needed around 2 hours with Ms Arnold. At 3:20 that afternoon, after a break, Mr Green's evidence then commenced.

55. Although the claimant had a tendency to repeat the same points (which was why his cross-examination of the respondent's witnesses took so long), the claimant was able to and did question the respondent's witnesses in a structured manner, referencing the list of issues and putting the allegations of his case to them.

56. As noted, there were problems with the claimant's internet connection that day (Monday, 15 May 2023) as well.

57. After he had been cross-examining Mr Green for about half an hour, the claimant asked Mr Green about a meeting he held with the claimant on 1 October 2020 (which was an investigation meeting which, ultimately, resulted in disciplinary proceedings being brought against the claimant). The claimant asked Mr Green whether, under the "grievance procedure", he accepted that there needed to be five days' notice of a meeting. The judge interjected at this point as he was concerned that the witness might be inadvertently misled as, firstly this was an investigation meeting and not a grievance meeting and, secondly, the judge had not seen anything in the respondent's policies which indicated that there needed to be minimum notice given for investigation meetings. The judge asked the claimant whether, if he was in fact putting it to Mr Green that there needed to be five days' notice of an investigation meeting under the policy, he could take Mr Green to the passage of the policy which he relied on. The claimant could not find it. The judge tried to assist by referring the claimant to what appeared to be the relevant disciplinary policy document.

58. At this point, Mr Joshi said that he had just been informed by Ms Riley (who had finished her evidence the previous week but was observing the hearing at that point) that there was a reference on page 54 of the disciplinary policy to *"48 hours' notice of disciplinary hearing"*. Mr Joshi was clearly doing this to assist the claimant in finding whatever reference he had in mind (and there was no reference in the policy to notice being required for an investigation meeting).

59. At this point, the claimant became very angry and objected to Mr Joshi "interrupting" him. The judge explained that Mr Joshi was trying to be helpful and to find the reference in the bundle for the claimant. The claimant objected to the fact that another member of the respondent notified Mr Joshi of this and appeared to be suggesting that somehow this was tipping Mr Green off in his evidence. He referenced that the judge had throughout the hearing made a point of emphasising to witnesses that, after their evidence had begun, they could not speak to anyone about the case until their evidence was completed (which the judge had done). The claimant then declared that this was not fair and that a *"fair trial is no longer possible. I will write an email to the employment tribunal"*. At this point the claimant's internet connection was weak, which made matters more difficult.

60. The tribunal told the parties that they would take a very short break and return, which they did. However, at this point, the claimant was no longer in the lobby of the CVP room. Mr Joshi confirmed that he had heard nothing further from the claimant. The tribunal asked its clerk to ring the claimant to find out why had not returned to the hearing. She was eventually able to speak to him by telephone and reported to the tribunal that *"he's having internet issues and doing a strike out urgently"*.

61. Some minutes later, the claimant came back into the lobby and the tribunal started the hearing again. The judge asked if internet problems had prevented the claimant from returning. The claimant said yes and that he was

making *"an urgent strike out application on the grounds of fairness"*. The judge began trying to ascertain from the claimant what he found objectionable about what Mr Joshi did, but the claimant's internet went again and he left the room. The tribunal took another break and asked its clerk to ring the claimant, but she reported that she was unable to get through and that her calls kept going through to voicemail.

62. The tribunal waited another 10 minutes but the claimant did not return to the CVP room. The tribunal therefore reconvened the hearing, to inform Mr Joshi that, as the claimant had not returned and it was by then 4:40 PM, the hearing would adjourn for the day, but the tribunal would email the claimant about the internet connection and the hearing would reconvene at 10:00 AM the following day.

63. The tribunal duly emailed the parties at 17:03 that afternoon as follows:

"Dear Parties,

Employment Judge Baty has asked me to write as follows:

The hearing has had to adjourn for the day because the claimant has been unable to rejoin, due to ongoing internet difficulties. A lot of time has been lost at this hearing so far because of the claimant's internet problems and there is now an increasing danger that the hearing will not be completed within the allocated time frame if this continues.

The hearing will recommence at 10 am tomorrow. It is the claimant's responsibility to have an internet connection which works properly. If he cannot rely on his current connection, he needs either to use alternative wifi or even change to an alternative suitable location which has adequate wifi.

Thank you very much"

64. The claimant subsequently sent two emails to the tribunal that evening (copied to Mr Joshi), at 23:12 and 23:30 respectively. The proximity of the two emails is significant and we quote them in full as they are relevant to the strike out application referenced below:

"Dear Sirs,

Urgent: Application for Strike out of Respondents' Response

The claimant is making an urgent application for Strike out of respondent's Response under Rule 37 on the grounds that fair Hearing is no longer possible. The reasons are set out below:

1. On Day-5 of the Hearing (15/05/2020), the process has prejudiced the Claimant due to the respondent having a staff member, Ms Ofori to comment during the cross examination of respondent's key witness, Mr Lewis Green when he was being cross-examined by the claimant today.

2. Employment Judge Baty, flanked by Ms Dansgate and Mr Taj had warned that Witnesses who are being cross-examined must not be spoken to by anyone, and that they must not speak to anyone until they have finished giving witnesses. However, the respondent's breached the Order in allowing one of its staff member, Ms Josie Ofori to ping an answer to Mr Green via its representative, Mr Joshi as he was being cross-examined by the Claimant at around 3.50pm today.

3. Mr Joshi, the respondent's representative confirmed at the ongoing hearing that Ms Ofori ,who was not giving witnesses has just pinged in 'to help the Witness Mr Green' in answering Claimant's questions relating to a particular bundle number during Cross examination. This is unreasonable.

4. This meant that the claimant who is not legally represented has been prejudiced. The Claimant asserts that it is no longer possible to have a fair Hearing in respect of the respondent's scandalous and unreasonable behaviour under Rule 37(e)

5. Given that the Employment Judge Baty on Day-1 of the Hearing (09/05/2023) has already found the respondent in breach of Rule 37(b)that the manner in which the proceedings have been conducted by or on behalf of the respondent has been scandalous, unreasonable or vexatious, and, Rule 37(c) for non-compliance with the Tribunal Rules and Order on 25 July 2022 as follows:

(i) the respondent was ordered to email a copy of the bundle, a separate bundle containing all the witness statements, the Hearing timetable, any skeleton arguments, chronology or cast list and any other relevant document, or a link to a site from which they can be downloaded, to the London Central inbox (londoncentralet@justice.gov.uk) or via the Document Upload Centre by midday on 20 April 2023.

The respondent missed the deadline by 12 days. It only just produced the documents on 2nd May 2023 - 7 days to the Final Hearing

(ii) The respondent also did not comply with the order to produce by 11 April 2023 a provisional timetable for the Hearing to ensure that a decision can be made within the time for which the case is listed. This document is to be agreed with the Claimant if possible.

The respondent missed the deadline by 21 days. It produced the documents on 2nd May 2023. The non-compliance made the Claimant who has complied with all the rules throughout the proceedings to suffer prejudice by not being able to have his Witnesses present at the ongoing hearing.

6. The respondent has behaved badly throughout these proceedings, it has missed tribunal deadlines multiple times, and has repeatedly failed to comply with the Tribunal Orders. On 16 February 2022, the respondent was serve **an Unless Order** for failing to comply with the orders.

7. Even as the Hearing is ongoing, the unreasonableness from the other side is continuing. Now the third test in Rule 37 'fair trial' has been breached.

8. Whilst EJ Baty ruled on 9th May that a strike out is too draconic, the proportionality and fairness of the hearing has been fundamentally undermined by one party (Respondent) to the detriment of the claimant throughout this proceedings.

A fair trial is no longer possible for the ongoing hearing as listed. So, on the basis that further delay would prejudice the claimant who had conducted proceedings appropriately, the Respondent's defence should be struck out.

I will be grateful if the strike out application is considered on the grounds listed above.

Please see the attached evidence that the respondent's unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps. It has made a fair hearing impossible.

I confirm that all parties are copied.

Yours Sincerely,
Frank Shina"

65. Whilst the claimant refers to Ms Ofori (of the respondent's HR department) having contacted Mr Joshi, we think that it was in fact, as we have referenced

above, Ms Riley whom Mr Joshi had said contacted him. However, it doesn't matter which of them it was for these purposes.

66. The claimant's second email was headed *"Medical Absence"* and was as follows:

"Dear Sirs,

Following my health condition,(my severe chest pain), and and my mental health, I regret to inform the Tribunal that the claimant is unable to participate in the coming days.

I will sent through a medical certificate within 7 days as required.

I apologise for any inconvenience caused.

I look forward to any further directions.

All parties copied.

Thanks for your cooperation.

Yours sincerely,
Frank Shina"

67. At the time when this was sent, there were 4 days of the hearing remaining (Tuesday 16 to Friday 19 May 2023 inclusive).

Tuesday 16 May 2023

68. The claimant did not attend the hearing on Tuesday 16 May 2023. The tribunal waited half an hour to give the claimant the chance to attend, but he neither attended not attempted to attend the CVP room.

69. The hearing recommenced at 10.35.

70. Mr Joshi then made an application that the tribunal should dismiss the claims under Rule 47 and in the alternative, strike them out under Rule 37(b) on the grounds of the claimant's unreasonable conduct of the proceedings and strike them out under Rule 37(1)(a) on the grounds that the claims had no reasonable prospect of success.

Respondent's Rule 47/Rule 37 applications

71. The tribunal heard submissions from Mr Joshi. It then adjourned for half an hour to consider the applications made and when the hearing reconvened, gave its decisions in relation to those applications with reasons for them orally at the hearing. The judge asked Mr Joshi if the respondent wanted the written reasons as well but he said the respondent was not seeking those written reasons.

72. The reasons for our decisions are set out below, following a brief summary of the law in these areas.

The Law

Rule 47

73. Rule 47 of the Rules states as follows:

Non-attendance

47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence.

Rule 37

74. The power to strike out a claim is contained in Rule 37 of the Rules which provides:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

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

75. Despite being a litigant in person, the claimant is well aware of these provisions as he referenced then in some detail at various stages of the hearing in the context of strike out applications he was making, including for example in his 23:12 email of 15 May 2023 to the tribunal which we have quoted in full above.

76. In relation to striking out claims on the basis of having no reasonable prospect of success, the importance of determining discrimination claims on their merits has been emphasised in the past, in particular in Anyanwu v South Bank Students Union [2001] IRLR 305, where it was stated that the power of strike out should be used only in the most plain and obvious of cases. In that case, Lord Steyn, at paragraph 24, emphasised:

"Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field, perhaps more than any other, the bias in favour of a claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

77. At paragraph 37, Lord Hope of Craighead stated:

"I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. 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."

78. However, some later cases have shown a keener interest in disposing of poor cases. Mummery LJ commented in Gayle v Sandwell & West Birmingham Hospitals NHS Trust [2011] IRLR 810 at paragraph 12:

"One area of debate is about cases of little or no merit, but considerable nuisance value. All are agreed that they should be cleared out of the system as soon as possible. They should not be allowed to take a disproportionate amount of time in the ET or cause the other party to incur irrecoverable legal costs and loss of valuable working time."

79. In addition, Judge Peter Clark in Deer v University of Oxford UKEAT/0532/12/KN [2013] stated at paragraph 42:

"There is a tendency to treat the observations of Lord Hope of Craighead in [Anyanwu] paragraph 37 as meaning that discrimination claims, including victimisation, must always be permitted to run their full course. That is too generalised an approach. Each case must be viewed on its own facts and circumstances."

Discrimination cases generally

80. In discrimination cases, the burden of proof rests initially on the claimant to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did treat the claimant less favourably because of the relevant protected characteristic. In Madarassy v Nomura International Plc [2007] IRLR 246 it was established that the burden of proof in discrimination cases does not pass to the employer simply on the claimant establishing a difference in status and a difference in treatment. There must be something more. If the claimant can establish this, the burden of proof shifts to the respondent to show that on the balance of probabilities it did not discriminate. If the respondent is unable to do so, the tribunal must hold that discrimination did occur.

81. However, the tribunal does not need to revert to the burden of proof if it is able to make clear positive findings either way.

Postponement application?

82. Before Mr Joshi made his submissions on his applications, the judge asked him whether or not he regarded the claimant's second email of 15 May 2023 (at 23:30 PM), which we quoted in full above, as an application to postpone the hearing. Mr Joshi said that he had not read it as a postponement application but rather as the claimant withdrawing from these proceedings.

83. In the context of considering the applications, however, the tribunal decided first to consider this email. We did not consider that it was 100% clear what this email amounted to. However, we felt that this was unlikely to amount to a withdrawal of the claimant's claims. It seemed to be suggesting that the claimant would not be able to attend the remainder of the current hearing, but without actually specifying that he was withdrawing his claims. Furthermore, in the context of his previous email, which was sent less than 20 minutes earlier and which was an application that the tribunal should strike out the respondent's responses, it was unlikely that the claimant would be intending to withdraw his claims. We did not therefore take this email as a withdrawal by the claimant of his claims or a withdrawal from the proceedings.

84. The email did not ask the tribunal to postpone the hearing; rather it just stated simply that the claimant was unable to participate in the coming days. It is not, of course, in the claimant's gift to decide whether the hearing should continue or not and it is up to the tribunal to decide whether or not any hearing should be postponed.

85. However, on the assumption that the claimant's email was an application to postpone, we refused to grant it. The application was made on medical grounds and based on a single sentence in which the claimant himself referenced his "severe chest pain" and "my mental health" without giving any further details. As noted, the claimant had made a reference to his "blood pressure" at one point on Friday, 12 May 2023 and there were allegations in the evidence regarding his mental health and evidence that he had some months previously used the respondent's confidential "Lifeworks" service in relation to mental health issues.

86. However, there was no medical evidence whatsoever to support any application to postpone. The claimant's reference that he would get a medical certificate "within seven days as required" was entirely inadequate; by that stage the remaining four days of the hearing would have expired.

87. Furthermore, as noted, the claimant had been able throughout the hearing to present his case in a structured and reasoned manner. Whilst the claimant had reacted extremely when things occurred which he did not like (the tribunal's decisions on introducing documents and Mr Joshi trying to assist him in finding his page reference being two such examples), most of the problems at the hearing had arisen as a result of either his unreasonable behaviour or his internet problems. We had not, therefore, seen any evidence ourselves that there was a material risk that he was not fit to continue the hearing.

88. Importantly, we had seen a great deal of evidence of the claimant being able to participate in matters when he wanted to but simply refusing to engage when he didn't want to. The most obvious example in the evidence was the fact that the claimant was able to and did engage with a lengthy grievance process regarding his pay, for which he had union support and in the course of which he attended meetings but which was of necessity an adversarial matter; whereas, despite the respondent's frequent attempts to get him to engage with it (in relation to what was in the end over a year's sickness absence) in the production

of medical evidence and, in particular, in attending welfare meetings, all of which was taking place at around the same time as the pay grievance, the claimant simply refused to engage or attend any welfare meeting. We saw similar examples at this hearing. Perhaps the clearest is the fact that, in one email on 15 May 2023, the claimant was able to put together a structured and reasoned strike out application, referencing the relevant areas of the law, and yet, in an email less than 20 minutes later, he declared he was unfit to carry on in the hearing.

89. For all these reasons, we did not consider that there were good grounds for a postponement before us at all.

90. In any event, had we granted a postponement, there would have been enormous prejudice to the respondent as the matter would have had to have been relisted for a continued multi-day trial, almost certainly not before 2024. Furthermore, for the reasons below in which we go into further detail on this matter, we had by this stage come to the view that the complaints brought by the claimant had no reasonable prospect of success; relisting for a further hearing would therefore have been a pointless exercise, with considerable cost and inconvenience to the respondent (there were still six witnesses (including Mr Green) to be heard from, many of whom were senior managers at the respondent) and a corresponding unnecessary use of tribunal time; it was highly likely that any such hearing would be conducted in the same unreasonable way by the claimant; and it would merely have resulted in the dismissal of all of his complaints.

91. For all these reasons, we refused the application to postpone the hearing (to the extent that it was an application to postpone at all).

<u>The claimant's strike out application of 15 May 2023</u>

92. We did not need to hear any submissions from Mr Joshi on this application, because the basis for it was so ludicrous, and we did not do so. We refused it for the following reasons.

93. The main basis for the application was the events late on 15 May 2023 when Mr Joshi attempted to assist the claimant in relation to finding documents, which we have described in some detail above. In the context of what happened, this was a ridiculous basis for an application. Mr Joshi was simply trying to assist the claimant. Mr Green was not assisted in giving his evidence in any way. There was therefore no basis for the application. To go on and suggest that a fair trial was not possible as a result of this was similarly ludicrous.

94. Any other matters referenced by the claimant in that strike out application were either matters which the tribunal had already dealt with in relation to the strike out application made by the claimant at the start of the hearing or historical matters to do with the preparation of the case; to the extent that the claimant was seeking in his application to include these as extra grounds for strike out, those parts of the application were for these reasons refused. In any case, notwithstanding any failings on the part of the respondent in earlier preparation for the hearing, none of this in any way meant that a fair trial was not possible.

95. We therefore refused to grant the claimant's application to strike out the responses.

Rule 47 application

96. Mr Joshi's application under rule 47 was that we should dismiss the claimant's claims (as opposed to that we should proceed with the hearing in the absence of the claimant).

97. Before determining the application, we considered any information available to us about the reasons for the claimant's absence, including the two emails which he sent late on 15 May 2023. We also considered whether there were any further enquiries that might be practicable which it was appropriate for us to make and concluded that there were not. This is because we were satisfied that there was no other reason for the claimant's non-attendance other than the purported reason set out in his second email of 15 May 2023.

98. Although the claimant had had internet difficulties previously, they had never stopped him joining the CVP room and certainly not for long periods (rather, the difficulties were with the strength of the connection when he was there); the tribunal had given the claimant until 10:35 to join the hearing that morning (in other words over half an hour) before recommencing the hearing; and he had neither joined nor attempted to join the CVP room.

99. By contrast, the reason given for the claimant's non-attendance, as set out in his second email of 15 May 2023, was clear; he said he was unable to attend because of his health. Even if someone from the tribunal had attempted to contact the claimant and been able to speak to him that morning, it is almost certain that he would simply have repeated the reason for his non-attendance which he gave in his email of 15 May 2023, late the previous evening; it was neither necessary nor of any practical value to try and ring him and enquire further; the reason why the claimant was not in attendance was clear from his email.

100. Having done this, we decided to dismiss the claims under rule 47 for the following reasons (many of which are the same or similar to the reasons set out above for refusing the "postponement" application).

101. First, the claimant had of course failed to attend (or to be represented at) the hearing. Despite being given time by the tribunal to join, he had not attended by 10:35 AM that morning, over half an hour after the hearing was due to commence.

102. Secondly, the reason he gave for non-attendance was ill-health, but he provided no medical evidence to support this. It was entirely unreasonable for the claimant to expect the tribunal to wait for up to seven days for him to send a "medical certificate", as the remaining four days of the hearing would have expired by then. Had the claimant indicated that he would send a medical certificate that day, the tribunal may have been prepared to wait for that;

however, to the contrary, the claimant indicated that a medical certificate would only be forthcoming within seven days.

103. Thirdly, as we have set out above in relation to the postponement application, the claimant had a history of attending in relation to matters when it suited him but not attending when he chose not to. We were therefore sceptical as to whether he could not indeed attend this hearing.

104. Fourthly, again as we have set out above in relation to the postponement application, the contrast between the careful structured strike out application, which referenced the relevant areas of the Rules, and the email less than 20 minutes later stating that he could not continue, was marked; we did not therefore consider that the claimant was not capable of attending but, rather, that he chose not to.

105. For these reasons, we were minded to dismiss the claims under rule 47.

106. We did consider whether it would be more appropriate either to postpone the hearing or to continue the hearing in the claimant's absence.

107. However, we did not consider it was appropriate to do the former for the reasons set out above in relation to the "postponement" application; in particular, the huge prejudice to the respondent of the postponement, especially in the context of complaints which we had by this stage concluded had no reasonable prospect of success.

108. As to continuing the hearing in the claimant's absence, we acknowledged that it would be possible to do this within the remaining hearing time. However, it would still be necessary to hear from six witnesses from the respondent and, even with limited questions from the tribunal, that would take time to do and would cause inconvenience to the respondent and its witnesses, many of whom were senior managers. In the context of the claimant's behaviour in not attending and our conclusions that the claims had no reasonable prospect of success, we did not consider that it was reasonable, necessary or proportionate to make them do this. We did not therefore consider it was in the interests of justice to continue with the hearing in the claimant's absence.

109. Having concluded that, and for the reasons set out above, we decided that we should dismiss the claims under rule 47 and they were so dismissed.

<u>Rule 37 application (unreasonable conduct)</u>

110. Had we not dismissed the claims under rule 47, we would have dismissed them under rule 37(1)(b) on the basis that the claimant conducted the proceedings unreasonably.

111. First, we considered the provision at rule 37(2) that a claim 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. This applies in relation to the strike out application under rule 37(1)(b)

and also in relation to the strike out application which we consider below under rule 37(1)(a).

112. The claimant had had a reasonable opportunity to make representations; we were in the midst of a hearing at which he could have made representations (either orally or, on request, in writing); however he chose not to attend. Nevertheless, he had had the opportunity to do so. Rule 37(2) was therefore satisfied.

113. We then went on to address the substantive application.

114. We could have addressed many of the examples of unreasonable conduct of the hearing by the claimant which are outlined above (his earlier applications relating to documents, for example). However, this application was limited to the alleged unreasonable conduct of the claimant in not attending on the sixth day of the hearing. That is the element of unreasonable conduct which we therefore addressed.

115. For reasons already outlined, we considered that it was unreasonable conduct of the claimant not to attend on the sixth day of the hearing. He did not ask the tribunal whether the hearing could be postponed; rather he told the tribunal in an email that he was unable to participate and then simply did not attend. We have already set out above the reasons for our scepticism as to whether he could not attend for medical reasons and the fact that no medical evidence was supplied either. In the light of those conclusions, we considered that it was unreasonable for him not to attend on the sixth day.

116. We then went on to consider whether to exercise our discretion to strike the claims out for this reason. In doing so, we took into account that this was only the latest in a series of aspects of unreasonable conduct by the claimant; that if we did not strike the claim out, there would be huge prejudice to the respondent in terms of a reconvened multi-day hearing at a much later date and the consequent additional demands on tribunal time (and therefore other tribunal users) and public money; and, of great importance, that all this would take place simply to result in the disposal of complaints which, by this stage, we had concluded had no reasonable prospect of success.

117. For all these reasons, we considered that we should exercise our discretion to strike out the claims on the basis of the claimant's unreasonable conduct.

<u>Rule 37 application (no reasonable prospect of success)</u>

118. If we had not struck out the claims under rule 47 or because of the claimant's unreasonable conduct, we would have struck them out pursuant to rule 37(1)(a), on the basis that none of the complaints set out in the list of issues had any reasonable prospect of success.

119. We consider briefly each of those complaints below. First, however, we address one point of particular importance in relation to this strike out application.

The case law in relation to striking out claims because of lack of reasonable prospects, which we have set out in our law summary above, rightly cautions against striking out discrimination claims where there are disputes of fact. That guidance is given in the context of what is, if we can call it this, the "standard" situation where a strike out application is brought before any evidence has been heard or read, normally at a separate preliminary hearing long before the final hearing of the case.

120. The situation here is, however, very far removed from that. This is not a preliminary hearing several months in advance of the full merits hearing. We are considering this application roughly 2/3 of the way through the final hearing itself. The tribunal has read all of the witness statements and the documents in the bundle to which they have referred; indeed, as the bundles in this case were not long, the tribunal has gone on to look at the vast majority of the documents in those bundles, regardless of whether they were referred to specifically in the witness statements. Furthermore, the tribunal has heard the entirety of the claimant's evidence and the evidence of two of the eight respondent's witnesses who were due to give oral evidence to the tribunal, plus part of Mr Green's oral evidence. Each of the three respondent's witnesses from whom we have heard were witnesses against whom individual allegations of discrimination have been made and who together were able to give evidence in relation to a substantial part of the allegations in the list of issues. Far from having not yet heard any evidence at all, the tribunal has, therefore, read and heard the majority of the evidence.

121. Furthermore, whilst the claimant's evidence and allegations diverged significantly from what was set out in the contemporaneous documents, the evidence which we have heard so far from those witnesses of the respondent who have given oral evidence did not in any material respect diverge from the contemporaneous documents; on the basis of what we have heard so far, it would not be unreasonable to expect that the evidence of the remaining witnesses was similarly likely to be consistent with the contemporaneous documents. Furthermore, whilst the respondent's witness statements are relatively brief, they are structured by reference to a lot of contemporaneous documents, which tell the story of what happened. The statements themselves are consistent in all material respects with those documents. Furthermore, it is the contemporaneous documents themselves which set out the majority of the basis of the primary facts relevant to the complaints in the list of issues; and we have read all of those documents.

122. In short, we are making this decision on reasonable prospects having read and heard the majority of the evidence relevant to our final decision; we are, in stark contrast to the "standard" situation, in a very good position to make informed judgments about reasonable prospects, including on areas of factual dispute, because we have heard/read so much evidence in relation to those areas of factual dispute.

123. We turn then to the individual complaints in the list of issues.

Direct race discrimination

124. We have seen nothing either in the claimant's pleaded case or in the evidence which would cause the burden of proof to shift. All of the 10 allegations of direct race discrimination would fail for that reason.

125. Nonetheless, we address each of them in turn. What we set out below is, necessarily and in the interests of proportionality, only a very brief summary, albeit it is as a result of a large quantity of factual evidence which we have looked at and analysed.

i 23 December 2019 Laura Stribbling grievance

126. The claimant's email to Ms Stribbling did not get actioned as Ms Stribbling left the company and it consequently slipped through the net. The reason for it not being actioned was therefore due to a mistake. It was not because of the claimant's race.

ii 21 January 2020 Eulalia Cardoso grievance

127. Ms Cardoso did not ignore the email the claimant sent her; she forwarded it to HR at the HR general email as was normal. The factual basis of the allegation is not therefore made out and it therefore fails. The fact that it was not actioned by the HR department was because it somehow slipped through the net. There is nothing to suggest that that was because of the claimant's race.

iii May 2020 grievance to Lewis Green

128. The claimant did not raise a grievance to Mr Green in May 2020. This allegation is not therefore made out on the facts and therefore fails.

iv Suspending the claimant on 1 October 2020

129. The claimant was suspended because he was taking significant extended time away from his shift without any adequate explanation. It is the respondent's standard policy to suspend employees in these circumstances because of the significant health and safety risk (for example if there was a fire) of having employees working who might desert their post, especially where they are the sole individual working as concierge in a block of apartments. It was nothing to do with the claimant's race.

v Being left on suspension from October to 21 December 2020

130. The claimant remained on suspension for this period because the respondent was carrying out a thorough investigation and disciplinary process. As soon as the decision to give the claimant a final written warning (rather than to dismiss him) for his actions in being away from his post was made, the suspension was lifted. It was nothing to do the claimant's race.

vi Issuing the claimant with a final written warning on 21 December 2020

131. The claimant was issued with the final written warning for being away from his post (which he was). He could have been dismissed for gross misconduct but Ms Riley instead chose to give the lesser sanction of a final written warning. The decision was nothing to do with his race.

vii Not being given the opportunity to apply for the role of head concierge

132. There was no role of head concierge to apply for, so the factual allegation is not made out. This allegation is based on a misunderstanding by the claimant.

viii Ignoring the grievance raised by the claimant to Victoria Arnold on 21 November 2020 and 28 December 2020

133. Ms Arnold did not receive the 21 November 2020 grievance. She did receive the 28 December 2020 grievance. She acted on it by forwarding it to the relevant members of the HR team who arranged a grievance process which then took place. She did not ignore the grievances and the factual basis for the allegation is not therefore made out. In any case, none of this is anything to do with the claimant's race.

ix Ignoring the grievance raised by the claimant to Esther Sanchez on 24 December 2020

134. This grievance was not ignored. It was dealt with as part of the grievance investigation carried out by Mr Pearson. The factual allegation is not therefore made out.

x Failing to offer redress or remedy in the grievance outcome letter of 15 March 2021

135. Mr Pearson did not fail to offer redress or remedy in his grievance outcome letter. Indeed, he partially upheld the claimant's grievance. The factual allegation is not therefore made out. In any event, Mr Pearson's decision was nothing to do with the claimant's race but was based on his analysis of the facts of the grievance as he genuinely saw them.

Harassment related to race

i On 29 December 2019, via its employee KA, calling the claimant a "crazy guy" and an "idiot" telling him to "fuck off" when challenged

136. Given our concerns about the reliability of the claimant's evidence, we do not consider that this is proven and this complaint fails because the allegation is not made out. In any event, it is the case that there was a disagreement between the claimant and KA at that time over a rental parking issue; even if these comments were made, they were not related to the claimant's race, so the complaint fails for that reason too.

ii In May 2020, via its employee KA, telling the claimant he was an "animal", using foul language and telling him to "fuck off" when challenged

137. Given our concerns over the reliability of the claimant's evidence, we do not consider that this is proven. It is noticeable that the claimant did not, as he has repeatedly alleged he did, report these comments to Mr Green at the time (May 2020), which further casts doubt on whether they were made. This complaint fails because the allegation is not made out.

138. In any case, both of the two complaints of harassment above were presented out of time. There are no successful in time complaints to which they could be connected so as to be conduct extending over a period such as to bring them in time. No reason has been suggested as to why it would be just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear them and they would be struck out on that basis.

iii On or before 23 December 2020, the claimant's property was removed from the staff wardrobe, put into a bin bag and dumped in the rubbish room; and his access card was revoked

139. As the claimant conceded in cross-examination, it was speculation on his part that this was done and that this was done, as he has alleged, by KA. This allegation is not, therefore, proven factually and therefore fails. In any case, there is no evidence that, even if someone did it, it was related to the claimant's race. The allegation fails for that reason too.

Unfair dismissal

140. The claimant was clearly dismissed by reason of capability; he had been off sick for well over a year at the time of his dismissal, with no indication of when he might come back to work. That was, therefore, a potentially fair reason for dismissal.

141. The respondent carried the dismissal out reasonably. It sought repeatedly to have welfare meetings with the claimant and to get from him medical evidence that might provide a diagnosis and prognosis on when, if at all, he might return to work. However, the claimant neither produced a medical report nor gave permission that medical documents which he had (for example through Lifeworks) could be released to the respondent. He completely refused to engage with the process or to attend any meetings. It was entirely reasonable for the respondent to dismiss him when it did.

142. The claimant's dismissal was not therefore unfair.

Victimisation

143. The claimant's dismissal was obviously for the reasons set out above and not because of the fact that he had brought an employment tribunal claim almost a year before he was dismissed; if the respondent had been looking to dismiss him, it could have done so far earlier but instead it gave him every reasonable

opportunity to engage with the process so as to avoid dismissal. The victimisation complaint fails.

Holiday pay

144. We were taken through the holiday records and payments in some considerable detail during the evidence. It is clear from that information that the claimant was paid his full holiday entitlement. Of his 24 day entitlement for 2021, he took and was paid for 15.5 days in September and four days in October 2021, leaving 4.5 days outstanding for 2021. He accrued 4.5 days in 2022 up to his dismissal on 8 March 2022. A total of 9 days accrued holiday was therefore outstanding at the time of the claimant's dismissal. He was paid for six days when his employment terminated. That left three days outstanding. The respondent paid this, albeit late, in December 2022 and the claimant accepted in evidence that he received this payment. The claimant was therefore paid for his full entitlement. The holiday pay complaint therefore fails.

Breach of contract - pension contributions

145. The claimant was enrolled in the respondent's auto-enrolment pension scheme. Contributions were deducted from his salary and employer contributions made if the claimant earned more than £192 per week. When he went off sick and was entitled only to statutory sick pay, his earnings were much less than that. Consequently, the respondent did not and was not obliged to deduct employee contributions from his wages or make employer pension contributions in respect of this period. There was therefore no breach of contract. The breach of contract complaint therefore fails.

Employer's contract claim

146. For clarity, the employer's contract claim would only have been relevant if the claimant's holiday pay complaint had succeeded. On the basis that it does not succeed, the employer's contract claim similarly falls away.

Discretion

147. For all of the reasons above, none of the claimant's complaints have any reasonable prospect of success. We therefore need to consider whether to exercise our discretion to strike out those complaints on this ground.

148. We do so unhesitatingly. It would be an injustice to allow these complaints to continue. They have no reasonable prospect of success. If they were permitted to continue, there would be the need for a further reconvened multi-day hearing, probably not before 2024, which for the reasons above would be enormously prejudicial to the respondent and indeed to other tribunal users if time that could be spent on their cases was unnecessarily used on this one. The result of allowing this would simply and inevitably be that the complaints would fail at the next hearing.

149. Therefore, had we not struck out the claims on the basis of the rule 47 application or the rule 37(1)(b) application, we would have struck them out on the basis of this rule 37(1)(a) application on the basis that they have no reasonable prospect of success.

Claimant's request for written reasons

150. The tribunal's judgment was sent to the parties on 17 May 2023.

151. By an email of 18 May 2023, the claimant requested the reasons for the judgment in writing and they have therefore duly been provided.

_____

Employment Judge Baty

Dated: 25 May 2023

Judgment and Reasons sent to the parties on:

26/05/2023

For the Tribunal Office

Annex

Agreed List of Issues

1. DIRECT RACE DISCRIMINATION S13(1) Equality Act 2010 ("EqA")

a. The Claimant identifies as Black African.

b. Was the Claimant treated less favourably by the Respondent than his comparator would have been treated? The Claimant relies upon a real comparator (Mr KA ("KA"), who is said to be of British/Filipino origin) or a hypothetical comparator ("HC"), a white male undertaking the same role.

c. Was the Claimant less favourably treated because of race? The acts of less favourable treatment alleged by the Claimant are:

i. Ignoring the alleged grievance raised by the Claimant to Laura Stribbling on 23rd December 2019 (HC)

ii. Ignoring the grievance raised by the Claimant to Eulalia Cardoso on 21st January 2020 (HC)

iii. Ignoring the grievance raised by the Claimant to Lewis Green in May 2020 (HC)

iv. Suspending the Claimant on 1st October 2020 (KA)

v. Being left on suspension from October to 21st December 2020 (KA)

vi. Issuing the Claimant with a final written warning on 21st December (KA)

vii. Not being given the opportunity to apply for the role of head concierge (KA)

viii. Ignoring the grievance raised by the Claimant to Victoria Arnold on 21st November 2020 and 28th December 2020 (HC)

ix. Ignoring the grievance raised by the Claimant to Esther Sanchez on 24th December 2020 (HC)

x. Failing to offer a redress or remedy in the grievance outcome letter of 15 March 2021 (HC)

d. Has the Claimant shown facts from which the tribunal could conclude in the absence of any other explanation that the reason for the less favourable treatment alleged was race? If so, has the Respondent shown that it did not contravene section 13 EqA?

2. HARASSMENT RELATED TO RACE - Section 26(1) EqA

a. Did the Respondent engage in unwanted conduct towards the Claimant, as listed below?

i. On 23 December 2019, via its employee KA, calling the Claimant a "crazy guy" and an "idiot" telling him to "fuck off" when challenged.

ii. In May 2020, via its employee KA, telling the Claimant he was an "animal", using foul language and telling him to "fuck off" when challenged.

iii. On or before 23 December 2020, the Claimant's property was removed from the staff wardrobe, put into a binbag and dumped in the rubbish room; and his access card was revoked.

b. Was any proven conduct related to race? If so, did such conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (In deciding if it had the effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable to have that effect).

3. JURISDICTION

a. Do the above complaints form conduct extending over a period, the end of which falls within time, so that the Tribunal has jurisdiction to hear them?

b. If not, are any of the complaints out of time?

c. If the complaints (or any of them) are out of time, is there a further period for bringing them that the Tribunal considers just and equitable and have they been brought within that period?

4. UNFAIR DISMISSAL

a. What was the reason for the Claimant's dismissal? The Respondent says it was capability or in the alternative conduct that was the reason or if more than one the principal reason; those are potentially fair reasons. The Claimant says that it was because he had brought a previous claim. Did the Respondent have a genuine belief in the reason(s) and was such belief reasonable and based on a reasonable investigation?

b. If the Respondent has shown a potentially fair reason pursuant to section 98(2) ERA 1996, did it act reasonably or unreasonably in treating it as sufficient to dismiss the Claimant pursuant to section 98(4)?

c. Did the Respondent follow a fair procedure?

d. If the dismissal is found to be unfair should there any reduction to any compensation to be awarded? What is the likelihood that the Claimant would have been dismissed in any event and when?

5. VICTIMISATION

If the dismissal was not for a fair reason, was it done because the Claimant had brought Employment Tribunal proceedings, contrary to section 27 EqA?

6. HOLIDAY PAY

Is the Claimant entitled to pay for holiday accrued but untaken at the date of dismissal and if so, how much? He says he is entitled to 8.5 days.

7. COUNTERCLAIM

If the Claimant succeeds in his claim for holiday pay, the Respondent seeks the repayment of £1,441.85 which it says was overpaid to the Claimant in October 2021. Was the Claimant overpaid in October 2021?

8. BREACH OF CONTRACT - PENSION CONTRIBUTIONS

Does the Respondent owe the Claimant money (and if so, how much) for employer pension contributions that the Claimant says were not made between March and August 2021 inclusive? Were these amounts outstanding on termination of the Claimant's employment so that the Tribunal has jurisdiction to hear the complaint?

9. REMEDIES

Is the Claimant entitled to compensation including financial loss, injury to feelings and/or personal injury?