Case No: 2300528/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr. D Adams**

Respondent: **NRCPD**

Heard at: **London South, by video** **On:** **10 & 11 July 2023**

Before: **Employment Judge Cawthray**

Representation
Claimant: **Ms. A Brown, Counsel**
Respondent: **Mr. C Crow, Counsel**

RESERVED JUDGMENT

1. The complaint of indirect disability discrimination under section 19 of the Equality Act 2010 is dismissed following a withdrawal by the claimant.

2. The claimant's remaining complaints of discrimination arising from disability and a failure to make reasonable adjustments under sections 15, 20 and 21 of the Equality Act 2010 will proceed to a hearing on a date of which will be notified in due course

3. The alleged PCP at issue 12.3 is struck out on the basis there is no reasonable prospect of success.

4. The alleged substantial disadvantages at issues 15.7 and 15.8 are struck out on the basis there is no reasonable prospect of success.

5. The following alleged PCPs (by reference to issue number) have little prospects of success. The claimant will be ordered to pay a deposit on condition with these complaints, as set out in the separate deposit order.

   11.1 11.2
   12.4
   12.5
   12.16
   13.2
   13.3

13.8.

REASONS

Procedure/Background/Discussions

1. The claim was presented on 13 February 2022 following ACAS Early Conciliation taking place between 9 June and 21 July 2021.

2. This public preliminary hearing had been listed following case management preliminary hearings heard on 13 January 2023 and 31 March 2023 in front of Employment Judge Nicklin and Employment Judge Perry respectively.

3. The claim, after clarification at earlier hearings and as before me today, included the following complaints: discrimination arising from disability (section 15 Equality Act 2010), indirect disability discrimination (section 19 Equality Act 2010) and a failure to make reasonable adjustments (sections 20 and 21 Equality Act 2010).

4. Within the ET3 the Respondent submitted that further clarification of the complaints was required and this was ultimately provided by provision of a draft List of Issues presented shortly before the Case Management Preliminary Hearing on 31 March 2023. Ms. Brown, on behalf of the Claimant, had assisted in the drafting of the List of Issues.

5. The List of Issues was appended to the Order of Employment Judge Perry.

6. Employment Judge Perry made some observations about some of the alleged PCPs and alleged substantial disadvantage at paragraph 7 of his Order, as copied below:

   "Counsel indicated at today's hearing that the list of issues was otherwise in an agreed form. There was insufficient time to discuss the full detail of the list of issues beyond the context of the discussion of whether an application to amend was required and would be granted. However, on further review, the Tribunal has concerns about the list of issues. At points the alleged PCPs appear contradictory (eg paras 5.4 and 5.5) or repetitive (eg paras 5.7 to 5.12 and 5.14 to 5.16) and are frequently vague. Matters are included as substantial disadvantages that appear actually to be the consequence of substantial disadvantages and which appear solely relevant to questions of remedy (eg paras 8.9 to 8.12). Given experienced counsel are instructed on both sides the list of issues is appended to this record. However, it should be kept under review. It may be in any event that my concerns foreshadow the applications the Respondent indicates it intends to make for strike out and deposit."

7. The hearing today had been listed to consider several matters, including: any application made on or before 28 April 2023, the question of whether or not the Claimant was disabled at the material times within the meaning of section 6 of the Equality Act 2010, the question of whether the Tribunal has jurisdiction to hear the Claimant's claims under section 123 Equality Act 2010, and to make case management orders through to a full merits hearing (if necessary).

8. On 28 April 2023 the Respondent submitted an application for strike out under Rule 37(a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013. The application is to strike out the complaints of indirect discrimination and the failure to make reasonable adjustments on the basis there is no reasonable prospect of success. There is no application in relation to the arising from discrimination complaint, which will continue to a final hearing.

9. The Respondent is seeking a deposit order under Rule 39 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, in the alternative to a strike out.

10. The Respondent had prepared a Bundle of 483 documents for use at the hearing today, and the Claimant had the opportunity to add to the Bundle.

11. The Respondent had provided a witness statement for Ms. Thomas-Morton and a skeleton argument.

12. At 9.15am on the first day of the hearing the Claimant provided a witness statement.

13. A discussion took place at the start of the hearing about the issues for determination and the appropriate way forward. Mr. Crow expressed concerns regarding the very late submission of the Claimant's witness statement and the prejudice caused to the Respondent in not being able to properly consider and prepare to deal with the contents of the witness statement and all the issues that were to be considered

14. It is noted that the claimant relies on 7 conditions as amounting to 7 separate disabilities. The Respondent accepts three of the conditions amounted to a disability from 2017 and 2020 and therefore it was agreed the determination as to whether or not the other conditions amount to a disability at the relevant times will take place at the final hearing. For completeness, Ms. Brown confirmed that despite reference to Optic Neuralgia in the Claimant's witness statement, the Claimant was not pursuing this as a disability that he sought to rely on in the claim.

15. Deleted

16. Deleted

17. Deleted

18. Deleted

19. Further, Ms. Brown clarified that the position was that the Claimant was seeking to argue there was conduct extending over a period. Mr. Crow submitted that the very late service of the Claimant's witness statement, which contained reference to his ability to lodge his claim, meant that the Respondent would be prejudiced in dealing with consideration of time limits at this hearing. The parties agreed that consideration of whether or not the claim was in time in accordance with section 123 of the Equality Act 2010 should also take place at the final hearing.

20. During the course of initial discussions Ms. Brown stated that the Claimant was withdrawing the indirect discrimination complaint, and therefore the application for strike out for consideration at the hearing related only to the failure to make reasonable adjustment complaint. I explained that the complaint would be dismissed upon withdrawal.

21. Neither Ms. Brown or Mr. Crow called the Claimant or Mr. Thomas-Morton to give evidence. No oral evidence was heard under oath or affirmation.

22. During the course of the hearing Ms. Brown made reference to various documents that had not been included in the Bundle and sent to myself and Mr. Crow the following:

    The Respondent's Code of Conduct (4 pages), the Respondent's Complaint Process (34); and

    The appeal outcome letter dated 4 February 2023 (25 pages).

23. Both Ms. Brown and Mr. Crow directed me to paragraphs in the appeal outcome letter.

24. I heard lengthy submissions from both Mr. Crow and Ms. Brown, that took until after 3.00pm on day 1.

25. The Claimant had not provided any evidence, and Ms. Brown had not made any submissions in relation to means to pay a deposit order. I raised this with Ms. Brown before the close of Day 2 and the Claimant sent an email to the Tribunal in relation to his means. Mr. Crow noted that no evidence had been provided and the respondent had not been able to cross examine the Claimant in this respect.

26. I asked the parties, who both had experienced representatives, to work together to produce some suggested case management directions and to add some further detail to the List of Issues appended to Employment Judge Perry's Order in terms of dates of the alleged acts of discrimination. A separate case management order has been sent to the parties.

27. At the start of Day 2 Ms. Brown explained that overnight she had spotted that the she had, in error, previously sent to the Respondent an incorrect version of the Claimant's Impact Statement. Ms. Brown apologized and the apology has been accepted. The matter of determining disability in relation to the other conditions relied upon will take place at a final hearing, and the

Respondent will require clarification on whether the Claimant seeks to rely on both statements.

Issues

28. Accordingly, in view of the above, the issues for determination today were:

(1) Whether to strike out the complaint (or part) of a failure to make reasonable adjustments because it has no reasonable prospect of success, and in the alternative;

(2) Whether to make a deposit order where an allegation has little prospect of success.

Law

29. Sections 20 and 21 of the Equality Act 2010 state as below:

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a

substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

(14) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(15) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(16) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

30. Under section 20, employers, and other relevant bodies, are required to make reasonable adjustments to ease disadvantages suffered by persons with disabilities. This duty is essentially a requirement to act to accommodate the specific needs of those who have the protected characteristic of disability. The duty may entail the modification of any provision, criterion or practice applied that places a disabled employee at a substantial disadvantage.

31. The assessment of substantial disadvantage must be undertaken in comparison with persons who are not disabled.

32. In the non-employment case of Finnigan v Chief Constable of Northumbria Police 2014 1 WLR 445, CA, Lord Dyson MR observed that 'the [PCP] represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone, but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not include the adjustments'.

33. Provision, criterion or practice' is not defined in the legislation, but the Equality and Human Rights Commission's Code of Practice on Employment states that the term 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' (para 4.5).

34. In cases relying on practices, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and the non-disabled comparators.

35. For a claimant to be successful in showing a failure to make reasonable adjustments, the claimant must clearly identify the PCP to which it is asserted adjustments ought to have been made. Furthermore, the tribunal must only consider the claim that has been made to it by the claimant.

36. It is also necessary for a claimant to set out the precise nature of the disadvantage the alleged PCP creates for a disabled claimant by comparison with a non-disabled person.

37. In Lamb v Business Academy Bexley EAT 0226/15 the EAT noted the term is to be construed broadly, 'having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability'. In that case the PCP pleaded by the claimant was that she 'was required to return to work from her sickness absence during the period September 2012 to December 2013 without a proper and fair investigation into her grievances'. In the EAT's view, the tribunal had impermissibly narrowed the scope of the PCP by treating it as a one-off decision requiring the claimant to return to work in September 2012.

38. In Nottingham City Transport Ltd v Harvey EAT 0032/12 the claimant claimed that his employer had failed to make reasonable adjustments. An employment tribunal found in favour of the claimant and said that investigation was not carried out in a reasonable manner and did not consider any mitigating circumstances arising from H's disability. The EAT overturned this decision, and held that the tribunal had erred by identifying the one-off application of a flawed disciplinary process to the claimant as something that constituted a 'practice' falling within the definition of a PCP. It commented that there was no evidence to show that the employer routinely conducted its disciplinary procedure in this way. It also said the application of the flawed disciplinary process to H did not cause him substantial disadvantage over and above his non-disabled comparators; it was obvious that a failure to investigate reasonably and consider mitigating circumstances would 'cause misery whoever is the victim'.

39. A one-off act can, however, amount to a practice if there is some indication that it would be repeated were similar circumstances to arise in the future. In Ishola v Transport for London 2020 ICR 1204, CA, the claimant argued that requiring him to return to work without a proper and fair investigation into his grievances was a PCP which put him at a substantial disadvantage in comparison with persons who are not disabled. At first instance, the employment tribunal determined that this was a one-off act in the course of dealings with one individual and not a PCP. That decision was upheld by the EAT, where Mr. Justice Kerr observed that although a one-off act can sometimes be a practice, it is not necessarily one. On further appeal, the claimant argued to the Court of Appeal that Nottingham City Transport Ltd v Harvey was wrongly decided and that all one-off decisions constitute a practice. The Court of Appeal, Lady Justice Simler, rejected this argument, however, she accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application, it was significant that Parliament had chosen these words instead of 'act' or 'decision'. As a matter of ordinary language, it was difficult to see what the word 'practice' added if all one-off decisions and acts necessarily qualified

as PCPs. In her view, the function of the PCP in claim for failure to make a reasonable adjustment is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The act of discrimination that must be justified is not the disadvantage, but the PCP. To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' indicate a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Accordingly, a one-off decision or act can be a practice, it is not necessarily one.

40. The Court of Appeal held that the tribunal had been entitled to conclude that TFL's failure to investigate grievances before dismissal was not a practice of requiring him to return to work without a proper and fair investigation into that grievance. There was no evidence of that being the way in which things were generally done in practice, or to indicate that it was the way in which things would be done in future. In that case the evidence showed that, in practice, grievances were promptly responded to and investigated by TFL. The particular timing and circumstances of the grievance in question explained why it was not investigated before the claimant's dismissal. They made it a one-off decision and the tribunal was entitled to conclude that the pleaded PCP was not made out.

41. It is also important to note the Court of Appeal's decision in United First Partners Research v Carreras 2018 EWCA Civ 323, CA, which set out that tribunals should not adopt an overly technical approach to what constitutes a 'practice' for the purpose of showing that a PCP has been applied. The claimant in that case relied upon a PCP of being 'required' to work late. An employment tribunal dismissed the claim, finding that although there was an expectation or assumption that C would work late, this was not the same as a 'requirement' that he do so. The EAT allowed the appeal, holding that he had not used the word 'requirement' in any statutory sense but merely as an example of a 'practice' noting the legislation meant that, when identifying the PCP, a tribunal should adopt a liberal rather than an overly technical or narrow approach. While 'requirement' might be taken to imply some element of compulsion, the EAT did not read the term as limited to that: an expectation or assumption placed upon an employee could well be sufficient. The Court of Appeal agreed that the tribunal had adopted too narrow an approach to the interpretation of the term 'requirement', noting depending on the context, it may represent no more than a strong form of 'request'.

42. In Ahmed v Department for Work and Pensions 2022 EAT 107, the EAT disparaged the practice of 'reverse-engineering' the PCP from the disadvantage perceived by the claimant. The EAT stated: 'A PCP, simply put, is where the employer has an expectation of the employee, and either the same expectation is made of other employees or there is an element of repetition in the expectation with the particular employee. In order to found a claim the PCP must create a disadvantage because of a disability; constructing the PCP from the disadvantage has the danger of circular reasoning. The identification of the PCP should, because of the protective

nature of the legislation, follow a liberal approach and a tribunal should widely construe the statutory definition.'

43. For completeness, I note that the Respondent directed me to the following cases:

Kaul v MOJ EAT 41/2023

Nottingham City Transport Ltd v Harvey [2012] 10 WLUK 206, [2013] Eq LR 4

Ishola v Transport for London [2020] IRLR

Ahmed v DWP 2022 EAT 107

Ahir v British Airways 2017 EWCA Civ 1392,

44. Rule 37 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

Striking out

37.

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

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

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) or non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

45. Operation of rule 37(1)(a) requires a two stage test. Firstly, has the strike out ground (here “no reasonable prospect of success”) been established on the facts.

46. If so, secondly is it just to proceed to a strike out in all circumstances (which will include considering whether other lesser, measures might suffice).

47. When considering an application for strike out a tribunal must form a view on the merits of a case, and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out.

48. In addition, I also considered the principles set out in well-established case law.

49. In Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in Ezsias, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ).

50. The EAT, in the case of Mechkarov v Citibank NA [2016] ICR 1121, summarised the approach to be followed by a Tribunal when faced with an application to strike out a discrimination claim as follows:

a) Only in the clearest case should a discrimination claim be struck out.

b) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.

c) The Claimant’s case must ordinarily be taken at its highest.

d) If the Claimant’s case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out.

e) A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

51. When assessing whether a claim has no reasonable prospect of success the Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely (Balls v Downham Market High School and College [2011] IRLR 217). The Tribunal must take the allegations in the claimant’s case at their highest. If there remain

disputed facts there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue (Ukegheson v Haringey London Borough Council [2015] ICR 1285). In other words a strike out application has been approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact. A strike out application succeeds where it is found that, even if all the facts were as pleaded by the claimant, the complaint would have no reasonable prospect of success. If a strike out application fails the argument about the overall merit of the claim is not decided in the claimant's favour. Both the claimant and the respondent argue their positions on the merits in full and afresh at the full hearing.

52. In Yorke v Glaxosmithkline Serviced Limited, at paragraph 51, HHJ Tayler states: "Where the parties are represented it is the representatives that bear the principle responsibility for ensuring that the list of issues is up to the job".

53. Although a poorly pleaded case presents difficulties for the tribunal, striking out the claim is rarely the answer. In case where there is a litigant in person, as established in Mbuisa v Cygnet Healthcare Ltd EAT 0119/18 the proper course of action would be to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and make a deposit order if appropriate. However, that is different from the present case in which Ms. Brown has assisted in the pleadings as set out in the List of Issues.

54. However, in Ahir v British Airways plc 2017 EWCA Civ 1392, CA, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.

55. Rule 39 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states:

Deposit orders

39.

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

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(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.

56. The Respondent pursues the application as an alternative to their strike out application. The test is therefore one of “little reasonable prospect of success” as opposed to “no reasonable prospect of success” for a strike out application.

57. Rule 39 allows a tribunal to use a deposit order as a less draconian alternative to strike-out where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success.

58. In Jansen van Rensberg v Royal London Borough of Kingston-uponThames UKEAT/0096/07, the EAT observed: “27. … the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.”

59. A deposit order application has a broader scope compared to a strike out application and gives the Tribunal a wide discretion not restricted to considering purely legal questions. The Tribunal can have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it. However, a mini trial of the facts is to be avoided, just as it is to be avoided on a strikeout application because it defeats the object of the exercise. If there is a core factual conflict it should properly be resolved at a full merits hearing: Tree v South East Costal Ambulance Service NHS Foundation Trust UKEAT/0043/17/LA.

60. In a case where a Tribunal concludes that a claim or allegation has little reasonable prospect of success, it does not mean that a deposit order must be made. The Tribunal retains a discretion in the matter and the power to make such a deposit order has to be exercised in accordance with the overriding objective and with having regard to all of the circumstances of the particular case.

Conclusions

61. I have set out below my conclusions in relation to each element of the application below, noting, in an overarching way, that the Respondent's application was based on arguments that the PCPs as pleaded were not workable and some of the pleaded substantial disadvantages would not meet the statutory test.

62. I have used the numbering from the List of Issues appended to the Order of Employment Judge Perry.

63. Mr. Crow made specific submissions, within the application, the skeleton argument and orally in relation to each alleged PCP and the allegations of substantial disadvantage it was making an application to strike out (and alternatively a deposit order). The submissions are summarised as far as I considered necessary under each allegation below.

64. The Claimant had not responded in writing to the application, and no skeleton argument was submitted. Ms. Brown gave introductory submissions of a general nature, and I have summarised the key elements here, and where any specific comment was made against a particular allegation, I have attempted to include it within the relevant section.

65. The was no application to amend the claim. Ms. Brown directed me to the ET1, which I have read carefully, and asserts that the Claimant's complaint is about the Respondent's process and procedures generally.

66. Ms. Brown also pointed out that the Respondent used legally qualified and experienced persons throughout the disciplinary process, which she submits was an adversarial and legalistic process in which the Claimant was disadvantaged. She submitted that the Respondent had no procedures in place that made provision for disabled registrants. She says the process and procedures amount to a PCP.

67. Ms. Brown made a global submission that, if an organisation subjects a person to process that is a PCP – it isn't a one off decision. She submitted that Ishola was about situation regarding an employee's return to work and that although she agreed with Mr. Crow's submissions on the law, she says those legal principles don't have application to the way the Claimant has put his case, and that the Claimant is not seeking to transform one off acts into PCPs and therefore whilst the case law referenced by Mr. Crow is interesting, it just doesn't apply in this context.

68. Ms. Brown also submitted that any matter that required detailed consideration of documents should not be struck out at a preliminary hearing, and should properly take place at a final hearing.

69. Ms. Brown relied on the same submissions for the alleged PCPs in paragraphs 11 and 12 of the List of Issues for the alleged PCPs in regard to the appeal process as set out in paragraph 13 of the List of Issues.

70. I have reminded myself that the task before me at this stage is to consider the applications for strike out, and in the alternative a deposit order, on the basis of the allegations as set out in the List of Issues that were prepared by experienced representatives, noting also that it is the List of Issues that the Tribunal at the final hearing will use to consider the claim. I have also kept in mind that Ms. Brown is not retained by the Claimant, but is assisting him on a pro bono basis.

71. It is not for me, at this stage and in view of the fact the parties have representation, to attempt to reformulate the allegations into the relevant statutory framework.

72. I have kept in mind the legal principles established by the case law that I have been directed to and needed to balance the law in relation to a failure to make reasonable adjustments and that in relation to determining applications for strike out and deposit orders.

<u>PCPs in respect of the decision to suspend the Claimant's registration</u>

I note that paragraph 11 of the List of Issues states: "11 Did the Respondent apply the following PCPs in respect of the decision to suspend his registration." In particular I note the word "his", and the alleged PCPs relate to the decision to suspend the Claimant.

73. "11.1 Make the decision to suspend the Claimant from the Register without any express and or implied consideration of whether the registrant/trainee has protected characteristics."

74. Mr. Crow submits that the alleged PCP as set out above relates only to the Claimant, and as pleaded does not point to applying to any others, is a one off decision and nothing more and therefore does not meet the threshold of a PCP.

75. He further says there is no basis (suggested or evidential) that the Respondent adopted an unlawful practice of ignoring protected characteristics.

76. Mr. Crow also submitted that if Ms. Brown attempted to reformulate the PCP in way to say that what was really meant was that the Respondent operated a wider practice that was applied to others, that such an on the hoof reformulation should not be allowed to succeed as there is no pleaded basis for such a claim, and there is a mere assertion of the existence of a practice.

77. Ms. Brown states that the Respondent has established rules, policies and procedures that apply to all registrants.

78. There was no application to amend the PCP at 11.1. However, in addition to the general submissions noted above, Ms. Brown stated that the alleged PCP at 11.1 was how the Respondent operated and that the Claimant was not aware of any evidence to the contrary. She submitted that the decision to suspend the Claimant didn't consider his protected characteristic, and that is how the Respondent operated and worked. She submitted this was a PCP in the context of the Respondent having knowledge of the Claimant's autism.

79. Ms. Brown also pointed towards the appeal outcome letter and submitted that the cases of Kaul and Ishola are not relevant.

80. Although I have been provided with the Respondent's Code of Conduct and Complaints Process I have not considered them in detail and simply note that such policies/processes are in written form, and the Complaints Process entails various stages.

81. In considering Rule 37 I have kept in mind that whether there or not there is a PCP, in this case a practice, is a question of fact, considering the pleaded case.

82. On the pleaded case as specifically drafted by the Claimant, it does not appear to indicate any element of repetition, and as pleaded it appears to be a one-off decision in relation to the suspension of the Claimant. It is hard to see on how it is worded that 11.1 is of general application rather than treatment that was specific to the Claimant.

83. However, although there is no specific evidence in front of me to suggest that the employer routinely suspended registrants without consideration of whether they have a protected characteristic I note that the Respondent has a policy and a process and note Ms. Brown's submissions that this is standard approach/practice.

84. As pleaded, I consider there may be difficulties with 11.1 amounting to a PCP, but am mindful there has not been full consideration of all evidence available and therefore I cannot reach a conclusion there are no reasonable prospects of success.

85. In considering Rule 39, again in view of the specific pleaded case, namely the decision relating to his own suspension, I have concluded there is little reasonable prospect of 11.1 amounting to a PCP for the reasons set out above.

86. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order. The Claimant is ordered to pay a deposit.

87. "11.2 Make the decision to suspend the Claimant from the Register without being given the opportunity to being given an opportunity to make representations. "

88. Mr. Crow repeats the submissions regarding applicability to the Claimant only as per issue 11.1 above.

89. Further, Mr. Crow submits that all registrants would be disadvantaged in the same way by being suspended and not being given an opportunity to make representations, therefore such a PCP will not satisfy the threshold of the test.

90. Ms. Brown submitted that in relation to the decision to suspend without being given an opportunity to make representations, that this was a practice that the Respondent had in place, that such decisions were made without the opportunity to make representations and that although it applies to everyone, it puts registrants with a disability at a substantial disadvantage.

91. In considering Rule 37 I have kept in mind that whether there is a practice is a question of fact, considering the pleaded case.

92. On the pleaded case as, specifically drafted by the Claimant, it does not appear to indicate any element of repetition, and as pleaded it appears to be a one-off decision to suspend the Claimant and not permit him to make representations. It is hard to see how worded that 11.2 is of general application rather than treatment that was specific to the Claimant.

93. However, I am mindful that I have not considered evidence about the suspension process, in regard to the Claimant or more generally, and note Ms. Brown's submission regarding the Respondent's approach to suspension. I also note that it is not entirely clear how the Claimant says disabled registrants are put at a substantial disadvantage compared to non-disabled registrants.

94. As pleaded, I consider there may be difficulties with 11.2 amounting to a PCP, but am mindful there has not been full consideration of all evidence available and therefore I cannot reach a conclusion there are no reasonable prospects of success.

95. In considering Rule 39, again in view of the specific pleaded case, I have concluded there is little reasonable prospect of 11.2 amounting to a PCP, for the reasons set out above, namely as pleaded there is no indication of repetition or of a wider practice beyond the decision to suspend the Claimant.

96. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order. The Claimant is ordered to pay a deposit.

<u>PCPs in respect of the disciplinary process</u>

I note that the introductory text to 12 in the List of Issues states: "Did the Respondent apply the following PCPs in respect of the Disciplinary Process." Noting, the general reference to the application of the disciplinary process.

97. Mr. Crow relied on the submissions as set out in his skeleton regarding the PCPs set out in the indirect discrimination claim, save for those related to group disadvantage for alleged PCPs 12.1 – 13.8 relating to the failure to make reasonable adjustments claims but in some cases made specific submissions.

98. 12.1 Requiring the Claimant to participate in a disciplinary process which was legalistic and adversarial.

99. Mr. Crow submits that the Claimant was not required to participate in the process, but he chose to. The assertion is that as pleaded this does not amount to a PCP and is bound to fail.

100. Mr. Crow submitted that if Ms. Brown attempted to reformulate the PCP in way to say that what was really meant was that the Claimant needed to participate, the position is that it cannot be seriously suggested that having a lesser disciplinary system and process will be less disadvantageous.

101. Ms. Brown submitted that the Claimant had a choice, he could have walked away or participate in a legal and adversarial process to try and vindicate or mitigate an outcome.

102. I consider the difficulty with this PCP as pleaded is the reference to "Requiring the Claimant".

103. In considering Rule 37 I have kept in mind the principles of case law in regard to a liberal approach to construction of a PCP and the decision in Carreras, and consider whether or not there was a "requirement" is a matter that requires determination at a final hearing. Indeed, I note Ms. Brown's own submission that the Claimant could have walked away and am mindful that it is natural for any person subject to disciplinary proceedings to consider that they have to participate in order to attempt to clear their name.

104. I do consider the PCP to be vague, and a little difficult to understand, it is not clear what is meant by required and participate and at what stages of the disciplinary process. I have not been able to form a view on whether or not the disciplinary process is legalistic or adversarial other than to

note the policy document is lengthy and there appears to have been a number of stages to the process.

105. I cannot therefore conclude there are no reasonable prospects of success, however, again, based on the specific drafting and the reference to the Claimant within 12.1, I have the same concerns as in relation to PCPs 11.1 and 11.2.

106. In considering Rule 39, again in view of the specific pleaded case, I do not feel able to reach a conclusion that there is little reasonable prospect of 12.1 because I consider proper consideration of various aspects, required, participate, legal and adversarial is required by reference to evidence at a final hearing and full consideration of the disciplinary process.

107. 12.2 Requiring the Claimant to participate in a disciplinary process without any express and or implied consideration of whether the Claimant has protected characteristics.

108. The Respondent repeats its submissions in relation to 11.1 in this respect.

109. Ms. Brown submissions in this respect were not entirely clear, but referenced the Claimant having requested details of the rules, policy statements and guidance.

110. I have reached similar conclusions in relation to 12.2 as in relation to 11.1 above, noting also my conclusions regarding “requirement” as per 12.1 above.

111. I am also mindful of the extracts of the appeal outcome letter that I was referred to. Reading the extracts alone, I cannot reach any clear conclusion on the level of knowledge of any alleged disability and what, if any, consideration had been given during the disciplinary process, and at what stage, although there are some paragraphs to suggest that in the disciplinary meeting there was some consideration to how the Claimant was presenting and the provision of further time and rest breaks.

112. I do consider the PCP to be vague, and difficult to understand, it is not clear what is meant by required and participate and at what stages of the disciplinary process.

113. I will not repeat again my conclusions as set in all the preceding alleged PCPs above, but conclude that wwithout full consideration of evidence I cannot conclude there is no reasonable prospect of success in relation to this PCP.

114. In considering Rule 39, again in view of the specific pleaded case, I do not feel able to reach a conclusion that there are little reasonable prospect in regard to 12.2 because I consider proper consideration of various aspects, required, participate, legal and adversarial is required by reference to evidence at a final hearing and full consideration of the disciplinary process.

115. 12.3 Required the Claimant to be present and or respond to submissions as to the adequacy/clarity/cogency and any other matter touching on the probity and fairness of the disciplinary allegations.

116. The Respondent submits that this alleged PCP makes no sense and therefore should be struck out on that basis. The Respondent made submissions orally and in the skeleton argument with reference to the submissions relating to 11.2 and
12.1.

117. Ms. Brown submitted that this alleged PCP may be clunky, for which she apologised but went on to say that lawyers routinely make and respond to submissions as part and parcel of legalistic and adversarial process. She referenced examples in the transcript from the meeting that she says indicated the Claimant did not understand the language or process which made him defenseless, which I have noted.

118. I have kept in mind that I am being asked to consider whether the particular PCP as pleaded has no (or little) prospects of success. I have concluded that PCP 12.3 is not clearly understandable. I have kept in mind that a claim must not be struck out until attempts to clarify have been undertaken. The Claimant has been assisted by Ms. Brown in formulating the PCPs. The Respondent's strike out application was submitted on 28 April 2023, and states "this PCP makes no sense". There has been no attempt to clarify or amend the PCP.

119. Considering my conclusion that the PCP is not understandable, and therefore not workable in law, I have

struck out alleged PCP12.3 as there is no reasonable prospect of success.

120. 12.4 Required the Claimant to engage legally qualified representation and/or a person that was not legally qualified but competent to conduct quasi-judicial proceedings.

121. Mr. Crow submits that the Claimant will not be able to demonstrate that the Respondent operated a PCP whereby registrants were required to engage representatives. The Respondent further submits that even if such a PCP existed there is no prospect of the Claiming proving any substantial disadvantage. The Respondent also submitted that the PCP was a nonsense and contradictory as the Claimant did represent himself at the disciplinary meeting and therefore that undermines any argument that a PCP required the Claimant to engage a representative. The Respondent submits that an opportunity to appoint a representative should not be conflated with a requirement to do so, and that in any event the appointment of a representative would not put the Claimant at more of a disadvantage.

122. Ms. Brown acknowledged that the word “required” used in this alleged PCP may not be good English and commented further there was effectively a requirement to secure meaningful engagement . Ms. Brown submitted that the whole purpose of the Equality Act 2010 is to put in place adjustments where persons are at a substantial disadvantage.

123. It is necessary for me to make my conclusions in relation to 12.4 with regard to 12.5 below.

124. 12.5 Alternatively, required the Claimant to participate as an unrepresented defendant.

125. The Respondent submits that allegations 12.4 and 12.5 are contradictory, and that on the Claimant’s own case – that he was represented - this PCP fails.

126. The Respondent repeats its submissions on the difference between a requirement and a facility.

127. Ms. Brown submitted that the Claimant could represent himself, but couldn’t do it in a meaningful way.

128. I have no clear detail about at what particular stages the Claimant was, or was not represented, other than it is clear that Ms. Brown attended at least one appeal meeting on behalf of the Claimant. I also note that submissions made by Ms. Brown do not accord entirely with the PCP that I am considering.

129. I have not reviewed the Complaint's Process in detail and therefore I cannot make a clear determination on whether the Claimant was required to engage a representative or not, but it seems very unlikely he would be required to engage a representative noting he seemingly attended the disciplinary meeting without a representative.

130. The difficulties appear to rest with the crafting of the alleged PCPs at 12.4 and 12.5, the contradictory nature and also the reference to the word required. I am not able to reach a conclusion there is no reasonable prospect of success on the information I have been provided with, noting I have not been directed to any particular section of any policy and have not read them in full. However, I do consider there is little reasonable prospect of success due to these reasons.

131. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order. The Claimant is ordered to pay a deposit in relation to 12.4 and 12.5.

132. 12.6 Required the Claimant to respond to formal legal arguments presented by counsel on behalf of the Respondent, citing or which cited legal authorities and or by reference to statutory provisions.

133. Mr. Crow made global submissions in respect of the alleged PCPs at 12.6 – 12.15.

134. He submitted that the alleged PCPs all relate to the process of making submissions, or responding, which he says are all normal parts of a disciplinary process in hearing setting.

135. He went on to say that, as pleaded, there is no reasonable prospect of succeeding as having the facility to do is not the same as being required and that further, the alleged PCPs are phrased as being specific to the Claimant. The

Respondent accepts the process allows for registrants to make submissions and question witnesses.

136. Mr. Crow also submitted that the nature of the alleged PCPs is contradictory, that in other alleged PCPs the Claimant notes that he can be represented. He submitted that being provided with a facility to ask questions puts pressure on anyone in a process.

137. Ms. Brown made submissions in relation to alleged PCPs 12.6 to 12.10. She stated that there was a lot of case law referenced in the disciplinary meeting and that was the way in which registrants are required to interact with the process. She also referenced the Respondent's counsel in the internal stage making submissions on law and evidence, which she says was regular practice, and which the Claimant could not respond or engage with because of his disability. She further submitted the transcripts shows examples of hearsay etc that a legal representative may have intervened on but that a none legal representative would be totally out of depth and not able to engage on.

138. I do consider the PCPs at 12.6 to 12.15 to be repetitive and vague. As with 12.1 I have kept in mind the principles of case law in regard to a liberal approach to construction of a PCP and the decision in Carreras, and consider whether or not there was a "requirement" is a matter that requires determination at a final hearing.

139. I have concluded that in regard to 12.6 – 12.15 that without full consideration of evidence I cannot conclude there is no reasonable or little prospect of success in relation to these PCPs, but do consider there may be some difficulties with the alleged PCPs.

140. 12.7 Required the Claimant to Respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel citing or which cited legal authorities and or by reference to statutory provisions.

See conclusion in relation to alleged PCP 12.6.

141. 12.8 Required the Claimant to present submissions and/or respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel, citing or which cited the rules of evidence and/or legal authorities as applied in court/tribunal

proceedings.

See 12.6.

142. 12.9 Required the Claimant to present and/or respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel citing or which cited the rules and legal authorities relating to the admissibility of documentary evidence as applied in court/tribunal proceedings, such as disclosure.

See conclusion in relation to alleged 12.6.

143. 12.10 Required the Claimant to present submissions and/or respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel, citing or which cited the rules and legal authorities relating to the admissibility of witness evidence, including on topics related to hearsay, relevance, cogency, examination in chief and cross examination.

See conclusion in relation to alleged 12.6.

144. 12.11 Required the Claimant to present submissions and/or respond to submissions citing or which cited the rules and legal authorities related to privacy, confidentiality including in relation to health.

145. I noted there was no specific submission from Ms. Brown in this respect. See conclusion in relation to alleged 12.6.

146. 12.12 Required the Claimant to present submissions and/or respond to submissions, citing or which cited the rules and legal authorities related to disclosure of documents.

147. I noted there was no specific submission from Ms. Brown in this respect. My conclusion is as per alleged PCP 12.6.

148. 12.13 Required the Claimant to conduct cross examination of witnesses.

149. The Respondent submits that there are no reasonable prospects of demonstrating that he was required to question witnesses. Further, that there is no reasonable prospect of proving substantial disadvantage.

150. I noted there was no specific submission from Ms. Brown in this respect.

151. I have not scoured the policies or procedures, and have no evidence in order to reach a conclusion of whether or not there was a requirement on the Claimant to cross examine witnesses. Although such a requirement seems very unlikely, I am not in a position to undertake a mini trial, and not able to reach a conclusion of no or little prospects of success.

152. See conclusion in relation to alleged PCP 12.6.

153. 12.14 Required the Claimant to present submissions and/or respond to submissions, citing or which cited the rules and legal authorities related to matters related submissions of no case to answer.

154. Ms. Brown submitted that the Claimant did not know how to deal with this.

155. My conclusion is as per alleged PCP 12.6.

156. 12.15 Required the Claimant to present submissions and/or respond to submissions, citing or which cited the rules and legal authorities related to sanction, including the concepts of current impairment, aggravating and/or mitigating features.

157. My conclusion is as per alleged PCP 12.6.

158. 12.16 Required the Claimant to submit to a process which had no express or implied provision, guidance and or safeguards and/or due regard for the Claimant's protected characteristics, whether in respect of the provisions and/or application of the disciplinary process and/or in respect of any decision on culpability and/or sanction.

159. Mr. Crow repeated submissions as per alleged PCP 11.1, namely as pleaded this relates to a requirement on the Claimant, not a PCP of wider application and therefore does not work as pleaded. He further submitted that it was fundamentally unlikely that the Tribunal would find that the Respondent operated unlawful process and there was no basis for finding that it generally operated such a practice.

160. Ms. Brown submitted that in relation to the alleged PCP 12.16 that there were no express or implied provision, guidance, safeguards or regard for the Claimant's

protected characteristic. She submitted the best evidence that this took place is actually in decision outcome of the appeal, which Ms. Brown submits shows that no regard was given.

161. Mr. Crow objected to the late inclusion of appeal letter, which amounts to 76 pages, and noted the Claimant had not previously requested the letter be added to the Bundle.

162. Both parties directed me to paragraphs in the appeal letter – that I read. Mr. Crow submits that the letter does actually show that there has been account taken of the Claimant's protected characteristic. Based on reading certain extracts of the letter alone, in isolation from other evidence, I cannot safely form any clear conclusion on any regard taken of the Claimants protected characteristic, and at what stage.

163. I do consider there may be some difficulty with how the PCP is put, in particular the reference to the Claimant being required but also the vague, wide and unclear nature. Accordingly, I have determined that although I cannot conclude there is no reasonable prospect of success, I do consider there to be little reasonable prospect of success.

164. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order. The Claimant is ordered to pay a deposit.

PCPs in respect of the appeal process

165. I note that the introductory text to issue 13 in the List of Issues states: "Did the Respondent apply the following PCPs in respect of the Appeal Process." Noting, the general reference to the application of the appeal process.

166. 13.1 Requiring the Claimant to participate in an Appeal process as part of the disciplinary process which was legalistic and adversarial.

167. Mr. Crow repeated his submission as per 12.1. The alleged PCP at 13.1 is the same as 12.1 apart from the fact this

refers to the appeal process and not the disciplinary process

168. A per my conclusion regarding 12.1, I do consider the PCP at 13.1 to be vague, and a little difficult to understand, it is not clear what is meant by required and participate and at what stages of the disciplinary process. I have not been able to form a view on whether or not the disciplinary process is legalistic or adversarial other than to note the policy document is lengthy and there appears to have been a number of stages to the process.

169. I cannot therefore conclude there are no reasonable prospects of success, however, again, based on the specific drafting and the reference to the Claimant within 13.1, I have the same concerns as in relation to PCPs 11.1,11.2 and 12.1.

170. In considering Rule 39, again in view of the specific pleaded case, I do not feel able to reach a conclusion that there is little reasonable prospect in relation to 13.1 because I consider proper consideration of various aspects, required, participate, legal and adversarial is required by reference to evidence at a final hearing and full consideration of the disciplinary process.

171. 13.2 Required the Claimant to engage legally qualified representation and/or a person that was not legally qualified but competent to conduct quasi-judicial proceedings.

172. Mr. Crow, in his written skeleton argument repeated the submissions made in regard to the alleged PCPs in the reasonable adjustment complaint as for the indirect discrimination complaint (save for the references to group disadvantage and statutory defence). He repeated this also orally, and Ms. Brown also submitted the same submissions made in relation to the alleged PCPS at issue 12 applied.

173. Paragraph 6 of the List of Issues sets out the PCPs relied upon in relation to the indirect discrimination claim, which are at 6.1 to 6.6. There are 6 alleged PCPs relied upon. However, at paragraph 13 of the List of Issues, there are 8 alleged PCPs relied upon in relation to the reasonable adjustments claim, and they vary slightly.

174. Alleged PCP 13.2 is the same as alleged PCP 12.4, 12.4 related to the disciplinary process and 13.2 relates to the appeal process. It is necessary to consider 13.2 and 13.3 together.

175. 13.3 Alternatively, required the Claimant to participate as an unrepresented defendant.

176. Alleged PCP 13.3 is the same as alleged PCP 12.5, 12.5 related to the disciplinary process and 13.3 relates to the appeal process. It is necessary to consider 13.2 and 13.3 together.

177. I have reached the same conclusions as set out in relation to alleged PCP 12.5 above, namely 13.2 and 13.3 are contradictory nature and also reference the word required. I am not able to reach a conclusion there is no reasonable prospect of success on the information I have been provided with, noting I have not been directed to any particular section of any policy and have not read them in full. However, I do consider there is little reasonable prospect of success due to these reasons.

178. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order. The Claimant is ordered to pay a deposit in relation to 13.2 and 13.3.

179. 13.4 Required the Claimant to present submissions and/or respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel, citing or which cited the rules and legal authorities relating to applications for permission to appeal against the decision of Conduct Panel.

180. This 13.4 appears to be similar to the alleged PCPs at 12.7 to 12.12 but this related to applications for permission to appeal. Similarly, I have dealt with 13.4 to 13.7 together.

181. 13.5 Required the Claimant to present submissions and/or respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel, citing or which cited the rules and legal authorities relating to the limited grounds of appeal provided and the legal tests to be applied, in accordance with the rules of the Respondent.

182. This 13.5 appears to be similar to the alleged PCPs at 12.7 to 12.12 but this relates to applications grounds of appeal and legal tests to be applied. Similarly, I have dealt with 13.4 to 13.7 together.

183. 13.6 Required the Claimant to present submissions and/or respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel, citing or which cited the rules and legal authorities relating to formulating grounds of appeal which met those limited grounds and the legal tests to be applied.

184. This 13.6 appears to be similar to the alleged PCPs at 12.7 to 12.12 but this related grounds of appeal and legal tests to be applied. Similarly, I have dealt with 13.4 to 13.7 together.

185. 13.7 Required the Claimant to present submissions and/or respond to submissions made by Counsel on behalf of the Respondent and/or Legal Assessor and or the Conduct Panel, citing or which cited the rules and legal authorities relating to the procedure to be followed during the appeal.

186. This 13.7 appears to be similar to the alleged PCPs at 12.7 to 12.12 but this relates to the rules and legal authorities regarding the appeal procedure. Similarly, I have dealt with 13.4 to 13.7 together.

187. I do consider the PCPs at 13.4 to 13.7 to be repetitive and vague, and as above, I have kept in mind the principles of case law in regard to a liberal approach to construction of a PCP and the decision in Carreras, and consider whether or not there was a “requirement” is a matter that requires determination at a final hearing.

188. I have concluded, in regards to alleged PCPs 13.4 – 13.7 that in that without full consideration of evidence I cannot conclude there is no reasonable or little prospect of success in relation to these PCPs, but do consider there may be some difficulties with the alleged PCPs.

189. 13.8 Required the Claimant to submit to a process which had no express or implied provision, guidance and or safeguards and/or due regard for the Claimant’s protected characteristics, whether in respect of the provisions and/or application of the disciplinary process and/or in respect of any decision on culpability and/or sanction.

190. This 13.8 is very similar to 12.16, accordingly I have applied the same considerations and reached the same conclusion as per alleged PCP 12.16. 191. I do consider there may be some difficulty with how the PCP is put, in particular the reference to the Claimant being required but also the vague, wide and unclear nature. Accordingly, I have determined that although I cannot conclude there is no reasonable prospect of success, I do consider there to be little reasonable prospect of success.

192. I have considered the information available to me in regards to means to pay, and note the impact of making a deposit order. I have also considered whether or not in all of the circumstances it is fair and just to order the Claimant to pay a deposit order. The Claimant is ordered to pay a deposit.

Substantial disadvantage

193. In regard to the alleged substantial disadvantage, Mr. Crow submitted that if the PCPs were made out, the alleged substantial disadvantage alleged at issues 15.1 to 15.6 could theoretically be capable of being substantial disadvantage, if proved. In regard to the alleged substantial disadvantage at 15.7 and 15.8 , Mr. Crow submitted there was no reasonable prospect of proving substantial disadvantage. Mr. Crow also referenced Employment Judge Perry's comments at paragraph 7 of his Order in regard to 15.9 to 15.12, namely that: "Matters are included as substantial disadvantages that appear actually to be the consequence of substantial disadvantages and which appear solely relevant to questions of remedy (eg paras 8.9 t 8.12)".

194. Ms. Brown submitted that set out at issue 15 is the alleged substantial disadvantage. She says this is a matter of evidence, that in discrimination claims should be reserved for a final hearing where it can be properly assessed.

195. I have reached conclusions in particular regarding 15.7 to 15.15, having determined that as some PCPs remain, the determination of 15.1 to 15.6, noting Mr. Crow's comments, must take place at a final hearing.

196. 15.7 The fact of having protected characteristics within the meaning and/or in the context of the Respondent's obligations pursuant to the Equality Act 2010 were not considered as were not considered in the disciplinary process.

197. 15.8 The fact of having protected characteristics within the meaning and/or in the context of the Respondent's obligations

pursuant to the Equality Act 2010 were not considered as part of the Appeal process.

198. In relation to 15.7 and 15.8 Mr. Crow submits that the alleged substantial disadvantage is effectively an allegation that disability was not taken into account, and that this does not amount to a substantial disadvantage arising from the PCP.

199. There has to be a link between the PCP and the alleged substantial disadvantage. The way that 15.7 and 15.8 are pleaded does not make sense as an allegation of substantial disadvantage. Accordingly, Considering my conclusion that the PCP is not understandable, and therefore not workable in law, I have struck out the alleged substantial disadvantage at 15.7 and 15.8 as there is no reasonable prospect of success.

200. 15.9 Being suspended from the Register

201. 15.10 Being subject to disciplinary findings

202. 15.11 Being removed from the Register

203. 15.12 Being subject to an order of conditions for 18 months (imposed by the Appeal Committee January 2023)

204. Mr. Crow submitted, with reference to Employment Judge Perry's observation, that 15.9 to 15.12 appear to be the consequence of substantial disadvantages. I have concluded that there does appear to be some difficulty with how the substantial disadvantages in these issues is put, but considering all of the circumstances do not think it can be said there is no or little reasonable prospects of success without full consideration at a final hearing.

EJ Cawthray

Employment Judge Cawthray
Date 23 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
26 February 2024

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FOR EMPLOYMENT TRIBUNALS