EMPLOYMENT TRIBUNALS

Claimant: **Mr JC Woods**

Respondent: **(1) The Secretary of State for Justice**
(2) Ms H Reeves
(3) Ms S Boreham

Heard at: **By video and by telephone (Cardiff)** **On: 20 July 2022**

Before: **Employment Judge R Harfield (sitting alone)**

Representation:
Claimant: Mr Woods represented himself
Respondent: Ms Hirsch (Counsel)

RESERVED JUDGMENT
(Strike out, deposit order, and amendment)

It is the decision of the Employment Judge sitting alone that:

1. The complaints against the second and third respondents are dismissed upon withdrawal by the claimant as the first respondent has accepted they are liable for any acts or omissions of the second or third respondent;

2. The respondents' application to strike out all or part of the claimant's complaints does not succeed;

3. The following specific allegations have little reasonable prospect of success (because they are likely to be caught by a binding COT3 agreement) and I have decided it is appropriate to make an order requiring the claimant to pay a deposit of £100 for each individual specific allegation as a condition of continuing to advance that specific allegation:

3.1 victimisation in respect of receiving a letter on 24 May that he was to be subject to a disciplinary investigation;
3.2 harassment related to sexual orientation in respect of receiving a letter on 24 May that he was to be subject to a disciplinary investigation;
3.3 harassment related to race in respect of receiving a letter on 24 May that he was to be subject to a disciplinary investigation;
3.4 harassment related to age in respect of receiving a letter on 24 May that he was to be subject to a disciplinary investigation;
3.5 trade union detriment in respect of respect of receiving a letter on 24 May that he was to be subject to a disciplinary investigation;
3.6 victimisation in respect of being informed verbally by the second respondent that he was going to be investigated but not being informed of the reason why;
3.7 harassment related to sexual orientation in respect of being informed verbally by the second respondent that he was going to be investigated but not being informed of the reason why;
3.8 harassment related to race in respect of being informed verbally by the second respondent that he was going to be investigated but not being informed of the reason why;
3.9 harassment related to age in respect of being informed verbally by the second respondent that he was going to be investigated but not being informed of the reason why;
3.10 trade union detriment in respect of being informed verbally by the second respondent that he was going to be investigated but not being informed of the reason why;
3.11 victimisation in respect of the claimant and his colleagues being interviewed which created a difficult working atmosphere;
3.12 harassment related to sexual orientation in respect of the claimant and his colleagues being interviewed which created a difficult working atmosphere;
3.13 harassment related to race in respect of the claimant and his colleagues being interviewed which created a difficult working atmosphere;
3.14 harassment related to age in respect of the claimant and his colleagues being interviewed which created a difficult working atmosphere;
3.15 trade union detriment in respect of the claimant and his colleagues being interviewed which created a difficult working atmosphere.

4. The claimant's complaint about being required to attend a disciplinary hearing (allegation iv) as presented has no reasonable prospect of success as it would be caught by judicial proceedings immunity, however, he should have the opportunity to amend the complaint to remove the reference to what was allegedly said at the judicial mediation. It could then proceed;

5. The claimant's application to amend is granted;

6. The case will be listed for a further case management hearing once the claimant has made the decision whether to pay some or all of the deposit order.

REASONS

1. Introduction

1.1 The claimant is employed as a crown court usher. He presented his current claim form on 27 September 2021 complaining of harassment and victimisation under the Equality Act and being subject to a detriment as a trade union representative.

1.2 The claimant brought an earlier tribunal claim 1402443/2019 which, following a judicial mediation, resulted in a COT3 agreement. I was provided with very limited paperwork relating to that first tribunal claim at the preliminary hearing before me. The ET1 for that first claim sets out a sexual orientation discrimination claim, in which the claimant was complaining about a comment made about him by a colleague (LJ) and then about the colleague's line manager's (KM) reaction to the claimant's complaint about the comment. That first ET1 also raised victimisation and trade union detriment complaints.

1.3 Since that hearing I have been able to access the Tribunal file relating to that first claim. I have since seen that it proceeded through a succession of case management hearings. By June 2021 that first claim consisted of a direct sexual orientation discrimination claim relating to the comment allegedly made by LJ, KM's alleged failure to investigate the claimant's complaint about it and KM allegedly suggesting that any fault lay with the claimant. It also include a victimisation claim about changes to usher rotas which the claimant said was because he had raised an informal complaint on 30 January 2019 and a grievance on February 2019 (this was not ultimately allowed to proceed due to time limit issues). It further (by way of a permitted amendment) include complaints of age and race discrimination or harassment related to age and race. This was about a statement made by LJ commenting that the claimant was from a different generation, was Northern Irish, and had the claimant ever made a character like LJ. There was a trade union detriment claim about the alleged removal of access to a post room that the claimant was using for trade union activities.

1.4 At a case management hearing on 28 June 2021 EJ Moore also gave the claimant permission to further amendment his claim to bring a victimisation complaint. She directed, however, that these allegations needed to be dealt with at a separate hearing as the existing complaints in the first claim were due to be heard 2 – 9 August 2021. Within his amendment application the claimant alleged that KM and the second respondent were seeking to undermine his position in the forthcoming employment tribunal hearing. He referred to KM raising complaints about him, and complained about how HR had acted in delaying telling him about KM's complaints, then telling him on 19 May 2021 that he was under investigation without telling him the allegations, and then on 24 May him receiving official notification that he was under a disciplinary investigation. The claimant made his application to amend in the first claim on 7 June 2021.

1.5 That first claim then proceeded to judicial mediation on 7 July 2021 and achieved a settlement to be enshrined within a COT3 agreement. On 8 July 2021 the

claimant emailed the Tribunal saying that following the successful judicial mediation he wished to withdraw his claim including the additional amendment considered by EJ Moore on 28 June 2021. His correspondence requested the Tribunal to issue a dismissal judgment. I had none of this before me at the hearing, but on since considering the file for the first claim and checking with the staff it does not appear that any action was taken by the Tribunal in response to that withdrawal correspondence. The file was simply closed as an administrative action without a referral being made to a judge for a dismissal judgment.

1.6 The claimant alleges the respondent's barrister said in verbal discussions during the judicial mediation that "*HMCTS wanted to continue with the allegations in order to conclude matters but that it would be by way of mediation*" [233]. He says that notwithstanding this on 9 July he was sent an invite to a disciplinary hearing, not an invite to mediation. This was 2 days after the COT3 was signed and one day after he had withdrawn the first tribunal claim.

1.7 The first respondent's position is that it was made clear to the claimant that any existing internal procedures would continue and in addition they had advised they were open to exploring workplace mediation. There is therefore a factual dispute between the parties. The first respondent points out the COT3 makes no mention of discontinuing the existing disciplinary process.

1.8 On 9 August 2021 the claimant attended the disciplinary hearing. On 16 August he was told the outcome was no case to answer. He presented his second claim on 27 September.

1.9 A case management hearing in this second tribunal claim took place before EJ Frazer on 21 December 2021. EJ Frazer identified in her case management order that the claimant was seeking to bring the following complaints:

(1) Harassment related to sexual orientation and/or age and/or race in proceeding with a disciplinary investigation from 24 May 2021 to 16 August 2021. EJ Frazer identified that in particular the claimant was relying on the following factors:

- *(i) Receiving a letter on 24 May that he was to be subject to a disciplinary investigation;*
- *(ii) The second respondent informed him verbally that he was going to be investigated but not informing him of the reason why;*
- *(iii) He and his colleagues being interviewed which created a difficult working atmosphere;*
- *(iv) Being invited to a disciplinary hearing on 9 July in circumstances where he understood from the judicial mediation that the disciplinary investigation was not going to continue against him and that the matter would instead proceed to mediation;*[1]
- *(v) Being subjected to an ongoing investigation between 9 July and 16 August in the circumstances.*

[1] Ie workplace mediation. In this decision, where appropriate, I refer to workplace mediation so as to distinguish it from judicial mediation.

(2) Victimisation, where the protected act relied upon was the bringing of proceedings under the earlier case number 1402443/2019. The detriments complained of were identified as being the same 5 matters as set out above in relation to the harassment complaints.

(3) Detriment on grounds relating to union membership/activities (section 146 TULR(C)A 1992). EJ Frazer identified the claimant was saying he had been involved as a representative in a colleague's appeal hearing in December 2020 during which a complaint of harassment was made against the second respondent. The claimant identified he was relying on the same 5 detriments again.

1.10 The respondent was to file an amended response and was permitted to request a public preliminary hearing to consider questions of strike out or deposit order. The respondent within their amended grounds of resistance argued, amongst other things;

1.10.1 That complaints (i) and (ii), as victimisation complaints, had already formed the basis of the permitted amendment of the first claim 1402443/2019, proceedings which had settled by way of judicial mediation. They cannot be reintroduced in a second subsequent claim;

1.10.2 That complaints (i) and (ii), as harassment claims, or trade union detriment, did not form part of the amendment application in 1402443/2019. However, the claimant would have been able to include them in his amendment application at the time as he was relying upon the same facts;

1.10.3 That the claimant would have been able to bring complaint (iii) in his amendment application in the first tribunal claim but did not do so, whether as harassment or victimisation or trade union detriment. It is said that he would have been aware that his colleagues would be interviewed as part of the disciplinary process when he received the notification of a disciplinary process on 24 May 2021;

1.10.4 The claimant had not been told at the judicial mediation that the disciplinary process would be discontinued, nor did the COT3;

1.10.5 The first respondent denies the claimant was subjected to "ongoing investigation" on the basis that the decision to proceed to a disciplinary hearing was sent to the claimant on 9 July 2021;

1.10.6 They deny that the second or third respondents played any role in the decision to continue with the disciplinary process;

1.10.7 They say there is nothing in the claim which links the protected characteristics relied on to the 5 factual allegations;

1.10.8 The disciplinary process concluded with no findings of misconduct so the claimant has not been subjected to any detriments.

1.11 The respondents requested a public preliminary hearing. The claimant made an application to amend to bring additional complaints of age and sex discrimination, arguing that the second respondent and third respondent have, in the course of an ensuing grievance procedure, been treated more favourably than he would

have been in similar circumstances. The application to amend was added to the matters to be decided at the preliminary hearing before me.

1.12 I had before me a preliminary hearing bundle extending to 273 pages. The claimant sent in one additional document, namely an email dated 6 July 2022 from Ms Murray to the claimant. The respondent's counsel provided written submissions and a chronology. I explained during the hearing that I had no access to any documents from the first tribunal claim, other than the COT 3 agreement[2]. Ms Hirsch sent by email what she had, which only extended to 24 pages. Principally these included the first ET1 claim form and also an explanatory document about judicial mediation. She also emailed a presidential guidance document and a Government guidance document on judicial mediation together with an authority of Pool v Pool [1951] 470. I heard submissions from both parties, and evidence from the claimant about the means to pay any deposit order, before reserving my decision. The claimant joined what was otherwise a video hearing by telephone because of connection difficulties. There were no objections to him joining in this way or giving evidence in this way and it did not, in my judgement, affect the fairness of the hearing in any way.

1.13 I apologise for the delay in handing down this judgment which was caused by commitments to long hearings in other cases, annual leave and the fact that the situation gives rise to some complicated legal considerations.

2 The legal principles – strike out orders and deposit orders

2.1 The power to make a deposit order is provided by rule 39 of the ET Rules, as follows:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(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.

[2] As above, I have since reviewed the Tribunal file for the first claim in order that I could understand what issues were before the Tribunal and what happened in relation to any withdrawal. To be clear, I cannot and do not have access to any documents relating to or record of the judicial mediation itself, other than the case management order listing the judicial mediation.

Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

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

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

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

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

2.2 The test for the ordering of a deposit is therefore that the party has little reasonable prospect success. It was said by the Employment Appeal Tribunal in Hemdan v Ishmail [2017] IRLR 228 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"* and it is*" emphatically not…to make it difficult to access justice or effect a strike out through the back door*." A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise.

2.3 As for the approach the Tribunal should take, in Wright v Nipponkoa Insurance [2014] UKEAT/0113/14 Van Rensburg v Royal Borough of Kingston-Upon-Thames and others [2007] UKEAT/0095/07 it was said when determining whether to make a deposit order, a Tribunal is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. That said there is a balance to be struck as to how far such an analysis can go. It was also made clear in Hemdan that a mini-trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested.

2.4 Under Rule 37 a claim or part of a claim can be struck out in grounds that include it has no reasonable prospect of success. A claim cannot be struck out unless the party has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

2.5 Operation of rule 37(1)(a) requires a two stage test. Firstly has the strike out ground (here "no reasonable prospect of success") been established on the facts. If so, secondly is it just to proceed to a strike out in all the circumstances.

2.6 When assessing whether a claim has no reasonable prospect of success the Tribunal must be satisfied that the claim or allegation has no such prospect, not just that success is thought to be unlikely (Balls v Downham Market High School and College [2011] IRLR 217). The Tribunal must take the allegations in the claimant's case at their highest. If there remain disputed facts there should not be a strike out unless the allegations can be conclusively disproved as demonstrably untrue (Ukegheson v Haringey London Borough Council [2015] ICR 1285). In other words a strike out application has to be approached assuming, for the purposes of the application, that the facts are as pleaded by the claimant. The determination of a strike out application does not require evidence or actual findings of fact. A strike out application succeeds where it is found that, even if all the facts were as pleaded by the claimant, the complaint would have no reasonable prospect of success. If a strike out application fails the argument about the overall merit of the claim is not decided in the claimant's favour. Both the claimant and the respondent argue their positions on the merits in full and afresh at the full hearing.

3. **COT3 Agreements and the without prejudice rule**

3.1 Most statutory employment rights contain a bar on an employee contracting out of those rights other than in certain circumstances. One of those circumstances is a settlement achieved with an Acas conciliation officer. For example, in section 144 of the Equality Act the bar on contracting out does not apply to a contract if the contract is made with the assistance of a conciliation officer. Section 288(1) and (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 contains a similar provision, where there is an agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under any of sections 18A to 18C of the Employment Tribunals Act 1996. Section 18C provides for a conciliation officer to endeavour to promote a settlement after the institution of proceedings if requested to do so by the person by whom and the person against whom the proceedings are brought.

3.2 Parties can therefore validly contract out of their statutory rights to bring or continue with an employment tribunal complaint where an agreement to do is incorporated into any settlement made following the involvement of a conciliation officer. It then generally operates as a bar to the rights that have been contracted away continuing to be pursued in legal proceedings. Instead, where required, the parties take steps to enforce the contract. There can be disputes about whether a COT3 agreement is valid and binding. Such disputes tend to be either on the basis that the requirements of section 144 (or its equivalent in other relevant legislation) have not been met, or that the COT3 is voidable for a common law reason (for example, undue influence, misrepresentation, lack of capacity to contract); Cole v Elders' Voice UKEAT/0251/19; Industrious Ltd v Horizon Recruitment Ltd [2010] IRLR 204 EAT; Greenfield v Robinson UKEAT/0811/95.

3.3 In Allma Construction Ltd v Bonner [2011] IRLR an oral agreement to settle a claim was binding even thought it had not been reduced to writing and had been concluded between the parties and then communicated to a conciliation officer. That communication to the conciliation officer was sufficient to satisfy the

requirement that a conciliation officer had to "take action." "Taking action" was said to cover any action taken by an Acas officer in relation to the claim that in some way endeavoured to promote settlement. In Slack v Greenham (Plant Hire Ltd) [1983] IRLR 271 it was held that there was no specific obligation on a conciliation officer to advise an employee of his rights and remedies.

3.4 Arguments that a COT3 Agreement is voidable at common law often rely on a party being able to adduce evidence as to what was said in the negotiations that led to the Agreement. Generally the negotiations that lie behind a COT3 Agreement will fall under the without prejudice rule, which is a rule governing the admissibility of evidence founded, in part, on the public policy of encouraging litigants to settle their differences, and to be able to speak openly when doing so, rather than litigate to a finish.

3.5 It was said in Cutts v Head [1984] Ch 290. 306: "*That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to rely to an offer as an actual reply) may be used to their prejudice in the course of proceedings. They should… be encouraged fully and frankly to put their cards on the table… The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."* The rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. In Cutts v Head it was also said that the other basis to the rule (other than public policy) lies in the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence, if, despite the negotiations, a contested hearing ensues.

3.6 There are, however, situations in which the without prejudice rules does not prevent the admission into evidence of what one or both of the parties said or wrote. The most importance instances were summarised by Walker LJ in Unilever Plc v The Procter and Gamble Company [1999] EWCA Civ 3027. They were re-stated recently by the Court of Appeal in Berkeley Square Holdings Limited & Others v Lancer Property Asset Management Limited & others [2021] EWCS Civ 441(a case about statements made at a mediation). In shortened form they include:

(a) Where the dispute is about whether without prejudice communications have resulted in a concluded compromise agreement; the communications are admissible to demonstrate that (or otherwise);

(b) Evidence of negotiations can be admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence (or any other common law ground for voiding a contract, such as lack of capacity);

(c) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel;

(d) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety". The threshold for unambiguous impropriety is high and exception should be applied only in the clearest cases of abuse of a privileged occasion;

(e) Evidence of negotiations may be given in order to explain delay (for example to the dates on which certain steps happened);

(f) Potentially where the evidence is relevant to other litigation affecting a third party (the position on this is complicated and remains uncertain as set out in Berkley Square);

(g) Offers made "without prejudice save as to costs", which are then referred to in costs litigation;

(h) a distinct privilege that had developed in matrimonial cases extending to communications received in confidence with a view to matrimonial conciliation. In particular statements made by a party in the course of communications for the purpose of conciliation cannot be referred to save in the unusual situation where the statement relates to the risk of serious harm to the wellbeing of a child (and if a Judge decides it is in the interests of justice to admit it).

3.7 The Supreme Court in Oceanbulk [2011] 1AC 662 added to that non exhaustive list:

(i) an "interpretation exception" where without prejudice communications may be admissible in evidence as part of the factual matrix or surrounding circumstances when determining the true construction of the agreement. Lord Phillips PSC said: *"When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted "without prejudice";*

(j) rectification – a party to without prejudice negotiations can rely upon what is said in without prejudice negotiations to show that a settlement agreement should be rectified.

4. Withdrawals and dismissal Judgments

4.1 Under Rule 51 of the Employment Tribunal Rules of Procedure, where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.

4.2 Rule 52 says that where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless – (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

5. Res judicata, cause of action estoppel and abuse of process

5.1 The doctrine of res judicata (literally meaning "a matter judged") prevents a party re-litigating an issue that has already been decided by a Judge or Tribunal or which could and should have been brought before a Tribunal in a previous claim but was not. The purpose of the doctrine is to provide finality of litigation for both parties, and that parties who are subject to litigation are not subject to re-litigation on the same issue.

5.2 Cause of action estoppel prevents a party pursuing a cause of action that has been judicially determined with in earlier proceedings involving the same parties.

5.2 Henderson abuse of process, is the principle which says it can be an abuse of process to seek to raise in subsequent proceedings matters which were not but could and should have been raised in earlier proceedings. The assessment of whether there is a Henderson abuse of process should be a broad merits based approach considering all the circumstances focusing on whether a party is misusing or abusing the process of the court to raise before it the issue which could have been raised before.

6. The COT3 Agreement in the first case

6.1 The COT3 Agreement for the first claim is at [1] to [4] of the preliminary hearing bundle. Paragraph 1 says:

"*Without admission of liability, the Respondent will carry out the obligations set out in paragraph 2 of this Agreement and the Claimant will accept the performance of such obligations, in full and final settlement of all his claims against the Respondent currently before the Tribunal under case number 1402443/2019 ("the Proceedings") and all other Relevant Claims arising up to and including the date this Agreement is reached with the assistance of ACAS. The Claimant and the Respondent agree that Relevant Claims are claims related to the Claimant's employment with the Respondent, whether at common law, under Statute or any statutory scheme, or pursuant to European Union law, either against the Respondent, or any officer or employee of the Respondent including any claim without limitation relating to detriment, discrimination, harassment or victimisation; under the Trade Union and Labour Relations (Consolidation) Act 1992, Employment Rights Act 1996 or Equality Act 2010; or any other claim which might be made by the Claimant to a court or tribunal related to his employment, provided that nothing herein contained shall affect the Claimant's accrued pension entitlement or any claim for latent personal injury."*

6.2 Paragraph 2 provided for the payment of an ex-gratia sum to the claimant dependent on several contingencies including that the claimant write to the Tribunal withdrawing his claim. Paragraph 8 required the claimant to write to the Tribunal withdrawing the proceedings in full under Rule 51 within 3 days of a receipt of a copy of the COT3 signed by the respondent. Paragraph 9 said "*It is the understanding of the parties that, following the withdrawal of the Proceedings by the Claimant, the Tribunal will issue a Judgment dismissing the Proceedings in accordance with Rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Claimant acknowledges that he (or his representative) will not raise any objection to, seek a reconsideration of or appeal against any such Judgment, and that he (or his representative) will use all reasonable endeavours to ensure that the Tribunal issues this Judgment as soon as possible."*

6.3 A withdrawal of a complaint *without* a dismissal Judgment being issued is not in itself a judicial act giving rise to cause of action estoppel; Khan v Heywood & Middleton Primary Care Trust [2007] ICR 24 CA. However, under Rule 51 the claim that is withdrawn comes to an end. The implications of this are that the original first Tribunal claim cannot be reactivated.[3] But as there has been no judicial determination, cause of action estoppel cannot stop the claim being relitigated in a fresh set of proceedings; unless there is another bar to relitigating the points, such as, for example the binding nature of a COT3 agreement or Henderson abuse of process.

7. The consequences of the COT3 agreement for allegations (i), (ii) and (iii)

Allegations (i) and (ii) (receiving a letter on 24 May that he was going to be subject to disciplinary investigation and being verbally informed he was going to be investigated but not the reason why)

7.1 The claimant does not dispute that the first two victimisation complaints he seeks to rely upon in this second claim were part of his first claim, after his amendment application in the first claim was granted (what the claimant refers to as the KM amendment).

7.2 On the face of it the claimant contracted out of his right to continue to pursue those specific victimisation complaints in his COT3 Agreement. On the face of it under Section 144 of the Equality Act the Tribunal has no jurisdiction to now hear them.

7.3 In addition to the specific claims particularised in the first tribunal claim, the claimant in the COT3 Agreement also signed away claims relating to detriment, discrimination, harassment or victimisation under the Equality Act 2010 and

[3] For completeness, I should add I made an observation to the contrary in the preliminary hearing, suggesting to the claimant that, for example, any application to set aside the COT3 and reinstate a complaint made in the first claim, may need to be made within that first claim. At the time I was working on the presumption a dismissal Judgment had been issued; neither party had addressed me on the existence or absence of a dismissal Judgment. I now know that one was not issued.

TULCRA 1992 (amongst other things) arising up to the date of the Agreement. He therefore, on the face of it, also signed away his right to complain about (i) and (ii) as being complaints of harassment related to age and/or sexual orientation and/or race, or as being detriment on grounds relating to trade union membership or activities.

Allegation (iii) (the claimant and his colleagues were interviewed creating a difficult working atmosphere)

7.4 Complaint number (iii) is that the claimant and his colleagues were interviewed which created a difficult working atmosphere. During the course of the hearing the claimant told me that this complaint was part of the amendment application he had made in the first claim. He said it was at that point he made his application to amend. Looking back at the first tribunal file since the hearing I cannot see an express reference to it in the amendment application of 7 June 2021. However, even if it was not part of the accepted amendment it was a complaint that the claimant, on his own admission at the hearing, knew about at the time of signing the COT3 (whether as a complaint of harassment, victimisation or trade union detriment). He would have, on the face of it, therefore signed away the allegation as part of signing away his wider rights that he had as at the date of the COT3 Agreement.

7.5 On the face of it the claimant is therefore barred from bringing these three factual complaints (i), (ii) and (iii), whether as harassment, victimisation, or trade union detriment unless he can establish that the COT3 is not binding. It is to that I therefore have to turn.

Did the signing of the COT3 meet the statutory requirements to be valid?

8.1 In the course of the hearing the claimant commented that he had not spoken with Acas on the day of the judicial mediation that led to the COT3 being signed. I am not adjudicating on this point, as I am principally assessing the claimant's case taken at its highest.

8.2 If the claimant is right about that, the Acas conciliation officer did, however, have some involvement as the COT3 Agreement was drawn up and circulated on 7 July and the claimant subsequently signed it. The case law shows a very minimal level of engagement from Acas is required for the COT3 Agreement to be valid and binding. Given the low threshold and the known involvement of Acas I do not consider the claimant has any reasonable prospect of successfully arguing that the COT3 Agreement was deficient in this regard.

9. Does the claimant have a reasonable prospect of establishing the COT3 is void at common law?

Misrepresentation?

9.1 Is there any other basis on which it could be said the COT3 Agreement does not bind the claimant, such that he has a reasonable prospect of being able to continue with the complaints? This would involve the COT3 Agreement being set

aside on one of the common law grounds. The claimant said he thought it should be set aside so that he could pursue the allegations in his second claim.

9.2 The claimant says he was told by the respondent's barrister that HMCTS wanted to continue with the allegations in order to conclude matters but that it would be by way of workplace mediation [233]. He acknowledged that there was no express statement of this within the COT3 he signed. But he said that he would not have withdrawn the KM amendment part of his first Tribunal claim without a promise being made to him that the disciplinary allegations relating to KM allegations would not proceed. He said that everything was on the table at the judicial mediation. He said the respondent's representative at the judicial mediation, CM, had commented that the judge had said it was important that the COT3 covered everything. He says that given he was a litigant in person the respondent could not stay silent and simply fail to include the withdrawal of the disciplinary allegations in the COT3 and not forewarn him about this. He said that the respondent had mislead him and the Employment Judge conducting the mediation.

9.3 There is a factual dispute about this as the respondent says they made no such promise and that they said the disciplinary case would continue, but it was hoped it could be dealt with by workplace mediation. They state that it was important to them, from a workplace management perspective, to try to ensure the procedures could go ahead in order to bring closure both for the claimant and KM. They say that the written terms of the COT3 were clear and did not include the withdrawal of the disciplinary proceedings, and it was the claimant's responsibility, if that was a red line for him, to ask for it and ensure it was enshrined within the agreement. They say it was not their responsibility to advise the claimant. They say the absence of a reference to the disciplinary proceedings in the COT3 shows in fact it was not a term of settlement. They state there were reasons why the claimant may have withdrawn his first Tribunal claim (including the KM amendment) without the disciplinary proceedings being withdrawn against him, such as the payment of the sum of compensation to him. They state ultimately workplace mediation could not go ahead because KM would not agree to it. That all said, in the context of the strike out application at least, I have to work on the basis of taking the claimant's case at its highest.

9.4 A claim for misrepresentation arises where one party to a contract made an untrue statement of fact that induces the other to enter into the contract. The Key elements of an actionable misrepresentation are: (a) a statement of fact made by or on behalf of the representor; (b) the statement was intended by the representor to induce the representee to enter into the contract; (c) the statement actually induced the representee to enter into the contract; (d) the statement had the character of a representation;(e) the representation was false.

9.5 I do not understand the claimant to dispute that workplace mediation could not go ahead because KM would not agree to it; the claimant included documents in the preliminary hearing bundle about that. Taking the claimant's case at its highest, in my judgement a misrepresentation claim, to set aside the COT3, would have difficulties. To found a misrepresentation the fact stated must be a present or

past fact. A representation as to future intention is only false if at the time the representation is made there is no intention to do that which is represented. If the respondent thought at the time KM would agree to workplace mediation (it is not in dispute she had in the past) then the representation may not have been false. On the claimant's version of what was said at [233] there is no definitive statement that if mediation proved not possible for whatever reason, there was an absolute commitment that disciplinary proceedings would not be pursued. It is a permutation that went unsaid and unexplored. The expression that HMCTS wanted to continue with the allegations in order to conclude matters tends, in fact, to suggest they considered there being some kind of formal conclusion was desired and important to them.

9.6 Looking at this point in isolation, and given I have to, when assessing strike out, take the claimant's case at its highest, I do not consider that I can say it has no reasonable prospect of success. That threshold is too high. But I do certainly consider, again looking at the misrepresentation point in isolation, that it has little reasonable prospect of success. When considering a deposit order, I can consider the respondent's position too. Looking at it from that perspective the risks for the claimant are greater. There is a very real risk that he will not establish the statement made to him was as definitive as he would suggest, as opposed to the respondent stating that they wished to deal with the allegations by way of workplace mediation. There is a very fine line between the claimant's version of what was said and the respondent's version. There is also a risk the tribunal would not accept that the statement was intended by the respondent to induce the claimant into entering into the contract; as opposed to being something simply said during the course of the mediation. Such a perspective would explain its absence from the COT3.

9.7 There is also a very real risk the claimant will not establish that the statement then induced him into entering the contract i.e. that the representation played a real and substantial part in his decision to enter into the contract. Paragraph 1 of the COT3 agreement makes clear that in return for the claimant giving up his rights and claims the respondent is committed to do what is in paragraph 2. Paragraph 2 is concerned with the ex gratia payment and says nothing about the respondent only pursuing the allegations through workplace mediation. Whilst the claimant is a litigant in person, he is a determined individual and an individual with a keen eye for detail. It is on the face of it remarkable that if a key factor for him was certainty in ensuring the disciplinary process did not go ahead other than workplace mediation that, even as a litigant in person, he did not notice that the commitment was not within the COT3 and then do something about it.

Does judicial proceedings immunity prevent any application to set aside being heard in any event?

9.8 I should add that all of the above also pre-supposes that the exceptions to the without prejudice rule bite such that the claimant can actually put forward at a substantive hearing what he alleges was said in the judicial mediation to actually found and evidence a misrepresentation claim. That is not a straight forward issue. Cases such as Unilever and Berkeley Square do show without prejudice

material can be put before a court/tribunal as part of a common law action to set aside a settlement agreement and that can potentially include without prejudice material from a mediation as was the case in Berkley Square (see also Brown v Rice and others [2007] EWHC 625 (Ch)). None of the authorities I am aware of, however, address the situation where the without prejudice material in question was said in the course of a *judicial* mediation.

9.9 In Farm Assist Ltd v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 1102 (TCC) it was held that a non judicial mediator independently held their own enforceable right of confidentiality separate to the without prejudice privilege held by the parties. It was said to be a right of confidentiality the courts would uphold except where it was necessary in the interests of justice for evidence to be given of confidential matters. (The mediator in that case was unsuccessful in setting aside a witness summons as the mediator would have relevant evidence to give as to whether the settlement agreement was procured through economic duress).

9.10 Again, however, Farm Assist was not a case with a judge acting as a mediator. The fact that it was a *judicial* mediation brings into play potential principles not just of without prejudice privilege (which belongs to the parties not the mediator) or of mediator held confidentiality (which may be overridden in the interests of justice) but also judicial proceedings immunity.

9.11 Judicial proceedings immunity started life as a rule that no action in defamation can be brought again judges, counsel, witnesses or parties for what was said or written in the ordinary course of court or tribunal proceedings. Over time the rule was extended to other types of civil claim, including, for example, a victimisation complaint arising out of evidence given in witness statements in employment tribunal proceedings. There are two public policy principles lying behind the immunity. First that those engaged in litigation should be able to speak and discharge their duties in that litigation process freely without fear of civil liability. The second is a wish to avoid a mulitiplicity of actions where one court would have to examine whether evidence given before another court was true or not. The authorities are clear that a witness (or other actor) does not lose immunity simply because he or she has been dishonest or malicious in giving their evidence. It is described as being a core immunity.

9.12 There are, however, limits on the scope of the immunity; for example malicious prosecution, perjury and contempt of court proceedings can be brought. It is also now possible for a party to sue their own expert witness or counsel in negligence. There are also limits on how far immunity extends in relation to preparatory steps for litigation (see Darker v Chief Constable of West Midlands Police [2001] 1 AC 435). It was said by the Court of Appeal in Singh v Governing Body of Moorlands Primary School and Reading Borough Council [2013] EWCA Civ 909, that

"*Other examples come to mind which are also inconsistent with the broad proposition. If a party alleges that a judgment against him was procured by fraud (e.g. by the bribing of witnesses) he may bring a second collateral action to set*

aside the judgment. The second action will examine closely the evidence given in the first, and the manner in which that evidence was procured. The precise legal basis on which such an action may be maintained was not explored in argument before us. It appears to have originated in a procedure in Chancery called a "bill of review": Flower v Lloyd (1877) 6 ChD 297. But nowadays it seems to be treated simply as an action based on fraud: see e.g. Jaffray v The Society of Lloyds [2007] EWCA Civ 586 [2008] 1 WLR 75; Cinpres Gas Injection Ltd v Melea Ltd [2008] EWCA Civ 9 [2008] Bus LR 1157. Whether a court could award damages in such a case was, again, not explored in argument but in principle I do not see why not. The ET also has a power to review a decision in the interests of justice. Exercise of this power may also require a re-examination of evidence given in a previous hearing or the circumstances in which it came to be prepared."

9.13 The Court of Appeal, having undertaken a thorough review of the authorities in the area, summarised the position by saying:

(a) The core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court;
(b) The core immunity also comprises statements of case (i.e. pleadings) and other documents placed before the court;
(c) That immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked;
(d) Whether something is necessary is to be decided by reference to what is practically necessary;
(e) Where the gist of the cause of action is not the allegedly false statement itself but is based on things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity;
(f) In such cases the principle is that a wrong should not be without a remedy prevails.

9.14 In Singh a complaint of constructive unfair dismissal alleging a breach of trust and confidence based on an allegation that the respondent had placed undue pressure on a colleague to produce a witness statement in employment tribunal proceedings containing inaccurate evidence was allowed to proceed. The cause of action was not based on anything the witness might say in the employment tribunal (which would be caught by immunity), but was based instead or what happened outside the tribunal and the means by which the witness statement was procured.

9.15 It seems likely to me that a judicial mediation would, in principle, be covered by judicial proceedings immunity. There are some features of court proceedings that are missing; such as the giving of evidence under oath, and the delivery of a Judgment. It is also a purely consensual process with the judge acting not as a decision maker but facilitative mediator. But it is a process where the judge is

acting in discharge of his or her judicial functions[4]. Rule 3 of the Employment Tribunal Rules of Procedure requires a tribunal, wherever practicable and appropriate, to encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes. Rule 7 empowers the Presidents of the Employment Tribunals to publish guidance, which Tribunals must have regard to but are not bound by. There is Presidential Guidance on Rule 3 – Alternative Dispute Resolution dated 22 January 2018. The Judge when acting as mediator is therefore exercising judicial functions under Rule 3.

9.16 It follows that statements made in the course of a judicial mediation are on the face of it covered by core immunity, in the same way as it would cover, for example, statements made by a barrister in the employment tribunal room in the ordinary course of a normal employment tribunal hearing.

9.17 But I am more hesitant in saying that it is bound to be the case that what is said in the course of a judicial mediation can never be used as evidence in an application to set aside a settlement agreement. The quote I have set out above from Singh above suggests a set aside application is the kind of purpose for which reference to what was said in the course of judicial proceedings may be made, if relevant. It mirrors the same situation under the without prejudice principle. But yet again, the position in a judicial mediation is more complicated than the examples set out in Singh. Singh talks about the need to examine the evidence given in the first set of proceedings. But usually those first proceedings will have taken place in open court, where there are witness statements and records of proceedings or at the very least hearings not under conditions of confidentiality. Judicial mediation is a different beast. Its very existence is premised on consent and confidentiality. The parties enter judicial mediation being told it is a consensual, confidential process. What they say to the judge mediator in private sessions is confidential and not repeated to the other party without express consent to do so. What is said by one party/their representative to the other (whether direct or via the Judge mediator) in the course of the mediation is not to be referred to in subsequent proceedings unless it is the kind of promise that becomes enshrined within a binding settlement agreement (or potentially a consent Judgment). The parties were sent, in advance of the judicial mediation, the Presidential Guidance. That Guidance emphasises that the judicial mediation is a private process, which provides a certain, speedier outcome within the parties' control. It states the judge will remind the parties of the vital confidentiality of the mediation process and that if the mediation fails no mention may be made of it *at all* in the further stages of the case or at any hearing[5].

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[4] See for example Engel v The Joint Committee for Parking & Traffic Regulation Outside London (P.A.T.R.O.L) [2013] UKEAT 0520_12_1705 (17 May 2013)

[5] There are also tight restrictions in other jurisdictions. The family courts now have Financial Dispute Resolution hearings. Their principles are enshrined within the Family Procedure Rules and Practice Direction. It is a compulsory process (unlike judicial mediation), and a private process. Like judicial mediation, the Judge hearing the FDR must have no further involvement with the

9.18 On balance, I ultimately struggle to see that what is said by one party confidentially to a judge in a private one on one session could be put in evidence (at least without their direct consent). I also struggle to conceive (as I expressed to the parties at the hearing) that the judge would be in a position of having to give an account or handing over any notes held. But I do not rule out that it is never possible in an application to set aside a COT3, made on the basis of an alleged misrepresentation said to have happened in the course of a judicial mediation, for the parties to give evidence as to what was said *between them* in the course of the mediation due to absolute judicial immunity.

9.19 I therefore would not grant a strike out on the basis of saying there is no reasonable prospect of the claimant setting aside the COT3 because judicial proceedings immunity would prevent him making the very argument he seeks to make. I have already found, in terms of a deposit order, that there is little reasonable prospect of success on other grounds in any event. But if the claimant is to pay his deposit, and proceed with an application to set aside the COT3 on the basis of what he alleges was said to him at the judicial mediation, there will need to be a preliminary hearing about (amongst other things) whether ultimately judicial proceedings immunity does bite, or whether there is a pathway, in part at least, through it. It is complicated. It requires full legal submissions by the parties. This is a strike out/deposit order application and my observations above are just that, observations. I have not definitively decided the judicial proceedings immunity issues. It may be that a judge at such a hearing would decide, on balance, that complete immunity should apply and which would be fatal to the set aside application.

9.20 For completeness, I should add that the claimant's answer to the potential judicial immunity difficulty was to say it would not be necessary to hear evidence as to what was said at the judicial mediation, as it could be inferred that the statement must have been made to him as he otherwise would not have signed away his rights, particularly the withdrawal of the KM amendment. But that is not the only inference that could be drawn from the scenario. The respondent's version is also plausible. There are other potential reasons the claimant may have signed away his rights. The claimant's proposal does therefore not resolve the problem. To determine a misrepresentation claim would require actual evidence as to what or was not said by the claimant, and the respondent's barrister, even if not the Judge.

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case. The practice direction says "*non -disclosure of the content of such meetings is vital and is an essential pre-requisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of Re D (Minors) (Conciliation: Disclosure of Information) [1993] Fam 231, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in Re D.*" (Re D is concerned with child protection issues). The Practice Direction therefore limits the use of FDR information to two very narrow circumstances. In V v W Sir James Munby held that the Practice Direction was lawful and binding and operated as an absolute bar (subject to the two limited circumstances) to disclosure of FDR material.

10. Where allegations (i) and (ii) as victimisation complaints are left

10.1 Allegation (i) (receiving a letter on 24 May that the claimant was going to be subject to disciplinary investigation) as a victimisation complaint was part of the first claim, as amended, as was allegation (ii) (being told verbally he was to be investigated). They were withdrawn and cannot be reopened in the first claim. They are caught by the COT3 agreement, which on the face of it prevents the claimant bringing the complaints afresh in this second claim. However, I do not find (bearing in mind I must take the claimant's case at its highest) that I can say the claimant has no reasonable prospect of setting aside the COT3 agreement. I do however, find that the claimant has little reasonable prospect of setting aside the COT3 agreement such that he should be ordered to pay a deposit on condition of being able to continue with these two complaints in the second claim. If the claimant pays the deposit and continues with the victimisation complaint there will need to be a substantive preliminary hearing to decide (at least):

(a) whether the COT3 is in fact binding and debars the complaints being brought;

(b) and/or whether principles of confidentiality and judicial proceedings immunity prevent the claimant seeking to set aside the COT3 on the basis of what was allegedly said at the judicial mediation;

(c) what evidence (if any) can be given as to what was said at the judicial mediation, and by who.

10.2 It is also possible the respondent would argue it would be Henderson abuse of process for the claimant to bring the complaints afresh in a second claim. I do not address that in any detail here as it seems likely to me that whether there is arguably an abuse of process in relitigating the complaints is very much tied up with whether the COT3 agreement is in fact valid and binding or should be set aside.

10.3 The respondent argues that the complaints are also without merit and are out of time. I do not strike out the complaint on consideration of the merits. I must take the claimant's complaint at its highest and this is an amendment that EJ Moore allowed the claimant to pursue in the first claim. The same applies to the application for a deposit order on a merits assessment basis. Time limits are an issue, however, again, in reality the considerations are closely tied up with the fate of the COT3 agreement and the claimant's argument is that there was a continuing act to include later in time events.

10.4 I return to the amount of the deposit order below

11. Where allegations (i) and (ii) as harassment related to age/race/sexual orientation are left

11.1 The claimant also seeks to pursue allegations (i) and (ii) as harassment related to sexual orientation, and/or harassment related to age and/or harassment related to race. They are complaints on the face of it caught by the COT3 agreement. The claimant would need to successfully apply to set aside the COT3

agreement to pursue the complaints. For the reasons given above, I do find the claimant has little reasonable prospects of success in any application to set aside the COT3 and should be ordered to pay a deposit order on condition of continuing with the complaints in the second claim (and in pursuing an application to set aside). Again, I consider Henderson abuse of process arguments are closely aligned to the outcome of that set aside application.

11.2 The respondent argues that the complaints should also be struck out or a deposit order made on the alternative basis that the complaints are also without merit and are out of time. The essence of the claimant's allegation is his belief that KM and the second respondent were engaged in a process of placing the claimant under investigation to damage his reputation in the first tribunal claim. Considering it from the claimant's perspective, its natural fit appears to be more one of victimisation rather than harassment related to a protected characteristic. I did ask the claimant why he said the conduct he complains about was harassment related to race or sexual orientation or age. He did not give me a cohesive answer and gave different responses. He said they were protected characteristics in the first claim. He also said that it was an ongoing process from the first claim. He also said that he was seen an individual with an older age profile, Northern Irish, and heterosexual and that this was KM and the second respondent continuing to view the claimant within that bracket.

11.3 Upon review of the first claim, it was LJ who made the comment in question about the claimant and his age and Northern Irish nationality, not KM or the second respondent, and it was the making of that comment by LJ (rather than a reaction to by KM or other managers) that was the basis of the harassment related to age and race in the first claim. The direct discrimination on grounds of sexual orientation in the first claim was about a different comment allegedly made by LJ about the claimant and KM's reaction to that.

11.4 To the best that I can understand what the claimant is saying, it is that he considers that that KM and the second respondent had a similar mindset to LJ, and that they also saw the claimant as someone who was different, an outsider, because of his older age profile, because he was Northern Irish, and because of a belief he did not have an understanding of homosexual people. He sees their alleged steps in complaining about him and having him placed under disciplinary investigation as being in part motivated by that perception of him and to cause trouble for him. In truth I do not see it as the strongest of complaints. To establish all that on evidence at a hearing, that presumably the claimant would have to extract through cross examination or inviting inferences is potentially quite a stretch. This is in circumstances in which the respondent would say the most obvious, non-discriminatory, explanation is that KM was feeling vulnerable, genuinely felt the way that she did, and the respondent felt duty bound to look into it. Often litigants are not best served by taking a scattergun approach to allegations, rather than focusing on their strongest points. But I have to approach a strike out application taking the claimant's case at its highest. It is not fundamentally inarguable and therefore I cannot say it has no reasonable prospect of success.

11.5 Turning to the deposit order considerations, I am conscious that the claimant's victimisation claim is also based on an allegation of an improper motivation on the part of KM and the second respondent relating to the first tribunal claim. There is scope, in my view, for the line between that alleged motivation, and this alleged motivation to become blurred; they relate to the same sequence of events. The assessment then becomes very dependent upon the evidence that would be given and tested at a hearing. In those circumstances, I do not consider it appropriate to conclude that the complaint has little reasonable prospect of success, and I decline to order a deposit order on that basis (albeit I have made one on other grounds in any event).

11.6 I also decline to strike out or order a deposit based on time limit considerations. As stand alone allegations they appear to be out of time (giving the claimant a limitation date of 27 August 2021 if 24 May is taken as the operative date). The claimant says that these events are linked through to the decision to require him to attend a disciplinary hearing (I address the status of that allegation below). He is entitled to advance an argument that these are matters forming part of a continuing act. Again, ultimately it will depend on the evidence heard and decisions reached at a final hearing.

12. <u>Where allegation (iii) is left (interviewing the claimant and his colleagues creating a difficult working atmosphere)</u>

12.1 Allegation (iii) is on the face of it caught by the COT3 agreement and would require the claimant to successfully set aside the COT3 whether brought as a victimisation complaint or harassment related to age/sexual orientation/race. For the reasons already given above I do not strike out the complaint but order payment of a deposit as I find the claimant has little reasonable prospect of setting aside the COT3 to allow the complaint to be brought.

12.2 The respondent asserts that the complaint should be struck out in any event (or a deposit order made) on the basis the complaint cannot amount to harassment as the respondent was under a duty to investigation the allegations, and it was inevitable that to do so they had to interview staff. They assert that it was not reasonable for the claimant to view the conduct as having the prescribed harassing effect.

12.3 Taking the complaint at its highest, and on its merits, I do not find that it has no reasonable prospect of success. The respondent's perspective is understandable; if it is ultimately found as a fact that the respondent was simply taking genuine steps to investigate a complaint it received. However, the claimant's position is that there was, in effect, deliberate targeting of him, and from that perspective interviewing colleagues without his knowledge could (if it is proved correct) be part of that scenario of an attempt (he would say) to build a case against him through victimisation or on the alleged harassment grounds he has identified. As with allegation (ii), I do not consider the complaint a strong one, but for reasoning similar to that set out at 11.5 above, I do not find there is little reasonable prospect of success. Ultimately the evidence needs to be heard and adjudicated upon (if the complaint is able to proceed in view of the COT3).

13. <u>Allegation (iv) (being invited to a disciplinary hearing on 9 July in circumstances where the claimant understood from the judicial mediation that the disciplinary investigation was not going to continue against him and the matter would proceed to workplace mediation)</u>

13.1 The claimant seeks to pursue this allegation as victimisation, or harassment related to age/race/sexual orientation. These are fresh complaints and are not caught by the COT3. The complaints relating to this allegation were presented in time.

13.2 I do not consider, however, that these complaints can proceed in the form set out by the claimant. For the reasons set out above, I consider that the judicial mediation was covered by judicial proceedings immunity. Here the claimant is relying upon something allegedly said by the respondent's counsel at the judicial mediation as an essential part of the claim he seeks to bring as victimisation /harassment related to age, race or sexual orientation. In my judgment, it is likely this is caught by the core judicial proceedings immunity and the claimant has no reasonable prospect of being able to pursue the complaint if it is presented on the basis of what was allegedly said at the judicial mediation. To allow it to proceed as a substantive complaint would amount to a substantive flank attack on judicial proceedings immunity.

13.3 It is different to the position where the claimant potentially seeks to set aside the COT3 agreement on the basis of what was allegedly said at the judicial mediation. What was allegedly said at the judicial mediation is being used there as evidence in the set aside application to in effect reinstate the earlier complaints (albeit brought in a second claim). Were that to be successful, what happened at the judicial mediation falls away; what happened at the judicial mediation it is not part of the substantive, reinstated complaints. That is very different to complaint (iv) which inherently relies, in its substance, on what allegedly said at the judicial mediation. In my judgment, the claimant can refer to the fact of the judicial mediation, to explain the time line of events, but he cannot rely on what was allegedly said at it to found a substantive actionable complaint.

13.4 The claimant is a litigant in person. These are complex legal principles. I do therefore consider the claimant should be given the opportunity to amend the basis of complaint (iv) should he wish to do so, so that it functions independently of the judicial mediation.

13.5 It seems to me, in particular, that it is open to the claimant to potentially argue that being called to a disciplinary hearing was allegedly an act of victimisation for bringing his first tribunal claim without being dependent upon what was allegedly said at the judicial mediation. His position was already the case that KM's complaints against him and the respondent's pursuit of them is to victimise him for bringing the first tribunal claim. If the claimant's basic premise is correct then, from his perspective, the calling to a disciplinary hearing is a further step in what was an ongoing situation.

13.6 The respondent argues that KM had genuine, subjectively held concerns, arising out of the difficult history in the workplace and that the respondent, as an

employer, was duty bound to investigate. They say the investigation and decision making was carried out by different managers, was reasoned and proportionate (with not all complaints being pursued). The claimant alleges that there was still influence going on behind the scenes, including the fact that the disciplinary proceedings continued to hearing based on one allegation which had been originally supported by evidence from the second respondent. I have to take the claimant's case at its highest. I cannot conduct a mini trial. I should be slow to strike out a discrimination basis on the basis of the type of argument made by the respondent. I do not consider it is appropriate to do so. What was happening and why are contentious issues of fact that need to be determined on the evidence at a full hearing (but shorn of references to what was said at the judicial mediation). I also do not consider that I can say the complaint has little reasonable prospects of success, such that a deposit should be ordered, because again it is a fact sensitive issue.

13.7 If they are to proceed likewise the complaints of harassment would have to be amended to remove the reference to what was said at the judicial mediation, and focus instead on the fact that the claimant was taken to a disciplinary hearing. I consider the complaints of harassment related to age/race/sexual orientation are likely to be weaker that the victimisation complaint. The claimant struggled in explaining the premise to me and I had to ask him several times. It appears his case is, in part, dependent on an ever widening group of individuals that the claimant is saying perceive him a certain way because of his older age profile (in workplace terms), because he is of Northern Irish nationality and because of his sexual orientation as a heterosexual male. The allegation now stretches over a time frame long after the original 2019 events, and over, as I have said, an ever widening group of personnel.

13.8 But I have allowed the victimisation complaint to proceed (if the claimant amends it). The border between the claimant alleging that KM and managers were victimising him because of, the first tribunal claim (victimisation), and alleging that KM and managers were trying to blacken his name in the first tribunal claim or otherwise disadvantage him because they allegedly continued to dislike the claimant for a reason(s) related to his age profile/ Northern Irish nationality/ sexual orientation is a narrow, evidence based line. I therefore do not consider I can find that the complaint has no reasonable or little reasonable prospect of success and I do not strike out the complaints or order payment of a deposit. That said, it is always sensible for any litigant to stop and think about how they are going to present their complaint at the final hearing, and whether there are stronger aspects to focus upon. I would recommend the claimant do so and consider taking some professional advice (whether from his union or otherwise). But they are ultimately matters for him.

14. <u>Allegation (v) being subject to an ongoing investigation between 9 July and 16 August</u>

14.1 The respondent argues this complaint should not proceed because the claimant was not under an ongoing investigation during this period; the decision had already been made that he should go to a disciplinary hearing. The respondent

may be technically correct but the claimant is a litigant in person and it is important not to put terminology over substance. The reality is the claimant is saying he was under ongoing disciplinary proceedings during that period and the complaint should be seen in that light.

14.2 The analysis then becomes the same, in effect, as the analysis for allegation (iv) in inviting the claimant to attend a disciplinary hearing and I therefore do not find that the complaint has little or no reasonable prospect of success and it can proceed.

15. Trade union detriment complaints

15.1 The claimant alleges that the respondents did not like the fact he was a trade union representative. He relies on an internal email sent by CM on 20 April 2021 at [110] which refers to a meeting the day before. An action point is listed in a case about DR. In the action point the third respondent is to speak to the decision maker in the case and share the original advice given to her by the caseworker about (i) whether it is appropriate for the claimant to rep the member of staff in absentia and "how we evidence he is acting on her "instructions" and (ii) if it is appropriate, what the claimant's role would be at any hearing (only to read out a statement?). The claimant says that this is evidence to show that the respondents were seeking to remove him from trade union activities.

15.2 Allegations (i), (ii) and (iii) have the same difficulties with being caught by the COT3. For the reasons already given I consider the claimant has little reasonable prospect of success in setting aside the COT3 to allow those three trade union detriment complaints to continue, and that a deposit order should be made in that regard.

15.3 The respondent argues that all the allegations should be struck out on their merits in any event. They argue the claimant does not have basis for his supposition about being subjected to detriments because of trade union activities. They say the claimant has misinterpreted the email of 20 April 2021 (and the meeting it refers to) which was not about removing the claimant was trade union activities, but was raising a concern genuinely held about whether any trade union representative could represent someone at a hearing in their absence, how they would know if what was being said was the actual position of the employee, and what the extent of the trade union representative's role would be.

15.4 The claimant disagrees with that interpretation and says the original disciplinary was brought and heard by the second respondent, who he alleges did not like the fact he was representing the employee. He says the disciplinary appeal was being dealt with in the West Midlands, but in the email the third respondent was becoming involved in something that did not involve her, and trying to get him removed from the appeal.

15.5 I have concerns, as expressed elsewhere, about the diffuse ways in which the claimant seeks to present the allegations in the case; it is not generally a sign of strength. But I have to take the claimant's case at its highest. I therefore cannot

find that the complaints have no reasonable prospect of success. The claimant's position (which is wider than the email of 21 April 2021) is that he was disliked for his trade union activities. If so, it is difficult to say there is no reasonable prospect of establishing a link with the disciplinary investigation and proceedings. Likewise, despite my reservations, I do not find that there are little reasonable prospects of success such that I should order a deposit on this ground. The issue is highly fact sensitive and I am not in a position, on the limited knowledge I have, to assess those facts.

16. Deposit Order

16.1 I have therefore found that allegations (i), (ii) and (iii) in all their permutations have little reasonable prospect of success because the claimant has little reasonable prospect of setting aside the COT3 that debars him from bringing those complaints. I consider it is appropriate to order a deposit order. I heard evidence from the claimant about his means that I do not need to repeat in his Judgment, except to say that the claimant would be able to meet a deposit order. In the claimant's situation the making of a deposit order is not so much about providing the respondent with security for costs. The claimant still works for the first respondent, and there are actions they could therefore take in that regard in the unlikely event of it becoming necessary. The purpose of making a deposit order here is the important one of making the claimant pause and think about the claims he is pursuing and the strength (or otherwise) of his position in trying to set aside the COT3. The sum ordered should therefore reflect that whilst being proportionate.

16.2 There are 15 complaints that are subject to the deposit order (victimisation, harassment related to race, harassment related to age, harassment related to sexual orientation, and trade union detriment for each of the 3 factual complaints). I need to make individual deposit orders because it is possible the claimant would decide to pursue some aspects but not others. I have therefore decided it is appropriate to make a deposit order of £100 for each of those individual complaints. If the claimant decides to proceed with all 15 individual complaints then the total deposit order to be paid will be £1500, or part thereof if the claimant decides to pursue only part. It is also of course open to him to not pay the deposit order at all which would mean those 15 complaints would not continue (but allegations (iv) and (v) would provided they are amended as identified above).

17. The amendment application

17.1 Allegations (i), (ii) and (iii) in all their various formats continue if the claimant pays the deposit orders and if he is successful in setting aside the COT3 agreement and other complicating matters. Allegation (iv) in its various formats continues if amended to remove the reference to what was allegedly said at the judicial mediation and (v) continues in its various formats if interpreted as a reference to the disciplinary proceedings rather than investigation.

17.2 I turn to the amendment application. I apply the principles set out in Selktent Bus v Moore and Vidal Modality Partnership v Vaughan. I have to take all

relevant factors into account, which may (although they are not a checklist) include factors such as the nature of the amendment, the timing of the application to amend, whether the proposed additional complaint is in time or not, the reason why the complaint was not brought at the outset, and importantly viewing the situation through the balance of prejudice and hardship to the parties, from a practical perspective, if the amendment is allowed/ refused.

17.2 The amendment application relates to the treatment of the claimant's subsequent grievance. The grievance decision was issued on 28 February 2022 and the claimant made his application to amend on 24 March 2022. At the point the application to amend was made the complaint about the grievance decision was in time. It is not now but that is not the fault of the claimant.

17.3 The respondent argues that permission to amend should be refused as the claimant should have issued a fresh claim rather than applying to amend. The case law is clear, however, that it is possible for a claimant to apply to amend an existing claim to cover matters that post-date the original presentation of the claim. It is my genuine experience that claimants often end up in a no win situation, as whichever route they choose they are subject to criticism. There is no material disadvantage to the respondent in the claimant's choice of process. There is a material disadvantage to the claimant if the amendment were rejected on the basis that he allegedly should have commenced a separate claim (that potentially would have been consolidated) because that separate claim would now be out of time. That does not appear to me to be in the interests of justice.

17.4 The respondent in reality was saying that if the second claim in terms of allegations (i) through to (v) do not proceed, then the second claim in effect no longer exists, and it would not be appropriate to keep it alive by virtue of the amendment alone. But that is not the position we have in fact ended up in, in any event. I would add that allegations (iv) and (v) (as amended) also do not need this new amendment relating to the grievance to assist with time limit issues as they are in time in their own right in any event.

17.5 It is possible to take the merits of a complaint into account when deciding an application to amend, including the potential merits of a proposed complaint which is not plainly so week it would fall to be struck out. But if a tribunal weighs in the balance, when considering an amendment application, a view on the merits, the assessment must be properly reached by reference to identifiable factors and taking proper account of the fact the tribunal does not have all the evidence before it and is not conducting a trial (Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132). Here the respondent argues that the merits weigh against the granting of the amendment.

17.6 The claimant, as part of his grievance, made a complaint that a witness statement by KM about him had been edited by the third respondent. His grievance was investigated by CR and the decision maker was LT. He complains that LT abdicated her responsibility when finding that the third respondent should not have amended KM's witness statement, but by then referring it back to region for further investigation. He also complains that no action was taken against the

second respondent who he says gave a statement in support of KM's complaints (on the one issue that he was taken to a disciplinary hearing about) but where at the disciplinary hearing the allegation was found not proven against him. He says that the second respondent, third respondent, CR and LT are all females, in the same age group and senior managers within HMCTS whereas he is male, 15 years older than him and in the lowest pay band. The claimant says that if he had done the same things as the second and third respondent he would have faced disciplinary action. He seeks to bring complaints of age and sex discrimination saying the second and third respondents have been treated more favourably than he would be treated in the same circumstances.

17.7 Direct discrimination takes place under section 13 of the Equality Act where an employer treats the employee less favourably than the employer treats or would treat others, and that less favourable treatment is because of a protected characteristic.

17.8 To found a claim the claimant employee must actually have been treated less favourably. It is necessary to identify what the less favourable treatment of the claimant is said to be. If it is the taking of the claimant through the disciplinary process then that is already part of his claim. It therefore appears the claimant is arguing that not disciplining the second and third respondent, as part of his grievance (and which he therefore has a vested interest in) amounts to less favourable treatment of him. As I understand it, he says, in effect, the decision maker was seeking to protect the second and third respondent because of an affiliation with them as women, or a shared age profile which lightened the findings and the consequences made against the second and third respondents.

17.9 I have reservations about the strength of these complaints. The obvious reasoning for what happened would lie with those involved having simply reached the view they did on the discretionary issues before them, even if others (including the claimant) would not have reached the same decision on the same information. Peoples' perspectives and assessments do vary in life. But these are discrimination complaints and I have not heard the evidence and cannot conduct a mini trial. I therefore cannot conclude that these are complaints I would strike out as having no reasonable prospect of success. I can nonetheless still take a view on the merits into account, but I heed the words of caution in Kumari. When I weigh into the equation, that the complaints if brought as separate proceedings would have been (at the time first raised) in time, would be as discrimination complaints unlikely to be struck out on their merits, and the lack of substantive prejudice to the respondent (other than having to face allegations they would have had to face anyway if brought as separate proceedings) I find that the balance lies in favour of granting permission to amend. The claimant is now potentially bringing a wide range of allegations, brought under multiple heads. As set out above, it is not always the wisest course of action. I continue to recommend that he considers getting some professional advice (from his union or otherwise) about the claims he is bringing. Having permission to proceed is not the same as being bound to win.

18. Withdrawal against named respondents

18.1 The claimant confirmed that as the first respondent was not running the statutory defence in respect of the second and third respondent, and they accepted they were liable for any acts or omissions of the second and third respondent as pleaded, then he was willing to withdraw his complaints against the second and third respondent.

16.2 Those complaints are therefore dismissed upon withdrawal but to be clear that does not in any way effect the continuation of the complaints against the first respondent.

19. Next steps and observations on redaction

19.1 The claimant has 28 days in which to pay part or all of the deposit order.

19.2 The case will then be listed for a further case management preliminary hearing. Depending on whether the claimant pays part or all of the deposit order, it is likely that a substantive preliminary hearing will then need to be listed to substantively decide, amongst other things, whether the COT3 agreement is binding, whether it should be set aside, whether any application to set aside the COT3 cannot proceed because of confidentiality and/or judicial proceedings immunity, or whether and to what extent those principles constrain what evidence can be put forward in relation to whether or not the COT3 should be set aside. These are complicated points and they need to be discussed with the parties before the ambit of the substantive preliminary hearing is finalised.

19.3 If the claimant proceeds just with allegations (iv) and (v) (as amended) together with his grievance amendments, it may be a substantive preliminary hearing is not required and that the proceedings just need case management to get the case ready for final hearing.

19.4 The claimant continues to work for the respondent; that cannot be easy for anyone and it is trite to say that ongoing litigation in general sadly only tends to further polarise relationships. Given the unusual history in this case it is difficult to see that it would be suitable for a further attempt at judicial mediation. Last time around things fell apart within 2 days of the judicial mediation. But I would encourage the parties to consider whether there are other ways open to them to resolve their differences and rebuild relationships. That is simply an observation, and is no form of judicial direction nor intended to be a criticism of anyone.

19.5 I finish on the topic of redaction. The preliminary hearing bundle before me had been redacted to the point of absurdity. I refer particularly to the redaction of the identity of individuals. It became nigh on impossible to identify who was who and for unknown reasons the first respondent was redacting the identity of individuals such as disciplinary decision makers who were simply carrying out their appointed roles. I make clear as I did at the hearing that no permission has been granted by the Tribunal for this kind of redaction. It is not appropriate for a party to unilaterally undertake it. **It is not acceptable for it to happen again in this case.** If the respondent wishes to redact material or make some other privacy application then they must follow procedures and make an application as other litigants do.

Employment Judge R Harfield
Dated: 21 October 2022

JUDGMENT SENT TO THE PARTIES ON

……21 October 2022……..

…… ……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS