EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L Kelly	**v**	**Symbolic Solutions Ltd**

Heard at: London Central
On: 24 – 26 February 2020

Before: Employment Judge Hodgson
Ms C McLellan
Mr D Shaw

Representation

For the Claimant: Mr L O'Callaghan, lay representative
For the Respondent: Ms A Rokad, counsel

DECISION

1. **The application to dismiss on the ground of no reasonable prospect claim is refused.**
2. **The claimant shall pay a deposit of £1,000. The order will be set out in a separate document.**

REASONS

Introduction

1. This case was listed for a full merits hearing with a time estimate of three days. The original claim form was served on 28 May 2019. It alleged disability discrimination and failure to pay wages. It failed to set out the

claimant's disability. It stated, "I believe the reason I was dismissed was due to my disability."

2. At a case management discussion on 1 October 2019, Employment Judge Joffe identified claims of discrimination arising in consequence of disability (section 15 Equality Act 2010) and unlawful deduction from wages. The claimant was ordered to provide further information concerning her claims.

3. On 15 October 2019, the claimant's representative, Mr O'Callaghan, forwarded a seven-page letter which purported to be in compliance with the judge's order. Employment Judge Joffe considered that letter and noted it went significantly beyond the scope of her order. Nevertheless, she treated it as an application to amend, which she then allowed. She revised her own list of issues and included a claim of harassment. The wages claim was dismissed on withdrawal. The timetable was not reviewed, in the light of the amendment.

The hearing

4. At the commencement of the hearing, it was necessary to consider the nature of the amendment and to agree with the parties whether all claims had been sufficiently identified. It was agreed that there were claims of discrimination arising from disability (section 15 Equality Act 2010) and harassment related to disability (section 26 Equality Act 2010). Mr O'Callaghan agreed that there were no other claims. We agreed that there were four allegations put as allegations of discrimination arising from disability and further, or in the alternative, claims of harassment. The allegations are as follows:
    a. allegation 1: by turning the meeting of 15 February from an appraisal into a probation meeting;
    b. allegation 2: by suspending the claimant on 27 February 2019;
    c. allegation 3: by dismissing the claimant on 8 March 2019; and
    d. allegation 4: by letter of 8 April 2019, rejecting the claimant's appeal.

5. The claimant alleged that she was disabled by reason of four impairments: the first impairment is a hereditary condition (hereditary multiple exostoses) which causes the development of multiple, cartilage covered tumours on the external surfaces of bones; the second impairment is said to be depression; the third anxiety; and the fourth chronic headaches.

6. The matters arising in consequence of disability were said to be multiple absences from work caused by disability, the perception that there would be continuing multiple absences from work caused by disability, and actual deficiency in her work, to include the making of mistakes.

7. The respondent denied any action occurred because of something arising in consequence of disability. It did not rely on a defence that any treatment was a proportionate means of achieving a legitimate aim. As regards the

suspension, dismissal, and refusal of appeal, the respondent stated that the claimant had, without authority, prepared, backdated, and electronically signed an offer letter. In addition, the claimant had, without authority, prepared her own contract of employment, which she had forwarded to a third party, in order to secure a lease on residential premises.

8. We read the statements. We considered the timetable. Each side wanted at least one day to cross examine the other party's witnesses. The witness evidence was extensive. There were a significant number of documents to consider. It was clear that the case could not be completed within the three days allowed.

9. It appeared, on reading the statements, that there were such evidential difficulties it was at least arguable there was no reasonable prospect of the claims succeeding. We raised this matter with the parties and the respondent indicated that it had previously wished to bring an application to strike out on the ground there was no reasonable prospect of success, and in the alternative to seek a deposit order. We agreed to hear the respondent's application to strike out. The matter was adjourned until 10:00 on day 2.

10. We ordered the respondent to serve its application and skeleton argument. We ordered the claimant to provide electronic copies of two emails that were directly relevant to the way in which the contract was forwarded to the third party, as the copies in the bundle were illegible.

11. We should note that during the first day we raised a potential conflict of interest with the parties. Mr Shaw is a newly appointed member. During his application, one of the panel members on his interview was Mr O'Callaghan, the claimant's representative. Mr O'Callaghan confirmed that he did not remember Mr Shaw. Both parties confirmed that in their view this did not give rise to a conflict of interest. Mr Shaw did not know Mr O'Callaghan personally. The interview had been part of a professional process of appointment and their interaction was limited to the interview process. Mr Shaw has now been appointed and the interview process closed; therefore, there was no continuing relationship. Had Mr O'Callaghan been the claimant rather than the representative, we thought there was at least some possibility of preconceptions having been formed as a result of the interview process. However, any such possibility could only be of concern if Mr O'Callaghan was giving evidence or was a party. The fact there had been interaction as part of an interview process did not suggest any conflict of interest and the tribunal did not consider that any reasonable observer would consider there to be any apparent bias.

Background

12. We have heard no evidence and we can make no findings of fact on contested matters; we indicate where relevant matters have been agreed.

There is significant common ground and it is appropriate that we should set out the relevant background before considering whether any claim should be struck out or in the alternative whether a deposit order should be made.

13. Mr Nick Tocher is a director of the respondent. The claimant alleges that she had worked with him previously from February 2014 to July 2015. She did some work for him in 2017; the claimant was a student at the time. On or around 6 July 2018, there was a meeting which led to the claimant being employed in the full-time position of junior commercial manager. It is agreed that she was neither given an offer letter of employment nor a written contract.

14. It is agreed Ms Natalie Boswood was recruited in September 2018. The claimant was to be her line manager. On 11 September 2018, Mr Tocher sent the claimant a template statement of terms of employment and an offer letter from another employer, with the intention of the claimant adapting it so an offer letter and contract could be sent to Ms Boswood (R1/77)[1]. There is dispute as to whether the template would also be used for the claimant.

15. The claimant prepared a contract for Ms Boswood; the completed document was forwarded to Mr Tocher, and this was completed on 21 September 2018 (R1/143). That contract referred to a probation period of three months. No contract was prepared for the claimant at that time. It is agreed that there is no written document which would support any contention that the claimant asked for a contract, or sought permission to use the contract, for herself, at that time.

16. For the reasons we will come to, it appears that the claimant, on or around 4 October 2019, prepared her own contract, and a retrospective offer letter, in order to forward supporting documentation to Let Alliance for the purposes of her residential lease application.

17. On 15 February 2019, there was a meeting. The claimant was invited by email with an attached letter. The email (R1/157) refers to an appraisal. The letter itself, dated 14 February 2019, refers to a probationary review. The meeting went ahead on 15 February 2019. The claimant, without authority, recorded the meeting and we have seen two transcripts of that meeting, one of which we understand has been professionally prepared (R1/219).

18. At the commencement of the meeting, there was reference to an appraisal which occurred three months earlier. It is clear from the transcript that the following happened. Mr Tocher referred to the meeting as being informal. He noted the claimant had been there for 6 months and referred to it as "the kind of the end of the probation period." The claimant stated, "My contract had said 3 months probationary." Mr Tocher said, "Did it? Right." The claimant was asked by the third member of the meeting, Ms Gallagher,

[1] This is a reference to the source documentation contained in the bundle.

if she had the contract and the claimant said “no.” Ms Gallagher asked what the contract said. The claimant stated it said three months’ probationary. Mr Tocher said, "Three oh right, okay.” He then went on to say, "That's all right, that's my fault." As the conversation developed the claimant said, " Yeah, because I sent it over to you for approval because I needed to provide it to the rent… with my references."

19. We have considered this transcript carefully. The following appears to be the position. It is clear that Mr Tocher was non-committal. He went on to say that the format of the meeting did not change. There is no response from Mr Tocher that we can read as an acknowledgement of the existence of any written contract. He did not challenge the claimant nor did he indicate any recollection that a contract had been sent to him, or had been discussed at any time. The response of Mr Tocher and Ms Gallagher is entirely consistent with neither knowing of the existence of any written contract. It also appears implicit that no such written contract had been placed on the claimant's file.

20. We should note that the contract prepared by the claimant for Ms Boswood does contain a clause with a three-month probation. The contract prepared for herself does not. On her own case she must have removed it, as she alleges she adapted Ms Boswood’s contract. There was reference to a three-month probation period in the offer letter, which the claimant prepared for herself on around 4 October 2018, but dated retrospectively.

21. The meeting on 15 February was lengthy and the transcript runs to just shy of one hundred pages.

22. The transcript reveals there was discussion about the claimant's physical disability, but there appears to be no discussion about any mental health issues or headaches. The claimant acknowledged that she had been given a health questionnaire. She stated, "I filled in the form and never gave it back to you though. I think he knew from when my mum was ill as well that we had the same thing” (R1/286). She went on to say, "I suppose I've always been slightly worried about bringing it up because as soon as my mum brought it up they used it to get rid of her." It appears there was then a conversation in which Mr Tocher confirmed that that obviously wouldn't be the case, as the law does not allow it. He indicated that all they would wish to do would be to support her so she could do her job. It is common ground that the remainder of the interview was positive. There appears to be no evidence that there were any concerns about absences, or the claimant's competence.

23. It is the respondent's case that Mr Tocher checked the position in relation to the contract, following the meeting. He found she had not been issued with a contract. He checked his emails and found two blank emails from 4 October 2018 which attached the retrospective offer letter and contract for the claimant.

24. This led to a meeting on 27 February 2019. The claimant stated she required the documents for her lease on a residential property. Mr Tocher maintained his position that he had not authorised the production of either the letter or the contract.

25. It is the respondent's case that Mr Tocher questioned the claimant's integrity. On 4 March 2019, he confirmed the allegation by letter. In a second letter of 4 March, he invited the claimant to a meeting to discuss her alleged unauthorised use of his signature. This led to further correspondence and a meeting on 6 March 2019.

26. The claimant was accompanied by her current representative, Mr O'Callaghan. The claimant set out her case in a letter of 6 March 2019. (R1/340). Her letter does not assert that she was authorised to prepare her own contract or offer letter during September. It states that between 2 and 4 October, in order to respond to Let Alliance for the purpose of obtaining a lease, she prepared her contract. She appears to say nothing about the letter. She alleged the contract had been sent to Mr Tocher and although he had not replied by email he had given verbal confirmation it was okay. She stated the contract of employment was sent to Let Alliance on 5 October. She alleged there was discussion on 7 January 2019 with Mr Tocher and Mr Dan Rudland where she made reference to the contract and offer letter referring to 37.5 and not 40 hours. She stated that it was she who brought up the contract on 15 February.

27. At the same meeting, the claimant had a different version of the letter of 6 March 2019 which she used her own purposes. This included an additional paragraph which stated "Sent a link to portal to submit the proof of employment, here instructed to add the contract. This is just a formality, unlucky I couldn't use the payslips so was an irritation that I had to send the contract but this gave me the perfect trigger to formalise the contract. No question I would lose the flat as I was confident that I was employed." That paragraph was not included in the letter given to the respondent.

28. It is the respondent's case that it was concluded the claimant had drafted and backdated an offer letter and inserted Mr Tocher's signature and then sent both to a third party without authority.[2] The falsification of company documents was considered to be gross misconduct. She was dismissed.

29. The dismissal was appealed. The appeal was undertaken by an independent consultant. As part of that appeal, Mr Tocher discovered an email which he alleges he had not seen before (R1/373A). This is an email sent to his inbox by Let Alliance. It appears to have a link which requested an employment reference. When he attempted to open it, the link had been closed.

[2] It is the claimant's case the letter was not sent. The respondent does not know if it was sent, but nothing turns on this point.

The key areas of dispute

30. The fact of disability is disputed.

31. Whether there were matters arising in consequence of disability is disputed. It is the claimant's case that she has four impairments (see para. 5 above) and that those impairments have caused two main effects: first, numerous actual absences; and second, that the quality of her work was impaired.

32. The causal link between disability (or its consequences) and the allegations of detrimental treatment is disputed.

33. Whether Mr Tocher knew of and consented to the preparation of the retrospective offer letter and the claimant's contract is disputed.

34. It follows that there are key disputed facts which revolve around what where the discussions, if any, about the preparation of the claimant's contract of employment; what authority was sought by the claimant in relation to the preparation of the contract and letter; when and how authority was sought; what authority was given and how; what authority was given for forwarding documents to Let Alliance; and how Let Alliance received a response from the employer, if at all.

35. The claimant accepts that she prepared a false retrospective offer letter which contained Mr Tocher's signature. She accepts she produced the contract. She accepts that only she corresponded with Let Alliance. She does not allege Mr Tocher ever responded to the email of 4 October 2018 from Let Alliance. She accepts that the contract was provided to Let Alliance from her, and no one else.

36. It is her case that she had authority for her actions. Her evidence is unclear as to what authority was given, and how, for her communications with Let Alliance. It is her case that Mr Tocher is now lying about giving her consent. She says consent was given orally and that she acted in accordance with his oral consent at all times. It is her case that, retrospectively, he has denied giving consent in order to hide his true motivation for suspending and dismissing the claimant. She alleges his true motivation revolved around the matters arising in consequence of disability and that he set about producing a smokescreen in order to obscure his true reasoning. She has referred to this as a sham.

The law

37. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response. The power to strike out a claim is set out in rule 37 Employment Tribunal Rules of Procedure 2013.

> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
>
> **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**
>
> **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
>
> **(d) that it has not been actively pursued;**
>
> **…**

38. Before striking out in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

39. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute (see, e.g., **North Glamorgan NHS Trust v Ezsias** [2007] EWCA Civ 330). Only in an exceptional case will it be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence.

40. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In **Anyanwu v South Bank Students' Union** [2001] IRLR 305, HL, a race discrimination case, Lord Steyn stated (at para 24):

> **For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.**

41. This is not a fetter on the tribunal's discretion, but the power to strike out in discrimination cases should be exercised with great caution.

42. A tribunal should not take the view that **Anyanwu** creates some form of public policy that prevents claims being struck out. The test is whether there is no reasonable prospect of success, as is made clear by Lord Hope at paragraph 39 of **Anyanwu** itself.

> **Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [sic] taken up by having to hear evidence in cases that are bound to fail.**

43. The Court of Appeal in **Ahir v British Airways Ltd** [2017] EWCA Civ 1392 made it clear there is no general proposition that where there is a potential dispute on facts a claim must proceed. It is necessary to look carefully at the facts and to consider the nature of the dispute.

44. Underhill LJ put it as follows:

> **16 … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success.'**

45. At paragraph 19 he went on to say:

> **… in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.**

And at paragraph 24

> **… As I already said, in a case of this kind, where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so...**

46. It can be seen from **Ahir** that it is not enough for a claimant to assert there is a dispute of facts, and that, therefore, the tribunal is compelled to find there is a prospect of success. First, the claim must be clear. Second, the facts alleged and relied on should be clear. Third, resolution of those facts should be capable of demonstrating discrimination whether directly or by way of inference. Fourth, the respondent's explanation should be considered. Fifth, if the explanation is disputed, there should be some plausible explanation for this from the claimant.

47. There is nothing in **Ahir** which conflicts with the general proposition that the claimant's case should be taken at its highest on the pleadings see, e.g., **Ukegheson v London Borough of Haringey** 2015 ICR 1285.

48. **Ahir** is authority for the proposition that the tribunal should treat with caution references to "exceptional" circumstances (see paragraphs 13, 14 and 16 of **Ahir**). A tribunal should be cautious not to be distracted by the application of adjectives that are a gloss on the plain wording of the rules.

49. The respondent referred to the case of **Silape v Cambridge University Hospitals NHS Foundation Trust** UK EAT 285/16. At paragraph 21, Mr Justice Choudhury referred to the EAT decision of **Mechkarov v Citibank NA** 2016 ICR 1121. Mitting J suggested a summary of the approach at paragraph 14. Neither case referred to in **Ahir,** which is a later Court of Appeal authority. The tribunal notes that Mitting J, at paragraph 14, suggests it may not be appropriate to hear evidence about key disputed facts, albeit such an approach may have been endorsed previously in **Eastman v Tesco Stores Ltd** 5 October 2012.

> **14. On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts. I would treat the approval of the course taken by an Employment Judge in Eastman v Tesco Stores Ltd [2012] UKEAT/0143/12 by HHJ Peter Clark, sitting in this Tribunal, of hearing oral evidence on critical disputed questions of fact with reserve, because Tayside, which was decided before Eastman, was not cited to him or by him in his Judgment. In any event, it cannot determine the approach that the Employment Tribunal should take in a case such as this, in which an analysis of contemporaneous documents is required to permit a secure conclusion to be reached.**

50. Although Underhill LJ did not consider it necessary to refer to or review any EAT decision,[3] we note **Mechkarov v Citibank NA** 2016 ICR 1121 provides a useful summary of the perceived cumulative effect of the case law. It is not clear that **Ahir** disturbs this, albeit there is an argument that paragraph 16 of **Ahir** is not wholly supportive of sub point (4) of paragraph 14 of **Mechkarov** (see above).[4]

51. A tribunal may order a deposit. Rule 39 Employment Tribunal Rules of Procedure 2013 provides –

> **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.**

[3] See *Ahir* para. 11.

[4] The words "if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established" do not appear to require undisputed contradictory contemporaneous documents.

(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.

Conclusions

52. We should consider the key areas of dispute. There are three broad areas we need to consider: what was the respondent's knowledge of the claimant's impairments; what were the consequences of any impairments; and to what extent the respondent gave consent to the claimant for her actions.

53. It is the claimant's contention that Mr Tocher knew of her disabilities. There appears to be no contemporaneous written documentation demonstrating that he knew of any mental health issues. There is no written evidence that Mr Tocher knew of the claimant's physical impairment until she referred to the physical disability on 15 February 2020.

54. It is agreed that the claimant was provided with a health questionnaire at the start of her employment. Her amended claim states at 2.1.3 "The respondent had given the claimant a health questionnaire to fill out in the first few weeks of her employment. The claimant completed the form with a formal diagnosis and when she tried to return it, the respondent dismissed it." This is her pleaded case and it is directly contradicted by the transcript of the meeting from 15 February 2019 where the claimant stated, in terms, that she filled in the form but never returned it (R1/286.) The claimant stated to us that she knew the form was in her top drawer at work and had never been given to the respondent. Mr O'Callaghan offered an explanation for the clear contradiction to the effect the claimant was confused, and her confusion was resolved when disclosure took place.

However, it would appear that the statement on 15 February 2019, and the amendment to her claim form, occurred prior to disclosure. It follows there appears to be no explanation, or rational basis, for why the disclosure of documents during the course of these proceeding made any difference. The explanation lacks rationality. There is a false an unsustainable allegation in the claim form and no adequate explanation for why it was made.

55. The transcript of the meeting from 15 February 2019 does not support an assertion that the respondent knew about the mental health condition. It is consistent with the claimant having not given any detail about her physical condition. The contemporaneous written evidence does not support a finding that the respondent knew of the claimant's alleged physical disability before 15 February 2019. It does not support an assertion that the respondent knew of any mental health issues.

56. The second broad area we must consider concerns the matters said to arise in consequence of disability. There is limited evidence in support of the alleged matters arising in consequence disability. The claimant relies on numerous absences. As part of her impact statement, she has produced a schedule which indicates she took many days absence through sickness. The dates alleged in her schedule (R1/489) are not supported by the claimant's work diary. Further, the claimant has disclosed a number of text messages where she indicated she would either be absent or late (see for example R1/431), but it is clear that there are not text messages, or emails corresponding to each alleged absence. The contemporaneous documentation would indicate that the claimant may have exaggerated the total number of absences. The claimant accepted that there was at least one discrepancy on her document at page 489.

57. We have been referred to no contemporaneous evidence that the claimant's performance was adversely affected as a result of any disability. The probation meeting on 15 February does not suggest a difficulty with her performance and therefore the available evidence we have appears to run to the contrary.

58. It follows, there is limited evidence in support of the alleged effects relied on. It is of course part of the claimant's case that the respondent perceived that she would take time off work. However, we have been shown no contemporaneous written documentation which would support such a finding.

59. There is serious doubt as to how, if at all, the claimant could point to facts that may establish a causal link between any disability, or its consequences, and any of the allegations of detrimental treatment.

60. The third area we need to consider concerns the issue of consent. If the respondent is able to establish, as a fact, that the claimant did not seek authority to produce the offer letter, insert the signature on the offer letter,

produce her contract, or send it to Let Alliance, it would have a very strong defence.

61. We have reviewed the documentation concerning the suspension, the investigation, the dismissal, and the subsequent appeal. It is clear that the documentation focuses on an investigation concerning the production of, and the use of, the letter and the contract. All of the documentation is consistent with the respondent's account. The claimant acknowledges that if she does not establish that the respondent's position is a sham based on a fundamental lie concerning the consent allegedly given by Mr Tocher, the claims concerning the dismissal are bound to fail. The reason for dismissal would be clear: i.e., the claimant's falsification of documents without authority.

62. Should the dismissal claim fail, it is difficult to see how any of remaining claims could succeed. If there is clear evidence of her falsifying documents without authority, that would appear to be an answer to the allegations concerning suspension, dismissal, and appeal.

63. We should note that the first allegation appears to stand on its own. However, the fundamental assertion that there was a change in the nature of the meeting is not supported by the contemporaneous documentation, as the letter inviting her to the meeting referred to a probationary meeting. Nevertheless, it appears to be part of the claimant's case that the totality of the treatment was part of the same scam. If the tribunal accepts that Mr Tocher had given consent for the production of the contract, it may be appropriate to look carefully at the circumstances surrounding the meeting on 15 February, even though the allegation appears unmeritorious.

64. If the claimant is unsuccessful in establishing the fact that Mr Tocher authorised her to produce the letter and contract, there appears to be no basis whatsoever on which she could establish that any of the allegations were either because of a matter arising in consequence of disability or related to disability.

65. The final point we need to consider is the claimant's allegation that the respondent's explanation is a sham. We should note that the claimant is using sham in the colloquial and not the legal sense.

66. As noted, it is the claimant's case that Mr Tocher is lying when he asserts he did not know that the claimant was producing a retrospective letter of appointment and her own contract, or that she was using them for the purposes of supporting her application for a lease. The general position that emerges from the case law is that we must accept, at its highest, the claimant's case. There is an exception which has been recognised by the case law. Where there is contemporaneous documentation, which is inconsistent with the claimant's allegation of fact, we may look behind her assertion of fact.

67. If we take the claimant's case at its highest, it is arguable we are bound to assume that she will demonstrate Mr Tocher knew of her actions, at least to the point when the contract was prepared, and he approved it. This would, inevitably, undermine the respondent's explanation. It is then at least feasible that the tribunal may, applying the reverse burden of proof, find the alleged detrimental treatment could be because of a matter arising in consequence of disability, or could be related to disability. There is at least an argument that if the respondent's explanation were so undermined, there could be findings of discrimination arising from disability and/or harassment.

68. From the respondent's perspective there is a difficulty. It is difficult for the respondent to point to contemporaneous documentation which would prove a negative. It can point to the absence of documentation. It can point to the consistent documentation demonstrating its explanation.

69. If the claimant could point to some documentation written by the respondent which gives some indication of consent and knowledge, that would clearly undermine the respondent's position and support the claimant's position. However, it is common ground that there is no written document produced by the respondent which supports the claimant's case.

70. There are three emails which are important. On 4 October 2018, the claimant sent two blank emails to Mr Tocher which appeared to attach the draft contract and the retrospective offer letter. Mr Tocher says he never opened them. There is nothing on the emails to indicate that there had been any discussion or any consent. We are told that he gave oral consent, and that the oral consent was given in the open plan office. However, there is no supporting evidence in the form of documentation or any witness to any conversation. The timing of, content of, and nature of, any consent is not set out. This prevents any potential witnesses from being identified. Nevertheless, it is possible that those emails were sent as a result of a conversation. It is also possible that they were opened by Mr Tocher, even though his evidence is that he did not see them until after 15 February 2019.

71. The third relevant email is the email of 4 October from Let Alliance. On the face of it this had a link to be used by the employer to provide information. Mr Tocher says he did not see it. When he did see it in February 2019 and tried to open the link, it was closed. It is unclear when the link was closed, why the link was closed, or on what basis. If it were the claimant's case that Mr Tocher had in fact opened it and responded to the Let Alliance, it would be strong evidence in her favour. However, that is not, and has never been, her case. The claimant accepts that she was the one who returned the contract. She does not suggest that the employer, at any time, gave any confirmation to the Let Alliance. This is strong evidence in support of Mr Tocher's position that he never saw the email or responded to it. The position is made more complex by the fact that the claimant appears to have had some access to his emails.

72. It is unclear whether any further evidence will be obtained, and resolution of this disputed fact concerning consent may well revolve around who is believed. It may be possible for a tribunal, in due course, to decide the matter on the balance of probability. However, issues of credibility may be relevant in this case. We cannot wholly ignore the difficulties with the claimant's account. There are inconsistencies and serious omissions in the claimant's evidence. We should consider some examples.

73. The claimant received the appeal hearing minutes in April 2019. She made a number of additions or comments. The comment she made at R1/364 states categorically that the production of her contract was agreed on 11 September 2019. That contention made in April 2019 is contradicted by her own witness evidence. In her statement she does not suggest there was agreement on 11 September, but she refers to copying Ms Boswood's contract on 4 October 2018. Her evidence, to the extent it gives any detail, suggest that consent was given on 4 October, and not before. That is a serious and damaging discrepancy, as it concerns a key factual dispute.

74. We have serious reservations about the claimant's evidence concerning her interaction with Let Alliance. Her evidence to us is that she responded to one link in one email, but had no other contact. It is clear that there was some difficulty caused by her not having three payslips, and hence the need for a contract. This would suggest that there was some additional communication, but she denies such communication. We have seen the application form completed by the claimant. It is the claimant's case that it contained a section for uploading documents, but the form we have seen has no such reference on it. It is clear that Let Alliance sought information from Mr Tocher via an email and link. There is no suggestion Mr Tocher responded. When he came to the email the link no longer worked. It appears to be the claimant's case that her uploading documents in some manner satisfied Let Alliance, such that it was not necessary to proceed with any information from Mr Tocher. However, this appears to be speculative and if she has any basis for that assertion, it is not set out. Her evidence on this point appears to be incomplete and unconvincing.

75. It follows that the claimant's account, particularly in relation to the giving of consent, has been inconsistent and is unsupported by documentation. Moreover, her account as to how documents were provided to Let Alliance is problematic for the reasons we have set out. This is important because whilst we must take the claimant's account at its height, this involves accepting she will establish the facts relied on, but fundamental facts are missing and the claimant's position is unclear, and at times contradictory.

76. The evidence the claimant has given about the health questionnaire may well lead a tribunal to question her credibility.

77. The claimant asked why she would send the contract and letter to Mr Tocher if she did not have consent. There are a number of possibilities, but we need not speculate. We note the claimant indicated she did have some access to his emails, but the detail of this is unclear. In any event, if

Mr Tocher is believed that he did not open the emails, and did not see the email from Let Alliance, the fact that she sent an email to Mr Tocher which appears to have attached her own contract may not assist, as it is not directly probative.

78. The claimant relies on a discussion in January 2019 where she suggests the existence of a contract was implicit. This appears to be extremely weak evidence and is unlikely to be persuasive.

79. This is an unusual and difficult case. There can be no doubt that the question of consent is a disputed fact which is central to the resolution of these claims. It cannot be said that there is clear contemporaneous documentation which is wholly inconsistent with the claimant's position. This would suggest that the factual dispute should be resolved by reference to all of the evidence and the case should be allowed to proceed.

80. However, the claimant asserts a factual position as a defence to behaviour which may otherwise be seen as a serious breach of her contract, and all that she can point to by way of supporting documentation is her own inconclusive emails. Her pleaded case and evidence is incomplete and inconsistent. It is very difficult to identify what factual case is advanced. Hence it is difficult to say what case should be taken at its highest. One way of resolving this would be to hear evidence on the disputed point. That may be sufficient to resolve the matter. However, that approach has been suggested by neither party and may not be supported by the case law, as noted above.

81. When we stand back and look at the case as a whole, we have the most serious reservations about the claimant's case and the plausibility of her contentions. It appears that the respondent's knowledge of disability was limited. It appears the claimant sought to obscure her physical disability prior to the hearing on 15 February 2019. She never, on the face of the evidence, revealed any mental health difficulties. There is very limited evidence in support of the alleged matters arising in consequence of disability. When disability was raised with the respondent, the reaction appears to have been positive and supportive. The meeting on 15 February was also positive and supportive. There was no suggestion there were any concerns about the claimant's conduct in general. On the claimant's own case, she did falsify her offer letter and prepare her own contract. She has been inconsistent as to when consent was sought or given. If consent was given it was oral and there is no document in support. There is no suggestion that the completed contract was ever given to the employer to be put on her HR file. It appears the evidence she has given in relation to her interaction with Let Alliance may be incomplete and potentially misleading. There are serious discrepancies in the claimant's evidence which may undermine her credibility.

82. The question we must ask is whether there is no reasonable prospect of success. That is a high hurdle. It probably does not assist to say that orders will only be made in exceptional cases. By its nature, strikeout is

exceptional. If we look at the matter as a whole, it may be both possible, and appropriate, to say that there is no reasonable prospect of success. However, in order to reach that conclusion, we have to take a view on the likely finding of fact on the central issue concerning consent. The only documents which potentially support the claimant are the two emails of 4 October attaching the retrospective offer letter and the contract. All the remainder of the evidence runs contrary. The central issue of consent cannot be determined without oral evidence. However, given the strength of evidence on the respondent's side, it is unlikely, in our view, that the factual dispute will be resolved in the claimant's favour.

83. The existing case law is generally interpreted as directing the tribunal to assume the claimant will be able to establish the facts on which she relies, unless there is clear documentary evidence to the contrary.[5] In this case there is no direct evidence to the contrary. It appears the case law assumes that the factual basis of a claim has been set out clearly; however, in practice the position may be complicated. In this case the factual basis is incomplete and internally inconsistent. It is arguable the claimant has failed to set adequately or at all the key facts on which she relies. It is clear that she asserts there was a conversation or conversations, but she does not adequately identify the detail: she does not say when any conversation occurred or give the detail of what was discussed. Whilst we may be directed to assume she will establish facts, when the claimant has failed to set out adequately the relevant facts, are we to assume she will establish a bare assertion?

84. If we were to strike out the claim, we would not be taking the claim at its height, as we would be rejecting the claimant's contention that she had consent to prepare and use the contract. In this unusual case we take the view that there is a very strong case for adopting that view. However, having regard to the case law we take the view we are constrained to allow the dispute to be resolved by evidence. In the absence of clear contradictory written documentation (as envisaged by para. 14(4)) of **Mechkarov**). We do not think it permissible to consider the overall strength of evidence, or the clear inconsistences that exist, in order to take a view on the likelihood of establishing the assertion that there was consent.

85. We have reached the conclusion that we cannot say there is no reasonable prospect of success despite our very considerable reservations about the claimant's case.

The application for a deposit order

86. For the reasons we have given there can be no doubt that there is little prospect of success. We have obtained financial information from the claimant. It is clear that she has savings of around £14,000, as a result of

[5] See, e.g., *Mechkarov v Citibank NA* 2016 ICR 1121, para. 14.

an inheritance. We have no doubt that she can fund a deposit of £1,000. The claimant will pay a deposit of £1,000 in order to proceed with the argument or contention that Mr Tocher gave consent as alleged. We have considered the wording of the parties and we will set this out in the deposit order itself. The reasons for the deposit order are set out above.

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Employment Judge Hodgson

Dated: 9 April 20

Sent to the parties on:

09/04/2020.....

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For the Tribunal Office