EMPLOYMENT TRIBUNALS

Claimant: **Mr M Javid Khan**

Respondent: **MTR Corporation (Crossrail) Limited trading as MTR Elizabeth Line**

Heard at: **East London Hearing Centre**

On: **10 January 2024**

Before: **Employment Judge Allen KC**
Members: **Ms J Forecast**
Mr S Woodhouse

Appearances:

For the Claimant: in person

For the Respondent: Mr C Milsom (counsel)

REMEDY JUDGMENT
COSTS JUDGMENT

1. The Respondent is ordered to pay to the Claimant the following sums:

    a. **£8,129** (net) for Wrongful Dismissal
    b. For Unfair Dismissal:

        i. Basic award of **£2,992**
        ii. Compensatory Award of **£12,239.98** (net).

2. The Claimant's application for a preparation time order is dismissed.

3. The Claimant is ordered to pay a contribution towards the Respondent's costs in the sum of **£5,000**.

REASONS

1. In a reserved Judgment and Reasons sent to the parties on 13 December 2023, the tribunal upheld the Claimant's claims for unfair dismissal and wrongful dismissal and dismissed all of his claims for discrimination and victimisation. The parties were notified of this remedy hearing and that the Claimant's application for a preparation time order would also be determined at this hearing. One of the Case Management Orders made stated that:

> "*The Remedy hearing will involve calculating the Claimant's notice pay; his basic award; and his loss of earnings and any other elements of his compensatory award for unfair dismissal and then applying the percentage reductions to the unfair dismissal basic award (50%) and the compensatory award (reduce by 75%, increase by 10%, reduce by 50%).*"

2. The tribunal also made a case management order to the effect that any other applications made by 3 January 2024 could also be determined at this hearing.

3. Both parties had applied for reconsideration of elements of the Judgment. Prior to this hearing, Employment Judge Allen KC considered both applications under Rule 72(1) and determined that there was no reasonable prospect of the original decision being varied or revoked. The parties were notified of those decisions.

4. The Claimant made a further application for strike out of the Respondent's response, which was heard as a preliminary matter today. The strike out application was not successful. Oral reasons were given at the hearing. The Claimant was asked at this hearing if he wanted written reasons in relation to the strike out application and he said that he did not.

5. The Claimant's application for a preparation time order / wasted costs order had been made on 23 October 2023. It was primarily based on the timing and manner of disclosure by the Respondent. The Respondent's costs application was primarily based upon the Claimant having been subject to a deposit order made by EJ Frazer on 1 August 2022 and upon his claims having been dismissed for substantially the reasons given in the deposit order. The Respondent in its application also relied upon the Claimant's failure to have accepted a 'drop hands' offer at the conclusion of his evidence in November 2023. Wisely, given that the Claimant had been successful and is being awarded compensation by the tribunal, Mr Milsom did not attempt to make a great deal of the 'drop hands' point.

6. The Claimant's Schedule of Loss was sent to the tribunal and the Respondent on 23 October 2023. The Respondent produced a Counter-Schedule of Loss for this hearing.

7. The Tribunal had retained the bundle from the previous hearing and in addition was directed to pages in a remedy bundle prepared by the Respondent numbered to page 382 (384 page PDF including a two page index); and a 35 additional bundle from the Claimant.

8. The Claimant gave evidence to the tribunal and was cross examined. The Tribunal heard oral submissions from both parties on all issues and took into account the written documents to which it had been referred.

9. The Tribunal gave oral reasons for the calculation of compensation. The Respondent requested written reasons. The Tribunal heard submissions on the respective applications for a preparation time order / costs and then reserved its Judgment on costs.

Findings of Fact

10. Some of the relevant findings of fact from the liability stage formed the basis of submissions before this hearing and were taken into account by the tribunal in its remedy decision making. These included the previous findings in relation to the Claimant's combative stance in relation to the internal proceedings and his post-dismissal behaviour in sending the 'karma' email and in covertly recording two of the internal witnesses including 'D' who was known to be a vulnerable person; and in relation to the lack of fairness in some aspects of the internal process at the Respondent; and in relation to the matters which were reflected in reductions or increases in compensation which have already been determined. The tribunal will not repeat those findings of fact here.

11. The tribunal did not have complete information as to the Claimant's pay from the Respondent, but it did have figures from HMRC in particular in a letter dated 8 September 2023 which set out the Claimant's pay from the Respondent in the financial years 2017 to 2022. The total figure fluctuated - which reflected pay increases and also different amounts of overtime. The gross figure earned from the Respondent in the last complete year of the Claimant's employment (to 5 April 2021) was £44,905. The tax paid that year was £6,479. Net pay for that year was therefore £38,426. Gross weekly pay for that year was £863.55; net weekly pay was £739. The year before was slightly higher and the following part year up to dismissal was slightly lower.

12. The Claimant informed the tribunal in his oral evidence that he had chosen to come out of the Respondent's pension scheme. The Claimant's evidence was that as well as his salary he (and his mother) had the benefit of a travel card for all zones and reduced rail travel costs. The tribunal determined that this was worth in the region of £3,000 per annum net to the Claimant.

13. The Claimant was pressed in cross examination as to his combative stance during the internal disciplinary and appeal process and as to his post-dismissal behaviour. It was suggested that the Claimant's relationship with the Respondent would have ended in any event, even if he had not been unfairly and wrongfully dismissed. The Claimant's evidence was that he would have accepted a penalty less than dismissal such as a written warning and / or a move to a different area. He denied that he would have continued to act as he did post dismissal if he had not been dismissed.

14. The Claimant found alternative employment within 6 weeks of his dismissal. His evidence was that he had made a large number of job applications. There was some documentary evidence of that but it was of a general rather than specific nature. The Claimant worked at a lower rate of pay and on an ad hoc basis – initially on £10 per hour as a temporary admin worker and then on an insecure but more regular basis via Career Legal Ltd Temps and Lexington Catering Ltd. The HMRC letter showed that in the tax year ending 5 April 2023 the Claimant had gross pay totalling £22,175. The tax paid that year was £1,741.40. His net pay was therefore £20,433.60 per annum which equates to £393 net per week. The tribunal had figures for the part of the previous financial year covering some of the period after dismissal which were not inconsistent with the earnings for the year ending 5 April 2023. The tribunal did not have any complete figures for the period after April 2023.

15. The Claimant has found permanent employment at £28,000 per annum gross with DTZ / Cushman & Wakefield from September 2023. This will result in net pay of £23,372.80 per annum which equates to £450 net per week.

16. The Claimant's evidence was that he was intending to stay in his new job where there were opportunities for him to progress and earn more and that he was confident that he could progress there. He considered that it would take him between 5 to 7 years of advancement in his new job to put himself back where he would have been in his old job.

The Legal Framework

Remedy – wrongful dismissal (failure to pay notice pay)

17. The remedy for wrongful dismissal is to put the Claimant back in the position that he would have been in if the contract had been adhered to. In other words – to award him the amount of notice pay that he would have been entitled to under contract (or statute).

Remedy – unfair dismissal

18. The Basic Award for someone of the Claimant's age at the date of dismissal is an amount reflecting the number of years' service times a weeks pay subject to (a) the cap on a week's pay (£544 for the relevant time); and (b) the reduction already determined at the previous liability hearing. The relevant parts of the Employment Rights Act 1996 state:

> ***119 Basic award***
>
> *(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—*
>
> *(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
>
> *(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and*

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

…

122 Basic award: reductions

. . .

(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

Compensatory Award

19. The relevant parts of Section 123 ERA state

123 Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

. . .

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding

20. A claimant is expected to mitigate the losses they suffer as a result of an unlawful act by giving credit, for example for earnings in a new job and a tribunal will not make an award to cover losses that could reasonably have been avoided. An

unfairly dismissed employee is expected to search for other work, and will not recover losses beyond a date by which the tribunal concludes the individual ought reasonably to have been able to find new employment at a similar rate of pay. Such an individual may be awarded the difference between the salary of a lower paid new job, and their previous salary, for a period until the tribunal concludes they could reasonably have found similarly paid work.

21. A claimant is expected to take reasonable steps to minimise the losses suffered as a consequence of the unlawful act. The burden of proving a failure to mitigate is on the respondent. It is insufficient for a respondent merely to show that the claimant failed to take a step that it was reasonable for them to take: rather, the respondent has to prove that the claimant acted unreasonably. There is a difference between acting reasonably and not acting unreasonably. If the claimant has failed to take a reasonable step, the respondent has to show that any such failure was unreasonable. A tribunal must consider:

    21.1 what steps the claimant should have taken to mitigate his or her losses;
    21.2 whether it was unreasonable for the claimant to have failed to take any such steps; and
    21.3 if so, the date from which an alternative income could have been obtained, and the amount of that income.

Costs

22. The relevant parts of Rules 39; and 75 to 79 of the ET Rules of Procedure state:

> **39 Deposit orders**
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> . . .
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
>
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders).
>
> otherwise the deposit shall be refunded.
>
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.
>
> **75 Costs orders and preparation time orders**
>
> (1) A costs order is an order that a party ("the paying party") make a payment to—
>
> (a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;

(b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

(c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

76 When a costs order or a preparation time order may or shall be made

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success; or

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

. . .

77 Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

78 The amount of a costs order

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party;

(d) order the paying party to pay another party or a witness, as appropriate, a specified amount in respect of necessary and reasonably incurred expenses (of the kind described in rule 75(1)(c)); or

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

79 The amount of a preparation time order

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is [£43[1]] and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

23. In the employment tribunal, costs orders / preparation time orders do not 'follow the event'.

24. There are three stages for a tribunal's decision making:

24.1 first, the tribunal must ask itself whether the costs jurisdiction is engaged (e.g. by a party having behaved unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted);

24.2 second, if the costs jurisdiction is engaged, the tribunal must go on to ask itself whether it is appropriate to exercise its discretion in favour of awarding costs against that party;

24.3 third, the tribunal must determine the amount of any award.

25. Where on a costs or preparation time application, the tribunal determines that a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing or conducting of proceedings (or part thereof) — rule 76(1)(a); or that the claim or response has no reasonable prospect of success — rule 76(1)(b), the tribunal is under a duty to consider making a costs order or preparation time order. However the tribunal retains the discretion as to whether or not a costs order should be made.

[1] As at 1 May 2023

26. If this tribunal decided specific allegations or arguments against the Claimant for substantially the same reasons given for making the deposit order, under rule 39(5), the Claimant will be treated as having acted unreasonably in pursuing that allegation or argument for the purpose of making a costs order under rule 76, unless the contrary is shown. If a costs order is made, the deposit sum (which will also be paid to the Respondent) will be set off against the total costs payable by the Claimant. Unless the Claimant can successfully show that he did not act unreasonably in pursuing the specific allegation or argument, a costs order can be made against him. If he successfully shows that he did not act unreasonably, the deposit will be refunded. If he cannot show that he did not act unreasonably, it is not inevitable that a costs order will be made but it does open the gateway to a cost order.

Conclusions

27. The information concerning pay before the tribunal was not complete. The Tribunal took into account the Claimant's suggestion that his earnings to 5 April 2021 were depressed because of the impact of Covid but taking into account the facts set out at paragraph 11 above, the tribunal considered that a fair approach to both parties would be to base its calculations of loss on the last complete year of employment for the Respondent (to 5 April 2021) and on the HMRC figures supplied by the Claimant. The figures for gross and net weekly pay were therefore £863.55 and £739.

28. The Tribunal also considered that on a similar basis, a fair approach to both parties would be to base its calculation of the amount that the Claimant earned in the period after dismissal on the HMRC figures for the complete year to 5 April 2023 and thereby to work out a net average weekly pay for the period up to September 2023. The net weekly pay figure up to September 2023 was therefore £393. This represents a net weekly loss of £346.

29. The net weekly pay for the period from September 2023 is £450. This represents a net weekly loss of £289.

30. On the basis that these figures were arrived at on an average basis, the tribunal considered that such considerations as accelerated receipt and pay increases would cancel each other out and that overall the approach taken by the tribunal on the basis of the net losses set out above was fair to both parties.

Wrongful Dismissal

31. It was agreed that this was 11 weeks pay. Net total pay was therefore 11 x £739 = £8,129.

32. It followed that the correct figure for wrongful dismissal was **£8,129**.

Unfair Dismissal - Basic Award

33. The capped figure for a week's pay was £544. The correct multiplier was 11.

34. It followed that the starting point for calculation of the Basic Award was £5,984.

35. The tribunal have already determined that the Basic Award should be reduced by 50%. The Basic Award payable is therefore **£2,992**.

Compensatory Award

36. Loss of earnings is calculated on a net basis.

37. The first 11 weeks after dismissal are covered by the wrongful dismissal award.

38. The tribunal was satisfied that the Claimant had mitigated his loss. The respondent had not shown that the Claimant had acted unreasonably. The tribunal accepted the Claimant's evidence that following his unfair dismissal, he would have struggled to get another job in the same industry and / or at a similar rate of pay. The tribunal accepted that it was not unreasonable for him to have worked at a lower rate of pay whilst seeking a secure permanent job and that it was not unreasonable for the Claimant to have found a job at £28,000 gross and for him to intend to stay in that job in order to progress.

39. The Respondent contended that the Claimant's employment would have ended in any event after a period of about 3 months, given the combative stance that he had taken in the disciplinary and appeal process; and given his post-employment behaviour in sending the 'karma' email and in covertly recording two of the internal witnesses including 'D', a vulnerable person. The tribunal did not agree. The tribunal took into account that the Claimant had not been put through a fair process and in relation to his stance during the internal process, although he may not have helped himself, he had some reason to be unsatisfied by the process that he had undergone. The tribunal did not conclude that the Claimant's stance and behaviour would inevitably have been the same and that it would have inevitably led to the end of the employment relationship even if he had not been unfairly and wrongfully dismissed. The Respondent argued that the employment relationship was 'doomed to fail' even if the Claimant had been given a final written warning. The tribunal did not agree. The employment that was brought to an end by the Respondent had persisted for 11 years and was employment that the Claimant had found congenial. The tribunal have already reflected the potential consequences of the Claimant's post-dismissal behaviour in the reduction already applied to his compensation as result of our previous conclusions and no further reduction is made.

40. The tribunal accepted on balance that it would take the Claimant 5 years in his new job to progress to the rate of pay that he would have had in his old job. The Tribunal dates that progression period from the time on which he obtained his new job (September 2023) to the end of August 2028. For the purposes of the calculation below, the tribunal will presume that the net loss decreases from £289 per week on a gradual basis. This approach is fair to both parties albeit that in reality the changes are likely to take place on career advancement dates which cannot be calculated precisely.

41. The tribunal therefore calculated that:

    41.1 the Claimant was dismissed on 29 September 2021;

    41.2 the 11 week period covered by the wrongful dismissal claim ended on 14 December 2021;

    41.3 the period to the new secure job in September 2023 was 88 weeks;

    41.4 in the 88 weeks from the end of the wrongful dismissal period and up to the start of his new job, the Claimant's net loss of earnings was on average £346 net per week. This came to a total loss for that period of £30,448 net;

    41.5 for the 5 years from the start of the new job to the end of August 2028, on the presumption that the differential in pay will gradually decrease over that time, starting at a net loss of £289 per week, the correct calculation - based on the mid-point - is £289 per week x 130 weeks (2.5 years). This comes to a total loss for that 5 year period of £37,570;

    41.6 total loss of earning is therefore 30,448 plus 37,570 equals £68,018

    41.7 the tribunal calculated the loss of the travel card to be worth £3,000 net for a period of 7 years, totalling £21,000.

42. The total compensatory loss (prior to reductions / uplift) is therefore 68,018 plus 21,000 equals £89,018.

43. Applying the reductions / increases outlined in the previous Judgment and reasons:

    43.1 Reduction of 89.018 by 75% under s123(1) ERA 1996: £22,254

    43.2 Increase of 22,254 by 10% under s207A TULR(C)A 1992: £24,479

    43.3 Reduction of 24,479 by 50% under s123(6) ERA 1996: £12,239.98.

44. The compensatory award after adjustments is therefore **£12,239.98**.

Costs

Claimant's application for preparation time order

45. The Claimant's application was headed 'preparations time / wasted costs'. The tribunal did not hear any submission which potentially opened the door to a consideration of wasted costs against the Respondent's representatives.

46. In considering the Claimant's application for a preparation time order, the tribunal took into account his written application and his oral submissions.

47. The Claimant relied primarily upon failures by the Respondent to disclose documents in accordance with the time frame set by tribunal orders. He was particularly exercised by the failure to disclose the documents relating to Mr Lewis prior to the hearing at which a deposit order was made. The tribunal was critical of the Respondent's behaviour in this regard. However the Respondent's behaviour in relation to disclosure had not jeopardised the fair hearing of this matter in November 2023 and it did not rise to the level of 'unreasonable behaviour'. The tribunal was not satisfied that the Respondent had behaved unreasonably in its conduct of the litigation. Late disclosure is unfortunate but not uncommon and the parties often have to act on their ongoing duty to disclose documents which come to light after the initial date for disclosure.

48. The Claimant also relied upon inconsistencies in the evidence given by the Respondent's witnesses at the hearing in November 2023 and the failure on the part of the Respondent to adequately explain why Mr Newell was not suspended in 2020; why a settlement agreement was offered to Mr Lewis in 2021; and the Respondent's alteration of its position expressed at the deposit order hearing that Grace Williams had been responsible for his suspension to one expressed at the liability hearing in November 2023 that Mr Newell had been responsible. The tribunal did not regard any of that as sufficient to open the gateway to the making of a preparation time order. It was not vexatious, abusive, disruptive or otherwise unreasonable conduct of the proceedings.

49. The Claimant's application for a preparation time order was therefore dismissed.

Respondent's application for costs

50. The Respondent restricted its application to an amount of £15,000. The Respondent's total costs were stated to be £68,933.28 including VAT.

51. The primary basis of the costs application was based upon the Claimant having been subject to a deposit order made by EJ Frazer on 1 August 2022 and upon his claims having been dismissed for substantially the reasons given in the deposit order.

52. The Respondent accepted that it had lost the unfair dismissal and wrongful dismissal claims (which had not been subject to deposit orders) and that it was difficult to disentangle the costs of those elements from the costs of the discrimination claims which had been the subject of the deposit order and which had been unsuccessful.

53. When pressed by the tribunal to give a crude assessment of the costs that might have been incurred on a simpler unfair dismissal / wrongful dismissal claim (which may have involved e.g. lower counsel's fees and the attention of a lower grade solicitor), the Respondent agreed that it may have been about 50% of the figure actually incurred.

54. The Claimant was invited to provide evidence as to his means but he not do so. He stated that he had debts due to the substantial decrease in his income but he did not provide any documentary evidence of this. The tribunal took into account that whatever debts the Claimant may have, he had a known asset in the form of the tribunal award and that he did now have a permanent steady job with prospects of advancement.

55. The operation of Rule 37(5) requires the tribunal to compare its reason for determining the discrimination claims against the reasons given in the deposit order. This proved to be somewhat difficult in this case given that the record of the deposit order was not very informative as to the reason for the making of the deposit order. There was no written record of any detailed reasons beyond those recorded in the deposit order itself. The Respondent tried to assist by providing counsel's note of the reasons given orally but the tribunal did not gain much assistance from this as it did not greatly add to the terms of the deposit order itself. The Respondent also supplied this tribunal with the skeleton argument used by the Respondent in its successful attempt to obtain deposit orders.

56. The deposit order was made on 1 August 2022 (sent to the parties on 4 August 2022) and it stated:

> 1. The Employment Judge considers that the following allegations or arguments as set out in the List of Issues within the case management order of Employment Judge Burgher dated 17th May 2022 have little reasonable prospect of success:
>
> **Direct race discrimination**
> 43.8.1 Suspension by Grace Williams on 21 May 2021
> 43.8.2 The delay in the investigation into allegations against him
> 43.8.4 Not being offered a settlement following dismissal
>
> 43.9.3 The use of Mr Marco Newell as an actual comparator
> 43.12.4 [should read 43.9.4] The use of Rohan Williams as an actual comparator
>
> **Direct religion and belief discrimination**
> 43.11.1 Suspension by Grace Williams on 21 May 2021
> 43.11.2 The delay in the investigation into allegations against him
> 43.11.4 Not being offered a settlement following dismissal.
>
> 43.12.3 The use of Marco Newell as an actual comparator
> 43.12.4 The use of Rohan Williams as an actual comparator
>
> **Victimisation**
> 43.15.1. Suspension by Grace Williams on 21 May 2021
> 43.15.2 The delay in investigation into allegations against the firm
>
> 2. For the avoidance of doubt there is no deposit ordered on the allegations of direct race and religion and belief discrimination as it relates to dismissal on the basis of reliance on a hypothetical comparator and the victimisation claim insofar as it relates to dismissal.
>
> 3. The claimant is ORDERED to pay a deposit of £20 per allegation not later than 28 days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

57. It is noted, as elsewhere that the references to 'Rohan Williams' should be to 'Rohan Lewis'.

58. The Claimant paid the deposits.

59. The note accompanying the deposit order went on to state:

> 1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.
>
> 2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

60. Given that EJ Frazer was told in para 26 of the Respondent's skeleton argument that Grace Williams had made the decision to suspend the Claimant (which was not the position put forward at the liability hearing in November 2023, which was that Mr Newell made the decision to suspend), this tribunal could not conclude that the deposit orders made in relation to 43.8.1 and 43.11.1 and 43.15.1 were made for substantially the same reasons as this tribunal's determination.

61. Given the paucity of reasoning for the making of the deposit orders, the tribunal considered whether it was able to conclude that the other discrimination and victimisation allegations had failed for 'substantially the reasons given in the deposit order' as required by rule 37(5).

62. In relation to the selection of the comparators (allegations 43.9.3, 43.9.4, 43.12.3, 43.12.4), the tribunal did not find it possible to conclude that its reasons were substantially the same as those of EJ Frazer. It was not possible to identify what EJ Frazer's reasons were. It was not self-evidently unreasonable to have *identified* those two comparators – albeit that it may have been self-evidently unreasonable to have gone on to have pursued some of the discrimination claims based on those comparators.

63. For the other allegations subject to the deposit order, the tribunal considered on balance that they were able to determine that its reasons were substantially the same as EJ Frazer's reasons. In relation to the direct discrimination claims, having identified those comparators, there were evident material differences between the Claimant's position and those of his named comparators; and there was no indication at all that race or religion had played a part in any less favourable treatment. In relation to the remaining victimisation allegation (the delay), there was no indication at all that the protected act was an influence on any decision maker. These matters were all argued before EJ Frazer and were self-evident problems for the Claimant's case from the outset.

64. It followed that pursuant to rule 37(5), the Claimant shall be treated by the tribunal as having acted unreasonably in unsuccessfully pursuing the discrimination and victimisation allegations identified in the deposit order as 43.8.2, 43.8.4, 43.11.2. 43.11.4, and 43.15.2 for the purpose of the

Respondent's costs application under rule 76, unless the contrary could be shown by the Claimant.

65. In that regard, the Claimant made reference to the disclosure provided by the Respondent after the deposit order had been made. The Claimant asked the tribunal to take into account whether EJ Frazer would have made the deposit orders at all if the information relating to Mr Lewis had been before it. However, this information would not have affected the situation relating to the comparisons with the treatment of Mr Newell in relation to the delay (allegations 43.8.2 and 43.11.2 and 43.15.2).

66. Particularly as the Claimant was in person, the tribunal considered that the notice accompanying the deposit order could have been clearer as to the potentially very serious costs consequences that could be visited on a Claimant that had been unsuccessful but the tribunal were content that he was warned and that he could have armed himself with the necessary knowledge of the potential consequences of continuing with his claim.

67. The tribunal did not consider that these factors demonstrated that the Claimant had not behaved unreasonably and therefore the costs jurisdiction was engaged but the tribunal did consider that those same matters were relevant factors in the next stage of the process, which was the question of whether the costs jurisdiction having been engaged, it is appropriate to exercise its discretion in favour of awarding costs against that party.

68. In coming to such a decision, the tribunal did not attempt to allocate specific costs to specific allegations. In this case, this would be an impossible task on the information before the tribunal. The tribunal did however undertake a broad brush approach relating to the number of allegations that did appear to be appropriately be the subject of a potential costs order.

69. In relation to allegations 43.8.3 and 43.11.3, the tribunal concluded that there was insufficient certainty caused by the late disclosure to make it inappropriate to include those matters when awarding costs. In relation to allegations 43.8.2 and 43.11.2 and 43.15.2 the tribunal concluded that it was appropriate to award costs as a consequence of the Claimant's unreasonable behaviour. The delay to the process was in part caused by the Claimant's state of health and request for a hiatus and there was no indication that any delay on the part of Mr Pearce was due to race, religion or a protected act (which Mr Pearce, a new employee knew nothing about).

70. In considering the size of the costs award, the tribunal considered that the prejudice to the Respondent of the remaining part of the allegations relating to delay which had been the subject of the deposit orders was relatively small and that £5,000 was a proportionate contribution towards the Respondent's total costs. As stated above, the Claimant did not offer any substantive documentary evidence concerning his means and the tribunal took into account the award that it had just made in the Claimant's favour.

71. The Claimant is therefore ordered to pay **£5,000** to the Respondent as a consequence of his unreasonable behaviour in relation to issues 43.8.2 and 43.11.2 and 43.15.2 following deposit orders having been made in relation to those issues on 1 August 2022.

Employment Judge W A Allen KC
Dated: 29 January 2024