EMPLOYMENT TRIBUNALS

Mr O AYODELE

Claimant

-and-

PRIORY HEALTHCARE LIMITED

Respondent

PRELIMINARY HEARING

Heard at: London South Employment Tribunal (Croydon)

On: 23 January 2017

Before: Employment Judge John Crosfill

Appearance:

For the Claimant: In person

For the Respondent: Mr N Caiden of Counsel instructed by DAC Beachcroft

Judgment

1. The Claimant's claim of direct discrimination because of race contrary to Sections 13 and 39 of the Equality Act 2010 relating to the e-mail sent by Mark Taylor has no reasonable prospects of success and is struck out.
2. The Claimant's claims of direct discrimination because of age contrary to Sections 13 and 39 of the Equality Act 2010 have no reasonable prospects of success and are struck out.
3. The Claimant's claim for unfair dismissal contrary to section 94 and 98 of the Employment Rights Act 1996 has little reasonable prospects of success and shall be made the subject of a deposit order.
4. The Claimant's claim for unfair dismissal contrary to section 94 and 103A of the Employment Rights Act 1996 has little reasonable prospects of success and shall be made the subject of a deposit order.
5. The Claimant's detriment claims brought under Section 47B and 48 of the Employment Rights Act 1996 have little reasonable prospects of success and shall be made the subject of a deposit order.
6. The Claimant's claim of direct discrimination because of race contrary to Sections 13 and 39 of the Equality Act 2010 relating to the decision not to appoint him as a

Ward Manager in March 2016 has little reasonable prospects of success and shall be made the subject of a deposit order.

7. It is just and equitable to extend time to permit the Claimant to bring the complaint above.

DEPOSIT ORDER

The Employment Judge considers that the claimant's contentions relating to:

(1) unfair dismissal contrary to section 94 and 98 of the Employment Rights Act 1996; and
(2) unfair dismissal contrary to section 94 and 103A of the Employment Rights Act 1996 alleging that he was dismissed by reason of making a protected disclosure; and
(3) claims brought under Section 47B and 48 of the Employment Rights Act 1996 alleging that he has suffered a detriment on the grounds of making a protected disclosure; and
(4) The Claimant's claim of direct discrimination because of race contrary to Sections 13 and 39 of the Equality Act 2010 relating to the decision not to appoint him as a Ward Manager in March 2016;

have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £50 in respect of each matter not later than 21 days from the date this Order is sent as a condition of being permitted to continue to take part in the proceedings relating to the matter to which the deposit order relates. The Judge has taken account of any information available as to the claimant's ability to comply with the Order in determining the amount of the deposit.

REASONS

1. On 9 December 2016 EJ Elliott conducted a preliminary hearing in this matter during which, with the assistance of the parties, she recorded at paragraphs 4 to 10 of her Case Management Order the issues said to be in dispute between the parties. Upon application by the Respondent but apparently with the agreement of the Claimant she listed the matter for a further preliminary hearing to be heard in public. The matters to be determined were identified as follows:

> *"1.1 Whether the claim or any part of it has no reasonable prospect of success such that it should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure 2013 or whether it has little reasonable prospects of success such that the claimant should be ordered to pay a deposit (not exceeding £1,000) as a condition of continuing to advance that allegation or argument. In particular the respondent will rely on:*
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> *1.1.1 Judicial immunity in proceedings in relation to representations to the NMC (direct race discrimination paragraph 8.2.2 below)*

1.1.2 there being no detriment in calling the claimant "sir" in relation to his claim for age discrimination.

1.2 whether the claims are out of time, having regard to the statutory time limit, such that the tribunal does not have jurisdiction to hear those claims. The respondent accepts the claim in relation to the act of dismissal is within time. There was a question as to whether the claim was in time in relation to the failure to appoint the claimant to the role of ward manager in May 2016 and both parties are ordered below to set out their case as to when and how the claimant was so informed."

2. Pressures on the resources of the Employment Tribunal meant that the case was not allocated to a judge to start at 10am. Rather than send the parties away without a hearing I was able to accommodate them by commencing the hearing over the lunch hour and then concluding it after a telephone hearing listed at 2 PM. As a consequence, it was after 4 PM by the time the Claimant had concluded his submissions. Recognising the importance of the matter to all parties I reserved my judgment.

3. The parties had each prepared written submissions. Mr Caiden was confident that his skeleton argument summarised the position taken by the Respondent and was content to permit the Claimant to address me orally on the written submission that he had produced. Mr Caiden restricted his oral submissions to a brief reply. I am grateful to both parties for their efficient conduct of the proceedings.

4. In his written submissions the Claimant had referred to claims not identified that the Preliminary Hearing before EJ Elliott or contained in his ET1. In particular, he referred to claims for discrimination because of disability. I reminded the Claimant that the scope of the present hearing was to consider the claims previously brought and identified. There was no formal application to amend the claim and no draft pleading had been provided. I therefore considered that it was inappropriate to entertain any application to amend the claim. I told the Claimant that one of the matters relevant to an application to amend was whether it had been made promptly and indicated that if he wished to apply to amend his claim he should do so sooner rather than later.

The law to be applied

"Strike Out"

5. The power to strike out a claim at a preliminary stage before a final hearing is found in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and in particular in rule 37 the material parts of which read as follows:

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

(a) that it is scandalous or vexatious or has no reasonable prospect of success……"

6. The power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances

Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly **[2012] IRLR 755**, at para 30.

7. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from his (or her) ET1 unless there are exceptional circumstances ***North Glamorgan NHS Trust v Ezsias*** **[2007] IRLR 603**. Such exceptional circumstances could include the fact that the Claimant's case is contradicted by undisputed contemporaneous documents or some other means of demonstrating that 'it is instantly demonstrable that the central facts in the claim are untrue' ***Tayside***.
8. In discrimination claims where findings of fact can depend upon whether or not it is appropriate to draw inferences from primary facts particular care needs to be taken before striking out a claim ***Anyanwu v South Bank Students' Union*** **[2001] IRLR 305, HL.**
9. The statements of principle derived from the cases referred to above do not in any way fetter the discretion of a tribunal to strike out a case where it is appropriate to do so ***Jaffrey v Department of the Environment, Transport and the Regions*** **[2002] IRLR 688 at para 41**. Where, as in one of the present claims (the RCN issue), it is suggested that the claim cannot succeed as a matter of law, then it would be appropriate to strike it out if the Tribunal were to accept that submission.
10. In ***Chandhok & Anor v Tirkey*** **UKEAT/0190/14/KN** Mr Justice Langstaff made the following comments:

> *"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):*
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> *"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*
>
> *Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."*

Judicial proceedings immunity

11. As a general rule anything said by a witness in legal proceedings cannot provide the foundation for a further claim in ***Darker v Chief Constable of the West***

Midlands Police **[2001] 1 AC 435,** it was held that a witness enjoys absolute immunity from any action brought on the basis that his or her evidence is false, malicious or careless, and that immunity extends to preparation of witness statements even if the trial never takes place. The immunity is a matter of public policy and is absolute. Whilst this broad statement has been narrowed in later cases (in particular the removal of any immunity for a negligent expert witness) it remains true in respect of a complaint of unlawful discrimination, victimisation or harassment: ***Parmar v East Leicester Medical Practice*** **[2011] IRLR 641**. Whether or not this rule applies will turn on the nature of the proceedings said to attract the immunity and whether or not the thing said or done in the course of those proceedings is the real trigger for the later proceedings. In ***Singh v Moorlands Primary School & Anor*** **[2013] IRLR 820** the manner in which the employer procured a witness statements was held to fall outside the rule and the employee was entitled to refer to that in a constructive dismissal claim.

12. The nature of the proceedings which would attract immunity was described in ***Heath v Commissioner of Police for the Metropolis*** **[2005] IRLR 270** at paragraph 23 where it was stated *"The nature of the exercise in determining whether a body is to be regarded as "judicial" for the purpose of giving absolute immunity to those involved in its proceedings is not a technical or precise one. It is one of determining its similarity in function and procedures to those of a court of law".* In that case it was decided that proceedings before a police disciplinary tribunal did attract judicial proceedings immunity.

Deposit Orders

13. The power to order a party to pay a deposit as a condition of proceeding with a claim or issue in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and in particular in rule 39 the material parts of which read as follows:

> *"39.—(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.*
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> *(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.*
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> *(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.*
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> *(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.*
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> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

14. The legal principles applicable to making a deposit order are the subject of the recent case of ***Hemdan v Ishmail & Anor*** **(Practice and Procedure: Imposition of Deposit) [2016] UKEAT 0021** where the President stated:

"*10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.*

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that

a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is

significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely Aït-Mouhoub v France [2000] 30 EHRR 382 at paragraph 52 and Weissman and Ors v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following:

> *"36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.*
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> *37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …*
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> *42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …"*

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

15. The threshold for making a deposit order is less than that for striking out a claim and in considering whether or not to make such an order a tribunal is entitled to

have regard to the likelihood of a party making out any factual contention and reach a provisional view of the credibility of any assertion see ***Van Rensburg v The Royal Borough of Kingston-Upon-Thames and others*** **UKEAT/0096/07**.

16. In making a deposit order it is mandatory to have regard to the paying party's ability to pay – see R39(2) and if more than one deposit order is made it may be necessary to have regard to the totality of the orders ***Wright v Nipponkoa Insurance (Europe) Ltd*** **UKEAT/0113/14/JOJ and** ***Hemdan v Ishmail***.

Time limits in discrimination claims

17. The time limit that applies is that set out in Section 123 of the Equality Act 2010. A claim must be presented within 3 months of the act complained of or within such further period as is just and equitable. The test for extension under Section123(2)(b) allows for the Tribunal to extend time where it is just and equitable to do so. That discretion is the exception rather than the rule: ***Robertson v. Bexley Community Centre*** **[2003] IRLR 434, at para 25**. Although the discretion is wide, the burden is on a claimant to displace the statutory time limits, lest his claim be shut out irrespective of its validity: ***Chief Constable of Lincolnshire Police v. Caston*** **[2010] IRLR 327**. In ***Abertawe Bro Morgannwg University Local Health Board v. Morgan (Unreported)*** **(UKEAT/0305/13/LA)**, Langstaff P held at para 52 that a litigant could hardly hope to satisfy the burden unless she provides an answer to two questions: The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was.

18. In ***British Coal Corporation v. Keeble*** **[1997] IRLR 336**, the EAT considered Limitation Act 1980, s.33 to provide a useful checklist for a Tribunal's consideration of whether to exercise its discretion to extend time. That checklist sets out the following factors:

    (a) the length of and reasons for the delay;

    (b) the extent to which the cogency of the evidence is likely to be affected by the delay;

    (c) the extent to which the party sued had cooperated with any requests for information;

    (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to cause of action;

    (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

19. The courts have subsequently clarified that this is merely a useful checklist rather than a statutory requirement: ***Southwark London Borough Council v. Alfolabi*** **[2003] IRLR 220.**

20. The tribunal should consider whether to exercise its discretion to extend time separately in respect of each claim rather than doing so on a global basis: ***Morgan*** (supra), at paras 51 and 55 and the summary.

Discussion

21. In assessing the applications I am dealing with, I have had regard not only to the Claimant's case set out in his ET1, but also to further particulars ordered by EJ Elliott and provided by the Claimant on 18 December 2016. It is fair to say that the ET1 is not structured in any particular way and it is difficult to discern how the facts set out related to the particular claims identified by ticking the various boxes of the form. The document submitted on 18 December 2016 is much clearer and sets out the facts and claims as understood by EJ Elliott in her case management order.

The Claims Relating to Dismissal

22. The first claims advanced by the Claimant relate to the fact that he was dismissed by the Respondent. The Respondent does not dispute that the Claimant was dismissed nor that he has sufficient continuity of service to satisfy section 108 of the Employment Rights Act 1996. The first contentious issue that arises is whether or not the Respondent can show that the reason for the dismissal was for a potentially fair reason [list of issues para 5.1].

23. The Respondent says that the reason the Claimant was dismissed was his misconduct in treating a patient. In particular, it is said that the Respondent dismissed the Claimant for giving a patient an injection in the thigh with a drug that should only have been injected into the "deep gluteal" region (which I understand to be the buttock). The Respondent had carried out an investigation into further allegations of misconduct two of which were not upheld and a fourth, relating to the rules under which students can observe treatment, was upheld but was accepted not to be sufficiently serious as to justify dismissal. I was asked to and read the letter of dismissal dated 7 July 2016 which sets out those reasons for the dismissal.

24. The Claimant does not accept that the reasons put forward by the Respondent are the true reasons for his dismissal. In his submissions the Claimant spent a considerable amount of time advancing his case that there was nothing wrong with his treatment of the patient and that it was perfectly acceptable to inject the drug into the thigh as opposed to the buttock.

25. The Claimant says that the real reason for his dismissal relate to him raising concerns in a letter to the Chief Executive Mr Tom Riall dated 15 April 2015 [list of issues para 7.1]. Those concerns related to the appointment of Sally McColl as a ward manager. That letter was included in the bundle at pages 61-61A. In his letter the Claimant says that this appointment was "racism and nepotism of the highest order". He describes the appointment of a newly qualified nurse as a ward manager to be "fraudulent". He says that sending that letter amounted to a protected disclosure falling within Section 43B of the Employment Rights Act 1996. He therefore presents an alternative case that his dismissal was automatically unfair contrary to Section 103A of the Employment Rights Act 1996.

26. In his helpful and realistic submissions Mr Caiden accepted that, just because an employer can demonstrate that there is ostensible reason for a dismissal, it does not follow that this was the actual reason for the dismissal. What he argued was that the reason put forward by the Respondent was so compelling and the rival theory contended for by the Claimant so unlikely that there was no room for any realistic doubt that the ostensible reason for the dismissal was the actual reason.

27. Having looked at the documentation I was supplied with I had to consider whether it is likely that the Respondent will fail to establish that the reason for the Claimant's dismissal was his decision to give an injection in the thigh rather than the buttock. I considered the following matters raised difficulties for the Claimant's case.

    27.1 I note from the Claimant's further particulars at paragraph 26 [page 42] and from the dismissal letter that the disciplinary investigation was not instigated by any manager with whom the Claimant has previously had difficulties but started after complaints by a student nurse. Of course I accept that the student nurse could possibly have been "infected" by a general animosity towards the Claimant but this would mean that there was a wider conspiracy against him and it seems unlikely. A likely explanation for her complaints was a genuine concern.

    27.2 There was no dispute that the Claimant had administered a drug to a patient and that as a consequence of that the patient had had to have further medical treatment. There is some suggestion that the injection site had ulcerated.

    27.3 The Claimant addressed me at length on the correct site to administer the drug he had given the patient. He referred extensively to a document entitled "safe injection techniques". In his submissions the Claimant's focus was directed to showing that he had made no clinical error. By itself, even if the Claimant were able to establish (with or without materials placed before the dismissing officer) that he had not made an error that would not be sufficient to deal with the Respondent's case. It is trite law that to establish that a dismissal was by reason of "conduct" an employer does not have to show that the conduct took place. It is sufficient to show that the dismissing officer had an honest belief based upon reasonable grounds following a reasonable investigation.

    27.4 The Claimant's case that the dismissal was not by reason of misconduct but for reasons personal to him might be supported if he could show that it was unlikely that any reasonable person could have concluded that he had done anything wrong. Having heard the Claimant's explanation for his decision to administer an injection in the thigh I do not consider it necessary to make a finding at this stage as to whether the Claimant made an error or not. The Claimant had produced correspondence from the manufacturer of the drug he had administered dated 21 December 2016. That letter was not before the decision maker and accordingly is of little or no evidential assistance in determining whether the decision was based on an honest belief. It states in terms that the drug should be injected "for deep intra muscular glutuel injection only". The letter then goes on to say that the product information supplied does not specify whether the injection should be given into the ventrogluteal of dorsoglutial muscle. The Claimant had injected the patient in the Vastus Lateralis. There is nothing in the correspondence from the manufacturer that suggests that this is acceptable.

    27.5 The Claimant had appealed his dismissal and the agreed bundle contained a letter setting out the grounds of appeal. The letter says "I am sincerely sorry that I did not read the product leaflet" and "this is the only error I have actually made". It is fair to say that during the appeal it appears that the Claimant returned to defending his clinical decision.

27.6 Taking these matters together, I find is that there is compelling evidence that would support a submission that it was open to a reasonable employer to conclude that the Claimant had made an error. His explanation given during the disciplinary process, and more fully developed before me, was far from being obviously right.

27.7 The Claimant has been reasonably but not entirely consistent in his denials of wrongdoing suggesting a level of honest belief in his position. From this I considered whether the Claimant would succeed in any argument that the decision to dismiss was so obviously harsh that it would suggest that there was some other reason in play. Against this the Respondent's case was, that by doggedly sticking to his position, the Claimant showed that he could not be trusted not to make the same mistake again. At best the Claimant is only moderately assisted by this argument in relation to the reason for the dismissal.

27.8 If the clinical error was the real reason for the dismissal then, I find that it is very unlikely that the Claimant will persuade the Tribunal that the decision to dismiss him fell outside of the range of reasonable responses. The Respondent might quite reasonably take the view that even a one off clinical error of judgment, which was not accepted or acknowledged, justifies dismissal. That said I do not discount entirely that a tribunal might consider the sanction so harsh as to fall outside the range of reasonable responses. As I note above the Claimant appears to have taken a different clinical position and appears to hold a genuine belief that he is right. It would be going too far the determine, on a summary basis, that there is no prospect whatsoever that any tribunal would conclude that the dismissal fell outside of the range of reasonable responses.

28. However even having had regard to the matters set out above I reminded myself that the burden of proof is on the Respondent to show the reason, or principle reason, for the dismissal. I cannot say that the Claimant has no reasonable prospect of persuading a tribunal that the principle reason for his dismissal was because of his past difficulties with management. Even where there is a compelling ostensible reason for the dismissal that might merely present the opportunity to dismiss rather than being the actual reason. A striking example of such a case is ***Associated Society of Locomotive Engineers & Firemen v Brady*** **[2006] IRLR 576**. The Claimant is able to point towards some evidence that might support his claim. I had regard to the following:

28.1 The nature of the Claimant's letter of 15 April 2015, whether a protected disclosure of not, could quite possibly cause Lucy Swatting and Sally McCoy, both named and criticised, in that letter not to feel favourably towards the Claimant; and

28.2 That letter was followed by a long grievance process which might have poisoned relationships further.

28.3 It is arguable that the Claimant was scored robustly when he applied for a job as a Ward Manager and he might be able to challenge whether that was justified.

29. In the circumstances, whilst I find that the Claimant's claim of unfair dismissal whether under Section 98 or under Section 103A have poor prospects, I cannot say that they have no realistic prospects of success or that they are bound to fail.

30. It follows that I do not consider it appropriate to strike out the claims so far as they relate to the dismissal.

31. I do consider that the claims have little reasonable prospect of success. There is no obvious link between the past difficulties and the dismissal. The Respondent can point to an incident of conduct by the Claimant that on both parties' case actually happened. Thereafter I have found that it was open to an employer to reject the Claimant's explanation. The Claimant will face a steep uphill battle in seeking to displace that ostensible reason for the dismissal. His case is one where I feel confident in finding that he has little reasonable prospect of success.

32. I am alive to the fact that even a small deposit order acts as a disincentive to bringing claims which whilst genuine might fail because of evidential difficulties. Proceeding beyond the making of a deposit order carries with it a risk of an adverse costs order that would not be present in a more finely balanced claim. Nevertheless, that must have been the intention of the rule makers when Rule 37(5) was enacted. I have a discretion whether or not to order a deposit but consider that I ought to do so in this case. I consider that the effect of a deposit will be to give the Claimant an opportunity to reflect on the weaknesses in his case that I have identified and consider whether he will be able to overcome them at any final hearing. He will not be shut out of the litigation. I consider that it would be appropriate to make a deposit order in respect of (1) the issue as to whether the dismissal was unfair applying the test in Section 98 and (2) whether the principle reason for the dismissal was that the Claimant had made protected disclosures by sending his letter of 15 April 2015.

33. The Claimant told me that he is in receipt of state benefits. He lives alone in a property has he owns. I find that he has little disposable income and will struggle to pay more than a nominal sum. He cannot realise his capital without selling his home and he should not be expected to do that to pay a deposit. Counsel for the Respondent did not seek to persuade me that anything other than a nominal deposit was appropriate. Having regard to the other deposit orders I am making I fix the proper amount of the deposit at £50 in respect of each issue.

<u>The protected disclosure detriment claims</u>

34. The list of issues sets out 4 issues at paragraphs 7.1 to 7.4 which taken together ask whether or not the Claimant's letter of 15 April 2015 amounted to a protected disclosure. The Claimant was ordered to provide further particulars of his reasonable belief and did so on 18 December 2016.

35. The first issue is whether or not there was a disclosure of information. The first paragraph of the Claimant's letter sets out his complaints about a recruitment exercise for the position of a ward manager. He says that he had been acting up in this role for 4 months but having applied he was not appointed. He goes on to say that the person appointed was "a newly qualified white girl" and "a fresher nurse who needs to be supervised". His letter then links the decision to appoint with race and provides a copy of the Claimant's CV as evidence. In addition to alleging that

the decision was racist the Claimant uses the expressions "nepotism" and "fraudulent".

36. I am alive to the distinction between making an allegation and conveying information recognised in ***Cavendish Munro Professional Risks Management Ltd v Geduld*** **[2010] IRLR 38**. I further recognise that some care is necessary in making that distinction see ***Kilraine v London Borough of Wandsworth*** **[2016] IRLR 422**. I am satisfied that the letter of 15 April 2015 does convey information. It states that there was a recruitment process, that the Claimant made an application that was rejected, that a white person was appointed, that the Claimant holds qualifications whereas the appointee was newly qualified and that there was a difference in race between the two. Those facts are followed by an allegation that the appointment was "racist". Only the last of these could be said to be an "allegation" and even then it is arguable that it contains a further information about the state of mind of Lucy Swatling.

37. The Claimant's further particulars are somewhat broad brush. At paragraph 7 he suggests that he disclosed information that satisfied Sub-sections 43B(1) (b), (c), (d) and (e). I consider that any contention that the Claimant could have had a reasonable belief that the information that the information he conveyed tended to show either of the matters at sub-sections (c) and (e) is quite hopeless. He could however have held a belief (the reasonableness of which can only be tested at trial) that the information he provided tended to show the appointment was an unlawful act of discrimination contrary to the Equality Act 2020 which is a legal obligation for the purposes of sub section 43B(1)(b). In addition, it is at least arguable that he held a reasonable belief that the appointment of an underqualified Ward Manager placed patients at risk and thus tended to show that the health and safety of an individual was likely to be endangered for the purposes of Sub-section(1)(e). I consider that the question of whether the Claimant reasonably believed that his disclosures were in the public interest is something that can only really be determined at a full hearing.

38. I am accordingly satisfied that it is at least reasonably arguable that the Claimant made protected disclosures and that in the light of those conclusions there is no basis for striking out the detriment claims or making a deposit order on the basis that there were no protected disclosures.

39. The list of issues identifies 2 detriments relied upon by the Claimant. The first is the failure to appoint him to a ward manager role in May 2016 (List of issues 7.5.1). The second, which is earlier in time, is that Lucy Swatling, by instructing another manager to give him an excessive workload, tried to manage him out of the company (List of issues 7.5.1).

40. There is no dispute that the Claimant was not appointed to the Ward Manager position. Section 48(2) of the ERA 1996 places the burden of proving the reason for any treatment on the Respondent. I have been shown the interview scores and it is clear that the Claimant has been given low scores. He said that he believed that the scores given by only one of three panellists was infected by his disclosures. He accepted that even without that effect he would not have been first choice for the job but when the first choice dropped out he was the next highest candidate. The Respondent's case is that with the scores given even by the "non infected panellists" the Claimant would never have been appointed.

41. The factual matters underlying the second part of the detriment claim are disputed. The Claimant says that he was given a greater than usual workload the Respondent does not accept that is the case. Such matters can only be resolved at a final hearing.

42. I do not think that in a case where the Respondent bears the burden of proof in showing the reason for its decision even where they put forward an apparently credible explanation for their actions it is right to say that the Claimant has no or even no little prospect of success in disputing those contentions. So much in such a case will turn on cross-examination of the Respondent's witnesses.

43. It follows from the matters above that it would not be appropriate to strike out or make a deposit order in respect of the protected disclosure detriment claims on their merits at this stage. A further issue requires to be determined and that is whether the Tribunal has jurisdiction to entertain the claims because of the time limits imposed by Section 48 of the ERA 1996. Mr Caiden focussed his submissions on this point.

44. Mr Caiden's first argument was that the two acts of detriment relied upon by the Claimant each took place more than 3 months + ACAS extension before the presentation of the ET1. That appear to be correct. The ET1 was presented on 18 September 2016. The Claimant had contacted ACAS on 17 August 2016 and the conciliation period bad ended on 17 September 2016. It follows from that that any act that took place on or before 18 May 2016 would be outside of the primary time limit for the presentation of claims. The Claimant accepted that he was told that he had not been appointed as a Ward Manager on 15 March 2016 [bundle page 47B]. The Claimant's other complaint relates to matters in May and June of 2015. As such unless the Claimant can show that it was not reasonably practicable to present his claims in time or unless he can show that his claims were presented in time by reason of Sections 48(3)(a) or 48(4) ERA 1996 then the tribunal has no jurisdiction to entertain them and they should be struck out.

45. Mr Caiden said that it was not open to the Claimant to use his dismissal claim brought under Section 94 and 103A of the ERA 1996 as the last in a series of similar acts for the purposes of Section 48(3)(a). He argued that a dismissal claim was distinct from a detriment claim and, by reason of section 47B(2) no complaint about dismissal can be advanced under section 48.

46. Whilst I would agree with Mr Caiden that an employee cannot complain of a detriment amounting to a dismissal under section 48 ERA 1996 I do not agree that that means that an employee cannot rely upon a dismissal or the instigation of disciplinary proceedings leading to the dismissal as providing the last of a series of "similar acts" for the purpose of determining when the time limit runs from. Section 48(3)(a) does not in terms specify that the "similar act" has to amount to a detriment actionable under that section (and nowhere else). I see no reason in principle why parliament would have intended that to be the case. On the other hand it seems clear to me that the expression "series of acts or failures" can only mean acts or failures to act which would themselves be actionable if brought in time. The issue remains as to whether any final act must be actionable under Section 48 itself.

47. If Mr Caiden is correct then a worker would be subject to a different time limit than an employee as the worker can bring a dismissal claim under section 47B and 48 ERA 1996. It is hard to see why that should be the case. I acknowledge that similar considerations arose in respect of the test of causation and remedy in ***NHS Manchester v Fecitt*** **[2011] EWCA Civ 1190** where it was held that the statutory language had created an anomaly but that language was perfectly clear and should be applied. Whilst the ERA was amended in the light of that case no attempt was taken to remove the anomaly that a worker who is dismissed has a much lower threshold in establishing causation than and employee in the same situation.

48. If I had to decide the matter I would have concluded that in order to qualify as a "similar act or failure" for the purposes of Section 48(3)(a) ERA 1996 any allegation must be actionable but could include a dismissal provided that the acts were connected by the necessary degree of similarity. I do not have to decide whether that is the case for the reasons set out below.

49. The matter does not depend entirely on the construction of Sub-section 48(3)(a) ERA 1996. An alternative route to establishing that the claim is in time is provided by Sub-section 48(4)(a) ERA 1996 see ***Arthur v. London Eastern Railway Limited (trading as One Stansted Express)*** **[2007] IRLR 58**. That sub section provides that "where an act extends over a period" the "date of the act" means the last day of the period". Almost identical wording appears in Section 123 of the Equality Act 2010. The approach to consideration of whether an act "extends over a period" is that set out in ***Hendricks v Commissioner of Police for the Metropolis*** **[2003] IRLR 96 CA where at paragraph 48 Mummery LJ said:**

> "the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism', 'a prevailing way of life', a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination."

50. Taken at its highest the Claimant alleges a campaign against him by the managers he criticised in his letter of 15 April 2015. It is arguable that that might, if established, constitute an act extending over a period. In both ***Hendricks*** and ***Arthur*** tribunals were warned of the danger of attempting to say whether acts extended over a period (or were similar for the purposes of Section 48(3)(a)) in the context of a Preliminary Hearing conducted without live evidence. I heed that warning and make no decision as to whether or not the two acts pleaded as detriments extended over a period such that there was a 'state of affairs' still current three months prior to the presentation of the ET1 or whether there is a series of similar acts. It may be that the interesting point raised by Mr Caiden as to the scope of Sub-section 48(3)(a) falls away in the light of any findings of fact made by the tribunal that hears this matter.

51. Mr Caiden's second argument was to say if I were to strike out the Section 103A claim then, as it was clear that neither of the two detriment claims was in time, the Claimant could not argue that the two earlier acts were part of a "series of similar acts" for the purposes of Section 48(3)(a). I accept that submission but as I have

declined to strike out the Section 103A claim it does remain open to the Claimant to argue that the two acts he has identified as detriments are similar acts to the disciplinary proceedings that led to his dismissal. I should therefore not strike out the Claims at this stage by reason of any lack of jurisdiction.

52. I have however found that the Section 103A claim has little reasonable prospect of success. If it fails, then that will make it difficult or impossible to argue that any state of affairs arising from the two acts of detriment relied upon amount to an 'act extending over a period" right up to the dismissal. It therefore follows that these claims too have little reasonable prospect of success as they are heavily contingent on the success of the Section 103A claim. For the same reason as in the dismissal claims I consider it appropriate to make a deposit order in the sum of £50 as a condition of pursuing these claims.

Direct discrimination because of race

53. The Claimant brings two separate claims of direct discrimination because of race. These are set out in paragraph 8 of the list of issues. The first relates to the decision not to appoint the Claimant as a ward manager in 2016 (also relied upon as a detriment in the public interest disclosure claim). The second relates to an e-mail sent by a Mr Mark Taylor to the Nursing and Midwifery Council ("NMC") who were investigating misconduct allegations against the Claimant.

54. The Respondent's primary position was that each of these claims should be struck out on its merits but in the alternative the Tribunal should find that the claims were out of time. I shall deal firstly with the merits of the claims before dealing with the alternative position on time.

The Ward Manager complaint - merits

55. It is common ground that the Claimant made a (second) application to be appointed as a Ward Manager in early 2016. He, and an external candidate, were interviewed on 4 March 2016. There was a panel of 3 conducting the interviews and each candidate was scored against 15 separate questions. They then gave the Claimant marks out of a total of 48. The claimant obtained marks of 15/48, 21/48 and 29/48. This gave an average of 45%. The successful candidate, who was white, got a score of 75%.

56. The Claimant is particularly affronted by the scores given by one of the panel members Ben Marshall who gave the Claimant a score of 0 for his CV.

57. The successful candidate did not actually take up the post and the Claimant contends that he should have been offered the post in his place. He says that the failure to offer him the post was because of his race.

58. This is a case where the Claimant struggles to demonstrate anything beyond a difference in treatment and a difference in race. I consider that this claim approaches the type of claim identified by the president in ***Chandhok & Anor v Tirkey*** above. The Claimant's pleaded case amounts to little more than an assertion that the reason for the difference in treatment was his race and not some other factor. The only matters set out his pleadings or further particulars set out any facts from which a tribunal might properly infer that the reason that the Claimant was scored as he was, was because of his race are that Ben Marshall's scoring not

only includes a remarkably low score for the Claimant's CV but also the fact that another member of the interview panel gave scores double his. In my opinion it is just about arguable that that calls for some explanation.

59. I am mindful of the fact sensitive nature of discriminations and in particular the possibility of subconscious discrimination. In the circumstances, by a somewhat narrow margin I do not find that the claim has no reasonable prospects of success. On the other hand, I consider that the claim is so weak that I am able to say that it has little reasonable prospects of success on the merits. I therefore make a deposit order in the sum of £50.

The Ward Manager claim - time

60. The Claimant has accepted that he was notified that he was not appointed to the role of Ward Manager on 15 March 2016.

61. The Claimant had provided copies of correspondence he had with the Respondent about his unsuccessful application for the position of Ward Manager. He had raised an internal complaint at an early stage and on 4 May 2016 in a letter from the Hospital Director the Respondent stated that it considered the matter closed.

62. The Claimant has not contended that the decision not to appoint him to the role of ward manager formed part of an act extending over a period. Accordingly, that act took place when the decision was made. This appears to have been early March 2016 but in any event the Claimant was aware of the decision no later than 15 March 2016.The Claimant has presented his claim some 2 months or more outside of the primary limitation period of 3 months. The issue is whether or not it would be just and equitable to extend time.

63. The Claimant gave me no explanation as to his reasons for any delay. I did have regard to material in the bundle that suggested that since his dismissal he had been suffering from anxiety and depression. There was no suggestion that this was so severe that he could not have presented a claim had he thought about it. Indeed, I note that the Claimant was able to appeal his dismissal and provide articulate written grounds of appeal and attend a hearing. I would however accept that he was anxious and depressed. This appears to be a recurrence of a previous episode of ill health in 2015. I accept that this would have some impact on his ability to properly consider whether to present a claim. He was also dismissed at around the point that the time limit expired and may have understandably focussed on that.

64. The Respondent did not suggest that it would suffer any particular prejudice. Indeed, the key witnesses would be the interviewing panel members and they would have their interview sheets to remind themselves of the interviews.

65. Balancing these matters against each other and having regard to the fact that it is for the Claimant to show why the time should be extended I do consider that it is just and equitable to extend time in respect of this complaint.

The claim relating to Mark Taylor's e-mail

66. In the light of the allegations that had been made against the Claimant the Respondent made a report to the NMC. I am satisfied that this was no more or less

than is required by the regulatory regime. It appears that the NMC then proceeded to conduct its own investigation initially for the purposes of deciding whether any interim measures were necessary for patient safety.

67. On 24 May 2016 Mark Taylor the Deputy Hospital Director responded to an e-mail enquiry from a Vikki Harris at the NMC which included in its header "Urgent response required". In his e-mail Mark Taylor made the following comment:

> *"With regards to my statements "concerns regarding his lack of compassion towards patients and awareness of safety" – I have only been in post at Farmfield since March 2016, and so when the allegations were made to me I have reviewed the accused nurses file – it appears that there were a number of historical statements submitted with regards to concerns about the nurses practice – it would appear that my predecessor did not do anything with these. I have attached the statements for your reference."*

68. The Claimant says that "my predecessor" referred to in the e-mail above was black. He says that it is implicit that Mark Taylor is suggesting that the reason that complaints were not acted upon is that the Claimant shared the same skin colour as his predecessor. This he says is an act of direct race discrimination.

69. I would accept that, if Mark Taylor had suggested that the reason that his predecessor had not taken any action against the Claimant was that he shared the same skin colour, then that would amount to an offensive racial stereotype and would constitute direct discrimination because of race. The difficulty for the Claimant is that Mr Taylor says no such thing. He simply states that his predecessor took no action. He does not link that with race in any way whatsoever.

70. I consider that insofar as there is any suggestion that it is implicit that in the statement actually made that Mark Taylor was suggesting that the reason no action was taken was that the Claimant and the predecessor shared the same skin colour then the Claimant's case is entirely misconceived, has no reasonable prospects of success and should be struck out.

71. I have considered whether the Claimant's case should be understood as a suggestion that the statement would not have been made had the Claimant and Mark Taylor's predecessor not shared the same skin colour. I do not think that is the way the case has been pleaded. Even if it was the Claimant's case I consider that it would amount to a bare assertion. There seems to be no dispute that no action was taken in respect of any earlier allegation so Mr Taylor's statement was true. The fact of previous concerns was a matter that was plainly relevant to the NMC's enquiries. There is nothing that might support an inference of discrimination. Again this is an allegation that falls plainly within the description of cases where other than an assertion there is nothing to support an allegation of discrimination. As such even on the alternative basis I have explored of muy own volition the claim has no reasonable prospects of success.

72. The Respondent resists this part of the claim on the alternative basis that a statement made in the course of judicial proceedings attracts absolute immunity. I have set out the relevant law above. The first question is whether I accept that proceedings before the NMC are akin to judicial proceedings. I consider that there is no material distinction between proceedings before the NMC and proceedings

before a police disciplinary tribunal where in ***Heath*** judicial proceedings immunity was held to apply. Both bodies are established by statute. Both are required to regulate a profession and have powers to discipline and to strike off. The nature of the complaints the NMC considers will include a breach of professional standards and is similar to those heard by the courts The nature of proceedings is adversarial and representation is common. The complainant bears the burden of proof.

73. The next question is whether or not Mark Taylor's e-mail should be considered to equate to making a statement in proceedings. Mr Caiden argues that it is. He firstly points to the fact that the NMC have a power to require a person to supply information. He then says that the enquiry was headed "response required". I do not necessarily accept that the fact that an enquiry was made marked "response required" indicated that the response was being demanded in accordance with the power identified by Mr Caiden. That said, I am entirely satisfied that the e-mail sent by Mark Taylor was for the proper purpose of the proceedings. In my view that alone is sufficient that it would attract judicial proceedings immunity.

74. I am therefore of the opinion that Mark Taylor's e-mail to the NMC attracted judicial proceedings immunity and cannot provide the foundation for a claim of race discrimination. This is what the Claimant attempts to do in his claim. As the principle of immunity applies the Claimant has no reasonable prospect of success and I would have struck the case out on this basis as well as on the merits of the pleaded case.

The e-mail of 24 May 2016 - time

75. The cause of action arose when the e-mail was sent. The Claimant contacted Acas within 3 months of that date and submitted his ET1 within 1 month of the date upon which the conciliation period ended. Accordingly the claim was presented within the time limit and should not be struck out on that basis.

Direct Discrimination - Age

76. The Claimant says that after he had complained about the appointment of Sally McCoy in 2015. She and Lucy Swatting then later "Tracy" a Security Manager greeted him by saying "good morning sir". He says that this made him feel like a centenarian.

77. It appears that the Claimant alleges that this mode of greeting him continued up to his dismissal and if that is the case there is no issue as to whether the claim was presented in time.

78. The position taken by the Respondent was that greeting a person with the expression "good morning sir" could not be amount to a detriment for the purposes of Section 39(2)(d) of the Equality Act 2010. Mr Caiden correctly in my view referred me to cases including ***Shamoon v Chief Constable of the RUC*** **[2003] ICR 337** in support of the proposition that in order to establish a detriment an employee must show that the conduct complained of was such that a reasonable employee would consider the treatment to amount to a disadvantage.

79. I part company with Mr Caiden in his suggestion that greeting the Claimant with the words "good morning sir" could not amount to a disadvantage. That ignores the context relied upon by the Claimant. The Claimant says that the individuals who

greeted him in this manner were those, or associates of those, who were the subject of his complaints in 2015. He says that the mode of greeting started at that time. Whilst ordinarily "good morning sir" appears innocuous the same words could be used laden with sarcasm and faux deference. I do not consider that this claim could be said to have no reasonable prospects or even little reasonable prospects of success on this basis.

80. I still need to consider the possibility of the Claimant establishing that the use of the expression "good morning sir" was because of his age. There are two possible routes for the Claimant. He could either say that the expression was inextricably associated with age or he could say that the reason that the expression was used was because of his age.

81. I consider the first possibility to be entirely hopeless. The expression "sir" is not one directed towards any particular age group. It is historically a term of respect often used towards ones "betters". That is why it can now be used sarcastically. It remains the standard greeting on much business correspondence. It is not used exclusively, or more often, towards the elderly. As an expression it has no association with age at all. I can only assume that the Claimant's view that "it made him feel like a centenarian" was one personal to him.

82. There is no evidence at all that the Claimant's protagonists referred to him as sir because of his age. On the contrary it is the Claimant's own case that this greeting commences once there had been a disagreement. There are no facts pleaded that would support an inference that the reason this expression started being used was the fact that the claimant is of a particular age rather than being a person unpopular for other reasons.

83. In the circumstances I have concluded that the Claimant's case of age discrimination has no reasonable prospects of success and should be struck out.

<u>The deposit orders</u>

84. I have made 4 separate deposit orders each in the sum of £50. If the Claimant pays them all he must find £200. I have revisited my orders and asked whether the global sum is such that there is a risk that the Claimant would be unable to pay it and therefore be shut out from pursuing his claims. Whilst the Claimant is on benefits he does own a house in London. I consider that an individual in his position would be able to raise a sum of £200 without undue hardship.

CASE MANAGEMENT

85. I have not struck out the whole of the Claimant's case and if he pays the deposit orders I have made then the matter will proceed to a final hearing. There was insufficient time to deal with case management at the hearing before me. If the Claimant pays the deposit on the race or detriment claims then the matter must be heard by a full tribunal. In the circumstances it is inappropriate to list this matter until he has made that decision as it might be possible to obtain an earlier hearing date if the matter is heard by a judge sitting alone.

86. I have set out the deposit orders separately above but in respect of case management I make the orders set out below.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. If the Claimant pays one or more of the deposits that he has been ordered to pay he shall, within 3 days of paying any deposit, notify the Respondent that he has done so.

2. If notified in accordance with paragraph 1 above that the Claimant is proceeding with some or all of his claims the Respondent shall prepare a draft list of appropriate directions including directions as to disclosure, preparation of a bundle and exchange of witness statements. The draft directions shall also include the Respondent's best estimate of the number of days required for a final hearing to include liability and remedy (if appropriate). That estimate should include a draft trial timetable giving sufficient time for deliberation and judgment. Attached to the draft directions the Respondent shall give any dates to avoid by reason of the unavailability of any witness or representative. The Respondent shall send the draft directions to the Claimant within 7 days of notification that the Claimant intends to pursue his claims.

3. The Claimant shall within a further 7 days send the draft directions to the Respondent and Employment Tribunal indicating whether or not he agrees with the suggested directions and timetable and if not, why not. The Claimant shall at the same time provide any dates where he, or any witness, is unavailable to attend the final hearing.

4. The parties shall co-operate in asking the tribunal to place the file before an Employment Judge who can consider whether to make directions and list the matter or whether a further Preliminary Hearing is necessary.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Crosfill

Dated: 9 February 2017