EMPLOYMENT TRIBUNALS

Claimant: Christian Mallon

Respondent: West Midlands Growth Company Limited

Heard at: Midlands West (by CVP) **On:** 2 September 2024

Before: Employment Judge Kight

Representation
Claimant: In person
Respondent: Mr P Bownes, Solicitor

RESERVED JUDGMENT

1. The Respondent's application to strike out the Claimant's claim is refused.

2. The Respondent's application for deposit orders of £1000 in respect of each of the Claimant's claims is refused.

REASONS

Background

1. By claim form dated 1 December 2023, the claimant presented a claim for disability discrimination relating to the way in which he was treated after he applied for a role as a Business Development Manager for Low Carbon and Manufacturing at the respondent on 18 September 2023.

2. The claimant has autism, ADHD and dyspraxia.

3. The respondent submitted a response to the claim and on 6 January 2024, made an application to the tribunal to strike out the claim, or for a deposit order.

4. The claimant's claim was discussed, at length, during a telephone preliminary hearing for case management conducted by Employment Judge Powers on 15 April 2024. The claimant's claims were identified as being for a failure to make reasonable adjustments based on a lack of an auxiliary aid, discrimination

arising from disability and victimisation. The claimant confirmed that he was not pursuing claims for direct discrimination, indirect discrimination or harassment. In the record of preliminary hearing, Employment Judge Powers set out the issues which the Tribunal hearing the claimant's claim would need to determine.

5. Those issues relevant to this hearing are as follows:

<u>Discrimination arising from disability</u>

   a. Did the respondent treat the claimant unfavourably by:
      i. Not providing the claimant with essential criteria for the role in the format requested
      ii. Not providing an oral application process
      iii. Having a telephone call with the claimant and failing to take notes
      iv. Ignoring his emails

   b. Did the following things arise in consequence of the claimant's disability:
      i. The claimant was not able to put forward how he met the essential criteria for the role
      ii. The claimant was rejected for the role.

   c. Was the treatment a proportionate means of achieving a legitimate aim?

<u>Reasonable adjustments</u>

   d. Did the lack of an auxiliary aid, namely providing the claimant with an oral application process based on the essential criteria, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was not able to identify his particular relevant skill set for the role?

   e. Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

   f. What steps could have been taken to avoid the disadvantage? The claimant suggests:
      i. Sending him the essential criteria by email
      ii. Allowing him to make an oral application a day or so after being given the essential criteria

   g. Was it reasonable for the respondent to have to take those steps and when?

<u>Victimisation</u>

   h. Did the claimant do a protected act by making an allegation to the respondent that they had contravened the Equality Act in respect of its treatment of him?

   i. Did the respondent:
      i. Fail to respond to the claimant's request for an investigation of its treatment of him?
      ii. Fail to investigate?

j. By doing so, did it subject the claimant to detriment?

k. If so, was it because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

6. Employment Judge Powers also listed a public preliminary hearing to consider the respondent's application to strike out the claimant's claims on the grounds that they are vexatious or have no reasonable prospects of success. In the alternative, whether a deposit order should be made on the grounds that the claims have little reasonable prospect of success. That hearing was originally due to take place on 31 May 2024, but was postponed to 2 September 2024.

7. On 20 April 2024, the claimant submitted what he described as an "amended statement of case" to the Tribunal and to the respondent. In that document, he included a claim for direct disability discrimination, which he had expressly stated previously he was not intending to pursue. He also reiterated the claims which had been identified as ones he was pursuing at the preliminary hearing on 15 April 2024. The respondent objected to any application to amend.

The hearing

8. As set out above, the purpose of this hearing was to consider the respondent's applications. The Tribunal was provided with an electronic bundle of 117 pages. In addition, there were several emails attaching: the respondent's amended grounds of resistance; the respondent's written submissions in respect of the applications; the claimant's response to those submissions; various statements from the claimant relating to the impact of autism/ADHD/dyspraxia on him, along with statements/letters from Dr Qureshi, Sara Heath, Sarah Musique and Jane Newport; and judgments from EJ Wedderspoon in case number 1303637/2021 Mallon v Steer Energy Solutions Limited and EJ Broughton in case number 1403759/2021 Mallon v Steer Energy Solutions Limited. During a shortened lunch break the Tribunal also received further emails from both Mr Bownes and the claimant, attaching email correspondence between the claimant and the respondent at the time of his application for the role in issue in this claim.

9. At the start of the hearing, any adjustments the claimant might need to ensure he was able to participate fully in this hearing were discussed. The claimant had sent a 5-page email about adjustments to the Tribunal, and we went through the paragraphs relevant to the conduct of this hearing. The claimant was informed that he would be given the time he needed to process questions and formulate responses, that if he needed more time to ask and that we would have regular breaks but if he needed any more, again to ask. I explained that I did not anticipate at this stage there being a need for further written submissions, but we could review this if it became relevant. The claimant confirmed that he was in a quiet room and able to manage any distractions. We agreed to use the mute function to avoid auditory disturbance as necessary. I explained that we have the full day for the hearing and so was able to accommodate flexibility in scheduling as needed. The claimant confirmed he did not require any other adjustments at this point.

10. In view of the claimant's email of 20 April 2024 and the need for the Tribunal to fully understand the claim the claimant was pursuing before determining an application relating to prospects, I decided that I must first establish whether the claimant was pursuing an application to amend his claim, and if so determine that application.

11. The claimant explained that he had interpreted paragraph 5 of Employment Judge Powers' record of the Preliminary Hearing of 15 April 2024 as an opportunity to amend his claim and that with support from AI tools he had prepared the document he had submitted on 20 April 2024 within the timescale envisaged in that paragraph.

12. After a short adjournment, I heard the claimant's application and heard representations from Mr Bownes, on behalf of the respondent, who objected to the claimant's application. The Tribunal decided to refuse the claimant's application and oral reasons for that decision were given to the parties. In summary, in deciding to refuse the application the Tribunal considered all relevant factors, but in particular the balance of prejudice and hardship, as per the guidance set out in ***Selkent Bus Co Limited v Moore*** and ***Vaughan v Modality Partnership*** and determined:

    a. that the claim for direct discrimination would amount to a new head of claim, which would necessitate further factual enquiry into the reasons why the claimant was not interviewed for the role he applied for.
    b. If the amended claim were to be accepted it would have been treated as presented on 2 September 2024, several months after the initial limitation period had passed. Bearing in mind the chronology to date, in terms of the claimant having had the opportunity at the preliminary hearing to express that he wished to pursue a claim for direct disability discrimination and the claimant's explanations for not doing so the Tribunal considered there was little to no reasonable prospect of the claimant succeeding in demonstrating that it would be just and equitable to extend time to allow such a claim to be determined.
    c. The claimant identified that the prejudice caused to him would be that his claim was not as comprehensive as it should be, whereas the respondent argued that the crux of the claimant's claim was his assertion that there had been a failure to make reasonable adjustments – a claim which the claimant is pursuing - and as such there would be no real prejudice to him were his application refused.
    d. On the contrary, the respondent would suffer the prejudice of being required to prepare for and defend a claim covering different issues which had been brought out of time in circumstances where the claimant had already been given the opportunity to clarify his claim.
    e. This, combined with the need for additional time and evidence to hear the new claim, resulted in the balance of prejudice and hardship falling more heavily on the respondent.

13. Having made that decision, the Tribunal then heard from the parties in respect of the applications to strike out and for deposit orders.

The law

14. **Rule 2** of the Rules sets out the overriding objective of the Tribunal to deal with cases fairly and justly. When exercising any power given to it by the Rules, the

Tribunal must seek to give effect to the overriding objective. This includes ensuring so far as practicable that the parties are on an equal footing, dealing with cases in a manner which is proportionate to their complexity and importance and avoiding delay.

15. **Rule 37(1) of Schedule 1 of the Employment Tribunal Rules of Procedure** (**the Rules**) provides that:

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

> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
> *(c) 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 a fair hearing in respect of the claim or response (or the part to be struck out).*

16. The power to strike out a claim is a draconian measure and great care is to be taken in deciding whether to exercise it and if so to what extent (see ***Anyanwu & another v South Bank University & South Bank Student Union [2001] ICR 391; Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684; Smith v Tesco Stores [2023] EAT 11***).

17. HHJ Taylor in ***Cox v Adecco Group UK & Ireland and others [2021] ICR 1307*** at paragraph 28 of his judgment gave the following guidance to Tribunals:

"28. From these cases a number of general propositions emerge, some generally well understood, some not so much:

(1) No-one gains by truly hopeless cases being pursued to a hearing;
(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
(4) The Claimant's case must ordinarily be taken at its highest;
(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become

like a rabbit in the headlights and fail to explain the case they have set out in writing;
(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

18. The case of ***Mecharov v Citibank NA [2016] ICR 1121*** also provided guidance at paragraph 14

"14. …the approach that should be taken in a strike out application in a discrimination case is as follows: (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…"

19. The meaning of "vexatious" was considered in ***Attorney General v Barker [2000] EWHC 453*** where Bingham LJ set out at paragraph 19

"19 …"Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process…"

20. **Rule 39(1)** of the Rules states:

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.

21. **Rule 39** goes on to describe what enquiries are to be made to ascertain a party's means of paying any deposit ordered and the effect of non-payment.

22. Mrs Justice Simler (then President of the EAT) in ***Hemden v Ishmail and anor [2017] ICR 486 EAT*** made the following observations:

"10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning,

rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds 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 ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door…"

23. Whilst the test of "little reasonable prospect of success" is not as rigorous as the test of "no reasonable prospect of success" there must nevertheless be a proper basis upon which to doubt the likelihood of a party being able to establish facts essential to the claim or the response (see paragraph 27 of the judgment in ***Jansen Van Rensburg v The Royal Borough of Kingston-upon-Thames & ors UKEAT/0096/07***).

The respondent's submissions

24. The focus of the respondent's submissions, put on behalf of the respondent in writing in the initial application on 6 January 2024, expanded further on 7 May 2024 and voiced orally by Mr Bownes at the preliminary hearing was on the proposition that the claimant is a very experienced serial litigant who has brought many, many claims which follow the same pattern; that he is unrealistic in applying for roles for which he has no relevant experience, without producing a bespoke CV or any other documentation and then pursues equally non-bespoke claims in respect of such applications when he is unsuccessful in securing the role or adjustments which he states he needs to be able to successfully apply. The Tribunal was referred to several Tribunal judgments which were said to demonstrate precisely this pattern. In particular the Tribunal was taken to a number of paragraphs in the recent decision on reconsideration in case number **1403759/2021 Dr C Mallon v Steer Energy Solutions Limited**, in respect of an application for costs.

25. Mr Bownes pointed to the fact that in his schedule of loss the claimant had assessed his prospects of securing the role he applied for at 25%, stating that this demonstrated that the claimant himself did not think he had much chance at securing the role.

26. Mr Bownes went further to suggest that the pattern of the claimant's conduct, in making modifications to his CV which do not, in this case, tailor it to the role he was applying for, demonstrate both that the claimant is capable of learning from past experience and making changes to documents and that the claimant is motivated not by securing employment but by increasing his prospects of securing success in a claim to the Tribunal and/or settlement. Mr Bownes, states that this, along with the claimant's use of AI in creating documents, a

lack of particularity to his alleged protected act and his claim form in this case, and his subsequent responses to the respondent's application, is evidence of the claim amounting to a vexatious proceeding. He submits that the claim has little or no basis in law, describing it as "an example of elevating form way beyond substance".

27. Mr Bownes submitted that it is clear from both the job advertisement and the claimant's CV, both of which were included in the bundle of documents before me, together with the claimant's failure at any point during the proceedings to date to address the respondent's position, that the claimant simply did not possess the skills required for the role. Without the claimant having the essential skills and experience required, there was no hope of him securing the position and therefore no prospect of the claimant being able to demonstrate that the adjustments he sought would have made any difference. Mr Bownes argument in respect of why the claim for unfavourable treatment arising from disability had no reasonable prospects of success was along the same lines, with the addition that it is clear causation issue - that the alleged unfavourable treatment could not have arisen from the alleged "something".

28. In respect of the claimant's claim for victimisation, Mr Bownes referred to paragraph 22 of the amended grounds of resistance where he said the claimant's alleged protected act – an email complaint – had been produced. He described it as nothing more than a template, with no explanation or detail of what it was that the claimant was complaining about, and this meant that there was nothing for the respondent to respond to or investigate.

29. Finally, in relation to the alternative application for deposit orders, Mr Bownes took the Tribunal to the claimant's evidence of means in support of his assertion that the claimant has the means to pay a deposit. He pointed to previous claims brought by the claimant in which he has been found to have been less than honest about his means. He added that the simple fact of the claimant stating that he chooses not to pay deposit orders must not be considered by the Tribunal as a relevant factor in deciding whether to make such an order.

The claimant's submissions

30. Like the respondent, the claimant had also produced written submissions, in several emails, all of which I have read. The fact that this judgment may not refer to everything contained within them (as indeed is also the case in respect of the written submissions prepared for the respondent) should not be interpreted as them not having been considered, carefully. The claimant also made oral submissions.

31. He gave some background as to the efforts he goes to, to try to secure a job, describing the process he has adopted in submitting significant numbers of job applications, the difficulties he has faced, his use of AI and why he persists.

32. He explained he did apply with a generic CV for the position this claim is about, but in the belief that his background, skills and experience were highly relevant to the role. He provided some examples both in writing and orally, as to why he believed this was the case, which included amongst other matters, reference to his knowledge of fuel cells – a matter he considered relevant because he had been told by the respondent that they were seeking investment for the construction of a battery plant. Perhaps more pertinent, the claimant gave

examples of business development activities and successes which he said he had done in previous roles and in the context of developing his own "hobby" business. He explained that he could not tailor his CV to the role specifically at the time because his conditions (autism, ADHD and dyspraxia) meant he could not decipher from the advert what the essential criteria for the role were, hence him referring in his CV to his conditions and their effect and asking for the adjustments contended for in this claim. He explained that he made multiple attempts to highlight his need for reasonable adjustments, which he said was at the heart of his claim. He asserted that his rejection by the respondent was influenced by an unwillingness to adapt to his needs. He believes his claim has reasonable prospects of success.

33. He also explained that he found tailoring his CV to particular roles and tailoring his subsequent complaint to the respondent a high administrative burden which was why he used templates provided by the Equal Opportunities Commission and to AI for support. In respect of the alleged protected act, the claimant accepted that the one email Mr Bownes had referred to was simply a template which did not contain the factual information about which he was complaining. However, he submitted that the Tribunal should not just read that email in isolation but look at the chain of emails, which the parties had sent to the Tribunal during the lunch break after the claimant had challenged whether what was contained in the amended grounds of resistance was the full email.

34. In terms of his approach to Tribunal litigation, the claimant acknowledged that he has brought multiple claims, but said that these are based on genuine grievances and are distinguishable on the facts of this particular case. He said that just because his CV and qualifications were found lacking in those cases, this does mean it was the case in the application which is the subject of these proceedings. He said he is not a vexatious litigant, he is not trying to exploit the system, he simply needs to secure work and this is an ongoing struggle. He described himself as "an experienced and determined litigant who will not be deterred from seeking justice".

35. In respect of the alternative application for deposit orders, the claimant submitted that he is of limited means, as he has set out in writing and that he will not pay any deposit if an order were to be paid, because he has been told by the Citizens Advice Bureau never to pay one.

Conclusions

36. In reaching its decisions in relation to the respondent's applications the Tribunal has due regard to the principles and guidance outlined above. The Tribunal is mindful of the need to take care in understanding the claims presented and the substantive legal issues in the case when considering applications for strike out and deposit orders in discrimination claims, especially so where claims are presented by litigants in person. The Tribunal reminds itself that it is only in the clearest cases that a claim for discrimination should be struck out and that even when considering whether to make an order for a deposit to be paid, there must be a proper basis upon which to conclude that a claim has little reasonable prospect of success.

37. It is a matter of fact which is not in dispute that the claimant has brought many claims in the Tribunal, relating to unsuccessful applications for roles. It is accepted by the Tribunal that in many of those cases referred to it by the parties

it is possible to establish similarities, or patterns, in terms of the way the claimant has applied for such roles and that over time the claimant may have adapted his approach. It is noted that other Tribunals hearing those other claims have made findings, at different stages in those proceedings, as regards to the claimant's motivations and the prospects of or actual success or otherwise of the claims. However, whilst that background may be relevant, it is the role of this Tribunal to consider the respondent's applications in the context of this particular claim and its individual facts. The Tribunal does not accept that the claimant's claims history alone demonstrates that his presentation of this claim is vexatious.

38. The Tribunal needs to consider the issues in this claim, as set out above, and identify, without having conducted a mini-trial or heard oral evidence, whether taken at their highest, the claimant's claims are vexatious and/or have no, or in the case of a deposit order little, reasonable prospects of success. That exercise must be carried out on the understanding that where there are core factual issues in dispute it is highly unlikely that it will be appropriate to exercise the power to strike out.

39. It is not in dispute between the parties that the claimant's CV used for this application is generic and contains detailed reference to the claimant's autism, ADHD and dyspraxia and the impact of them upon him. However, there are the following fundamental disputes of fact, namely:

    a. whether the claimant was genuinely unable, or substantially less able than a person without his conditions, to identify from the job advert and demonstrate to the respondent how he met the essential criteria for the role without having the essential criteria identified and sent to him and then the opportunity to make his application orally
    b. whether the claimant possesses the relevant qualifications, skills and experience to make him suitable for the role he applied for and therefore whether taking the steps contended for would have had the effect of alleviating the alleged disadvantage.

40. These aspects are particularly relevant to the claimant's claim for failure to make reasonable adjustments.

41. As to the first dispute, the respondent points to the claimant's claims history and his ability to learn from what he has been told in previous claims to tailor documents to suit the claimant's objective (the respondent says this was the pursuit of successful claims or settlement rather than securing employment). This does not, in the Tribunal's view, address the question of whether the claimant could identify himself, the essential criteria from the advert without them being identified for him.

42. The claimant argues that his need is genuine and where an advert does not expressly identify the essential criteria for the role, as is the case here, he is unable to identify which of his skills and experience would demonstrate his suitability to meet them and to then create a bespoke CV or focus his application. If this is the case, it cannot be said that there is no or little reasonable prospect of the claimant demonstrating that he was put to a substantial disadvantage by the lack of an auxiliary aid. The Tribunal is mindful of the fact that in preparation for and during this hearing the claimant appeared capable of picking out particular roles or activities that he considered relevant

to the role (see paragraph 32 above), though whether they were in fact relevant or not to the essential criteria for the role is unknown. The respondent submits that what the claimant identified demonstrates the claimant was not suitable for the role at all. It appears therefore that this remains a core factual dispute that cannot be determined without full consideration of and challenge to all the evidence both documentary and oral evidence.

43. Notwithstanding this, it is the respondent's case that even if the claimant was put to a substantial disadvantage, the adjustments contended for would not have alleviated the disadvantage because the claimant was simply not a suitable candidate for the role. The respondent submitted that the job advertisement, the claimant's CV and the perceived lack of explanation from the claimant as to his suitability for the role, along with the claimant only giving himself a 25% chance of securing the role clearly demonstrates that the claimant was not a suitable candidate.

44. The claimant's CV does contain a complete job history and appears to show that the claimant's more recent job history was not obviously relevant to the role; however, it does not include details of the duties the claimant carried out in those roles to know whether he did gain the requisite skills and experience needed to stand a realistic chance of securing this role. The respondent states that this was intentional on the part of the claimant, to improve his chances in Tribunal, but the claimant vehemently disagrees. What is more, the Tribunal disagrees with the respondent's proposition that the Claimant's assessment of his prospects demonstrates a lack of suitability. It appears rather to be a potentially reasonable assessment that he might be one of four candidates applying for the role. The Tribunal does not consider that the documentation produced "conclusively disproves" or "is totally and inexplicably inconsistent" with the claimant's claim in all the circumstances and therefore that it is sufficient to demonstrate that the claim has no reasonable prospects of success such as to justify strike out.

45. In view of the above, it cannot be determined at this stage in the proceedings, without the opportunity to hear the oral evidence and for it to be challenged that the claimant's claim for failure to make reasonable adjustments is either vexatious or has no or little prospects of success.

46. Turning to the claimant's claim pursuant to **section 15 of the Equality Act 2010**. Disability and knowledge thereof having been conceded by the respondent in paragraph 18 of the amended grounds of resistance, to succeed in this claim the Tribunal would need to be satisfied, on the balance of probabilities, that the treatment alleged (which it is not disputed by the respondent happened) was unfavourable treatment because of something arising in consequence of disability and the respondent cannot show that the treatment was a proportionate means of achieving a legitimate aim (see ***Secretary of State for Justice & anor v Dunn EAT 0234/16***).

47. As to the meaning of unfavourable treatment, the Equality and Human Rights Commission's Code of Practice on Employment states that it means that the disabled person "must have been put at a disadvantage". The first two acts of alleged unfavourable treatment of not providing the claimant with essential criteria for the role in the format requested and not providing an oral application process attract the same issue of factual dispute as set out above in relation to the reasonable adjustments claim. The second two allegations of having a

telephone call with the claimant and failing to take notes and ignoring his emails are distinct, though the Tribunal is not satisfied that there is no reasonable or little reasonable prospect of the claimant successfully arguing that these acts put him to a disadvantage.

48. Moving to the next question however, the claimant's case is that he was subjected to the unfavourable treatment alleged because either he was not able to put forward how he met the essential criteria for the role and/or because he was rejected for the role. The argument appears somewhat circular and presents a causation challenge for the claimant. The Tribunal would need to be satisfied that the reason why the respondent acted as it did (in part by not making the requested adjustments) was because the claimant needed the adjustments he had requested and/or because it had already rejected the claimant for the role in consequence of his disability.

49. The respondent's defence to this claim is essentially a repeat of what has been set out above in relation to the claim for failure to make reasonable adjustments – that the claimant's Tribunal record demonstrates that he was capable of putting the necessary detail in his CV to demonstrate suitability but had removed it and that "the claimant was not successful in his application because he did not have the relevant skills and experience, as demonstrated by his job history". The factual matrix pleaded by the respondent is that the HR Advisor who initially spoke to the claimant after receiving his CV, reported back her discussion to the hiring manager who considered the information but was already of the view that the claimant's background and experience were not suitable for the role based on the claimant's CV. Then a combination of oversight, absence and workload resulted in the claimant's emails not being responded to.

50. Whether this is a more plausible explanation for the reason why the Claimant was treated as he was, than the Claimant's assertion, again needs to be tested in evidence before any determination could be made as to prospects of success. Finally, the same would apply to the question of objective justification.

51. As such, the Tribunal refuses to strike out or make a deposit order in respect of the claimant's claim for discrimination arising from disability.

52. That leaves the claimant's claim for victimisation. The respondent submits that the alleged protected act, the claimant's complaint, cannot possibly amount to a protected act as although it refers to "potential instances of discrimination" and the Equality Act 2010 it is a template which has not been completed with any information setting out the nature of the claimant's complaint. As such even if it was a protected act, the lack of response or investigation into it was simply because there was nothing in the complaint to investigate or respond to. The claimant accepts that the email which the respondent refers to is a template and is not completed. However, he argues that the template email must be considered as part of an email trail in which it is obvious what the complaint is about and that it is a complaint of discrimination. The email trail was produced to the Tribunal and the following is noted:

    a. At 14:16 on 18 September 2023 the claimant emailed the respondent, expressed an interest in the role, included the contents of the advert, attached his CV and asked to speak and to be provided with the

essential criteria for the role in the body of an email so that he could prepare.

b. At 08:17 on 12 October 2023, the claimant sent a chasing email to the HR advisor with whom he had spoken asking “when the oral application will happen based on the essential criteria”

c. At 21:29 on 24 October 2023, the claimant shared information with the HR advisor about why he would need an oral application based on the essential criteria.

d. At 11:21 on 11 November 2023, the claimant chased the HR advisor about what was going to happen. He mentioned not receiving a reply to his last two emails.

e. At 15:29 on 15 November 2023, the claimant emailed the HR advisor asking for notes of their previous telephone call and an explanation for the delay as “reasonable adjustments”.

f. At 18:18 the same day, the claimant emailed the HR advisor again providing information on why he would need an oral application.

g. At 18:36 the same day, the claimant emailed the HR advisor again asking that her manager take over the process. He further states that he has run through the email trails with AI and the AI had reached conclusions which he set out. Those “conclusions” intimated that “the Equality Act 2010 could be applicable”, and amongst other potential heads of claim under the act, that the lack of response or accommodation of the claimant’s requests for reasonable adjustments could indicate a failure to comply with the duty to make reasonable adjustments. In bold at the end of the email it is stated “**Based on the emails, the lack of responsiveness or accommodation despite your clear communication about your disability and accommodation needs suggests potential breaches related to the duty to make reasonable adjustments and possibly discrimination arising from disability or indirect discrimination.”.**

h. At 19:04 the same day, the claimant sends a further email to the HR advisor again setting out AI “conclusions” of potential breaches of the Equality Act 2010

i. At 13:49 on 17 November 2023, the claimant sends an email to the HR advisor with whom he had previously spoken and the respondent’s general enquiries email address with the subject “Formal Complaint Regarding Potential Discrimination in Job Application Process”. The email identified that the claimant has unspecified ongoing concerns related to his recent job application process. The claimant does not identify when he applied for the role, or what the role was he applied for. The email goes on to state that the claimant is “deeply concerned about potential instances of discrimination based on my neurodiverse conditions during the application process. Upon reviewing the details of our interactions and the conclusions provided by AI analysis, several concerning points have come to my attention:”. What follows are headings “Direct Discrimination”, “Indirect Discrimination”, “Failure to

Comply with the Duty to Make Reasonable Adjustments", "Harassment", "Discrimination Arising from Disability", "Victimization". The email concludes by stating that the claimant believes it is imperative to address these concerns promptly and appropriately and requests a formal investigation and meeting to discuss next steps. It adds that the claimant is "willing to provide further details or evidence as necessary".

j. At 13:58 the same day the claimant forwards the earlier email to numerous other email addresses at the respondent with the words "can you bring this email trail to the attention of senior management asap as I believe discrimination has occurred, as I will to make this a formal complaint".

k. At 14:43 the same day in a third email to the HR advisor and general enquiries email address the claimant writes "after further rejection today from Claire and her manager who does not email me or supply their contact details: I watched this video today on YouTube with almost 500 comments I guess from fellow folk gifted with autism" provides a link to YouTube and includes the text from what appears to be a summary of common problems autistic people face in searching for a job. The claimant states he is sending this "so this does not happen t the next autistic person who try [sic] to apply after myself and not get blocked.

l. At 23:28 on 20 November 2023 the claimant emails the HR advisor and general enquiries email address a fourth time requesting an email address, telephone number and name of the HR Advisor's manager as a reasonable adjustment. He states that if this request is ignored he will make contact with ACAS, reiterates that he wishes to make a formal complaint and attaches 8 attachments all of which were blank templates and did not provide any specifics relating to the claimant's situation.

53. **Section 27(2)(d) of the Equality Act 2010** covers allegations whether or not express, made by the claimant that the employer or another person (in this case a prospective employer) has contravened the Equality Act. The claimant did not identify at the Preliminary Hearing where he said he made such an allegation to the respondent. He certainly did not limit himself solely to his email of 13:49 on 17 November 2023. Based upon the email trail disclosed, the Tribunal is not persuaded that there is no or little reasonable prospects of the claimant successfully demonstrating that he did a protected act.

54. As for the question of detriment and the reasons why the respondent did not respond to the complaint or investigate the matter, if this were a case, as Mr Bownes on behalf of the respondent appeared to be asserting, of the claimant simply producing a template with no specific information about what had happened to him, then the submission that there was nothing to investigate and therefore the claim had no reasonable prospects of success may have some force. Absent any other evidence it would be difficult for the claimant to be able to show facts from which the Tribunal could infer that the reason for not responding to/investigating the complaint was a protected act. However, in view of the email trail produced and the context it provides the Tribunal is not satisfied that such a determination could be made without hearing oral evidence from the respondent as to their motivations.

55. The Tribunal therefore refuses to strike out the claimant's claim for victimisation on the grounds that it has no reasonable prospects of success. Nor is the Tribunal satisfied, at this stage of the proceedings and without hearing oral evidence, that the respondent's assertion that the claimant's use of AI and of a template in the circumstances is demonstrative of a vexatious claim. Finally, in view of the factual issues in dispute the Tribunal cannot on a summary assessment of the claim determine that this claim has little reasonable prospects of success.

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Employment Judge **Kight**

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Date 3 September 2024

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