Case Number: 2304039/2018

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
v	
Ms Z Peveller	**London Borough Of Southwark**

OPEN PRELIMINARY HEARING

Heard at: **London South Employment Tribunal**

On: **1 November 2019**

Before: **EJ Webster**

Appearances
For the Claimant: In person
For the Respondent: Mr J Arnold (counsel)

PRELIMINARY HEARING RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is struck out.

2. The Claimant is disabled for the purposes of the Equality Act 2010 by reason of all three impairments relied upon namely:
   (i) Irritable Bowel Syndrome
   (ii) Post natal depression
   (iii) Hemiplegic migraine

3. The claimant's claim for sex discrimination is struck out as it is out of time.

4. The claimant's claims for disability discrimination are not struck out or subjected to a deposit order save for as follows:

(i) The claimant's claim for direct disability discrimination on the basis of the operation of the claimant's sickness guidance process is struck out as being out of time for the period of November 2012 until January 2015.

The claimant's direct disability discrimination claim based on the same process for the period 7 January until May 2018 is allowed to continue.

RESERVED REASONS

The Hearing

5. By an ET1 dated 7 November 2018, the claimant has brought claims for unfair dismissal, disability discrimination (direct and failure to make reasonable adjustments), pregnancy discrimination and a holiday pay claim.

6. Following a case management discussion on 11 June 2019, this hearing was listed to determine the following matters:

   (i) Whether the tribunal has jurisdiction to hear the Claimant's unfair dismissal claim based on an effective date of termination of 12 March 2019
   (ii) Whether the claimant is disabled for the purposes of bringing a disability discrimination claim
   (iii) Whether the claimant's discrimination claims are out of time and if so whether it would be just and equitable to extend time; and
   (iv) Whether any or all of the claimant's claims ought to be struck out because they have no prospects of success or, in the alternative whether a deposit order ought to be imposed because they have little prospects of success.

7. At the previous hearing various orders were made to enable the tribunal to make the above decisions. In particular the claimant was ordered to provide Further and Better Particulars of Claim setting out what the basis for her claims were and the dates of any incidents relied on within those claims. She was also ordered to provide an impact statement which described the effect the impairments she relies upon (Hemiplegic migraine, IBS and Post-natal depression) have on her day to day activities.

8. Neither of those orders were completely complied with. A document was sent to the tribunal on 16 July 2019 which gave short details of her claims but did not amount to further and better particulars of claim nor did they address the impact of her health conditions. The claimant did however provide her doctor's notes which she said related to those conditions. The claimant said that she had not understood what her obligations were under the orders made at the previous hearing and thought that she had complied.

9. In light of the above it was agreed that it was the best of use of the tribunal's time and in the interests of the overriding obligation by placing the parties on an equal footing to determine what the basis for the claimant's claims were and to determine the issues. It was also agreed that it would be difficult for me to make the findings on the strike out and deposit order applications without everyone fully understanding the claimant's claims. We therefore spent a considerable period of time noting what the claimant said had occurred under each heading of claim and determining the issues before reaching my Judgment in respect of the respondent's applications and submissions.

10. I also heard at the outset submissions from respondent's counsel and the claimant regarding the timing of the unfair dismissal claim. My judgment is set out below but I found that the tribunal does not have jurisdiction to hear that

claim because the ET1 was submitted before the claimant had been dismissed or put on notice of dismissal.

11. Once the basis for the claimant's claims had been identified the parties agreed to take an early lunch to enable the claimant to write notes for the purposes of her giving oral evidence regarding the impact of her conditions on her ability to carry out day to day activities.

12. She gave that evidence as her evidence in chief and I asked her questions and Mr Arnold asked her questions so that I would be able to determine whether the impairments amounted to disabilities for the purposes of the Equality Act 2010.

13. Mr Arnold then made submissions regarding the claimant's conditions and the respondent's applications for the claims to be struck out or have a deposit order imposed either due to time limitation points or because the respondent asserted that they had no reasonable prospects of success or little prospects of success.

14. The claimant was given an opportunity to respond to those submissions.

15. Before setting out my Judgment on the respondent's applications, I now set out the agreed issues that will need to be determined and that I needed to assess for the purposes of determining the respondent's applications.

The Issues

16. The issues that it was agreed that formed the basis for the claimant's claims are as follows:

Disability

17. The claimant relies upon the following conditions as impairments:
    (i) Hemiplegic migraines
    (ii) Irritable Bowel Syndrome (IBS)
    (iii) Post Natal Depression

    17.1 Do each of the above conditions amount to impairments that have a long term, significant adverse effect on the claimant's ability to carry out day to day activities?
    17.2 Was the claimant experiencing any or all of the impairments at the relevant time?

Direct Disability Discrimination

18. Was the claimant treated less favourably than a non-disabled person by the respondent?

    In October 2017 the claimant was told that she had too many sickness absence days. However following a meeting she was assured that the situation would be dealt with in a supportive manner rather than a punitive one. Against that backdrop the following occurred:

(ii) In mid-January 2018, Ms K Hays stated at a capability review meeting, that due to her absence levels the claimant would be put onto a capability

management process with a target of zero absences. The claimant states that at the time she was diagnosed with the impairments of IBS and Post Natal Depression.

(iii) In mid-January 2018 the claimant was set a target of having zero absences for 2 months.

(iv) In January 2018 the claimant was told that she was no longer allowed to take unpaid leave instead of recording days off as sickness absences.

(v) In February 2018 the claimant was not able to recover from a car accident because she felt unable to take time off due to the zero absence sickness absence target.

(vi) The claimant met her zero absence target in that 2 months period. The claimant asserts that she was told that the respondent would 'wipe the slate clean' regarding her absence levels. However in May 2018 the claimant suffered her first hemiplegic migraine and took sick leave. The respondent initiated sickness absence capability hearing which the claimant asserts was contrary to what she had been promised.

(vii) In May/June 2018 The decision to subject the claimant to an absence capability hearing occurred before the respondent obtained an Occupational Health report.

(viii) In May/June 2018 the respondent failed to apply an extended 'trigger point' to their sickness absence policy despite this being recommended by the Occupational Health report.

(ix) In May/June the respondent failed to update the claimant in a timely manner on whether the sickness absence was going to proceed any further.

(x) Between February and July 2018, the claimant felt she had to attend work despite suffering IBS flare ups because she was unaware as to whether or not the sickness capability process was being pursued by the respondent.

(xi) Between February and September 2018 the claimant was not allowed to work at home during her IBS flare ups.

(xii) On 23 May 2018 and subsequently, the claimant was off sick with her Hemiplegic migraine. During her absence her work was not delegated to colleagues.

(xiii) When the claimant returned to work after this absence she tried to catch up on the work herself by working outside normal hours but was threatened with disciplinary action.

(xiv) Kelly Henry asked the claimant inappropriate questions about her health on 19 September 2018.

(xv) From November 2012 the claimant was diagnosed with post-natal depression. From then on she asserts that she was subjected to continuous sickness guidance processes.

Failure to make reasonable adjustments

19.

(i) Between September 2018 and her dismissal the claimant was not allowed to work from home during her IBS flare ups.

(ii) February 2018 until dismissal - The claimant was not allowed to use her annual leave to take time off to care for her sick daughter in 2018. The refusal for her to use her annual leave coincided with the capability management process so this made her situation very difficult.

(iii) The claimant was not allowed to work from a difference office building, namely Curlew House between May 2018 and her dismissal. This would have alleviated her hemiplegic migraines.

Direct Sex Discrimination

20. In 2016 the claimant sadly suffered a miscarriage. On her return to work, about 8-10 weeks after her miscarriage, the claimant was put under sickness absence guidance and had a difficult meeting with her line manager where her line manager made inappropriate comments about lots of people losing babies. The meeting was so difficult that HR had to intervene and stop the meeting.

Unlawful deduction from wages claim

21. From May 2018 the claimant was informed that she must not take annual leave instead of sickness absence. Subsequently, the respondent deducted from her wages, any leave that she had taken as holiday instead of sickness absence even in respect of leave that she had taken before the ban was imposed.

Conclusions

22. At this preliminary hearing I had to determine the following:

(i) Whether the tribunal has jurisdiction to hear the Claimant's unfair dismissal claim based on an effective date of termination of 12 March 2019
(ii) Whether the claimant is disabled for the purposes of bringing a disability discrimination claim
(iii) Whether the claimant's disability and sex discrimination claims are out of time and if so whether it would be just and equitable to extend time; and
(iv) Whether any or all of the claimant's claims ought to be struck out because they have no prospects of success or, in the alternative whether a deposit order ought to be imposed because they have little prospects of success.

Unfair Dismissal

23. At the outset of the hearing I determined that the tribunal did not have jurisdiction to hear the claimant's unfair dismissal claim as the claimant's claim was issued both before she was given notice of her dismissal and her last date of termination.

24. The claimant was given notice of dismissal on or around 17 December 2018 with an effective date of termination of 12 February 2019. The claimant's claim was issued on 7 November 2018.

25. To bring a claim under s94 Employment Rights Act 1996 the claimant must have been dismissed. S111(3) ERA allows;
"Where a dismissal is with notice, an [employment tribunal] shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination".

Where a claimant has issued proceedings before being given notice the claim is premature and cannot be heard (Throsby v Imperial College of Science and Technology [1977] IRLR 337 EAT.

26. It was conceded by the claimant that she had issued her proceedings before she was given notice of dismissal. She said that she thought it was about to happen and so had put the claim in. Since dismissal she has not put a second claim in. I therefore had no option but to strike out the unfair dismissal claim as the tribunal does not have jurisdiction to hear this claim.

Was the claimant disabled at the relevant time?

27. Following evidence provided by the claimant, the respondent accepted that the claimant was disabled for the purposes of the Equality Act 2010 with regard to the impairment of Post Natal Depression. The respondent conceded that the condition of Hemiplegic Migraines could amount to a disability but that as the claimant was only diagnosed in May 2018 there was no indication that it was likely to be long term. They dispute that the condition of IBS had a significant impact on day to day activities as the claimant had failed to provide evidence that it had caused her to be absent from work prior to July 2018 thus indicating that it may not have had a significant impact on her ability to carry out day to day activities prior to this date. There also seemed to be a question mark over whether she had suffered from this condition prior to that date in any event.

28. For the sake of completeness, I record here that I find that the condition of Post Natal depression does amount to an impairment that has a significant adverse effect on the claimant's ability to carry out day to day activities and that the claimant is disabled for the purposes of the Equality Act 2010.

29. The claimant was diagnosed with post-natal depression in 2012 and has had it ever since. It can have the effect of preventing the claimant from being able to leave the house, carry out basic self-care such as washing and getting out of bed. She described extreme heightened levels of anxiety and has suffered anxiety attacks which stop her driving. She has had suicidal thoughts on particularly bad days. I accept all of the claimant's evidence in this regard and conclude that the impairment is long term in that it had lasted more than a year at the relevant time. The impact that the claimant describes amount to a more than minimal adverse effect on her ability to carry out day to day activities. She takes citalopram to control it and has done for some time. I therefore conclude that by reason of the post-natal depression she is disabled for the purposes of the Equality Act 2010.

30. The claimant was diagnosed with the condition of Hemiplegic Migraines in May 2018 and continues to experience them today. The claimant states that it is a lifelong condition. The claimant states that she experiences such migraines every two to three months with 'normal' migraines occurring once or twice a week. If the hemiplegic migraines develop into a full 'episode', then the symptoms mimic those of a one-sided stroke and the claimant is effectively paralysed down one side and cannot do anything, including move the affected side, for 2 to 3 days until it subsides. The claimant takes medication at the point that they commence in order to control the severity of the episodes.

31. I must assess whether, at the relevant time, (from May 2018 until her dismissal) the condition was likely to last a year or more. In *SCA Packaging Ltd v Boyle [2009] UKHL 37*, the House of Lords upheld the decision of the Northern Ireland Court of Appeal that "likely" in the context of the DDA 1995 meant that something could well happen. The *EqA 2010 Guidance* states " Likely should be interpreted as meaning that it could well happen (paragraph C3).

32. The likelihood must be assessed at the tie of the discrimination as set out in Latchman v Reed Business Information [2002] ICR 1453, in which the EAT said that:

    "the likelihood falls to be judged as it currently was, or would have seemed to have been, at the point when the discriminatory behaviour occurred… it is not what has actually later occurred but what could earlier have been expected to occur which is to be judged."

33. I understand that the burden of proof is on the claimant to prove her disability. I consider that the condition of Hemiplegic migraines was likely to last a year or more at the relevant time because it is a life long condition and therefore lasts from the point of diagnosis. I accept the claimant's evdiecne to the tribunal that as far as she is aware it is a lifelong condition. In the medical report at pgs 90-91 by the claimant's GP, dated 28 June 2018, the GP states as follows:

    "Hemiplegic Migraines cause stroke paralysis and are a serious side affect to Zoe's head injury caused by her Road Traffic accident in February 2018. Zoe is prescribed sumatriptan and propranolol to control the severance of this debilitating condition. Work place adjustments are quire when necessary. This diagnosis is a disability under the equality act."

    Whilst the GP does not specifically address how long the condition is likely to last in this letter, I believe it is more likely than not that in reaching her conclusion on this matter, the doctor took into account whether the condition was likely to last a year.

34. The opinion that this is a long term condition is also supported by the OH report at page 94, dated 2 July 2018 which states that:
    "Ms Peveller's……hemiplegic migraine….[and other conditions] are longstanding."

35. I therefore conclude that the claimant is disabled by reason of hemiplegic migraines as they were likely to have a long-term effect at the relevant time (from May 2018 onwards). The effect is substantial as they have a more than minimal adverse affect on her ability to carry out day to day activities namely moving and doing any basic activities. This occurs on a relatively regular basis.

36. The respondent disputes that the claimant was disabled by reason of her IBS as they submitted that there was no evidence provided that demonstrated that it was a long term or likely to be a long term condition at the relevant time. They said that the first time there is any evidence of the claimant requiring time off because of the IBS was July 2017. The claimant described that she had suffered IBS from around the age of 19 and that although she could control it and had had to have relatively little time off work because of it prior to July

2017, it was a serious condition and it had a significant negative impact on the claimant's ability to carry out day to day activities. She said that it could cause incontinence if she did not have easy access to a toilet. She experienced frequent urgency to go the toilet and would sometimes not be able to make it in time. Further she stated that she suffered significant cramps and pain as a result of the condition. The respondent did not dispute this but stated that there was no evidence that it had lasted or was likely to last a year at the relevant time.

37. I find that it was long term at the relevant time. The medical evidence provided by the claimant, whilst giving no specific dates, did reflect that the condition was a long standing one. For example:

    (i) Pg 85, Self-certification form dated 26 April 2018 confirms reason for absence was kidney/IBS flare
    (ii) Pg 91 Dr Pilai's letter dated 28 June 2018 states that the claimant has a blue badge because of her IBS. Whilst I do not rely upon the Blue badge as in indication of disability in terms of the definition, it supports the claimant's assertion that it was long term as it is difficult to obtain a Blue badge quickly for such conditions.
    (iii) OH report dated 2 July 2018 (pg94) states at paragraph 2 that "Ms Peveller's …… IBS [and other conditions] are longstanding and may potentially impact upon her day to day activities.

38. This coupled with the claimant's evidence that she had experienced this condition for many years, which I found plausible, leads me to conclude that it was long term at the relevant time.
39. I also conclude that the IBS condition had a significant adverse impact on the claimant's ability to carry out day to day activities given that it clearly regularly affects her continence and causes her significant pain and discomfort on a regular basis.

<u>Are the claimant's claims for disability out of time?</u>

40. The claimant brought her claim on 7 November 2018. The ACAS Early Conciliation process lasted 15 days (between 29 August and 13 September). Therefore, anything that occurred on or before 24 July 2018 is potentially out of time.

41. The claimant makes allegations of discrimination stretching between 2016 and her dismissal.

42. The respondent only applied for the allegation regarding the sickness absence process which stretches from November 2012 until May 2018 as set out at paragraph 18 (xiv) above to be ruled out of time. Their first point was that the entirety of the claim was out of time per se because the process was only being operated until May 2018. Further they state that there is a natural break in the operation of the process because there is gap between sickness absence review meetings between 28 October 2013 and 9 January 2015. They stated that it was not just and equitable to extend time because no real reason had been provided by the claimant as to why she did not bring a claim earlier.

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

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

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

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

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

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

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

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

46. I accept that there was a break in the operation of the sickness absence process between 28 October 2013 and 9 January 2015. This is over a year where the sickness absence process was not enacted in relation to the claimant and she was not monitored at all. I therefore conclude that any operation of the policy prior to 9 January 2015 is out of time as the claimant cannot establish that there was a series of events amounting to an ongoing act extending over a period of time when there is such a significant gap. I do not consider that it is just and equitable to extend time and allow these historic claims in. Those events occurred many years before the claimant's dismissal and did not form part of the reason behind her dismissal or the deterioration in her relationship with the respondent. Further, the claimant has not provided any evidence as to why, in the intervening 3 years, she did not seek to raise any such claim in the tribunal.

47. However, for the remainder of the period I accept that the claimant could potentially establish a continuing act regarding the operation of the respondent's sickness absence monitoring process. Although that process may have ceased in May 2018 I find that it is just and equitable to extend time to allow this series of events as a claim because the claimant was very unwell from May 2018 until the submission of her claim, she was raising her concerns with her employer during the period, the facts that are required to determine whether the operation of the process finished in May 2018 as incomplete before me today, the delay is not excessive and I do not consider that the respondent is adversely prejudiced by the allowance of this claim being allowed to continue. The facts of the operation of the sickness absence monitoring policy will have to be considered by the tribunal when assessing the remainder of the claimant's claims in any event and so the respondent is not going to be subjected to significant additional disclosure or witness evidence requirements to address this claim. The claimant on the other hand would be severely prejudiced as the operation of what she considers to be an onerous and demanding sickness absence monitoring process underpins her discrimination allegations against the respondent generally.

48. I therefore conclude that it is just and equitable to extend time and allow the claimant's claim with regard to the operation of the sickness absence process to be considered by the tribunal in relation to the period of 7 January 2015 until her dismissal.

Sex discrimination

49. The claimant's claim for sex discrimination is based on one discrete incident which occurred in 2016 after she returned to work following a miscarriage. It is therefore clearly outside the relevant time limit. I have therefore considered whether it was just and equitable to extend time to allow this claim in.

50. The claimant did not put forward any explanation as to why she had not brought a claim in relation to this incident prior to November 2018 save that she had been unwell. I do not dispute that the claimant's health has been very challenging for her in the intervening period, however I do not consider that this is sufficient to justify such a significant delay. I find that, weighing up the prejudice between the parties, the respondent would be significantly prejudiced by allowing such a historic one off incident to be considered when there have been no intervening relevant incidents. Memories can fade and I find it would be difficult for evidence relating to this incident to be provided. I therefore do not exercise my discretion to allow the claim in as I do not think it would be just and equitable to do so.

51. I therefore strike out this claim for being out of time. I have not gone on to consider the respondent's subsequent application for the matter to be struck out or subjected to a deposit order because it had little or no reasonable prospects of success because I have found it to be out of time.

Respondent's application for strike out or impose a deposit order

52. The respondent only made an application for strike out or deposit order in respect of the following claims:
    (i) Failure to make reasonable adjustments in not being allowed to work from Curlew House;
    (ii) All direct disability discrimination claims

53. The respondent's submissions can be summarised as follows:

(i) The respondent stated that this claim had never been advanced before. It had never been suggested in any of the Occupational Health reports and the claimant had never raised it before and therefore lacked plausibility and should either be struck out as having no reasonable prospects of success or subjected to a deposit order as having little reasonable prospects of success.
(ii) The respondent stated that the direct disability discrimination claims ought to be struck out or subject to a deposit order because:
    (a) The case of Malcolm established that her comparator for these claims would have to be someone in the same circumstances as the claimant but without a disability.
    (b) The evidence showed that the claimant had been treated more favourably than her colleagues, not less favourably; and
    (c) The reasonable adjustments that had been made for the claimant made it less likely that the respondent had directly discriminated against her.

The law to be applied

"Strike Out"

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

    "(1) At any stage of the proceedings, either on its own initiative or on the application of the party, a Tribunal may strike out all or part of the claim or response on any of the following grounds –
        (a) that it is scandalous or vexatious or has no reasonable prospect of success……"

55. The power to strike out a claim under Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755, at para 30.

56. It will generally not be appropriate to strike out a claim where the central facts necessary to prove the case are in dispute. It is not the function of a tribunal such an application to conduct a mini trial. The proper approach is to take the Claimant's case at its highest as it appears from her ET1 unless there are exceptional circumstances *North Glamorgan NHS Trust v Ezsias* [2007] IRLR 603. Such exceptional circumstances could include the fact that the Claimant's case is contradicted by undisputed contemporaneous documents or some other means of demonstrating that 'it is instantly demonstrable that the central facts in the claim are untrue' *Tayside*.

57. In discrimination claims where findings of fact can depend upon whether or not it is appropriate to draw inferences from primary facts particular care needs to be taken before striking out a claim *Anyanwu v South Bank Students' Union* [2001] IRLR 305, HL.

58. The statements of principle derived from the cases referred to above do not in any way fetter the discretion of a tribunal to strike out a case where it is appropriate to do so *Jaffrey v Department of the Environment, Transport and the Regions* [2002] IRLR 688 at para 41.

59. In *Chandhok & Anor v Tirkey* UKEAT/0190/14/KN Mr Justice Langstaff made the following comments:

"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):

"…only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike-out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."

Deposit Orders

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

"39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out.

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

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

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

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

otherwise the deposit shall be refunded.

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

61. The legal principles applicable to making a deposit order are the subject of the case of *Hemdan v Ishmail & Anor* (Practice and Procedure: Imposition of Deposit) [2016] UKEAT 0021 and I have had due regard to the President's conclusions in that matter.

62. The threshold for making a deposit order is less than that for striking out a claim and in considering whether or not to make such an order a tribunal is entitled to have regard to the likelihood of a party making out any factual contention and reach a provisional view of the credibility of any assertion see *Van Rensburg v The Royal Borough of Kingston-Upon-Thames and others* UKEAT/0096/07.

63. I do not strike out the claimant's claims regarding the reasonable adjustment or direct disability discrimination. I find that without hearing the evidence that apply to these claims, I cannot make the assessment that respondent's counsel does as to the factual basis or credibility of the claimant's claims or whether she can establish that she has been treated less favourably than a comparator. The fact that the respondent made some adjustments does not preclude a claim for direct discrimination; it is simply an argument that the respondent may advance as showing that they treated the claimant sympathetically. Inevitably the claimant disputes this. The central facts of the case are in dispute and I am not in a position to conduct a mini trial that would establish whether these claims had no reasonable prospects of success. To strike out a claim is a draconian measure and this is not one of the rare circumstances in which it ought to be exercised as the facts central to the claim are in dispute.

64. Further I find that the same fundamental dispute of facts contributes to my conclusion not to impose a deposit order in relation to these claims. Whilst I understand that the respondent puts forwards difficulties with regard to the evidential burden on the claimant particularly in respect of her direct discrimination claims, I am not in a position to state that those difficulties show that she has little reasonable prospects of success. The facts underpinning claims which extend over a significant period of time are difficult to assess in a summary hearing such as before me today. I cannot say that the claimant has little reasonable prospects of success despite the evidential concerns identified by the respondent as I have not heard the evidence.

65. The same conclusion applies to the reasonable adjustment claims. The respondent asserts that they have not been properly pleaded and that they therefore lack credibility. The claimant is a litigant in person and has not had the benefit of legal advice so failure to properly plead something is not necessarily an indication of lack of plausibility. Any arguments about the plausibility or otherwise of the claimant will need to be assessed by reference to the full evidence in the claim at a full hearing.

66. I therefore do not uphold the respondent's application for these claims to be strike out or subject to a deposit order.

67. At the hearing I made orders with the agreement of both parties in respect of preparation for any full hearing. These orders and the List of Issues which will now have to be decided by the tribunal at the full merits hearing are set out in a separate document.

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Employment Judge Webster

23 November 2019