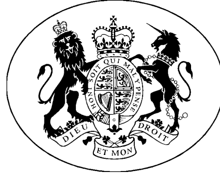

EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Mikans**
Respondent:	**Co-operative Group Limited**
Heard at:	**East London Hearing Centre (via Cloud Video Platform)**
On:	**27, 28 and 29 June 2023**
Before:	**Employment Judge M Brewer**
Members:	**Ms J Henry** **Ms J Isherwood**

Representation

Claimant:	In person
Respondent:	Mr A Leonhardt (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. **The claimant's claims for direct race discrimination fail and are dismissed.**

2. **The claimant's claims for victimisation fail and are dismissed.**

3. **The claimant shall pay the respondent's costs in the sum of £10,380.00.**

REASONS

Introduction

1. The claimant brings claims of direct race discrimination and victimisation against his current employer, Co-operative Group Limited.

2. At the hearing the claimant represented himself and the respondent was represented by Mr Leonhardt of Counsel.

3. The claimant gave evidence on his own behalf and produced a short witness statement. The claimant also presented us with a witness statement prepared by or on behalf of a former colleague, Jurius Plesaunieks. Mr Plesaunieks did not attend the Tribunal, could not be cross examined and in the circumstances, we have given his witness statement little weight.

4. The respondent called for witnesses, Mr Anton Prior, Shift Manager and the claimant's direct line manager, Deborah O'Reilly, Depot Operations Manager and Mr Prior's line manager at the relevant time, Matthew Hill, Transport Operations Manager who heard the claimant's grievance, and Brian Keyworth, Depot General Manager who heard the claimant's grievance appeal. We had written witness statements from all four of the respondent's witnesses.

5. Finally, we had an agreed bundle of documents running to 222 pages and page references below are to pages in the agreed bundle.

Issues

6. The issues in this case were agreed at a case management preliminary hearing which took place in person on 10 January 2022.

7. The note of the case management hearing is at [30]. The agreed issues were as follows.

a. **Direct race discrimination**

i. The claimant's race discrimination claims are based on his Latvian nationality, he relies on the following as acts of less favourable treatment because of his race:

1. The claimant complained that Mr Malecki, who is Polish, accessed the CCTV and took pictures of the claimant on his mobile phone; he then lied to the claimant telling him that the shift manager had sent the picture to him.

   The claimant alleges that i) Mr Malecki would not have taken the picture of him if he was Polish; and ii) he would not have come to him to say that he was not working if he was Polish.

2. The claimant says he was less favourably treated by Anton Prior in that Mr Prior ignored his complaints about Mr Malecki and did not do anything. He alleges that Mr Prior would not have acted in that way if the claimant was English and had made a complaint. The claimant relies on Kerry Turner as a comparator. The claimant alleges that she made a complaint/brought a grievance about something else and her shift manager dealt with it straight away by speaking to the other person, whereas the claimant was still waiting for his grievance meeting when her complaint was all sorted.

3. The claimant says he was less favourably treated by Debbie O'Reilly who did not take his grievance seriously, she did not treat it with respect and ignored the Co-op's grievance policy.

4. The claimant alleges that Matt Hill treated him less favourably than he would have treated an English person by lying about Mr Prior's statement; lying about organising a mediation; by not sending the claimant the CCTV policy when he requested it; and lying about Mr Malecki's training

b. **Victimisation**

i. The claimant relies on his assisting his wife with her complaints under the Equality Act 2010 as a protected act.

ii. He alleges that he was subjected to the following detriments because he did a protected act:

1. Mr Prior ignored his complaints about Mr Malecki and did not do anything.

2. Debbie O'Reilly did not take his grievance seriously; she did not treat it with respect and ignored the Co-op's grievance policy.

3. Mr Keyworth

a. did not give the claimant a chance to appeal his decision and he failed to send the CCTV policy to the claimant with the outcome letter.

b. refused the claimant's request for Mr Malecki's team manager's name and statement.

Mr Keyworth told him it was not possible to provide this because the incident had taken place nearly four months before. The claimant disputes it was not possible to provide the manager's name and a statement; he believes Mr Keyworth could have asked Mr Malecki for the name of the manager.

Deposit order

8. At this stage we note that prior to the case management hearing the respondent made an application for a deposit order to be made as a condition of the claimant continuing with his claims.

9. On 21 April 2022 Employment Judge Lewis made a deposit order in respect of each of the claimant's allegations in the sum of £10 each. It was noted that whilst the amount of each deposit was a nominal sum, the claimant should be aware of the

consequences of proceeding with the claims and the potential for an adverse costs order where his claims fail for the reasons set out in the decision. Those reasons in brief as follows:

a. the allegation of delay in dealing with the claimant's complaint was not a strong point. The claimant did not dispute that he got most of what he wanted out of his grievance. Complaints based on technical breaches of a company grievance policy, delays of a few weeks, failing to provide policy documents, or even a failure to inform of a right of appeal are not enough to establish discrimination or victimisation without more. The claimant accepted that the complaint by his comparator, Kelly Turner, did not involve allegations of breaches of data protection regulations by a manager and he did not know exactly what her complaint had been about,

b. the claimant did not make any allegations of discrimination at the time that the treatment was in any way influenced by the claimant's nationality. The only link the claimant could point to between the matters he complains about, and the previous complaints of discrimination brought by his wife is that Mr Prior had worked with his wife at some point in the past and he could not think of any other explanation for why he did not get back to him in response to his request for the CCTV policy,

c. the claimant found it difficult to explain why his managers would treat him less favourably because of his Latvian nationality. The Employment Judge specifically found that it was unlikely that the claimant would be in any better position in establishing his claims once the Tribunal had an opportunity to hear from the respondent's witnesses.

10. It is also worth noting at this stage that in the deposit order decision the claimant is taken to the key case law relating to the burden of proof in discrimination cases which we again set out below.

Law

Direct race discrimination

11. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

12. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

13. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ. 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**. Most recently the law as set out in **Madarassy** was

approved by the Court of Appeal in **Base Childrenswear Limited v Otshudi** [2019] EWCA Civ. 1648.

14. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

15. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (see for example **Chapman v Simon** [1994] IRLR 124 and **South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

16. Discrimination cannot be inferred only from unreasonable treatment (**Glasgow City Council v Zarfar** [1998] ICR 120).

Victimisation

17. In determining allegations of victimisation three questions should be asked

    a. did the alleged victimisation arise in any of the prohibited circumstances covered by the Equality Act 2010,

    b. if so, did the employer subject the claimant to a detriment,

    c. if so, was the claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

18. Section 39(4) Equality Act 2010, provides that an employer (A) must not victimise an employee of A's (B):

    a. as to B's terms of employment,

    b. in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training, or for any other benefit, facility or service,

    c. by dismissing B or,

    d. by subjecting B to any other detriment.

19. Tribunals need to make findings as to the precise detriment pleaded (see for example **Ladiende and ors v Royal Mail Group Ltd** EAT 0197/15).

20. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the

organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related award. A detriment might also include a threat made to the complainant which they take seriously, and it is reasonable for them to take it seriously. The claimant will not succeed simply by showing that he or she has suffered mental distress: it would have to be *objectively reasonable* in all the circumstances.

21. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view (**Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, HL, **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL and **Derbyshire and ors v St Helens Metropolitan Borough Council and ors 2007** ICR 841, HL).

22. To succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment *because* he or she did a protected act or *because* the employer believed he or she had done or might do a protected act. Where there has been a detriment and a protected act, but the detrimental treatment was due to another reason, e.g., absenteeism or misconduct, a claim of victimisation will not succeed.

23. It is not necessary for the protected act to be the *primary* cause of a detriment, so long as it is a significant factor (**Nagarajan v London Regional Transport** 1999 ICR 877, HL). If protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out.

Findings of fact

24. We make the following findings of fact.

25. The claimant is employed by the respondent as a Warehouse Operative at its Thurrock depot. The claimant commenced employment with the respondent on 12 September 2010.

26. During 2018 and 2019 the claimant's wife who, at that time, was employed by the respondent, brought, and settled an Employment Tribunal claim against the respondent. The claimant represented his wife in that claim.

27. For most of the period of his employment the claimant's direct line manager has been Anton Prior. Until the present claim there is no suggestion that the claimant had any concerns about Mr Prior acting towards him in any way which can be described as discriminatory or as victimisation. Until the present proceedings Mr Prior was not aware the claimant was Latvian. Mr Prior had no knowledge of the claimant assisting his wife with an Employment Tribunal claim.

28. For the past five years or so the claimant's second line manager and Mr Prior's direct line manager was Ms O'Reilly. Until the present claim there is no suggestion that the claimant had any concerns about Ms O'Reilly acting towards him in any way which can be described as discriminatory or as victimisation. Until the present proceedings Ms O'Reilly was not aware the claimant was Latvian. She was aware of the claimant's wife's case and that the claimant participated in that.

29. Mr. Hill did not know the claimant until he dealt with the claimant's grievance. Until the present proceedings Mr Hill was not aware the claimant was Latvian.

30. Mr Keyworth had little contact with the claimant prior to undertaking his grievance appeal. Until the present proceedings Mr Keyworth was not aware the claimant was Latvian. He was aware of the claimant 's wife's claim but not fully aware of the detail and he was not aware of the claimant 's involvement other than the fact that he was her partner.

31. The claimant has worked alongside his colleague Mr Malecki for the last 10 years and they had a friendly relationship.

32. On 9 March 2021 Mr Malecki was acting up as team manager and during the shift he approached the claimant and showed him a picture and a short video which he, Mr Malecki, had stored on his mobile phone. The picture and the video were taken from the respondent's CCTV monitor which was in the manager's office. The images showed the claimant using his mobile phone at work which was not allowed. Mr Malecki told the claimant that the picture and video had been sent to him by the shift manager Mr Prior.

33. On the same day, 9 March 2021, the claimant went to see Mr Prior and told him that Mr Malecki was in possession of a video and images of the claimant which were taken from the respondent's CCTV monitor. The claimant told Mr Prior that Mr Malecki had told him that Mr Prior had sent the images to Mr Malecki. This was not true; Mr Prior had not sent the images to Mr Malecki. This was confirmed by Mr Malecki during the grievance investigation [89].

34. Following the claimant's complaint, Mr Prior spoke to Mr Malecki and highlighted to him that the CCTV system is to be used for safety and security reasons not to deal with any performance concerns [see 95].

35. On 12 March 2021 the claimant raised a formal grievance with Ms O'Reilly in two letters [72 and 73].

36. The claimant said that the subject of his grievance was harassment. In the first letter he described what took place on 9 March 2021, stated that this made him feel stressed and unsafe at work and "*a bit ridiculed in front of other colleagues*". The claimant concluded as follows:

> "*I would like to ask for clarification of picture and video source. I would like to ask you to solve the problem as soon as possible so that I can return to work*"

37. On the face of the first grievance all that the claimant was asking for was clarification of how Mr Malecki came to have the picture and video.

38. The second letter of grievance followed broadly the same format as the first, but the claimant does confirm that Mr Prior denied taking the picture and video and sending them to Mr Malecki. After describing how the claimant felt he said as follows:

> "*I believed he as a shift manager, actions by sending my video to another colleague as clearly breaches his code of conduct and my data protection rights. I would like to understand why shift manager - Anton Prior did not show any interest of resolving this problem and would like to get clear explanation of why he allowed access to CCTV to another colleague*" (sic)

39. In short, looking at both grievance letters, the claimant wanted to know:

   a. the source of the images of Mr Malecki's phone,

   b. whether Mr Prior had taken the images and sent them to Mr Malecki,

   c. why Mr Malecki had access to the CCTV monitor, and

   d. why Mr Prior did not show any interest in resolving the claimant's complaint.

40. On 24 March 2021 Ms O'Reilly acknowledged receipt of the claimant's two grievance letters and asked him to confirm that he had raised the matter informally with his "*immediate supervisor*" [74].

41. The claimant responded to Ms O'Reilly by e-mail on 26 March 2021 [78]. He confirmed that he had raised the matter informally with his shift manager, Mr Prior.

42. On 26 March 2021 the claimant also wrote to Mr Keyworth complaining that Ms O'Reilly "*is denying my rights by not dealing with my grievances. She is ignoring me and she also ignoring Co-op grievance policies… she does not take my grievances with respect and seriousness*" (sic).

43. It must be remembered that during 2021, as a result of the COVID pandemic, working arrangements had become rather more flexible than had previously been the case. Ms O'Reilly's circumstances at the time were that for most of the week she was working from home because her partner was clinically vulnerable, and she had a 1.5 hour commute each way and needed to spend more time at home to care for her partner.

44. In those circumstances she did not feel that she could devote sufficient time to the claimant's grievance and that it would be better dealt with by another manager at the same level. Consequently, she asked Mr Hill to deal with the grievance.

45. Ms O'Reilly sent an e-mail to the claimant on 13 April 2021 confirming that the grievance would be arranged with a manager at the required level, and she apologised to the claimant if he had trouble contacting her on her office phone number stating that there were limited times that she was at her desk [77/78].

46. The claimant responded on the same date to say that the delay was unacceptable and that he was disappointed with the respondent.

47. In response to the claimant's e-mail, Ms O'Reilly sent an e-mail to him on 14 April 2021 again apologising that he felt disappointed and stating that it had been difficult to find a senior manager to deal with his grievance because of pre-booked holiday and other work commitments [76/77].

48. On 27 April 2021 Mr Hill emailed the claimant introducing himself and confirming that Ms O'Reilly had asked him to deal with his grievance. He stated that he would be in touch before the end of the week with a date for a meeting [76].

49. On 30 April 2021 Mr Hill emailed the claimant stating that he intended to meet with him at 2:00 AM on 11 May 2021. The reason for the early meeting is because the claimant worked on the night shift. Mr Hill stated that:

> *"I know this is a bit of a way in the future, but I'm sure you appreciate it's challenging to find a window in my diary where I can work a night shift"*
> [76]

50. Mr Hill's e-mail was followed up by a more formal letter confirming the date and time of the meeting. Mr Hill also confirmed that the claimant could bring a colleague or a trade union representative with him should he wish [79].

51. Mr Hill did attend the night shift on 11 May 2021 when he met with the claimant, Mr Malecki and Mr Prior. The claimant was accompanied by a union health and safety representative. Notes were taken of all of the meetings, and these can be found at [80 – 96].

52. Following the meetings Mr Hill wrote to the claimant with his conclusions on the grievance [97/98]. Mr Hill confirmed that the source of the images which the claimant was complaining about was Mr Malecki and that Mr Prior did not send him those images. The complaint about Mr Malecki having the images was therefore upheld. The complaint about Mr Prior was not upheld. He did not send the images and he did take action following the claimant's complaint to him because having recognised that Mr Malecki had not been trained around use of the CCTV system, he was given what Mr Hill described as training in the correct use of the system.

53. During the course of the grievance meeting the claimant asked Mr Hill what the respondent's policy was around CCTV use and the outcome letter refers the claimant to the respondent's data protection policy which was to be found on the respondent's intranet.

54. Mr Hill also confirmed that in future the respondent would assist colleagues who were acting up into more senior roles with information about essential policies they needed to be aware of.

55. Finally, Mr Hill said that if there were any ongoing relationship concerns which the claimant had, these would be best dealt with through internal mediation or other means and Mr Hill stated that the warehouse team would facilitate this.

56. On 18 May 2021 the claimant wrote to Mr Keyworth to appeal against Mr Hill's decision [99/100]. It is in this letter that for the first time the claimant refers to discrimination. He says:

> "*I would like to say that I feel disappointed how this grievance was held. Firstly, I address this grievance to Deborah O'Reilly - my shift manager's manager. She completely discriminates and ignored me. Secondly, Matt hill came to meeting not ready to hold it, he even was not aware that there are two grievances and was not ready to give me answers to my questions what I stated on my*

grievance's letters on 12/03/2021. I feel discriminated and harassed not only from my shift manager but also from all top managers…" (sic)

57. In relation to the points of appeal it must be remembered that there were four questions asked across both grievance letters as follows:

a. the source of the images on Mr Malecki's phone,

b. whether Mr Prior had taken the images and sent them to Mr Malecki,

c. why Mr Malecki had access to the CCTV monitor, and

d. why Mr Prior did not show any interest in resolving the claimant's complaint.

58. The answer Mr Hill gave to the first two questions was straightforward; Mr Malecki was the source of the images, and he lied about receiving them from Mr Prior, therefore Mr Prior had not taken the images. The third point was not really a complaint. At the time Mr Malecki took the pictures, he was acting up and therefore had access to the office. The answer to the final question was given by Mr Hill who said that Mr Prior had told him that he had spoken to Mr Malecki and had given him what Mr Hill described as training on the correct use of the CCTV system.

59. Therefore, what the claimant describes as his appeal on "*not upheld decisions*" were not in fact related to the matters about which he raised a grievance, they were about questions he raised during the grievance process.

60. The claimant's appeal was acknowledged by letter on 19 May 2021 [101].

61. By letter of 2 June 2021 an appeal hearing was set up for 10 June 2021 [102].

62. On 10 June 2021 the claimant commenced early conciliation.

63. The claimant received his early conciliation certificate on 10 June 2021

64. In the event the appeal hearing was delayed, and it eventually took place on 17 June 2021. The claimant was represented by a union official. Notes of the hearing start at [105].

65. On 7 July 2021 the claimant presented his claim to the tribunal.

66. The appeal outcome letter was delivered on 10 July 2021. The appeal was not upheld.

Discussion and conclusions

67. Before concluding on the allegations of discrimination and victimisation we should say a word about how the hearing progressed.

68. The first point to note is that when the claimant was cross examined, much of the cross examination focused on why, or the evidential basis upon which, the claimant made a connection between his nationality and/or his wife's Tribunal claim, and what he

believed to be the less favourable and detrimental treatment he says he suffered. His invariable response to those questions was that he either did not know, he could not say, or he had no evidence of any reason for his treatment which related to his nationality/the previous claim, but it is what he believed.

69. The second point that we would make is that when the claimant cross examined the respondent’s witnesses that cross examination was extremely short even in the Tribunal members’ experience of very inexperienced litigants in person. All four of the respondent’s witnesses had completed their evidence in less than 1 hour. It is particularly noteworthy that prior to the claimant cross examining the respondent’s witnesses he was advised of the purpose of cross examination and expressly that he should challenge any aspect of the respondent’s witness evidence with which he did not agree, and that he should put his case to the witnesses where relevant.

70. The respondent’s first witness was Mr Prior who, in common with all of the witnesses, said that he was not aware that the claimant was Latvian until these proceedings and while he was aware that the claimant's wife had previously brought a claim against the respondent, he was not aware that the claimant had any involvement with that. Neither of those points were challenged by the claimant. Further, the claimant finished his cross examination without putting to Mr Prior that he had discriminated against him either generally or in any specific way or that he had victimised him. The claimant had to be reminded that this was a matter he really ought to put to each witness so that they could respond, and we could record their response. The claimant somewhat reluctantly did this with Mr Prior, but he failed to do so during his cross examination of the respondent’s next witness, Ms O’Reilly. He was reminded again that this was a matter he really ought to put to each witness and again, rather reluctantly he did so with Ms O'Reilly. However, having got that far, the claimant did not put to either Mr Hill or Mr Keyworth that they had discriminated against him and/or victimised him.

71. To be clear as to the position on the question of nationality and on the victimisation claim:

a. Mr Keyworth’s evidence was that he did not know that the claimant was Latvian before these proceedings and he was aware of the claimant 's wife's claim but not fully aware of the detail and he was not aware of the claimant 's involvement other than the fact that he was her partner,

b. Ms O'Reilly's evidence was that she did not know the claimant was Latvian at the time of the grievance, she was aware of the claimant's wife’s case and that the claimant participated in that,

c. Mr Prior's evidence was that he was aware that the claimant was Eastern European but did not know that he was Latvian prior to these proceedings, and he had no knowledge of the claimant assisting his wife with an employment tribunal claim, and

d. Mr Hill’s evidence was that he was not aware that the claimant was Latvian at the time he dealt with the grievance. There is no allegation of victimisation against Mr Hill and therefore his knowledge of any involvement by the claimant in previous tribunal claims is not relevant.

72. On the question of credibility, this was a case where there were not great issues of fact between the parties, however, credibility remains important partly because there is a cost warning in place as a result of the deposit order and also because of evidence given by the claimant about the point at which he believed he had been discriminated against and/or victimised.

73. As we have noted in our findings of fact, the claimant did not at any point claim that he had suffered race discrimination or victimisation, even though he used the word harassment in his grievance, until his appeal. During cross examination the claimant was asked why, if he thought he had been discriminated against before and during the grievance process he did not raise this during the grievance hearing. The claimant's response was to say that he felt that the data protection issue, that is to say the photographing of a CCTV screen was more important than discrimination and therefore he did not mention discrimination during the hearing. However, we also note that he values his injury to feelings for discrimination at £30,000 which suggests that he was extremely upset by what took place.

74. The claimant also says that he discussed discrimination during the appeal hearing but that this is not reflected in the notes of the appeal hearing or in his witness statement. However, the claimant signed every page of the notes at the end of the meeting confirming that they were accurate and has at no point prior to the tribunal hearing suggested that they were not accurate.

75. We will turn to the detail of the claimant's evidence shortly but at this point we simply note that the claimant's evidence about the point in time at which he says he felt he had been discriminated against because he is Latvian and victimised because of his wife's Tribunal claim was that he did not conclude that he had been discriminated against until the grievance meeting although he accepts that he did not mention discrimination at the grievance meeting because he did not think it was sufficiently important.

76. We did not find the claimant to be a credible witness particularly in relation to his asserted belief that what had happened to him was because of his nationality and because he had represented his wife in her claim against the respondent some three or so years before the issues, we have had to deal with arose. Whilst we accept that an absence of complaint does not mean that there is an absence of a problem, given that the claimant had represented his wife in her claim, which we understand to have involved claims of discrimination, it is very surprising that given the purported strength of feeling the claimant has about being discriminated against because of his nationality and being victimised, he failed to mention it at any point in this process either at all or in any detail and he did not choose to discuss it at either the grievance hearing or the grievance appeal hearing. This must inevitably give rise to the question whether the claimant actually believes that he has been the subject of discrimination and victimisation as he asserts.

77. Where there were conflicts of evidence in this case, we have preferred the evidence of the respondent’s witnesses whose evidence was internally consistent and consistent with the contemporaneous documents we have seen.

78. We now turn to our conclusions on each of the allegations of discrimination and victimisation.

Conclusions on the discrimination allegations

Mr Malecki would not have taken the picture of him if he was Polish

79. Under cross examination the claimant confirmed his view that Mr Malecki took the photos of him because he is Latvian. The claimant said that he had worked with Mr Malecki for 10 years without any problems, that Mr Malecki had never made any comments to the claimant about him being Latvian and on the occasion when the images were taken and shown to the claimant, there was no mention about the claimant being Latvian and/or Mr Malecki being Polish.

80. When pressed to say why he connected the taking and showing of the images with his nationality the claimant said:

> "*I have no evidence to support my belief that Mr Malecki did this because I'm Latvian*"

81. In fact, not only did the claimant say that he had no evidence to support his belief that Mr Malecki was motivated by either the claimant's Latvian nationality, or by the fact that he was not Polish, he could not even say why he believed that to have been the case other than that he could not see any other reason for the treatment.

82. In our judgment the claimant has not proved facts from which we could decide, in the absence of any explanation from the respondent, that there had been a contravention of any of the provisions of the Equality Act 2010. In respect of this allegation the claimant has failed to shift the burden of proof.

83. If we are wrong about that, and we do not consider that we are, the fact is that it is the unchallenged evidence of the respondent as set out in the bundle, that as acting team leader on 9 March 2021, Mr Malecki saw the claimant on the CCTV monitor using his mobile phone while at work which was not permitted, he took an image and a short video of the claimant using his mobile phone and then challenged the claimant as he thought he was entitled to do. That is an explanation untainted by discrimination. So even if the burden of proof had shifted to the respondent, we are satisfied the respondent has shown that it did not discriminate against the claimant in this regard.

84. For those reasons this allegation fails and is dismissed.

Mr Malecki would not have challenged the claimant to say that he was not working if he was Polish

85. The claimant has never denied that he was using his mobile phone at work and has not denied that he should not have been doing so. Given his previous good relationship with Mr Malecki and given that Mr Malecki was acting up as team leader, and further, given that he noticed the claimant using his mobile phone at work, it is entirely unsurprising that he challenged the claimant about that. He would not have been doing his job had he not done so.

86. The inference we draw from these facts is that in challenging the claimant on 9 March 2021, Mr Malecki was simply performing the role into which he was acting up and there is no evidence that this had anything to do with the claimant's Latvian nationality or the fact that the claimant is not Polish.

87. In our judgment the claimant has not proved facts from which we could decide, in the absence of any explanation from the respondent, that there has been a contravention of any of the provisions of the Equality Act 2010. In respect of this allegation the claimant has failed to shift the burden of proof.

88. If we are wrong about that, and we do not consider that we are, the fact is that, as with the previous allegation, it is the unchallenged evidence of the respondent as set out in the bundle, that as acting team leader on 9 March 2021, Mr Malecki saw the claimant on the CCTV monitor using his mobile phone while at work which was not permitted, and he challenged the claimant about that as he thought he was entitled to do. That is an explanation untainted by discrimination. So even if the burden of proof had shifted to the respondent, we are satisfied the respondent has shown that it did not discriminate against the claimant in this regard.

89. For those reasons this allegation fails and is dismissed.

Being less favourably treated by Anton Prior by his failing to act on the complaint made by the claimant about Mr Malecki

90. Under cross examination the claimant said that having gone to Mr Prior to complain, Mr Prior did not investigate the complaint.

91. The respondent's grievance procedure [131] states that problems should be resolved informally wherever possible. It asks staff to speak to the manager and says that if things do not improve or if the complaint is about that manager, then the matter can be escalated ultimately to a formal grievance. The procedure expressly states that if the complaint is about the individual's line manager, then the complainant should first try to speak to their manager's manager.

92. In this case there was of course a complaint, implicit in what the claimant had to say, about Mr Prior because it was alleged that Mr Prior had himself taken the images and forwarded them to Mr Malecki. The claimant's clear concern was that having the CCTV images stored on a mobile phone was misuse of his personal data. In that context actually the claimant ought to have raised the matter first with Ms O'Reilly, but he did not.

93. Notwithstanding that, Mr Prior listened to the claimant's complaint.

94. Subsequently, and contrary to what the claimant asserts, Mr Prior did not do nothing. According to the contemporaneous notes, he spoke to Mr Malecki highlighting to him that CCTV is there for security purposes and to assist in accidents, not for dealing with performance issues [92, 93 and 95].

95. Under cross examination the claimant was taken to the notes of Mr Prior's meeting with Mr Hill and in particular his evidence about what he did following the claimant's complaint to him [95], and the claimant said:

"*I have no evidence that what Mr Prior said is not true about what he did on 9 March 2021*"

96. The claimant simply said that he thought that the matter should have been handled in a different way. The claimant went on to say that he had no evidence that Mr Prior did what he did because the claimant is Latvian, but he said he believed it was because of Mr Prior's attitude against him. When asked what he meant by that he simply said that "*he didn't do what I thought he should have done"* and when asked what that was, the claimant said that it was to investigate the complaint.

97. The difficulty with the claimant's response here is that his complaint to Mr Prior was that Mr Malecki had effectively misused his personal data by capturing images of him on his mobile phone from the CCTV monitor. Mr Prior never doubted that that was the case, and indeed Mr Malecki never denied it, and so there was nothing else to investigate. The claimant was not doubted, Mr Malecki was spoken to, and, in those circumstances, it is extremely difficult to understand what else the claimant expected Mr Prior to do given an informal complaint which appeared to have been dealt with there and then.

98. In our judgment the claimant has not proved facts from which we could decide, in the absence of any explanation from the respondent, that there had been a contravention of any of the provisions of the Equality Act 2010. In respect of this allegation the claimant has failed to shift the burden of proof.

99. If we are wrong about that, and we do not consider that we are, the fact is that, on all the evidence we heard, Mr Prior did not fail to act on the claimant's complaint about Mr Malecki. On the contrary, he acted as he described to Mr Hill, informally by giving Mr Malecki advice and guidance (which Mr Hill referred to as 'training' in his outcome letter). So even if the burden of proof had shifted to the respondent, we are satisfied the respondent has shown that it did not discriminate against the claimant in this regard.

100. Before we leave this allegation entirely, we do wish to say a word about the allegation that there has been less favourable treatment of the claimant compared to his comparator Kerry Turner.

101. The claimant alleges that she made a complaint/brought a grievance about something else and her shift manager dealt with it straight away by speaking to the other person, whereas the claimant was still waiting for his grievance meeting when her complaint was all sorted.

102. The key points to note about this are first that the claimant did not know whether this was a complaint or a grievance. That matters because there is a significant difference between an informal complaint to a line manager and a formal grievance which requires a specific process to be followed. Further, this clearly was a matter not dealt with by Mr Prior and so it cannot be said that it was he who treated the claimant differently from the way Ms Turner was treated. Finally, and significantly, as set out at the case management hearing and as referred to by Employment Judge Lewis in her Deposit Order:

"*The claimant accepted that the complaint by his comparator… did not involve allegations of breaches of data protection regulations by a manager and he did not know exactly what her complaint had been about*" [45]

103. In that context it is not even clear to us that Ms Turner is an appropriate comparator but even if she is, we cannot see how it can be said that Mr Prior treated the claimant less favourably than he or indeed anyone at the respondent treated the comparator given the available facts.

104. For those reasons this allegation fails and is dismissed.

Ms O'Reilly did not take the claimant's grievance seriously; she did not treat it with respect and ignored the respondent's grievance policy

105. It seems that this allegation amounts to a complaint that Ms O'Reilly did not in fact deal with the grievance. Under cross examination the claimant said that Ms O'Reilly should have dealt with his grievance, she should not have passed it to the Transport Manager and that, along with the delay, is the reason for the allegation that she did not take the grievance seriously or show the claimant respect.

106. On her own admission Ms O'Reilly accepts there was delay in appointing Mr Hill to deal with the claimant's grievance, but she says this had nothing to do with the claimant's nationality.

107. When asked about this under cross examination the claimant again said that he had no evidence to support his assertion that Ms O'Reilly did not deal with the grievance and/or passed it on to Mr. Hill because of claimant's nationality.

108. We accept the evidence of Ms O'Reilly that she was working mostly from home during this period, had a heavy workload and was caring for her clinically vulnerable partner and therefore felt that she would not have sufficient time to devote to the grievance. Whilst the delay in appointing Mr Hill is regrettable the claimant has not pointed to a single fact from which we could conclude or infer that the reason for the delay had anything to do with his nationality or indeed for any reason other than that identified in the respondent's witness evidence.

109. If we are wrong about that, and we do not consider that we are, the fact is that, on all the evidence we heard, Ms O'Reilly acted reasonably in asking another senior manager to deal with a grievance she felt she did not have time to deal with in the circumstances. That is a reason untainted by race discrimination and we are satisfied the respondent has shown that it did not discriminate against the claimant in this regard.

110. For those reasons this allegation fails and is dismissed.

Mr Hill treated the claimant less favourably than he would have treated an English person by lying about Mr Prior's statement

111. The allegation about Mr Hill lying has two elements. The first is that the claimant says that in his outcome letter Mr Hill said that Mr Prior supported what Mr Malecki did which he asserts is untrue. The second is that Mr Hill said that Mr Prior gave Mr Malecki training, but he did not.

112. As to the first matter, the evidence of Mr Prior given to Mr Hill was that after the claimant raised his complaint, he, Mr Prior, told Mr Malecki that he should not be using CCTV to monitor performance. Under cross examination, when this was put to the claimant, he said that he agreed that this in fact happened so in that context it is difficult to understand what it is that the claimant is alleging was less favourable treatment.

113. As to the second allegation, the question posed by the claimant's allegation is not whether Mr Prior in fact gave Mr Malecki training because it is entirely clear from reading Mr Hill's outcome letter that he did not assert this. At no point in the outcome letter does Mr Hill assert that Mr Prior in fact gave training to Mr Malecki. Mr Hill quite specifically says:

> *"Anton stated that [Mr Malecki] was given training in the correct use of the CCTV system we have legitimate reason to use it in future*"

114. In other words, Mr Hill was reporting what Mr Prior had told him he did and he could not therefore be lying about that because that is in fact exactly what Mr Prior did tell him.

115. As with the other allegations we have dealt with so far, the claimant could not explain the basis upon which he asserts that anything Mr Hill did was related in any way to the claimant's nationality and in fact under cross examination the claimant said, in terms, "*I don't believe my nationality was why Mr Hill lied"*.

116. In our judgment the claimant has not proved facts from which we could decide, in the absence of any explanation from the respondent, that there had been a contravention of any of the provisions of the Equality Act 2010. In respect of this allegation the claimant has failed to shift the burden of proof.

117. Given the above and the claimant's concession, these allegations fail and are dismissed.

Mr Hill lied about organising a mediation

118. We can deal with this allegation very shortly because at no point did Mr Hill say that he would organise or be involved in organising mediation and therefore he did not lie about organising a mediation.

119. What Mr Hill did say at several points in his outcome letter was that if there were ongoing concerns which the claimant had regarding either his manager or colleagues these would be better resolved informally via mediation or other means and specifically in relation to mediation that this would be a matter for the warehouse team to facilitate.

120. Furthermore, we infer from the concession made by the claimant in relation to the alleged lies we have dealt with above, that is that the claimant did not believe that Mr Hill lied for a reason related to the claimant's nationality in respect of Mr Prior 's involvement in this matter. We infer from that that there is no reason to conclude that even if Mr Hill had lied about mediation, that lie in any way related to the claimant's nationality. The better view is that it equally did not relate to the claimant's nationality, although as we say our conclusion is that Mr Hill did not lie.

121. In our judgment the claimant has not proved facts from which we could decide, in the absence of any explanation from the respondent, that there had been a contravention of any of the provisions of the Equality Act 2010. In respect of this allegation the claimant has failed to shift the burden of proof.

122. For those reasons this allegation fails and is dismissed.

Mr Hill lied by not sending the claimant the CCTV policy when he requested it

123. We understand that what the claimant meant by this allegation was that when Mr Hill said that he would send the claimant the respondent's CCTV policy, he had no intention of doing so and therefore was simply lying about that.

124. In fact, on the evidence we saw, it seems to us that Mr Hill did try to obtain the respondent's CCTV policy in order to let the claimant have a copy. In reaching that conclusion we rely on the e-mail at [103]. Although we do not have the entire chain of emails, it is apparent that Mr Danny Gent is responding to an e-mail sent by Mr Hill sometime on or before 9 June 2021 inquiring as to the respondent's CCTV policy.

125. We conclude from Mr Gent's e-mail that there was no separate CCTV policy at the relevant time and that the matter was under review. In the meantime, CCTV was referred to in the respondent's data protection policy which the claimant had access to via the respondent's Intranet.

126. In short, Mr Hill did not send the claimant the CCTV policy because the respondent did not have one at that time and we cannot infer from the facts that when Mr Hill said that he would send the policy he did not intend to do so because, in our judgment, we can infer that if he did not intend to do so he would not have made the inquiry of Mr Gent.

127. As with the other allegations we have dealt with so far, there is no evidence from which we could decide or infer that anything done by Mr Hill was motivated in any way by the claimant's nationality.

128. In our judgment the claimant has not proved facts from which we could decide, in the absence of any explanation from the respondent, that there had been a contravention of any of the provisions of the Equality Act 2010. In respect of this allegation the claimant has failed to shift the burden of proof.

129. If the claimant had shifted the burden of proof, we are entirely satisfied from the evidence of Mr Hill that he dealt with the grievance on the basis of the information he was presented with and we bear in mind that on the key point he upheld the grievance, and that his decision making was in no way tainted by race discrimination.

130. For those reasons this allegation fails and is dismissed.

131. That deals with all of the allegations of direct race discrimination. We now turn to the allegations of victimisation.

Conclusions on the victimisation allegations

Mr Prior ignored his complaints about Mr Malecki and did not do anything

132. As we have concluded above, Mr Prior did not ignore the claimant's complaint about Mr Malecki, He did what he felt was proportionate in the circumstances. Taking the claimant's case at its highest it seems that he expected Mr Prior to act as though the claimant had raised a grievance, but he did not raise a grievance with Mr Prior, he raised the matter on an informal basis in accordance with the grievance policy and when he was not satisfied with the outcome, he raised a formal grievance as was his right. But it is simply wrong of the claimant to say that Mr Prior ignored his complaint when that was patently not the case and for that reason this allegation fails and is dismissed.

Ms O'Reilly did not take his grievance seriously; she did not treat it with respect and ignored the co-op's grievance policy

133. This is a repeat of the allegation of direct discrimination, and we adopt the same findings we made above about that. The fact is that Ms O'Reilly did take the grievance seriously. She considered the matter and decided that she would not have sufficient time to devote to the grievance and felt that it was the right decision for her to pass it on to another senior manager. While that meant the grievance may have taken a little longer than is desirable, the fact is that Mr Hill acted reasonably promptly in concluding the grievance and we note that there is no allegation of victimisation against him. It took the respondent from around 18 March 2021 when they received the grievance to 11 May 2021 when Mr Hill delivered the outcome to deal with, a total of around 7 weeks which, in the Tribunal's experience is not an excessive period.

134. In our judgment the claimant's complaint really amounts to no more than he thinks that Ms O'Reilly should have not passed the grievance on and should have dealt with it herself. No doubt she could have done but on the basis of her evidence we have no doubt that that would have built in even greater delay than was the case.

135. More importantly the claimant has provided no evidence to prove, or from which we could infer that the reason Ms O'Reilly did not deal with the grievance herself was the protected act relied upon by the claimant.

136. For those reasons this allegation fails and is dismissed.

Mr Keyworth did not give the claimant a chance to appeal his decision

137. We can again deal with this quite briefly because the grievance policy has only one level of appeal and therefore it was not open to Mr Keyworth to, in effect, create policy on the hoof by allowing a second appeal, even if he had the power to do so, which given there is a group set up by the respondent for the express purpose of reviewing policies, seems unlikely.

138. Given what the grievance policy says we cannot begin to see how the claimant can successfully assert that Mr Keyworth's 'failure' to do something he could not do and which the policy did not allow for, could possibly be victimisation and for those reasons this allegation fails and is dismissed.

Mr Keyworth failed to send the CCTV policy to the claimant with the outcome letter

139. The response to this allegation can also be dealt with briefly. At the time of the appeal outcome letter there was no CCTV policy in place. Mr Keyworth did the next best thing which is that he provided the claimant with copies of the depot CCTV training sign off and copies of what are referred to as CCTV requisition forms.

140. It cannot, in our judgement, be victimisation to not do something it was impossible to do. At the hearing the claimant asserted that he could have been sent an old policy if the current policy was under review, but that is not our reading of the evidence. Our reading of the respondent's evidence is that there was not at this point a separate CCTV policy, and that use of CCTV was dealt with under the more general data protection policy to which the claimant already had access via the respondent's intranet. Indeed, we infer from the evidence that had there been in place a CCTV policy at any point, the claimant would likewise have had access to it via the respondent's intranet. The fact that he did not is evidence that it did not exist, and we understand the reference in the documents to a review to be a review of a new, separate, CCTV policy. But we stress, at the date of the grievance and the appeal this policy was not in place and could not therefore be provided to the claimant.

141. The claimant provided no evidence to connect anything done or not done by Mr Keyworth to the fact that the claimant had represented his wife in a previous Employment Tribunal claim.

142. For those reasons this allegation fails and is dismissed.

Mr Keyworth refused the claimant's request for Mr Malecki's team manager's name and statement

143. The final allegation relates to a request by the claimant to be told who Mr Malecki's team manager was on 9 March 2021. The Tribunal accepts Mr Keyworth's evidence that that information was not available electronically. He could have no doubt asked Mr Malecki who his team manager was at the time, but we accept that the reason he did not is because he did not consider it was relevant information which was needed to resolve or deal with any of the claimant's complaints whether at the grievance stage or the appeal stage.

144. The claimant provided no evidence to connect what Mr Keyworth did, or strictly, failed to do, to the fact that the claimant had represented his wife in a previous Employment Tribunal claim.

145. For those reasons this allegation fails and is dismissed.

146. In summary, all of the claimant's claims of direct race discrimination and victimisation fail and are dismissed.

Respondent's application for costs

147. After giving the above judgment the respondent made an application for the claimant to pay their costs of defending his claims.

148. As we indicated at the beginning of this judgement the claimant was the subject of a deposit order and therefore was aware if not before then at least by the time of that order that he may face an award of costs against him should he fail in his claim. The deposit order was made on 21 April 2022.

Law related to deposit orders and costs

Effect of the deposit order

149. Rule 39 of the Tribunal Rules 2013 deals with deposit orders.

150. If at any stage following the making of a deposit order the Tribunal decides against the paying party in relation to that specific allegation or argument for substantially the same reasons as those it relied on when making the deposit order, that party is automatically treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of rule 76 (unless the contrary is shown) — rule 39(5)(a).

151. This means that the Tribunal will be required to consider whether to make a costs order (or preparation time order (PTO) which is not relevant in this case) against that party under rule 76(1).

152. In **Dorney and ors v Chippenham College** EAT 10/97 the EAT said that there should not be a 'fine-tooth comb' approach to a comparison between the reasons for making the order at a preliminary hearing and the reasons leading to a finding against the claimant. In that case the employment tribunals subsequent reasons for finding that the respondent had established a potentially fair reason for dismissal were substantially the same as those given at the preliminary hearing stage. It was therefore open to the tribunal to make a costs award where the tribunal considered that the claimant was unreasonable in persisting in having the matter determined at a full hearing.

'Treated as having acted unreasonably'

153. Under rule 39(5)(a) the relevant party will be presumed to have acted unreasonably in pursuing the specific allegation or argument for the purpose of a costs order. In other words, unless the party in question can prove the contrary, unreasonable conduct will be made out under rule 76(1)(a) and the Employment Tribunal must consider whether to make a costs order.

154. We note that the presumption of unreasonableness does not mean that the Tribunal will automatically make an order: under rule 76(1) it must still ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party (see for example **Ono v UC (UNISON)** 2015 ICR D17, EAT, where the EAT held that an employment tribunal had erred in proceeding directly from a finding that ODs claims were dismissed for the reasons given in the deposit order to a decision as to whether to make a costs order by reference only to ODs means and the amount of the costs order. Under rule 76(1) the tribunal ought first to have considered whether, despite ODs unreasonable behaviour, it was appropriate and proportionate to make a costs order having regard to all the circumstances of the case. The tribunal had a discretion as to whether to take ODs means into account at that second stage).

155. If it is established that the claimant acted unreasonably in bringing or continuing the claims, we are empowered to award unassessed costs up to a maximum of £20,000 (rule 78).

156. By virtue of rule 84, we may, but do not have to, have regard to the ability or means to pay any award we make. Either way reasons have to be given for that decision.

Litigants in person

157. Although what have been called the 'threshold tests' in rule 76(1) are the same whether a litigant is or is not professionally represented, the EAT has held that, in applying those tests, the status of the litigant is a matter that the Tribunal must take into account (**AQ Ltd v Holden** [2012] IRLR 648, EAT). In Holden, Judge Richardson responded to the submission that the tribunal in that case had given impermissible weight to the fact that the claimant against whom the respondents sought an order for costs was unrepresented by stating (at [32]):

> *"A tribunal cannot and should not judge a litigant in person by the standards of a professional representative. Lay people are entitled to represent themselves in tribunals; and, since legal aid is not available and they will not usually recover costs if they are successful, it is inevitable that many lay people will represent themselves. Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life. As [counsel for the claimant] submitted, lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional adviser. Tribunals must bear this in mind when assessing the threshold tests in [rule 76(1)(a)]. Further, even if the threshold tests for an order of costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice."*

Exercise of our discretion

158. In **Beynon v Scadden** [1999] IRLR 700, EAT, Lindsay J stated:

> *"The proper test for the employment tribunal was…whether it was just to have exercised as it did the power conferred upon it by the rule … [The EAT] must not consider whether we would have ordered as the [employment judge] did but*

instead ask ourselves whether the employment tribunal took into account matters which it should not have done, or failed to take into account that which it should have done or whether in some other way it came to a conclusion to which no employment tribunal, properly directing itself, could have arrived—see eg Carter v Credit Change Ltd [1979] IRLR 361 at 363, 16."

159. It is a basic principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the party ordered to pay the costs.

Discussion and conclusion

160. The basis of the application for costs is essentially that the claimant knew and always knew or should have known that he had no evidence to support his central assertions that he was discriminated against because he is Latvian, or not English, or not Polish (and we note that the reason varied depending on the allegation), or in the case of victimisation that he had supported, and indeed represented his wife in a previous Employment Tribunal claim.

161. As we set out in our judgment there were two striking things about the evidence in this case. The first is that the claimant not only adduced no evidence connecting what he says were the cause or causes of his treatment and that treatment and he failed to put forward any cogent argument that he suffered discrimination and victimisation for the purported causal reasons.

162. In fact, his evidence on this amounted to no more than him saying in effect that 'I believe I suffered discrimination and victimisation because of my nationality and the fact that I represented my wife in her claim against the same respondent, but I do not know why I believe this'.

163. Furthermore, when pressed on the causation point the claimant's response was to say that he believed that he was treated in the way he was because of his nationality and his representation of his wife in her claim because he could think of no other reason why he was treated in the ways he was complaining about.

164. It is striking to note that even after receiving a deposit order and the accompanying costs warning, and even after Employment Judge Lewis set out what she saw as the weaknesses in his case and what the law said about shifting the burden of proof, the claimant produced a witness statement running to just 9 paragraphs, none of which touch upon why the claimant says there is any connection between his nationality or the fact that he represented his wife and the treatment he complains about.

165. The claimant presented his claim to the Employment Tribunal in July 2021, and he has had almost two years to prepare for the final hearing despite which he essentially produced no evidence to support his assertions of discrimination and victimisation against four named individuals who have had these claims hanging over them for all of that time.

166. We do into account that the claimant is a litigant in person, but we also take into account that he represented his wife both at a preliminary hearing, where the issues were discussed and set out, and at a final hearing where those issues were litigated (we pause to note that the claim went the part heard and was then settled so there was no judgment). Those issues included maternity discrimination, sex discrimination and race discrimination. We consider the claimant to be an intelligent individual and although not a lawyer or other professional representative, he will have understood having gone through that process, what was required to prove, on a *prima facie* basis, the allegations of discrimination and victimisation, yet he singularly failed to do that or even come remotely close to doing that in this case.

167. We have taken into account the claimant’s means on the basis that they were taken into account when the deposit order was made, and we note that the deposit for each allegation was very small taking into account the claimant’s small disposable income. The claimant advised us that the position relation to his finances had not changed since the deposit order was made. We accept that he has some, although not a great deal of disposable income after all of his outgoings are met. He does not have a mortgage and so is not affected by the current changes to interest rates and in his submissions, he did not suggest that the costs being sought by the respondent should not be awarded because he could not pay them. We accept that he may require time to pay if an award is made.

168. The difference between the position as it pertained when the deposit order was made and the current application for costs is of course that the important aspect of the deposit order was the greater potential for a costs award to be made should the claims fail for substantially the same reasons given for making the deposit order. That has of course been the case. It was therefore incumbent on the claimant, had he not considered the position before the deposit order was made, to give serious consideration to the position once the order was made and to ask himself whether it was more likely than not that he would succeed, and, if it was not, then he understood that he would be at risk of a costs award against him, and in that context although we note his means and although we have taken them into account, we do not consider that that prevents us from awarding the costs sought by the respondent.

169. For the avoidance of doubt, we are satisfied that our reasons for rejecting the claimant's claims are substantially the same as the reasons given for the making of the deposit order.

170. Finally, we have considered the amount of the costs sought in relation to the nature and complexity of the case before us. The total sum of costs which includes solicitors’ fees, counsel’s brief fee and his refresher is £10,380.00.

171. In our experience, given the two years or so of litigation, the number of allegations, the preparation of a reasonably large bundle, production four detailed witness statements and dealing with all of the other matters which Employment Tribunal litigation inevitably involves, including in this case preparation for and attending a detailed in-person case management preliminary hearing, we consider the costs incurred to be reasonable and proportionate in all of those circumstances.

172. In summary, the respondent's application for a costs award against the claimant in the sum of £10,308.00 succeeds for the reasons given above.

Employment Judge M Brewer
Date: 29 June 2023