EMPLOYMENT TRIBUNALS

Claimant: Mr Ryan Stackhouse

Respondents: TNT UK Ltd (1), Garry Barber (2), Colin Gibson (3), Dean Woolley (4), Nick Link (5), Paul Roberts (6), Fedex Limited (7).

RECORD OF A PRELIMINARY HEARING IN PUBLIC

Heard: Birmingham

On: 20 January 2023

Before: Employment Judge Flood (sitting alone)

Appearances
For the claimant: in person
For the respondents: Mr C Adjei, counsel

RESERVED DECISION

1. Claim 1 in so far as it is pursued against the fifth respondent (Nick Link) is **struck out**.
2. Claim 2 in so far as it is pursued against the seventh respondent (Fedex Limited) is **struck out**.
3. The complaint of breach of contract in Claim 1 is **struck out**.
4. The following complaints in Claim 1 have **little reasonable prospects of success**:
    a. The complaint of direct race discrimination in so far as it is made against the second respondent (Gary Barber);
    b. The complaint of victimisation in so far as it is made against the third respondent (Colin Gibson);

    and should be made subject to a deposit order. The amount of any such deposit that the claimant should be ordered to pay if he wishes to continue with such complaints will be determined following any representations from the parties after a period of 28 days.

5. The respondent's application for a strike out or deposit order to be made in respect of the claimant's complaint that the first respondent is in breach of regulation 12 of the Working Time Regulations 1998 ('WTR') is **refused.**

6. The claimant is **permitted** to amend Claim 1 to add the following allegations of less favourable treatment to his complaints of direct race discrimination (which are set out at paragraphs (ii) a. to c. of Appendix 1 to this Order):

   a. Failing to attach as much weight to the claimant's version of events as Steve Brown's version of events.

   b. Having a notetaker present during the claimant's investigation interview when one was not present during Steve Brown's investigation interview.

   c. Not believing the claimant's version of events and instead believing Steve Brown.

7. The claimant is **permitted** to amend his complaint of victimisation in Claim 1 to rely on an additional protected act (which are set out at paragraphs (xii) b. of Appendix 1 to this Order), namely:

   b. Formally raising a grievance around 26 November 2018 by way of letter sent by recorded delivery and addressed to Dean Woolley.

   and to add the additional detriments (which are set out at paragraphs (xiii) a. to h. and also k. of Appendix 1 to this Order), namely:

   a. Lynn Ingram and/or Gary Barker failed to forward the claimant's grievance, which he had sent around 26 November, to Dean Wooley.
   b. In a meeting on 29 November 2018 Dean Wooley misinformed the claimant about the CCTV evidence by telling him it could not be viewed in the room they were in.
   c. No notes of the meeting on 29 November 2018 were provided to the claimant despite Lynn Ingram taking notes during the meeting and the claimant asking for a copy via his union representative.
   d. The claimant's grievance was heard by Gary Barber's manager Colin Gibson which was outside of procedure as it should have been hear by the claimant's own line manager or supervisor.
   e. Dean Woolley informed Gary Barber about the grievance on 29 November 2018 which was outside of procedure as it should have been kept confidential.
   f. Colin Gibson had a meeting about the claimant's grievance with Gary Barber on or around 10 December 2018 prior to meeting the claimant to discuss his grievance.
   g. Colin Gibson was hostile towards the claimant in correspondence prior to meeting him, in particular Colin Gibson in a letter of 10 December 2018 casted doubt on the claimant's assertion that he had not received a previous letter.
   h. In a meeting on 17 December 2018 Colin Gibson was irate towards the claimant, and in particular he said: "We will deal with this in the way I want and if you don't like it, I will deal with it less sociably".

and

k. At the end of the meeting on 17 December 2018 Colin Gibson ended the discussion abruptly and held the door open for the claimant and told him he would escort him off the premises.

8. The claimant's application to add the following allegations as complaints of direct race discrimination is **refused**, namely:

"*Has Paul Roberts subjected the claimant to the following treatment:*

a. Refusing to remove himself from the disciplinary process (despite the claimant's request that he do so on the ground he was not neutral in an email sent on or around 5 June 2019)."

9. The claimant is **permitted** to add the following allegations as complaints of harassment related to race (which are set out at paragraph (viii) a. and c. of Appendix 1 to this Order:

a. Gary Barber ignored evidence that was in his possession before the investigation meeting took place on 6 November 2018, namely the CCTV footage of the incident and the witness statements from John Stokes, Mohammed Malik and Adharna Tennowo, and said that even though there was no evidence to support the accusations of racist comments put forward by Mr Brown, the claimant could well have made the comments.

The claimant believes this was related to race as it was due to Mr Barber's perception that the claimant was white.

and

c. Gary Barber invited the claimant to further investigatory meetings on 9, 13 and 16 November 2018. The claimant says this was done in order to make further allegations against him as Mr Barber realised the allegations of racism would have to be withdrawn due to his perception of the claimant's race being mistaken.

The claimant believes this was related to race as there would have been no need for further meetings if Gary Barber had not made assumptions based on his perception of the claimant's race in the meeting on 6 November.

The claimant believes this was related to race as it was due to Mr Barber's perception that the claimant was white.

10. The claimant's application to add a complaint of detrimental treatment on the grounds of having made a protected disclosure is **allowed** in part. The claimant is permitted to rely on those disclosures which are alleged to have taken place on or after 14 November 2018 i.e during the investigation and disciplinary process and which are set out at paragraphs (xv) h. to r. in Appendix 1 to this

Order. The claimant is permitted to rely on the acts of alleged detrimental treatment set out at paragraphs (xvi) e., g. to i., p. to z. and aa. to bb. in Appendix 1 to this Order. The claimant's application to amend his claim to add the alleged disclosures set out at paragraphs a. to g. and the alleged detriments set out at paragraphs a. to d., f. and j. to o. is **refused**.

CASE SUMMARY AND REASONS

1. The claimant presented his first claim form which was allocated case number 1306541/2019 ('Claim 1') on 9 August 2019, following a period of early conciliation between 11 June and 10 July 2019. He then presented a second claim form which was allocated case number 1300172/2020 on 14 January 2020 ('Claim 2'). The respondent defended those claims with responses submitted on 3 October 2019 and 14 February 2020 respectively. The claims relate to the respondent's treatment of the claimant following an incident at work on 22 August 2018 and his subsequent dismissal

2. This was the fourth preliminary hearing in these proceedings. The first two had been before Employment Judge Meichen on 22 January and 17 March 2020 during which time a significant amount of time was spent identifying and recording the issues. This was recorded in two case management orders, the first being sent to the parties on 30 January 2020 ('1st CMO') shown at pages 113-117 of the bundle prepared for today's hearing ('PH Bundle') and the second being sent on 7 April 2020 ('2nd CMO') shown at pages 120-129 PH Bundle. This process was not quite completed so directions were made for the respondent to make a focused request for further information. The respondent's position at this time was that as not all claims identified had been pleaded, an amendment application would be needed. The matter was then listed for a further preliminary hearing to consider whether permission was needed to amend and if it should be granted, whether any part of the claim should be struck out and to carry on identifying and recording the issues in Claim 1 and to carry out that process in Claim 2. There had been a further preliminary hearing before me on 4 June 2020 but that was adjourned because the claimant was unable to effectively participate in that remote hearing due to technical problems with his phone signal.The draft List of Issues that the parties had identified to date (including those issues on which an amendment determination was required) was included in to the order sent to the parties following the third preliminary hearing ('3rd CMO').

3. At the last hearing, the claim was listed for an Open Preliminary Hearing on 18 September 2020 in person with a time estimate of 1 day to consider:

    3.1 Whether the claimant needs permission to amend to proceed with any of his claims, and if so, should permission be granted.

    3.2 Whether any part of the claim should be struck out.

    3.3 Identification of the issues in the second claim and case management.

4. That hearing was postponed as solicitors previously representing the claimant had come off record and as it was to take place remotely (and the claimant had difficulties accessing on previous occasions) it was rescheduled to take place in person. It was relisted for 21 October 2020. That was postponed due to the unavailability of the respondent's counsel. The parties were asked to provide dates when they were unavailable to attend a rescheduled hearing on 15 October 2020. These were provided but due to delays in the administration as a result of the Covid 19 pandemic, this information was not picked up until September 2021 almost a year later. The Tribunal once again apologises for the delay in dealing with this matter.

5. At the outset of the hearing, I decided that as the process of identifying the complaints and recording these had not been completed, it would be better to do that first before going on to consider issues of amendment and to hear any applications to strike out.

6. We firstly discussed the complaint for protected disclosure detriment. The detriments the claimant sought to rely on were contained in the further information he provided on 19 February 2020 (pages 154-156 PH Bundle). The claimant was ordered by Employment Judge Meichen to also provide details of the e mails he says were sent which contained protected disclosures which the claimant did on 24 March 2020 (pages 159-166). We spent time discussing and recording the remainder of the claimant's complaints made under the Working Time Regulations 1998 ('WTR'); for breach of contract, unlawful deduction of wages, failure to provide itemised pay statements and unfair dismissal. To the extent permitted to go ahead as a result of the remaining applications made, the issues as far as I understand them to be on all such complaints are set out at Appendix 1 to this Order.

Amendment Application

7. The parties went on to make submissions on amendment. Mr Adjei stated that the claimant was required to seek permission to amend his claim to include the following complaints:

   7.1 The complaints of direct race discrimination set out at paragraph 12 (ii) to (iv) of the 1st CMO (shown at page 113 of the PH Bundle). The respondent contends that the allegation of less favourable treatment at d. of "*Attempting to make the claimant change his version of events during the investigation"* is in Claim 1, but the matters alleged at a, b and c, namely:

      a. *Failing to attach as much weight to the claimant's version of events as Steve Brown's version of events.*
      b. *Having a notetaker present during the claimant's investigation interview when one was not present during Steve Brown's investigation interview.*
      c. *Not believing the claimant's version of events and instead believing Steve Brown.*

were not pleaded. It is submitted that the only allegation at para 23 of Claim 1 (page 16) is general in nature and that when the claimant complains about Gary Barber's conduct in the investigation at para 5 of Claim 1 (page 14) these matters are not mentioned at all. It is submitted that the claimant does not explain why these matters were not originally pleaded and that Mr Barber faces extreme hardship dealing with new allegations dating back to 2018.

7.2 The complaint of victimisation set out at para (v) and (vi) of the 1st CMO (shown at page 114 PH Bundle). It is submitted that the protected act at relied upon set out at b (raising a grievance around 26 November 2018) and the detriments pleaded at a through to h and also k, namely:

l. Lynn Ingram and/or Gary Barker failed to forward the claimant's grievance, which he had sent around 26 November, to Dean Wooley.
m. In a meeting on 29 November 2018 Dean Wooley misinformed the claimant about the CCTV evidence by telling him it could not be viewed in the room they were in.
n. No notes of the meeting on 29 November 2018 were provided to the claimant despite Lynn Ingram taking notes during the meeting and the claimant asking for a copy via his union representative.
o. The claimant's grievance was heard by Gary Barber's manager Colin Gibson which was outside of procedure as it should have been hear by the claimant's own line manager or supervisor.
p. Dean Woolley informed Gary Barber about the grievance on 29 November 2018 which was outside of procedure as it should have been kept confidential.
q. Colin Gibson had a meeting about the claimant's grievance with Gary Barber on or around 10 December 2018 prior to meeting the claimant to discuss his grievance.
r. Colin Gibson was hostile towards the claimant in correspondence prior to meeting him, in particular Colin Gibson in a letter of 10 December 2018 casted doubt on the claimant's assertion that he had not received a previous letter.
s. In a meeting on 17 December 2018 Colin Gibson was irate towards the claimant, and in particular he said: "We will deal with this in the way I want and if you don't like it, I will deal with it less sociably".

And

k. *At the end of the meeting on 17 December 2018 Colin Gibson ended the discussion abruptly and held the door open for the claimant and told him he would escort him off the premises.*

(all shown at pages 114 of the PH Bundle) are not matters that are in Claim 1 and require the Tribunal's permission to be added to the claim. The respondent says that the complaint of victimisation in Claim 1 at paras 25, 26 and 27 does not mention the protected act of raising a grievance around 26 November 2018. Further it is said the detriments alleged are broad and just mention being treated unjustly, his grievance not being

treated seriously, having relevant points ignored, going through the motions and prejudgment.

7.3 The complaint of direct race discrimination set out at para 9 (i) to (iii) of the 2nd CMO (shown at page 12-22 of the PH Bundle). The respondent submits that this allegation, namely:

"Has Paul Roberts subjected the claimant to the following treatment:

a. Refusing to remove himself from the disciplinary process (despite the claimant's request that he do so on the ground he was not neutral in an email sent on or around 5 June 2019)."

does not appear in Claim 1 at all but was added at the second preliminary hearing and this causes severe hardship to Mr Roberts as no allegations of direct race discrimination are made against him at all in Claim 1.

7.4 The allegation of race related harassment. The respondent submits that the alleged conduct at para (iv) a and c of the 2nd CMO (shown at page 122 of the PH Bundle), namely:

a. Gary Barber ignored evidence that was in his possession before the investigation meeting took place on 6 November 2018, namely the CCTV footage of the incident and the witness statements from John Stokes, Mohammed Malik and Adharna Tennowo, and said that even though there was no evidence to support the accusations of racist comments put forward by Mr Brown, the claimant could well have made the comments.

and

c. *Gary Barber invited the claimant to further investigatory meetings on 9, 13 and 16 November 2018. The claimant says this was done in order to make further allegations against him as Mr Barber realised the allegations of racism would have to be withdrawn due to his perception of the claimant's race being mistaken.*

The claimant believes this was related to race as there would have been no need for further meetings if Gary Barber had not made assumptions based on his perception of the claimant's race in the meeting on 6 November.

The claimant believes this was related to race as it was due to Mr Barber's perception that the claimant was white."

does not appear in Claim 1 and so requires the tribunal to grant permission to amend. It is submitted that para a above does not appear at all and because although complaints are made at paras 6 of Claim 1 (page 14 PH Bundle) about Gary Barber inviting the claimant to further meetings there is no suggestion this is related to race and the only

allegation of race related harassment against Gary Barbert at para 28 (page 17 PH Bundle) relates to numerous attempts to contact the claimant.

7.5 The respondent submits that the complaint of whistleblowing detriment is not in Claim 1 at all and the claimant requires permission to amend Claim 1 to pursue this. The respondent says that this was first raised by the claimant at the first preliminary hearing and that although the claimant suggested this was mentioned at para 27 of Claim 1 (page 17) the heading this falls under is one of victimisation. The respondent also submits that the reference here is to alleged wrongdoings "*during the processes*" that the claimant went through which is a clear reference to the investigatory and disciplinary processes complained about. However it is said the claimant then set out numerous historic alleged disclosures going back 2 years or more not even involving the same people involved in the disciplinary process. Mr Adjei contends this amendment application should be refused as the claimant does not explain why this complaint was not made before and this causes considerable hardship as it addressed matters starting in 2016, covering different depots amounting to 52 protected disclosures in total and 28 detriments.

8. The claimant submitted that he is not legally qualified and when he submitted Claim 1 he was going through the most stressful time of his life. He said that he made general allegations and thought and expected that he would be able to provide detail at a hearing. He said that as a litigant in person he provided further details about his claim when he was required to do so. On the specific points raised above, he denies that the respondent will be at a disadvantage dealing with the matters complained about at paras 7.1 to 7.4 above, as they were already aware of the nature of his complaints and the basis of his complaints as being direct discrimination and harassment related to the respondent's perception of his race had been made clear to the respondent. In relation to 7.5 above, he acknowledges that the original complaint in his claim form about whistleblowing detriment related to what took place during the processes he was undergoing following the incident on 22 August 2018. However he states that when asked to provide further particulars he realised that he had more complaints than he originally thought. He suggests that this information is important to show a background of the respondent not complying with its obligations. He submitted that it is in the interests of justice for all the matters to be heard.

9. I reserved my decision on this application. After the hearing, I considered the guidance of the relevant authorities in particular Selkent Bus Co. Ltd v Moore [1996] ICR 836; Vaughan v Modality Partnership UKEAT/0147/20/BA(V) (9 November 2020) and Galilee v Commissioner of Police of the Metropolis 2018 ICR 634. I noted that the key issue is the balance of prejudice, injustice and hardship that would be occasioned by granting or refusing the amendment and that time limits must be taken into account in the balancing exercise. Other important factors may be whether the claim has apparent merit and whether the respondent has lost the ability to deal with it evidentially. The fact that the new complaint is brought out of time does not automatically mean that the application must fail. In particular where there is a question as to whether

events earlier than the usual scope of the time limit amounted to elements of an act extending over a period, or whether it would be just and equitable to extend time, in cases under the Equality Act 2010, the potential of a time limits defence can be left for determination at the final hearing by granting the amendment subject to time limits considerations. I made the following decisions:

9.1 I decided to allow the claimant's application to add the following allegations as complaints of direct race discrimination:

a. *Failing to attach as much weight to the claimant's version of events as Steve Brown's version of events.*

b. *Having a notetaker present during the claimant's investigation interview when one was not present during Steve Brown's investigation interview.*

c. *Not believing the claimant's version of events and instead believing Steve Brown.*

Considering the nature of the amendment and the timing/manner of application, I noted that the application to amend was made at the first preliminary hearing in January 2020. The claimant had already brought a race discrimination complaint so it is not an entirely new cause of action. These are "entirely new factual allegations which change the basis of the existing claim" as identified in the Selkent case mentioned above. The facts behind this allegation must presumably have been known to the claimant at the time of presenting Claim Form 1 and were not included. However this was raised with the Tribunal at the first reasonable opportunity for this to take place i.e at the first case management preliminary hearing. The claimant is a litigant in person. In the context of the overall litigation I do not consider this to be a particularly late application to amend. As to the applicability of time limits, it may be that this allegation is potentially out of time, but there is still the question (at least in respect of the claim against the first respondent) whether this is part of conduct extending over a period ending with a complaint brought in time. There is also the Tribunal's just and equitable discretion. Therefore my view is that whether the amendments to the claim are brought in time or not is something that evidence would need to be heard on. I adopt the approach in Galilee above and defer the issue of whether such matters are in time to the final hearing. Therefore whether the amendment requested was out of time was a factor that was broadly neutral. It did not tip the balance one way or the other. As to balance of prejudice, the claimant would be prejudiced if the amendment is refused as such complaints could not be made. As to the respondent it means that additional now fairly historic allegations are being made against the respondent which is prejudicial. However this relates to one investigatory meeting which the Tribunal is already going to have to hear evidence on to determine the complaints already brought. Having conducted a careful balancing exercise, and having regard to all the circumstances, including the nature of the amendments sought and any delay on the part of the claimant in

making the application I conclude that the balance of prejudice weighs heavier on the claimant and so he should be permitted to amend to amend his claim in the manner sought.

9.2 I decided to allow the claimant's application to amend his claim to rely on an additional protected act, namely:

b. Formally raising a grievance around 26 November 2018 by way of letter sent by recorded delivery and addressed to Dean Woolley.

and to add the additional detriments pleaded at a through to h and also k, namely:

t. Lynn Ingram and/or Gary Barker failed to forward the claimant's grievance, which he had sent around 26 November, to Dean Wooley.
u. In a meeting on 29 November 2018 Dean Wooley misinformed the claimant about the CCTV evidence by telling him it could not be viewed in the room they were in.
v. No notes of the meeting on 29 November 2018 were provided to the claimant despite Lynn Ingram taking notes during the meeting and the claimant asking for a copy via his union representative.
w. The claimant's grievance was heard by Gary Barber's manager Colin Gibson which was outside of procedure as it should have been hear by the claimant's own line manager or supervisor.
x. Dean Woolley informed Gary Barber about the grievance on 29 November 2018 which was outside of procedure as it should have been kept confidential.
y. Colin Gibson had a meeting about the claimant's grievance with Gary Barber on or around 10 December 2018 prior to meeting the claimant to discuss his grievance.
z. Colin Gibson was hostile towards the claimant in correspondence prior to meeting him, in particular Colin Gibson in a letter of 10 December 2018 casted doubt on the claimant's assertion that he had not received a previous letter.
aa. In a meeting on 17 December 2018 Colin Gibson was irate towards the claimant, and in particular he said: "We will deal with this in the way I want and if you don't like it, I will deal with it less sociably".

And

k. *At the end of the meeting on 17 December 2018 Colin Gibson ended the discussion abruptly and held the door open for the claimant and told him he would escort him off the premises.*

As to the nature of the amendment, Claim 1 contain a complaint of victimisation so it is not a new cause of action. In addition, I also conclude that the protected act the claimant seeks to add is also referenced in Claim 1 at para 25 where the claimant explains that he made an informal complaint on 14 November 2010 *"and then placed a formal grievance in after Gary Barber knocked at my door for 10 minutes".* There are two

separate matters referenced here the informal complaint and then a formal grievance. Although no date is included, the grievance itself is mentioned. On this basis, no amendment is required as this second protected act already appears in Claim 1.

The additional detriments sought are not specified as acts of detrimental treatment in the claim form. The claimant makes a generalised allegation of "*being treated unjustly throughout the grievance process and my grievance was not taken seriously at any stage. Relevant points I raised were ignored and it appeared that people involved were just going through the motions in order to claim my grievance had been heard and then move on to the disciplinary hearing whether there was already prejudgment of the case."* This amendment application was made at the first preliminary hearing so was not made particularly late in the proceedings. The same issues of time apply as to other similar claims so I do not see this as a factor which tips the balance one way or another. There are a number of additional factual allegations which does add to the respondent's burden and cause prejudice as it will have to call evidence again on matters that date back over 4 years. However again much of this information will need to be addressed in any event for the other complaints already brought by the claimant. Accordingly for similar reasons as are set out in paragraph 9.1 above, I decided to allow the application to amend.

9.3 I decided to refuse the claimant's application to add the following allegations as complaints of direct race discrimination, namely:

"*Has Paul Roberts subjected the claimant to the following treatment:*

a. Refusing to remove himself from the disciplinary process (despite the claimant's request that he do so on the ground he was not neutral in an email sent on or around 5 June 2019)."

The complaint of direct race discrimination is not a new cause of action certainly against the first respondent (although it is a new cause of action to the extent it is brought against the sixth respondent). The factual allegation does not appear in Claim 1 in any context. The application to amend was added at the second preliminary hearing. I accepted that this causes severe hardship to Mr Roberts as a witness and also as a potential respondent as no complaints of direct race discrimination are levelled against him at all in Claim 1. The only complaints relate to unfairness of the disciplinary hearing and failures to follow the ACAS Code of Practice. This is an entirely different type of allegation with entirely different evidential considerations. Whilst the Tribunal will have to consider evidence on the hearing complained about for the unfair dismissal complaint, this is a different nature of complaint entirely which will severely prejudice both the first and sixth respondent at this late stage. The claimant will be prejudiced by being unable to pursue this complaint but as he is able to pursue the existing direct race discrimination complaints (and the amendments sought above) the relative prejudice here bears more heavily on the respondent. The application is refused.

9.4 I decided to allow the claimant's application to add the following allegations as complaints of harassment related to race:

a. *Gary Barber ignored evidence that was in his possession before the investigation meeting took place on 6 November 2018, namely the CCTV footage of the incident and the witness statements from John Stokes, Mohammed Malik and Adharna Tennowo, and said that even though there was no evidence to support the accusations of racist comments put forward by Mr Brown, the claimant could well have made the comments.*

The claimant believes this was related to race as it was due to Mr Barber's perception that the claimant was white.

and

c. Gary Barber invited the claimant to further investigatory meetings on 9, 13 and 16 November 2018. The claimant says this was done in order to make further allegations against him as Mr Barber realised the allegations of racism would have to be withdrawn due to his perception of the claimant's race being mistaken.

The claimant believes this was related to race as there would have been no need for further meetings if Gary Barber had not made assumptions based on his perception of the claimant's race in the meeting on 6 November.

The claimant believes this was related to race as it was due to Mr Barber's perception that the claimant was white."

Similar considerations apply as are set out in paragraph 9.1 above as to the nature of the amendment. This is not a new cause of action but in relation to a above, is a new factual allegation not in Claim 1. The allegation in c does appear albeit in general terms, not as a harassment complaint. As to the timing/manner of application, this was raised and recorded at the second preliminary hearing on 17 March 2020, but as this was a continuation of the previous preliminary hearing the delay again is not a significant matter for consideration. The issue of time limits has been considered but this is already an issue identified for consideration at the main hearing and so can equally be considered in respect of. Again, the claimant would be prejudiced if the amendment is refused as such complaints could not be made, albeit he is pursuing many other complaints. As to the prejudice to the respondent, these are matters which now date back over four years. Nonetheless the Tribunal will need to hear evidence about this meeting and the requests made after it, to determine the other allegations and complaints already brought. Having conducted a careful balancing exercise, I conclude that the balance of prejudice weighs heavier on the claimant and so he should be permitted to amend to amend his claim in the manner sought.

9.5 In relation to the claimant's application to add a complaint of whistleblowing detriment, I have decided to allow this in part. The claimant is permitted to add complaints of whistleblowing detriment to the extent that he is relying on disclosures which are alleged to have taken place on or after 14 November 2018 i.e during the investigation and disciplinary process. The claimant is also permitted to rely on alleged detrimental treatment to the extent that these relate to an allegation that a "*decision had been taken to simply get rid of me*" i.e those allegations of detrimental treatment that pertain solely to the investigation and disciplinary process which led to the claimant's ultimate dismissal. I have determined that the claimant's application amend his claim to rely on disclosures made at the Saltley depot (i.e. from around August 2016 to February 2018) and in the new depot in or near Aston from around February 2018 onwards and to any alleged detriments alleged to have occurred "at the old depot" and which did not relate to the investigation and disciplinary process is refused. The reason for this decision is because there is oblique reference or the foreshadowing of such a complaint in Claim 1 at paragraph 27 where the claimant states:

"During the processes I have gone through I have at various times pointed out the wrong doings of various people involved in these procedures. It appears that rather than address these issues pointed out by myself the decision had been taken to simple get rid of me

However no detail is provided. The respondent points out that such a complaint is headed as "Victimisation" but I am conscious that the Tribunal should not be two concerned as to the labels put on the complaints if the substance of the allegation is clear. At the two preliminary hearings that have taken place and in written documents since, the claimant has given significant amounts of detail of things he now says are protected disclosures, some of which go back many years and involve entirely different individuals than the other complaints. On any accounts this is a substantial amendment to Claim 1. Whilst the claimant made his application to amend relatively promptly by adding detail at the two preliminary hearings held, there is simply no explanation why disclosures and detriments said to have occurred at previous depots were not raised earlier. I accept the respondent's submission that this causes considerable hardship as it addresses matters starting in 2016, covering different depots and if permitted in full would mean that the Tribunal has to hear varied and detailed evidence on 52 protected disclosures in total and 28 detriments. It is true that the claimant will be prejudiced by not having the opportunity to adduce evidence on the vast amount of alleged protected disclosures he is said to have made but on the basis that I am allowing this amendment in part that prejudice is vastly reduced. On the basis that the claimant has attached an incorrect label to his complaint, I am prepared to allow him to amend his claim to pursue a complaint of protected disclosure detriment solely as this relates to alleged disclosures made during the investigation and disciplinary process and alleged detriments relating to the respondent's investigation and disciplinary process. Whilst there are still a

significant number of disclosures and detriments included, these relate to matters which the Tribunal will still be required to hear evidence upon to determine the claim so the prejudice to the respondent is much reduced. Whilst there is prejudice to the claimant in not being able to pursue the more historic and general complaints, the balance weighs much more heavily against the respondent so I have determined that they should not be permitted to proceed.

10. The allegations which the claimant has permission to add to his claims are shown in the draft List of Issues in Appendix 1 to this Order and are shown in underlined text and the allegations that the claimant is not permitted to add to his claims are shown in strikethrough text.

Strike out Application

11. The respondent also made applications for the following claims and parts of claims to be struck out on the basis that they had no reasonable prospects of success (with an application for a deposit order on the basis of little reasonable prospects of success made in the alternative):

11.1 The claims made against the third, fourth, fifth and sixth respondents in their entirety. This is on the basis that although they were named as respondents, no complaints of discrimination, victimisation or harassment were detailed against any of them in Claim 1. Whilst each features in the narrative in respect of the investigatory and dismissal process, it is submitted there is no allegation that what was done by them amounted to direct race discrimination, victimisation or harassment. Mr Adjei stated that allegations of direct race discrimination and race related harassment are only made in respect of the second respondent and the allegation of victimisation is too general in nature. The claimant resisted this application on the basis that although the first respondent was responsible for the actions, these were the individuals who carried out the acts and had to take responsibility individually for their own actions.

11.2 The claim of direct race discrimination made against the second respondent. This is made on the basis that the only allegation of direct race discrimination against the second respondent in that which is set out at paragraph 23 of Claim 1 complains about an investigatory meeting which took place on 6 November 2018. It is also submitted that the last involvement at all of the second respondent was on 28 November 2018. Therefore even if this was the last possible act of discrimination, the claimant would have needed to commence early conciliation at the latest by 25 February 2019 for his complaint to possibly be in time. The claimant commenced early conciliation on 11 June 2019 so on that basis this claim against the second respondent it is submitted is 7 months out of time. I was referred to the authority of Aziz v First Division Association [2010] EWCA Civ 304 and it was suggested that as different individuals were involved in the alleged incidents of discrimination over the period and where there is a break in contact of several months this may not be a continuing act. The claimant

submitted that the actions of the various individuals amounted to a continuing act with each individual who acted after the second respondent, carrying on the same discriminatory treatment.

11.3 The complaint of victimisation set out at paragraphs 25-27 of Claim 1 against the third respondent. This is made on the basis that there was no reference to the third respondent being responsible for any victimisation and similarly his last involvement was at a grievance meeting on 17 December 2018 (para 10 of Claim 14). On this basis as early conciliation was not commenced by 17 March 2019 (and not until 11 June, almost 3 months later) this complaint is out of time. The claimant again resists this application on the basis that there are continuing acts of discrimination with the last one being made in time and points me to the authority of Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686, [2003] IRLR 96, [2003] ICR 530, CA

Items 1-3 were contained in the respondent's position statement submitted on 1 May 2020 (page 190-192 PH Bundle).The respondent confirmed that it no longer sought strike out in relation to the other two matters in that position statement, namely the complaint of race related harassment against the second respondent set out at paragraph 28 of Claim 1 nor in respect of the unfair dismissal and race discrimination claims in Claim 2.

11.4 The complaint of breach of contract. The respondent states that this has no prospect of succeeding because it is contained in Claim 1 and at the time that Claim 1 was presented, the claimant was still employed. Therefore as this is not a complaint which 'arises or is outstanding on the termination of the employee's employment' as provided for by regulation 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994, there is no jurisdiction to consider it. The claimant suggested that he was as far as the respondent was concerned 'dismissed' prior to the point his employment had been terminated as the decision makers at the respondent had already determined that he would be dismissed in breach of their own rules. Therefore it was a claim which should be permitted to proceed.

11.5 The complaint clarified at the hearing of a breach of regulation 12 of the WTR. The respondent submits that as this claim involves the claimant's attendance at a disciplinary meeting on 19 June 2018 that this does not fall within the definition of 'working time' contained withing regulation 2 (1) of the WTR. It is submitted that the claimant as a loading bay operative and so attendance at a disciplinary hearing was not time when he is at his employer's disposal and carrying out his duties, and there was no relevant agreement providing for this matter. The claimant contended that he was still at his employer's disposal for the day in question as he was required to be there and could not leave.

11.6 In respect of Claim 2, the entire claim in so far as it is made against the sixth respondent, Fedex Limited as the claimant was never employed by that entity. The claimant suggested that he had included Fedex Limited as some of the individuals involved were employees of this entity

including the sixth respondent so the claimant believed they should also be included in the claim.

12. I again reserved my decision on this application due to insufficient time. After the hearing, I considered the following relevant legal provisions:

12.1 The power to either strike-out complaints or to make a deposit orders and the tests be applied to each application are set out in Rule 37 (Strike Out) and Rule 39 (Deposit Orders) of the Rules. The relevant part of Rule 37 states:
"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;…

The relevant part of **Rule 39** states:

"Where a 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."

These powers are discretionary. When deciding whether or not to exercise its discretion, the tribunal must have regard to the overriding objective in **Rule 2 of the Rules**. The overriding objective is to enable tribunals *"to deal with cases fairly and justly".*

"Dealing with a case fairly and justly includes, so far as is practicable:

(a) Ensuring that the parties are on an equal footing;

(b) Dealing with cases in ways that are proportionate to the complexity and importance of the issues;

(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) Avoiding delay, so far as compatible with proper consideration of the issues; and

(e) Saving expense."

12.2 I also took guidance from the relevant authorities on strike out applications in particular recent EAT guidance on the duties of a Tribunal when considering strike-out against litigants in person in Cox v Adecco and ors 2021 ICR 1307, that a strike out where prospects of success turns on factual issues in dispute was unlikely to be appropriate. It stated that there must be a reasonable attempt to identify the claim and the issues before considering strike out or making a deposit order. In Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive. In Ezsias v North Glamorgan

NHS Trust 2007 ICR 1126, CA, the Court of Appeal held that the same or a similar approach to striking out discrimination claims should generally be taken in protected disclosure cases and that it would only be in exceptional cases that a claim will be struck out as having no reasonable prospect of success when the central facts are in dispute. Balls v Downham Market High School and College 2011 IRLR 217, EAT, noted that it was not a question of assessing whether a claim was likely to fail or whether its failure was a possibility but that the claim had no reasonable prospect of success and that the tribunal should assess this from a careful consideration of all the available material. In Mechkarov v Citibank NA 2016 ICR 1121, the EAT held that when considering whether to strike out the tribunal must takes the claimant's case at its highest and assume that the claimant's version of any key disputed facts is correct. If the case is conclusively disproved by, or is totally and inexplicably inconsistent with, undisputed contemporaneous documents, then it might be appropriate to strike it out. However if there are core issues of fact that turn to any extent on oral evidence, these should not be decided without an oral hearing. It is not appropriate for the Tribunal to carry out mini-trial of the facts at a preliminary hearing. In Ahir v British Airways plc 2017 EWCA Civ 1392, CA, the Court of Appeal held that discrimination claims involving disputes of fact could potentially struck out if a Tribunal was entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, as long as they are aware of the danger of such a conclusion in circumstances where the full evidence has not been explored.

12.3 In relation to deposit orders I considered the authorities of Hemdan v Ishmail [2017] IRLR 228, where it was pointed out that the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails' and its purpose 'is emphatically not … to make it difficult to access justice or to effect a strike out through the back door'. When deciding on the amount of the deposit, a tribunal must make sure that the order 'does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice' . I also noted when determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward - Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07 [2007] All ER (D) 187 (Nov)).

13. My decisions on each of the applications are as follows:

13.1 Claim 1 in so far as it is pursued against the fifth respondent is struck out. Although the fifth respondent is named as respondent, no complaints of discrimination, victimisation or harassment or indeed unlawful detriment on the grounds of having made a protected disclosure were detailed against the fifth respondent in Claim 1 and no

amendments to Claim 1 were sought or permitted allowing any such complaints to proceed. The other complaints in Claim 1 are not complaints that can be pursued against individual employees but rather are complaints made against the claimant's employer. i.e the first respondent. Whilst the fifth respondent is involved in the narrative and may be someone who is called as a witness in the claims made by against the other respondents, there is no reasonable prospect of success in any possible complaint against him as no such complaint has been made in these proceedings. For the same reasons, the complaints of direct race discrimination and race related harassment contained in Claim 1 as against the third, fourth, fifth and sixth respondent are also struck out and the complaint of victimisation as against the sixth respondent is struck out. No such complaints are pursued against those respondents in Claim 1 and the only application to amend to include such a complaint against the sixth respondent has been refused – see above. Complaints of victimisation are now pursued as against the third and fourth respondents either originally included within Claim 1 or permitted to be pursued as a result of the claimant's application to amend.

13.2 The complaint of direct race discrimination in so far as it is made against the second respondent has little reasonable prospects of success. This is because the only allegation of direct race discrimination against the second respondent set out at paragraph 23 of Claim 1 relates to an investigatory meeting which took place on 6 November 2018. As the claimant commenced early conciliation on 11 June 2019, this claim against the second respondent is on its face presented 7 months out of time. The claimant's contentions that the actions of the various individuals amounted to a continuing act with each individual who acted after the second respondent, carrying on the same discriminatory treatment is only a possible argument in relation to the claim brought as against the same respondent. Although different individuals may have been involved, if one of the alleged acts was presented in time, it may be regarded as being conduct by the first respondent (albeit by different employees) extending over a period ending with an in time complaint. None of the complaints for direct race discrimination as against the second respondent are on their face in time. The claimant may be able to persuade the Tribunal to exercise its discretion to allow such complaints because is it just and equitable in all the circumstances to extend time. However given the lack of explanation for the late complaints to date, he has little reasonable prospect of doing this. This complaint has little reasonable prospects of success and should be made subject to a deposit order. In considering the level of such a deposit, I must make reasonable enquiries into the ability of the party to pay the deposit and have regard to any such information when deciding the amount of the deposit. The claimant has not yet been asked to give information on this matter so I make additional orders that the claimant be permitted to provide such information within 28 days of receiving this Order. Then the level of deposit can be considered and the deposit order made by me on the papers unless either party objects to this

course of action. If in the meantime the claimant decides that he wishes to withdraw the complaints that I have determined have little reasonable prospects of succeeding, then he is of course able to do so.

13.3 For similar reasons I have decided that the complaint of victimisation set out at paragraphs 25-27 of Claim 1 against the third respondent also has little reasonable prospects of success. The last involvement of the third respondent was at a grievance meeting on 17 December 2018 (para 10 of Claim 14). On this basis as early conciliation was not commenced by 17 March 2019 (and not until 11 June, almost 3 months later) this complaint is out of time. Once again, the amount of the deposit order to be made will be considered once the claimant has had the opportunity to make representations on his ability to pay. See Order above.

13.4 The complaint of breach of contract is struck out. I entirely accept the respondent's submissions. It has no reasonable prospects of success as it is not a complaint which 'arises or is outstanding on the termination of the employee's employment' as provided for by regulation 3 of the Employment Tribunals (Extension of Jurisdiction) Order 1994. The Tribunal has no jurisdiction to consider this complaint as part of Claim 1.

13.5 The respondent's application to strike out the claimant's complaint that the respondent is in breach of regulation 12 of the WTR is refused. I have also determined that no deposit order will be made in respect of this complaint. There is a clear dispute of fact as to whether attendance by the claimant at a disciplinary hearing falls within the definition of 'working time' contained withing regulation 2 (1) of the WTR. Evidence and submissions will need to be heard on this matter and it is not possible for me to conclude at this preliminary stage that it has no or even little prospects of success.

13.6 In respect of Claim 2, the entire claim in so far as it is made against Fedex Limited is struck out as it has no prospects of succeeding as against that entity. The claimant was never employed by Fedex Limited. Claim 2 relates solely to the claimant's dismissal from his employment and so liability (if any) for any unfair dismissal (and any discriminatory act in this regard) rests with the claimant's employer, which it is not disputed is the first respondent and not Fedex Limited.

13.7 The list of issues as I understand it to be following the various applications above are set out in the Appendix to this Order. This shows those complaints that have either been struck out or where application to amend has been refused in strikethrough text and where amendments have been made in underlined text. The claim has been listed for a further preliminary hearing on 2 August 2023 for 2 hours. At this hearing the list of issues in its current form will be discussed and finalised (with only very minor adjustments being appropriate at that late stage) and then the claim will be listed for final hearing and appropriate case management orders made

CASE MANAGEMENT ORDERS

Further preliminary hearing

14. There will be a further case management hearing on 2 August 2023 to be held by CVP video hearing starting at 10.00 a.m. This hearing will be before me or Employment Judge Meichen, if possible, in private and will be for case management: to finish identifying the issues, make any Orders needed to progress the claim and to list for final hearing.

15. It has been given a time allocation of 2 hours. If you feel that this is insufficient, please inform us in writing within 7 days.

Amendment

16. The claimant is permitted to amend his claim as set out above.

Claims and Issues

17. The claims and issues, as discussed at this preliminary hearing and following the decisions made above, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by **10 March 2023**. If you do not, the list will be treated as final unless the Tribunal decides otherwise.

Further information

18. Within 28 days of the date that this Order is sent to the parties, the claimant must send to the Tribunal and the respondent any evidence he wishes to rely on (and make any submissions in writing he wishes to make) as to his ability to pay any deposit order that may be made in accordance with rule 39 (2) of the Employment Tribunal Rules of Procedure ('ET Rules'). This may include a statement containing a schedule of his current household income and outgoings; assets (to include all businesses and properties in which he has any interest) and liabilities.

19. Within 14 days of the date that any such evidence is sent to the respondent, the respondent is permitted (although not required) to make further brief submissions on the claimant's ability to pay any deposit that may be ordered.

20. Within 28 days of the date that this Order is sent to the parties, the respondent is permitted to file an amended response.

Writing to the Tribunal

21. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

22. All judgments and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

23. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/*

24. The Employment Tribunals Rules of Procedure are here: *https://www.gov.uk/government/publications/employment-tribunal-procedure-rules*

25. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

Employment Judge Flood
27 February 2023