EMPLOYMENT TRIBUNALS

Claimant: Mr Z Y Sougui

Respondents: Advanced Supply Chain Group Ltd (R1)
Claim dismissed (R2)
Claim dismissed (R3)
GXO Logistics UK II Limited (R4)
Boohoo.com UK Limited (R5)

Date: 1 September 2023

Before: Employment Judge James

At: Sheffield (by CVP)

Appearances

For the claimant: In person

For the respondents: Abbas Khan, solicitor, for R1
Mr A Willoughby, counsel, for R4
Andrew Halpin, solicitor, for R5

JUDGMENT

(1) The Regulation 13 TUPE claims against R4 and R5 have no reasonable prospect of success and are struck out (Rule 37 Employment Tribunal Rules of Procedure 2013) (claim number 180100/2023).

(2) The remaining post transfer claims against R1 and R4 have no reasonable prospects of success and are struck out (Rule 37 Employment Tribunal Rules of Procedure 2013).

(3) Of the remaining claims against R1 in claim 1800835/2023, those set out at paragraphs 1.1 to 1.5, 1.7, 1.10 and 1.13 of Annex A have no reasonable prospects of success and are struck out (Rule 37 Employment Tribunal Rules of Procedure 2013).

WRITTEN REASONS

The proceedings to date and today's hearing

1. The Claimant issued the first claim form on 1 February 2023 against the First and Second Respondent. The claimant sent further Particulars of Claim to the Tribunal on 13 February 2023 in respect of the first claim. The Claimant issued a second claim form on 14 February 2023, this time against the Third and Fourth Respondent. The Claimant issued a third claim against the Fifth Respondent on 19 February 2023.
2. The three claims were consolidated on 7 March. A preliminary hearing took place on 27 April. The claim against the second respondent was dismissed on withdrawal, following the preliminary hearing. The claim against R3 was dismissed on withdrawal on 28 June 2023. By the time of this hearing, allegations remained against three respondents, R1, R4 and R5. At this preliminary hearing, the remaining respondents applied to strike out the claims against them, alternatively for deposit orders, in relation to the remaining allegations.
3. The claimant helpfully confirmed at the outset, as he did on the last occasion, that his claims against R5 were under Regulation 13 of TUPE, not Regulations 11 or 12. The claimant accepts that he does not have standing to bring the latter claims, which can only be brought by a transferee employer, not by employees. Nothing more needs to be said about those specific claims.

The law on strike out and deposit orders

4. Rule 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

> *(1) An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds:*
>
> > *(a) that it is scandalous or vexatious or has no reasonable prospect of success (r37(1)(a)); ……*

5. Before making a strike out order in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing (r.37(2)). An application by a party for such an order should be made in accordance with the provisions of r.30.
6. The striking-out process requires a two-stage test (see *HM Prison Service v Dolby [2003] IRLR 694, EAT*, at para 15; approved and applied in *Hasan v Tesco Stores Ltd UKEAT/0098/16 (22 June 2016, unreported*). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.
7. The principles applicable to strike out applications are set out in numerous authorities, and recently in for example in, *Malik v Birmingham City Council, UKEAT/0027/19/BA*, 21 May 2019, Choudhury P, paras 29-33; *Cox v Adecco, UKEAT/Appeal No. UKEAT/0339/19/AT*, 9 April 2021, at para 28.

8. The general principle is that a Tribunal will not strike out discrimination claims except in the most obvious and plain case (*Anyanwu v South Bank Student Union [2001] 1 WLR 391*). The same approach applies in whistleblowing cases: see *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*, at para 29, in which the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases.

9. However, self-evidently (and as *Anyanwu* and *Ezsias* themselves make clear) such cases must exist. The respondents argue that this is such a case.

10. As Lord Hope set out in *Anyanwu*, at para 24: *"The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail'.*

11. See further for example, the Court of Appeal's judgment in *Ahir v British Airways plc [2017] EWCA Civ 1392* at paras 15-16:

    Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established…

12. And, at para 24 of Ahir, per Underhill LJ:

    … where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so.

13. See also *Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1,* CA at para 77:

    … there is no absolute rule against striking out a claim where there are factual issues - see, eg Ahir v British Airways plc [2017] EWCA Civ 1392. Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed.

14. Finally, as put by HHJ Tayler in *Cox v Adecco*, at para 28(1) "*No-one gains by truly hopeless cases being pursued to a hearing*" (see also the authorities cited at *Malik* at paras 32-33 which make the same point).

15. Deposit Orders are covered by Rule 39, which provides:

    Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

16. Rule 39(2) requires a Tribunal to make reasonable enquiries into the claimant's ability to pay and to have regard to any such information when deciding the amount of the deposit.

17. In *Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames* UKEAT/0096/07, a case determined under the previous Rules, the EAT (The Honourable Mr Justice Elias (as he then was) presiding), observed at paragraph 27:

… the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

Application to strike out Regulation 13 claims against R4 and R5

18. A TUPE transfer of employees employed by R4 at Shepcote Lane took place in July 2022, to Boohoo.com UK Limited - R5. The claimant accepts that his employment did not transfer to R5 in July 2022. This is because, on or about 2 March 2022, prior to the July 2022 transfer, the claimant's place of employment moved from R4's Shepcote Lane site, to R4's Europa Way site. This meant that by the time of the July 2022 transfer, the claimant was not part of the organised group of employees at Shepcote Lane that transferred in July to R5.

19. The tribunal was referred to a document regarding consultation between employee representatives at Shepcote Lane and management of R4 in respect of that transfer. See page 269 of the bundle which records:

    We have now completed 2 formal meetings on the 18th May and 7th June 2022.

    At the last meeting all representatives confirmed there were no objections to the proposed transfer under TUPE, or to the proposed measures outlined in letter dated 17th May 2022.

20. The document refers to this being a 'Third Consultation Meeting', held on 21 June 2022. The tribunal concludes, on the balance of probabilities, on the basis of this evidence (in conjunction with the further corroborative evidence below about there being elected representatives in respect of the January 2023 transfer from R4 to R1), that there were elected employee representatives at Shepcote Lane for the purposes of the July 2022 transfer.

21. The claimant argues that there were no elected representatives at Europa Way in relation to this transfer. However, that is entirely unsurprising, since they were not part of the organised group of employees in scope for transfer, being employed on a separate site.

22. As to time limits, the claimant accepts that he received an email from Caitlin Ryan referring to the January 2023 transfer, on 7 December 2022, which contained a document which stated:

    Earlier in the year we shared with you an announcement regarding the Shepcote Lane operation, which transferred from Clipper, in house to boohoo.com UK Limited in July 2022. The boohoo.com UK Limited/PLT [Pretty Little Thing] team have continued to implement and embed a largescale automated solution for the site, which is now live, and GXO (Legacy Clipper) have continued to support with inbound pre-retail/pre automation support and the returns management solution from Sheffield Europa.

    Clipper are delighted to have played a part in the journey, and growth of Pretty Little thing over the recent years. The decision has been reached that the Pretty Little Thing returns operation has been awarded to Advanced Supply Chain Group Limited.

23. The claimant told the tribunal that he became confused on receiving this email and did not know if this was referring to the July 2022 transfer or to the proposed January 2023 transfer of the organised group of which he was part, at Europa Way.

24. The claimant accepts that his employment transferred from R4 to R1 on 16 January 2023. It is accepted by both the claimant and R1 that liability in relation to any discrimination claims that the claimant has against R4, that predate that transfer, have also transferred to R1.

25. The claimant's employment with R1 ended on 29 January 2023, because the work upon which he and colleagues were engaged, was transferred by R1 from the Europa Way site to another of R1's workplaces. There is no claim against R1 directly relating to the termination of the claimant's employment.

26. The tribunal was referred to minutes of consultation meetings between management of R4 and elected representatives for the Boo-hoo/PLT returns service at Shepcote Lane which were held on 14 December 2022, 21 December 2022 and 9 January 2023. The names of the elected representatives are shown in the minutes.

27. The tribunal was also referred to notes of a consultation meeting between the elected representatives and affected employees on 10 January 2023, which the claimant attended. The notes record that the claimant was told by the elected representatives that they had been elected for the purpose of the transfer; that two meetings had taken place by then; and that TUPE applied to the transfer. The claimant signed the notes of the meeting to confirm that he had been present. The tribunal concludes on the balance of probabilities that there were elected representatives in relation to the January 2023 transfer and the claimant was aware of that fact.

Conclusions on the application to strike out the Regulation 13 claims

28. Regulation 15(1) TUPE 2006, sets out who has a right to bring a claim for a breach of Regulation 13. In effect it sets out a hierarchy as to who can bring a claim as follows:

    28.1. In the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

    28.2. In the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related (emphasis added);

    28.3. In the case of failure relating to representatives of a trade union, by the trade union; and

    28.4. In any other case, by any of his employees who are affected employees.

29. It is therefore abundantly clear from Regulation 15(1) that if there are employee representatives in relation to a transfer, an individual affected employee has no standing to bring a claim for an alleged breach of Regulation 13.

30. In respect of the transfer from R4 to R5 in July 2022, the claimant has no standing to bring such a claim. This is because there were employee representatives. It is those representatives alone who had the right to bring a claim for breach of Regulation 13, had they chosen to do so. The claimant has no right to bring such a claim, as an individual.

31. Nor was the claimant an 'affected employee', in relation to the July 2022 transfer, on the basis of the facts set out above. Indeed it could not reasonably be argued that the employees at Europa Way were 'affected employees' (see *UNISON v Somerset CC [2010] IRLR 207*, *[2010] ICR 498, EAT;* and *I Lab Facilities Ltd v Metcalfe UKEAT/0224/12* (*25 April 2013, unreported*).

32. The claimant's claim against R5 is based on his argument that he should have been informed and consulted about the July 2022 transfer to R5, as an 'affected employee'. The claimant argues that he was an 'affected employee' because he was part of 'the organised group' (see the penultimate paragraph of his witness statement for this hearing on page 3). The claimant's argument that, in the circumstances set out above, he was part of the organised group, is misconceived. It is inconsistent with his acceptance that his employment did not transfer. It did not transfer precisely because he was not part of the organised group.

33. Since the claimant was not an elected representative; since he was not part of the organised group of employees that transferred; and since he was not an affected employee; his claims against R4 and R5 in relation to the July 2022 transfer have no reasonable prospect of success. I have considered whether it is appropriate to strike out the claims, and I have determined that it is. The making of a deposit order is not appropriate, when such claims are hopelessly misconceived. They are accordingly struck out.

34. Although it is not strictly necessary to determine the time limit issue, I would in any event have found that the claim in respect of the July 2022 transfer was out of time. At the latest, Acas early conciliation should have been commenced by the end of October 2022. Even if the claimant was not aware that the transfer had taken place in July 2022 (which I reject in any event), he should have been aware, following receipt of the 7 December 2022 email from Caitlin Ryan, that it had. He had at that stage the necessary information to enable him to commence Acas Early Conciliation around that time and then submit a claim shortly thereafter. Instead, the claimant delayed until 3 February 2023 to commence Acas Early Conciliation. Even if I had concluded therefore that it was not reasonably practicable to commence Acas early conciliation in October 2022 (which I do not), I would have concluded that the claimant did not in any event commence Acas early conciliation and thereafter submit the employment tribunal claim within a reasonable period thereafter. A period of nearly two months was not reasonable.

35. As for the January 2023 transfer, the tribunal has found that there were elected representatives in relation to that transfer, on the basis of the evidence before it. Again therefore, the claimant has no standing to bring a claim for an alleged breach of regulation 13. In respect of the January 2023 transfer therefore, the claims are also struck out because they have no reasonable prospect of success and it is appropriate to exercise the discretion to strike out the claims. This effectively ends claim number 1801001/2023, subject to any application for costs.

Application to strike out post-transfer claims against R4 & R1

36. The tribunal considered next, whether any allegations against R4 and R1, which post dated the transfer on 16 January 2023, had no reasonable prospect of success; alternatively, little reasonable prospect of success. There are in effect two such allegations, which will be dealt with in turn.

The post-transfer allegation against R4

37. The first is whether the claimant was harassed and or victimised on 23 January 2023, when Seven Thompson, General Manager, wrote to the claimant on behalf of R4, inviting him to a grievance appeal hearing, (to be conducted as a review and not a complete re-hearing) on 25 January, 2023 at 03:30 pm at Unit 1 Europa Way; and further harassed and victimised him on 25 January 2023, when the claimant was informed that the hearing had been cancelled.

38. The tribunal was shown a copy of R4's grievance policy, under which there is no right to a rehearing on appeal; it is left open to R4 which way to proceed. The claimant accepted that was the case.

39. I conclude that the claimant has no reasonable prospect of success in relation to these allegations against R4. The transfer had only taken place a week before the email was sent. It is clear that at this stage, R4 still thought that it was responsible for dealing with the claimant's grievance appeal hearing. It is equally clear that by 25 January 2023, R4 had realised that post transfer, it was no longer responsible for conducting the appeal. It is fanciful for the claimant to suggest that these events were related to his disability; when asked, the claimant could not explain how these allegations were related to his disability. His harassment claim in relation to these events could not possibly succeed.

40. To the extent that the claimant is arguing that the decision to deal with the grievance appeal by way of a rehearing was itself harassment and/or victimisation, I conclude that that allegation has no reasonable prospect of success. R4 was simply choosing to deal with the grievance appeal hearing in the most efficient way possible. That decision clearly had nothing to do with the nature of the grievance itself.

41. [I note in passing that, to the extent that the claimant is complaining about R4 failing to tell R1 about the grievance appeal, such actions would have pre-dated the transfer, and R4 could no longer be responsible for that. In any event, it is again difficult to conceive how that could possibly be related to the claimant's disability.]

42. As for victimisation, it was accepted by both respondents, after helpful clarification by the claimant by reference to the documents in the bundle, that both of the claimant's grievances, dated March and December 2022, raised complaints of discrimination. That much was clear from the notes of the grievance meeting in March 2022; and from the decision letter dated 6 January 2023. However, it is again entirely fanciful for the claimant to suggest that the reason that R4 continued to deal with the grievance post-transfer was because the claimant had complained in his grievance about disability discrimination. Put another way, it is the claimant's case that were it not for the fact that he was complaining about discrimination, R4 would have left it to R1 to deal with the grievance appeal. I conclude that the claimant has no reasonable prospect of succeeding in such an argument. R4 should not be put to the expense of defending again itself against a claim that is based on such an unreasonable and baseless assertion. For those reasons, the claimant's claims against R4 relating to the grievance appeal are struck out because they have no reasonable prospects of success in the alternative section of ordering a deposit order instead would not be reasonable in the circumstances of this case.

The post transfer allegation against R1

43. As for R1, the complaint is set out in paragraph 50 of the amended particulars which state:

> *Zoe Jones told me in that e-mail of 31 January, 2023 that,* 'we will be in touch to invite you to attend a formal appeal hearing ...it may take longer than usual... we will then need to restart our own investigation etc*.'. I would like to clarify here, that on 31 January, 2023 I was not even employed by Advanced Supply Chain and she victimised me after employment relationship ended because she told me that she will take longer than usual and restart the investigation from scratch, which was unreliable because some ex-employees who were involved in the case had already left both the transferee and transferor. Again, she harassed me and this harassment made me feel frustrated. This intention of delaying the grievance appeal was breach of ACAS Code of Practice of Disciplinary and Grievance. I was treated unfavourable and unfairly. I felt she victimised me because the mistreatment I received even after lodging the further grievance. Again, her intention was to delay the Grievance Appeal Hearing until I would have run out of time.*

44. From the underlined words above, it appears that the claimant is making claims of harassment and victimisation related to these facts and the claimant confirmed at this hearing that was the case.

45. The tribunal notes that the full extract from the email of Isobel Dutton of 31 January states:

> *we will be in touch to invite you to attend a formal appeal hearing … due to TUPE this may take a little longer than usual as we are currently retrieving all the information from Clipper. Once we have received all the relevant information, we will then need to restart our own investigation in this case.*'

46. R1 submitted that the claimant did not engage with the grievance appeal after receiving that email from Isobel Dutton. The claimant accepts that was the case.

47. In relation to these allegations against R1, it appears to the tribunal that they too are baseless and contradictory. In relation to the transfer, the claimant has complained that R4 did not inform R1 of the grievance. Yet when R1 became aware of the grievance appeal, and contacted him about it, the claimant was still unhappy.

48. The claimant explained that he was unhappy due to him being informed that because of the TUPE transfer, it may take a little longer than usual to deal with the appeal, as R1 was having to retrieve all the information from Clipper. The claimant has no basis for suggesting that the contents of the email to him are related to his disability and nor could he explain how it could be so connected. Nor has he any reasonable basis for suggesting that he was told what he was about the grievance appeal because he had in the grievance against R4 complained about discriminatory acts against him. R1 could not have had any axe to grind against the claimant, just because he had exercised his right to raise a grievance against R4, in which he complained, amongst other things, of disability discrimination by R4. Further, it is obvious that following the transfer, R1 as the new employer would need more time to deal with a grievance appeal, when the grievance itself had previously been dealt with by the transferor.

49. Yet further, the tribunal concludes that the claimant has no reasonable prospect of succeeding in showing that the contents of the email of 31 January 2023, which were both reasonable and innocuous, amounted to a detriment. In order to deal with the grievance appeal of the claimant properly, it was entirely reasonable of R1 to suggest that it would need to conduct some form of investigation itself.

50. For the above reasons, the post transfer allegation against R1 is struck out as it has no reasonable prospect of success and it is not appropriate to make a deposit order instead.

The remaining claims against R1

51. The remaining allegations made by the claimant, which are taken from the draft list of issues which was annexed to the case management order following the hearing on 27 April 2023, are dealt with in turn below. In relation to each specific allegation, the decision is set out as to whether or not, in relation to the potential merits of the allegation, it has no, alternatively little, reasonable prospects of success. Having considered all of the allegations individually, consideration will then be given as to whether, because of potential time limit issues, it is appropriate to strike out any of the remaining claims, or to order a deposit order in relation to them.

1.1 At a meeting on 18 February 2022, was the claimant told to change shifts, and his place of work, from the Shepcote Lane site to the returns department in the Europa Way site? [s.15, s.26]

52. The clamant alleges that this request is an example of him being mistreated due to high sickness absence. In terms of the potential merits of the claim, this will involve a factual exploration of the context in which that request was made and the reasons for it. In the tribunal's judgment, it is not possible at this stage to say that the merits of this specific allegation, as pleaded, have no, alternatively little, reasonable prospect of success. The question of time limits is however considered further below.

1.2 At that meeting, was the claimant (1) told by Caitlin Ryan that he would be 'put in extensive physical work' at the new site; and (2) asked for occupational health records, which had already been received. [s.15, s.26]

53. The claimant clarified at the hearing that it was actually Mr C Burns who asked him this question, but that Ms Ryan had asked Mr Burns to ask the claimant the question (Ms Ryan being on maternity leave at that stage). The question asked was: "*If we had to put you on a more physical task, how would that affect you*?". The claimant having clarified this at this hearing, it is the judgment of the tribunal that asking such a question could not reasonably be argued to be unfavourable to the claimant or to have subjected him to a degrading etc environment. On the contrary, it is a perfectly reasonable question for an employer to ask, prior to considering whether an employee should be instructed to move site. The tribunal concludes that the claimant has no reasonable prospect of success in relation to the first part of this allegation.

54. As for the request for occupational health (OH) records which the claimant says had already been received, the tribunal accepts that in principle, that the request could be said to be linked to something arising from the claimant's disability. It is however difficult to see how that could be classed as being unfavourable, or creating a degrading environment etc. In relation to this aspect of the allegation, the success of it will depend on the extent to which those records were available to the respondent and if so why they were being requested again. In the tribunal's judgement, it is not possible to say that this allegation has no reasonable prospects of success; but that it is an allegation that has little reasonable prospect of success,

and a deposit order would have been made in relation to it, had it not been struck out on time grounds (see below).

1.3 At a sickness absence review meeting on 23 February 2022, was the claimant put on stage I of the procedure, and did he remain on stage I at the time of his dismissal? [s.15, s.26]

55. From the notes of the meeting which appear at page 251 of the bundle, it appears that this meeting took place on 25 February. The tribunal accepts, contrary to the respondent's submissions to the contrary, that putting somebody on stage I of the procedure could potentially amount to a unfavourable treatment. Whether it did will depend on the factual circumstances. It is noted that the claimant was to remain on stage I for six months only. In terms of the merits of this allegation, the tribunal's judgement is that it is not appropriate to strike it out under Rule 37, or make a deposit order under Rule 39. Again however, the question of time limits is considered further below.

1.4 On 1 March 2022, the claimant lodged a formal grievance, and the hearing took place on 3 March 2022. Following the hearing, was there no further communication with the claimant about his grievance? [s.26 [and s.15]]

56. The claimant was asked at the hearing how this allegation related to his disability. The claimant stated that the treatment was because of his high sickness absence in the past which was because of something arising from his disability. It appears from this that the claimant is pursuing the allegation under section 15, rather than section 26. Evidence will need to be heard in due course, in order to determine to determine why the claimant was not contacted again about his grievance (assuming that was indeed the case). However, other than a bare assertion that this was connected with his sickness absence, it is difficult to see how the claimant could succeed in such an allegation. In relation to this particular allegation, in the tribunal's judgement it has little reasonable prospect of success and a deposit order would have been made in relation to it, had it not been struck out on time grounds (see below).

1.5 On 2 March 2022, was the claimant instructed to attend the Europa Way site? [s.15, s.26, s.27]

57. This allegation is linked to 1.1 and the same reasoning applies in relation to the merits of it in respect of the allegations under SS 15 and 26. As to the claimant victimisation however, it appears to the tribunal that has no reasonable prospects of success, given that discussions about a move to another site had taken place on 18 February, and it is simply fanciful for the claimant to argue that the only reason the instruction was given with because he submitted a grievance alleging disability discrimination at the beginning of March. That specific allegation of victimisation is therefore struck out. The question of time limits is considered further below in relation to the remaining heads of claim applying to this allegation.

1.6 On 14 October 2022 during a meeting with the claimant, did Assad Rizvi question whether the claimant was capable of working full-time? [s.15, s.26]

58. The tribunal concludes, in relation to this allegation, that it is likely to be fact sensitive. There is clearly a potential connection, between recent sickness absence, related to disability, and that question. It may well be possible for the respondent to justify the asking of the question, but that will depend partly on the surrounding

evidence. In those circumstances, the tribunal does not feel able to conclude that the allegation has no, alternatively little, reasonable prospects of success.

1.7 In a referral to occupational health on 15 October 2022, did R4 unreasonably question whether the claimant was fit to work? [s.15, s.26]

59. The claimant had recently had a period of sickness absence. It was perfectly reasonable for the respondent to refer the claimant to occupational health, and it is standard practice to ask occupational health whether a claimant is fit to work, even where a fit to work note has been prepared by their GP. The tribunal therefore concludes that this allegation has no reasonable prospect of success and it is struck out. It is not appropriate to order a deposit order instead.

1.8 On 23 October 2022, was the claimant told by Asad Rizvi, Shift Manager: 'I cannot keep you in the Returns Department with such high level of sickness absences'? [s.15,s.26]

60. The tribunal concludes, for the same reasons set out in relation to allegation 1.6, that is not possible to conclude that the allegation has no, alternatively little, reasonable prospects of success.

1.9 At the end of October 2022, did Asad Rizvi tell the claimant: 'this job is not for you and you need to rethink'? [s.15, s.26]

61. Again, the tribunal concludes, for the same reasons set out in relation to allegation 1.6, that is not possible to conclude that the allegation has no, alternatively little, reasonable prospects of success.

1.10 On 18 November 2022, was the claimant told in an email from Sabiha Rani: 'you have exhausted your SSP allowance for the financial year and would like to point out, for any further occasions off absence/sick you will not receive SSP'. [s.15, s.26, s.27.]

62. The tribunal concludes that in writing in those terms to the claimant, Ms Rani was simply stating a fact. In so doing, Ms Rani was giving the claimant important information with regard to any future absences. The claimant's allegations that such action amounts to discrimination under section 15, harassment, or victimisation, has no reasonable basis, has no reasonable prospect of success, and is struck out. It is not appropriate to order a deposit order instead.

1.11 Was the claimant subjected to disciplinary proceedings in November 2022 for allegedly failing to call the absence line during a period of alleged sickness absence between 29th October and 1st November? Was he subsequently invited to an investigatory hearing on 30 November 2022? [Note, the claimant says this was a period of authorised but unpaid dependent's leave.]

Further: 1.11.1 Did the claimant's pay slip at the end of November record the period as unauthorised absence? and,

1.11.2 Although the hearing did not take place, the claimant was not formally notified of that, but just told to go back to the shop floor? [s.15, s.26, s.27]

63. The tribunal concludes, in relation to this allegation, that it is fact sensitive. There is potentially a connection between recent sickness absence, related to disability, and the disciplinary proceedings. It may well be possible for the respondent to justify/explain the actions taken. However, at this stage the tribunal does not feel

able to conclude that the allegation has no, alternatively little, reasonable prospects of success.

1.12 Following the claimant lodging a further formal grievance on 4 December 2022, and a hearing in relation to that grievance on 3 January 2023, with Bill Norman, were there breaches by R4 and/or R1 of the grievance process and in particular:

1.12.1 unreasonable delays?

1.12.2 was the sending of minutes of meetings to the claimant delayed?

1.12.3 were meetings rescheduled without good reason?

1.12.4 was the claimant not provided with notes of the meetings?

1.12.5 was the grievance unreasonably rejected?

1.12.6 were some of the complaints raised by the claimant in his grievance not dealt with? [s.15, s.26, s.27]

64. The tribunal concludes, in relation to this allegation, taken as a whole, that it is fact sensitive. At this stage, before any facts have been found, the tribunal does not feel able to conclude that the allegation has no, alternatively little, reasonable prospects of success.

1.13 On 13 December 2022 did Caitlin Ryan email the claimant to say that since the claimant had been absent for more than 7 days he had to provide a fit note in order to be entitled to Statutory Sick Pay? [s.15, s.26, s.27]

65. The email sent on 13 December 2022 states:

> *You have now had over 7 days of absence and you haven't provided a fit note. If you are planning on not returning to work then I need a sick note from your doctor by 5pm tomorrow (14th December). Unfortunately if this is not provided then I will have to go down the AWOL route, whilst you are ringing up it is still your responsibility to provide us with a sick note after 7 days or you will not be eligible for sick pay.*

66. The claimant was asked how this incident could amount to an act of discrimination/harassment/victimisation. The claimant said it was because Ms Ryan knew that the claimant was eligible for SSP, because he was an employee and he had been referred to OH. However, neither of those facts entitled the claimant to special treatment. The application of standard sickness absence procedures to the claimant in the circumstances was entirely reasonable. The tribunal therefore concludes that this allegation has no reasonable prospect of success and it is struck out. It is not appropriate to order a deposit order instead.

Time points and strike out/deposit orders

67. There are two main time periods in which the discrimination alleged by the claimant is said to have occurred. The first, raised by allegations 1.1 to 1.4 (1.5 having been struck out), occurred between 18 February and 1 March 2022. The later incidents date from 14 October 2022 onwards, a number of them relating to the claimant's manager Mr Rizvi. Given the dates of Acas Early Conciliation in relation to the first claim (14 to 30 January 2023 inclusive) allegations predating 15 October 2022 are potentially out of time. In respect of the remaining allegations from 1.6 onwards, the tribunal does not consider that they should be struck out and/or made the subject of deposit orders, on the basis that the claimant has no, alternatively little

reasonable prospects of success of succeeding in arguing that those claims are in time.

68. The situation is entirely different in relation to the February and March 2022 allegations. Those allegations relate to the claimant's employment at Shepcote Lane, under different managers. Although one of the later allegations, namely allegation 1.13 is against Ms C Ryan, as is allegation 1.2, allegation 1.13 has been struck out. There is therefore no individual linking the February and March 2022 allegations with the later allegations. Further, those allegations relate to the claimant's employment at the Europa Way site. The tribunal concludes therefore that the claimant has no reasonable prospect of succeeding in an argument that the alleged conduct in February/March 2022 amounts to conduct extending over a period. There is simply no link with the later allegations, on the facts of this particular case as relied on by the claimant in his claim form and amended particulars. Therefore, the remaining allegations 1.1 to 1.5 inclusive are struck out, on time grounds. The tribunal does not consider it appropriate to make a deposit order instead. R1 should not be put the expense of defending itself against allegations which are out of time. The facts relating to those allegations are not facts which it is necessary for the claimant to bring for the tribunal, in relation to the later allegations from October 2022 onwards. There will be a saving of time and costs for the parties and for the tribunal, if only the later allegations are allowed to proceed.

69. For convenience, Annex A sets out the original list of allegations. Those allegations which have been struck out because they have no reasonable prospects of success, are shown as text which has been struck through in that Annex.

Employment Judge James

11 September 2023

ANNEX A
ALLEGATIONS STRUCK OUT/REMAINING ALLEGATIONS

1. **Discrimination/victimisation claims – alleged adverse treatment**

Did R4 do the following (for which R1 is liable under TUPE 2006):

~~1.1 At a meeting on 18 February 2022, was the claimant told to change shifts, and his place of work, from the Shepcote Lane site to the returns department in the Europa way site? [It is noted that the claimant will in due course argue, if this claim is successful, that had he remained at the Shepcote Lane site, he would not have made been made redundant, along with his other colleagues, at the Europa Way site; his employment would instead have continued with R5.] [s.15, s.26]~~

~~1.2 At that meeting, was the claimant told by Caitlin Ryan that he would be 'put in extensive physical work' at the new site; and asked for occupational health records, which had already been received. [s.15, s.26]~~

~~1.3 At a sickness absence review meeting on 23 February 2022, was the claimant put on stage I of the procedure, and did he remain on stage I at the time of his dismissal? [s.15, s.26]~~

~~1.4 On 1 March 2022, the claimant lodged a formal grievance, and the hearing took place on 3 March 2022. Following the hearing, was there no further communication with the claimant about his grievance? [s.26]~~

~~1.5 On 2 March 2022, was the claimant instructed to attend the Europa Way site? [s.15, s.26, s.27]~~

1.6 On 14 October 2022 during a meeting with the claimant, did Assad Rizvi question whether the claimant was capable of working full-time? [s.15, s.26]

~~1.7 In a referral to occupational health on 15 October 2022, did R4 unreasonably question whether the claimant was fit to work? [s.15, s.26]~~

1.8 On 23 October 2022, was the claimant told by Asad Rizvi, Shift Manager: 'I cannot keep you in the Returns Department with such high level of sickness absences'? [s.15,s.26]

1.9 At the end of October 2022, did Asad Rizvi tell the claimant: 'this job is not for you and you need to rethink'? [s.15, s.26]

~~1.10 On 18 November 2022, was the claimant told in an email from Sabiha Rani: 'you have exhausted your SSP allowance for the financial year and would like to point out, for any further occasions off absence/sick you will not receive SSP'. [s.15, s.26, s.27.]~~

1.11 Was the claimant subjected to disciplinary proceedings in November 2022 for allegedly failing to call the absence line during a period of alleged sickness absence between 29th October and 1st November? Was he subsequently invited to an investigatory hearing on 30 November

2022? [Note, the claimant says this was a period of authorised but unpaid dependent's leave.] Further:

1.11.1 Did the claimant's pay slip at the end of November record the period as unauthorised absence? and,

1.11.2 Although the hearing did not take place, the claimant was not formally notified of that, but just told to go back to the shop floor? [s.15, s.26, s.27]

1.12 Following the claimant lodging a further formal grievance on 4 December 2022, and a hearing in relation to that grievance on 3 January 2023, with Bill Norman, were there breaches by R4 and/or R1 of the grievance process and in particular:

1.12.1 unreasonable delays?

1.12.2 was the sending of minutes of meetings to the claimant delayed?

1.12.3 were meetings rescheduled without good reason?

1.12.4 was the claimant not provided with notes of the meetings?

1.12.5 was the grievance unreasonably rejected?

1.12.6 were some of the complaints raised by the claimant in his grievance not dealt with? [s.15, s.26, s.27]

~~1.13 On 13 December 2022 did Caitlin Ryan email the claimant to say that since the claimant had been absent for more than 7 days he had to provide a fit note in order to be entitled to Statutory Sick Pay? [s.15, s.26, s.27]~~