



# **EMPLOYMENT TRIBUNALS**

**Claimant:** Mr. P Broster  
**Respondent:** R.E.A.L Education Ltd  
**Heard at:** Via Cloud Video Platform (Midlands East Region)  
**On:** 25<sup>th</sup> November 2021  
**Before:** Employment Judge Heap

## **Representation**

**Claimant:** Mr. P O'Callaghan - Counsel  
**Respondent:** Mr. C Khan - Counsel

## **COVID-19 Statement**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote via CVP. A face to face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing.

# **RESERVED JUDGMENT**

1. The complaint of wrongful dismissal is dismissed on withdrawal by the Claimant.
2. The complaints of victimisation involving acts of detriment pre-dating 1<sup>st</sup> September 2020 are struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 as having no reasonable prospects of success.
3. The complaint of direct disability discrimination by association is struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 because it has no reasonable prospect of success.
4. The Respondent's application to strike out the remaining complaints under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is refused.
5. The Respondent's application for Deposit Orders in respect of all remaining complaints succeeds and those are set out in separate Orders accompanying this Judgment.

# REASONS

## BACKGROUND & THE ISSUES

1. This is a claim brought by Mr. Peter Broster (“The Claimant”) against his now former employer, R.E.A.L Education Ltd (“The Respondent”) presented by way of a Claim Form received by the Employment Tribunal on 10<sup>th</sup> March 2021. The claim came before Employment Judge Butler on 8<sup>th</sup> June 2021 at a Preliminary hearing for case management.
2. It was identified at that Preliminary hearing that the Claimant was advancing the following complaints:
  - a. Wrongful dismissal;
  - b. Unfair dismissal;
  - c. Automatically unfair dismissal contrary to Section 103A Employment Rights Act 1996;
  - d. Detriment contrary to Section 47B Employment Rights Act 1996;
  - e. Direct disability discrimination by association;
  - f. Victimisation; and
  - g. Harassment related to disability.
3. At the Preliminary hearing Employment Judge Butler expressed the view that a number of the claims advanced were, as he termed it, extremely weak. He therefore listed this hearing to determine whether any of the complaints should be struck out as having no reasonable prospect of success or whether Deposit Orders should be made. I have determined the issues on the basis of my own assessment of the claims and taking the Claimant’s case at its highest. I have not had regard to the observations of Employment Judge Butler other than in considering the reasons why this Preliminary hearing was listed.
4. Employment Judge Butler also Ordered the Claimant to file Further & Better Particulars of the claims that he was advancing which were settled by Mr. O’Callaghan. I have paid reference to those when determining the issues at this hearing.
5. The complaint of wrongful dismissal was withdrawn before this Preliminary hearing and I have accordingly dismissed it under Rule 52 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

## THE HEARING

6. The claim was listed for one day of hearing time and was conducted remotely via Cloud Video Platform (“CVP”). The Claimant was initially in attendance and I heard evidence from him briefly as to his means in connection with the issue of whether to make Deposit Orders and, if so, in what sums.
7. The Claimant had also filed a lengthy 36 page witness statement for this hearing. It did not deal with his means but he was helpfully taken through his evidence on that matter by Mr. O’Callaghan and cross examined briefly by Mr. Khan. I did not feel it necessary to hear from the Claimant as to the other issues raised in his witness statement as I have taken the Claimant’s case at its highest; did not

intend to make findings of fact which might bind a future Tribunal and the issues to be determined today can be adequately dealt with by submissions only.

8. In that regard I have considered oral submissions from Mr. O'Callaghan and Mr. Khan and both had equally served very helpful skeleton arguments.
9. It had not been possible for the parties to agree a single bundle for the Preliminary hearing. I was supplied with a bundle from the Respondent's side running to 476 pages and a separate bundle from the Claimant running to 766 pages. I also had a 36 page witness statement from the Claimant; a number of exhibits in a separate bundle and written submissions along with an authorities bundle. It was not possible to read that considerable volume of documentation and, indeed, to do so would have taken the whole of the day that the hearing was listed for. I therefore directed the parties to identify which documents were relevant to the issues to be determined and that any of particular importance which were not referred to in their skeleton arguments should be drawn to my attention during oral submissions. As it was, I was taken only to a handful of documents within both the Claimant's bundle and that prepared by the Respondent. Should this matter progress to a full hearing I urge the parties to cooperate in compilation of the trial bundle and to reflect on whether all documents are in fact strictly necessary to include.
10. I have summarised the respective positions of the parties in respect of each of the claims. Whilst those are a summary only the parties should be assured that I have considered carefully each of the arguments advanced on each side.

## THE LAW

### Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

11. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.
12. Rule 37 provides as follows:

*“At any stage of the proceedings, either on its own initiative or on the application of a party, the 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;*
- (b) For non-compliance with any of these Rules or with an order of the Tribunal;*
- (c) That it has not been actively pursued;*
- (d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)”*

13. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success.
14. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is “no reasonable prospect” of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

*“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 words “no” because it shows 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 the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects...”*

15. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**).
16. Particular care is required where consideration is being given to the striking out of discrimination claims and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as enjoying no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim (see **Ahir v British Airways Plc [2017] EWCA Civ 1392**). Each case will, however, turn on its own facts.

**Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013**

17. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

*“(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.”*

18. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.
19. The Tribunal is required to have regard to the means of a paying party both as to whether to make an Order and, if so, the amount of that Order. Otherwise, the setting of a Deposit which the paying party is not able to pay will amount to a strike out by the back door (see **Hemdan v Ishmail & Anor 2017 ICR 468**).

## **CONCLUSIONS**

### **“Ordinary” unfair dismissal**

20. It is not in dispute that the Claimant was employed by the Respondent to provide home based learning as a teaching assistant for his daughter, LB. The Claimant’s daughter has complex needs. She has autism, is non-verbal and has issues with communication and sensory overload. In the Claimant’s own words LB requires care 24/7 and he and, to a lesser degree his wife, are responsible for providing that care. In the Claimant’s own words he is currently doing the same work for LB that he was doing whilst employed by the Respondent albeit that he is now not getting paid. The submissions of Mr. O’Callaghan were also to the effect that the Claimant was not able to seek to mitigate his losses because of the care that he is required to provide to LB.
21. After some dispute that involved proceedings before the Special Educational Needs and Disability Tribunal (“SEND”) a placement was arranged for LB via her local council, Nottingham County Council (“NCC”). That eventually developed into a home based placement with the Respondent with the Claimant employed directly as LB’s teaching assistant.
22. The Respondent’s position is that it determined that it could no longer meet LB’s educational needs. The parties are in dispute as to whether the Claimant’s actions caused or contributed to that determination, but I do not need to deal with that today. The Claimant disputes that the Respondent could not continue to meet LB’s needs and says that it was able to do so as long as they continued to employ him.
23. As the Respondent determined that it could not meet LB’s needs, it is said that in consequence they served notice on NCC that they could no longer provide a placement to LB and NCC withdrew funding accordingly. It is said by the Respondent that as a natural consequence the Claimant’s employment was terminated because that employment was dependant upon LB’s placement. It is common ground that LB was the only student supported by the Claimant. From what the Claimant has told me about the extent of the care that he provides to LB – i.e. 24/7 care – I cannot see that he could have been placed elsewhere by the Respondent to support another student. Indeed, that does not appear to be suggested.
24. The Respondent contends that this complaint has no reasonable prospect of success and is simply an attempt to litigate the SEND proceedings in another jurisdiction. It is said that the Claimant does not advance a positive case as to why he says that he was unfairly dismissed and all that he says is that he does

not accept the Respondent's reason for dismissal. It is said that the SEND proceedings are the proper venue for issues about LB's placement to be litigated and allowing this claim to proceed will run the risk of an Employment Judge being asked to make findings which impinge on the specialist jurisdiction of the SEND Tribunals.

25. Mr. O'Callaghan submits that the argument of the Respondent that the Tribunal is not the correct forum is incorrect. He points to the fact that a claim of unfair dismissal can only be determined in that forum and as the Claimant contends that he has been unfairly dismissed he is entitled to advance that here. He submits that the Tribunal is not being asked to determine the same issues that the SEND Tribunal will and in all likelihood that determination will already have taken place before this claim is heard. It is said that the Tribunal will need to decide if the dismissal was fair or unfair and that will include considering the procedure adopted.
26. Having regard to the competing arguments this is not a claim which I consider should be struck out as having no reasonable prospect of success. I remind myself that where it is in dispute the burden will be upon the Respondent to establish that there was a potentially fair reason for dismissal and I accept the argument of Mr. O'Callaghan that this is the only jurisdiction in which the Claimant can advance an unfair dismissal complaint.
27. However, it is a claim that I consider has little reasonable prospect of success. The sole reason that the Claimant was employed was to provide care for LB. That does not appear to be in dispute. I consider it highly unlikely that a Tribunal would conclude that the Respondent somehow came to manufacture a decision that it could no longer support LB's educational needs and I am mindful of Mr. Khan's submissions that an educational plan of this nature involves a multi agency approach. It appears from the documents that I have seen that there is simply a dispute between the Claimant and Respondent about whether LB's care plan could continue to be met because the Claimant and his wife had one view about how that should be undertaken and the Respondent had another. It appears to me that if the Respondent had formed a genuine view about that then that is not something that the Tribunal will be able to interfere with given that it will not be entitled to substitute its view for that of the employer.
28. It seems to me that the inevitable consequence if it is found that the Respondent genuinely took a decision that LB could not be supported by them is that there was no basis upon which to continue to employ the Claimant. It cannot reasonably be said that there was some alternative to dismissal in terms of the Claimant supporting another student because his 24/7 responsibilities for LB would have meant that that was simply not possible. The Claimant's case that there might have been alternatives to dismissal does not suggest what any of those might be. I can only envisage that that argument might be a rather circular one that the Respondent should have allowed the Claimant and his wife to dictate what the educational arrangements for LB should have been.
29. The Claimant contends that there was no substantial reason to dismiss him because as long as he continued to be employed the Respondent was able to meet LB's needs. Such an assertion does appear to me to be a challenge to the care plan and impinge on the jurisdiction of the SEND Tribunal, something which Mr. O'Callaghan asserted the Claimant was not seeking to argue. However, as those proceedings should conclude before this claim is heard, I cannot rule out

that something of relevance may come to light which may change the face of the unfair dismissal claim. That seems perhaps unlikely but I cannot say that it has no reasonable prospect of success. What I would say, however, is that the Claimant's mere assertions that his continuing employment would meet LB's needs is plainly not going to be enough.

30. Whilst I accept Mr. O'Callaghan's submissions that the Tribunal will also need to consider if the dismissal was procedurally unfair, it is perhaps notable that no procedural issues have at this stage been identified.
31. Whilst this is not a case which I can say is doomed at trial and should be struck out, for the reasons that I have given it is one that has little reasonable prospect of success such that a Deposit Order should be made. I deal with the amount of the deposit below.
32. I would also observe that the Claimant should perhaps reflect on what this claim might actually be worth even if it was to succeed. If it was to succeed on the basis of some as yet unidentified procedural flaw then the result might well be that that would have made no difference to the eventual outcome of dismissal given the inherent link between LB's placement and the Claimant's employment and the result of the termination of the former on the sustainability of the latter. At best in such circumstances the Claimant may simply end up with a pyrrhic victory. He may wish to consider whether the emotional and financial commitment of these proceedings is ultimately worth that potential outcome.

#### Automatically unfair dismissal

33. The Claimant contends that he made protected disclosures and that as a result of those he was unfairly dismissed.
34. Mr. Khan submits that firstly the disclosures which are relied upon by the Claimant could not properly be seen as protected disclosures but that even if they were, they were plainly not the reason for dismissal.
35. Mr. O'Callaghan submits that whistleblowing cases should be treated in the same way as discrimination claims and should not be struck out unless in the most exceptional cases and certainly not where there are factual disputes between the parties. His position is that that is the case here and there can be no fair determination of the matter without the benefit of hearing the oral evidence.
36. I agree with Mr. O'Callaghan that this is not a claim which should be struck out because there is a dispute of fact. That can only be resolved in my view after hearing live evidence from the Respondent's witnesses as to the reason for dismissal and the Claimant having the opportunity to cross examine and interrogate those matters. Again, given that the Claimant has qualifying service the burden of proof is on the Respondent to satisfy the Tribunal as to the reason for dismissal.
37. Whilst Mr. Khan relies on the decision in **Ahir** and points to the fact that Tribunals are entitled to strike out claims which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, I do not conclude that this is one of those cases. As observed at paragraph 25 of **Ahir**, each case will turn on its own facts. I bear in mind in that regard that **Ahir** was a somewhat unique case. The Claimant was relying on

arguments which the Her Honour Judge Eady in the Employment Appeal Tribunal found to be fanciful and the Court of Appeal described as having inherent implausibility. That argument involved the Respondent having concocted an anonymous letter to trigger an investigation because the Claimant had done protected acts and that each of the six decision makers who determined individually that there was a case to answer had been aware of them and motivated by them. That was despite the fact that it was not in dispute that the basis of the allegation which underpinned the dismissal, falsification of information on a curriculum vitae, was correct.

38. The Claimants case here, whilst inherently weak, does not reach a level of that nature and is not a claim which is one of the rare cases that should be struck out without hearing the evidence.
39. However, for some of the same reasons as I have given in respect of the ordinary unfair dismissal claim I take the view that this claim has little reasonable prospects of success. The Claimant's case is, essentially, that the Respondent manufactured a story that they could no longer support LB's educational needs because he had made protected disclosures.
40. Leaving aside the problem that the Claimant will be likely to have in establishing that he made protected disclosures (and I deal with that further below) there was already in train issues as to LB's educational plan well before this point and I have already observed that that plan is subject to multi agency involvement. Other than the Claimant's say so on the point there does not appear to be anything at all which points to the decision having been a sham or having been taken because of the communications upon which the Claimant relies as being protected disclosures. Indeed, it is perhaps notable that even the Further & Better Particulars settled by Counsel do not engage with the reason why any disclosures that are made out are said to be the reason or principle reason for the dismissal.
41. I take into account in this case that disclosure has already taken place between the parties – and substantial disclosure at that – but I have not been taken to anything that underpins the Claimant's case that the protected disclosures were the real reason for his dismissal. However, as I have observed the burden will be on the Respondent to establish their potentially fair reason for dismissal and that should be subject to the evidence of the relevant decision makers.
42. Again, this is a claim which appears to me to have little reasonable prospect of success such that a Deposit Order should be made. The level of that Deposit Order is dealt with below.

Detriment contrary to Section 47B Employment Rights Act 1996

43. The Claimant relies on two letters, both dated 1<sup>st</sup> September 2020, as being protected disclosures. They relate both to the complaints of detriment and of automatically unfair dismissal.
44. I fail to see at all how the first of those letters (pages 411 and 412 of the Preliminary hearing bundle) could possibly amount to a protected disclosure. This letter was not something one which conveyed information that showed or tended to show a relevant failure contained in Section 43B(1) Employment Rights Act 1996. All that the letter did was ask that the Respondent did not visit LB or



take her from the premises and asked for confirmation of that. There cannot in my view be said to be any basis upon which to suggest that that showed or tended to show a relevant failing. Moreover, it was clearly a letter written by the Claimant and his wife as LB's parents and in a private capacity. It related only to LB and I cannot see how it could properly be said that the Claimant had a reasonable belief that it was in the public interest.

45. However, I have not struck out reliance on that communication given the decision in Norbrook Laboratories (GB) Ltd v Shaw UKEAT/0150/13 as to cumulative communications on which the Tribunal may need to hear evidence and submissions.
46. The second letter makes reference to matters such as illegal surveillance, data accuracy, fraud and risk due to Coronavirus. It reads more as a letter of unstructured allegations than information tending to show a relevant failure. However, I take the view that given the requirement for reasonable belief, the Claimant needs to give evidence and that can only be done at a full hearing.
47. However, I do consider it very unlikely that he will be able to establish that either or both of those documents amounted to a protected disclosure (even when read together) such that I am making a Deposit Order because it follows that if the Claimant cannot establish that then he cannot make out a claim for detriment.
48. The complaints of detriment themselves also in my view have little reasonable prospect of success. The acts of detriment which the Claimant relies upon are two letters which he and his wife received from the Local Authority (NCC). The Claimant effectively says that the Respondent's communications with the Local Authority were the reason that those letters were sent and that the detriment that he was caused is that the letters caused him stress and placed pressure on him.
49. I have not struck the detriment complaints out, but the Claimant should be aware that that was only by a very narrow margin. Firstly, the letters did not come from the Respondent but from the Local Authority. It appears to me that the argument that they came about as a result of discussions that the Respondent had had with the Local Authority is an attempt to shoehorn the basis of the claim into Section 47(b)(1) Employment Rights Act. Moreover, I accept that there is considerable force in Mr. Khan's argument that all that the Respondent was doing in communicating with the Local Authority was discharging their statutory duties and it is difficult to see in so doing how they were motivated by any alleged disclosures or subjecting the Claimant to detriment.
50. Secondly, the Respondent would have had to have known that the Local Authority would, in consequence of those discussions, have written to the Claimant in terms that he would find distressing and thirdly the detriment that appears to be being claimed appears to me to be the effects of a detriment and not a detriment of itself. It is also difficult to see how receipt of a letter asking for permission to undertake an assessment of LB in perfectly measured tones could be said to be a detriment. It is by the slimmest of margins that I have not struck these complaints out.
51. Deposit Orders are appropriate but I urge the Claimant to think carefully about whether these aspects of the claim are really sustainable.

52. I should observe that one of Mr. Khan's arguments was that the first act of detriment was out of time. However, I have not struck that complaint out as I have not heard any evidence from the Claimant about the issue of time limits and that will be a matter for the final hearing.

Direct disability discrimination by association

53. There is no dispute as helpfully confirmed by Mr. Khan at the Preliminary hearing that LB is a disabled person within the meaning of Section 6 Equality Act 2010.
54. However, no details of any direct discrimination complaint have ever properly been advanced. They are not referenced within the original Claim Form nor within the Further & Better Particulars other than a passing reference at paragraph 28 which in all events is in the context of harassment. As this aspect of the claim has never been articulated in the eight months since the Claim Form was presented and despite a set of Further & Better Particulars and the benefit of two Preliminary hearings, it is clear that there is no basis for it. It can be properly said to have no reasonable prospect of success and accordingly I am striking it out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

Victimisation

55. The protected act relied on by the Claimant is a letter which he wrote to the Respondent dated 1<sup>st</sup> September 2020.
56. The Further & Better Particulars settled by Mr. O'Callaghan cross refer to paragraph 9(1) of the original particulars which the Claimant had submitted at the time that he presented his Claim Form. He also refers to the receipt of letters from the Local Authority dated 2<sup>nd</sup> February and 11<sup>th</sup> February 2021.
57. Mr. Khan submits that all of the acts at paragraph 9(1) occurred prior to the date of the alleged protected act and so causation is a clear issue. These are the same acts relied on as for harassment. Mr. O'Callaghan quite properly accepts that if the acts of detriment which are claimed pre-date the alleged protected act then those are apt to be struck out as having no reasonable prospect of success. It is not in this regard advanced that the Respondent believed that the Claimant might do (rather than had done) a protected act. Therefore, any detriments pre-dating 1<sup>st</sup> September 2020 are struck out as having no reasonable prospects of success, even on the Claimant's own case.
58. Insofar as the letters of 2<sup>nd</sup> and 11<sup>th</sup> February 2021 are concerned, Mr. Khan says that that cannot be a detriment done by the Respondent because they did not send it, the Local Authority did and equally the content of those letters could not sensibly amount to a detriment.
59. Mr. O'Callaghan raises that the letters flowed in consequence of actions of the Respondent in contacting the Local Authority which he contends was done because the Claimant had written his letter of 1<sup>st</sup> September 2020.
60. Dealing then with those two letters relied upon by the Claimant. Both of those post date the alleged protected act upon which the Claimant relies. The first letter sought to engage with the Claimant and his wife about an educational assessment for LB. The Claimant says that that was a detriment because it was a request made during the pandemic and would place LB, himself and his wife at

risk of contracting Covid-19. The second letter is in similar terms but makes plain that an Order will be sought if the Claimant and his wife continued to refuse access to LB for an assessment to take place.

61. This is essentially the same argument as was advanced in respect of the detriment complaints and I do not need to rehearse again what I have already said about those matters above.
62. Suffice it to say, for the same reasons as I have Ordered a deposit in respect of the detriment complaints, it is also appropriate to make one in regards to the victimisation claim.

Harassment related to disability

63. The Claimant relies on the following acts of alleged harassment:
  - a. Telephone calls received from the Respondent on dates between 31<sup>st</sup> March 2020 and 13<sup>th</sup> July 2020 which related to LB (and thus it is said related to disability); and
  - b. Being told on 1<sup>st</sup> July 2020 that his hours were to be reduced but that he would still have to undertake the same work.
64. Without hearing evidence from the Claimant as to the content and effect of those calls I am unable to say that this element of the claim has no reasonable prospect of success such that it should be struck out. That being said, I have seen the notes of the conversations at Annex 4a of the documents supplied for this hearing. It appears to me that there is force in the submissions of Mr. Khan that it appears that all that was happening here was the Respondent continuing to seek to meet their duty of care towards LB as her overall educational needs provider and to engage with her and the Claimant. The fact that the Claimant may not have wanted them to do that is unlikely in my view to be seen when considering matters objectively as harassment within the meaning of Section 26 Equality Act 2010. I am therefore satisfied that this is also a complaint which has little reasonable prospects of success and should be made subject to a Deposit Order.
65. Equally as to the second alleged act of harassment, whilst I accept that the Claimant's evidence on this point will again be needed there is substantial force in the submission made by Mr. Khan that it appears that all that was being done here was the communication of news, albeit unwelcome news. The Claimant might well have been putting his case another way if he had not been forewarned about that. Again, therefore, I consider it very unlikely to say the least that this could, objectively viewed, amount to harassment within the meaning of Section 26 Equality Act.

66. Deposit Orders are therefore appropriate also for the acts of harassment claimed.

The amount of the Deposit Orders

67. Mr. O'Callaghan submits that the Claimant's means are such that he cannot afford to meet any Deposit Orders and as such they should not be made. The Claimant's evidence in this regard was that he had no disposable income following the termination of his employment because he cannot obtain another job as a result of needing to provide 24/7 care to LB. His evidence was that he

had no savings as those have all been spent following the termination of his employment and the legal costs that he has incurred in respect of this matter and the SEND proceedings. The Claimant said that he has so far expended the approximate sum of £6,000.00 in these Tribunal proceedings and around £18,000.00 for the proceedings before the SEND Tribunal. His position is that he and his family are reliant on family to help them financially including in respect of any additional legal costs that might be incurred.

68. Mr. Khan contends that the Claimant's evidence should be treated with caution given that he had initially said that he had no savings but then gave evidence that he had spent approximately £24,000.00 on legal costs since the termination of his employment. He further submits that at the times when he has had to find money to fund legal proceedings he has always managed to do so and could call upon the family members who have been assisting him financially.
69. I have in mind when considering the amount of the Deposit Orders the decision of the Employment Appeal Tribunal in Hemdan v Ishmail & Anor 2017 ICR 468. As I remarked to the Claimant when explaining the effect of a Deposit Order and why his means were relevant to that issue, if I were to make Orders that he was unable to pay then that is effectively tantamount to striking out the claim.
70. I am conscious that I have not had any documentary evidence about the Claimant's means and I note the submissions of Mr. Khan but ultimately I cannot make Deposit Orders of such a significant sum that it may render the Claimant unable to pay them. That would cause injustice. The Claimant has of course had no income since his dismissal and it would not be unexpected for savings to have dwindled in those circumstances and where considerable costs of legal expenses have been incurred.
71. That being said, I do not accept that no Deposit Orders should be made in these circumstances. A Deposit Order, even of a modest level, should be enough to make the Claimant seriously reflect on the complaints that he is advancing and to evaluate whether he really wants to pursue them in view of what I consider the likely outcome will be.
72. I am satisfied that a Deposit Order of £10.00 in respect of each of the complaints that has little reasonable prospect of success will be sufficient and will nevertheless be something that the Claimant will be able to meet if he does want to continue with the matter given his acceptance that he has always found the money for legal fees when he has to, including for the hearing today. I have fixed a longer period for payment than I would ordinarily have done to allow the Claimant to take stock and gather the necessary funds if he decides to pay the deposits and taking into account the fact that it is almost Christmas. If it was necessary, it is always open to the Claimant to seek an extension of time before the date for payment has passed.
73. I sincerely hope that the Claimant will reflect on the terms of the Orders that I have made and not take from the fact that some of the complaints have not been struck out that they are said to have merit. I stress that my conclusions are that the remainder of the complaints have little reasonable prospect of success and he should consider with great care whether to continue to expend time and costs in pursuing them further.

74. His attention is drawn particularly to the note accompanying the Deposit Orders for the repercussions of what may follow if he pursues the complaints and they do not succeed for substantially the same reasons as I have given in this Judgment.

APPLICATION FOR A STAY

75. The Claimant seeks a stay of proceedings pending the SEND proceedings concluding which is anticipated will be in March 2022. It is said that the Claimant is occasioned considerable stress by having to deal with two sets of proceedings and that he is already under the pressure of having to care for LB as well. The Respondent opposes that application. It is said that the Claimant has elected to litigate in two forums and the Respondent is entitled to have the claim against them determined.

76. Ultimately, I do not consider a stay of the proceedings to be necessary. The full hearing is not scheduled until March 2023 and so the Orders for the preparation for that hearing can simply be put back until after the SEND hearing has taken place.

77. I have not at this stage made any Orders because I consider it appropriate to wait until the date for payment of the Deposits has passed as it may be that the Claimant elects not to pay them and to not continue with the claim. If the deposits, or some of them, are paid then I will review matters again and make Orders for the further conduct of the claim towards a final hearing.

78. However, given the observations that I have made, if the Claimant does elect to pay the deposits and the matter reaches a full hearing I have recused myself from hearing it. That is not because I do not consider that I could deal with the matter fairly on the evidence but simply because I want the Claimant to have every confidence that he will receive a fair hearing before a Judge looking at matters with a fresh pair of eyes.

\_\_\_\_\_  
Employment Judge Heap

Date: 13<sup>th</sup> December 2021  
JUDGMENT SENT TO THE PARTIES ON

.....

.....  
FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.