EMPLOYMENT TRIBUNALS

Claimant: Mr P A Edrissa Manjang

Respondents: (1) Uber Eats UK Limited
(2) Uber Portier B.V.
(3) Uber London Limited

Heard at: East London Hearing Centre

On: 18th September 2023

Before: Employment Judge A Frazer

Representation

For the Claimant: Mr C Milsom (Counsel)
For the Respondents: Mr T Coghlin KC and Mr N Pourghazi (Counsel)

RECONSIDERATION

1. The decision of the Tribunal dated 9th July 2022 is varied to the following extent:

   1.1 The decision on the first amendment application as concerns the allegation at paragraph 26 iv of the amended grounds of complaint dated 16th May 2022 is varied and the amendment of this particular is not permitted to proceed on the basis that it is protected by judicial proceedings immunity.

2. The remainder of the decision is confirmed.

3. The Claimant's third amendment application is allowed save for paragraphs 30 iv and 32 viii.

REASONS

Background

1. The Claimant brings a claim for indirect race discrimination, harassment, victimisation by way of a claim form presented on 1st October 2021. Early conciliation commenced on 28th July 2021 and the certificate was issued on 8th September 2021. The details of claim as presented were set out in a rider to the ET1 dated 28th September 2021. A response and grounds of resistance were entered on 19th November 2021.

2. The Respondents applied for a strike out/ deposit by way of letter dated 29th November 2021. That letter is at page 105 of the bundle. It was submitted that the claim was based on fundamental factual errors as the Claimant lost access to the app only temporarily following a *human* facial verification check and a separate flagging of unusual use of the Respondents' systems. It was stated that while the Claimant would not have been aware of the full reasons behind the temporary activation at the time of presentation of the claim the Claimant was now aware of the reality of the situation, which was a reality that the Respondents would be able to demonstrate to the necessary standard for strike out and deposit by reference to a small number of contemporaneous documents. It was also submitted that the victimisation claim was circular and implausible for reasons which were set out in the response. There were points raised about jurisdiction (employment status) but those were not in issue for the purposes of this preliminary hearing.

3. The matter was listed for a public preliminary hearing on the Respondents' application for three hours on Thursday 19th May 2021. The Claimant made two applications to amend the claim, one on 16th May 2021 and one on 18th May 2021, both opposed by the Respondents. The claim which related to the amendment application on 16th May is set out at page 66 and the claim which related to the application dated 18th May is set out at page 90. On 19th May 2021 I heard submissions from both counsel in relation to the applications under rule 37 and 39 and in relation to the amendment applications. I then reserved my decision.

4. On 23rd May 2022 the Claimant's representatives wrote to the Tribunal about a witness statement which they said was disclosed approximately two hours before the preliminary hearing. The Claimant's representatives made a number of points arising from the disclosure of the witness statement and about the removal of Uber London Limited as a respondent. The Respondents responded to this by email on 23rd and 24th May 2022 objecting to the Tribunal considering points raised by the Claimant's representative after close of proceedings. The correspondence only came to my attention on 21st June 2022 and this was the correspondence sent by the parties on 23rd May, which did not include the more detailed email from the Respondents dated 24th May 2022. I allowed the Claimant's additional submissions in but only to the extent that they addressed the witness statement. I permitted the Respondents to provide a response by 27th June 2022 and it did so dated 27th June 2022 (p.315).

5. I provided a judgment and reasons dated 9th July 2022 which was sent to the parties on 13th July 2022 and amended to include Mr Pourghazi on 13th September 2022 and which is the subject of this reconsideration application. I dismissed the Respondents' application for a strike out and deposit and allowed the Claimant's amendment application dated 16th May 2022. I permitted the Third Respondent to remain a party to the proceedings.

6. There was then some correspondence from the parties in July 2022 about whether I had intended the order on amendment to address the application dated 18th May as well as the application dated 16th May as the judgment was silent on the 18th May amendment application. On 9th August 2022 the Tribunal wrote to the parties confirming that I omitted to deal with the 18th May application and that I had proposed to deal with this on the papers as a reconsideration. The parties were invited to say whether they agreed that was proportionate or whether a hearing was required within 7 days. The Respondent agreed that it was not proportionate to list for a further hearing and provided a response to the amendment application dated 18th May 2022 (page 411). According to a reconsideration judgment dated 18th August 2022 I allowed the application. On 23rd August the Respondents' representatives, having received the judgment, wrote to the Tribunal because on 16th August 2023 the Respondents had sent in documentation including further submissions, further documentary evidence and a short authorities bundle. My judgment had referenced the Claimant's email of 21st July and the submissions of 10th August and the Respondents' email dated 25th July but not the additional documentation.

7. I confirmed that I had not been provided with the documents before I had written my reconsideration judgment and therefore the parties were written to by the Tribunal on 24th August 2022 and informed that I would now consider the reconsideration judgment in the light of having received those documents. That decision is at page 429 of the bundle. I confirmed that the decision on the amendment would stand and the reconsideration of the reconsideration judgment was sent to the parties on 13th September 2022 (page 431).

8. On 23rd August 2022 the Respondents appealed to the EAT against the Judgment dated 13th July 2022 refusing the Respondents' application to strike out the Claimant's claims, refusing the Respondents' application in the alternative for one or more deposit orders and allowing the Claimant's application to amend dated 16th May 2022. The Notice of Appeal is at page 436.

9. A further notice of appeal was sent to the EAT on 30th September 2022 which concerned the reconsideration decision dated 18th August 2022 allowing the amendment application dated 18th May and the reconsideration decision dated 30th August 2022 which confirmed that that decision would stand (page 504).

10. The case came before HHJ Barklem on 23rd December 2022 on sift and the order was sealed on 20th February 2023 (page 587). He stayed the appeals for a period of 56 days from the date of seal in order to give the Respondents an opportunity to submit to the Employment Tribunal an application for reconsideration. HHJ Barklem provided short reasons for his decision and at paragraph 3 stated that 'it is virtually impossible fairly to form a view at sift stage, not least as the Employment Appeal Tribunal does not have the totality of the evidence before the Employment Tribunal. At paragraph 4 HHJ Barklam stated *'it seems to me that the more logical step for the Respondents to have taken would have been to seek reconsideration. The ET could then have explained the reasons for it having taken the view that it did'.*

11. On 3rd March 2023 the Respondents made an application for reconsideration of the Tribunal's decision dated 9th July 2022 and requested that the application be determined at a one day hearing. The grounds for seeking a variation/ revocation of the judgment were advanced as the thirteen grounds of appeal. The order sought was set out at paragraph 28, namely:

    11.1 That the Claimant's claim be struck out in whole or in part, as having no reasonable prospects of success.

    11.2 To the extent that any part of the Claimant's claim is not struck out, to make appropriate orders for the payment of a deposit in relation to those allegations and arguments made by the Claimant which have little reasonable prospects of success and

    11.3 That the First Amendment Application is refused.

12. By way of a Notice dated 17th March 2023 the Claimant was ordered to provide a response to the application dated 3rd March 2023 by 4th April. In the meantime on 17th March 2023 the Claimant provided a position statement (page 614). The Respondents responded on 22nd March 2023 (page 643).

13. On 29th March 2023 there was a telephone case management preliminary hearing before EJ Hook. EJ Hook's Case Management Order is at page 678 of the bundle. He listed the case for a seventeen day final hearing to take place in November 2024. He directed disclosure to take place by 11th August 2023 for lists and for the provision of copies by 8th September 2023 (paragraphs 32 and 33 , page 686). Following this hearing the Claimant's representatives emailed the Tribunal on 12th April 2023 to advise that the Claimant was making further amendments which were highlighted in blue text on the particulars of claim. The Claimant's representatives did not consider that an application to amend was necessary but confirmed that if one was, their email stood as an application.

14. On 5th May 2023 the Respondents wrote to the Tribunal querying paragraph 23 of the case management order of EJ Hook as he had permitted the amendments as proposed by the Claimant. However at the hearing EJ Hook had decided to give the Claimant a deadline of 12th April by which to submit an amended claim and that to the extent that it was opposed by the Respondents, it would be determined at the upcoming preliminary hearing in front of me. The Respondents' representatives sought clarification from EJ Hook. EJ Hook acknowledged in correspondence from the Tribunal dated 2nd June 2023 that this was incorrect and that any disputed amendments would be considered at the reconsideration hearing.

15. The reconsideration had originally been listed for 25th July 2023 but Counsel were not available on that date and so it was re-listed to Counsels' availability on 18th September 2023.

Documents for the Hearing

16. I had before me a hearing bundle which was 847 pages long and an authorities bundle. For the Claimant I had a submissions document dated 12th September 2023 from Mr Milsom. On behalf of the Respondents I received a skeleton argument dated 12th September 2023 from Mr Coghlin and Mr Pourghazi. During the course of the hearing I received an additional document from the Claimant's representatives entitled Appendix 3. On Tuesday 19th September 2023 I received a number of additional documents from the Claimant's representative to include an MP3 recording, 6 Appendices and a letter addressed to me. The reason the appendices were sent were because some of the highlighting on the documents in the bundle were showing as redacted on my screen. The audio recording was mentioned in the hearing but was not provided and when Counsel for the Claimant sought to make submissions on it Mr Coghlin objected on the basis that it had not previously been disclosed and he had not had the opportunity to take instructions on it.

The Hearing

17. The hearing was a hybrid hearing. The parties attended at the Tribunal and I attended via video link. I heard oral submissions from Mr Coughlin and from Mr Milson. I reserved my decision.

The Issues for the Hearing

18. Whether the Tribunal should vary or revoke its decision to a) refuse to strike out or make deposit orders in respect of the Claimant's claims or b) grant C's first amendment application dated 16th May 2023 and c) whether the Tribunal should allow the Claimant's application dated 12th April 2023 to amend his claim. This is the Claimant's third amendment application. The Respondents oppose some but not all of the proposed amendments.

19. As concerned case management owing to the lack of time, I agreed with the parties that the case would need to be listed for a further telephone case management preliminary hearing with a time estimate of 2 hours. The parties requested that I hold the hearing given my prior involvement with this case and at the time of writing I understand that it has been listed accordingly.

The Applicable Law – Reconsideration and Variation/Revocation of Case Management Orders

The Powers

20. Rule 70 provides that 'A Tribunal may, either on its own initiative or on the application of a party reconsider any judgment where it is in the interests of justice to do so. On reconsideration the original decision may be confirmed, varied or revoked.

21. The power to reconsider relates to a judgment as defined by Rule 1(3)(b) of the Employment Tribunals Rules of Procedure 2013. The decision on an application

for strike out is a judgment because it finally determines an issue which is capable of finally disposing of a claim.

22. Decisions on an application to make deposit orders or to amend are case management orders as defined by Rule 1(3)(a). Under Rule 29 of its Rules of Procedure the Tribunal can vary, suspend or set aside any earlier case management orders.

The Test for Reconsideration

23. The test for reconsideration is the interests of justice test. This was described as a 'residual category of case, designed to confer a wide discretion on tribunals' – **Flint v Eastern Electricity Board [1975] ICR 395** at 401 per Phillips J. It is not necessary or there to be 'exceptional circumstances' or 'procedural mishaps' for the interests of justice test to be met: **Williams v Ferrosan Ltd [2004] IRLR 607** at paragraph 12 and Newcastle upon **Tyne CC v Marsden [2010] ICR 743** at paragraph 16. 'Interests of justice' mean justice for both parties – **Redding v EMI Leisure EAT 262/81.**

24. In **Outasight VB Ltd v Brown UKEAT/0253/14/LA** at paragraph 33 HHJ Eady QC as then was stated:

> *'The interests of justice have thus long allowed for a broad discretion, albeit one that must be exercised judicially, which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation.'*

25. In **Ebury Partners Ltd v Acton Davis [2023] EAT 40** at paragraphs 24 and 27 the EAT held:

> *'24. The employment tribunal can therefore only reconsider a decision if it is necessary to do so 'in the interests of justice'. A central aspect of the interests of justice is that there should be finality in litigation. It is therefore unusual for a litigant to be allowed a second bite of the cherry and the jurisdiction to reconsider should be exercised with caution. In general, while it may be appropriate to reconsider a decision where there has been a procedural mishap such that a party had been denied a fair and proper opportunity to present his case, the jurisdiction should not be invoked to correct a supposed error made by the ET after the parties have had a fair opportunity to present their cases on the relevant issue. This is particularly the case where the error alleged is one of law which is one more appropriately corrected by the EAT.*
>
> *27. It is notable that in this passage the judge appears to have decided to carry out a reconsideration because he had reached a new conclusion based entirely on material which was before him at the time of his original*

judgment, which is certainly not generally considered a good ground for reconsidering a judgment.'

26. In **Stevenson v Golden Wonder Ltd [1977] IRLR 474** it was held by Lord McDonald that a reconsideration is not an opportunity for a rehearing '*at which the same evidence can be heard with different emphasis or further evidence adduced which was available before'.*

27. At paragraph 45 of **Ameyaw v Pricewaterhousecoopers Services Ltd EAT 0291/19** (paragraph 45) the EAT followed **AB v Home Office EAT 0363/13** and held that an application for reconsideration is not a vehicle for challenging an employment tribunal's reasons or, insofar as not part of the essential reasoning upon which the decision is based, other things said by the employment tribunal in arriving at its decision. At paragraphs 41 to 45 of AB it was held:

> *41. In her reasons for refusing a review the EJ correctly identified rule 35(3) as the power which she was exercising. The key question for her was therefore whether there was any reasonable prospect of the decision being varied or revoked It was not the purpose of rules 34-36 to provide a mechanism for an ET to improve (or change) its reasons in the absence of a reasonable prospect of the decision being varied or revoked.*
>
> *42. There is, I think a distinction to be drawn between (1) overlooking an issue altogether, and therefore not deciding it and (2) deciding an issue and giving reasons for it which are inadequate and incomplete. I think the distinction is the same under the old rules and the new rules. I will refer to 'reconsideration' under the new rules because this is the language with which we are now familiar.*
>
> *43. An EJ who, upon receiving an application for reconsideration, appreciates that the ET has altogether overlooked deciding an issue can and usually should arrange for the ET to reconsider its judgment. The ET will have failed to decide an issue which was before it for determination: it will be necessary in the interests of justice for the ET to determine that issue. This happens rarely, but it can occur in cases where there are many issues. The ET may hold a further hearing or (in a case where a hearing is not necessary in the interests of justice) may give the parties a reasonable opportunity to make further representations.*
>
> *44. On the other hand, if the EJ considers that the ET did decide the issue, and at most the reasons might be considered incomplete or inadequate, but there are no reasonable prospects of the judgment being varied or revoked, the EJ must not order reconsideration.*
>
> *45. This distinction between a review or reconsideration and the giving of further reasons is recognised in the EAT's standard form of order under what is known as the Burns/Barke procedure: for this procedure see Barke v SEETEC Business Technology Centre Ltd [2005] IRLR 633. Where an ET is alleged to have failed in its judgment to deal with an issue at all, or*

to have given no reasons or no adequate reasons for a decision, the EAT may invite ET to clarify, supplement or give its written reasons before proceedings to a final determination of the appeal. The EAT's standard form of order effectively invites the ET to consider review (now reconsideration) as an alternative to providing further reasons. In this way an ET which has not merely omitted to give reasons but has actually omitted to decide an issue may reconsider its judgment; an ET which has merely omitted to give reasons may give those reasons in response to the EAT's request.'

28. In **Ladd v Marshall [1954] 3 All ER 745 CA** the Court of Appeal held that in order to justify the reception of fresh evidence it was necessary to show that the evidence could not have been obtained with reasonable diligence for use at the trial; that the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive and that the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. In **Outsight VB Ltd v Brown UKEAT/0253/14** the EAT held that the test in **Ladd v Marshall** would in most cases encapsulate what is meant by interests of justice but there might be cases where the interests of justice would permit fresh evidence to be adduced notwithstanding that the principles laid down in **Ladd v Marshall** were not strictly met.

Case Management Decisions

29. Rule 29 provides ' a case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice.'

30. The employment tribunal has a broad discretion when exercising case management decisions which are only overturned on appeal in the face of an error of law or where a conclusion is 'outside the generous ambit within which reasonable disagreement is possible' – **Norrani v Merseyside TEC Ltd [1999] IRLR 184**.

31. In **Serco v Wells [2016] IR 768** at paragraph 43 it was held that an order can be varied or revoked when there is '*either a material change of circumstances or a material omission or misstatement or some other substantial reason'.*

Strike Out/ Deposit

32. In **Balls v Downham Market High School and College [2011] IRLR 217** at paragraph 6 Lady Smith held:

'*The tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows*

that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions on disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects'.

33. In **Anyanwu v South Bank Student's Union [2001] IRLR 305** it was held by Lord Steyn at paragraph 24 that 'discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.

34. In **Hemdan v Ishmail [2017] ICR 486** it was held that the purpose of a deposit order under Rule 39 was to identify claims with little prospects of success and to discourage their pursuit with a risk of costs if the claim failed, but it was not to make access to justice difficult or to effect a strikeout through the back door. There had to be a proper basis for doubting the likelihood of a party being able to establish essential facts, while avoiding a mini-trial of the facts. In addition at paragraph 15 it was held by Simler P:

> '*once a tribunal concludes that a claim or allegation has little reasonable prospects of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had, for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved and the case is likely to be allocated a fair share of limited tribunal resources are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of wider public interest.'*

35. The employment tribunal must have a proper basis for doubting the party being able to establish the facts essential to the claim or response**: Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and others EAT 0096/07.**

The Parties' Submissions

36. The parties submissions are contained in their skeleton arguments. Mr Coghlin and Mr Poughazi's arguments on the strike out/ deposit are set out at paragraphs 32 to 71 of the skeleton argument and Mr Milsom's are at paragraph 60 onwards. The submissions are tailored to the grounds of appeal advanced by the Respondents. I was additionally assisted by way of additional oral submissions on the day of the hearing.

Mr Coghlin

37. More generally Mr Coghlin submitted that the Claimant had more recently made a further amendment which suggested that he accepts that there were deficiencies in his case. The EAT must have thought the grounds had some merit for it to make the Order. The Tribunal has to engage with the grounds fully for the purposes of this reconsideration, on the basis of the overriding objective. The Claimant has since produced a DSAR letter but that did not take his case any further and that it painted a clear narrative that showed the fundamental failings in the Claimant's case. The Claimant had made submissions that the Tribunal should in effect draw inferences because the Respondent had committed GDPR breaches. The Tribunal had no jurisdiction to determine breaches of GDPR and it would be improper for a tribunal to draw inferences of discrimination from alleged non-compliance with GDPR. Mr Coghlin drew my attention to paragraph 38 of **D'Silva v NATFHE [2008] IRLR 419** in which Underhill J as was stated:

> *'….we have observed a tendency in discrimination cases for respondents' failures in answering a questionnaire, or otherwise in providing information or documents, to be relied on by claimants, and even sometimes tribunals, as automatically raising a presumption of discrimination. That is not the correct approach. Although failures of this kind are specified at item (7) of the 'Barton' guidelines' as endorsed in Igen Ltd v Wong [2005] IRLR 258 (see at p.270) as matters from which an inference can be drawn, that is only 'in appropriate cases'; and the drawing of inferences from such failures – as indeed from anything else – is not a tick-box exercise. It is necessary in each case to consider whether in the particular circumstances of that case the failure tin question is capable of constituting evidence supporting the inference that the respondent acted discriminatorily in the manner alleged; and if so, whether in the light of any explanation supplied it does in fact justify that inference. There will be many cases where it should be clear from the start, or soon becomes evident, that any alleged failure of this kind, however reprehensible, can have no bearing on the reason why the respondents did the act complained of, which in cases of direct discrimination is what the tribunal has to decide. In such cases time and money should not be spent pursuing this point.'*

38. In addition, it would be an error to draw inferences where the Respondent raises privilege **(Sayers v Clarke Walker (A Firm) [2002] WL 1039757**. There was no deliberate misinformation of the Claimant by the Respondent and Mr Tan's letter as well as the Grounds of Resistance has addressed the 'who' and 'why' as concerned the decision.

39. The Respondents have disclosed evidence of the Bounce and McFly procedures. The best evidence of the procedures is available to the Tribunal, including the safety lens data, which shows that the Claimant did not fail a computer review.

Mr Milsom

40. Mr Milsom submitted that the focus of the claim was that the Claimant was dismissed for reasons that were not true, namely that he used a substitute. At the time the Claimant was told that it was a computer activated review. The Claimants were not submitting that the inferences can be drawn from the Respondents asserting privilege but that the material produced may not be privileged. The EAT was not saying that there was any merit but that it was impossible to form a view at sift stage. The ET said it was premature to order a deposit/ strike out. Both tribunals were saying exactly the same thing. In the interests of finality triable cases should be tried. In terms of the GDPR the Claimant was not asking the Tribunal to act as the Information Commissioner but the crucial point relied on was that the Claimant had a right to remove himself from automated decision making and any process to be fully explained. Da Silva had to be taken in its own context.

<u>The Grounds of Application and the Parties' Submissions on them</u>

<u>Ground 1 – The Tribunal erred by failing to strike out and/or make deposit orders in respect of the Claimant's allegations that relied on the premise that his account was deactivated on 30 April 2021 because he had failed a computer review.</u>

Respondent:

41. The Respondents assert that central to the Claimant's claims for harassment, indirect discrimination and the second pleaded act of victimisation was the assumption that the deactivation of his account which occurred on 30th April 2021 was because he failed a computer review. The Respondents applied for a strike out and deposit on the basis that it was beyond realistic argument that the Claimant had never failed a computer review so this could not be the reason for his deactivation.

42. The Respondents assert that the safety lens data is determinative. The safety lens data showed that the Claimant only ever failed a human review on 1st December 2020. The safety lens data was not just 'one piece of the puzzle' but was the most reliable and comprehensive evidence in existence about the HRTID check the Claimant had and when and whether they were human or computer. There was nothing in disclosure which contradicted this document. Moreover the safety lens data provided positive evidence that there was in fact no verification failure on 30th April 2021, contrary to the Claimant's pleaded case. While the Claimant did assert that the safety lens data did not provide the full picture, the Tribunal had missed the significance of this point. Mr Bruschetti's evidence addressed this to say that if the selfie was not clear no HRTID check is undertaken and there is no adverse consequences for the individual. Mr Bruschetti's evidence was that every time a HRTID check is done it is recorded on safety lens. The Tribunal were incorrect in finding that there was no evidence of a verification failure that relates to 1st December 2020. That was

incorrect as there was a record of a failed human check on 1st December 2020 on safety lens.

Claimant:

43. It was submitted that if the Tribunal had accepted the response and witness statement presented by the Respondents uncritically it would have been guilty of an error of law. There are reasons to believe that the safety lens is not the whole picture, and this is not confined to the representations made by the Respondents themselves at the time of deactivation seven months prior to the ET3. It appears that there are three elements of the Respondents' AI systems: trigger, facial detection analysis and a further facial recognition analysis [305]. It was submitted that the Respondents' data was partial in this regard and provided no safe basis for obstructing the Claimant's access to the ET. Moreover, Mr Bruschetti's statement raises more questions than it answers as to precisely how the 2022 deactivation took place: para.15 [303-306]. There is a dearth of evidence as to the 2021 disclosure: paras.16-17 [306]. The Respondents have repeatedly refused to explain and identify what data fed into the solely automated decision to deactivate the Claimant notwithstanding their obligations to do so under UK GDPR.

Ground 2: The Tribunal erred by relying on the Claimant's need to take its case at its highest

44. The Tribunal expressly applied the principle to the Claimant's argument that there was a lack of clarity surrounding the reason for the Claimant's activation (paragraphs 86, 91 and 93 of reasons) and that was an error of law. The Tribunal should not have uncritically accepted the Claimant's comments on the evidence and instead should have analysed the Claimant's comments on lack of clarity for itself. The principle of 'taking a case at its highest' has no application to deposit orders which require the Tribunal to take a broad and realistic approach to the Claimant's likelihood of success: **Jansen Van Rensberg v Kingston Upon Thames UKEAT/00/96/07** at [19] and [23-27].

45. It was submitted by Mr Milsom that this was a 'groundless assertion with no substantive foundations'.

Ground 3: The Tribunal erred in failing to strike out or make a deposit order in respect of the Claimant's indirect discrimination claim which relied on the PCP of 'deactivation and/or dismissal' (PCP3)

Respondent:

46. This ground related to paragraph 92 of the reasons where the Tribunal had held that it would not be fair for there to be a summary conclusion about the application of any PCP or the causal connection between the PCP and the disadvantage without full disclosure and that there would need to be full disclosure for there to

be a fair assessment to be made on the harassment and victimisation claims. It was submitted that it was incumbent on the Tribunal to examine the arguments in relation to each of the claims together rather than grouping them together – **Silape v Cambridge University Hospitals NHS Foundation Trust EAT/0285/16** at [36]. In so doing the Tribunal ignored or overlooked a series of meritorious arguments for strike out or deposit. The matters that it overlooked were not fact sensitive nor matters that could realistically turn on disclosure. The arguments that were put forward by the Respondent were that as concerned PCP3 dismissal (and therefore deactivation) cannot constitute a valid PCP in law: it is at most the result of the application of some other PCP: **Fox v British Airways plc UKEAT/0315/14/RN** at [78]. There is no causal connection between PCP Three and the alleged disadvantage, which is being "*less likely to pass the facial recognition test and thus more likely to face the consequences of being barred from the app and/or employment with Uber*". As a matter of chronology and logic, dismissing/deactivating someone cannot possibly make it less likely that they pass the facial recognition test and thus more likely to face the consequences of being barred from the App, whatever their race.

Claimant:

47. It was submitted that dismissal/deactivation was capable of constituting a PCP which had been or would be applied to others in similar circumstances: *BA v Starmer plc.* There was no basis on which the ET could satisfactorily conclude that there was no racial disadvantage in the facial recognition process and thus that racial groups may more readily face the disadvantage flowing from the loss of employment. To the extent that there is any genuine confusion, it is resolved in the revision provided by the Claimant on 27 March 2023.

Ground 4: The Tribunal erred in failing to strike out or make a deposit order in relation to the Claimant's indirect discrimination claim which relied on the PCP of 'the practice and/or requirement of communication via message and without telephone consultation with drivers prior to deactivation/ dismissal (PCP Five).

Respondent:

48. It was submitted that the Tribunal failed to engage with the argument that PCP Five had little or no reasonable prospects of success. There was no causal connection between the PCP and the alleged disadvantage. Whether or not someone received a telephone consultation prior to deactivation cannot possibly make it more likely for someone to fail the facial verification process which would precede the telephone conversation, whatever their race. There was no evidence that this PCP was applied to C as his case was that he received an email afterwards to say that his account had been deactivated (particulars of claim paragraph 11). Claimant:

49. If BAME drivers are more likely to face deactivation due to failing the facial recognition process or data surrounding these facial detection and recognition

checks, the absence of a prior step to engage via telephone consultation so as to resolve difficulties will arguably lead to greater disadvantage. The ET was entitled to allow it to proceed.

Ground 5: The Tribunal erred in failing to strike out or make a deposit order in respect of the Claimant's victimisation claim based on 'the denial of a telephone call'. (VCT Detriment 1)

Respondent:

50. The Respondent's case was that the Tribunal had failed to engage with or uphold the Respondent's contentions set out in its skeleton argument for the PH at paragraphs 64 to 67 that this claim was inherently implausible.

Claimant:

51. The reason why the Respondents refused the Claimant's urgent requests for review are a matter of primary evidence, particularly where on the Respondents' own case the explanation conveyed to the Claimant at the time of deactivation was untrue. The ET could not permissibly reject these claims at an interlocutory stage: it is not in the interests of justice to fall into the legal error urged by the Respondents now. It would be particularly perverse to do so given that the Respondents themselves assert that they have been "*unable to establish what review (if any) took place at this stage"* and seemingly cannot access, or are unwilling to be transparent about, records for the period immediately following deactivation [802]).

Ground 6: The Tribunal erred in failing to strike out or make a deposit order in respect of C's victimisation claim based on the "the denial of a human review" (VCT Detriment 2) and "the failure to investigate the discriminatory consequences of the Real Time ID check" (VCT Detriment 3) and "the failure to reconsider the Claimant's dismissal" (VCT Detriment 4).

Respondent:

52. It was submitted that the Tribunal erred in failing to engage with, or uphold, Rs' contentions (set out in paragraphs 68-80 of its Skeleton Argument for the PH on 19 May 2022, which are at pages 299 to 301 of the bundle) that:1) these claims were circular and logically flawed: C's complaint was in essence that these failures occurred despite him doing the protected act of challenging the deactivation as discriminatory, not because of him doing so; or to put it another way there was no worsening of the alleged treatment following the protected act; and 2) there in fact *was* a human review, and an investigation, and a reconsideration of the deactivation, which led to the reactivation of C's account.

Claimant:

53. The reason why the Respondents refused the Claimant's urgent requests for review are a matter of primary evidence, particularly where on the Respondents'

own case the explanation conveyed to the Claimant at the time of deactivation was untrue. The ET could not permissibly reject these claims at an interlocutory stage: it is not in the interests of justice to fall into the legal error urged by the Respondents now. It would be particularly perverse to do so given that the Respondents themselves assert that they have been "*unable to establish what review (if any) took place at this stage"* and seemingly cannot access, or are unwilling to be transparent about, records for the period immediately following deactivation [802]).

Ground 7: The Tribunal erred in failing to strike out or make a deposit order in respect of C's claim that his "deactivation/dismissal" amounted to victimisation.

54. It was submitted that C's fifth victimisation allegation – that his deactivation/dismissal on 1 May 2021 amounted to victimisation – was unsustainable as a matter of logic and chronology. C did his protected acts after he was told that his account was deactivated. C cannot have been subjected to a detriment because of a protected act that post-dated the detriment.

Claimant:

55. The reason why the Respondents refused the Claimant's urgent requests for review are a matter of primary evidence, particularly where on the Respondents' own case the explanation conveyed to the Claimant at the time of deactivation was untrue. The ET could not permissibly reject these claims at an interlocutory stage: it is not in the interests of justice to fall into the legal error urged by the Respondents now. It would be particularly perverse to do so given that the Respondents themselves assert that they have been "*unable to establish what review (if any) took place at this stage"* and seemingly cannot access, or are unwilling to be transparent about, records for the period immediately following deactivation [802]).

The Decision on the First Amendment Application

Ground 8: The Tribunal erred in allowing C to amend his claim to allege that Rs had harassed and victimised him by their "continued failure to provide a full account as to the process applied to verification and investigation(s) including most recently in the Respondent's letter of 6 May 2022''.

Respondent:

56. It was submitted that the Tribunal erred in allowing this amendment in circumstances where the correspondence in question was brought into existence for the purpose of the proceedings and was covered by judicial proceedings immunity – **South London and Maudsley NHS Trust v Dathi UKEAT/0422/07/DA**. In any event, it was submitted that even if judicial proceedings immunity did not apply (which is denied), the claim would still have had no reasonable prospect of success because Rs' conduct in legitimately protecting its position in legal proceedings could not amount to a detriment –

***British Medical Association v Chaudhary* [2007] IRLR 800, CA; and *Derbyshire v St Helens MBC* [2007] ICR 841, HL.**

Claimant:

57. It was submitted that the issue of judicial proceedings immunity was fundamentally unsuited to an interlocutory decision on the papers as evidence. The ongoing failure of the Claimant to provide an honest and transparent account of why the Claimant was deactivated is by no means confined to conduct which was a necessary consequence of proceedings and/or issued pursuant to an order from the ET. The failure is all the more remarkable given the Respondent's positive obligations under the GDPR to ensure and be able to demonstrate the lawfulness, fairness and transparency of processing of personal data which lies at the heart of these claims. It was further submitted that conduct which went beyond reasonable steps to defend the Respondent's positions was capable of constituting a detriment: St Helen's. This is to be viewed from the Claimant's perspective which could only be done on hearing evidence.

Ground 9: The Tribunal erred in allowing C to amend his claim to allege that Rs had subjected him to race-related harassment by "the requirement to undergo heightened and excessive identity verification checks (including, but not limited to, the requirement to repeatedly submit photographs) as compared to white colleagues, which are inexplicably rejected".

Respondent:

58. It was submitted that in allowing this amendment the Tribunal erred by failing to have regard to the following relevant considerations:

    1. C's allegation of a difference in treatment (i.e. being required to retake and resubmit selfies more often that white colleagues to enable the facial verification process to take place) was pure speculation. He named no actual comparators and said nothing to suggest that he had any basis for suggesting a difference in treatment. By contrast, in his original details of claim he had cited extensive material which he suggested established a disparate impact to support his central case that facial verification processes that are performed by computers are discriminatory against people who are black/African, etc.

    2. If C's allegation were based on more than pure speculation, he would have been in a position to make the allegation in his original ET1, given that Rs' facial verification process was gradually rolled out from August 2020 and C's original Particulars of Claim is dated 21 September 2021. The fact that C did not do so suggests that this was not a claim which he originally believed had merit, or that it was one that he had deliberately chosen not to advance.

    3. C's allegation was that his failed attempts to submit selfies met the high threshold necessary for harassment. However, this allegation was comprehensively undermined by Mr Bruschetti's evidence, which was not

challenged, that failed submission attempts are not Verification Failures, do not have any impact on a Courier's account, and cannot lead to deactivation.

4. More generally, the timing of this new allegation, especially when considered alongside the matters described above, indicated that it was a transparent attempt to try to keep some or other claim alive following disclosure of the SafetyLens data which fatally undermined his central claim, namely that he was deactivated for failing a Computer Review.

Claimant

59. The ET did not err in permitting this amendment. Contrary to para.29 [448], no comparator is required. Even if there is some element of speculation this is inevitable when proceedings were at their early stages. It would have been wholly improper for the ET to conclude that allegations were "*comprehensively undermined*" by the contents of a witness statement provided the day of the hearing and in the absence of full disclosure and oral evidence.

Ground 10 – The Tribunal erred in allowing C to amend his claim to allege that Rs applied a PCP of *"the requirement and/or practice of human verification checks"* which was indirectly discriminatory.

Respondent:

60. It was submitted that by allowing this amendment the Tribunal had given C permission to advance facts which were mutually contradictory in an unified case. This was impermissible ***- Clarke v Fine Art (London) Ltd*** **[2002] 1 W.L.R. 1731** at [28]-[30] per Patten J (as he then was), cited with approval in ***Binks v Securicor Omega Express Ltd*** **[2003] 1 WLR 2557,CA** at [8]. The Claimant submitted that there was no error of law in the ET granting permission to amend: *Clarke v Marlborough* concerns compliance with CPR 22. The CPR is not transposed to the ET: ***Harris v Academies Enterprise Trust*** **[2015] ICR 317**. Even if it has some analogous assistance, Patten J concluded that it was open to a claimant to plead "inconsistent factual alternative…based on incomplete but plausible evidence in circumstances where they are not able to choose decisively between the rival possibilities without access to the trial processes of disclosure and cross-examination;" In the present case the Respondents overstate the supposed incompatibility. One guise of facial verification may be more extreme in its discriminatory effect but both may be discriminatory. A wealth of research material indicates that BAME people face group disadvantage on the application of recognition checks whether human or automated. The Claimant submitted photographs of himself. They were rejected by way of a process which remains opaque. This is a question which can only be determined on holistic assessment of the evidence and the clarification of the claim on 27 March 2023 resolves the formalistic objections of the Respondents. The ET permitted the amendment for the same unimpeachable reasons as it refused the strike out orders: this could only be determined on full consideration of the evidence.

Ground 11 – The Tribunal erred in allowing C to amend his claim to allege a PCP that "the application of the verification checks as identified by the Respondent" which was indirectly discriminatory.

Respondent:

61. It was submitted that this PCP was vague. It was submitted that insofar as this was a complaint about Computer Review, the claim necessarily failed for the same reason that C's original claim about Computer Reviews should have been struck out (namely, that he was not deactivated for failing a Computer Review) and the Tribunal erred by failing to have regard to this relevant consideration. Insofar as this is a complaint about Human Review, the amendment should have been refused for the reasons identified at Ground 10 above, where the nature of the Tribunal's errors of law have also been identified.

Claimant:

62. It was submitted that the grounds were repetitive and had already been addressed.

Ground 12 – The Tribunal erred in allowing the amendment to introduce a PCP of "the application of any process or checks conducted in or around the time of the 'usual activity' (sic) in late April 2021.

Respondent:

63. It was submitted that the Tribunal failed to have regard to the following considerations. This was not a sustainable PCP but was vague, incoherent and speculative. It is a pleading of the kind described by Scrutton LJ in ***O'Rourke v Darbishire*** **[1919] 1 Ch 320, 346-347** as *"a pleading obviously framed to take the benefit of anything that may turn up, without any clear idea of the case which the plaintiff is alleging."* As Scrutton LJ noted at 348-349, these sorts of pleadings should be recognised as nothing more than a mere guess and an attempt to obtain disclosure on the chance of finding out something which will support a case, either the original case pleaded or a new case that can be advanced by way of amendment. It was not clear how this alleged PCP is said, even arguably, to lead to the alleged disadvantage for people who share C's race, namely that *"they are less likely to pass the facial recognition test and thus more likely to face the consequences of being barred from the app and/or employment with Uber."* Again, the case that is being advanced appeared to be a mere guess without any knowledge or understanding of the matters that are being complained about.

64. Further, on the realistically unchallengeable documentary evidence, it appeared that C was not even subjected to the PCP and/or put at such a disadvantage. He did not, at any time in fail either a Computer Review or a Human Review, as the SafetyLens data demonstrates.

Claimant:

65. It was submitted that the grounds were repetitive and were addressed already.

Ground 13 – The Tribunal erred in proceeding on the basis that all of the victimisation claims which C sought to add by way of amendment were "pleaded as continuing acts and appear to be in time" (Reasons para 79).

Respondent:

66. It was submitted that contrary to the Tribunal's assumption, the following alleged acts of victimisation which C sought to add by way of amendment were not continuing acts and were outside of the primary time limit:

67. *"The failure to communicate the fact of, or outcome(s) of the investigation(s) to the Claimant".* C was aware of these investigations at the latest when he received the Grounds of Resistance on 19 November 2021. C's amendment was brought on 16 May 2022, approximately 3 months late.

68. '*The uncommunicated reactivation of C"*. The reactivation occurred on 16 September 2021. R's position is that C was aware of his reactivation immediately since he "went online" on the App around half an hour after it happened. But on any view C was aware of his reactivation when he received the Grounds of Resistance on 19 November 2021, so his amendment application, which was brought on 16 May 2022, was approximately 3 months late at least.

Claimant:

69. It was submitted that even if the amendment was outside the primary limitation period it did not bar the ET from granting the amendment: ***Vaughan****.* The Respondent invites the ET to do precisely that which Lady Smith identified as erroneous in law, namely to "*consider what is put forward by the respondent either in the ET3 or in submissions*" and deciding whether disputed matters "*are likely to be established as facts*." This is error of principle in respect of deposit orders just as much as it is regarding the approach to strike out. There is a significant number of disputed facts. This dispute is compounded by the continued opacity of the Respondents. The approach urged by the Respondents is for the ET to assume all aspects of the GoR will be proven and strike out accordingly. This approach is misguided in law having regard to domestic authority. It is a stark derogation from the Article 6 right to a fair trial. It cannot sensibly be countenanced. The ET is therefore asked to grant the amendment and refuse the reconsideration application. It is now time for complaints presented nearly two years ago to be determined on their merits.

Conclusions

Summary of the Claim

70. The Claimant's claims are presented in his claim form on 1st October 2021. The Claimant is a driver for Uber Eats. He is a black male of African descent. In April

2020 the Respondent introduced a Real Time ID check system in the UK which relies on Microsoft Real Time ID Check software. This requires drivers to upload a real time selfie when using the app which is checked against the driver's profile photo. Use of the app is a pre-requisite to accessing work and getting paid. On 30th April 2021 the Claimant received a message from Uber Eats notifying him of his permanent suspension from the app. The reason given was that he had shared his Uber Eats delivery partner account on multiple occasions. The Claimant was then informed by a further message that he had failed the photo recognition check. The Claimant's account was then deactivated. The Claimant then responded complaining of race discrimination, which he has pleaded as the first protected act for his claim of victimisation. The Claimant's case is that the Respondent messaged back to say that the deactivation was because of 'continued mismatches' and the Claimant messaged back to say that the algorithm was racially biased. This is relied upon as the second protected act. Someone called Ken messaged the Claimant and said that they were sorry that he felt that way and that they would never discriminate against users of their services. The message went on to say that the Respondent streamlined communications through email so they were unable to fulfil his call request. The Claimant was then advised that his account had been reviewed and that that the deactivation was due to repeated flagging for improper use of the Uber app. The Claimant says that it was unclear what review process was utilised and whether that was a human comparison between the image submitted and the profile photo. The Claimant says that he was not offered a telephone call because the Respondent wanted to avoid a telephone conversation about the race discrimination that he had mentioned. He says that he did not request a phone call but the Respondents said that he did. In September 2021 the Claimant was reactivated on the app after starting early conciliation.

Safety Lens Data

71. The Respondents have produced a document which is called 'safety lens data' and which, it says, provides information about the comparison between the profile photo and the real time selfie submission, when it was submitted and what the outcome of the decision about that photo was (p.455 onwards). It says that the Claimant only ever failed one HRTID check, which the safety lens recorded as being on 1st December 2020 (p.463) and that this was in any event a manual or human review. Its case, therefore, is that the Claimant's case that there was an automated rejection of this HRTID on grounds of discriminatory facial recognition is misconceived. It says that this document is determinative and has produced a witness statement by Mr Bruschetti to that effect.

Subsequent Documentation

72. On 31st October 2022 the Claimant wrote to Ms Emma O'Dwyer, Head of Labour Relations, asking a number of questions about his deactivation (p.580). He asked why he had been asked to complete five facial recognition checks in the events leading up to the deactivation and how that fed into the decision to deactivate

him; who made the decision to deactivate on 30th April and what process was followed; who considered the concerns that he had raised and why he was reactivated in September 2021. Mr David Tan, Head of Courier Operations at Uber Eats UK and Ireland, provided a substantive response on 22nd May 2023. I did not have these documents before me at the first preliminary hearing but am being asked to reconsider in the light of them. At page 713 it was clarified by Mr Tan that *'the only automatically generated message you received was the initial standard email informing you that you had ben deactivated, that was triggered when you were deactivated. All subsequent messages from the support team were not automated messages. There were humans involved in the decisions made in sending those messages'.*

73. The Claimant's case is that there remains some opacity surrounding the decision-making process that led to the Claimant's deactivation but submits that on the face of it, from Mr Tan's letter, the deactivation was the result of an automated decision. The Claimant asserts that there remain a number of questions unanswered about the process including why the Claimant had to undertake so many facial verification checks in April, how the data was used, what was the 'unusual activity' which formed the basis of the decision and how was the deactivation decision made.

74. In a letter from Mr Tan to the Claimant dated 22nd May 2023 it was explained that the triggers for the five verification checks between 27th and 29th April 2021 were either 'Mutombo' or 'Bounce' checks. He explained that a 'Mutombo' check was an HRTID check that occurred at various intervals for couriers and that 'Bounce' check meant that the check had been triggered because of a combination of change in device, and the locations and time of the attempted login would suggest that more than one person may have been attempting to use the Claimant's account. Mr Tan said that the concerns that the Claimant had raised at the time of his deactivation had been escalated to various support teams but that those were not escalated to the correct team for consideration. Level 1 team escalated the Claimant's communication to Level 2 support but neither team ever escalated it to the Incident Response Team. It was stated that the reason for this was human error. It was stated that the teams would not have had access to the safety lens data at the time. The Respondents accepted that message sent to the Claimant initially was the message that was sent to him telling him that he had been deactivated but stated that the subsequent messages from the support teams were not automated messages.

75. The Respondents have, since the original preliminary hearing, stated that it has a rule whereby if there are four bounce events and a past HRTID fail there will be a deactivation and that this is what happened to the Claimant in April. This is called a McFly rule. The Respondents say that this is not fully automated because one element of it is human verification. Either the photo is verified by a human or at the very least on every occasion when the courier uploads a selfie he has the option of a human review. The Respondents have provided data of the Bounce events relied on at page 840. The Bounce algorithm was brought in to detect

cases where there are drivers who are sharing the app with others who may not be verified to work for Uber and whose suitability to work may be in question (e.g. not being permitted to work in the UK).

76. The Respondents say that the circumstances surrounding the Claimant's reactivation in September 2021 are protected by litigation and/or legal advice privilege which is not an issue that I have to determine as part of this reconsideration.

77. The Claimant say he does not know the full circumstances of the decision to deactivate his account and has only had this information on a piece by piece basis since the litigation commenced, which is how the case has unfolded. For example, the safety lens data was provided after the claim was presented. The Respondents have provided information about Bounce and McFly upon further correspondence and after the original preliminary hearing.

Ground 1

78. I do not consider that the Claimant's claim should be struck out on this basis. The decision to deactivate was an automated and the Claimant's case is that it remains unclear what the process was that led to deactivation and whether this involved any facial recognition in the process and to what extent. The Respondents say that the deactivation occurred because it was based on four bounce events and a previous failure (which was a human review). There has been some evidence advanced of this McFly rule in the form of the printout of the bounce data. However the process remains unclear as concerns the steps involved in the process which ended in deactivation and to what extent the facial recognition process (human or automated) feeds into the deactivation process. That may become clearer at trial but only on a hearing of **all** of the evidence. The Claimant was informed at first that the reason related to the photo submitted not matching his profile photo. Therefore the Respondents' assertions that the safety lens document is determinative is a matter of evidence and weight. There was also an allusion in the automated messages to account sharing. I consider that the question of 'related to race' for the harassment claim is a matter for determination by the panel on the evidence to see to what extent there was any facial recognition in the whole process and what the continuity of process was. In order for the victimisation claim to be determined there will need to be full evidence of the processes that were followed once the Claimant had complained of discrimination. There was some acceptance by the Respondents that it was not escalated as it should have been and on the face of it, the communications were cursory and in message format. There is at least an argument that the raising of discrimination may have shut out the possibility of a further review. All the steps in the process will need to be considered fully for the indirect discrimination claim as well. I do not vary my decision to strike out under rule 37 or order a deposit.

Ground 2

79. The Claimant's case at its highest is that he was deactivated having submitted a photo of himself and part of the reason given at the time was that the Respondent could not be satisfied that the photos were of him. This ground does not change my view that this case requires a full panel to consider the evidence relating to the processes that fed into the Claimant's deactivation and that the safety lens data is only one part of the puzzle. The weight and assessment of that document in the context of the other evidence will be a matter for the Tribunal of fact. The evidence will involve consideration not just of what the safety lens data said but of what the Claimant was informed and by whom, what processes fed into the deactivation, the reason for the number of times he was asked for a photo on the days leading up to the deactivation and the extent to which the submission of his selfie at that time led to the decision to deactivate. If there is any error, which I find that there was not, it does not materially affect my decision and I do not vary my decision not to strike out or make a deposit order on this ground.

Ground 3

80. I have considered this PCP again. I do not see any difficulty with this PCP being applied generally or to the Claimant. A one off act is capable of being a PCP. The articulated disadvantage via the more recent amended particulars is that the protected group is more likely to face the disadvantage of being barred from employment if deactivated. To the extent that the disadvantage was not sufficiently connected to the PCP or was unclear, this has been clarified by way of the most recent amendment dated 27th March 2023 and for the reasons that I have stated below, I have allowed that amendment.

Ground 4

81. I accept that the disadvantage and the causal relationship between the PCP and the disadvantage was not wholly clear in the first amendment but it has been further clarified in the third amendment dated 27th March 2023. The way that it has been put has been that the disadvantage created a loss of opportunity for the protected group. To the extent that this remedies the lack of clarity in the original pleading I allow it and have expanded on my reasons for allowing the amendment below.

Ground 5

82. In paragraph 6 of the letter of the Respondent dated 25th July 2023 the Respondent says that the handling of the Claimant's queries post deactivation appeared to be simply human error and nothing to do with the allegation of discrimination by the Claimant. This is a matter of evidence. The Claimant's case is that he was shut down in effect and so the Tribunal of fact will need to determine whether this was in fact human error or an avoidance on the part of the handler to engage in any difficult conversation. I do not vary my decision not to strike out/ not to make a deposit order.

Ground 6

83. This allegation turns on the evidence of how the post deactivation processes were handled after the Claimant made an allegation of discrimination. The Claimant's case is that the processes were opaque and there was a lack of engagement. The question for the Tribunal will be whether the raising of the discrimination allegation had any bearing on the fact that there was no full review of the Claimant's deactivation. The allegation is premised on the facts as stated leading up to the particulars as set out in the claim form so the time in question is May 1st and not September. I consider that this is a matter for a full Tribunal to determine on the evidence. I do not vary my decision not to strike out/ not to make a deposit order.

Ground 7

84. The detriment concerned was Ken's decision to deactivate the Claimant's account on 1st May. Therefore the review process will need to be considered by the Tribunal including how Ken reached the conclusion that the deactivation should be maintained. The Claimant was given inconsistent reasons so the Tribunal will need to make a finding on what the real reason was. That is a question for proper determination on the evidence. I do not vary my decision not to strike out/ not to make a deposit order.

The Decision on the First Amendment Application – Grounds 8 to 13

Ground 8

85. I accept the Respondent's submission that the detriment alleged relates to conduct of disclosure and therefore would be protected by judicial proceedings immunity – **South London and Maudsley NHS Trust v Dathi UKEAT/0422/07/DA** and I have reviewed my decision to allow the amendment on this basis. I reject the amendment as it can have no reasonable prospects of success and so the balance of hardship would favour the Respondent on this basis. I vary my decision and refuse the amendment in respect of this allegation.

Ground 9

86. I do not vary my decision on allowing this amendment. The Claimant did not make an allegation of harassment in his original claim form on this basis. However it has been part of the existing factual matrix and is not a wholly new allegation. The application was made at the case management stage. I do not consider that it will prejudice the Respondent to defend it whereas the Claimant otherwise has no opportunity to put his whole case. There is a question on the facts as to why the Claimant was requested to undergo so many checks on that day and leading up to the deactivation so it is not an entirely new matter. Whether it was related to race and how it ties in with the deactivation is an appropriate finding for the Tribunal of fact to make and will need a full determination of the evidence.

Ground 10

87. In this case the Claimant has submitted a pleading in the alternative based on the Respondent's account of the circumstances of deactivation rather than two inconsistent accounts in one case. There remains some issue over to what extent there was a mix of human and automated decision making in the deactivation and ensuing review. The provision of information from the Respondent has unfolded throughout the course of the litigation. The PCP in the alternative is premised on the Respondent's own account so they will be defending what is already within their own case. The application was made before the commencement of the case management timetable and particulars were finally settled by the Claimant on 27th March 2023 well in advance of the trial. The balance of hardship favours the Claimant in advancing his case through amendment in the alternative based on the way that the Respondent's case has been put forward not all at the same time. For example, the DSAR responses and information about Bounce and McFly came after the first preliminary hearing. Safety lens was after the claim had been presented. I do not find that the Claimant is raising claims on a mutually contradictory basis as they are put on an alternative basis depending on the primary facts that the Tribunal make and given the unfolding disclosure from the Respondent. The case of **Clarke v Marlborough Fine Art (London) Ltd** and another concerns the CPR and particularly, the issue posed by a party making two conflicting statements of truth. In that case it was in held (with reference to the CPR) that if a claimant was pleading an alternative he was not in fact stating that he believed both sets of facts to be true so he would be in a position to advance an alternative case.

Ground 11 and 12 and the Third Amendment Application

88. I accept that the PCPs in Grounds 11 and 12 are not clear. However they have been further clarified by the amendment application dated 27th March 2023 which states that it is put on an alternative basis on the Respondent's pleaded case. The PCP has been clarified at paragraph 33vi as '*the requirement and/or practice of human verification checks whether in general or in the absence of racial bias training of those conducting the training'.*

89. The word *'usual'* has been amended to *'unusual'* at paragraph 33vi(c) in the third amendment application which was evidently a mistake given that the factual account on which it was based was because the Respondent had made reference to 'unusual activity' as part of its reason for deactivation (see paragraph 29 of the grounds of response). I do not consider that this causes any great hardship and is clarification.

90. Paragraphs 30 iv and 32 viii are not permitted because they have no reasonable prospects of success if covered by judicial proceedings immunity.

91. I have read the amendments at paragraphs 33 iii and 33 vi (a) together as they expand the Claimant's case to an alternative one which is premised on the reason for deactivation being human recognition. This reflects the Respondent's

case that has been advanced in the litigation that the only photo submission failure was a human review. However it will need to be determined if and the extent to which this has been factored into the deactivation decision. Therefore the pleading addresses the finding that the Tribunal could make that the only extent to which facial recognition factored into the deactivation decision was the human review on 1st December. However given the explanation that was given to the Claimant that day the Claimant still raises a question about whether there was automated verification. Again, the 'safety lens' data document and how it is populated with the relevant data, when it is populated and how it factors into deactivation decisions will need to be considered along with the other evidence.

92. The amendment at paragraph 34 iii essentially clarifies the disadvantage that was pleaded in the earlier amendment.

93. Other than that, I find that the amendments are corrections and not substantial and I allow them.

94. In making the decision to allow the substantive amendments and in response to the application to vary my decision on amendment, I have taken into account **Cox v Adecco and others [2021] ICR 1307 EAT** and find that the amendments of the claims improve upon the previous pleadings where they were unclear and serve to put the claims on alternative bases following the unfolding information in the case put forward by the Respondent. This is a case which merits full ventilation. I consider that the Claimant would be subject to hardship if he was not permitted to put his full case. I considered that the Respondent would be put to some additional enquiry insofar as the Claimant's amendment now involves the consideration of human recognition in the alternative but the processes involved insofar as what aspect of which decision is made by a human and which aspect is automated needs to be fully determined in any event. In this kind of case it is not in the interests of justice to allow parts of the case to go ahead piecemeal, chopped up along the way via summary consideration. Because there has been some inconsistency in the explanation given to the Claimant at the time and some lack of clarity surrounding the processes involved in the deactivation and how they flow into one another, the hearing of a live witness(es) referring to documents tendered by the Respondent and subject to cross-examination would be in the interests of justice so the full process is seen and followed. On the whole the amendments still address the base factual scenario concerning the deactivation so they are not going to cause additional hardship to the Respondent than if they were entirely new factual and legal allegations spanning different time periods and involving (potentially) different witnesses of fact. The amendment is allowed. I have considered the out of time nature of the amendment but I find that the case has necessarily evolved over the course of the litigation for the reasons I have given and that any limitation points do not affect my decision on the balance of hardship, the need for the whole case to be put and the corresponding opportunity for the Respondents to defend it (see ground 13 below).

Ground 13

95. I have reviewed the Respondent's submissions in relation to the limitation point and in the event that those claims were out of time by three months. I take into account that this is only one factor in the balancing exercise in **Vaughan**. I have reflected on this but consider that in the main, there is no hardship to the Respondent posed by the effluxion of time given that the existing factual matrix is not expanded to any significant degree and I balance that against the hardship to the Claimant if he were not permitted to put the whole of his case, which is important in this case so that there is a full picture. The Respondent will ultimately have the opportunity of defending the claims at trial.

Audio Recording

96. I have declined the Claimant's application to hear post-hearing evidence of the audio recording. The Respondents ought to have been notified that this was to be relied on in advance of the hearing so that Counsel could make submissions on it. It also appeared to be of peripheral relevance to the issues that I had to determine as part of this decision and as a matter of proportionality I have declined to accept it in.

Employment Judge A Frazer
Date: 16th October 2023