EMPLOYMENT TRIBUNALS

Claimant: Mr L J Dodsworth

Respondents: 1. Platform 81 Ltd
2. Mr Nicholas James Martin Wroe

Heard at: Manchester **On:** 8 May 2024

Before: Employment Judge Eeley

REPRESENTATION:

Claimant: Mr S Shipton, Trade Union Representative
Respondent: Miss L Halsall of Counsel

JUDGMENT having been sent to the parties on 17 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These are the reasons for the Tribunal's decision in relation to the following preliminary issues:

    a. Whether the claimant was disabled at the relevant time, as defined by the Equality Act 2010, for the purposes of his Tribunal claim.

    b. Whether to strike out the claimant's complaint of protected disclosure detriment in relation to dismissal as pursued against the second respondent (an individual.)

    c. Whether to make a deposit order in relation to the claimant's complaint of protected disclosure detriment in relation to dismissal as pursued against the second respondent (an individual.)

    d. Whether to make a deposit order in relation to the claimant's complaint of harassment related to sexual orientation.

e. Whether to strike out the claimant's complaint (against the first respondent) of automatically unfair dismissal because of protected disclosures.

f. Whether to make a deposit order in respect of the claimant's complaint (against the first respondent) of automatically unfair dismissal because of protected disclosures.

g. Whether to strike out or make a deposit order in relation to the claimant's complaint of disability related harassment in respect of the comments made by Ms Meredith.

2. During the preliminary hearing, the Tribunal heard oral witness evidence from the claimant and from his partner, Mr C Prince. The Tribunal had regard to the relevant documents within a preliminary hearing bundle, which contained 264 pages. The Tribunal also received oral submissions on behalf of both parties, for which it was grateful.

Disability

Legal principles

3. Section 6 of the Equality Act 2010 sets out the definition of disability. It states:

(1) A person (P) has a disability if-
a) P has a physical or mental impairment, and
b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to day activities.
(2) A reference to a disabled person is a reference to a person who has a disability.
(3) In relation to the protected characteristic of disability-
a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability.
b) A reference to persons who share a protected characteristic is a reference to persons who have the same disability.
(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)-
a) A reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
b) A reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

4. Section 212 of the Equality Act 2010 defines 'substantial' as more than minor or trivial.

5. The definition of 'long term' is set out in Schedule 1 to the Act. It states that the effect of an impairment is long-term if:
- It has lasted for at least 12 months,

- It is likely to last for a at least 12 months, or
- It is likely to last for the rest of the life of the person affected.

6. The definition also states that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is 'likely to recur.' 'Likely' has been defined for the purposes of the Act as 'could well happen.' (See e.g. Boyle v SCA Packaging Ltd and also the 2011 'Guidance on matters to be taken into account in determining questions in relation to the definition of disability.')

7. The question of whether the effects of the impairment are likely to last for more than 12 months is an objective test based on all the contemporaneous evidence, not just that before the employer. The Tribunal is not concerned with the employer's actual or constructive knowledge of the disability Lawson v Virgin Atlantic Airways Ltd EAT 0192/19.

8. In looking at the impact of the impairment the focus should be on what an individual cannot do or can only do with difficulty rather than on the things he or she can do.

9. Normal day-to-day activities are activities that are carried out by most men or women on a fairly regular and frequent basis (Appendix 1 EHRC Employment Code). It is not intended to include activities which are only normal for a particular person or group of people. The indirect effects of an impairment should also be considered.

10. Paragraph 5 of Schedule 1 to the Act deals with the effects of medical treatment. The impairment is to be treated as having a substantial adverse effect on the ability of the person to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. Thus, unless the treatment is completely curative of the underlying impairment, the treatment or measures are disregarded in terms of whether the impairment has a substantial adverse effect on the claimant. The Tribunal seeks to determine what the position would be for the claimant in the absence of the treatment, the 'deduced effect.'

11. The time at which to assess whether the definition of disability is met is at the date of the alleged discriminatory act. The Tribunal should consider the evidential position as at the date of the alleged discriminatory act (see e.g. McDougall v Richmond Adult Community College [2008] ICR 431.) This is particularly relevant in determining whether an impairment is likely to recur. The Tribunal should restrict itself to the evidence that was available at the relevant date for the determination and not take into account events which took place later. Whether the impairment *in fact* recurred after the relevant dates should not be used to help determine whether the impairment was 'likely to recur' when examined and determined at the relevant date. The Tribunal should not use the benefit of hindsight in this way.

12. In determining the likelihood of recurrence account should be taken of both the typical length of such an effect on an individual and any relevant factors specific

to this individual, such as general state of health and age.

13. Paragraph 2(2) of Schedule 1 to the Act provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is 'likely to recur'. 'Likely to recur' means 'could well happen." The Guidance states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (paragraph C6). The question is not whether the impairment is likely to recur but whether the substantial adverse effect of the impairment is likely to recur. In assessing the likelihood of a claimant's impairment recurring and thus qualifying as 'long term' an Employment Tribunal should disregard effects taking place after the alleged discriminatory act but prior to the Tribunal hearing

14. The effect of the impairment does not have to remain the same during the 12 month period. The adverse effect may disappear temporarily or get worse over the relevant period.

15. There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause (see para 7 Appendix 1 EHRC Employment Code).

Facts and evidence on disability

16. The impairments relied upon for the purposes of the disability claim are mixed anxiety and depression. The relevant period, so far as we can identify it for the purposes of the claim, is said to be the period of his employment with the respondent. That employment started on 14 March 2022 and continued through to dismissal on 8 March 2023. The Tribunal's starting point was the medical evidence in the case as supplemented by the witness statements of both the claimant and of his partner, Mr Prince.

17. In terms of the medical evidence, I had before me a copy of some GP records. I noted the observation that they may be incomplete due to the claimant having changed his GP, however I note that I can base my findings on what I have in front of me. It is not for the Tribunal to fill in the gaps in the records or to guess at what might be missing from the documents presented in evidence. I also note that the summary section at page 213 of the bundle refers to 'Minor Past' issues in 1996, 1997, 2001, 2008, 2012 and 2021. There is no obvious gap in the period of time covered by the documentary records insofar as it is reflected in the summary section.

18. I note that in terms of 'Significant Past' problems, reference is made to 9 February 2023 and a diagnosis of mixed anxiety and depressive disorder.

19. I consulted the list of medications that had been prescribed to the claimant (page 224) and I noted that escitalopram was prescribed *after* the period of employment under consideration. The prescriptions for that particular medication seem to run from 6 April 2023 through to 22 August 2023. Prior to that there is a record for a prescription of propranolol in February 2023. The record relates to a prescription for 56 tablets to be taken up to three times a day

for anxiety when needed. This prescription relates to a time which is within the period of employment under consideration.

20. I also reviewed the record of GP consultations. The first relevant consultation goes all the way back to 2012 (8 August 2012), where there is reference to *"depressed mood".* There is no further detail in the record as to how the depressed mood manifested itself or what treatment was recommended. There is no reference to the prescription of drugs.

21. After this GP record there is, as the respondent pointed out, a significant gap in the records until 9 February 2023. There is then reference to a self-referral to IAPT (Advanced Clinical Practitioner) (p219) and then there is the lengthy report of the consultation on 9 February (pages 218-219). It effectively summarises what the claimant was reporting to the clinician. It states, inter alia:

"I was diagnosed with depression as a teenager and was initially medicated for this. I took myself off medication out of personal choice, however due to recent events in my workplace, my mental health has suffered as a result. I also have quite severe anxiety that is being exacerbated by my workplace and I am struggling to keep the constant panic attacks under control."

In response to the question "How long as this been a problem?" the answer is recorded as:

"Technically years, but significantly worse in the last six months or so."

I pause to insert here that (given the date of the record) that would take the claimant back to approximately August 2022, being approximately six months prior to the consultation under consideration.

22. Carrying on with the record, the claimant is asked what the cause of the problem is, as far as he is concerned. He says, "*workplace bullying."* When asked what help he would like the claimant says:

"I would like to discuss options, and potentially find out about medication."

The claimant noted that a face to face appointment might be quite difficult for him as it was quite hard to get away from work. He confirmed that the problem was not an emergency. The record (apparently written by the GP practice) refers to the fact that "*there are both non pharmacological strategies that can help manage symptoms such as antidepressants and anti-anxiety medication. The anti-anxiety medication is taken on a need to use basis as opposed to every day. We can also signpost you to counselling services if this might help. I have attached a few links for you to have a read of…"* A few links are attached for the claimant, including a reference to "Six Degrees," which I understand is a provider of counselling services.

23. Below that long narrative the problem is recorded as "mixed anxiety and depressive disorder." The history is summarised as:

"Was diagnosed as depression at age of 15 and was on SSRI. Felt ok for a few years so gradually weaned off dose. Has been ok but then events occurred at work which has affected MH. Feels struggling more with panic attacks. Has some coping strategies but becoming less effective. Mentioned workplace bullying. Has escalated issues to appropriate manager….Anti anxiety meds also discussed- keen to try propranolol…Signposted to anxiety UK/Qwell/six degrees"

There is also a reference to a hybrid working situation, two days in the office and three days at home. There is a follow-up to take place four weeks thereafter.

24. We also then have the records for the follow-ups which I note do take place after the termination of the claimant's employment, but for completeness I will record them here:

    - 10 March 2023 – A consultation with Mrs Natalie Mason. Problem: mixed anxiety and depressive disorder. Refers to request for reasonable adjustments at work. Refers to termination of contract and the fact that he is seeking advice from his trade union. Taking propranolol intermittently. Did not notice much of an effect. Not yet sought help from 6 Degrees. Not keen for SSRIs yet. Asking for diazepam, advised not to have. Trial of increasing dose to 2 tabs three times. Follow-up in three weeks.

    - 6 April 2023 –A consultation with Natalie Mason regarding mixed anxiety and depressive disorder. Again reference to propranolol not being effective. Hesitant to take SSRIs due to SE but will try low dose. "More anxiety than depression." Not yet reached out to 6 Degrees. No TOSH (which I interpret as 'thoughts of self-harm'). Start SSRI and review in 5 weeks. (That coincides with the change in prescription to escitalopram.

25. Those are the consultations we have recorded. There is also a medical letter (page 228) dated 23 May 2023. Again, that postdates the relevant period and it largely appears to repeat what the claimant reported to Mrs Mason at the consultation. There is particular reference to anxiety.

26. The medical evidence is not the whole story in this case. Important evidence (which supplements the medical evidence) is the witness evidence and my findings in relation to it. The claimant provided a disability impact statement (p235) which was supplemented by oral evidence.

27. In terms of the mental health concerns and conditions, there are two labels that appear in the various pieces of documentary evidence. There is reference to depression and there is reference to anxiety. In functional terms, in terms of the impairment and its effect on day-to-day activities, it is not clear the extent to which the different label (depression versus anxiety) reflects a difference in the way that the symptoms manifest on the claimant or the difficulties that he has in his day-to-day activities. The substance may be that they have the same impact or similar impact on the claimant whether labelled "depression" or

"anxiety." The initial records refer to "depression" from 2012. It may well have included elements of anxiety too. It may be that there is an absence of description within the GP records. I am prepared to accept the claimant's own witness evidence that it was both anxiety and depression that he has suffered from. He asserts that he first suffered from anxiety and depression at around the age of 15. We can see his reference to being described as "on edge" back at the age of 16 years of age. The claimant refers to fluoxetine being prescribed (that is the SSRI) in 2012. There is no reference of the actual medication in the claimant's GP records but having heard the evidence of the claimant I believe what he says to me about having taken it at that early stage but having then come off it again a few weeks later. In his own evidence it was a very short-term prescription.

28. I also accept what the claimant says about having a baseline of "normal" 'for him.' His baseline 'normal' included some level of anxiety but, to an extent, he was functioning, even without medication. When the symptoms got worse and the claimant had gone beyond what was 'normal for him,' he was unable to carry out basic personal hygiene tasks, make sure that he ate properly or, indeed, cook for himself. The claimant says (and I understand and accept this) that most of the time he was operating somewhere in the middle of these two extremes. He was somewhere between his own "normal for him" and "not functioning" using the claimant's own spectrum of experiences, as it were.

29. At its worst, the claimant's condition manifests itself with panic attacks which included palpitations, hence the references to propranolol in the medication records. The claimant also explained that he had previously been referred to CAMHS but that, unfortunately, he did not get to the top of the waiting list for treatment before he turned 18. There is no record of this in the GP records but again, having heard and assessed the claimant's witness evidence, I am prepared to accept the claimant's account of this.

30. The claimant explained that when he was not on medication, he used coping strategies and self-soothing techniques such as meditation, mindfulness exercises, walking, taking a nap (if possible and appropriate.) Those coping strategies are of varying degrees of effectiveness depending on the severity of the underlying symptoms and condition experienced by the claimant. For example, if the claimant were to experience a panic attack or palpitations, the coping strategies would not be effective to prevent or avoid that exacerbation of his symptoms or any associated debility.

31. I find that the claimant's normal day-to-day activities were certainly affected. The affected activities included cooking, eating and food shopping. I note (and accept) that the claimant could cope a little better from 2018 when he was prompted and helped by his partner in relation to such activities. I also accept that without that help from his partner he would not have been able to cope as well. Indeed even with that help and support from Mr Prince, he could not do what was required of him on the majority of days.

32. A recurring theme in the evidence is social interactions and social anxiety. The claimant gave specific examples in his evidence of avoiding birthday celebrations during 2022 and 2023; avoiding public spaces which were busy

with people shopping, avoiding fireworks, avoiding Christmas markets and the like; and avoiding the respondent's Christmas work event/party.

33. The claimant also referred to a lack of sleep and the resultant fatigue and the adverse impact that this had on his concentration, focus and punctuality.

34. I also heard evidence from the claimant's partner which supported the claimant's account. Mr Prince was aware of the claimant's anxiety in particular since they met in 2015. He has observed the claimant over a considerable period of time. He also gave evidence and described an example of the claimant's reaction to attending his sister's party. He described the difficulties which the claimant faced. He noted (and was prepared to accept) that the claimant's symptoms had improved over the time that they had been together in a relationship. Having said that, he explained that when the claimant was working in the office day-to-day for a portion of his working week there would be a daily lunchtime telephone call from the claimant to Mr Prince. This phone call would be made in order to get support from Mr Prince. He would use that support to persuade or force himself back to work for the afternoon session.

35. Both witnesses referred to at least one panic attack having taken place in the office when the claimant was at work. There is a question mark as to whether that was June or September of 2022. The claimant says it was in June/July. Mr Prince indicated that he had tried to persuade the claimant to go back to his GP about his symptoms well before the claimant in fact made an appointment and did so in February 2023. It was suggested that his efforts to get the claimant to go to the doctor went back at least as far as December 2022.

36. It is clear to me, from the evidence that I have heard and read, that the claimant has always had a tendency towards anxiety and depression but he managed largely without medication between 2012 and 2023. The condition has had some impact on his day-to-day activities and the degree of impact and the severity of the impact has fluctuated over time. For large periods of time he was able to cope without medication. However, the pattern (as far as it can be discerned) is that his condition deteriorated during the course of his employment with the respondent. There was, understandably, a delay between the start of this deterioration in his condition and the claimant resorting to a GP appointment. This is often the case in relation to a chronic condition (as opposed to an acute condition or an accident). It may take time for a patient to realise and recognise that things have got worse over time and that a consultation with a medical professional is required. Hence the delay. Consequently, it is important to recognise that there will have been a period of deterioration in the claimant's condition before (and in the run up to) the first of the medical consultations which are recorded in the documents.

37. It is also important to note that the symptoms had deteriorated and were bad enough for the claimant to suffer a panic attack at work between July 2022 and (at the latest) September 2022.

38. Based on the foregoing and based on the claimant's description of the impact of his condition on his day-to-day activities when coping mechanisms do not prove fully effective, it seems to me that the claimant's impairment and condition

had had a significant adverse effect (arising from the anxiety and depression) for *at least six months* by the time his employment terminated.

39. I was directed to review and consider the claimant's work probation reviews in June (and later at the nine month point). There is no relevant content within those documents. However, I do note that an employee may not necessarily refer to mental health conditions in such a context, particularly if there are difficulties at work and a strained working relationship with the individual who is conducting that meeting, as the claimant asserts in this case.

40. I heard evidence that even when the claimant was not at his worst (in terms of his symptoms) he would still panic about his work. He would be in a state of panic about working in the respondent's office from the day before he was due to go into the office.

41. The claimant did not take any regular sick leave but I accept that the panic attacks were just the tip of the iceberg in terms of the claimant's experience of his condition. The panic attacks were intermittent fluctuations which were overlayed on top of the main symptoms of anxiety and low mood. The claimant's partner describes the claimant as suffering the main symptoms of anxiety and low mood from waking in the morning until bedtime. Mr Prince described the claimant as suffering from both anxiety and depression, although he needed more support from his partner in relation to the anxiety element of his condition.

<u>Conclusion on disability</u>

42. I have to apply section 6 Equality Act 2010 and the related guidance to my findings of fact. I have to determine whether there was an impairment which had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

43. There was clearly a mental health condition in the claimant's case. It was present at some level from 2012. It fluctuated in severity and the claimant had coping mechanisms.

44. "Substantial" for the purposes of the Act means "more than minor or trivial" in terms of adverse effect. "Long-term" leams that I have to look at the longevity of the substantial adverse effect. For the purposes of this case, I need to look at whether the effect has been there for at least 12 months or is 'likely' to last for at least 12 months. If the effect ceases it is to be treated as continuing to have the effect if it is 'likely to recur.' "Likely" for this purpose means "could well happen." I am directed by the case law and the guidance to focus on what the claimant cannot do (or only do with difficulty) rather than what he can do.

45. I am satisfied that the claimant had a mental health impairment. The activities that are described as being impacted are properly to be considered 'normal day-to-day activities.' At some points during the relevant period of time the impact of the impairment was substantial. At other times it was not. The coping mechanisms improved matters at times and to an extent, but they were not curative of the underlying problem. Coping mechanisms could (and did) break down from time to time.

46. Taking the evidence in the round, I doubt whether (during the period of employment) there was the necessary substantial adverse effect on the claimant until he suffered the panic attack in around mid-2022. From August 2022 onwards matters developed. The claimant's partner tried to persuade him to go to his GP. The claimant's coping mechanisms were increasingly ineffective. He then went to his GP and this culminated in him receiving a prescription. I find that, once the panic attack took place, that was effectively a breakdown in the claimant's coping mechanisms, particularly in the workplace. It was something of a turning point. Thereafter his situation and the degree of impairment and adverse effect fluctuated. However, I *am* satisfied that the adverse effect was *substantial* from the time of the panic attack on an ongoing basis until at least the date of termination in March 2023. This gives a continuous period of 6 to 9 months where the threshold of severity is met.

47. There is nothing in the evidence to suggest that the adverse effect was reducing towards the end of the claimant's employment or that his condition was improving as at the date of termination. This suggests that it was likely to last for at least 12 months. There was no trajectory of improvement in his condition during this period.

48. Furthermore, given the fact that the claimant had always battled with some degree of impairment over a number of years (for which he had previously sought treatment) this lends weight to the conclusion that at the start of this particular exacerbation (when there was a panic attack) it could still be said that the substantial adverse effect was *likely* to last for 12 months. This was not a first event which came 'out of the blue.' Rather, it was the most recent event in a history of mental health problems which went back over a number of years (albeit he had not always required medical treatment.) Whilst this was the first time for a while that the adverse effect had become substantial, the previous history is still relevant to the likelihood of the symptoms and adverse effect continuing for over 12 months from the start of the relapse and the panic attack. The claimant's prior mental health history made it more likely that this particular episode would last at least 12 months rather than being a one off and brief period of impairment with the relevant adverse effect.

49. Further, or alternatively, the impairment could also amount to a disability on the basis that it was 'likely to recur' on one or more occasions over a period of 12 months of more. The claimant's mental health had fluctuated over time. He had required treatment years before. He had had to continue to self-manage his condition and there had been a relapse. That, taken together with the length of this particular relapse episode, indicates that the relevant degree of impairment was likely to recur over a period of 12 months or more even if there were periods of improvement. Each episode arose from the underlying condition which had led the claimant to experience anxiety and depression symptoms to a greater or lesser extent over a number of years. It 'could well happen' that there would be further flare ups to a substantial adverse level over more than the requisite 12 month period. I am prepared to accept that the substantial effect was ongoing throughout that period on the basis that it was 'likely to recur.' This is taking into account the pattern of the evidence during the course of the claimant's employment allied with the previous history going back to 2012 and the fact that he had been continuing to use the coping mechanisms throughout

the relevant period: more successfully at the beginning, less successfully at the end.

50. On that basis I conclude that the claimant was disabled from August 2022 onwards on the basis that the substantial adverse effect was likely to last for 12 months, or it was likely to recur over and beyond the relevant 12 month period. For the avoidance of doubt, I am not relying on the evidence as to the claimant's medical treatment or the development of his symptoms in the period of time after the termination of employment. Rather, I am considering the position and the evidence as it would have presented during the relevant period (i.e. his period of employment with the respondent.)

51. For the purposes of the record I had regard to the 2011 Guidance on matters to be taken into consideration on determining the issue of disability. In particular, it was necessary to look at paragraph B7 which deals with coping strategies, B9 that deals with avoidance strategies, B10 and C5-C7. The coping mechanisms which were previously effective, broke down around August 2022, the panic attacks increased, the substantial adverse effect increased and I conclude he was disabled from 1 August 2022.

Strike out and deposit

52. There are four aspects to the respondent's application for strike out and/or deposit. The written application is at page 249 onwards in the preliminary hearing bundle.

Applicable legal principles in relation to strike out and deposit orders

53. Rule 37 of the Employment Tribunal Rules of Procedure 2013 sets out the grounds on which the Tribunal can strike out a complaint. It provides:

"(1) At any stage of 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 prospects 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) for 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 fair hearing in respect of the claim or the response (or the part to be struck out)."

54. Establishing one of the specified grounds on which a clam can be struck out is not, of itself determinative of a strike out application. If one or more of the grounds at (a) to (e) is established the Tribunal must then decide whether to exercise its discretion to strike out. It is a two-stage approach. In deciding whether to strike out the Tribunal should have regard to the overriding objective of dealing with cases 'fairly and justly.' This includes ensuring (so far as is practicable) that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, and avoiding delay. The overriding objective requires that the proportionality of the sanction should be at the front of the Tribunal's considerations, having regard to the relevant default, its effect on the other side and whether a lesser sanction is available and appropriate.

55. In line with Cox v Adecco Group UK & Ireland and ors 2021 ICR 1307, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed it is highly unlikely that strike-out will be appropriate. There has to be a reasonable attempt at identifying the claim and the issue before considering strike out or making a deposit order. The claimant's case must be taken at its highest. A fair assessment of the claims and issues should be carried out on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim. Discrimination and whistleblowing cases should not generally be struck out save in the most obvious of cases (Anyanwu v South Bank Student Union 2001 ICR 391, Ezsias v North Glamorgan NHS Trust ICR 1126.) It is rare to strike out such a case where the central facts are in dispute. In any event, it is usually necessary to 'take the claimant's case at its highest."

56. The power to make a deposit order is derived from rule 39 of the Employment Tribunal Rules of Procedure 2013 which provides:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospects of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1000 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 same 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 purposes 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 order 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."

58. The initial threshold test for imposing a deposit order therefore sets a lower standard for the applicant to overcome. Rather than determining that a claim has *no* reasonable prospect of success, it is sufficient if, instead, it has *little reasonable prospect of success.* This reflects to some extent the fact that it is a less draconian order to make than to strike out a claim or part of a claim. There is greater leeway when considering whether to make a deposit order but there must still be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response. The likelihood of a party being able to establish the facts essential to their case is a summary assessment. A 'mini trial' is to be avoided.

59. Just because the Tribunal concludes that a claim has little reasonable prospects of success this does not mean that a deposit order must be made. The Tribunal retains a discretion as to whether to make such an order and the discretion must be exercised in accordance with the overriding objective. A relevant factor may be the extent to which costs are likely to be saved and the case is likely to be allocated a fair share of limited Tribunal resources. It may also be relevant to consider the importance of the case in the context of the wider public interest.

<u>The applications in this case</u>

Ground 1: harassment- sexual orientation (against Platform 81 Limited only).

57. The first application relates to harassment in relation to sexual orientation, and this is the comment relating to a sex scene in a film relating to a same sex relationship (a zombie movie or something similar) and a comment that was allegedly made by Caroline Meredith, one of the respondent's main witnesses. The Particulars of Claim assert that Ms Meredith made comments in relation to episode 3 of season of the TV show "The Last of Us." She is alleged to have stated that the story line of two gay men made her "feel uncomfortable during the sex scenes." The claim alleges that the episode in question did not have any sex scenes. It further asserts that Ms Meredith knows that the claimant is

gay because he had previously mentioned being in long-term relationships with men. The claimant felt that these comments were hostile and offensive towards gay people and that this made him feel uneasy.

58. The respondent denies the comment that is alleged to have been made. It denies that any such conversations of this nature were had during the telephone conversation. As such it is not accepted that comments had the necessary purpose or effect within the meaning of section 26 of the Equality Act. In any event it is asserted that the conduct did not amount to harassment as it was not related to the claimant's sexual orientation.

59. I am asked to consider giving a deposit order in relation to this, essentially on the basis not only that there is a dispute about what was said but most importantly that it is difficult to see how that it going to meet the test of being 'related to' the protected characteristic of sexual orientation. The difficulty is that I have to determine this application based on the pleadings and submissions. I have not got access to the witness statements from either party, and I have not heard what either party says about precisely what words were used and, more importantly, the context in which they were used. All of these factual disputes are, as yet, unresolved and are central to the prospects of success of this complaint of harassment.

60. In such circumstances it is very difficult for me to come to a conclusion that there is little reasonable prospect of the alleged comments being proven or that they were said in the context and in the manner alleged by the claimant. Furthermore, it is also very difficult for me to conclude that there is little prospect of the claimant establishing the necessary link to the protected characteristic of sexual orientation. So much will depend, not only on what was actually said, but also on the context in which it happened. Sometimes the manner in which something is said, where it falls within a conversation, or the things that are said before and after the comment in question, give the Tribunal clues as to whether it has the necessary relation to the protected characteristic of sexual orientation. I am not prepared to impose a deposit order there. I think that there is no alternative but to hear the evidence and make a decision based on the facts as they are found by the Tribunal. There is no way to short circuit it. I also note that the comments do not have to be 'because of' sexual orientation. Nor do they have to be because of the claimant's own protected characteristic. The relevant test for section 26 requires a looser connection to the protected characteristic. Is the unwanted conduct 'related to' the protected characteristic of sexual orientation? This makes the factual findings and the context of the alleged comments even more relevant to the prospects of success of this complaint.

61. For all these reasons, this claim should not be the subject of a deposit order. The relevant evidence needs to be heard and assessed and the claimant should not have to overcome an additional financial hurdle in order to have this part of his claim ventilated and determined.

Ground 2: unfair dismissal (against Platform 81 Ltd only)

62. The second aspect of the application was an application for strike out of the unfair dismissal claim, which is a protected disclosure unfair dismissal claim against the first respondent (i.e. Platform 81 Ltd, the company.) That is essentially an application made on the basis that the original claim form/ET1 did not provide sufficient substantive basis for the claim, in terms of a reasonable belief that the information conveyed tended to show breach of a relevant legal obligation. The respondent's representative points out that it was only once this was identified in the respondent's Grounds of Resistance (in defence of the claim) that the claimant was given permission to amend the Particulars of Claim. The respondent says it was only then that any substantive basis for the claim was identified. It is asserted that the legislation was included to fit around the claim. It is further asserted that the late addition of this information suggests that the claimant can have had no genuine belief regarding the disclosure (as required by the whistleblowing legislation) at the time that he made the alleged protected disclosures. I am therefore asked to say that this complaint has no reasonable prospects of success (and should be struck out) or, alternatively, that it has little reasonable prospects of success (and should be the subject of a deposit order).

63. I went back to the pleadings first of all to see if the respondent's argument stacked up. The alleged protected disclosure relates and refers to accessibility issues and the Equality Act 2010 (paragraph 2.10.) and subsequently (in the amended Particulars of Claim paragraph 2.10.3) to the Supply of Goods and Services Act 1982. There are various relevant pages in the papers. At page 16 the Particulars of Claim there do refer to accessibility and the Equality Act 2010. For example, paragraph 1.14 talks about accessibility. The respondent's Grounds of Resistance say that the claimant has failed to identify the relevant legal obligation. An amended Particulars of Claim then followed which fleshed out the position at page 28.

64. Having reflected on this, I see the amendment as adding detail to what was already there (page 16 paragraph 2.7- 2.12). The proposition that it was wholly absent from the pleaded case and has only been added at a later date does not appear to be correct. It is evident that there are differences between the original and the amended Particulars of Claim but the extent of the difference is not as great as the respondent would suggest. It is not accurate to say that the basis for asserting that a protected disclosure was made was absent from the original document. It was present but was supplemented in the later document. In any event, it would be harsh to conclude that the prospects of success must be low because the unamended claim did not have all the detail of the amended claim included in it. In fairness, the Tribunal will have to hear the evidence and decide what information was disclosed, in what circumstances, and will have to consider the evidence from the respective parties as to what the claimant's reasonable beliefs could or could not have been. The respondent is essentially asking me to strike out or order a deposit on the basis of a pleading point rather than the substantive evidence in the case. I do not consider that it would be appropriate for me to strike out and to conclude that there are no reasonable prospects of success essentially on the basis that further information has been added as an amendment. The cause of action is clearly referred to and set out in the original pleadings, it is just elaborated on in the amended document. I add to that the fact that there is case law which deals with those claimants who

may have an honest but incorrect belief about the law when they make a disclosure, and also about how specific their reference to the relevant legal obligation needs to be in order for the disclosure to fall within the scope of the Employment Rights Act 1996 as a protected disclosure. All of this means that the claim may well fail at the final hearing, but *if* the claim *is* going to fail *that* is the stage where it should happen: after all the evidence has been heard, evaluated and the appropriate legal principles applied to the findings of fact. Consequently, I have decided not to strike out this complaint. I cannot say that the claim has no reasonable prospects of success or that it would be appropriate to strike out in response. I cannot conclude (at this preliminary stage) that the application to amend the claim was in some way 'cover' for the absence of the necessary reasonable belief as provided for by the Employment Rights Act.

65. For the same reasons I do not think a deposit order would be appropriate either. I cannot conclude that the complaint has little reasonable prospects of success based on the material and submissions that have been put before me.

Ground 3: detriment treatment on grounds of protected disclosure (against both respondents.)

66. The claimant has agreed to withdraw the complaint of detriment against the first respondent (the company). The detrimental treatment complained of is the termination of the claimant's employment. The claimant now recognises that this is properly to be brought as a claim of automatically unfair dismissal insofar as it is a claim against his employer (section 103A Employment Rights Act 1996.) Hence, he withdraws this aspect of the claim. He recognises that the case of Wicked Vision v Rice [2024] EAT 29 was decided after the last hearing in his case and that, in light of the decision in Rice, he should content himself with the section 103A claim against the limited company.

67. However, he wishes to maintain a claim of protected disclosure detriment (in the form of the decision to terminate employment/dismissal) as against the second respondent, who is an individual respondent rather than the Limited Company that employed him.

68. The respondent cites the decision in Wicked vision v Rice 2024 EAT 29 and argues that it reduces the circumstances in which the Osipov finding is applicable (International Petroleum v Osipov [2019] ICR 655). The respondent argues that the EAT in Rice concluded that it would be odd for Parliament to have intended to bar any claim against an employer based on a detriment which "amounts to dismissal (within the meaning of Part X)" (under s47B(2)(b) of the ERA 1996) while at the same time permitting precisely such a claim to be made under subsection 47B(1B) of the ERA 1996 in addition to a claim under section 103A of the ERA 1996. They argue that, in Osipov the claimant was unable to bring a claim against his employer under section 103A of the Employment Rights Act whereas in the current case the claimant *has* brought a claim under section 103A of the Employment Rights Act 1996. The respondent argues that the claimant should not be permitted to have 'two bites of the cherry' and benefit from the lower evidential threshold required under section 47B(1B), particularly

given the EAT's findings in Rice and as section 47B(2)(b) Employment Rights Act specifically prohibits this.

69. Furthermore the respondent argues that section 47B(1A) (a) refers to any detriment by any act/deliberate failure to act by a co-worker. The respondent argues that Mr Wroe cannot be a co-worker when he is the director/co-owner of the company. The respondents argue that this was also the case in Rice where the dismissing officer was the owner of the company. The EAT identified that where that is the case, the owner's actions in the course of business are those of the company. The fact that there is no distinction between Mr Wroe and the company dilutes the reasonable steps defence. To allow a claim against Mr Wroe would be to allow the claimant to have a second attempt at succeeding should his claim at ground 2 fail. The respondents also point out that in Osipov the company was insolvent and therefore there was no realistic prospect of the claimant collecting any award made under a successful section 103A claim. That is not the case in the current proceedings.

70. The first thing I should say is that the claim against the first respondent (i.e. against the company, the employer) for detriment under section 47B rather than section 103A (unfair dismissal) is withdrawn.

71. The second point to make is that I am not making a final determination on this issue. I am considering whether the claimant's claim has no reasonable prospects of success or, alternatively little prospects of success. Even if the claim proceeds to a final hearing, it may still fail on the merits at the conclusion of that hearing.

72. Osipov is authority for the proposition that there is a distinction between dismissal by an employer within the meaning of the unfair dismissal provisions of the Employment rights Act 1996 (which is excluded from the ambit of detriment claims, section 47B(2) Employment Rights Act) and the detriment of dismissal caused by a co-worker, which is not within the meaning of those provisions (and so which can form the basis of a detriment claim.) It was open to Osipov to bring a claim under s47B(1)(A) against the respondents for subjecting him to the detriment of dismissal, and also to bring a claim of vicarious liability for that act against the employer under s47B(1B).

73. In Rice, the claimant was dismissed by a co-worker, who was also the owner of the respondent employing company. The claimant brought a claim of automatically unfair dismissal section 103A against the employing company. He also alleged that the co-worker had dismissed him (as a detriment) and sought to use this to hold the employing company vicariously liable for the actions of his co worker in dismissing him. The EAT found that he could not do this. He should bring his unfair dismissal claim against the employer company under section 103A. As this claim was available to him, he should not then use the actions of the co-worker to found a detriment claim against the company on the basis of vicarious liability (s47B (2).

74. Neither of the appellate cases is on all fours with Mr Dodsworth's case.

75. In Mr Dodsworth's case the only claim which is pursued for detriment (in the form of dismissal) is that which is pursued against the second respondent in his own name. Looking at the relevant sections in the Employment Rights Act that claim for 'dismissal as detriment' against the second respondent must be being pursued under section 47B(1A). It is a direct claim against the second respondent as an individual to hold him responsible for his actions as an individual. It is not a vicarious liability claim against the first respondent using the provisions at section 47B(1B). It is not an attempt to make a claim against the company using vicarious liability provisions to hold the company responsible for the acts of the director (but using the easier causation tests of a detriment claim which might undermine the stricter 'sole or principal reason' test in s103A.)

76. It is such a vicarious liability claim under section 47B(1B) that the Rice case deals with. It is such a vicarious liability claim which would water down the usual unfair dismissal tests as applied to the company (e.g. looking at the 'sole or principal cause for the dismissal.) Following the decision in Rice there can be no vicarious liability on an employer in respect of a co-worker's imposition of a detriment amounting to dismissal where the employee already has an automatically unfair dismissal against the employer pursuant to section 103A. In Rice the company was *the only respondent to the claim*, the co-worker was not a named respondent and therefore did not have a claim of detriment as dismissal against him for which he would personally be liable to pay compensation. The argument in Rice was whether the company could be held vicariously liable for the detriment that the co-worker subjected the claimant to and therefore have to pay out under a less stringent test than would apply in the direct claim (s103A) against the company as employer.

77. The case is distinguishable from Dodsworth's, both on the facts and also looking at the way the causes of action are pleaded, which sections of the Act are in play, and which parties are respondents to the claim. In Mr Dodsworth's case, the co-worker is a named, individual respondent, *in addition to* the employing company. The direct claim against the employer company is now, properly, pursued as an automatically unfair dismissal claim (s103A). Is Mr Dodsworth *necessarily* precluded from running the claim against his co-worker as a detriment claim, just because there is a claim against the company already?

78. Paragraph 24 of the Rice decision frames the ambit of the issue under consideration: can 47B nevertheless found a claim against an employer arising from a co-worker's act amounting to a dismissal? Paragraph 25 points out that Osipov is authority for the proposition that a claim can be brought against a co-worker under s47B(1A) even where the co-worker's act amounts to dismissal. The judgment then goes on to consider whether the Osipov decision goes any further than the proposition in paragraph 25. Paragraphs 41 and 42 of Rice seek to identify the ratio of the Osipov case. The position of the employer was not part of the ratio of the case. In Rice there was no claim against the co-worker. The detriment claim rested solely on an allegation of vicarious liability for the actions of Mr Strang, who was not a respondent to the claim.

79. In Mr Dodsworth's case against Mr Wroe, section 47B(1B) is irrelevant. Having reviewed the case report in Rice I conclude that paragraph 47 of the judgment there is directed to the argument on vicarious liability. I refer to paragraph 47 because that is the basis referred to (at least in part) in the application by the respondents in Mr Dodsworth's case.

80. So there are two questions that are posed really in this aspect of this case. The first question is: can you claim section 103A automatic unfair dismissal against the employer and at the same time make a section 47B(1A) detriment claim against a co-worker for the same dismissal act? Paragraph 47 of the Rice judgment (which warns against duplicate claims against the employer using 103A and 47B(1B)) informs paragraph 49 of the Rice judgment. In essence, if it is a claim against the employer for the act of dismissal, the claimant must use section 103A. If it is a claim against a co-worker you must use section 47B(1A). I also refer to paragraphs 53 and 54. The Rice decision deals with the vicarious liability point and what claims can be brought against an employer. Timis v Osipov deals with the question: "can you bring a detriment claim (in respect of a dismissal) against a co-worker?" Osipov says that you *can* bring such a claim against a co-worker. Thus, the decision in Rice does not *directly* bind me in relation to Mr Dodsworth's case because the issues in play are different. The issue here is whether Mr Dodsworth can make his claim against his co-worker in addition to his claim against his employer.

81. On that basis I would be reluctant to strike out or order a deposit. It would be inappropriate to resolve this against the claimant at a preliminary hearing. Nor would it be appropriate to say that such an argument has little reasonable prospects of success so that a deposit order should be made. The claimant should be able to bring such an argument to a final hearing and have it finally determined after full argument, based on all the evidence, without a financial impediment being placed in his way. His claim *may* ultimately fail at the final hearing but that does not necessarily mean that it should not be heard and determined at that final hearing stage rather than at a preliminary hearing.

82. The second limb of the respondent's argument relates to whether a director can be a co-worker (and thus liable under s47B(1A). The respondent has made the point that the second respondent is a director of a company, they are effectively one and the same entity so far as decision-making goes. The respondent argues that it would be fictional to call Mr Wroe a co-worker and therefore we should not be looking at this case under section 47B(1A). On the other hand, the claimant says there may well be a factual distinction between the Rice case and this case because in Rice the director was the sole director of the company. In such circumstances, if the company was going to make any decisions or take any actions, it had to be done via the sole director. By contrast, in the current case, Mr Wroe is one director out of four directors in the company. Without hearing the evidence and making findings of fact it is not possible to determine whether that makes for a substantive and meaningful distinction between the two cases. It may or may not be a good argument. It may by that the Tribunal (at the end of the final hearing) decides that there is no meaningful distinction between Mr Wroe and the company but, again, that is a decision which would need to be taken on the basis of the evidence as to how the relationships operated, how the company operates etc. I would need to hear full argument

after full evidence in order to determine whether the co-worker principle actually applies to Mr Wroe (on the facts of this case) or whether the director is, to all intents and purposes, the same as the company. I find myself unable to strike out or order any deposit on that argument at this preliminary hearing. I am not satisfied that the claimant's argument has no/little reasonable prospects of success or that this issue should be determined at a preliminary hearing. It should go forward to be determined at the conclusion of the final hearing.

Ground 4: disability related harassment (against both respondents)

83. Part of the claimant's claim of disability related harassment relates to comments allegedly made by Ms Meredith when the claimant called her during an alleged panic attack. The respondent points out that the comments were allegedly made around June to July 2022 and are therefore almost 8 months out of time. The respondent says that the comments do not form part of a continuing act.

84. The part of the claim that I am being asked to consider is very specifically the allegations about comments made by Caroline Meredith, and it is being said, first of all, that they should be struck out as out of time. They relate to comments made in June/July 2022 for which the normal three month time limit would be up to October 2022. Given the dates of the Early Conciliation period (2 April to 2 May 2023) and the fact that the claim was presented to the Tribunal on 31 May 2023 this part of the claim is seven months or more out of time.

85. The claimant alleges that there are some other acts of disability related harassment after this incident, particularly on 8 March 2023. He says that this gives him a reasonable prospect of arguing that there was a continuing act during this period. Even if he is not successful in establishing a continuing act, he says that the Tribunal will need to consider whether to extend the time limit on a 'just and equitable' basis. He argues that, given the nature of the claimant's medical condition and disability and his desire to 'keep his head down' and 'not rock the boat' with his employer during the period between the Meredith comments and the termination of his employment, he may well be able to establish that it would be just and equitable to extend time and hear the complaint outside the applicable time limit.

86. This part of the application comes before me to look at on the basis of strike out or a deposit. I am not asked to determine the substantive time limit point or to make a final decision whether it would be just and equitable to extend time and hear the late complaint. Hence, the parties have not led evidence on this jurisdictional point and I have not heard evidence from the claimant on the out of time/just and equitable extension issue. In such circumstances I have to examine this issue by taking the claimant's case at its highest and based on the parties' submissions. Does the claimant have reasonable prospects (taking the case at its highest) of establishing either that the complaint was actually presented in time, or that it would be just and equitable to extend time and determine the case on its merits?

87. I have to consider the fact that I have not yet heard the evidence on the just and equitable point or, indeed, in relation to the other aspects of the harassment complaint. The evidence at the final hearing may or may not be sufficient to link

this to the later acts of harassment and bring it 'in time.' I have my reservations about whether it is possible and appropriate to add harassment by one individual together with harassment by another individual (on two different occasions) and conclude that it is a continuing act, but I cannot say that the claimant has no reasonable prospects of success in showing that. Furthermore, I also cannot say that the claimant has no reasonable prospects of success of persuading the Tribunal that it would be just and equitable to extend time without having heard the evidence as to why there was a delay in presenting the claim, hearing that evidence tested in cross examination, and weighing up the balance of prejudice between the parties. The claimant may yet fail in establishing that the time limit should be extended according to the applicable test but, then again, he may not.

88. Likewise, the respondent argues about whether Ms Meredith's comments are related to the disability. However, the context of the claim as pleaded, is that the claimant had the exchange with Caroline Meredith when he was in the process of having a panic attack. Again, the Tribunal will have to make findings of fact in relation to that. It may not look like an obvious case of conduct related to disability given the nature of the words allegedly uttered by Caroline Meredith, but in context of the claimant's alleged panic attack, a Tribunal fully appraised of the evidence might take a different view.

89. On the above basis I do not consider that this part of the case falls below the 'no reasonable prospect of success' or the 'little reasonable prospects of success' test and so I will not be issuing a strike out or a deposit order in relation to that aspect of the case.

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Employment Judge Eeley

Date: 18 June 2024

REASONS SENT TO THE PARTIES ON

1 July 2024

FOR THE TRIBUNAL OFFICE