EMPLOYMENT TRIBUNALS

Claimant: Matthew Ivey

Respondent: Tata Communications (UK) Limited

Heard at: by CVP from the Central London Tribunal **On:** 3 July 2024 at 10am

Before: Employment Judge Woodhead (sitting alone)

Appearances

For the Claimant: Mr N Bidnell-Edwards (Counsel)

For the Respondent: Mr A Smith (Counsel)

PRELIMINARY HEARING IN PUBLIC JUDGMENT

1. The complaint that the Claimant was subjected to Detriment 5 (as defined below) for making a protected disclosure is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

2. The complaint that the Claimant was victimised by being subjected to Detriment 5 (as defined below) is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

3. Detriment 5 referred to above is alleged to be: "The Claimant's DSAR made on 28 July 2023 not being replied to completely until 7 November 2023" ("**Detriment 5**").

THE ISSUES

4. The Claimant brings claims of:

   4.1 direct race discrimination (Section 13 EqA);

   4.2 discrimination arising from disability (Section 15 EqA);

   4.3 failures to make reasonable adjustments (Sections 20 and 21 EqA);

   4.4 victimisation (Section 27 EqA);

4.5 whistleblowing detriment (Section 47B Employment Rights Act 1996 ("**ERA**"));

4.6 automatically unfair dismissal, by reason of whistleblowing (Section 103A ERA); and

4.7 'ordinary' unfair dismissal (Section 94 ERA).

THE HEARING

5. This hearing had been listed for 1 day to be heard in public. The Respondent asked for the hearing to be reduced in length to 3 hours and that request was accepted. Three hours was patently too little time.

6. I was provided with:

6.1 A bundle of 163 pages

6.2 Respondent skeleton arguments of 16 pages

6.3 A Respondent bundle of authorities – 382 pages

6.4 Claimant skeleton arguments – 5 pages

6.5 A joint case management agenda

7. I was asked to determine applications by the Respondent for strike out/deposit orders ("**the Applications**").

8. There was insufficient time for me to make decisions on the Applications and so this decision is promulgated with reasons after the hearing.

9. In determining the Applications I have heard no evidence and I make no findings of fact.

A. The Law

10. The parties were for the most part in agreement on the law applicable to strike out and deposit orders and I was referred to and took into account:

10.1 Rule 37 and Rule 39 of the Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237 as amended

10.2 Cox v Adecco & Ors [2021] ICR 1307 at [28 et seq];

10.3 Eszias v North Glamorgan NHS Trust [2007] IRLR 603 at [26];

10.4 ABN AMRO Management Services Ltd v Hogben [2009] UKEAT/0266/09/DM at [15];

10.5 Patel v Lloyds Pharmacy Ltd [2013] UKEAT/0418/12 at [19-21];

10.6 Chandhok & another v Tirkey [2015] IRLR 195 at [20];

10.7 Mechkarov v Citibank NA [2016] ICR 1121 at [14];

10.8 Ahir v British Airways [2017] EWCA Civ 1392 at [22-26];

10.9 Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 at [77]: and

10.10 Malik v Birmingham City Council & another [2019] UKEAT/0027/19/BA, at [29-34].

10.11 Rule 39

10.12 Hemdan v Ishmail & another [2017] IRLR 228 [10]

10.13 Van Rensburg v The Royal Borough of Kingston Upon Thames [2007] UKEAT/0096/07 [27]

10.14 Sami v Nanoavionics UK Ltd & Others [2022] EAT 72, [25]:

10.15 Rojha v Zinc Media Group plc [2023] EAT 39, at [26-32].

11. As regards strike out and as per Malilk (29 – 34):

> *29. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides:*
>
> > ***"Striking out***
> >
> > ***37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—***
> >
> > ***(a) that it is scandalous or vexatious or has no reasonable prospect of success..."***
>
> *30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121, which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.*
>
> *31. In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*
>
> > ***(1) only in the clearest case should a discrimination claim be struck out;***

> ***(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;***
>
> ***(3) the Claimant's case must ordinarily be taken at its highest;***
>
> ***(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and***
>
> ***(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."***

32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."

33. A similar point was made in the case of ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09, where it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in Meek v City of Birmingham District Council [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.

34. I should also refer here to the Decision of the Court of Appeal in Madarassy v Nomura International Plc [2007] EWCA Civ 33 because much has been submitted about the need for a discrimination complaint to contain "something more" than just a difference in status and a difference in treatment. Mummery LJ said as follows at paragraphs 54 to 57:

> *"54.I am unable to agree with Mr Allen's contention that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by Igen v. Wong nor by any of the later cases in this court and in the Employment Appeal Tribunal. It was not accepted by the Employment Appeal Tribunal in the above mentioned cases of Network Rail Infrastructure ...paragraph 15) and Fernandez (paragraphs 23 and 24) and by the Court of Appeal in Fox (paragraphs 9-18 see above).*
>
> *55.In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in Igen v. Wong.*

> *‘28. …..The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could have committed" such act.*
>
> *29. The relevant act is, in a race discrimination case …., that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example, in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities. [The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.]’*

56. The court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57."Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.”

12. A discrimination or whistleblowing claim may be struck out (although it is rare) if, for example:

    12.1 there are no pleaded facts indicative of, or which could plausibly establish a prima facie case (ABN Amro);

    12.2 a claim is based on "*really no more than an assertion of a difference of treatment and a difference of protected characteristic which…only indicate a possibility of discrimination*" (Chandhok).

    12.3 what is asserted by the Claimant is so inherently implausible, and unsupported by any contemporaneous material, that it has no reasonable prospect of success (Ahir).

13. As regards deposit orders, Rule 39 provides:

> *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*
>
> *(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
>
> *(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.*
>
> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*
>
> *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
>
> *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.*
>
> *(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

14. The making of a deposit order is a less draconian sanction than a strike out. The test of "little reasonable prospect" is less rigorous than "no reasonable prospect" and a Tribunal therefore has greater leeway to make such an order. It does not, however, follow that a Tribunal will necessarily make a deposit order in relation to an allegation with little reasonable prospect of success – it must exercise its discretion to do so in accordance with the overriding objective to deal with cases justly and fairly (Hemdan). In Hemdan, Simler P gave the following guidance:

> *"The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis."*

15. As per the EAT in Van Rensburg:

> *"It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."*

16. Before making any decision relating to the deposit order, the Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit, and must take this into account in fixing the level of the deposit (Rule 39(2)).

B. Claimant's means

17. I was provided with a witness statement setting out details of the Claimant's means in respect of a deposit order (162-163).

18. The Respondent submitted that the Claimant had not explained the basis on which he has been funding, and continues to fund, his legal representation in these proceedings.

C. The alleged protected disclosure

19. The Respondent said that the Claimant's remaining whistleblowing complaints (some having been dismissed on withdrawal at this hearing) should be struck out or subject to a deposit order because the Claimant had no or little reasonable prospects of success in establishing that the Grievance amounted to a protected disclosure. It said, amongst other things, that even if the Claimant could establish that in submitting the Grievance, he made disclosures of information which in his view tended to show that he had been treated unlawfully by the Respondent, and that such a belief was reasonably held (which is denied), there is no (or alternatively little) reasonable prospect of his establishing that the public interest component of the statutory test is satisfied – which comprises both a subjective and objective limb.

20. At paragraph 32 of the particulars of claim the Claimant says:

> "*The Claimant had, and continues to have a reasonable belief that his disclosure was made in the public interest in that it could affect the treatment of employees at the time of the disclosure, and afterwards to extend to an unlimited number of individuals. The Claimant had referred to a lack of adjustments for disabled staff, or care for employee's health and safety; he had alleged that i) he had disabilities (Paragraphs 9 to 11 of the 28 July 2023 Grievance); and ii) that he had suffered Disability and Race Discrimination (Paragraph 23 and following of the 28 July 2023 Grievance).*"

21. I remind myself of the provisions of Section 43B ERA which include:

> *43B Disclosures qualifying for protection*
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be damaged, or*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

22. I think it is likely that a Tribunal determining this claim at a final merits hearing will find that the Grievance predominantly raises concerns personal to the Claimant and his circumstances. There is of course a danger in lifting phrases out of a document and taking them out of the context in which they sit but I note that the Claimant makes comments such as:

    22.1 "*toxic working environment and unreasonable targets";*

    22.2 *"unrealistic and unreasonable targets";*

    22.3 *"As it stands today the onus is placed on the employee to identify primary*

coaching needs and goal setting. For someone suffering with their mental health in this kind of dysfunctional environment is unduly oppressive and unhelpful."

22.4 *"I find this sort of discriminatory practice abhorrent. It is unwanted, unnecessary, and undignified. I also find it intimidating and highly oppressive. The environment has felt highly nepotistic since arriving at The Company. This is a view shared by several of my current and former colleagues."*

22.5 *"I am asking the management to observe Chapter 18 of the Statutory Code of Practice on Employment, and undertake training amongst the workforce to ensure that discriminatory acts are not inflicted upon my person, or any other person at all. This may require action beyond the online training that is clearly not having the desired effect on day-to-day business operations."*

23. It may be that at trial the Claimant is not successful in establishing that the Grievance in fact discloses information of the required nature (rather than just making an allegation) and he may fail to establish that he had a reasonable belief that the disclosure of such information was made in the public interest. However, I do not consider that he has no reasonable prospects of establishing that (and so do not grant the strike out application) and do not consider that he has little reasonable prospects of establishing that (and so do not make a deposit order).

24. In any event, whilst I accept the Respondent's contention that there is no rule that strike out or a deposit order should never be granted in respect of Section 43B ERA, in this claim I consider that the question of whether the grievance constituted a protected disclosure is one that at a Tribunal should determine having heard evidence.

D. The alleged protected disclosure/protected act and cause of Detriments 1 and 5

Detriment 1: His grievance being rejected on 10 October 2023;

25. The Respondent relied on oral submissions here which I summarise as follows:

25.1 It does not make sense that the Respondent would subject the Claimant to the detriment of rejecting the Claimant's grievance because the Claimant had raised the grievance.

25.2 This calls into question whether the Claimant is saying that had he not said specific things in the Grievance then the Grievance would have been upheld.

25.3 If that is the suggestion then it is illogical.

25.4 This is the type of case where the Claimant pleads out a long list of detriments / complaints and then repeats them under a long set of heads of claim without thought to what they are actually alleging. As such it is misconceived and should go no further.

26. The Claimant said in written submissions that this could not be determined without evidence being heard, and should proceed to trial. I summarise the Claimant's oral submissions as follows:

27. Although we have the grievance outcome and the cover email sending it (108-109, 111-115), it remained unclear how the Respondent came to reach its conclusions on the grievance and that could only be determined with the hearing of evidence.

    27.1 The grievance elaborated at great length on the impact the whole situation had had on the Claimant's health, and his ongoing treatments and the Claimant told the investigators that he had notified his line manager about the impacts.

    27.2 The investigator probed by asking whether the Claimant had ever requested specific adjustments to his role or his workload or targets based on his health concerns and the Complainant admitted that he never did so.

    27.3 The grievance outcome does not set out that the heart condition is a disability and engages obligations under the EqA and erroneously suggests that the onus was on the Claimant to suggest or ask for adjustments. This displayed and embarrassing misunderstanding or ignorance of the obligations of the Respondent under the EqA (the onus not being on the employee to suggest adjustments).

    27.4 The Respondent was exceedingly dismissive of the grievance where it said:

        The fact that there is hardly any written documentation of the Complainant communicating his own health situation, as well as that of his spouse, and the limited recollection of AR and BY, makes it impossible to assess whether the Company failed in its duty of care. However, the Complainant himself admitted that he never explicitly requested any reasonable adjustments to be implemented.

    27.5 This was a nonsensical conclusion as the Claimant had had absences while undergoing heart surgery.

    27.6 Exactly how the outcome came to be written is a matter that would have to be determined at a hearing and the Claimant asserts that it is influenced by the fact that the Claimant had made a protected disclosure.

28. I do not consider that, on the papers, the Claimant's complaints that his grievance was rejected on 10 October 2023 because/on the grounds that he had raised his grievance (which is said to amount to unlawful victimisation under Section 27 EqA and detriment under Section 47B ERA) appear to have good prospects of success. The conclusions on the Claimant's grievance appear to be reasoned. I nonetheless accept the Claimant's submissions that it could not be said that these complaints of victimisation or whistleblowing detriment have no reasonable prospects of success. I do not therefore strike out those complaints.

29. Whilst these complaints border on having little reasonable prospect of success because the grievance outcome does appear to be reasoned and not 'nonsensical' (as the Claimant describes it), I nonetheless do not consider that it has little reasonable prospects of success and conclude that it should not be the subject of a deposit order. It is a claim that would be better determined by a Tribunal hearing evidence and I do not consider that the Claimant should be subject to a deposit order as a condition of having these complaints determined.

Detriment 5: The Claimant's DSAR made on 28 July 2023 not being replied to completely until 7 November 2023

30. The Respondent relied on oral submissions here. It said that this was a bizarre complaint and questioned on what basis the Claimant was contending that the Respondent had retaliated against him for having raised a grievance by delaying its response to the separate statutory process that applies to date subject access requests (DSAR). It pointed to paragraph 28 of the grounds of resistance at page 46 of the bundle. It said that:

    30.1 the DSAR in question was a complex request to which a time limit of 3 calendar months applied.

    30.2 the DSAR in question was submitted on 28 July 2023 so the normal 3 month time limit ended on 28 October 2023 but because that was a Saturday the Respondent was not legally bound to reply until Monday 30 October 2023;

    30.3 the Respondent did respond to the DSAR on 30 October 2023;

    30.4 the Respondent erroneously omitted documents from the DSAR but then provided the missing documents promptly on 7 November 2023;

    30.5 the Claimant could not therefore seriously contend that, had he not raised a grievance, the documents that were provided to him on 7 November 2023 would have been provided a week earlier on 30 October 2023.

    30.6 The allegation was therefore fanciful with respect to there being any causative link between the delay of 7 days or there having in fact been any detriment.

31. In written submissions the Claimant said that this could not be determined without evidence being heard, and should proceed to trial.

32. In oral submissions the Claimant said the DSAR was not responded to for some time and the Claimant may well be able to show that this was because of apprehensiveness caused by the Claimant's protected disclosure/grievance in which the Claimant highlighted failings by the Respondent to which the Respondent would be sensitive. This was prima facie unreasonable conduct for which there was no obvious explanation and the matter was therefore a triable issue.

33. DSAR's often do take a long time to deal, are frequently only complied with on the final deadline and documents are often missed in error. Taking the

complaints at their highest the Claimant goes no further than pointing to circumstances which I consider to be entirely ordinary and usual. He goes no further than making a bare assertion that those ordinary events were because of his protected disclosure/protected act. I accept the Respondent's submissions and conclude that these complaints have no reasonable prospects of success and should be struck out.

E. The grievance appeal extension complaints

Detriment 3: The Claimant not being permitted an extension of time beyond 20 October 2023 to submit an appeal against the grievance outcome

34. The Respondent submitted:

> *At paragraph 10 GOR [43], R refers to various claims being pursued by C in respect of his complaint that R failed to permit a further extension of time to submit an appeal against the rejection of the Grievance. Specifically, R refers therein to claims of (a) direct race discrimination[1], (b) discrimination arising from disability[2], (c) failure to make reasonable adjustments[3], and (d) victimisation[4]. In fact, C also pursues a claim of (e) whistleblowing detriment in respect of the same complaint[5]. In the circumstances, R seeks permission to 'extend' its strike out / deposit order application to encompass the whistleblowing detriment aspect of this claim. There is no prejudice to C; the same arguments arise in respect of it.[6]*

35. The Respondent set out a timeline of events (para 46- 53) and then submitted:

> *54. There was plainly nothing unlawful about R's approach to C's grievance appeal. In summary:*
>
> > *54.1. R did agree to (a) extend the deadline stipulated in its policy, and (b) consider C's grievance appeal which was submitted on 19 October 2023;*
> >
> > *54.2. R decided to exercise its discretion (to depart from the standard appeal procedure) in C's favour, and it is not accepted that the 'extension*

[1] Paragraphs 14 & 17 POC [20-21]; and LOI ¶2.1.2(o) [69-70] ("Act 15").

[2] Paragraph 22(a), (b) & (c) POC [22]; and LOI ¶3.2.2(g)(i), (h) & (j) [71-72].

[3] Paragraphs 24(g), 25(d) & 26(f) POC [23]; and LOI ¶3.3.2(g), 3.3.3(d) & 3.3.5(d) [72-73].

[4] Paragraph 29(c) POC [25-26]; and LOI ¶4.2(c) [74].

[5] Paragraph 33(c) POC [27]; and LOI ¶5.2.1 [74-75]

[6] Indeed, in responding to C's pleaded complaints of whistleblowing detriment at paragraph 85 GOR [55], R repeated its response to the victimisation claims (at paragraph 79 GOR): see in particular paragraph 79.3 GOR [54].

decision', made on the particular facts of C's case, constituted the application of a PCP9;

54.3. treatment which confers an advantage on a disabled person cannot constitute unfavourable treatment for the purpose of a claim under section 15 EqA, even if a claimant contends that they could have been treated more advantageously[7]*;*

54.4. in any event, C was in effect granted a further extension to the appeal deadline (significantly beyond 19 October 2023), in circumstances where he was afforded the opportunity to present further written representations, which he did – at a time in November 2023 when (as he confirmed) he had had an opportunity to review the response to his DSAR and give further consideration to the Grievance Outcome, with the benefit of legal advice;

54.5. even if R's 'extension decision' could properly be classified as the application of a PCP (which is denied), C cannot credibly claim to have been substantially disadvantaged in circumstances where he was able to submit detailed written representations in respect of his grievance appeal, both in his original grounds and supplemented thereafter, with the benefit of legal advice;

54.6. R's approach was, in the circumstances, demonstrably reasonable (and there was no failure to make a reasonable adjustment, even if a relevant duty arose); and

54.7. there is no proper basis for C's allegations that the procedural approach adopted by R in respect of his grievance appeal was: (a) because of C's race, (b) because of something arising in consequence of disability[8]*, (c) because C had done a protected act, or (d) because C had made a protected disclosure.*

36. In written submissions the Claimant said that this could not be determined without evidence being heard, and should proceed to trial and that given that the Claimant was obviously a disabled person, the decision to refuse an extension whilst the Claimant was struggling with his health was plainly unreasonable. The Claimant had expressly communicated his mental health problems (116).

37. It was submitted orally for the Claimant that:

    37.1 He was obviously a disabled person and had health problems and he asked for an extension of time and it was surprising that there was as much resistance from the Respondent as there was and that the Respondent did not consult occupational health. The Respondent's response displayed extreme callousness.

[7] Trustees of Swansea University Pension and Assurance Scheme v Williams [2019] IRLR 306.
[8] As pleaded at paragraphs 21(a)-(c) & (e)-(f) POC [22]; see also LOI ¶3.2.2(a)-(c) & (e)-(f), and (g)(i), (h) & (j) [71-72].

37.2 His email of 13 October 2023 said:

> *I wish to appeal against the decision but given the state of my mental health, which has once again been aggravated due to this shocking decision, I cannot handle this now. Also, I note that the SAR Request I made has not been complied with. In the circumstances, I would like to have a time extension to lodge my appeal until 14 days after the SAR Request is complied with. I trust this is a reasonable adjustment required under the Equality Act 2010.*

37.3 The Respondent's reply of the same date said (116)

> *We have noted your response to the outcome of the investigation.*
>
> *Considering your health, as a gesture the company will extend the appeal timeline to 7 days from the date the outcome was communicated (10 October).*
>
> *In addition, we would like to remind you about a company benefit of the Employee Assistance Program, in case you need to make use of the same - Seek-Guidance (sharepoint.com)*

37.4 He submitted his appeal outcome outside that timeline on 19 October 2023 and the Respondent agreed to accept it but the Claimant was nonetheless forced to provide his appeal grounds at a time when he was unwell and there should have been an assessment of when he would fit to participate in the process.

37.5 There was no reason for the Respondent, given its size and resources and access to expert advice, to limit the appeal timeline to 7 days and risk exacerbating the Claimant's health. The Respondent's conduct was bizarre and callous and showed indifference to the Claimant's health.

37.6 The Respondent's conduct was indicative of an Employer that has had enough of someone. That raises the question why and why they should be so begrudging, brusk and harsh in their approach. That question would need to be explored at a hearing with evidence.

Conclusions on Detriment 3 claims

38. Given that the Claimant was given an extension to the deadline for submitting his appeal, his appeal outside that extended deadline was accepted and on 7 November 2023 the Claimant submitted a further lengthy written representation which:

38.1 attributed his delay to the unavailability of his solicitor until the second half of the previous week (126);

38.2 confirmed that he had had the opportunity to review the documents provided by the Respondent in his DSAR (sent to him on 30 October 2023);

38.3 indicated that he had been able to provide a detailed timeline to his

solicitors and identify what he considered to be relevant documentary evidence (127).

38.4 stated that he had identified what he considered to be "the most pertinent" evidence for consideration in the grievance appeal; and

on 10 November 2023 the Claimant then declined to provide copies of documents/emails to which he had referred in his correspondence of 7 November 2023, there is a prospect that the Claimant, at the final merits hearing, will be unable to establish that he suffered the necessary harm (being less favourable treatment, unfavourable treatment, substantial disadvantage or detriment (as applicable)). If he establishes the necessary harm I think his prospects are likely to be lowest in respect of being able to link that harm to his race (the harm in that case of course needing to be less favourable treatment).

39. However, whilst I could not categorise his prospects as being 'good' based on the papers, I nonetheless do not conclude that he has no or little reasonable prospects of success in his complaints and I do not therefore strike out any of these complaints or issue a deposit order in respect of any of them. I consider that they are ones that need to be decided at trial after evidence has been heard and I do not consider that the Claimant should be subject to a deposit order as a condition of having these complaints determined.

_____

Employment Judge Woodhead

Date 24.07.24

Sent to the parties on:

30 July 2024

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For the Tribunals Office

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording,

for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/