EMPLOYMENT TRIBUNALS

Claimant: Mr F P Wandji Mboungueng
Respondent: 1. British Gas Services Limited
2. Centrica PLC

HELD AT: Liverpool (by CVP) **ON:** 30 June 2022

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondents: Mr M Proffitt, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The correct respondent is the first respondent, and all claims are dismissed on withdrawal against Centrica PLC who is no longer a respondent and has no further interest in these proceedings.

2. The claim for unpaid accrued holiday pay is dismissed on withdrawal.

3. The Tribunal does not have the jurisdiction to consider the claimant's complaints of unlawful race discrimination alleged between April 2019 and July 2020 which was presented after the end of the relevant time limit and it was not just and equitable to extend the time limit to the 31 July 2020. The historical claims brought under section 13 of the Equality Act 2010 are dismissed. The post 26 September 2020 claims remain to be decided.

REASONS

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Kinley CVP video fully remote. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. This is a preliminary hearing to consider the respondent's application to strike the claimant's complaints of disability discrimination brought under section 13, 15 of the Equality Act 2010 ("the EqA") on the basis that the claims are out of time, or in the alternative order a deposit. Mr Proffitt confirmed there was no time issue with the claimant pursuing a complaint of direct race discrimination relating to his dismissal by reason of capability which includes the report prepared by Lauren Edwards dated 10 June 2021. The unfair dismissal complaint was lodged within the statutory time limit.

3. The Tribunal has before it a bundle consisting of 125 pages. The claimant has not presented a statement of means and nor has he produced any documents relating to his means and savings. Accordingly, the claimant gave oral evidence dealing with means which I found less than credible for the reasons set out below. The claimant also provided an explanation as to why proceedings for race discrimination were not issued within the statutory time limit.

4. A number of breaks were made today including a lengthy adjournment at the claimant's request, who suffers with his mental health, in light of guidance set out in the Equal Treatment Bench book, after Mr Proffitt had made submissions that referred to case law, copies of which was forwarded to the claimant who requested time to consider and prepare his oral submissions which was granted with the result that there was insufficient time to give oral judgment and reasons. It was agreed case management would take place and case management orders were made leading to the final hearing listed for 12, 13 and 14 December 2022 at present, although this listing would have changed to 11 to 14 March 2024 (the earliest available date) if all of the historical complaints had proceeded to a final hearing taking into account the breaks required by the claimant who will remain a litigant in person.

5. The claimant confirmed the following:

    5.1 The correct respondent is British Gas Services Limited and the employer set out in the employment contract and not Centrica PLC against whom all claims are withdrawn and dismissed.

    5.2 He was no longer proceedings with the holiday pay claim which is dismissed on withdrawal.

    5.3 Despite informing EJ Batten at the preliminary hearing heard on the 22 April 2022 that complaints numbered 41.2.1 to 41.2.5 (which he acknowledged were significantly out of time and he was aware of the 3-

month statutory time limit) might be pursued as "context" only, confirmed today that they were to remain live race discrimination claims and not form part of the factual history to the later claims. Accordingly, time was spent with the claimant understanding those claims including establishing the names of alleged perpetrators in order to ascertain whether there is a prima facie case for the claimant to have a have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.

Issues

6. The issues to be decided are as follows:

   6.1 Whether the complaint of race discrimination or any allegation within that complaint pre-26 September 2020 was presented outside the time limits in section 123(1)(a) and (b) of the Equality Act 2010 and, if so, whether it should be dismissed on the basis that the Tribunal has no jurisdiction to hear it or whether time should be extended on a just and equitable basis;

   6.2 Whether the unfair dismissal and race discrimination claim(s) or any allegation made within them should be struck out as having no reasonable prospect of success; and

   6.3 .in the alternative, whether a deposit of up to £1,000 per claim or allegation should be ordered to be paid by the claimant, if the claim(s)or any allegation have only little reasonable prospect of success. The respondent is seeking a deposit of £1000 for the race discrimination complaints and a further £1000 for the unfair dismissal.

The claim form

7. The claimant commenced proceedings in a claim form received on 8 November 2021 following ACAS early conciliation and the issuing of a ACAS Early Conciliation Certificate which records DAY A: 23 September 2021 and DAY B: 29 June 2021. The parties are in agreement that these are the applicable dates.

8. The claimant complains:

   8.1 In 2018, he applied for part-time working but was denied this, whilst white colleagues in his team, who also applied, were allowed to work part-time. At today's hearing the claimant confirmed the date was **April 2019**, the relevant manager Philippa Edgar who was his line manager at the time but this changed later. The comparators are Debbie Worstold and Karla Johnson.

   8.2 In 2018, the claimant applied to work part-time in another area of the respondent's business and, whilst his application succeeded, he had to go through an interview process unlike white colleagues who

were granted part-time working without an interview. At today's hearing the claimant confirmed the date was **May 2019** and did not know who the decision maker was, possibly Philippa Edgar's line manager. The comparators are Debbie Worstold and Karla Johnson.

8.3 In January 2019, the claimant had to re-apply for his job, in contrast to white colleagues who did not have to reapply. The claimant cannot remember who the decision maker was, possibly head of human resources, and no comparators have been referenced.

8.4 The claimant was passed over for a promotion in **August 2019** by Lauren Edwards, whilst white colleagues with less experience and no qualifications, were promoted. No comparators were referenced;

8.5 Between January 2019 and September 2020, whilst working in the respondent's customer contact centre, the claimant suffered racial abuse from customers during telephone calls which he handled, and the respondent did not take any action to protect him from such. The claimant indicated the relevant dates were **January and July 2020** for two incidents following which notes were made by Philippa Edgar or Laura Blackburn who investigated and was his line manager at the time. Mr Proffitt indicated the respondent has looked for these notes and cannot find anything.

8.6 It is agreed the claimant went on sick leave on the 26 September 2020. The claimant alleged he asked for support from the respondent in order to return to work but his manager pressurised him to resign and did not give him support. The claimant did not resign. Today the claimant confirmed the allegation involved 3 managers; Laura Blackburn, Laura Edwards and Nicola Davies who allegedly throughout his sickness absence made a concerted effort at every single monthly meeting to pressurise the claimant to return to work and failed to provide him with support. MyHealth and MyCare also "coerced" the claimant to get back to work without giving him mental health support. There was some confusion as to when the named managers carried out the alleged discrimination, which was resolved with the claimant's agreement by reference to an Attendance Report prepared by his line manager Lauren Edwards. I have referred to the report below. The relevant dates are:

8.6.1 23 October 2020, 13 November, 4 December 2020 and 8 January 2021 health review by Laura Blackburn.

8.6.2 1 February 2021 health review by Olivia Hamnet (who has not bene referenced by the claimant as one of the managers involved in discriminating against him on the grounds of race).

8.6.3 25 February 2021, 26 March and 21 May, health review by Lauren Edwards.

8.7 29 June 2021 the claimant was dismissed by Janine Tomlinson, revenue protection team manager who was allegedly independent, on the basis of a long-term 9-month sickness absence, whereas white colleagues have been on sick leave for more than 3 years and have kept their jobs. The claimant has not named the comparators.

9. The claimant was a customer service advisor and he had been employed by the respondent since 31 January 2018 originally in the planning department until he obtained a quantity surveying job with another company unconnected with the respondent and reduced his hours with the respondent by changing departments to customer services in May 2019. The claimant claims damages for discrimination and unfair dismissal in the sum totalling £117,159.800 including loss of earnings to date of £160,000. The claimant believes his case is worth millions of pounds.

10. As recorded in the case management discussion and confirmed by the claimant today, on 26 September 2020 the claimant commenced sickness absence due to stress. He did not return to work prior to his dismissal. During the claimant's sickness absence the respondent held a number of health review meetings with the claimant. The respondent also referred the claimant to occupational health. The claimant complains that the respondent's partner organisations, MyHealth and MyCare, did not support him to return to work and instead "bullied him to leave". The claimant did not resign.

11. It is notable in the notes produced following the stage 4 attendance meeting (a copy of which the claimant had received and did not object to today) that preceded the claimant's dismissal the claimant informed Jannine Tomlinson it was going to be 12 to 18 months before he returned to a job he didn't enjoy and it was a "dead-end job…I have a certain income that I cannot drop below so I cannot move on" and he had been looking for another job in addition to the second job taken up with another company that had resulted in a change in department and part-time working hours. When it was put to the claimant he had already been off for 9-months "with no real idea of a returning date" the claimant's response was that he would raise a grievance. Today, the claimant denied he stated he would be absent for a further 12 to 18 months, maintaining he had said his absence would continue to bring the total period to 12 to 18 months taking into account the existing absence of 9-months, and he had been told this by his GP. The documents do not reflect the claimant's current position, and it is notable the outcome letter dated 29 June 2021 refers to the claimant being absent from the business since 26 September 2020 "and currently have no expected return to work date." As indicated below, the claimant did not dispute this.

Law and conclusion: time limits

Issue: whether the complaint of race discrimination or any allegation within that complaint was presented outside the time limits in section 123(1)(a) and (b) of the Equality Act 2010and, if so, whether it should be dismissed on the basis that the Tribunal has no jurisdiction to hear it or whether time should be extended on a just and equitable basis;

12. The time limit within which claims to the employment tribunal must be brought is set out at section 123 of the Equality Act 2010: "(1) … proceedings on a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. […] (3) For the purposes of this section— (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it. (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something— (a) when P does an act inconsistent with doing it, or (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

13. The case law reflects in relation to the concept of a continuing act where there is a series of distinct acts the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. In the well-known case of Barclays Bank plc v Kapur and ors [1991] ICR 208, HL, it was held that a distinction existed between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time. The alleged events leading up to claimant's absence on 26 September 2020 were one-off decisions and the issue whether the decision to refuse the claimant's application to work part-time **April 2019** made by the claimant's line manager Philippa Edgar, the requirement that he applied to work part-time in another area of the respondent's business in **May 2019** and go through an interview process in **January 2019**, re-apply for his job and passed over for a promotion in **August 2019** by Lauren Edwards, was whether the different decision makers had taken the decision on racial grounds.

14. The allegation that the claimant had been subjected to racial abuse from customers during telephone calls which he handled in **January and July 2020**, subsequently investigated by a line manager was difficult to understand as put by the claimant, given the fact that what customers say to call handlers cannot be controlled and does not attract vicarious liability. The claimant did not state how the respondent had failed to protect him when he clarified this allegation and nor did he make any reference to such a failure. It is notable the last allegation was July 2020 and the claimant continued to turn up to work until his absence on 26 September 2020, following which the discrimination complaints were of an entirely different nature, namely, managing the claimant under the respondent's Attendance Management Policy and Procedure coupled with the right reserved in the contract for it to refer the claimant to an occupational health provider to determine his fitness for work and work capability/workplace adjustments – clause 10 of the claimant's contract of employment.

15. It appears to me that the discrimination complaints alleged pre-26 September 2020 carried out by different individuals unconnected to absence management process followed post 26 September 2020 through to dismissal were unconnected and isolated acts from which time would begin to run from the date when each specific act was committed according to the dates provided by the claimant. The claimant's argument that the alleged discrimination caused his stress at work and mental health issues does not assist him in establishing that they were continuing acts.

16. With reference to the claimant's allegations relating to the management of his absence under the respondent's Attendance Management Policy starting with the 23 October 2020 monthly absence reviews conducted initially by Laura Blackburn followed by Olivia Hamnet when Laura Blackburn went on maternity leave, and then Lauren Edwards culminating in the 10 June 2021 capability report prepared by Lauren Edwards and the claimant's dismissal, the claimant has established a prima facie case that the complaints he raises against the various managers and the respondent's occupational health provider are so linked to possibly be a continuing act or constitute an ongoing state of affairs in direct contrast the pre- 26 September 2020 allegations which do not show a reasonably arguable basis for the contention: Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA.

Extending the Time Limit – "Just and Equitable" Test

17. The pre-26 September 2020 allegations are substantially out of time as acknowledged by the claimant and it remains for me to consider whether it is just and equitable to extend time from the date of the first individual allegation being April 2019 through to the last allegation in July 2020. In oral submissions the claimant argued the extension should be granted because the respondent was not prejudiced and it had the resource and ability to defend itself against claims brought in relation to allegations of discrimination that occurred right back to when the claimant started to work for the respondent. The respondent, he argued, has a system to record its business practice for compliance and its wrongdoing should not be ignored because time had passed. It is important, submitted the claimant, for the Tribunal to highlight to society that people should be treated equally, and it would benefit society if the time was extended. The claimant compared the position he was in to stopping slavery.

18. Despite the force of the claimant's arguments the law is clear on extensions of time, and in the claimant's case we are not talking about a few days, weeks or months but approximately 2 years 7 months from April 2019 to 8 November 2021 when proceedings were issued.

19. Whilst s.123(1)(b) EqA allows a Tribunal to consider a complaint out of time where it is just and equitable to do so, there is no presumption that the Tribunal should exercise its discretion to extend time. A Tribunal should not extend a time limit unless the Claimant can demonstrate that it is just and

equitable to do so as confirmed in the Employment Appeal Tribunal case of Robertson v Bexley Community Centre [2003] IRLR 434.

20. The exercise of discretion should be the exception rather than the rule. This approach was approved by the Court of Appeal in Department of Constitutional Affairs v Jones [2008] IRLR 128.

21. In British Coal Corporation v Keeble [1997] IRLR 336 the Employment Appeal Tribunal indicated that the Tribunal's discretion is as wide as that of civil courts under section 33 of the Limitation Act 1980. There is no legal obligation to go through the list (Southwark London Borough v Afolosi [2003] IRLR 220) and the Tribunal is entitled to consider anything that it deems to be relevant (Hutchinson v Westwood Television Ltd [1977] IRLR 69*).* I have worked through the relevant aspects of the list set out in Keeble as a framework to ensure none of the relevant matters were omitted and dealt with each parties submission made under each separate principle as follows.

The prejudice each party would suffer if the extension was refused.

22. The balance of prejudice does not lay in the claimant's favour and I was persuaded that the respondent would be prejudiced. The delay has prejudiced the respondent in respect of matters such as investigation and obtaining evidence relating to the more recent July 2020 allegation, for example, records relating to the two alleged racist behaviour of the respondent's clients when talking to the claimant on the phone in the call centre. The claimant raised an issue with the fact that no documentary evidence could be found and there was no record of the phone calls despite the passing of time and the number of calls taken and monitored by the respondent, and he was suspicious the respondent was not telling the truth. Had the delay been a matter of days or a maximum of a few weeks the claimant could have a point, but it was not and as a matter of logic there is no reason why the respondent would retain copies of notes or recordings of calls after a substantial amount of time had lapsed.

23. I accepted Mr Proffitt's submissions that the memories of witnesses will have deteriorated to a significant degree. The claimant's memory has deteriorated evidenced by the change of dates from 2018 to 2019 since the first preliminary hearing. There is no reason why the individual managers referenced by the claimant today for the first time, over 3 years after the date of the first allegation, would have any clear recollection of what had taken place during the relevant period, especially given the fact that there is no clear evidential basis on which to remind them. The claimant raised no grievance or written email/issue at the time save allegedly with regards to the alleged racist calls from customers in January 2020 when the notes the claimant states were generated by him, his manager and the record of the calls cannot be found. Had the claimant raised a grievance, undergone ACAS early conciliation and issued proceedings within the limitation period the problem with witnesses recollection and contemporaneous evidence may not have been as acute. I did not agree with the claimant's submission that "fresh memory" from the respondent's witnesses was "not a problem" because of the

financial recourses available to it including a system recording business practices, concluding on balance that given the extent of the passage of time memories would be adversely affected.

The length and reasons for delay

24. The claimant's evidence under oath was that he had been told at the time by other employees who had also been discriminated against that there was "clear discrimination" but he was "desperate to keep job" and only when dismissed had the confidence to do the research and issue a claim. In oral submissions the claimant stated he was humiliated and in the few months when he could have brought a claim was prevented from doing so because of a "culture of intimidation. I did not find the claimant credible in his explanation.

25. At the preliminary hearing sent to the parties on 10 May 2022 the contents of which has not been disputed by the claimant, it is recorded at paragraph 43 that the claimant "was aware of the need to bring his complaints within 3-months of the act complained of and he accepted that many matters were out of time; he said that he pursued them as 'context.' At this preliminary hearing the claimant maintains he was unaware of the 3-month time limit and he was not pursuing the complaints as context. I do not find his position credible. On his own account he was aware from speaking with colleagues that the alleged acts amounted to race discrimination and chose not to take action in fear of losing a job which he did not like. The claimant is a professional, a quantity surveyor with access to the internet and capable of conducting research into issuing employment tribunal proceedings. The claimant has not given a cogent and satisfactory reason for the length and reasons for the delay. It is important for the claimant when seeking an extension of time to provide a credible explanation for the delay and he has failed to do so.

26. I accepted Proffitt's submission that the cogency of the evidence would be affected by the substantial delay. The claim form was badly pleaded and it is only today the claimant has clarified the dates and people involved. I also take the view that if the extension of time was granted and as a result the trial taken out of the list this December and re-listed on 11 March to 19 March 2024 which is the next available date for a 7-day trial taking into account the historical claims and the breaks required by the claimant, the cogency of the evidence will be even further affected. I took the view that it was in the interests of justice for both parties that the case should remain in the list for the 3-day trial in December 2022, and case management orders have been made separately on this basis.

27. In the EAT decision Secretary of State for Justice v Mr Alan Johnson [2022] EAT 1 and the Court of Appeal decision in Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23 Underhill LJ at paragraphs 31 to 32 considered whether an employment tribunal in analysing a claim that had been submitted a matter of days outside the statutory time limit was entitled to take into account the fact that allowing an extension of time would result in consideration of matters that had happened a considerable time before the submission of the claim, because the claim included complaints that went

back over a considerable period of time. The historical claims went back to 2018 involving different people and in the words of Underhill LJ at para 31. "…the substance of the claim concerned events which had occurred long before the formal act complained of, and that the evidence of those events was likely to be less good than if a claim about them had been brought nearer the time…Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less undesirable in principle. **As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago** [my emphasis]. On the facts of this case the Judge clearly had in mind both the respects in which the events of late 2016 were historic…and she also had in mind the fact that the Appellant could have complained of them in their own right as soon as they occurred or in May... She does not, rightly, treat this factor as decisive: in fact, as I read it, she placed more weight on the absence of any good reason for the delay. But what matters is that she was entitled to take it into account."

<u>The promptness with which the Claimant had acted once he knew of the possibility of taking action, and the steps taken by the Claimant to obtain professional legal advice once he knew of the possibility of taking action.</u>

28. The claimant did not act promptly in relation to the historical claims.

29. The Tribunal has a wide discretion to consider whether it is just and equitable to extend time in discrimination cases. It can take a wide range of factors into account including the prejudice which each party would suffer as a result of the decision reached, and I recognise that the claimant will feel he has been prejudiced if unable to take the historic claims forward, and the respondent will feel prejudice if the case proceeds to trial in 2014 because of the further lapse in time and effect on the cogency of the evidence coupled with memory of witnesses, in addition to increased costs of a 7-day as opposed to a 3-day hearing and further delay to 2014. I do not accept the claimant's submission that extending time will benefit society on the basis that the respondent's alleged wrongdoing should not be ignored as a result of time passing, as in the case of slavery the Tribunal should look into the case to highlight the equal treatment of people. The statutory time limit exists for a reason, and the ultimate aim is to ensure both parties have a fair hearing taking into account the evidence available at the relevant time. Had the claimant been concerned about the Tribunal looking into the discriminatory treatment he could have issued proceedings within the statutory time limit and consciously chose not to do so.

30. Given the passage of time and the claimant's own poor recollection of the dates and details of his allegations, I am persuaded the respondent would be caused greater prejudice than the claimant due to the lengthy delay, fading

memories and the fact that there is nothing to prevent the claimant from referring to his historical allegations to give context to the remaining claims as referenced by the claimant at the preliminary hearing. The claimant still has his main claim of unfair dismissal and race discrimination which do not depend on the historic allegations and will attract the greater award if the claimant is successful. I agreed with Mr Proffitt that the historic claims if well-founded may not increase any injury to feelings and I am certain the claimant will not be awarded damages in the millions, contrary to his expectations today, bearing in mind he worked part-time in a job he did not like and was looking to leave and the circumstances of his dismissal on the grounds of capability after a lengthy absence with no foreseeable return as indicated below.

31. In conclusion, the Tribunal does not have the jurisdiction to consider the claimant's complaints of unlawful race discrimination alleged between April 2019 and July 2020 which was presented after the end of the relevant time limit and it was not just and equitable to extend the time limit to 8 November 2021.

Issue: Whether the claim(s)or any allegation made within them should be struck out as having no reasonable prospect of success.

32. Having struck out the historic claims for being out of time there is no requirement for me to consider striking them out as having no reasonable prospects of success. Had I not struck them out I would have gone on to find that there was no prospect of the claimant convincing the Employment Tribunal at the final hearing that time should be extended.

33. With reference to the remaining discrimination complaints and unfair dismissal claim post 26 September 2020 Mr Proffitt has invited me to strike out both complaints on the basis that the claimant's claim at its highest was he had been off work for 9-months without a foreseeable return within a further period of 12 to 18 months and the decision to dismiss was made by a manager from a different department who had nothing to do with the claimant's history and was independent. I was reminded that the Tribunal cannot step into the shoes of the employer and the claimant's dismissal, given his lengthy absence, would have fallen well within the bands of reasonable responses. In short, there is no prospect of the claimant succeeding in his unfair dismissal complaint. Mr Proffitt's submissions were persuasive.

34. The claimant submitted that there was a "culture of intimidation" and he was "coerced" to come back into work, attend the hearing which resulted in his dismissal and the panel did not include a person "who looks and sounds like myself." The claimant alleges the managers who conducted the absence meetings had "an agenda from day 1" and did not support him. He was "coerced" and made to feel guilty to return to work when he was not ready.

Law and conclusion: strike out

35. The Tribunal's power to strike out the Claim is set out in Employment Tribunals Rules of Procedure 2013 Rule 37(1) that "*(a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious*".

36. Paragraph 12 of the Presidential Guidance – General Case Management provided "In exercising these powers the Tribunal follows the overriding objective in seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute."

Rule 37(1)(a) – scandalous, vexatious or has no reasonable prospects of success

37. Taking into account the well-known case of Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in Ezsias, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ).

38. Mr Proffitt referred to the judgment of Lord Justice Mummery in Madarassy v Nomura International plc 2007 ICR 867, CA, where he stated: 'The bare facts of a difference in status and a difference in treatment 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.'

39. S.13(1) EqA provides that direct discrimination occurs where "a person (A) discriminates against another (B) if, because of a protected characteristic [race] A treats B less favourably than A treats or would treat others. An actual or hypothetical comparator is required who does not share the claimant's protected characteristic and is in not materially different circumstances from him. Para 3.23 of the EHRC Employment Code makes it clear that the circumstances of the claimant and comparator need not be identical in every way, what matter is that the circumstances "which are relevant to the [claimant's treatment] are the same or nearly the same for the [claimant] and the comparator."

40. Section 13 EQA requires not just consideration of the comparison (the less favourable treatment) but the reason for that treatment and whether it was because of the relevant proscribed ground. be These two questions can be considered separately and in stages; or they can intertwined: the less favourable treatment issue cannot be resolved without deciding the reason why issue. As was observed by Lord Nicholls in Shamoon v Chief Constable Royal Ulster Constabulary [2003] UKHL 11 at paragraph 11: "…tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? … If the former, there will … usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable then was or would have been afforded to others."

41. The burden of proof is set out in Section 136 of the EqA which provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

42. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case race], failing which the claim succeeds.

43. Mr Proffitt submitted the claimant has no prospect of shifting the burden of proof, and to do so there needs to be a difference of treatment and something more. The claimant has made bare allegations that everyone was racially motivated, even when an independent manager took a decision on the basis of what the claimant told her at the stage 4 hearing, which I have dealt with above.

44. It is notable the claimant was given a copy of the notes taken at the Stage 4 hearing that referred to his continuing absence for a further 12 to 18 months with no foreseeable return to work. In the dismissal letter dated 29 June 2021 reference was made to the claimant being absent "since 26 September 2020 and currently have no expected return to work date". The claimant, who was informed in the letter that he had the right to appeal, did not appeal and did not raise an issue the reference to him i.e. saying he would be returning within 12 to 18 months calculated from the 26 September 2020, which was his position at this hearing. The claimant had not cited any actual comparator in contrast to his earlier historic claims when two named comparators were relied upon, and I take the view the claimant is going to have great difficulty in persuading the Tribunal at final hearing that he was treated differently to a hypothetical comparator who does not share the claimant's protected characteristic and is in not materially different circumstances from him, in other words, an employee absent from work for the same time as the claimant with no foreseeable return date in 12 to 18 months, or on the claimant's account which is contradicted by the contemporaneous evidence, a total of 12 to 18 months leaving 3 to 8 months before a possible return. The claimant is going to be in considerable difficulties proving primary facts from which inferences of unlawful discrimination can be drawn before the burden shifts to the respondent to provide an explanation untainted by race.

45. The claimant has come very close to his claims being struck out the basis that the direct race discrimination and unfair dismissal have no reasonable prospects of success.

46. In Mbuisa v Cygnet Healthcare *Ltd EAT 0119/18* the EAT noted that strike-out is a draconian step that should be taken only in exceptional cases.

47. I am mindful of the fact that a Tribunal should be slow to strike out a claim of race discrimination where in the word of Maurice Kay LJ in Ezsias, there is 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence.' There is an issue concerning the input of Laura Blackburn and Lauren Edwards who conducted the health reviews and Lauren Edwards produced the Attendance Report (Capability) and Appendices that were relied upon at the Stage 4 hearing following which the claimant was dismissed on the grounds of capability. The actions of the managers, including the dismissing officer, are relied upon by the claimant as acts of direct race discrimination and he has made a number of serious allegations concerning the way he was treated leading to dismissal by reason of capability. It is possible that there may be a link between the alleged behaviour of managers and the final decision to dismiss despite the fact the dismissing officer was on the face of it independent and the claimant's indication that he could not return to work in the foreseeable future after a lengthy 9-month absence. A full panel needs to hear this evidence, despite my view that the claimant's claims are weak. For this reason I am not minded striking out the claimant's claims of post 26 September 2020 direct race discrimination and unfair dismissal despite serious reservations about his claim. The evidence needs to be tested and evaluated before a full panel.

48. I am further persuaded in my decision not to strike out by the House of Lords decision in the well-known case Anyanwu v South Bank Student's Union [2001] IRLR 305 which dealt with striking out discrimination claims, Lord Steyn referred to discrimination cases as being "generally fact-sensitive, and their proper determination is always vital on our pluralistic society. In this field, perhaps more than any other, the bias is in favour of a claim being examined on the merits or demerits of its particular facts are a matter of high public interest". I agree with the claimant's submission that it is in the interests of society (and justice) for his discrimination complaints to be heard and for me not to use my discretion to strike out.

Issue: in the alternative, whether a deposit of up to £1,000 per claim or allegation should be ordered to be paid by the claimant, if the claim(s)or any allegation have only little reasonable prospect of success.

49. The respondent is seeking a deposit of £1000 for the race discrimination complaints and a further £1000 for the unfair dismissal on the basis that the claimant has little prospects of being able to make out any part of the legal tests. I agree for the reasons set out above culminating in my view that the claimant's case is very weak in respect of the post 26 September 2020 claims of direct race discrimination and unfair dismissal.

50. Rule 39(1) of the Tribunal Rules 2013 provides that where at a preliminary hearing a 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'.

51. A deposit of up to £1,000 can be ordered in respect of 'any specific allegation or argument' and id would have been open to me to order more than two deposits given the allegations raised by the claimant in connection with individual managers and the manner in which the sickness absence procedure was conducted. I have not done so as to increase the amount of the deposit from £1000 for unfair dismissal and £1000 for direct race discrimination may be a barrier to justice when standing back and looking at the question of proportionality. A figure of £2000 is just and equitable in this particular case, and I have used my discretion to order this amount.

52. In deciding the figure of £2000 I have taken the claimant's means into account and the less than credible evidence given under oath. When considering whether to make a deposit order a tribunal is required under rule 39(2) to make reasonable inquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit. The claimant provided oral information unsupported by any documentary evidence.

53. I did not accept the claimant's evidence on his means credible. On the claimant's account:

53.1 He worked as a customer advisor part-time because he needed the money and was looking for another job. At the same time he had obtained work as a quantity surveyor with another company. The claimant had two jobs. After the claimant's dismissal by the respondent on the 29 June 2020 two weeks later he resigned from his employment as a quantity surveyor. The claimant had been absent from both jobs on sick leave beforehand.

53.2 The claimant has not been employed since and has not been earning any money and has not income. He has not been in receipt of benefits. His partner, who worked before his dismissal and resignation, continues to work.

53.3 The claimant "tried to be self employed from December 2021" working as a man and van and manual labour. He earned no money because he was trying to raise funds from family and friends to purchase the van and since December 2021 has raised £5000 (£500 per month) towards the purchase of a van paid by family and friends. I took the view the claimant has savings of £5000 out of which a deposit could be paid, albeit moneys earmarked for him to start a business.

53.4 The claimant's bank account will show he has no funds and he cannot pay any deposit.

54. On cross-examination it came to light that the claimant was the sole director of Emergence Property Limited appointed on the 24 May 2019 that had been trading for the last 2-years. The claimant is also a sole director of Emergence Property Services Limited appointed on the 20 February 2020 whose nature of business was "Buying and Selling of own real estate and other letting and operating of own or leased real estate." The claimant maintained that the five properties owned by Emergence Property Limited were investments involving friends and family resident oversees and his role was to manage the business on their behalf for which he received £50 per month described as a stipend. The claimant's responsibility included making sure "all income was fed back to the rightful owner" and he confirmed he had no access to the property portfolio which was growing.

55. The claimant failed to mention any of this information when I asked him about his means and work, and he was silent about the £50 per month having confirmed he was in receipt of a £500 loan per month from family and friends which he was required to pay back. I do not accept the claimant cannot pay a deposit of £2000 whatever his bank account shows, and find that he intentionally failed to disclose to me his property dealings which goes to the heart of his credibility. The claimant, who has no earnings save for £50 per month according to his oral evidence, is in a position to obtain money from family and friends and has money saved towards a van. I am satisfied the claimant can afford to pay £2000 as a condition of continuing with his claims.

56. A Deposit Order has been made, which can be found in a separate document sent to the parties. If, following the making of a deposit order, the tribunal decides the specific allegation or argument against the paying party for substantially the same reasons given in the order, the paying party will be treated as having acted unreasonably in pursuing that allegation or argument for the purpose of making a costs or preparation time order under rule 76, unless the contrary is shown — rule 39(5)(a). The deposit sum will be paid to the other party — rule 39(5)(b). In order words, unless the paying party successfully shows that it did not act unreasonably in pursuing the specific allegation or argument, a costs or preparation time order can be made against it. If the paying party successfully shows that it did not act unreasonably, the deposit will be refunded.

57. If the claimant fails to pay by the date specified, the direct race discrimination claim and unfair dismissal claim will both be struck out under rule 39(4) of the Employment Tribunal Rules. A tribunal has no discretion on the matter: the strike-out occurs automatically on the failure to pay. The date I have inserted takes into account any reconsideration application from the claimant as to the amount ordered.

58. The possibility of a reconsideration was discussed at the preliminary hearing, and if the claimant is minded to make such an application, this should be accompanied by the following documents taking into account the manner in which the claimant gave his evidence today:

    58.1 A statement from the claimant setting out all of his income, savings and cash payments received from either family or friends and his wife's income before the claimant went off ill and after his dismissal and resignation, accompanied by a statement of truth.

    58.2 Bank and building society statements for the last 3-months together with statements from any joint account including oversees accounts.

    58.3 Certified accounts of Emergence Property Limited and Emergence Property Services Limited and documents relating to payments received by him claimant including the payment of £50 per month and £500 per month. The claimant's witness statement will include his dealings with both companies, the monies he has received and the income generated by those companies by way of rent etc. In short, the claimant will ensure that full disclosure is made of all relevant financial matters in order that a fair assessment can take place of his ability to pay a deposit.

    58.4 With reference to any rental payments received by the claimant and/or the companies he will provide a breakdown confirming whether they are by cash and/or direct debit from the date of his dismissal through to today's hearing. I am satisfied that this information is available given the claimant's evidence under cross-examination (and not in response to any

questions asked by me) that he has sole control over both companies and the business carried out.

_____
Employment Judge Shotter
DATE: 1 July 2022

RESERVED JUDGMENT AND REASONS

SENT TO THE PARTIES ON

DATE: 6 July 2022

…….
FOR THE SECRETARY OF THE TRIBUNALS