EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105318/2020

Held via Cloud Video Platform (CVP) on 23 June 2022

Employment Judge Murphy

Const D Cook	**Claimant** **Represented by** **Mr D Jaap -** **Solicitor**
Chief Constable of The Police Service of Scotland	**Respondent** **Represented by** **Mr K Tudhope -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

(i) the respondent's application to strike out all extant claims is refused; and

(ii) the respondent's application for a deposit order is refused.

REASONS

Introduction

1. The claimant lodged an ET1 on 30 September 2020. It asserted that he was and is a disabled person and explicitly identified a claim for a failure to make reasonable adjustments ("RAs") which related to the equipment supplied to him to carry out his role. Averments were also included about the alteration of a job application form but the legal basis for any claim asserted with reference to those averments was not articulated. There have been three

previous preliminary hearings on case management and associated Case Management Orders. Two draft amendments to the claim were lodged by the claimant's representative on or about 8 December 2021 and 8 February 2022 (respectively, the "December Iteration" and the "February Iteration"). In the latter Iteration, a complaint of direct discrimination was asserted in relation to the job application form alteration.

2. On 1 April 2022, the respondent's representative set out grounds for a strike out application in relation to all extant claims on the basis that they have no reasonable prospect of success (pursuant to Rule 37(1)(a)) and, in the case of the claim for a failure to make reasonable adjustments on the additional basis that the claimant had not complied with an Order of the Tribunal (pursuant to Rule 37(1)(c)). Alternatively, the respondent sought a deposit order or orders.

3. The claimant's representative lodged a response resisting the applications on 22 April 2022. He also lodged a further draft amendment to the claim on that date (the "April Iteration").

4. A hearing was ordered by EJ O'Donnell at a preliminary hearing on case management on 29 April 2022 to consider the respondent's strike out / deposit order application and the claimant's applications to amend the ET1. The open preliminary hearing proceeded on 23 June 2022.

5. The original strike out / deposit order applications were prepared before the April Iteration had been prepared and before an application to amend in its terms had been considered or determined by the Tribunal. Mr Tudhope confirmed that the respondent maintains its applications with respect to this most recent iteration. Indeed, he advised during the preliminaries that he would be basing his oral submissions in support of strike out and a deposit order on the text of the April Iteration as opposed to the original claim form or any other iteration. He confirmed he would not oppose amendment in terms of the April Iteration but would seek strike out of the claim as formulated in that version.

6. As discussed with parties during the preliminaries, it is not open to the Tribunal to strike out a draft amended claim in circumstances where the Tribunal has not yet granted leave to amend in the terms contended for. The April Iteration goes beyond further and better particulars of the original claim and leave to amend is necessary for the introduction of at least some of its content. That such leave is required was not disputed by either party. In these circumstances, I considered it expedient to determine the applications with which the preliminary hearing was concerned in the following order:

   (FIRST) The claimant's (unopposed) application for leave to amend to substitute the April Iteration for his original ET1 paper apart;

   (SECOND) The respondent's applications to strike out the RAs claim as articulated in the April Iteration or to issue a deposit order in respect of that claim;

   (THIRD) The respondent's applications to strike out the direct discrimination claim as articulated in the April Iteration or to issue a deposit order in respect of that claim; and

   (FOURTH) The claimant's (opposed) application for leave to amend by adding to the April Iteration any additional averments contained in the February Iteration.

7. A separate Case Management Order ("CMO") has been issued of even date determining the amendment applications. For present purposes, it is necessary to record that leave to amend in terms of the April Iteration was granted, subject to certain adjustments as set out in the CMO. My consideration of the respondent's strike out and deposit order applications in this judgment is, therefore, with reference to the adjusted text of the April Iteration which has been permitted (the April Amendment).

Relevant Law

8. Under Rule 37(1)(a) of the 2013 Rules, a Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success. In determining such applications, the claimant's case must ordinarily be taken at

its highest and, if the question of whether it has reasonable prospect of success turns on disputed factual issues, it is unlikely that strike out will be appropriate (**Cox v Adecco** UKEAT/0339/19).

9. The guiding consideration when considering strike out for non-compliance with an Order is the overriding objective (**Weir Valves and Controls (UK) Ltd v Armitage** [2004] ICR 371). Striking out will not always be the result of disobedience to an order.

10. In either type of strike out application, a two-stage process is required. First, the Tribunal must determine whether one of the specified grounds for striking out has been established. If so, the Tribunal then must go on to decide as a matter of discretion whether to strike out the claim, order it to be amended, or order a deposit to be paid (**HM Prison Service v Dolby** [2003] IRLR 694).

11. Under Rule 39 of the 2013 Rules, where a Tribunal considers at a preliminary hearing that a specific allegation or argument has little reasonable prospect of success, it may make an order requiring the payment of a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

12. The test in Rule 39(1) of the 2013 Rules may allow a Tribunal greater leeway than would be permissible under the test for strike out applications for an order to be made where the facts are in dispute (**van Rensburg v Royal Borough of Kingston-Upon-Thames & Ors** UKEAT/0095/07). A "mini-trial" of the facts is to be avoided. When it comes to discrimination claims, however, particular caution is needed in cases where there are disputed facts. It has been doubted by the EAT that an employment judge at a preliminary hearing, without hearing oral evidence or coming to any determination in what may be disputed facts should have a different approach depending on whether she is considering striking out or making an order for a deposit (**Sharma v New College Nottingham** UKEAT/0287/11A). Either striking out or ordering a deposit, the EAT noted, "is on any view, serious and potentially fatal" (para 21),

13. The EAT suggested the same approach should be taken when considering applications under Rule 37 and 39. It based its conclusion on an analysis of the decisions of the House of Lords in **Anyanwu v Southbank Students Union** [2001] UKHL 14 on race discrimination and of the Court of Appeal in **Eszias v North Glamorgan NHS Trust** [2007] EWCA Civ 330 on protected disclosures. With regard to discrimination, the EAT in **Sharma** quoted Lord Hope's statement in **Anyanu**: "*Questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answer to these questions is deferred until all the facts are out. A Tribunal can then base its decision on its findings of facts, rather than on assumptions, as to what the Claimant might be able to establish if given the opportunity to lead evidence*."

14. There is a duty in certain circumstances on an employer to make reasonable adjustments in relation to a disabled employee. Mr Jaap clarified that he relies upon section 20(3) of the Equality Act 2010 ("EA") and not, as previously indicated, section 20(5) of that Act which is concerned with auxiliary aids. The relevant provisions are as follows:

> ***'20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonably practicable to have to take to avoid the disadvantage.*
>
> *….*

> ***21 Failure to comply with duty***
>
> *(1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person*

15. The provisions of the EA dealing with burden of proof are also relevant (both to the RAs claim and the direct discrimination claim). They are in the following terms:

> *'**136 Burden of proof***
>
> *(1) This section applies to any proceedings relating to a 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 provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*
>
> *…*
>
> *(6) A reference to the court includes a reference to*
>
> *(a) an employment tribunal*

16. The claimant need not identify the particular adjustment at the time the adjustment falls to be made (See EHRC Code para 6.24). At that stage the onus to comply with the requirements of the EA is on the employer.

17. However, the EAT has confirmed that, by the time of the Tribunal hearing, there should be some indication of what adjustments the claimant alleges should have been made (**Project Management Institute v Latif** [2007] IRLR 579). What is necessary is that the respondent understands the broad nature

of the adjustment proposed and is given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not (para 55).

18. In **Noor v Foreign and Commonwealth Office** [2011] ICR 695, **Latif** was approved, but the limits on how far the claimant must identify reasonable adjustments in the pleadings was explored. That case concerned a claim for RAs under the equivalent provisions of the Disability Discrimination Act 1995. The claim had been struck out by the Tribunal below. The EAT held that the employment judge fell into error in striking it out by focusing only on the adjustment put forward by the claimant (in this case a re-interview for a dyslexic candidate) when they ought to have considered whether *any* adjustment could have been made at or prior to the interview to prevent the disadvantage (my emphasis). The EAT identified other potential adjustments "which plainly ought to have been considered" which were not identified by the claimant (paras 24-31).

19. The claimant also brings a complaint of direct disability discrimination which is likewise the subject of an application for strike out. The relevant provisions of the EA relating to that complaint are as follows:

> ***'13 Direct Discrimination***
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *…*
>
> ***23 Comparison by reference to circumstances***
>
> *(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.*
>
> *(2) The circumstances relating to a case include a person's abilities if –*

(a) on a comparison for the purposes of section 13, the protected characteristic is disability ;

20. The effect of section 136 is that, if the claimant makes out a *prima facie* case of direct discrimination, it will be for the respondent to show a non-discriminatory explanation.

21. There are two stages: Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination. This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to provide those facts. The respondent's explanation, however, is to be left out of account in applying Stage 1.

22. Merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden in accordance with Stage 2. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could properly conclude that, on the balance of probabilities, the respondent had committed un unlawful act of discrimination. 'Something more' is, therefore, required (**Madarassy**).

23. If the claimant shows facts from which the Tribunal could decide a discriminatory act has occurred, then, under Stage 2, the respondent must prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of the protected characteristic (**Igen v Wong** [2005] IRLR 258). It is possible for an employer to unconsciously discriminate against a claimant. This has long been acknowledged in the caselaw. In **Nagarajan v London Regional Transport** [1999] IRLR 572, the House of Lords observed in the context of a race discrimination case that '*All humans have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make up. Moreover, we do not always recognise our own prejudices. Many people are unable or unwilling to admit to themselves that actions of*

theirs may be racially motivated… After careful investigation … an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did…".

Caselaw cited

24. The following caselaw was cited by the parties' representatives in their submissions on the strike out / deposit order applications. There was no material dispute between Mr Tudhope and Mr Jaap regarding the caselaw Mr Tudhope cited or its interpretation. In particular, Mr Jaap did not dispute Mr Tudhope's contention that consultation with or assessment of a disabled employee could not in and of itself be a reasonable adjustment. Mr Jaap agreed with Mr Tudhope that **Mid-Staffordshire General Hospitals NHS Trust** could no longer safely be relied upon and was not good law in light of the subsequent approach of the EAT in **Tarbuck,** later endorsed in **Latif**.

25. Mr Tudhope referred to the following cases:

- **Cox v Adecco Group** [2021] ICR 1307, EAT
- **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1, CA
- **Ahir v British Airways Plc** 2017, WL 02978862 (2017), CA
- **Hemdan v Ishmail** [2017] IRLR 228, EAT
- **Gould v St John's Downshire Hill** [2020] IRLR 863, EAT
- **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664, EAT
- **Project Management Institute v Latif** [2007] IRLR 579, EAT
- **Mid-Staffordshire General Hospitals NHS Trust v Cambridge** [2003] IRLR 566, EAT

26. Mr Jaap cited the following case:

- **C Mallon v AECOM Limited** UKEAT/0175/20/LA(V)

Claim of failure to make reasonable adjustments pursuant to s.20(3) EA 2010

27. The April Amendment, so far as material to the complaint of failure to make RAs, is in the following terms:

> *"The Claimant is a Police Constable and Office Holder with the Respondents. He is an authorized firearms officer based at Annan Police Office Dumfries and Galloway.*
>
> *The Claimant was required to wear a utility belt and bullet proof front and back armour whilst on duty to carry out his role as an authorized firearms officer. The utility belt had various items on it which pressed upon the Claimant's stoma bag. This Provision, Criteria (sic) or Practice caused him to have discomfort or burning to his skin. His stoma bag was pressed upon and leaked during shifts. The issues with this caused the Claimant to sign himself off sick as it was effecting (sic) his health. He went off sick on or about 21st September 2020 (this was his first day of absence in 2020), as part of his sickness absence he attended a hospital appointment on 28 September 2020. The Respondent's duty to reasonably adjust the Claimant's provision criteria (sic) or practice to have him wear a utility belt caused leakages causing him to sign off sick because of this on 21st September 2020. The duty continued from that date until on or about ~~25th~~ 28th October 2021 when the claimant was finally 'back in card' for his role as an Authorised Firearms officer following issue of new armour which allowed carriage of items which were previously on the utility belt on the armour plate. The cause of the pressure and leakage on the belt was therefore relieved. Throughout the period 21st September 2020 until 28th October 2021 (the date new armour was received by him), the Claimant remained at a substantial disadvantage and the respondent's (sic) were under a continuing duty to reasonably adjust the PCP. They did not do so despite repeated requests from the claimant to alter his body armour.*
>
> *…*

Claim arising from Reasonable Adjustment

The claimant has raised the issue of his equipment consistently over his service and more particularly since November 2016 and on 21st September 2020 he did so again following signing off sick. He sought an impact assessment on his condition. The Respondent's Optima Health Occupational Health advisors recommended that an impact assessment be carried out when he was assessed by them in November 2020. The date when the Respondent's duty ***~~to consider reasonable adjustment~~*** *in terms of Section 20(3) of the Equality Act 2010 began for the purposes of this claim is 21st September 2020. That duty has continued from then until* ***~~31st~~ 28th*** *October 2021 when the Claimant has been provided with replacement armour which fulfils that duty."*

28. Leave to amend was granted subject to certain adjustments to the April Iteration. These are indicated in bold font with any deleted text shown in strike-through.

Submissions

29. Mr Tudhope argues, among other matters, that the claimant has failed to comply with a CMO issued by EJ Hoey on 25 January 2022, following a PH the previous day. The relevant part of the order is in the following terms:

Proper and full specification of the claim

By no later than ***8 February 2022*** *the claimant must send to the respondent and the Tribunal a replacement paper apart to the ET1 which sets out the full and proper basis for the 2 claims being advanced (a claim for breach of sections 20 … of the Equality Act 2010), to include:*

a. *Clear specification as to the PCP being relied upon in respect of the section 20 claim, and when the duty was engaged (being a particular point in time and if continuing on other dates, reference*

to such other dates and why the claim is a continuing one) and the step that should have been taken to remove the disadvantage.

30. Mr Tudhope complained that from the pleadings, it is not known what steps the respondent was obliged to carry out and when. The only specific averment which appeared to identify the RA, said Mr Tudhope, was the sentence: *"He sought an impact assessment on his condition."* This, in the respondent's submission, was not a relevant adjustment. He referred also to the sentence, "*The date when the Respondent's duty to* ***consider*** *making reasonable adjustment … began .. is 21st September 2021*" (emphasis added). Mr Tudhope likewise challenged the relevance of this averment, which appeared in the unadjusted April iteration, on the basis that there is no duty to 'consider making reasonable adjustments' but only to make reasonable adjustments where the legislation is engaged. He cited **Tarbuck**. A failure to consult about adjustments was not a breach of the EA.

31. Mr Tudhope observed that no other 'reasonable' step was articulated in the pleaded case to answer the call in EJ Hoey's order. The claimant was, he argued, required to specify the step and when it should have been taken. In the respondent's submission, he had not done so. Even if the Order was technically satisfied, Mr Tudhope said the case should be struck out on the grounds it has no reasonable prospects of success. The adjustment contended for was irrelevant and based on bad law. Alternatively, he said, the less stringent condition necessary for a deposit order was met, the claim having little reasonable prospect of success.

32. Mr Tudhope had concerns not only about the nature of the adjustment postulated but also the specification of when it was required. He argued the claimant has,, in the April Iteration (as in previous iterations) failed to set out when the duty was engaged as required by EJ Hoey's Order. In his understanding, the duty is said by the claimant to have begun on 21 September 2020 and to have continued until a date in late October 2021. (During the hearing, Mr Jaap clarified the correct date of the three mentioned in October 2021 when he says the failure ended - because the duty was fulfilled - is 28th October 2021). Mr Tudhope criticised the omission to specify

more precisely when the adjustments ought to have been made. He was skeptical that a requirement for a particular reasonable adjustment could have crystallized across such an extended period. He maintained there was a failure to comply with the Order by omitting to specify more precisely both the asserted adjustment and the date of crystallization of the duty to make it.

33. Mr Jaap confirmed he was in agreement with Mr Tudhope's synopsis of the law relating to strike out applications and reasonable adjustments. His view was that the claimant's case was simple and clear. He said he had set out the dates when the duty engaged, namely the period from 21 September 2020 until 28 October 2021. He said he had set out the PCP. He considered it was possible to identify the RAs asserted from the claim as pleaded in the April Iteration. It was, he said, recorded in the pleadings that the issue of the new armour allowed the carriage of items which had previously been on the utility belt. The RA, he said was the removal of the utility belt or the issue of the new armour which allowed the items to be removed from the utility belt.

34. Mr Jaap went on to clarify with reference to the second page of the April Iteration, that the claimant does not argue the respondent was under a standalone duty to "consider" reasonable adjustments or to carry out an assessment as an adjustment in itself. The point of the inclusion of these averments, said Mr Jaap, was that they went to the ease with which the adjustments contended for could have been carried out. He confirmed he did not disagree that **Tarbuck** was good law, but that the averments about assessments were to signal the opportunities for assessments to be carried out which would have informed the respondent from 20 September 2020.

Discussion and decision – RAS claim

(i) Little or no reasonable prospects? (Rule 37 (1) (a) and Rule 39)

35. In light of the clarifications provided by Mr Jaap during the hearing, permission to amend was granted subject to the edits indicated in paragraph **27** above. It is fair to reiterate that Mr Tudhope made his submissions before the claimant's application to amend to introduce the April Iteration had been

determined. He did not, when making his submissions, have the benefit of sight of the slightly adjusted April Amendment which was ultimately permitted.

36. I agree with Mr Tudhope's submission that a case based on an alleged failure to consult or to consider adjustments would not be a relevant one. I also accept that the pleadings as set out in the April Iteration had the scope to cause confusion with respect to whether such an adjustment was contended for, and more generally with respect to the nature of the RAs asserted by the claimant. These matters were clarified by Mr Jaap in his oral submissions.

37. I considered it inexpedient to permit amendment in those terms only thereafter to strike out parts of the permitted amendment under Rule 37 because of a lack of relevancy. In granting leave to amend, I excluded from the proposed text of the amendment the controversial averment which may imply an asserted duty to 'consider' making reasonable adjustments. I cannot strike out that which has not been allowed in.

38. Even with the adjustments in the April Amendment, it might be said that the claimant's pleadings could be more explicit in the articulation of the step or steps he says the respondent should have taken. These were clarified during the hearing, and it is indeed unfortunate that they were not more explicitly identified in response to the call in EJ Hoey's CMO. I return to the issue of CMO compliance below.

39. However, for the purposes of determining whether the RAs claim has no or little reasonable prospects, I require to take the claimant's case at its highest. I should not interpret the pleadings in an overly technical or ungenerous manner. The April Amendment makes it tolerably clear that the claimant accepts that the eventual provision of replacement armour by the respondent in October 2021 fulfilled its duty. It is capable of being inferred from those averments that the provision of replacement armour allowing carriage of items previously carried on the utility belt is an RA which the claimant accepts discharged the respondent's duty. It might therefore be inferred that the claimant's case is that it would have been reasonable for the respondent to take this step earlier than it did.

40. The pleadings identify the PCP as the requirement to wear the utility belt and front and back armour. There are references in the April Iteration to a duty to "adjust" the PCP on a couple of occasions. It is right, of course, that the obligation on a respondent in section 20(3) is not a requirement to adjust the PCP but to take such steps as are reasonable to avoid the disadvantage at which it puts the claimant. There is, however, nothing to prevent a claimant from contending that the alteration of the PCP itself is a reasonable adjustment which a respondent should have been made. At the hearing, Mr Jaap clarified that the removal of the utility belt was a step the claimant asserts it would have been reasonable for the respondent to take. Reading the claim form generously, the reference to a duty to adjust the requirement to wear a utility belt might at a stretch be construed as offering notice of the broad suggestion that changing or removing the requirement to wear the utility belt is an RA step for which the claimant contends.

41. In any event, whether or not such the adjustments now posited can properly be discerned from the April iteration, following **Noor**, the question for me is whether the claimant has an arguable case that the respondent ought to have made any reasonable adjustment to prevent the disadvantage. I ought not to focus unduly narrowly or exclusively upon that which is explicitly articulated in the claim form. I am satisfied the claimant has an arguable case that the respondent ought to have taken the step of removing the requirement to wear the belt or the step of providing alternative equipment to comply with its obligations regarding RAs under section 20(3), whether or not those adjustments are capable of being inferred from the pleadings.

42. With regard to the specification of the dates when adjustments fell to be made, I am not persuaded that it is incumbent on the claimant to specify more precisely when particular adjustments ought to have been identified and implemented. As soon as a PCP puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a potential duty on an employer to take steps to avoid the disadvantage if there are steps that it is reasonable for the employer to have to take. When bringing proceedings, or at least before the final

hearing, the claimant requires to give notice in broad terms of the nature of the adjustment proposed (**Latif**). However, at what point any particular step may or may not have been reasonable for a particular employer to take is likely to be a matter within the respondent's knowledge. The factors with which a respondent requires to grapple in deciding an adjustment is a reasonable step to have to take may or may not be known to a claimant.

43. The April Amendment adequately identifies the alleged disadvantage and the period during which the claimant offers to prove that disadvantage persisted as a result of the application of the PCP. There was no obligation on the claimant at the time the disadvantage applied to identify the steps the respondent should take. Two asserted adjustments have been elucidated during the PH which the claimant says would have removed or alleviated the disadvantage. In **Noor,** the EAT concluded the Tribunal fell into error in striking out a claim for RAs without considering adjustments the claimant had not pleaded. It would not be in keeping with the EAT's approach there to strike out a claim for RAs on the basis that the claimant has failed to plead particular dates for different adjustments asserted. The alleged period of disadvantage wrought by the PCP has been sufficiently identified.

44. The key elements of the RAs claim have now been clarified. It is now confirmed that the claimant does not advance a case that there was a duty to assess or consider adjustments. The success or otherwise of the complaint will be fact sensitive, particularly with regard to the question of whether it was reasonable for the respondent to have to take the suggested steps and when. Evidence will require to be heard to determine these issues. I refuse the application to strike out this complaint under Rule 37(1)(a) and for a deposit order under Rule 39. I am not persuaded that, without hearing such evidence, it is possible to assess that the claim for RAs as having either little or no prospects of success.

45. At the heart of the respondent's challenge to this claim has been Mr Tudhope's criticism of the articulation of the RAs in the claimant's pleadings. His points about a possible case based on a 'duty to consider' are well made but have been addressed by the claimant's clarifications at the PH and by the

restrictions on the amendment permitted. I have sympathy with the criticisms regarding the ease with which the two adjustments Mr Jaap verbalised during the hearing may be inferred from the written pleadings. Nevertheless, it would be erroneous to focus too narrowly on the claimant's formulation of the adjustments in the pleadings.

(ii) Non-compliance with EJ Hoey's CMO (Rule 37(1)(c))

46. Mr Tudhope alternatively seeks strike out of the RAs claim on the basis of non-compliance with EJ Hoey's Order under R37(1)(c). That Order called for '*Clear specification as to the PCP being relied upon in respect of the section 20 claim, and when the duty was engaged (being a particular point in time and if continuing on other dates, reference to such other dates and why the claim is a continuing one) and the step that should have been taken to remove the disadvantage.'*

47. The April Iteration could certainly have been more explicit in the articulation of the step or steps he says the respondent should have taken to remove the disadvantage. I agree that, in that respect, the claimant's response to the Order fell short of the 'clear specification' he was called upon to provide. It is arguably possible to discern the steps by inference from the pleadings, but the specification is less than 'clear'.

48. Having identified a default in compliance, I turn to the question of whether, as a matter of discretion, the RAs claim should be struck out on that ground. The guiding consideration in determining whether a strike out application should be granted for non-compliance with an order is the overriding objective. I require to consider all the circumstances, including the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption or prejudice has been caused and still whether a fair hearing is possible (**Armitage**). Ambiguity and a lack of clarity in pleadings and responses to Orders are to be deprecated, particularly where parties benefit from professional representation.

49. I am not satisfied, however, that there is a real, substantial or serious risk, as a result of the default in this case, that a fair final hearing is no longer possible.

Certain clarifications were made by Mr Jaap during the PH which address the default. These have now been recorded. The posited adjustments have been explicitly articulated. The amendment which has been permitted has been limited to exclude the most contentious aspect of the April Iteration which appeared to suggest a 'duty to consider'.

50. Without minimizing the default, it is fair to observe that the Order itself and the claimant's response must be considered in the context of the principles in **Latif** and **Noor**. What is required is only that the respondent understands the broad nature of the adjustment proposed and is given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved. If that was not intelligible from the April Iteration, it has since been clarified by Mr Jaap.

51. Nevertheless, I accept the default, which appears to lie at the door not of the claimant but his representative, has caused disruption and delay in the case. If the clarifications now given had appeared in the original response to EJ Hoey's Order, or indeed in the April iteration, it may be that no application for strike out would have been advanced.

52. However, the prejudice to the claimant in striking out the RAs claim because of the default in compliance is of the most severe kind; he would be deprived entirely of the opportunity to litigate that claim. The prejudice to the respondent in refusing the strike out is less severe. It will continue to have to defend the claim, but, following the latest preliminary hearing, has fair notice of the asserted adjustments. It would be given the opportunity to answer the clarified claim and would have sufficient time to prepare for a final hearing on the basis of the clarified claim. Taking into account all of the relevant circumstances, I have resolved to exercise my discretion not to strike out the claim on the grounds of the non-compliance. To do so, in my view would, in my view, be disproportionate.

Claim of direct discrimination pursuant to s.13 EA.

53. The April Amendment, so far as material to the complaint of direct disability discrimination, is in the following terms:

'On the 12th May 2020 the claimant applied to join Cyber Crime. He declared himself disabled by ticking the appropriate box. That was returned to him on 13th May 2020 although he was on his days off on 13th May 2020 and did not read it until the 20th May 2020. It was unticked after going through his line management email chain. His line managers were Sergeant Byron Morgan, Inspector Allen and Chief Inspector Millar.

The claimant was declared 'disabled' on the Scope record of the Respondents and they knew or ought to have known he was disabled.

The Claimant grieved this matter and as indicated in the outcome letter of 21st May 2021 the Respondent indicated that they were unable to determine who unticked his application. The Claimant's Senior Line Managers Inspector Allen and Chief Inspector Miller denied changing the form. The Claimant's Sergeant Byron Morgan conceded he may have done so but suggested this was inadvertent. The claimant as part of the grievance process requested sight of the internal email chain between the line managers to ascertain at what point and by whom the form had been altered. That email chain has been deleted or lost by the Respondents. The claimant believes the form was altered by Sergeant Byron Morgan.

The less Favourable treatment which the claimant therefore relies upon is the Respondent's treating him as not disabled for the purposes of his Cyber Crime application when they knew he was disabled.

The Claimant believes his line management was responsible for that treatment. He believes on a balance of probability it was his line manager Sergeant Byron Morgan. That treatment occurred either on 12th or 13th May 2020 but the Claimant only became aware of it on the 20th May 2020.

This was direct discrimination in that the Claimant's line managers knew or ought to have known that he was disabled and determined

that the application which had been correctly ticked by the claimant should be unticked.

The claimant was therefore treated as not being disabled when he was. The Comparator for this scenario is a hypothetical officer who had applied for a post within cyber crime but whose form had not been altered by his line management in any way. The reason for the form being altered was the claimant's disability.'

54. Mr Tudhope seeks a strike under Rule 37(1)(a) out on the grounds that this complaint has no reasonable prospect of success, which failing a deposit order under R39 on the ground that it has little reasonable prospect of success.

Submissions

55. I did not hear evidence on the matter. However, the joint bundle contained certain evidential material with respect to this head of claim to which I was referred. It contained a copy of the relevant job application and a copy of the claimant's subsequent grievance submitted on 20 September 2020, both as referred to in the claimant's pleadings. My understanding from the parties' submissions and the documents referred to therein is that certain facts are not in dispute.

a. It is not in dispute that the claimant completed a job application form for a job in Cybercrime. He sent it to his line Manager, PS Morgan, on 12 May 2020. His line manager would not be involved in deciding the application; the purpose in sending it to PS Morgan was that the claimant's line manager required to provide input into the application before it was submitted. He required to fill in a section of the form. PS Morgan required thereafter to forward the form to the claimant's Area Commander / Head of Department for sign off. The form was then to be returned to the claimant to submit to the Central Recruitment Team who would process and deal with his application.

b. It is not disputed that the form had a section headed 'Interview Guarantee' which set out the commitment of the Scottish Police Authority and Police Service of Scotland to guarantee an interview to 'any applicant who has a disability, as defined under the Equality Act 2010, and who meets the essential criteria of the post.' The form had two possible boxes, Yes and No in response to the question "Do you consider yourself to have a disability?"

c. The claimant's position is that he had ticked the 'Yes' box before forwarding the form by email to PS Morgan. His position is that the form was returned to him by email on 13 May 2020 from CI Millar.

d. It is uncontroversial that, on the returned form, PS Morgan had completed the section to be completed by the claimant's line manager. It's accepted he confirmed in that section that he supported the application. It's also accepted that CI Millar, as Area Commander or Head of Department had signed off the returned form in accordance with the instructions printed on it.

e. The claimant's position is that the 'Yes' box had been unticked in the returned form and the 'No' box had been ticked. The claimant's position is that he discovered this on or about 20 May 2020 when he opened the email and reviewed the attached form. It is not disputed that, at this stage the form had not yet been submitted to the Central Recruitment Team for consideration. The claimant's position is that he unticked the 'No' box and re-ticked the 'Yes' box before submitting the application to the Central Recruitment Team.

f. After some confusion on the issue, it has now been agreed that the claimant was granted an automatic interview for the post under the Interview Guarantee but was unsuccessful.

g. The respondent's position is that PS Byron Morgan does not recall doing so but accepts that he may have inadvertently unticked the 'Yes' box on the claimant's application form when he was inputting into the form.

56. Mr Tudhope invited me to consider the claim as pleaded. There was, he said, no reasonable prospect that on the case relied upon, an employment tribunal would find in the claimant's favour. He referred to the requirements of section 13 and noted that in determining the cause of the less favourable treatment, the focus is not on the claimant's perception but on the alleged discriminator. The 'reason why' test is a subjective one. For the claimant to succeed, the perpetrator of the alleged less favourable treatment must have been influenced by the claimant's disability.

57. Mr Tudhope noted that the claimant accepts he does not know which one of three potential superiors in his chain of command unticked the 'Yes' box on the form. To succeed, he argued, the claimant must establish not only that one of those colleagues unticked the box, but that the individual responsible was motivated to do so because of his disability. He argued that the claimant has not specifically pleaded which individual was responsible or their motivation for doing so and that, without such averments, the claimant will not be able to lead evidence that would sustain the findings needed to succeed in this claim.

58. He argued that the claimant does not assert in the April Iteration that any of the three individuals were motivated by his disability. He suggested it was a serious allegation to make and that the claimant seemed reluctant to make it. It was difficult, he said, for the claimant to allege a discriminatory motive based on his knowledge. The pleaded case did not, according to Mr Tudhope, suggest a disadvantage beyond the unticking of the box itself. There was no suggestion that he was overlooked for the position because the box had been unticked.

59. It was reasonable to assume, according to Mr Tudhope, that if PS Byron Morgan was called to give evidence, he would maintain the position he took when questioned during the grievance, namely that he may have unticked the box inadvertently. If that were PS Morgan's evidence and, if the tribunal accepted his evidence, the claimant could not succeed.

60. The lengthy procedural history of the case was relevant, in the respondent's submission. The claimant has had plenty of opportunity to clarify and expand on this claim. It was reasonable to assume he would have done so. In the December Iteration, he noted the claimant made no averment denying that the respondent had made an administrative error in unticking the box. This lack of denial has continued, Mr Tudhope observed, in subsequent iterations.

61. He queried what evidence the claimant would lead to seek to establish his claim. There were, he said, little or no reasonable prospects of the claimant successfully establishing less favourable treatment because of disability. He clarified he sought the direct discrimination claim to be struck out. Alternatively, he sought deposit orders, suggesting separate orders should be made in relation to the each of the three individuals in the chain of command who have been identified as potentially involved. He proposed deposit orders of £500 in relation to each of the three.

62. Mr Jaap said the claimant had specified that, on the balance of probability, the person responsible for unticking the form was PS Morgan. He said the claimant would give evidence about what he (the claimant) did with the form and what happened when it was returned to him. He agreed with Mr Tudhope that, without assessing evidence from the respondent, the tribunal would not be able to make findings as to whether the facts were discriminatory or not. He said the claimant's claim for RAs could not be ignored. It didn't take much, he suggested, to raise the inference as to why the form was altered. Mr Jaap suggested the respondent discriminated against the claimant because it did not accept he was disabled. (This is not an averment that appears in the April Iteration). He indicated his view that he would merely need to ask the respondents' witnesses in cross -examination: "Why, if you unticked the box, did you do it?" It would then be for the tribunal to assess the credibility and reliability of the evidence.

63. In his written response dated 22 April 2022 to the respondent's strike out application, Mr Jaap wrote that "the claimant has stated all along that as a result of the box being unticked he did not automatically get an interview for the post he was applying for and had to informally grieve to get an interview".

However, this averment does not appear in the claimant's original ET1, nor in any of the three subsequent iterations. At the hearing Mr Tudhope pointed out this was factually incorrect. An automatic interview was granted before the claimant raised any grievance, the box having been re-ticked. Mr Jaap did not dispute this at the PH. He said the claimant instead complains that the less favourable treatment was the box being unticked; he does not allege that the detriment was not getting an interview for the position. He went on, however, to add that the detriment was the unticking of the box "and the deprivation of the opportunity for an automatic interview".

64. The direct discrimination complaint should not be struck out in Mr Jaap's submission and nor should a deposit be ordered. He advised that the claimant's disposable income per month after essential bills was around £440. He was given the opportunity but declined to comment upon what level of deposit might be reasonable in the event such an order were made.

65. I asked Mr Jaap what matters, if any, the claimant would rely upon beyond the presence of a protected characteristic and the alleged unticking of the box in order to invite the Tribunal to infer that the act was discriminatory. He explained the claimant would rely upon the apparent disappearance of the email chain among members of his line management which may have served to clarify at what point the box became unticked. He would also adduce evidence of the narrative in support of the RAs complaint and rely upon it in support of an inference of discrimination in the section 13 complaint. At this time, he was unable to identify any other matters of which the claimant envisaged adducing evidence to support an adverse inference. He awaited the outcome of a Subject Access Request, however, and suggested additional material or information may arise from that.

Discussion and decision

66. I must take the claimant's case at its highest in determining the strike out and deposit order applications.

67. Very little direct discrimination today is overt. It is the nature of a direct discrimination claim that the Tribunal is concerned with assessing the reason

for the alleged less favourable treatment by the perpetrator. It is common that a claimant does not have direct knowledge of the perpetrator's subjective reasons for their treatment, conscious or unconscious, whatever suspicions he may harbour. It is invariably the case in a defended direct discrimination claim that the respondent denies that the protected characteristic influenced their acts or omissions. That those circumstances should apply in this case is unremarkable and does not offer a compelling basis for striking out the claim or imposing a deposit order. It is unusual to find direct evidence of discrimination.

68. Neither is the claimant's inability to identify with certainty exactly who within the respondent was responsible for the respondent's act or decision particularly unusual.

69. The reverse burden of proof provisions were enacted in recognition of the difficulty for claimants who often lack direct evidence showing explicitly that the reason for their treatment was discriminatory. It is relevant to consider these in the context of the present applications. I do not accept Mr Jaap's proposition that, at a final hearing, he would merely need to take the claimant's evidence about the form being unticked and ask the respondents' witnesses in cross -examination: "Why, if you unticked the box, did you do it?". If the claimant does not offer to prove facts sufficient to transfer the burden to the respondent, then his claim will have little or no reasonable prospect of succeeding.

70. For the burden to shift, he requires to establish facts from which the Tribunal could properly decide, in the absence of any other explanation, that the respondent unticked the box because of his disability. Provided the Tribunal can properly infer from facts proved that his disability had a significant influence on the act, in the sense of not trivial, discrimination will be made out (**Igen**; **Nagarajan**).

71. To surmount Stage 1, the claimant must therefore offer to prove facts from which an inference of discrimination could properly be drawn, leaving the respondent's explanation of an inadvertent error out of account. If the

claimant succeeds in shifting the burden to the respondent at Stage 2, then a Tribunal will have to assess the factual question of whether that explanation is accepted on the balance of probability or whether the claimant's disability influenced the actions of the individual who unticked the box.

72. The claimant's stance in relation to the respondent's explanation of inadvertence might be described as less than forthcoming in the pleadings. As Mr Tudhope points out, he does not expressly deny the respondent's alleged explanation but seems merely to record it in relatively neutral terms. Nevertheless, I must take the claimant's case at its highest and construe the claim form generously in considering an application for strike out. Taking this approach, I do not consider that too much ought properly to be read into the absence of an explicit denial of the explanation. The essence of a section 13 claim is an allegation of less favourable treatment because of the protected characteristic. A case of direct discrimination is undoubtedly pleaded. It may be preferable if it were explicitly stated, but it must be inferred from the pleadings that the claimant's case is that the respondent's alleged non-discriminatory inadvertence is indeed disputed.

73. Therefore, if the claimant's averments are sufficient that, if proved, he could surmount Stage 1 and transfer the burden of proof, matters will at Stage 2 turn on the disputed factual question of whether the respondent's act was inadvertent.

74. Does the claimant offer to prove facts from which the Tribunal could properly conclude, ignoring the respondent's explanation, that the unticking of the box was less favourable treatment influenced by the claimant's disability? If he does not, the claim has little or no reasonable prospects. If he does, I will not order strike out or a deposit in the absence of having heard evidence because the case will turn on the disputed factual question of the respondent's explanation (**Cox, Sharma**).

75. The pleaded less favourable treatment is the respondent treating the claimant as not disabled for the purposes of the application. It is worth clarifying that the 'respondent' here must refer to those in the claimant's chain of line

management, not to those within the respondent who were responsible for deciding the job application. At another part of the April Iteration, it is said: "*This was direct discrimination in that the Claimant's line managers knew or ought to have known that he was disabled and determined that the application which had been correctly ticked by the claimant should be unticked."* Despite Mr Jaap's contrary suggestions in earlier correspondence, the pleadings don't assert the less favourable treatment was the deprivation of an interview. Based on the facts which I understand to be agreed, that assertion is untenable.

76. I accept, in principle that the unticking of the box of itself could amount to less favourable treatment. The claimant offers to prove it was unticked. Such an unticking would risk prejudicing the claimant in the recruitment process if it had not been picked up and corrected. It could be construed as his line management denying his disability which could cause hurt and upset.

77. Are there averments which would support an inference that the act was influenced by the claimant's disability? As Mummery LJ observed in **Madarassy,** "*most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation for those facts*" (para 12). It will not usually suffice to prove merely a difference in disability status and a difference in treatment; something more will normally be required from which discrimination can be inferred.

78. The claimant will rely upon his averments with respect to his RAs claim. Under his pleaded case, the alleged failure to make adjustments occurred between 21 September 2020 and October 2021. Mr Tudhope pointed out that these allegations, therefore, postdate the alleged box unticking which is said to have occurred in May 2020. That is true, though it does not of itself render the averments about RAs incapable of being relevant to the Tribunal's assessment of whether an inference can be drawn.

79. The claimant will also rely upon the deletion or loss of the email chain among his line management dealing with the application. I am not satisfied that there

is no reasonable prospect that these averments could, if established, allow a Tribunal to properly infer that the unticking was *prima facie* influenced by discriminatory reasons. This is not one of those exceptional cases where it can be concluded without hearing the evidence that the averments could not sustain an inference of discrimination. Direct evidence of discrimination will be thin or absent but that is entirely common. It will be for the Tribunal who hears the evidence of the matters pleaded by the claimant to assess it cumulatively and determine whether the facts as found do give rise to an inference that the box unticking was influenced by discrimination.

80. I acknowledge certain authorities suggest that the test in Rule 39(1) regarding deposit orders may allow greater leeway for an order to be made where the facts are in dispute. I am mindful, however, of the EAT's comments in **Sharma**. Without hearing evidence, there is a danger in hastening to a view of the prospects of success in a fact sensitive case for the purposes of Rule 39 as well as Rule 37(1)(a). I don't consider I can be properly determine, based on the pleadings and those facts which I understand to be agreed, that there is little reasonable prospect of the section 13 claim succeeding.

Employment Judge: Lesley Murphy
Date of Judgment: 29 July 2022
Entered in register: 02 August 2022
and copied to parties