



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Mullings

v

John Lewis PLC

Heard at: Central London Employment Tribunal (by CVP and telephone)

On: 17 April & 11 July 2024

Before: Employment Judge Brown

Appearances:

For the Claimant:

In Person

For the Respondents:

Mr S Wyeth, Counsel

JUDGMENT AT A PUBLIC PRELIMINARY HEARING

The judgment of the Tribunal is that:

- 1.The Claimant does not need to amend his claim form to pursue allegations 1.2.6 and 1.2.7 as set out by EJ Joffe on 1 February 2024.**
- 2.The Claimant's complaints do not have no reasonable prospects of success. A strike out judgment is not appropriate.**
- 3.Each of the Claimant's allegations of discrimination has little reasonable prospects of success. It is appropriate to order him to pay a deposit as a condition of continuing to advance each of his allegations.**

REASONS

This Hearing

1. A Public Preliminary Hearing was held on 17 April 2024 to consider:

- 1.1.The Respondent's application to strike out the Claimant's claims on the grounds that they have no reasonable prospect of success (rule 37 of the Tribunal Procedure Rules 2013); or, if not;**

- 1.2. Whether any allegation or argument in the claim has little reasonable prospect of success and the claimant should be required to pay a deposit (not exceeding £1000) as a condition of continuing it (rule 39 Tribunal Procedure Rules 2013);
 - 1.3. Whether the Claimant would need to amend his claim form to pursue 2 allegations – below at 1.2.6 and 1.2.7 and whether such amendments should be allowed.
2. At the conclusion, I indicated that I was persuaded to strike out the Claimant's complaints, but that I would reserve my reasons. Having considered the matter further in Chambers, I decided not to issue a strike out judgment and wrote to the parties on 22 May 2024, saying that I intended to issue a deposit order instead. I said that I would give the Claimant an opportunity to give evidence as to his means, before deciding on the amount of the deposit order.
 3. On 29 May 2024, the Respondent replied, pointing out that the correct procedure would be for the parties to be given an opportunity to make further submissions, before judgment was given.
 4. I agreed and, on 6 June 2024, I wrote to the parties, saying that a further public preliminary hearing would be listed, in the circumstances that no written judgment or reasons had yet been given, before I gave judgment on the matters in issue. I asked the Claimant to indicate his dates of unavailability, as the Respondent had already provided its dates. In that letter I also set out, for each head of claim, the matters which I considered relevant to both strike out and deposit order. This was to assist the parties at the resumed hearing.
 5. On 8 June 2024 the Tribunal sent a notice of hearing for a further Public Preliminary Hearing to be held on 11 July 2024. On 3 July 2024 the Claimant wrote to the Tribunal saying that he was not available because of scheduling conflicts. He asked for the hearing to be postponed until November 2024. I did not grant his application for postponement, which he renewed. I gave my reasons in writing.
 6. The hearing proceeded on 11 July 2024. The Claimant had some technical difficulties joining the video hearing and the hearing was conducted by telephone, with the consent of the parties.
 7. There was a bundle of documents for the Public Preliminary Hearing. At the hearing on 17 April 2024, the Claimant contended that relevant evidence was missing from it. He had received documents separately, through a DSAR request. On 17 April, I gave him the opportunity to send any further documents on which he wished to rely to me. He did so and I added all those documents to my bundle. I also told the Claimant to indicate to Mr Wyeth, for the Respondent, what documents he said were missing from the disclosure the Respondent had provided for the hearing. The Claimant did not tell Mr Wyeth that any other documents were missing from disclosure. The Claimant then confirmed that he was content to proceed with the hearing.
 8. Both parties presented skeleton arguments, which I read, and both parties made oral submissions at each hearing.

9. Each party addressed all 3 issues for decision, together.
10. Any facts I have stated in this judgment are for the purposes of this judgment and are not intended to bind the Tribunal which hears the Final Hearing.

Background

11. By a claim form presented on 26 August 2023, the Claimant brought complaints of age, race, sex and religion and belief discrimination against the Respondent. He contended that he had been discriminated against in relation to his application to the Respondent for a job as an Agile Coach.
12. At a Preliminary Hearing before EJ Joffe on 1 February 2024 EJ Joffe identified the issues in the claim as follows:

1. Direct age, sex, race or religion discrimination (Equality Act 2010 section 13)

1.1 The claimant's age group is mid thirties and he compares his treatment with people in their forties and older. The claimant is male and Black British. He says that his facial hair gives rise to a perception that he is Muslim and says that he was treated less favourably on the basis of that perception although is not Muslim.

1.2 Did the respondent do the following things:

1.2.1 Mr D Walker sharing the claimant's name and the fact that he had an interview with the respondent with Mr N Brown, a third party working for a different organisation. This allegation is not disputed;

1.2.2 Mr Walker asking Mr Brown for information from the claimant's private LinkedIn profile and discussing the information with Mr Brown;

1.2.3 On 28 April 2023, Mr Walker making grossly inaccurate interview notes which did not reflect the answers the claimant gave, including what he told Mr Walker about his qualifications;

1.2.4 Mr Walker underscoring the claimant so he did not progress through the recruitment process;

1.2.5 Mr Walker asking Mr Brown to look again at the claimant's LinkedIn profile the day before a decision was made on the claimant's application;

1.2.6 Not carrying out a fair and thorough investigation into the claimant's complaints about these matters and rejecting the claimant's complaints except with regard to the data breach;

1.2.7 Not handling the claimant's complaint confidentially and sharing it beyond the people the claimant had indicated could see it: Ms M Goodin, Lisa [last name uncertain, Mr Walker's manager] the CEO, the chair and the head of DEI.

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

1.4 If so, was it because of age, sex, race or perceived religion?

1.5 Did the respondent's treatment amount to a detriment?

13. The Claimant explained to EJ Joffe why he contends that he was discriminated against in these ways:

"The claimant told me that he believed that the interviewer, Mr Walker, wished to look at his LinkedIn profile in order to ascertain his protected characteristics and thereafter discriminated against him on the basis of one or more of those characteristics. He could not say whether Mr Walker might have been aware of some of those characteristics when he sought to access the profile. In terms of what factors pointed to discrimination, he mentioned this and other allegedly unreasonable behaviour by the respondent, the fact that all of the respondent's agile coaches are white and the fact that the interviewer and complaints investigator are white and older than he is."

14. The Claimant repeated these matters at the Public Preliminary hearing before me. These are the "something more" that he relies on in shifting the burden of proof to the Respondent in his allegations. He also contended that all the Respondent's existing agile coaches are older than he is and that many of them are over 50 years of age.

15. He relies on the fact that the Mr Walker contacted a former colleague who was a "first degree" connection of the Claimant's on Linked In and that Mr Walker viewed the Claimant's more full LinkedIn profile and photograph through a first degree connection.

16. He contends that Mr Walker would not have viewed a female candidates mor full LinkedIn profile and photograph.

17. EJ Joffe had ordered the Respondent to provide the following information to the Claimant and the Tribunal
 - 17.1. The age, race, sex and religion of its existing agile coaches;
 - 17.2. The age, race, sex and religion of:
 - 17.2.1. The applicants for the role of agile coach in the recruitment exercise the claimant participated in;
 - 17.2.2. Those shortlisted for interview in that exercise;
 - 17.2.3. Those offered a second interview in that exercise;
 - 17.2.4. Those offered a role in that exercise.
18. The Respondent had provided most of that information, p146 -149. It did not have information regarding the religion of external candidates.
19. It indicated those candidates whose first and/or second stage interview was conducted by Mr Walker.
20. Out of 117 applicants, male and female, who had a wide range of ages and diverse ethnicities, 17, including the Claimant, were offered first interviews. Of those 17, excluding the Claimant, 7 were white males, 2 were white females, 3 were Indian males, 2 were Indian females, one was a black male, and one was a male 'of other Asian background'.
21. Unlike the Claimant, there were at least 9 white male candidates in their forties and above who were not selected for a first stage interview and a further 9 white males in their thirties who were also not selected for a first stage interview.
22. One of the original successful candidates was a male who was black and aged 33. After initially accepting the position, this candidate later declined it, p148.
23. The Claimant contended that this candidate was not the same age as the Claimant. However, for the purposes of his claim, the Claimant's age group is mid-thirties and he compares his treatment with people in their forties and older. Accordingly, save for the protected characteristic of perceived religion, for which there was no data available for external job applicants, this successful candidate shared all the Claimant's protected characteristics which the Claimant says were the reason he was rejected. Mr Walker and Lisa Howden undertook this candidate's second stage interview.
24. It was not clear whether the Claimant contended that the data in relation to the applicants and successful candidates tended to show that the Respondent had discriminated on the basis of sex, age, or race, in, either, inviting candidates to interview, or deciding to whom to offer the role.
25. However, he did rely on all the existing agile coaches being white. He relies on the average age of the Respondent's coaching cohort being 49 years old and 4 out of 8 being over 50 years old. He also said that the proportion of leadership (level 4, 5 & 6) employees was 80%, 75.3% and 70.9% White.
26. The Claimant said that he did not know whether the other candidates had been treated in the same way as he had – for example, he did not know whether any

other candidates Linked In profiles had been looked at by the Respondent. He said that it was unfair that the Respondent had looked at his LinkedIn profile.

27. From the figures, at the end of the process, 3 candidates were offered the role – 2 white men and one black British man. Both the white men were aged over 40. One of the white men and the black British man initially accepted the job offer but then declined. It therefore appeared that only one white man was appointed to the role, out of the original 17 interviewees.
28. The Claimant contended that the interview transcript which he had prepared showed, of his answers to interview questions, “There was expert level detail in response to the questions Duncan asked the Claimant and yet a score of 4/12 was recorded for 4 questions each marked out of 3.”
29. The Respondent had not agreed the transcript. Nevertheless, Mr Wyeth for the Respondent highlighted a number of occasions during the interview when the interviewer asked follow up questions, apparently attempting to get a more specific answer from the Claimant.
30. From the Claimant’s interview transcript, The interviewer asked, p4, “So can you tell me about the last time you delivered some agile training, sorry, agile training? What was the outcome that you were trying to achieve and what were your key learnings?” The Claimant did not say when he last delivered agile training, but gave a general answer about the type of training he delivers. The interviewer followed up by asking, “Yeah. Can you give me a specific example of one of those bits of training then? What was it like? And what outcome were you trying to achieve?” After the Claimant again answered with a general description of a problem which needed to be solved at an NHS Trust, the interviewer asked another follow up question, seeking a specific detail from specific training, “ Yeah. And did you, can you talk to me specifically about what you did with that training? Did you develop the training?” The Claimant’s answer was again directed to general problems and general solutions.
31. The Claimant’s transcript also recorded the interviewer asking the Claimant a question “Imagine that you are supporting the kickoff of a new business team working in the John Lewis Partnership, and they're going to be working in an Agile way. ...”. After the Claimant had given his answer, the interviewer again asked a follow-up question, “Yeah. So if we were to expand on that, and let's say the team are new, they've not actually worked together before. How would you help establish them? Because I mean, you mentioned about a sprint zero, observe, see what they're doing. But this is a brand new team. They've just formed, day one, they've never worked together. How would you approach that?”
32. The following additional background was relevant:
33. The Claimant applied for the role of Agile Coach with the Respondent on 18 April 2023.
34. On 25 April 2023 the Claimant was invited to a first stage interview with Duncan Walker, Agile Coach, conducted by video call on 28 April 2023.

35. The Respondent told the Claimant that his application had been unsuccessful on 3 May 2023. On 4 May 2023, the Claimant requested Mr Walker's written interview feedback and justification for rejecting his application. The Claimant was given the interview notes that day. p94-100.
36. The interview notes were 6 pages long and covered each question, with notes of the Claimant's answers and scores for each question from 0 – 3, with 4 positive indicators and 4 negative indicators specified, for assessing answers against.
37. On question 2, the notes recorded, "**ASKED: Can you be more specific.** NHS trust, losing money not enough coders on the team. Repayment process, too many mistakes, too many possibilities. Train as many people as you can, if they leave, train the next cohort. Raised the headcount by 50%. **ASKED : What did you specifically do** Fixed mindset based on fear, train them well, they will stay.

Limited mention of agile training or what he specifically did.

In Person, interview, miro

Did not talk about what he brought to the training, lots of we, you, no I." p99.

38. On Question 4, the notes recorded, amongst other things,

"Observe how the team operate, sprint zero, see what they are doing

Collaboration, how could your role be better

Increase methods to increase the capability, autonomy

Maybe reshape the size of the team, 20 people down to smaller teams

Switch through the stances, teacher, mentor, Coach & facilitate

Who is the customer, build contracting, what we expect from you, what they expect from me.

Team formed day 1 no prior working : how would approach that", p101.

39. On 4 May 2023 the Claimant emailed the Respondent alleging a data breach and submitted a data protection complaint that Mr Walker had told an ex-colleague, now working at ASOS, Nicolas Brown, that he was interviewing the Claimant, because Mr Walker had seen that the Claimant was a first connection to Mr Brown on LinkedIn, p156-157. The Claimant asserted that this "...surely contributed to biasing [sic] my chances of securing this Agile Coach position." The Claimant also alleged that a number of the Respondent's coaches and developers had viewed his profile that week. He said that, "the implications of this are that what I look like seems to be more important than who I am as a person, what I know as an agilist [sic] and how I can deliver value to the partnership as a professional", p157.
40. The Claimant and various senior employees of the Respondent exchanged emails over the course of about a month. The Respondent appointed Mr Angus Tozer, Acting Head of Process Excellence, to look into the complaint. He sent a response to the Claimant's complaint about the alleged data breach on 12 May 2023, p 125-126). Mr Tozer also identified concerns which the Claimant had raised in previous correspondence and invited the Claimant to provide any additional information or evidence by 16 May 2023. On 31 May 2023 Mr Tozer sent an email to the Claimant, responding to ten questions set out in bullet form in the Claimant's 17 May 2023 reply email, p122-123.

41. The Claimant reiterated his concerns in further communications. The Respondent's Director of People Operations, Helen Rhodes, wrote to the Claimant on 23 June 2023, saying that there was nothing further the Respondent could add to the responses already provided, p 171.

Law - Strike Out – No Reasonable Prospects of Success

42. An Employment Judge also has power to strike out a claim on the ground that it is scandalous, vexatious or has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)(a)*.

43. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said: "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recensions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

44. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46.

45. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

46. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

47. In *Madarassy v Nomura International plc* 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where the Claimant proves a difference in protected characteristic and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

48. The EAT restated in *London Borough Of Islington v Ladele* [2009] IRLR 15 at [40] that it may be that the employee has treated the claimant unreasonably. "That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson said in *Zafar v Glasgow City Council*

[1997] IRLR 229: 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Deposit Order

49. If, at a Preliminary Hearing, an Employment Judge considers that and specific allegation or argument in a claim or response has little reasonable prospect of success, he or she may make an order requiring that party to pay a deposit not exceeding £1,000 as a condition of continuing to advance the allegation or argument, *r39(1) ET Rules of Procedure 2013*.
50. The Tribunal is required to make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to such information into account in deciding the amount of the deposit, *r39(2)*.
51. When determining whether to make a deposit order, a Tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward, *Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07, [2007] All ER (D) 187 (Nov). Although, as Elias J pointed out in that case, the less rigorous test for making a deposit order allows a tribunal greater leeway to take such a course than would be permissible under the test of no reasonable prospect of success, the Tribunal 'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (para 27).
52. In *Hemdan v Ishmail and anor* [2017] ICR 486, EAT, Simler J observed that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim fails. It does, however, have to be one with which the claimant is capable of complying.

Decision: Amendment

53. I decided that the Claimant did not need to amend his claim to include allegations 6 and 7. In his claim form he had said,

"I have tried to handle this informally with JLP both by sharing what happened during the hiring process, asking for pertinent information and later referring this to ACAS. I have had nothing by way of helpful commitment from JLP to take this seriously despite finding in my subject access request that recommendations not to engage with me in earnest were shared internally (details redacted). My complaint was not assigned an identifier, leaving me with little piece [sic] of mind it was ever properly logged.

Their hiring processes and policies were not shared despite numerous requests for JLP to do so. It was left to me to prove a negative without any reasonable disclosure from JLP."

54. I decided that the Claimant had pleaded the facts of an allegedly superficial and unsatisfactory investigation. That was essentially the factual allegation in allegation 6. He had ticked the boxes age, race, religion or belief and sex on his claim form.
55. I also decided that the Claimant's words, "I have had nothing by way of helpful commitment from JLP to take this seriously despite finding in my subject access request that recommendations not to engage with me in earnest were shared internally (details redacted)", pleaded facts of an alleged failure to handle his complaint confidentially; in that the Claimant is complaining about the handling of his complaint and, in that context, he is alleging that instructions were given within the Respondent not to engage with the Claimant. Allegation 7, likewise, complains that the Claimant's complaint was not handled confidentially, but was shared beyond the appropriate people.

Decision on Strike Out / Deposit Order

56. For the purposes of the strike out application, the Respondent contended that I could come to a view on the likelihood of the Claimant being able to establish the contested facts. However, I considered that there were disputes of fact which could only be fairly decided after hearing the evidence – for example, the reason contacted Mr Brown; what Mr Brown and Mr Walker said to each other; whether Mr Walker had made grossly inaccurate interview notes which did not reflect the answers the Claimant gave; whether Mr Walker underscored the Claimant; and whether the Respondent had carried out a thorough investigation.
57. While I did have many of the relevant documents, I had not heard evidence witness evidence on these matters. It was not possible for me to resolve those disputes of fact at a preliminary hearing. I therefore proceeded on the basis that the allegations of fact were proven.
58. I considered the allegations individually and together, as well as considering the whole factual matrix relied upon by the Claimant, including statistics.
59. I decided that the test for strike out had not been met.
60. The approach to considering deposit orders is somewhat different; I considered a possible deposit order in the light of the evidence, on the basis of which the Claimant had agreed to proceed.
61. All the allegations were of sex, race, perceived religion and age discrimination.
62. I considered allegations 1 – 5 together, in that they all concerned Mr Walker's actions and decision-making in relation to the Claimant's interview and its outcome. The allegations were that the Respondent had treated the Claimant less favourably than a comparator by:

1.2.1 Mr D Walker sharing the claimant's name and the fact that he had an interview with the respondent with Mr N Brown, a third party working for a different organisation. This allegation is not disputed;

1.2.2 Mr Walker asking Mr Brown for information from the claimant's private LinkedIn profile and discussing the information with Mr Brown; disputed

1.2.3 On 28 April 2023, Mr Walker making grossly inaccurate interview notes which did not reflect the answers the claimant gave, including what he told Mr Walker about his qualifications; *disputed*

1.2.4 Mr Walker underscoring the claimant so he did not progress through the recruitment process; *disputed*

1.2.5 Mr Walker asking Mr Brown to look again at the claimant's LinkedIn profile the day before a decision was made on the claimant's application; *disputed*

Decision: No Strike Out: Age and Race

63. Assuming that the facts of all these allegations were established, I considered that it could not be said that there was no reasonable prospect of success on these race and age discrimination complaints. Along with the statistics – which showed that all the existing trainers are white and most were of an older age group – and that the one person who was recruited from the interview was white and of an older age group – I decided that, together, those factual allegations, if proven, and the statistics, could reasonably be considered to shift the burden of proof to the Respondent, to show that age and race were not the reasons for that treatment.
64. If the burden of proof shifted on those allegations, I also considered that there was a reasonable prospect that the Tribunal would conclude that the burden of proof also shifted on the other allegations against Mr Walker about investigating LinkedIn and discussing the Claimant with Mr N Brown.

No Strike Out: Interview: Religion

65. In addition, I decided that a Tribunal would be unlikely decide that the burden of proof had not shifted in relation to religion because the Respondent does not keep statistics on the religion of external candidates. It might note that the *Equality and Human Rights Commission: Code of Practice on Employment (2011) paragraph 18.25* recommends that all employers carry out equality monitoring. Paragraph 18.24 describes equality monitoring as "... the process that employers use to collect, store and analyse data about the protected characteristics of job applicants and workers." A Tribunal could draw an adverse inference from the Respondent's failure to monitor collect data regarding applicants' religion.
66. The Respondent contended that the Code was not relevant because the Claimant's case related to perceived religion, not actual religion. I considered that the Tribunal could still draw inferences from the absence of statistics on how the Respondent actually treated candidates of different religions.

No Strike Out: Interview: Sex

67. Regarding the Claimant's sex discrimination claim, the Claimant contended only that Mr Walker would have been unlikely to have looked at a female candidate's private LinkedIn profile. He did not refer to the statistics.
68. I had no evidence about whether Mr Walker did in fact look at any other candidate's private profile. Assuming that Mr Walker would not have looked at a female candidate's profile and therefore would not have discussed them (which I assume for the purpose of considering strike out), I decided that a Tribunal could reasonably decide that that was less favourable treatment of the Claimant and that

the burden of proof had shifted to the Respondent. A Tribunal could consider that looking at a profile and discussing them with another person could amount to an additional assessment which the female candidates did not have to go through.

69. Again, if the burden of proof shifted in the sex discrimination complaints on those allegations, I considered that the Tribunal could also reasonably decide that the burden of proof shifted on the 'interview scoring' and 'interview notes' sex discrimination allegations against Mr Walker.

Investigation: No Strike Out

70. *1.2.6 Not carrying out a fair and thorough investigation into the claimant's complaints about these matters and rejecting the claimant's complaints except with regard to the data breach;*

71. *1.2.7 Not handling the claimant's complaint confidentially and sharing it beyond the people the claimant had indicated could see it: Ms M Goodin, Lisa [last name uncertain, Mr Walker's manager] the CEO, the chair and the head of DEI.*

72. Regarding allegations 6 and 7, again, I assumed that the Claimant succeeded in establishing the facts on which he relied.

73. I noted that *Equality and Human Rights Commission: Code of Practice on Employment (2011)* paragraphs 17.94, 17.96 and 17.97 could be breached if those facts were established: "[17.94] ... Where a grievance involves allegations of discrimination or harassment, it must be taken seriously and investigated promptly and not dismissed as 'over-sensitivity' on the part of the worker. [17.96] It is strongly recommended that employers properly investigate any complaints of discrimination. ... [17.97] "Whether or not the complaint of discrimination is upheld, raising it in good faith is a 'protected act'...". That could give rise to an adverse inference against the Respondent.

74. I therefore decided that there were reasonable prospects of success in these allegations.

75. I therefore decided that there were reasonable prospects of success in all the sex, race, age and religion discrimination allegations.

Decision: Deposit Order

76. However, I also considered that the Claimant had little reasonable prospects of success in each of his allegations in respect of each of the protected characteristics, for the following reasons:

77. *1.2.1 Mr D Walker sharing the claimant's name and the fact that he had an interview with the respondent with Mr N Brown, a third party working for a different organisation. This allegation is not disputed;*

78. I considered there was little reasonable prospect of the Tribunal concluding that Mr Walker shared the Claimant's name and application with Mr Brown because of race, sex, age or religion, rather than because the Claimant had happened to

name Mr Brown in his LinkedIn profile and Mr Walker knew Mr Brown. On the face of it, Mr Walker's contact was prompted by the Claimant naming Mr Brown, as someone he had worked with. Further, I considered that there was little reasonable prospect of the Claimant establishing that this allegation amounted to anything more than a difference in treatment and a difference in protected characteristic. The Claimant's contention, that looking at the Claimant's photograph and thereby seeing his protected characteristics, was the 'something more' which indicated discrimination, was extremely weak. Mr Walker was going to see the Claimant in interview anyway. The statistics for the interview outcomes, in fact, indicated that age and race and sex were not the reason (see below paragraph 87) – and so would not constitute 'something more' indicating discrimination. Accordingly, there was little reasonable prospect of the burden of proof shifting to the Respondent to disprove discrimination, both on this allegation and the other allegations in relation to the LinkedIn profile.

79. *1.2.2 Mr Walker asking Mr Brown for information from the claimant's private LinkedIn profile and discussing the information with Mr Brown; disputed*

80. I considered there were little reasonable prospects of the Tribunal concluding that Mr Walker did this because of race, sex, age or religion. The Claimant contended that Mr Walker did this because he wanted to view his profile picture, to identify his race. Given that Mr Walker was going to interview the Claimant by video, he would have obtained that information during the interview, so there was no need to look at his photograph to ascertain his race, or his perceived religion, or his sex. Likewise, there would have been no need to do this to establish his age as Mr Walker already had this information.

81. *1.2.3 On 28 April 2023, Mr Walker making grossly inaccurate interview notes which did not reflect the answers the claimant gave, including what he told Mr Walker about his qualifications; disputed*

82. From the contemporaneous documents, on which the Claimant relies, the Claimant's recording and the interview notes have conspicuous similarities. For example, both the recording and the notes show the Claimant being prompted on a number of occasions. On question 4, the recording and the notes both record the Claimant referring to "sprint zero" and the Claimant being prompted to address the scenario of a team being entirely new. The notes and transcript appear broadly similar.

83. The notes also appear to have been recorded in a carefully structured scoring system.

84. I therefore considered that there was little reasonable prospect of the Claimant establishing the factual allegation that the interview notes were grossly inaccurate. While the notes are clearly "notes", so they are much less detailed than an audio recording, I considered that it was extremely unlikely that a Tribunal would consider the difference in detail to amount to 'inaccuracy' – a note taker will necessarily take much more brief notes than a recording.

85. *1.2.4 Mr Walker underscoring the claimant so he did not progress through the recruitment process; disputed*

86. I considered there were little reasonable prospects of success of the Tribunal concluding that Mr Walker underscored the Claimant. From the Claimant's own recording, he did not answer 2 of the questions and had to be prompted by Mr Walker to do so. Even when prompted, he talked in generalities and did not address the specific question he had been asked. From the Claimant's own recording, an objective observer was likely to conclude that it was not clear from the Claimant's answers that he had actually delivered Agile training, as opposed to knowing the broad theory of Agile training. A Tribunal is very likely to find that the Claimant's answers did not merit higher scores than Mr Walker gave them.
87. *Further, with regard to both allegation 1.2.3 and 1.2.4, the statistics from the outcome of the interview process do not point to age or race or sex being the reason the Claimant was rejected. A candidate who shared all those characteristics with the Claimant was offered the role. Very many candidates with different protected characteristics were neither offered an interview nor given the role. I considered that a Tribunal was very likely to find that the statistics from the interview did not provide evidence of discrimination. The statistics would not lead to the burden of proof shifting to the Respondent to disprove discrimination in the interview process.*
88. *1.2.5 Mr Walker asking Mr Brown to look again at the claimant's LinkedIn profile the day before a decision was made on the claimant's application; disputed.*
89. This allegation is essentially parasitic on allegations 1.2.1 and 1.2.2. For the same reasons as I have already given in respect of those allegations, this allegation of discrimination has little reasonable prospects of success.
90. *1.2.6 Not carrying out a fair and thorough investigation into the claimant's complaints about these matters and rejecting the claimant's complaints except with regard to the data breach; disputed*
91. *1.2.7 Not handling the claimant's complaint confidentially and sharing it beyond the people the claimant had indicated could see it: Ms M Goodin, Lisa [last name uncertain, Mr Walker's manager] the CEO, the chair and the head of DEI. Disputed;*
92. On the contemporaneous records, the Respondent appears to have engaged with the Claimant at length in respect of his complaints, including providing him with his interview notes. I considered that there was little reasonable prospect of a Tribunal finding that the Respondent had treated the Claimant less favourably than a comparator. The Claimant has not put forward any evidence that a comparator interviewee was, or would have been, given a more thorough investigation, or a different grievance outcome. Allegation 1.2.6 therefore has little reasonable prospects of success.
93. I considered that there was little reasonable prospect of the Claimant establishing that the Respondent treated the Claimant differently than it would have treated a comparator by sharing the Claimant's grievance with people other than a group dictated by the Claimant. A Respondent will necessarily have to share the allegations in a grievance with anyone who is likely to have relevant evidence to

give, and not just with the people who the Claimant has specified. Allegation 1.2.7 therefore has little reasonable prospects of success.

94. I decided that it was appropriate to order the Claimant to pay a deposit as a condition of continuing to advance each of his allegations of discrimination.

The Claimant's Means

95. I heard evidence from the Claimant of his means, before deciding the amount of the deposit orders.

96. On the Claimant's evidence, he is currently earning £800 as a self-employed 121 personal coach and receives universal credit of £832 a month.

97. The Claimant has not completed his 2023-2024 accounts. In the year to April 2023 he earned between £20,000 and £30,000. He is actively applying for jobs.

98. He lives on his own in a housing association rental property and pays £600 in rent each month. He does not know the amount of his monthly gas and electricity bills. His mobile phone bill, on a SIM only basis, is £18 month. He believes that his Council Tax bill is covered while he is on universal credit. He does not drive and does not own a vehicle. The Claimant spend £100 on food each month and £200 each quarter on clothes and shoes. He has no dependents and no savings. – none

99. The Claimant has £19,000 debts but these are currently not being recovered.

100. The Claimant contended that a total sum of £250 for the deposit orders was appropriate.

101. I decided that the Claimant has little means and substantial debts. He is currently receiving about £1,600 a month and spending at least £800, and probably at least £1,000, taking into account likely payments for gas electricity and water.

102. He does not have access to other sums.

Amount of the Deposit Orders

103. I decided that it would be appropriate to order the Claimant to pay a total of up to £500 by way of total deposit orders. Allocating an equal amount to each complaint which has little prospect of success, the Claimant is ordered to pay £70 each as a condition of continuing to advance each of the factual allegations in his claim as allegations of discrimination.

104. It is very important that the Claimant thinks very carefully before continuing with these claims.

105. As I explained to the Claimant at the hearing, the effect of a deposit order is to put the Claimant at risk of having to pay the Respondent's costs if his claims fail for the same reasons as the deposit orders were made.

106. The amount of costs is likely to be high. He may be paying the costs for a very long time. That could have a substantial impact on his standard of living for years to come. It would also be likely to affect his credit rating and his ability to borrow.
107. I set the level of the deposit orders at a level which the Claimant can afford, but which also requires him to think seriously about continuing with claims which I have explained to him, in this judgment, have little prospect of success.

Employment Judge **Brown**
Date: 11 July 2024

SENT to the PARTIES ON

18 July 2024

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FOR THE TRIBUNAL OFFICE