EMPLOYMENT TRIBUNALS

Claimant: Mr S Mutangadura

Respondent: The Home Office

Heard at: Manchester **On:** 23 October 2018

Before: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Ms Trotter of Counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

1. The respondent's application for an order striking out the claimant's race discrimination claims is dismissed.

2. The respondent's application for an order that the claimant pay a deposit in relation to his race discrimination claims is dismissed.

3. The respondent's application that the claimant's complaints of disability discrimination have no reasonable prospect of success and should be struck out is granted and the claimant's disability discrimination claims are hereby dismissed.

REASONS

1. The Tribunal has today been considering applications made by the respondent for orders that the claimant's claims be struck out , or in the alternative that the Tribunal makes an order that the claimant pay a deposit as a condition of being permitted to advance the claims any further. The claims in question are claims of race discrimination and disability discrimination , which were made in a claim form presented to the Tribunal on 29 April 2018. They came before Employment Judge Howard on 16 July 2018 in a preliminary hearing to identify the issues, and as a result of the discussion on that occasion the claims were identified in her judgment

and the issues to be considered in this preliminary hearing were then set out. This hearing was then listed to consider them.

2. In terms of the claims before the Tribunal, they were at that time identified as being race discrimination , in respect of the claimant identifying his race as black African and that the respondents, in their dealings with him in connection with applications that he made, successfully, for roles as administrative officer and executive officer with the respondent were in fact instances of direct race discrimination in relation to , in particular , the security clearance that he was required to obtain for at least the first of those posts. Those issues were discussed and identified in paragraph 3 of the Case Management Orders on that occasion, and, in relation to the disability discrimination claims , the disability was identified as being a condition of anxiety and depression. The claims that were made were identified as being complaints of failure to make reasonable adjustments in relation to a provision, criterion or practice ("PCP") that the respondent accepts was applied to the claimant and others, that all candidates for these posts were communicated with via email. The claimant's claims were identified in that preliminary hearing as being that he believed this placed him at a significant disadvantage , as this practice led to delays in responses which exacerbated his anxiety and depression. Those matters are set out in that Order and consequently this hearing has been held to consider the applications that the respondent then made.

3. The claimant has appeared in person , and the respondent has been represented by Ms Trotter of counsel. The parties have both provided skeleton arguments. The claimant, although unrepresented, has clearly put much time and effort into his submissions and arguments, indeed has clearly done some extensive research and has been able to make references to case law, but the Tribunal , of course , bears in mind that he is not a qualified lawyer. He clearly has researched extensively into these issues and has produced, for an unrepresented party, a considerable body of argument and documentation which has assisted the Tribunal greatly in determining this application. The respondent has similarly produced a skeleton argument and there has been an agreed bundle of documents for this hearing, the claimant also advancing some further documents in support of his contentions.

4. The Tribunal, of course, on such an application makes no findings of fact and does not determine any claims in terms of the merits, other than to determine whether or not the respondent's contentions that the claims, or any of them, have either no reasonable prospects of success , or little reasonable prospects of success. That is far as the Tribunal's enquiry on this occasion will go.

5. In terms of the facts, they are largely agreed and where they are not agreed they will be assumed in the claimant's favour, as , for example, disability will be for these purposes, and is conceded for these purposes, although in the claims as a whole that has not as yet been conceded. In terms of the basis of the claims and the facts that are largely agreed, they are as follows.

6. The claimant made applications for two roles with the respondent: the AO (administrative officer) role and the EO (executive officer) role, in late 2017, and indeed was successful in obtaining first the AO role and subsequently the EO role. These claims arise out of the process that was then followed by the respondent in terms of obtaining security clearance for the claimant , given that he was to work for

the Home Office. In terms of that process, the claimant accepted the first offer, the AO caseworker role, by an email of 21 September 2017, and there then ensued email communication and the requirement to complete various documents. Amongst those documents was a health questionnaire , and various other pieces of information that were required from the claimant which he prepared and sent back to the respondent. In due course he was referred to a website link in relation to the security check that was to be undertaken in relation to this role, which he duly followed and completed. It was at that point that the issues arose.

7. The link took the claimant to a questionnaire which he completed and noted, if it did not expressly say so itself, that the questions that he was being asked were consistent with a level of security check which is higher than the lowest of the three levels that the respondent operates, which are , firstly, a counterterrorist check, which is level 1; secondly is a security check and the third is developed vetting. The role that the claimant at that point had successful obtained, the AO role, did in fact require the first level, the counterterrorist level check, but the questionnaire that the claimant completed included particular references to his finances and credit history, and consequently was consistent with, and indeed was, part of the information required for a counterterrorist check, a CTC as it has been referred to in the documentation.

8. Consequently, by an email of 24 October 2017 , the claimant queried why the questionnaire that had been referred to him had this level of detail in it , and was not consistent with a counterterrorist check but the higher level. Consequently in that email he raised as a query, and it is right to say it was no more than that at that stage, whether this was in fact correct and should he be doing that. The email address he used in relation to HR employment checks was @hremploymentchecks, it was not an individual that he sent the email to, but the response came from one Jack Holding, and that is at page 8 of the bundle, on 31 October. The answer to the claimant's queries was simply "you will need to answer all of the questions on the link questionnaire" and continued "if you would like to query this further please contact HO security enquiries" and an email address was given for the claimant to do so, but that was his communication with Mr Holding at that time. The claimant duly did so, and sent an email to HO security enquiries, as directed to do so, on 31 October , and he raised the same query as he had done in his previous email as to whether it was right that he should be completing a questionnaire which went further than the CTC level that he was expecting to be applicable to this post.

9. There seems to have been some difficulty, and this was replicated subsequently with the HO security email, because there was disruption to the service and the reply he got to that email was indeed a temporary disruption , and he was advised to respond later on. So he did not get an immediate response and consequently he renewed his enquiries in due course.

10. In the meantime, the claimant having completed as part of the documentation that he did on 25 September when he accepted the AO role, a medical assessment form (page 39 of the bundle) was then invited to attend an appointment to assess his medical suitability, he having on that form, which he dated 25 September, ticked the box in answer to the question "do you consider yourself to be disabled" and indeed having then ticked the next box "do you require any reasonable adjustments" Thus it was that he was referred onwards for a medical assessment, and there was email

traffic about that which was subsequently arranged, and the ensuing report dated 28 November 2017 is at pages 62 and 63 of the bundle.

11. That report did refer to the information that the claimant supplied to the doctor, namely that the claimant had had previous treatment for anxiety and depression between 2015 and February 2017, but he explained that overall he was well and that he was functioning at a normal level in terms of everyday activity. He did explain he did have some issues with anxiety when called to workplace meetings, otherwise he explained to the doctor that he had no particular issues with psychological ill health. In terms of the adjustments that may be required, the doctor reported that the claimant stated when completing the questionnaire that if he was called into a meeting by management he would like to request it was done in a manner that would not cause to think that something bad was likely to happen in that meeting. On that basis the doctor expressed his view that the claimant was medically fit for work and repeated that the recommendation was that any meetings would be dealt with in the way in which the claimant had asked. Other than that , however, no other issues with the claimant's employability or issues from his condition were addressed. The report does not express a view as to whether the claimant's condition was or was not a disability, although he had of course ticked that box on the assessment form.

12. Thereafter, the claimant completed the security check as requested, and did indeed provide the financial information that was requested in that form, although he remained concerned as to whether that was indeed the correct form of check that was required, and indeed he continued his enquiries in that regard by continuing to send emails to, amongst others, PM Recruitment. That is an organisation, or a limb of an organisation, that is in fact part of the respondent and was, as the name suggests, instrumental in the claimant obtaining the posts that he had applied for. That was an organisation he continued to correspond with , as well as communicating with Home Office Security.

13. The claimant’s next email to Home Office Security was 13 November 2017, where he again repeated his query as to whether or not the appropriate level of clearance was SC or CTC, and indeed he also asked in that email (page 10 of the bundle) whether this was an accident, that he had been sent this link instead of the CTC clearance, and whether or not any credit score would have any bearing on whether or not the applicant would get security clearance for this role. The response that came from Home Office Security was from one Shila Peli, that was on 14 November and is, other than a salutation and to thank him, a one line email in which it is simply said “the level of security clearance is requested for SC NOT CTC”, and that somewhat terse email was sent to the claimant effectively in answer to his query. So he was told on that occasion that the higher level of security clearance was apparently correct, the author being somewhat emphatic about it.

14. Around about this time, it is not exactly clear when, the claimant had a telephone conversation (the respondents do not specifically deal with this in terms of whether they accept it or not, but it will be assumed for these purposes) with someone called “Sheri” in which he again raised the question as to whether or not this was the correct level of security clearance for the post that he had been offered, and again this person, he says, said that that was indeed correct.

15. PM Recruitment, however, that he was in communication with on 15 November 2017 by email, gave the claimant a response of 16 November (page 12 of

the bundle) in which it was confirmed that the level was in fact CTC, so the claimant was receiving conflicting information from different wings, as it were, or emanations of the respondent as a Government department. PM Recruitment's understanding was that CTC was the correct level.

16. Consequently, the claimant continued to raise these matters with PM Recruitment and indeed sought to do so with Home Office Security. In terms of Mr Holding, however, he had no more direct dealings with him at that stage and did not get any direct response from Home Office Security. The claimant around about this time started going onto online chatrooms to see what other people who had made the same application had been doing, and he learnt that they too seemed to have been filling in CTC level security checks, confirming his suspicion that the SC level was being applied to him and him only.

17. Subsequently, the next major development was that in January 2018 the claimant was successful in being offered the other role, the EO role, and indeed he was offered that by an email of 11 January 2018 (page 15 of the bundle). That then gave rise to the need for pre-employment checks and further emails about that, the claimant pointing out in that email exchange that followed that of course he had already been through this process when he had accepted the AO caseworker role, and he raised queries as to whether he needed to do this again, pointing out that he had in fact also completed financial information as part of the information for those checks. It was at this time that he entered into communication with one Roy Williams, who was in fact from Home Office Security, and again raised the question as to whether or not the SC vetting process was indeed the correct one. This came to a head in email exchanges which took place mainly on 8 March 2018 onwards, and that email is pages 18-20 of the bundle, in which the claimant expressly went through the history of the security checks , and again raised the query as to the appropriateness of him going through the SC vetting process. He went on to say in that email that he considered it unfair that he had gone through the SC process , when that the CTC process was probably the correct one, and he again complained and sought an explanation as to why this was. In particular he asked, at the bottom of page 19 of the bundle, "did all the other applicants who received provisional offers for this role have to undergo the SC vetting process instead of the CTC vetting process?". The claimant also asked in that email (again at the moment this is still addressed to Roy Williams) could he also please find out why he [the claimant] was advised that the level of check required of him was that of SC as opposed to CTC a long time after he had accepted the provisional offer of the job in the AO role?. The claimant expressed his concern that other applicants did not have to do an SC as this would put him in a disadvantaged position.

18. The answer that Mr Williams provided on 9 March 2018 (page 20 of the bundle) was in these terms, "Please note that your Home Office sponsor", which is a reference in fact to Jack Holding, "has submitted your application for an SC level security clearance, and as such part of the clearance process is the oversight of the applicant's finances". That, in effect, was all Mr Williams said. He explained in that email that this had been, as indeed seems likely to be the case, the action of Mr Holding and that he was the person who had submitted the security clearance application on that basis.

19. The claimant continued to seek clarification of these issues and again was in communication with PM Recruitment on 11 March about them. He sent them a

lengthy email on that date which is at pages 21-23 of the bundle. An email in identical or virtually identical terms was also sent to Home Office Security enquiries again, again the same date, and this is at pages 23-25 of the bundle. The last paragraph of each of these emails makes the following observations, which is this:

> *"I would like to request the Home Office makes reasonable adjustments for me in the recruitment/checks process with regards to my mental health disability. All the uncertainty regarding the CTC/SC situation has caused me panic and anxiety. Can it please be arranged so that when I ask the Home Office regarding the recruitment process i.e. queries about CTC/SC, that they are answered in a clear and reasonably prompt manner. Some of the questions which I asked in emails sent to the Home Office were not answered in the subsequent replies. This made me feel anxious and hurt. As I pointed out earlier, I did not receive replies to some of my emails, this also exacerbated my levels of anxiety."*

That email was sent in those terms to both PM Recruitment and to Home Office Security.

20. PM Recruitment did reply to the claimant on 12 March 2018 (pages 25-26 of the bundle) in which the reply is this:

> *"I can confirm that candidates from the two campaigns only require counterterrorist check, CTC. We cannot confirm as to why you were required to complete SC level, this could purely be down to abbreviations."*

21. They then went on to say that they would forward his email to the pre-employment checking team and that a number of checks would be conducted in relation to his applications, but at the end of that email, which was copied to Home Office Security Enquiries, the following is written: *"Home Office Security team issue the links – could this please be looked into and advise the individual"*, which the Tribunal takes as being a communication directly to Home Office Security asking them to pick this up , and indeed to reply directly to the claimant in relation to this. In effect PM Recruitment were passing the matter back to Home Office Security to answer the claimant's queries.

22. The email traffic continued and in due course the claimant continued to email to the employment checks email address, which is indeed Mr Holding's email address , although not addressed to him personally that was the email address that he appeared to use and from which in due course a reply was eventually sent. Basically, after further enquiries of various people , Roy Williams on 21 March sent the claimant a copy of what he had sent to Mr Holding, which was in effect the email traffic that had taken place between 6 and 22 March , and in effect he sent that to Mr Holding effectively for comment and copied the claimant in on that email. The upshot of this was that on 22 March Mr Holding did respond to the claimant in these terms (pages 35-36 of the bundle):

> *"I am sorry for the distress you have been caused by the CTC/SC security clearance application. I have been in touch with the Home Office Security Team today and confirm that CTC clearance is required for the job vacancy you have applied for, not SC clearance."*

Other than to say "regards" and his name, that is the end of the email.

23. The claimant replied to that (page 37 of the bundle) on 22 March 2018, saying that he was still very distressed and how mortified he was that he had to go through the SC process when other people who had applied for the roles only had to go through the CTC process. At the end of the second paragraph of that email he says this:

> *"Why was I required to go through the SC process when other people applying for the same AO and EO roles only had to undergo the CTC vetting process?".*

24. It is right to say that no reply to that question was ever received, certainly not from Mr Holding, and one of the claimant's issues in this claim is that there was no explanation, no answer to that query; a query that he repeated again in subsequent emails . Indeed by the time that one Adam Duffy became involved in the matter (he appears to be someone from Civilian Human Resources) in an email to him on 13 May 2018 (pages 42 and 43) again the question was asked . The claimant made the point to him that he had been waiting for a response to that question posed in his email of 22 March , but still had not got one.

25. Subsequently on 1 June an email was sent by Laura McKeswick, again from Human Resources it would appear, in which she said this:

> *"I can only apologise that your security clearance was raised incorrectly. I did correct our error as soon as it was picked up. Please think about your decision."*

26. The decision that she is referring to is that which the claimant made, or had made by that date (sent to the respondent or confirmed around about 13 May) that he was in fact not pursuing the job anymore and was going to withdraw, and indeed did withdraw, from the EO position that he had in fact been offered, and so that was the end of his involvement in terms of employment with the respondent.

The application – the race claims.

27. Those are the basic facts or allegations, if not agreed in some instances in full by the respondent, that form the basis of the claimant's claims of race discrimination and indeed disability discrimination. In terms of the application, it is put in relation to the race discrimination claims in the respondent's skeleton argument and indeed in submissions today in these terms: the facts are indeed largely agreed but the prospects of the claimant succeeding in establishing that what happened to him was any form of race discrimination are non existent, or certainly not reasonable, or failing that he has little reasonable prospect of establishing that. In essence, what is submitted is that the facts as explained a moment ago basically are agreed but that the explanation that there was an error which was responsible for the claimant undergoing the higher of check is one that in effect is bound to succeed, if necessary. The respondent's primary position, I take it to be, is that the claimant will not in fact get past the first hurdle of establishing a prima facie reversing the burden of proof. From the facts as alleged by the claimant and agreed largely by the respondent there is no real prospect of the claims succeeding.

28. In support of that , it is contended that the documents show that the contention that this was at worst an error, and an easy one to make, are established, or will be established easily, from an examination of the relevant document which would be completed in this instance in the claimant's case, an example of which is at pages 80-86 of the bundle. This is a blank form of screenshot, one presumes, of the process that would have been undertaken in relation to how this security vetting would have been set up in the case of the claimant. This is, as I have said, a blank form and the Tribunal does not have the benefit of the one that actually was completed in the claimant's case, but it is pointed on behalf of the respondent by Ms Trotter that , whereas certain parts of the document have to be populated by typing in details, other parts and in particular section 7, contain drop down boxes . In particular box 7.4 has a number of drop down boxes where the security level required is indeed in a drop down form, and although it is blank on the example before the Tribunal it is presumably where , if the little arrow on the right-hand side was clicked , it would give the three options of level of security check, and the person completing the form would then select one of the three levels. In the claimant's case he or she , on the respondent's case, presumably clicked in error "SC" for security check , when the menu gave him or her CTC, and this is simply an error , effectively, of inputting. This, it is submitted, is an easy mistake to make and therefore is a plausible explanation that if advanced in a hearing is likely, or more than likely, to succeed , and therefore explains any apparent discrimination that the claimant complains of.

29. It is also submitted that it would not be apparent to whoever it was that made this alleged error that the claimant was indeed black or black African, whichever of the characteristics he wishes to advance, and that that too would make any form of discrimination most unlikely .The claimant's prospects of success therefore are nil or next to nil. Alternatively, if they are not that low there is little reasonable prospect of him succeeding in the race claims.

The claimant's response.

30. The claimant resists that, not surprisingly, and invites the Tribunal to look at the history of the matter , and indeed also not only what happened to him but the explanation, or lack of explanation , or lack of prompt explanation, for it. He points to the email exchanges that I have referred to , and how it was that only on 1 June 2018 that somebody did actually say that this was an error .That that was the first time that this had been put forward. It is perhaps worth observing that that, of course, was post the institution of these proceedings, which was on 24 April 2018. Be that as it may, the claimant effectively relies upon not only that happening of the event , and his race , but also the history of his enquiries and the response of the respondent to the complaints that he made.

31. Additionally, the claimant submits that on an assessment day he was in the minority , in terms of white people , and black or non white people, and submits that it is therefore likely that he was in a minority , if not of one , but at least of a very small number of people in terms of the racial makeup of the potential applicants or successful applicants. He argues that the respondent in these circumstances should have the burden of proving that what happened to him was not discriminatory.

32. Those, in essence, are the arguments on the race claims.

Discussion and findings – the race claims.

33. In terms of striking out discrimination claims, Ms Trotter has rightly in her submissions referred the Tribunal to the case of ***Anyanwu v South Bank Students Union [2001] IRLR 305*** which has long been held to be the authority which counsels Employment Tribunals against striking out claims of race discrimination except in the clearest of circumstances. That has been the law for many years. But, as the case of ***Ahir v British Airways PLC [2017] EWCA Civ 1392*** makes clear, and indeed as do other cases, this should not be elevated to a rule of law; a Tribunal always has a discretion , and it is not the case that just simply because a claim is a claim of discrimination, whether it be race or any other form, that that is somehow some protection against being struck out in an appropriate case. The respondent's submissions are that this is an appropriate case and the Tribunal should not therefore shrink from making such an order just because this is a discrimination claim.

34. In terms of the law, of course, and little has been said about this but it is clearly a matter the Tribunal must take into account and the claimant has touched upon, the burden of proof is now to be found in section 136 of the Equality Act 2010, which effectively provides that the burden of proof is reversed if there are facts from which the court could decide in the absence of another explanation that a person contravened the provision concerned, in which case the court must hold that the contravention occurred. In other words, once a claimant has established facts from which a Tribunal could, but not must, absent an explanation, consider that the claimant had been discriminated against, the burden shifts to the respondent to put forward a credible and plausible non discriminatory reason, and the claimant's argument is that he has done, or can do , that and that the Tribunal in those circumstances should not strike out the race claims, or indeed make a deposit order.

35. In terms of the burden of proof, of course in addition to the section there is much case law both before and after the 2010 Act, and in particular as to whether and when the burden of proof shifts, and in particular the case of ***Madarassy v Nomura International plc [2007] ICR 867***, a pre 2010 case, has been referred to but it remains in effect good law, which held in essence that it was not enough for a claimant to establish a difference in status and a difference in treatment as being sufficient to reverse the burden of proof. In other words, simply to say, "I have the protected characteristic, I suffered a difference in treatment" of itself would not be enough to shift the burden of proof, and ***Madarassy*** held that, and that has been held to be good law since the enactment of section 136 Equality Act 2010. It has sometimes been termed as the "something more" test , that in those circumstances a claimant has to show "something more" to shift the burden of proof. My task today is not to decide whether the claimant has done so , but whether there is any reasonable prospect of him doing so, and my view is that there is.

36. The "something more" it seems to me that could, and that is as far as I need to go today, shift the burden of proof is to be found in a number of facts, but two in particular. First of all, the respondent's contention that it would not be apparent to anyone dealing with the claimant's security check level that he was black or of black African origin seems to me to have little strength in it for two reasons: firstly, there is his name, which clearly is likely to alert anybody to the possibility, nay the probability, that he has some ethnicity other than white British; but secondly, if that were not enough, in the form that the claimant filled in and submitted on 25 September 2017

for the AO post , at page 46 , amongst the details that he provides a the bottom of page 46 in relation to his nationality, in addition to the current, at birth he has put "British and Zimbabwean", so anyone looking at that, quite apart from his name, would be likely to take the view that he may well be a person of non white origin. So in terms of the alleged lack of knowledge of his race, these were not anonymised applications or anything of that nature. It seems to the Tribunal highly likely that anyone dealing with his applications would be likely to consider , or know , that he was of non white origin. Indeed in terms of the computerised form itself, of course, the blank example in the bundle requires the entry of all the applicant's details, including the claimant's name, so this was not being filled out anonymously.

37. Secondly, I take the claimant's point in relation to sections 7 and 8 of this form, that in addition to section 7, section 8 requires the person completing it actually to save it , and to carry out some further checks to ensure that they have filled it in correctly, including the relevant security clearance section. This suggests that there is, or ought to be, given that it is required to be saved, some form of this document in existence, either in hard copy or on some form of computer record. No copy has been produced, all the Tribunal has got is the blank form, so in terms of the likelihood of the person making a mistake and explaining that mistaken, it is not just simply a question as submitted by the respondent of one drop down box, it is a drop down box plus a requirement to actually check what has been written and to save it. That is a requirement to doublecheck, as it were, that the security clearance section has been entered correctly. In terms of the ease with which the mistake might be made it is not, or at least it seems to the Tribunal, or at least it is arguable, as easy perhaps as was first thought.

38. The third element that could contribute to the "something more" test under ***Madarassy***, it seems to the Tribunal, is the lack of explanation of lack , or prompt explanation , in reply to the claimant's queries, and indeed the specific question from 22 March onwards as to why this happened. In particular there is the lack of any explanation from the person who apparently was responsible for it, Jack Holding. I say "apparently" because one does not know who actually competed the form. Mr Holding was the only person who responded eventually, but effectively he only simply stated that there had been an error, but did not begin to explain why.

39. Were it the case that the Tribunal had before it today some witness statements from the person or persons who actually did make the mistake, in which they set out in a coherent , comprehensive , and plausible looking document an explanation for how this came about, then the Tribunal might take a different view, but the Tribunal does not have that evidence at the moment, it only has assertions as to what the explanation was, and the documents . Those assertions may well be right , and as and when the relevant people give the relevant evidence the Tribunal may well come to that finding that there is an innocent explanation, if the burden of proof does indeed pass. I am satisfied today , however, that it certainly is arguable that the burden of proof should pass to the respondent, and if it is arguable that it should then it is far too early for the Tribunal to say that the respondents are bound to succeed in any non discriminatory explanation that they put forward in the evidence.

40. For those reasons I hold that not only does the claim not have no reasonable prospect of success , I cannot say that it has little reasonable prospect of success in

terms of the race claims, and I decline to make an order either striking out the race claims or indeed ordering any deposit in respect of those.

The disability claims.

41. I now turn to the disability discrimination claims. The first issue there is that the claimant at present has to accept that the claims before the Tribunal are those that were identified in the preliminary hearing before Employment Judge Howard. The Tribunal agrees that in the submissions and documents the claimant has put forward today, and this is not a criticism because he is unrepresented and doubtless perhaps did not appreciate this at the time, but what he has effectively sought to do in respect of the disability discrimination claims in particular is to widen their scope. Consequently to the extent that he wishes to complain of not only the delay in any email response he got from the respondent , but also in relation to the content of those responses, particularly for example the email of 14 November 2017, those are not claims that he has presently put before the Tribunal and will have to form the basis of an application to amend if he so decides to pursue them.

42. In relation to the claims that are before the Tribunal, they are of failure to make reasonable adjustments in relation to email communications. The PCP identified on the last occasion was the requirement to use email communications for this purpose, and the complaint made , the failure to make reasonable adjustment , was the delay occasioned in doing so . The claimant will have to consider, and the Tribunal will have to consider, whether the respondent can be shown to have had the requisite knowledge. The requisite knowledge comes in two forms: first of all of the claimant's disability, and secondly of the disadvantage to which the claimant's disability was likely to put him, which is the effect of the provisions of schedule 8 to the Equality Act 2010.

43. In terms of the former, the claimant says "well, I ticked the box on the form that I had a disability", which is right, but that in itself is not sufficient to establish that the claimant's disability was one that the respondent knew of or ought to have known of in terms of what it was; it was merely an indication that he had a disability. In terms of the subsequent medical examination and assessment, the question, it is right, was not asked, but neither did the claimant say in terms, and he was provided with a copy of that document, that his condition amounted to a disability. Not every medical condition amounts to a disability, and to the extent to which the impairment of the claimant's day-to-day activities is recorded in the medical examination at page 62, it has to be observed that the effect on those day-to-day activities is relatively marginal because it relates to difficulties in attending meetings at work and the manner in which those might be done. So , it seems to me at this stage that it is far from clear that the respondent would be put on notice at that stage that the claimant had the particular disability of which he now complains, and which may well be established, but in terms of the knowledge of the respondent at that stage then this report, it seems to me, potentially falls very short of giving them that requisite knowledge.

44. Quite apart from that, even if that report put them on constructive knowledge of his disability , he would have to go further and establish effectively that the respondent knew or ought to have known that the disability in question put him at the particular disadvantage in question, which in the context of these claims, of course, is in relation to delay in responses to emails. Whilst the claimant has quite rightly,

and indeed very thoroughly, referred the Tribunal to cases such as ***Home Office v Kuranchie UKEAT/0202/16/BA*** and indeed other guidance on disability, where it is clear that disability is something where an employer cannot be excused from the failure to make reasonable adjustments merely because the employee has not suggested that adjustment. It is right that in various instances that is so, but in this context one has to bear in mind that this was not employment , this was prospective employment, and the degree to which an employer can be expected to know of the particular disadvantages to which a prospective employee's disability may put him, when he has not even begun to employ that person , it seems to me , is very different from that which he could reasonably expect to glean for himself once the employee was actually in employment. So whilst taking on board his arguments in relation to the effect of those cases, it seems to me that the claimant will have grave difficulty in establishing, certainly prior to 11 March 2018 email where he expressly made these points, that up until then the respondent had the requisite constructive or actual knowledge of his disability, and/or the disadvantages to which it would then put him. to impose upon them the duty to make the reasonable adjustment of not communicating with him by e-mail, or doing so promptly.

45. After 11 March 2018, however, the claimant accepted that there was in fact no unreasonable delay in responding to his emails, so in terms of the reasonable adjustment claims after 11 March, which is the point at which constructive knowledge may well then be found to have arisen, the difficulty then is that there is no actual failure to comply with the reasonable adjustments, or the duty did not arise. The claimant accepts that the subsequent replies, which indeed the Tribunal can see for itself, were reasonably prompt and would not amount to a breach of that requirement to make reasonable adjustments. So , the only disability claims that the claimant effectively has made, even if it is not clear at the moment as to whether they do go back any further than 11 March 2018 , if they do already on existing pleadings, the Tribunal is satisfied that those claims would have no real prospect of success, and rather than make a deposit order the Tribunal indeed agrees that those are so unlikely to succeed that they can be struck out, and they will be.

46. Consequently, the disability discrimination claims are dismissed. There is no need for the Tribunal to consider any financial issues because it is not going to make a deposit order, but the race discrimination claims will proceed. Case management orders are made in a separate Order.

Employment Judge Holmes

Dated : 1 November 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 November 2018

FOR THE TRIBUNAL OFFICE

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