



EMPLOYMENT TRIBUNALS

Claimant: Mr W. Ali
Respondent: Department for Work and Pensions

London Central

25 August 2022

Employment Judge Goodman

Representation:
Claimant: in person
Respondent: Alexander Jones, counsel

JUDGMENT

1. The claimant is permitted to amend his claim by adding the treatment identified at 1.2, 1.19, 1.20, 1.23 on the list of issues.
2. The claimant's application to amend in respect of 1.7, 1.8, 1.9, 1.16, 1.17, 1.18, 1.21, 1.22 is refused.
3. All claims of direct discrimination because of age, sex, race or religion are struck out under order 37 as having no reasonable prospect of success.
4. The claimant of unauthorised deduction in relation to cab fares is struck out as having no reasonable prospect of success.

REASONS

1. This claim is brought under the Equality Act 2010, with the addition of the claim of unlawful deductions from wages under the Employment Rights Act 1996. It concerns the claimant's employment with the respondent as a work coach. The claimant started work on 26 October 2020 at Redbridge Jobcentre, where he was to be trained for 6 weeks. In the event he only worked on 26 October 2020. He returned to Barking to collect some equipment with a view to restarting on 1 March 2021, but in the event has not resumed work since then, though he remains employed.
2. It is useful to set out the history of the claim. He presented the claim on form ET1 on 31 March 2021. This has a short narrative of events between 23 October 2020 and 1 March 2021. There are claims for discrimination because of age, race, sexual orientation and religion and belief. He also ticked the boxes for claims for notice pay, holiday pay, arrears of pay and other payments, without specifying what they were. At a case management hearing in October 2021 he clarified that it was a claim of sex discrimination, not sexual orientation discrimination, and the latter claim was dismissed on withdrawal. Meanwhile the respondent had filed a response on 19 July

2021.

3. At the case management hearing on 20 October 2021 he was ordered to file further particulars of his claims by 14 January 2022, and there was to be an open preliminary hearing on 18 February 2022 to consider the respondent's applications to strike out the claims or make deposit orders. This generous time allowance was because the claimant had indicated that he was unwell; he was also pursuing a grievance. He did not file particulars as ordered, and the respondent applied to strike out the claim for failing to comply. He then filed further particulars on 14 February 2022. They cover 7 pages, without paragraphs.
4. The hearing on the 16 February 2022 before Employment Judge Burns was converted to a case management hearing as the further particulars appeared to include new matters. She ordered a stay of proceedings until 27 April 2022, in part because of the ongoing grievance proceedings; the claimant was also undergoing counselling. If he wished to apply to amend his claim, he was to do so by 29 April 2022.
5. The claimant filed his second set of further particulars on 30 April 2022. This extends to 11 pages.
6. At a further case management hearing on 30 May 2022, Judge Burns discussed the claim with the claimant in order to clarify what he was saying. She identified that additional claims were being made orally.
7. She then prepared a list of issues, as part of the case management summary. The list is attached to this judgement. It identifies which allegations had been brought after the claim was first presented, and when. She then listed this open preliminary hearing to decide, firstly, whether the claimant was permitted to amend his claim, and secondly, the respondent's application to strike out the claims as having no reasonable prospect of success, and in the alternative, make deposit orders if they have little reasonable prospect of success.
8. Despite the 2 sets of written particulars, and the discussion at the hearings, it was necessary to ask the claimant for further information in the course of hearing today's applications. This was time consuming. I gave judgement on the application to amend at the end of the morning, with summary reasons. The afternoon was devoted to the application to strike out, and I then reserved judgement.

Application to Amend Claim

9. The Tribunal has a discretion under Rule 29 to permit amendments to a party's statement of case. In accordance with the principles in **Selkent Bus Company v Moore [1996] ICR 836**, the discretion must be exercised in accordance with the overriding objective to deal with cases justly and fairly, and taking into account all the circumstances, including: (a) the nature and extent of the amendment, whether for example it is a relabelling of material already before the tribunal or a wholly new matter (b) its timing (including any applicable time limits and the implications of the amendment in terms of impact on the trial timetable or costs), (c) its merits (where those are obvious, there being no point in adding an amendment to bring a hopeless claim), and (d) the relative prejudice or hardship to the parties of either granting or refusing the amendment. **Galilee v MPC (2018) ICR 634** establishes that an amendment made out of time does not confer jurisdiction: the time point still remains to be determined by the tribunal.

10. While it is in general desirable to permit amendments where that will enable the Tribunal to adjudicate on the 'real dispute' between the parties, they are expected to set out their claims at the outset. As was said in **Chandhok v Tirkey UKEAT/0190/14**; "the claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so...", and "an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings".

Amendment – discussion and conclusion

11. The first addition is item 1.2, about events on the claimant's first day of work, 26 October 2020. In the claim form the claimant says that having been told before he started that masks were not supplied, he found when he attended work that " the management discouraged throughout the day". In his further particulars in February 2022 the claimant said that Junaid Salah was looking at the claimant whenever he mentioned masks or anything to do with Covid. This morning the claimant added that other people starting with him wore masks to begin with but gradually took them off. I conclude that this is not a fresh allegation, but a description of how management "discouraged" the wearing of masks. The respondent will already have known to discuss the events of the day with Mr Salah, including Covid PPE, so the elaboration puts them at no significant disadvantage. It is allowed.
12. Next is item 1.7, that the respondent "repeatedly refused the claimant's request for counselling made on several occasions since January /February 2021 to.. line manager Charlene Ayton". This was first mentioned in the particulars of 30 April 2022. There are obvious time difficulties with this allegation: while the claimant has not dated the refusal of counselling, he was in touch with Ms Ayton regularly at the time. He could have included it in the claim form on 31 March 2021. It was also a series of refusals – he does not say he was kept waiting for an answer. By the end of the year 2021 he had already arranged counselling through his general practitioner (which was still under way at the time of the February case management hearing), so it seems likely that he then ceased asking for counselling through the respondent - though it is possible that has asked for more once the NHS course finished. Although Charlene Ayton might have notes of her meetings with the claimant, whose health she would have been considering because he was away from work, this is a new topic, going back a considerable time, and may well require oral evidence, which puts the respondent at a disadvantage in obtaining the evidence. He could have included it in his particulars filed 16 February 2022. The claimant was not able to explain why he did not mention it before; he just said he presumed it would be discussed at the next hearing. He also said he thought the claim would settle. (these two explanations were repeated for many of the late inclusions discussed). He added that it was a continuous course of conduct, so was not out of time. This last is an implausible argument, given that by the end of the year he had arranged other counselling. It is also not shown how the claimant could show it was related to any protected characteristic, or why he believes this, other than that Charlene Ayton is not a Muslim and not a man. I conclude that the balance of prejudice is against the claimant and this amendment is not allowed.
13. Next is 1.8, delay in providing pension information. The claimant explained that when he joined the respondent's final salary scheme (aged 28) he wanted to transfer in several small pension pots from previous employment. He first asked early in 2021,

when he was not in the workplace. He got the information at the end of the year 2021, he was not clear precisely when that was, but it was more than 12 months after his start date, so after the cut off for transfers in. This is not mentioned in *either* set of 2022 written particulars, though it could have been, and in February it will have been fresh in his mind. The complaint was first made verbally at the case management hearing on 20 May 2022. There is nothing to explain how the delay is related to the claimant's sex, race, age or religion, or why he believes it was, indicating this is a weak claim. An explanation might be administrative oversight. It is a fresh topic which will require a separate investigation. It will be hard for witnesses to recall what happened - or why it did not happen – over a year ago. The balance of prejudice is against the claimant. This amendment is not allowed.

14. Next is 1.9, delaying providing minutes of the Health and Attendance meetings conducted by Ms Ayton. The claimant says he met her on 2 February 2021 and then at two monthly intervals, and the target time for notes to be sent to him was 5 days. It was not clear from his answer to a question how long the delays were. This was not on the claim form on 31 March 2021, although minutes could have been outstanding for the best part of 2 months at that date. It was not in the particulars filed in February 2022 either, and is first mentioned on 30 April 2022. As with the last 2 matters relating to Ms Ayton's administration it is not easy to understand from the information given by the claimant how or why this is related to race sex age or religion, or why he believes that this was the reason. There is only a hypothetical comparator. It is also not clear how it put him at a disadvantage. The balance of prejudice is against the claimant, and this is not allowed either.
15. The next item for amendment is 1.16, being that he was not reimbursed the cab fares (as agreed) when he attended work on 1 March 2021, as had not wanted to travel by public transport because of the risk of Covid. This is not mentioned in the claim form on 31 March 2021 – although perhaps at that time the claimant thought he was going to be reimbursed. More seriously, it is not mentioned on 16 February or 30 April 2022, and first came to light verbally at the case management hearing on 20 May 2022. It was not clear from today's discussion why he had not been reimbursed. As with the other administrative matters (pension fund information, minutes of meetings, requests for counselling) the claimant is not able to say why he believes he has not been paid because of his race, religion, age and sex, i.e. that an older man, or a woman, or a Bangladeshi, or Hindu, for example, would have been treated better. For this reason, this item of treatment seems to have poor prospects of success, may have difficulty overcoming any time limit, and contributes to a proliferation of claims which the respondent has to investigate when old. Once again, the balance of prejudice is against the claimant. Aside from the Equality Act claim, a claim for expenses cannot be brought in the employment tribunal while he is still employed, as they are excluded from the definition of wages in the employment rights act. If they remain unpaid the claimant has the option of a claim in the County Court, or after termination of employment, in the employment tribunal under the Extension of Jurisdiction Order. The amount involved is under £13.
16. Next is 1.17, an allegation that the respondent deliberately delayed the hearing to consider his grievance dated 4 May 2021. This matter was first raised in the further particulars dated 30 April 2022. The claimant explained there had been an investigation meeting in June 2021, and he got the decision in October 2021. On these dates, there seems to have been little delay investigating his grievance. By the standards of many public service grievance procedures, this time span is not abnormal, and it is unlikely he will be able to show that hypothetical comparators

would have had their grievances resolved earlier. If the claimant did consider there was delay because he had presented a grievance alleging discrimination, or because of his race, sex, age or religion, he might have been expected to mention this in his further particulars on 16 February 2022, given that he had known since the end of October 2021 that he would have to give these details. This allegation is taken together with 1.18, which is that at the hearing in June 2021 he was not permitted legal representation, was shown no empathy, and made to feel that he was in the wrong and there was no investigation of his concerns. As an employee, he will not have been permitted legal representation and today the claimant said it was about not having trade union representation, complaining that he had not been able to join a trade union in time to use their services because he had not been advised by the employer that he could join a union. This part of the claim seems weak, as in any event he would have been able to take a companion. He does not explain why he made no mention of this in February 2022, even though by that point (a) he would have known that the grievance was going badly because it had been turned down in October 2021 (b) that decision had recently been overturned on appeal. Neither of these items is allowed, as the balance of prejudice is against the claimant.

17. Item 1.19 is about a meeting with Ms Ayton in late January or February 2022 when she “quizzed him inappropriately about his symptoms”. This is first mentioned on 30 April 2022, but given the vagueness of dates, it is not clear whether it should have been included in February 2022, and may have been in time on 30 April. He felt he was being accused of lying. This allegation is closer in time and respondent has a better opportunity to investigate. The amendment is allowed.
18. Item 1.20 is about delay providing documents under the subject access request (SAR). On 2 February 2022 he asked for documents. On 22 March 2022 he was sent the documents, but he did not have the software on an old computer to open them so he asked for hard copies, which were provided in or around May 2022. Some documents from Charlene Ayton were not received until mid-July 2022. The claimant believes this was a deliberate delay, and although it is not stated it must be implied that it was because he had brought a grievance, or because of race, sex, religion or age. However, given that the respondent complied very promptly with an electronic file, it seems very unlikely that the reason he was not provided with hard copies until later was because of any protected characteristic or allegation. Though weak, it is in time, and the amendment is allowed.
19. Item 1.21 is another matter first raised on 30 April 2022. The claimant says he was not provided with the vouchers for a Specsavers eye test he was entitled to. He said he first asked in February 2021 (not February 2022 as recorded by Judge Burns). He was refused in a telephone call late in 2021. He does not remember if he was given the reason for this. Then he was given some information about the employee benefit scheme, and he went to Specsavers to have an eye test but was told on 25 March that any request must come through his employer.
20. Item 1.22 says the respondent deliberately delayed the rehearing of his 4 May 2021 grievance, which had been remitted for fresh consideration following his appeal. The claimant’s appeal succeeded on 7 February 2022. His grievance was to be reinvestigated. There was an investigation meeting on 13 April 2022. He got a summary of the investigation findings on 1 June 2022. He says he has still not had the final outcome, though the respondent says it is due in a week or two. It is hard to understand how the meeting was said to be delayed, in the context of public service grievance procedures, when it was a matter of weeks between the outcome of the

appeal and the meeting being held, and seems improbable that he experienced any more delay than any public service employee without his protected characteristics. This has poor prospects of success as an Equality Act claim. It complicates and extends the investigation and length of hearing. The balance of prejudice is against the claimant.

21. Item 1.23 is the last. The claimant makes the same complaints about the conduct of the meeting in April 2022 as he has about the meeting in June 2021. This claim is in time, being notified on 30 April 2022. It is not possible to assess the prospects of success when so little is known about what happened in that meeting. It is relatively straightforward for the respondent to investigate the conduct of the meeting at this date. The amendment is allowed.
22. I make a general observation about the reliability of the claimant's information about his claim. He stated all in his written particulars, and more than once in this hearing, that he had not been provided with any payslips by the respondent. In the course of exploring the claim for unauthorised deduction of additional voluntary contributions (AVC's) to the pension scheme from his wages (and considering whether a claim for failing to provide a pay statement should be added to the list of issues), I asked whether, in the absence of payslips, he had received the annual P60 statement of tax deduction for the year ending April 2021. He conceded he had, and as he sorted through his papers, it then emerged that in fact he *had* received payslips for the months in question, though later in the year. When the claimant said he had not received payslips, he meant that he had had to ask for them, and got them late.
23. Finally, and for the avoidance of doubt, I record that there is no application to amend to add a claim of unfavourable treatment because of making a public interest disclosure. Employment Judge Burns noted that the claimant, in discussion at the hearing in May 2022, said he had been unfavourably treated because he had made a public interest disclosure, but there was little information, and she ordered that the claimant file a written amendment of claim, given the complex nature of these claims. He has not done so.

Respondent's application to strike out the claim, alternatively impose a deposit order

Relevant law – the rules, and the burden of proof in equality cases

24. Order 37(1) of the Employment Tribunal Rules of Procedure 2013 provides:

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;

25. Striking out claims at a preliminary stage, before evidence has been heard, is a draconian measure, only to be taken in an obvious case. In any case where there is a "crucial core of disputed facts", those should be decided after hearing the evidence, and not at some kind of "impromptu trial" based on pleadings and written statements, save where there is, for example, incontrovertible contradictory evidence in a document. In whistleblowing (public interest disclosure) and Equality Act cases, which are important in a democratic society, over and above the interest of the individual claimant, and particularly fact sensitive, tribunals should be especially careful – **Anyanwu v South Bank University and another UKHL (2001)14;** **Tayside Public Transport Company Ltd v Reilly (2012) IRLR 755;** **Ezsias v North**

Glamorgan NHS Trust (2007) IRLR 603. The tribunal must first decide whether there is no reasonable prospect of success and then whether to exercise discretion to strike out – **Balls v Downham Market High School and College (2011) IRLR 217.**

26. Rule 39 of the Employment Tribunal Rules of Procedure 2013 concerns deposit orders. It states:

- (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.

27. The amount of the deposit is set having regard to the party’s ability to pay, and must not be so high as to bar access to justice; the real deterrent effect of a deposit order is the risk of paying costs. If at final hearing the claimant loses because of substantially the same weakness in his case as identified in the deposit order he is likely to have to pay the other party’s costs. I explained this to the claimant at the hearing.

28. Making a deposit order requires the tribunal to take the decision in two stages, firstly, to assess the prospects of success, secondly, to exercise its discretion on whether a deposit order is appropriate - see **Hasan v Tesco Stores Ltd UKEAT/ 0098/16** (which concerns strike out).

29. Applications for deposit orders are decided on the basis of the pleaded case and available documents, without taking oral evidence. The tribunal should consider the prospects of establishing the case on the basis of what is pleaded, and may also take into account the party’s prospects of establishing the facts pleaded – **van Rensburg v Royal Borough of Kingston on Thames UKEAT/0095/07.**

30. A deposit order can have a chilling effect in what is largely a no-costs jurisdiction, and should not be done lightly, or bar access to justice in practice. The guidance to tribunals in exercising discretion set out in **Hemdan v Ishmail (2017) IRLR 228** is:

The purpose of the 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 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.

Ability to pay

31. Employment Judge Burns made an order on 30 May that if the respondent made an application for a deposit order (which did on 8 July) the claimant was required to prepare a short witness statement by 10 August 2022 setting out information about his means to pay a deposit, including information about his income, outgoings and any savings or debts. The claimant had not done this. Asked why not, he said he was not sleeping well. I then asked questions about his means. He has remained away from work since March 2021. He was paid in February and March 2021, but has not been paid since, as his absence has either been treated as unauthorized and unpaid, or for sickness, and he has exhausted his right to sick pay. He lives with his parents, his wife and his son, in a house owned by his father. His father works "on and off", he was unaware of his income. His mother takes care of his son but does not go out to work. His wife works as a dental receptionist for 24 hours per week, plus occasional overtime. She said she earned £708 per month. There are payments of child benefit. The claimant has not applied for benefit for himself. He says this is for two reasons. First of all, he would have to put on a form that he is employed at a salary of £34,000 per annum, which he says would exclude him, even though he is not being paid it. Secondly, while he is British, his wife is not, and her visa provides she must have no recourse to public funds. He believes this would exclude him from claiming benefit even for himself. He denied having any kind of second job, employed or self-employed. He denied having savings; he did not mention any debts. He is supported by his wife and father. I conclude his ability to pay is limited, though there may be family resources.

Proving an equality case

32. The burden of proving that the reason for any less favourable treatment was because the protected characteristic is on the claimant. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

33. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order

to see whether it is legitimate to infer that the actual decision complained of in the originating applications were” because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not “a mere intuitive hunch”. **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent’s explanation. There is no need to prove positively that the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not “without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent” committed an act of unlawful discrimination”. There must be “something more”.

Discussion and Conclusion

33. At this stage in the case, the employer has been able to respond to many but not all of the allegations, and it was already envisaged that they will be given an opportunity to amend the response the scope of the claim was clear. Some facts about the allegations appear in the grievance investigation report but this must be treated with caution given that it has been held that the grievance must be reinvestigated. Thus much of the focus at this stage must be on what the claimant says, and to assume that he can establish those facts at a hearing.
34. Item 1.1 is about the claimant being allocated to Redbridge job centre, and he wanted to work at Newham or Barking which would enable him to go to work without using public transport. When he objected he was told (on the telephone) to accept or reject the offer, or speak to his manager. The claimant explained that there had been general recruitment exercise from May 2024 new staff in DWP in East London, anticipating many claims arising from the pandemic. He had applied, and been placed on the reserve list. This was the context of the telephone call offering him a job at Redbridge. The claimant was asked on what basis he believed he was being treated differently to other candidates on the reserve list who had expressed a preference for a place of work, or why he believed that he was offered Redbridge (and told to take it or leave it) because he was young, a Muslim, with a Pakistani background, or a man. The claimant was not able to explain why this was the case. On its own, the claimant has no facts other than his protected characteristics to establish that he was to work at Redbridge because of them. There is nothing more, even in his own account. This item is struck out as having no reasonable prospect of success. Of course, it sets the scene for subsequent events.
35. Item 1.2 is about management discouraging the wearing of masks. The claimant had already had a telephone discussion with the manager, Junaid Salah, about PPE, and been told that hand gel and white provided, but not masks. (At the time, wearing masks was compulsory on public transport). As the office was not public facing, but being used for training, staff were not required to wear masks. The claimant says that gradually several new starters took off their masks during the morning. This was because Junaid Salah talked about young people not being at such high risk, social distancing, and so on. The claimant interpreted Junaid Salah looking at him as a pointed and discouraging reference to his mask. What is not at all clear is in what way this related to any protected characteristic. Junaid Salah was a man, and a Muslim, who had already explained the claimant that he could use the prayer room during the day; his age and ethnic background are not stated. Asked about this, the

claimant said Junaid Salah would not have done this if they had not been of the same background – i.e. he would not have done this if the claimant had been white or a Christian or a woman, in other words, he was less favourably treated than hypothetical comparator because they share the same background. The claimant was unable to point to any factor on which he based this belief, other than that he felt uncomfortable in a space where other people were not wearing masks. I conclude that the claimant has no reasonable prospect of establishing that there was “something more” to establish that any less favourable treatment was because of a protected characteristic.

36. Item 1.3 is that he was not allowed to pray in the afternoon when a woman was allowed to. It had already been explained to the claimant that the prayer was available for use during the working day, and that he need only signal to his manager that he required to use it. The claimant says that during the afternoon session he made a hand signal to indicate he wanted to go to the prayer room, but Mr Salah ignored it. However, he saw a woman going to use the prayer room. This item is pleaded as sex discrimination only. The claimant, on these facts, may establish a difference in treatment, (this assumes that the explanation is not that Mr Salah missed his signal - according to the response, the claimant did not ask). What the claimant has not shown is any fact that suggests the reason why Mr Salah did not say he could leave the group to pray was because the claimant was a man. The facts point the other way: Mr Salah, himself a Muslim, had already indicated that there was no problem, he only had to ask. There is nothing to suggest a preference for women praying, or disparagement of men praying, other than the single fact that a woman went to the prayer room in the afternoon. I conclude that there is no *reasonable* prospect of the claimant establishing that the reason Mr Salah did not heed his signal was because he was a man. Had I not reached this conclusion, I would certainly have made a deposit order as a condition of proceeding with this part of the claim.
37. Item 1.4 is that when the claimant did not come to work the next day, and telephoned Mr Salah about taking a Covid test (he asked to be sent home testing kit), Mr Salah pressed him to take a test in person, which would require him to leave the house and travel to a testing station. (The respondent denies that the manager was told anything other than that the GP had advised self-isolation until he could take a test and just asked to be told the result). Again, the claimant says this is because he was young, or a Muslim, or of Pakistani background. Asked why he believed this, he said that Mr Salah would have been more considerate if he had not had these characteristics, but did not indicate any matter on which he based this belief. If the claimant establishes these facts, there is still no reasonable prospect of showing that any instruction to attend a test centre was because of any protected characteristic. This claim is struck out.
38. Item 1.5 is that the respondent refused to allow the claimant to work at an office closer to his home, or delay his return to the office, and made light about his concerns about his family’s underlying health conditions. The respondent argues that this is about his health, not any detected characteristic. Asked why he believed this was because of any protected characteristic, the claimant replied that the respondent had had a mass recruitment exercise in May 2020, and they must have had a job for him nearer his home. I conclude that there are no facts from which the claimant could invite the tribunal to draw an inference that the reason for the respondent’s action was because of any of the 4 pleaded protected characteristics. This claim is struck out.

39. Item 1.6 concerns a conversation in November 2020. The claimant's Covid test result came back negative, but he said that he was still fatigued and was not attending work. On the claimant's case, he was told he must return to work or resign, despite explaining that his family were more prone to health difficulty because of their ethnic background. The claimant resigned. Ms Ayton, a more senior manager, intervened with the result that the claimant withdrew the resignation, unpaid special leave was substituted for unauthorised leave, and it was arranged that another workplace could be allocated when he was fit for work - he now had a fit note until 26 January 2021. (In the event he was certified and fit for the period up to 28 February and to start date was put back to the 1 March at Barking). The tribunal will have to decide what facts the claimant has proved to establish that Mr Salah's conversation about his absence from work, and pay while he suspected he had Covid (though he did not) were because of any protected characteristic. The claimant repeated only that he believed that because of his background the family were more prone to health difficulty, so he did not want to attend work when he had to travel by public transport, or where people were not wearing masks. Even if the claimant could establish an actual or hypothetical difference in treatment, there are no facts from which the tribunal could conclude that the reason for any difference in treatment was because of any of the pleaded protected characteristics. Mr Salah's actions could be understood as those of a new manager exploring unusual sets of facts in the evolving pandemic and the claimant advances no other fact to suggest a protected characteristic might be the reason. This claim has no reasonable prospect of success.
40. Items 1.10 to 1.15 concern the claimant's attendance at Barking office on 1 March to collect equipment to restart his training. A security guard came up close to him, with his mask and his chin. After hearing counsel for the respondent say that the guard must have been treating everyone like that, as it was not stated that he pulled his mask down as he approached the claimant, the claimant said that this was what had in fact happened. The guard asked him who he was. The claimant says he would not have been treated in such a challenging way if he had been white or a woman. The guard was South Asian. Then he was kept waiting for 2 hours despite it having been arranged that he was to attend respondent explains this was because he did not have an access card and the manager had to come from home to get the equipment for him. He was told to get a cup of coffee while he waited, but he did not have any cash as he had only expected to come and go by Uber, using the app. When the manager attended, he is said to have asked the claimant about his background and nationality. At 1 pm on 1 March, (these emails come from the preliminary hearing bundle of 20 May 2022 listed under claimant's disclosure) the claimant emailed Charlene Ayton complaining that no one had been expecting him, that the manager had asked him to spend the day shadowing someone, and said "we would like to get you set up and working as you've been home doing nothing and special pay". There was detailed about arrangements for the card, about whether the claimant could come in next day the following day to collect his kit and card. The claimant said that he was not comfortable being there for long periods and sitting next to someone as it gave him 'paramount anxiety'. He does not mention questions about background or ethnicity. Then on 3 March the claimant emailed again saying he had not been sleeping because of how he been treated on Monday, 1 March. He had "grave concerns regarding PPE and social distancing" which she could not ignore and he did not feel comfortable going in. He then made a subject access request for all CCTV angles in the areas where he was. Again, there is no mention of inappropriate remarks by the manager. It does seem to have been mentioned however in the

grievance of 4 May 2021 (see discussion below and that victimisation claim). On this contemporary evidence, and assuming there is no other email that has not been placed in the bundle, it seems unlikely that the claimant can establish that hostile questions related to his ethnicity were made at the time. Today, the claimant said he understood the manager was of Bengali background, and that there was animosity between Pakistanis and Bangladeshis because of the war in 1970, and that was why he experienced the questions that hostile. At 1.14 the claimant complains that a card was not available so his kit had to be stored even though he had signed for it.

41. Taking these allegations together, the lack of any contemporary complaint, when the claimant complained to his manager and both on the day and 2 days later about events at Barking, indicate that there is little reasonable prospect of success. As a complaint of less favourable treatment, such evidence as there is suggests that the lack of preparation was because it was not appreciated that the claimant had been at work so little that he did not yet have a card, not because of any protected characteristic. (The claimant volunteered that if he had been a woman, he would not have been made to wait because he would have been pregnant or have small children, but this is implausible because not all women are pregnant, and men and women might be accompanied by small children, and will be treated with additional consideration for that reason). As a direct discrimination complaint there is no reasonable prospect of success. As a complaint of harassment, it depends on the facts, but the lack of any contemporary complaint weakens the claim, which has little reasonable prospect of success, as in relation to the security guard and the mask, or the conversations on the day with Muz Misbah, the manager.
42. As for the subject access request (1.15), the claimant was told that G4S, who are contracted to provide site security, was the data controller. On enquiry with G4S, he was told (1 April) that in fact at Barking, unusually, DWP was the data controller. It seems that by the time he established as the CCTV was no longer available, but the claimant's explanation was not entirely clear. I conclude that there is little reasonable prospect of success in establishing that the reason why the CCTV was not provided to him in time was because either he was complaining of discrimination, (i.e. victimisation). This is because it is only too plausible that the real explanation is lack of clarity of the data protection position. As a direct discrimination complaint, i.e. that he did not get the CCTV because he was young, male, a Muslim, or of Pakistani ethnicity this has no reasonable prospect of success, because there are no facts other than a hypothetical difference in treatment from which the tribunal could conclude that one of these was the reason.
43. The next item on the list that survives is 1.19, about Miss Ayton's style in questioning him on a keeping in touch day in January or February 2022. The claimant says that she was sceptical of his symptoms (which were being discussed because of his continued absence from work) up, because he is a young man and would therefore be less likely to have health difficulties than an older person, or a woman. He did not mention his ethnicity in this context, but I can credit that he may have overlooked this, given that in other contexts he maintained that this was relevant to his fear of infection. I conclude that in the context of the discussion about his health there is no reasonable prospect of success in the direct discrimination claim related to any of the 4 protected characteristics. As a victimisation claim – that she was unduly critical he had made a complaint of discrimination – there is some, but little reasonable prospect of success. Examining the facts advanced by the claimant carefully, there is no reasonable prospect of success in establishing that any hostility or intimidation he can show he experienced was related to any of the four protected characteristics.

44. Moving on to 1.20, delayed disclosure of the personnel file, for the reasons set out in paragraph 18 there is no reasonable prospect of success, given the facts advanced by the claimant, of showing that any delay in disclosure of the file was because he had made a claim, alleged discrimination, or because he was a man, young, Muslim or of Pakistani national origin. In reality, the documents were supplied and the real difficulty was that he did not have the right software. His complaint or his protected characteristics been relevant, they would have delayed disclosing the electronic file. The claimant has not pointed to any factors that would suggest that delay getting hard copies was because of the protected characteristic or a protected act.
45. Finally, 1.23, which is pleaded as direct discrimination because of any of the 4 protected characteristics, and is about the conduct of the meeting in April 2022. The claimant said that this was discriminatory because the meetings were conducted by older white women, who would have treated a younger man of minority ethnicity less favourably than they would have treated (presumably) another white older woman. The allegation is very bare. The claimant does not point to any feature of the investigation report that followed the meeting which might indicate some feature that suggested there was more to the conduct of the meeting from which a tribunal could infer that he was less favourably treated than someone under investigation in the same circumstances (concerned about contracting a Covid infection and so on), who happened not to be young, male, Muslim or of Pakistani origin. I conclude that there is no reasonable prospect of success in establishing this claim.
46. I turn to the indirect discrimination claim. The PCP is not enforcing wearing of masks in the workplace, providing hand gel, and ventilation. There are sufficient facts to show that staff were not required to wear masks at work, that there was hand gel, but more in one workplace than the other, and it is possible that ventilation was insufficient and required opening the windows, as this is often the case in government buildings. The weakest part of the claim is showing that *non-Muslims* are more vulnerable to Covid than others. There may also be difficulty establishing the people of the *Pakistani* background the more vulnerable to Covid than others. During the pandemic there have been news items indicating that people of ethnic minority origin were more likely to suffer health complications related to Covid. There has been speculation that this may be related to comorbidity, such as diabetes, more prevalent in some nonwhite populations, or to poverty and crowded housing conditions, or vaccine hesitancy. The claimant said that he had statistical evidence showing that London boroughs with high Muslim populations had higher complication rates, and that being Muslim was correlated with Pakistani populations, though not all London Muslims of course are of Pakistani origin. The justification is an uncertain area, given that is not yet been pleaded, but they have to be related to what government guidance on masks and handwashing was on 26 October 2021 and 1 March 2022, the dates of the incidents to which this claim relates. If established, the likely value may be complex to ascertain, but is most unlikely to reach the £500,000 on the most recent schedule of loss. This claim has some prospect of success.
47. The harassment claims have been discussed already. For the avoidance of doubt, 1.12, about the 1st March incident, has already been discussed and is the subject of a deposit order. The other, about conduct by Miss Ayton at a January or February 2021 meeting, has been struck out as a harassment claim, but survives for victimisation.
48. The victimisation claims rely on two protected acts. One is a complaint made by

email on 1 March 2021 to Miss Ayton (the parties agree that the entry at 14.1 on the list of issues is mistakenly dated a year later) and the grievance of 4 May 2021. The only email I can find on 1 March 2021 to Miss Ayton makes no mention of discrimination or anything else that could be read as an allegation of a breach of the Equality Act, or that could suggest that there was to be such an allegation. It is possible that there *is* some other email that is not in the bundle, and on that basis I order a deposit to be paid for any claim relying on this protected act (rather than striking it out now).

49. The other protected act alleged is the grievance of 4 May 2021. The grievance document itself does not appear to be in the bundle, but the tabular review by the appeal officer indicates that the grievance included an allegation that Muz Misbah made discriminatory and offensive remarks to the claimant, and it is to be assumed this is about 1 March 2021 incident.
50. The consequences of the protected act which survive the amendment application are 1.15 (the SAR request for CCTV) and 1.19, was Ayton's conduct of a KIT meeting). As discussed earlier, both these are the subject of a deposit order in the victimisation claim. Item 1.15 is of course doubly vulnerable, as it depends on showing that there was a complaint of discrimination on 1 March or soon after.
51. Finally, leaving the Equality Act claims and moving on to the money claims under the Employment Rights Act, the 1st is about failing to reimburse cab fares on 1 March 2021. This is not about wages but about expenses, which are explicitly excluded under section 27 of the Act. The claimant can of course present a claim in the County Court, or in the employment tribunal after termination. In these proceedings, this claim is struck out.
52. The other money claim relates to deductions made from his pay in February and March 2021 for additional voluntary contributions to the pension scheme. The respondent relies on **Somerset County Council v Chambers UKEAT/0471/12** as authority establishing that pension contributions are not wages. However, the judgement in that case specifically rejected an argument that the exclusion for "pension" in section 27(2)(c) covered pension contributions, rather than payments of pension itself. The decision concerned a claimant who had ceased to be a full-time employee with pension scheme membership, and then worked on a different basis. The tribunal found that the terms of his contract on the new basis should have included membership of the pension scheme, such that failure to make contributions to the scheme after the change was an unauthorised deduction from his wages. The reasoning underlying the successful appeal against this finding related to the tribunal having construed the terms of the contract, which was impermissible, following **Southern Cross Healthcare (2011) ICR 285** and **Mears v Safecar (1982) ICR 626**. In this claimant's case, the employment tribunal is not required to construe the terms of the contract, which are clear enough. The claim arises from what appear to have been mistaken deductions, amounting to just under £800, and you made on the basis that the claimant had authorised additional voluntary contributions, over and above the contractual employee contributions, when he had not. Subject to evidence, or more detailed legal argument, it does not appear that the claim should be struck out on the basis that it has little or no reasonable prospect of success.
53. Summary
54. all the direct discrimination claims struck out as having no reasonable prospect of success.
55. Deposit orders are made (a separate document) if the claimant wishes to proceed with the harassment and victimisation claims.

56. The indirect discrimination claim (section 19 Equality Act 2010) and the 4 additional voluntary contributions to pension proceed to a hearing.

Employment Judge Goodman

Dated: *26 August 2022*

JUDGMENT AND REASONS SENT to the PARTIES ON

26/08/2022

FOR THE TRIBUNAL OFFICE

Appendix

List of Issues (Questions for the Tribunal)

Introduction

The Claimant is a man. He was born on 1 March 1992. He is a Muslim. He relies for his race discrimination on his colour and Pakistani background.

Alleged Detriments for the Purposes of the Claimant's Direct Discrimination and Victimisation Claims

1. Has the Respondent subjected the claimant to the following treatment:

1.1 In October 2020, the Claimant was allocated to Redbridge JCP when the Claimant had chosen Newham and Barking which was closer to his home and enabled him to go to work without using public transport. When the Claimant objected he was told he had to either accept or reject the offer and/or to speak to his manager. He was not offered special leave as an alternative to starting work.

1.2 On 26 October 2020, when the Claimant continued to wear his mask, his manager, Mr Junaid Salah, while conducting inductions and training, kept looking at the Claimant whenever he mentioned masks of anything to do with Covid. **This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 18 February 2022.**

1.3 On 26 October 2020, the Claimant was not allowed to offer prayers by Mr Saleh when his females were allowed to do so.

1.4 On 27 October 2020, when the Claimant had stayed at home fearing he had Covid, he was pushed by Mr Salah to take a Covid test in person even though he had no personal transport.

1.5 Between 2 November and 22 December 2020, the Respondent was refused the Claimant's requests to:

10.2 Judgment - rule 61

- (a) change his work location and
- (b) delay to return to office for him

which he had made in light of his concerns about his and his family's underlying health conditions.

1.6 In early November 2020 the Claimant was forced by his line manager Mr Saleh to resign or face dismissal on the grounds of an authorised absence.

1.7 Repeatedly refused the Claimant's requests for counselling which he says he has made on several occasions since January/February 2021 to his new line manager Ms Charlene Ayton. **This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.**

1.8 Repeatedly delayed providing him with pension information. The Claimant says he first asked Ms Ayton for the information in early 2021, but he was not provided with the information until it was too later for him to make a pension transfer. **This allegation was not in the original claim form. It was raised for the first time verbally at the case management hearing on 20 May 2022.**

1.9 Delayed providing him the outcome and the minutes from the Health and Attendance meetings conducted by Ms Ayton. The Claimant says this has been the case every time he has had a meeting with her from 2 February 2021 onwards. **This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.**

1.10 On 1 March 2021, when the Claimant attending Barking JCP to collect kit, one the three security guards (identified by the Claimant as the male Asian security guard to distinguish him from the other two security guards, one of whom was a black male and the other a female) coming up very close to him without a mask.

1.11 On 1 March 2021, he was kept waiting at the Barking two hours with no update, despite the appointment being pre-arranged. This was by the team of people sitting at the front of the office. The Claimant says he was told to go and get a cup of coffee.

1.12 On 1 March 2021, the manager present, Mr Muz Misbah, who issued kit to the Claimant asked the Claimant for unnecessary details about his background and nationality.

1.13 On 1 March 2021, Mr Misbah's face and body language changed he learned the Claimant's was of Pakistani descent and he said to the Claimant: "you been paid for sitting at home doing nothing. We need you to train here and then continue at home".

1.14 On 1 March 2021, Mr Misbah made the Claimant sign to say that he had received his computer kit, refused the Claimant's request to post the smart card for the computer kit to him, made him wait for Uma and when he said he couldn't stay to be trained, asked Uma to store his kit away even though the Claimant has signed for it and was responsible for the kit.

1.15 Failed to deal with a formal SAR request for the CCTV footage relating to his treatment on 1 March 2021. The SAR request was made on 3 March 2021.

1.16 On an unknown date, he was told by Ms Ayton that she had raised the issue of his unpaid cab fares with the relevant department, despite this being incorrect. **This allegation was not in the original claim form. It was raised for the first time verbally at the case management hearing on 20 May 2022.**

1.17 Deliberately delayed the grievance hearing to consider his grievance of 4 May 2021. **This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.**

1.18 Failed to deal with his grievance dated 4 May 2021 fairly at the hearing conducted in June 2021 in that the respondent:

- Did not allow him to attend with legal representation
- Showed no empathy for the experiences he had gone through
- Made him feel as if he was in the wrong and it was an investigation of him rather than an investigation into his concerns

This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.

1.19 Ms Ayton's behaviour towards him in response to him revealing he had tested positive for Covid twice and was continuing to suffer from long term covid symptoms at a meeting in late Jan / Feb 2022. The Claimant says she quizzed him inappropriately about his symptoms. **This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.**

1.20 Failed to deal with a formal SAR request made on 2 February 2022. This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.

1.21 Refusing his request for eye test vouchers. The Claimant says he asked Ms Ayton for these in or around February/March 2022. **This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.**

1.22 Deliberately delayed the grievance hearing to consider his grievance of 4 May 2021 which had been remitted for fresh consideration following his appeal. **This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.**

1.23 Failed to deal with his grievance dated 4 May 2021 fairly at the hearing conducted in April 2022 in that the respondent:

- Did not allow him to attend with legal representation
- Showed no empathy for the experiences he had gone through
- Made him feel as if he was in the wrong and it was an investigation of him rather than an investigation into his concerns

This allegation was not in the original claim form. It was raised for the first time in the Claimant's document dated 30 April 2022.

Equality Act 2010, section 13, section 39: direct discrimination because of race, sex, age, religious belief

2. Was that treatment (with the exception of allegation 1.16) "less favourable

treatment”, i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators.

3. If so:

3.1 in the case of allegation 1.3 was this because of the claimant’s sex?

3.2 In the case of the remaining allegations was this because of the claimant’s race, age, sex or religious belief?

4. If the treatment was less favourable treatment because of the claimant’s age, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

[TBC]

Equality Act 2010 section 19: indirect discrimination: race and religion

5. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP(s):

5.1 A practice of not enforcing guidelines to protect employees in the workplace from Covid including not requiring mask wearing, not providing sufficient hand gel and not providing ventilation?

6. Did the respondent apply the PCP(s) to the claimant at any relevant time?

7. Did the respondent apply (or would the respondent have applied) the PCP(s) to persons of a different race and religious belief to the claimant

8. Did the PCP(s) put persons of the same race or religious belief at one or more particular disadvantages when compared with persons with whom the claimant does not share the characteristic?

8.1 The claimant’s case is that people of Pakistani background were more vulnerable to covid than others and needed therefore to ensure protective measures were in place;

8.2 The claimant’s case is that non-Muslims were more vulnerable to covid than others and needed therefore to ensure protective measures were in place.

9. Did the PCP(s) put the claimant at that/those disadvantage(s) at any relevant time?

9.1 The claimant claims that he was exposed to risk on 26 October 2021 because mask wearing was not enforced, there was only one hand gel in a room of 15-20 people and there was insufficient ventilation; and

9.2 He was further exposed on 1 March 2022 because the hand sanitiser in the entrance to Barking JCP was empty and the security guard who approached him was not wearing a mask

10. If so, has the respondent shown the PCP(s) to be a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

Equality Act section 26: harassment related to age sex, race, religious belief

10.2 Judgment - rule 61

11. Did the respondent engage in conduct as follows:

11.1 The claimant relies on the conduct of Mr Misbah described at paragraph 1.12 and the conduct of Ms Ayton described at paragraph 1.19

12. If so was that conduct unwanted?

13. If so, did it relate to the protected characteristics of race, sex, religious belief or age?

13.1 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act, section 27: victimisation

14. Did the claimant do a protected act? The claimant relies upon the following:

14.1 the complaint he made by email to Ms Ayton on 1 March 2022

14.2 his grievance dated 4 May 2021

15. Did the respondent subject the claimant to any detriments as follows:

15.1 The claimant relies on the allegations at paragraphs 1.15, 1.16, 1.19 and 1.21

16. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Unauthorised deductions

17. Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by:

17.1 failing to pay his cab fares incurred on 1 March 2021 for £6.48 and £6.37; and

17.2 deductions for pension contributions he had not authorised of between £700-£800 for the months of February and March 2021

Time limits / limitation issues

18. Were all of the claimant's complaints of discrimination and victimisation presented within the normal 3 month time limit in section 123(1)(a) of the Equality Act 2010 ("EQA"), as adjusted for the early conciliation process and where relevant taking into account that section 123(3)(a) says that conduct extending over a period is to be treated as done at the end of the period?

19. If not, were the complaints presented within such other period as the tribunal thinks just and equitable pursuant to section 123(1) (b) of the Equality Act 2020?

20. Were the claimant's complaints of unlawful deductions relating to his payments while on furlough presented within the normal 3 month time limit in section 23(2) of the Employment Rights Act 1996, as adjusted for the early conciliation process?

21. If not, is the tribunal satisfied that (a) it was not reasonably practicable for the complaints to be presented before the normal time limit and (b) that they were

presented within such further period as the tribunal considers reasonable pursuant to section 24(4) of the Employment Rights Act 1996?

Remedy

22. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation will decide how much should be awarded.