Case No: 2603222/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Godber**

Respondent: **Loros Enterprises Ltd**

Heard : **via CVP** **On:** **15th June 2021**

Before: **Employment Judge Eeley**

Representation
Claimant: In person (assisted by Mr J Waldron, lay representative)
Respondent: Mr A Rowell, solicitor

JUDGMENT

1. The claimant was disabled within the meaning of section 6 Equality Act 2010 by reason of stress, anxiety and depression from 14th October 2019 until 30th April 2020.

2. The claimant's claim of age discrimination is dismissed upon withdrawal by the claimant.

3. The claimant's claims of discrimination arising from disability and victimisation (contrary to sections 15 and 27 of the Equality Act 2010) are struck out as having no reasonable prospects of success.

4. The claimant's claims of direct discrimination and a failure to make reasonable adjustments (contrary to sections 13 and 20 of the Equality Act 2010) are made the subject of a separate deposit order.

REASONS

1. This was a preliminary hearing to deal with the following issues:

   (a) Whether the claimant was disabled within the meaning of the Equality Act 2010 during the relevant period for the purposes of her claim.

   (b) Whether any portion of the claim should be struck out as having no reasonable prospects of success.

(c) Whether I should make a deposit order in respect of any part of the discrimination claim on the basis that it has little reasonable prospect of success.

2. To determine the issues I had the benefit of written and oral witness evidence from the claimant, Mr V Godber, Mr J Waldron and Ms A Beyless. I was referred to the contents of an agreed bundle of documents. I had the benefit of a skeleton argument on behalf of the respondent and oral submissions on behalf of both parties.

DISABILITY

The applicable law

3. Disability is defined by section 6 of the Equality Act 2010 ("EA 2010") which states:

(1) A person (P) has a disability if-

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

In terms of the application of that test I have to look at Schedule 1 to EA 2010 which defines a long-term effect at paragraph 2 thus:

(1) The effect of an impairment is long-term if-

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities it is to be treated as continuing to have that effect if that effect is likely to recur.

4. I have to consider the question of whether the claimant was disabled looking at the state of affairs as at the date of the alleged acts of discrimination. The question is not whether she is disabled now or whether the relevant sections of the Act are fulfilled now. Rather, the question is whether the statutory definition was fulfilled at the time of the alleged discrimination. So, I have to consider whether there is an impairment, with the requisite substantial adverse effect, which is of sufficient duration as at the time of the alleged acts of discrimination. In this case the alleged acts of discrimination commence in May 2018 and extend over a period until the effective date of termination in April 2020 so that is the relevant period to consider.

5. I remind myself that where the impairment relied upon is a mental impairment the EA 2010 has no requirement that there be a diagnosis of a clinically well-recognised disorder. The issue is whether there is an impairment with the

requisite substantial adverse effect and duration within the meaning of the Act.

6. Section 212(1) EA 2010 indicates that "substantial" for these purposes means "more than minor or trivial". When considering whether the relevant impairment is "long term" in the sense of "likely to last for at least 12 months" paragraph C3 of the "Guidance On Matters To Be Taken Into Account In Determining Questions Relating To The Definition Of Disability 2011" is relevant. "Likely" for these purposes means that "it could well happen." It doesn't have to be "more likely than not". The test of whether something is "likely" is an objective one which is based on all the relevant contemporaneous evidence from the date of the alleged discrimination. The Tribunal must not use the benefit of hindsight or subsequent events. Subsequent events do not assist in determining whether something could be considered 'likely to happen' as at the date of the alleged discrimination.

7. Paragraph 5 of Schedule 1 to EA 2010 (so far as relevant) deals with the effects of medical treatment thus:

   (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –
   (a) measures are being taken to treat or correct it, and
   (b) but for that, it would be likely to have that effect.

   (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

   In essence that asks me to deduce what the claimant's situation would have been if she had not been taking medication or receiving treatment for her condition and it's that impairment (without the benefit of treatment) which I'm to examine and test against the statutory definition.

Findings of fact

8. The claimant was signed off from work in August 2019 for the first time with work related stress. We have three GP fit notes signing her off unfit to work with work related stress from 9th August until 14th October 2019.

10. There was a letter from Mr Loach (Lead Nurse) from occupational health, dated 4th October 2019. This indicated that the claimant remained unfit for work, that her GP fit note been extended and that she wouldn't be back to work for at least the next two months. He agreed that the claimant was suffering with work related stress and that she needed interventions to assist with that. He had suggested that she self-refer for talking therapy in order to assist her further. He commented that her work related stress had affected her severely and impacted on every aspect of her life. He noted that the work related stress was due to the immense amount of pressure that she had had with work and these issues would need to be addressed before she could contemplate a return to work. He confirmed that a formal workplace risk

assessment would need to be completed and that it may be worth thinking about additional resources that could be given to assist her for the future at that point in time rather than leaving it to the 'last minute' to organize. He confirmed that she would need an awful lot of support to enable a successful return to work going forward.

11. The occupational health letter was followed up by further fit notes signing the claimant off work for the period 14th October 2019 to 16th December 2019 with work related stress.

12. There was a further occupational health report dated 26th November 2019 following on from the review of the claimant that same day. It indicated that the claimant had made some progress in dealing with her stress and depression but was not yet at a place where the expert could condone a return to work. Reference was also made to an informal meeting at work which the claimant had said she found beneficial and supportive. Mr Loach indicated that the claimant was still in the early stages of her ill health journey but that he was hopeful that within the next few weeks they might be able to consider a plan for her return to work.

13. There were further fit notes signing the claimant unfit to work due to work related stress during the period 16th December 2019 to 17th January 2020.

14. The occupational health letter of 15th January 2020 states: *"Elaine is making gradual progress but is still not ready to start back to work at this stage. She does need to make further improvement and a review with the support services, before trying to resume back to work in any capacity. Elaine is keen to resume back to her existing role of Corporate & Community Relations Co-ordinator. As Elaine has been off work for a long period, I have suggested she starts with some therapeutic hours initially, then resume on a phased return. Elaine will extend her sick leave for a further two months."* Then, under the heading "Plan/Recommendations" Mr Loach continues: *"Please meet with Elaine to complete stress risk assessment and also to identify desk and office base where she will be located on her return. Having a permanent set base will reduce the anxiety of looking for space to work from. Elaine to commence 2 weeks of therapeutic hours, as per GP advice sometime next month. During this period Elaine can look at resetting her computer login, check emails and catch up with any changes in the department. Maybe to attend a few team meetings to help her back into the department. After the successful therapeutic return, Elaine hopefully will be ready to start the 4 week phased return. Weeks one and two to start with 50% of hours, increase the hours to 75% at weeks three and four. During the first few weeks of the phased return, Elaine will need time to complete any outstanding training/emails/admin and set up her computer."*

15. There were further fit notes signing the claimant off work with work related stress from 17th January 2020 to 24th March 2020.

16. The occupational health letter of 26th February stated that the claimant had made good progress and was keen to resume back to work from the next week on therapeutic hours (i.e. the beginning of March). Mr Loach understood that the respondent was in the process of arranging a meeting with Elaine to discuss a return to work plan. Again Mr Loach continued:

"Please follow the plan from the previous report dated 14th January 2020. Review her annual leave hours for phased return period. Elaine will continue with the counselling over the next few months."

17. There was a further fit note dated 27th April 2020 which passed the claimant as fit for work on a phased return to work basis with week 1 and 2 at 25% of normal working hours and weeks 3 and 4 50% of normal hours then review with GP or occupational health. The condition was referred to as work related stress. There was a final GP fit note which post-dated the claimant's dismissal. This note, dated 16th June 2020, referred to the condition as depression and stress related problems. The claimant was signed off unfit to work from 29th April to 20th July 2020.

18. A letter from Amica Staff Counselling and Psychological Support Services, dated 23 February 2021, confirms that the claimant attended Amica counselling sessions from 29th October 2019 to 27th April 2020.

19. The claimant provided the Tribunal with a letter from her GP, Dr Dalby, which is dated 4th June 2021. The salient points of that letter are that the claimant first presented in July 2019 complaining of low mood, symptoms of anxiety, emotional lability and citing, in particular, that she wasn't coping well with work. She cited an excessive workload. She had significant symptoms of depression and was started on the antidepressant fluoxetine 20 mg daily. She was given Med 3 sickness certificates stating the diagnosis of work related stress. She was reviewed at regular intervals. On 13th September 2019 the dosage of fluoxetine increased to 30 mg daily. She was reviewed again on 27th September 2019 and 14th October 2019 when her fluoxetine was increased to 40 mg daily. She was reviewed at regular intervals and remained taking fluoxetine. She also received some psychotherapy at this time. She was reviewed in November and December 2019 and January, March, April, June, August, October and December 2020. The final paragraph indicates that the claimant remains under regular review at the medical centre with ongoing symptoms of depression. She remains on fluoxetine currently at a dose of 20 mg daily. The situation is currently stabilised and Dr Dalby envisages her needing to take the antidepressants for approximately a further 3 to 6 months.

20. It can be seen from the GP's letter that the dosage of medication has increased over time and then decreased. The claimant was able to confirm in oral evidence that she did not start reducing the dosage of her antidepressant until some time in September 2020. This is some significant time after the relevant period for the purposes of this claim.

21. The medical evidence was supplemented by witness evidence from the claimant, Mr James Waldron (her brother), Mr Vincent Godber (her husband) and from Ms Angela Beyless (the claimant's former colleague). The witness evidence indicates that the stress symptoms developed from 2018 and the claimant's first visit to the doctor with any condition related to mood or mental health symptoms was in July 2019. This precipitated the claimant being signed off work sick. The claimant underwent counselling. The claimant suffered from an inability to sleep and what appears to be a pattern of continuous intrusive thoughts. She was prone to rumination. She lacked motivation to carry out household chores such as shopping, hoovering, laundry and cooking. Her husband took over these tasks. She lacked

motivation to take care of personal hygiene in the usual way. She felt the need to spend days in bed and ceased being the primary dog walker in the family. Most importantly, she developed an inability to focus or concentrate in the usual way. The claimant's brother indicated that in late 2019 it was apparent to him (from speaking to the claimant and from direct observation) that her ability to focus and to converse in the normal way had been severely diminished. She also reported to him the impact it was having on her ability to carry out her daily chores and household activities. Likewise, her husband noted that the claimant would go into a 'trance' and that there was an adverse impact on her memory and concentration. It is apparent from all the witness evidence that there was a significant cognitive impairment as well as an adverse impact on her overall mood.

Conclusions on disability

22. Applying the law to the findings of fact I conclude that the claimant had a mental health impairment made up of symptoms of stress, anxiety and depression during the relevant period. Did that impairment have a substantial adverse effect upon her ability to carry out normal day-to-day activities? Yes, it did. The impact was more than minor or trivial. In particular, I have to consider the impact of the medication on the claimant's condition. Although the claimant was on medication, the dosage of that medication needed to be increased on two occasions. This indicates that to start with it was not having the desired effect in improving her symptoms. Even though there were indications, later in the chronology, that the symptoms were improving such that the claimant could begin to countenance some form of return to work, I have to deduce what the situation would have been 'but for' that medication. It seems to me that in the absence of medication the impact on her ability to carry out day-to-day activities would have been even worse. It would not have improved but would probably have stayed at or around the level of severity which she experienced from July 2019 when she first went to her GP. Even with the benefit of medication and even as her condition improved I find that the claimant's impairment still had a substantial adverse effect on her ability to carry out normal day-to-day activities. Even with the medication the adverse effect was more than minor or trivial. The mere fact that she was contemplating some sort of return to work in March 2020 does not mean automatically mean that her symptoms had fallen below the minor or trivial threshold at that stage. A disabled person may well be signed fit to return to work even though they have an impairment with a substantial adverse effect on their ability to carry out normal day-to-day activities. Being unfit to work and being disabled are not synonymous.

23. The final issue is duration. The last alleged act of discrimination is in April 2020. By that stage the claimant had suffered the impairment to the requisite degree for a period of around nine months (July 2019 to April 2020). I appreciate that there is some discussion in early 2020 of a return to work with adjustments and the fact that the claimant is making some improvement and may be able to undertake some therapeutic hours at work. Having said that, she wasn't ready to return to work imminently in any full or meaningful sense. She started her medication in July 2019 and the dosage was increased twice: September 2019 to 30 mg; October 2019 to 40 mg. There was no decision to reduce the medication dosage until September 2020. So although there is some discussion about coming back to work at the beginning 2020 that's

arguably because the medication is starting to take effect and so I do not find that that in itself curtails the period of substantial adverse effect.

24. Given that, by the date of the last act of alleged discrimination, the claimant had not suffered the impairment for at least 12 months I have to consider whether she fulfils the statutory definition on the basis that it was "likely" to last for at least 12 months and, if so, at what point in time it could be said that she was likely to suffer the requisite impairment for at least 12 months (this is without the benefit of hindsight as to what actually happened to symptoms after the date of dismissal).

25. Looking at the chronology as at 14th October 2019 the claimant had already been suffering symptoms for at least 4 months and had been undergoing active treatment during that time. Not only that but her medication dosage had been increased for the second time. At that point in time the trajectory is of the claimant's symptoms getting worse rather than better- hence the increased dosage. There is no recovery in sight in the relatively near future. By April 2020 the medication may be taking effect to relieve some of the symptoms but there is nothing in evidence to indicate that she is actually recovering from the symptoms, certainly not without the medication. I therefore conclude that, based on the information as it stood on 14th October 2019, the requisite impairment was likely to last at least 12 months from that date in the statutory sense of "it could well happen." I conclude that the claimant was disabled within the meaning of EA 2010 during the period 14th October 2019 to the end of April 2020. Throughout that period the evidence indicated that the impairment with the substantial adverse effect was "likely" to last at least 12 months.

STRIKE OUT/DEPOSIT

The legal principles

26. The Tribunal's power to strike out all or part of a claim is set out at rule 37 of the Employment Tribunals Rules of Procedure 2013:

> *" (1) At any stage of 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, vexatious or has no reasonable prospects 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;*
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)…."*

Where the threshold to strike out part of a claim or response has not been met the Tribunal may consider making a deposit order. The power to do so is set out at rule 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 £1000 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 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."

27. The appellate guidance indicates that Tribunals should be slow to strike out a claim brought by a litigant in person on the basis that it had no reasonable prospects of success. In Mbuisa v Cygnet Healthcare Ltd EAT 0119/18 the EAT noted that strike out is a draconian step that should be taken only in exceptional circumstances. Particular caution should be exercised if a case is badly pleaded. If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that a strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are. There has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. A claim brought by a litigant in person should not be ascertained only by requiring the claimant to explain it orally while under the stresses of a hearing. Reasonable care has to be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out their case. If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or

refusing the amendment. There had to be a reasonable attempt at identifying, in reasonable detail, the claims and issues so as to consider whether there was a reasonable prospect of success (Cox v Adecco UKEAT/0339/19AT (V)).

28. Appellate guidance stresses the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination (Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391). Likewise, in the whistleblowing context it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute (Ezsias v North Glamorgan NHS Trust 2007 ICR 1126.) (See also guidance in Balls v Downham Market High School and College 2011 IRLR 217). However, Tribunals should not be deterred from striking out even discrimination claims which involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. (Ahir v British Airways plc 2017 EWCA Civ 1392.

29. The threshold requirement for making a deposit order is lower than for striking out. A Tribunal has greater leeway when considering whether to order a deposit. Consideration of whether to make a deposit order should be focused on particular allegations/arguments, each of which should be considered separately. A deposit of up to £1000 can be ordered in respect of 'any specific allegation or argument." When considering separate deposit sums in respect of different allegations or arguments the tribunal should stand back and look at the total sum awarded and consider the question of proportionality before finalizing the orders made Wright v Nipponkoa Insurance (Europe) Ltd EAT 0113/14. The power to order a deposit has to be exercised in accordance with the overriding objective to deal with cases fairly and justly having regard to all of the circumstances of the particular case.

Conclusions on strike out/deposit in this case

30. It has been clarified by the claimant that the age discrimination claim isn't being pursued so I will issue an order dismissing that part of the claim upon withdrawal by the claimant.

31. At a case management preliminary hearing on 24th November 2020 Employment Judge Ahmed sought clarification from the claimant of the way she intended to put her discrimination claims. She was unable to provide that clarification during the hearing. The judge explained the different types of disability discrimination claim which can be pursued under EA 2010 and set it out in writing as part of the written record of the hearing. He required the claimant to provide further information in relation to her case in line with Schedule 1 to his case management order. He went so far as to require her to provide the information using the same numbered paragraphs as in the Schedule to the order in order to ensure that all the relevant information was provided and in a format which could be readily understood by the Tribunal.

32. The claimant attempted to comply with the order to provide further information in her Further and Better Particulars document dated 21st February 2021.

That document provided further narrative in numbered paragraphs. It utilized some of the legal terminology of the EA 2010 but did not comply with the specific requirements of Judge Ahmed's order. The claimant was given a further opportunity to elaborate and explain the basis of her claims in oral submissions at today's preliminary hearing before the Tribunal determined whether any of the allegations was apt for strike out or deposit.

33. The following consideration of the claimant's discrimination claim adopts the paragraph numbering from the claimant's Further and Better Particulars document of 21st February 2021.

34. Paragraphs 1, 2 and 3 of the Further Particulars deal with allegations during the period May 2018 to August 2019. These incidents pre-date the onset of the claimant's disability (from 14th October 2019) and so cannot constitute disability discrimination within the meaning of the EA 2010 even if all the facts the claimant alleges are proven. On that basis they can have no reasonable prospects of success and must be struck out. It appears that the claimant may have characterized these allegations as section 15 claims of discrimination arising from disability. All such section 15 claims are struck out.

35. Paragraph 4 of the Further Particulars apparently makes claims of victimization and breach of the duty to make reasonable adjustments. In order for a victimization claim under section 27 EA 2010 to succeed the claimant must establish that there was a 'protected act' pursuant to s27(2) EA 2010 and that she was subjected to a detriment by the respondent because of the protected act. The written pleadings and Further and Better Particulars do not set out what the protected act is said to be and when it said to have taken place. The claimant was also unable to explain orally what the protected act in her case was. Her description of the victimization in this case did not match the structure of the statute but was more a description of victimization in 'lay man's terms'. It is apparent that even after being given a number of opportunities to set out her victimization claim the claimant has been unable to set it out in a manner which, taken at its highest, has any reasonable prospect of success. I am satisfied that any further opportunity to clarify her claim in this regard would be fruitless. I have therefore concluded that any claim of victimization in these proceedings within the meaning of s27 EA 2010 must be struck out as having no reasonable prospects of success.

36. Judge Ahmed's guidance also set out the structure of a claim for a breach of the duty to make reasonable adjustments and required the claimant to specify what the relevant "Provision Criterion or Practice" ("PCP") was in her case. The respondent has quite fairly pointed out that she has failed to do that. Having said that, I also have to take into account the fact that the claimant is unrepresented and that she may struggle to formulate her case in line with the statutory framework and I do have to make suitable allowances for that. The difficulty with the reasonable adjustments claim is that she doesn't state in terms what the PCP is which is said to put her at a substantial disadvantage as compared to non-disabled employees and thus triggers the duty to make reasonable adjustments. Having read the documentation it is possible to glean potential PCPs working back from the suggested reasonable adjustments. These may or may not be the PCPs relied upon by the claimant in this case. Some of possibilities I have identified are:

- Commissioning an occupational health report but not acting to implement its recommendations reasonably promptly or within the timescale suggested by the occupational health report.
- Not arranging/carrying out a formal workplace risk assessment or stress risk assessment until the employee is either back at work or imminently due to return to work.
- Requiring an employee to return to work without the occupational health recommendations being fully implemented or implemented in advance.

There is, to my mind, some significant uncertainty as to whether any of those PCPs is to be relied upon by this claimant. The claimant has not been able to clarify this at the hearing.

37. The reasonable adjustments sought by the claimant are relatively easy to identify from the occupational health documentation. The claimant was looking for a formal workplace risk assessment/stress risk assessment from October 2019 onwards. She wanted the respondent to consider and identify any measures that were required to get back into work. She was looking for the appropriate forward planning and implementation of a phased return to work. She needed early clarity as to how that was going to take place in terms of therapeutic hours and then a four-week formal phased return to work. The claimant wanted all of these measures to be implemented as soon as possible from October 2019 rather than waiting until she was ready to come back to work imminently or already back at work in some capacity. So, I can make out part of the outline of an arguable legal claim for a failure to make reasonable adjustments but this takes some effort. Even so, I would still require clarification or confirmation from the claimant that I have understood her case properly. Whilst the claims I have outlined may have some prospects of success I am not confident that the prospects exceed "little" reasonable prospect of success. There is the further difficulty that the reasonable adjustments claim is predicated on the respondent having an obligation to carry out stress/risk assessments and plan for a phased return to work many months before the claimant's health made it a realistic or imminent proposition. There is, to my mind, little prospect of such an adjustment from October 2019 being considered reasonable by the Tribunal at the final hearing particularly in circumstances where there is said to be an intervening redundancy situation which may make any risk assessment or phased return to work plan futile. Having said that, this s20 reasonable adjustments claim is a claim that has some prospect of success. I do not consider it to have no reasonable prospects. Consequently, I will not strike out this particular claim but I will order a deposit to be paid as a precondition of the claimant pursuing it to a final hearing.

38. Paragraph 5 of the claimant's Further and Better Particulars is said to be an allegation of section 13 direct discrimination. It is alleged that during the claimant's sick leave the respondent engineered a redundancy situation. In particular, it is said that nobody else's role was evaluated and if they had been this would not have been carried out whilst they were absent from work. Contrary to Judge Ahmed's request, the claimant has not dealt with the issue of a comparator. No named comparator has been identified. I assume (but this is not stated) that the claimant relies on a hypothetical comparator for this

part of her case. However, she has not complied with paragraph 2.3 of Schedule 1 to Judge Ahmed's order. There are no details of what is to be put forward in support of the contention that the comparator would have been more favourably treated. Nor does she comply with paragraph 2.4: she does not set out the facts and matters relied upon in support of the contention that the claimant was treated in the manner complained of because of the disability. (The provisions of section 23 of the Equality Act are particularly relevant here). In the absence of such clarification, either in writing or orally, I cannot say that the claim has more than little reasonable prospect of success. I do not go so far as to say that it has no reasonable prospects of success as I appreciate there will be disputes of fact and the claimant is not legally represented and may not understand how to put forward the further particulars which have been requested at this preliminary stage rather than through the process of disclosure and exchange of witness statements. In order to show that the reason for the less favourable treatment was the disability rather than anything else (e.g. the business reorganisation, the profitability of the claimant's work etc) she is going to have to lead some evidence in support of her contention and this could be quite a difficult hurdle for her to overcome. Consequently, I have concluded that this claim has little reasonable prospects of success such that I will make a deposit order as a precondition of the claimant pursuing it to a final hearing.

39. At paragraph 6 the claimant again talks about selection for redundancy and alleges that that the respondent selecting her for redundancy was an act of direct discrimination because of her disability. For the same reasons as set out above in relation to paragraph 5 I consider that this allegation has little reasonable prospects of success. I consider that it is going to be a challenge for the claimant to establish that a non-disabled person in materially the same or similar circumstances would not have been dismissed given the prevailing business conditions for the respondent at the time. I will order a deposit in relation to this allegation.

40. At paragraph 7 the claimant alleges that the failure to offer suitable alternative employment instead of redundancy and the failure to offer furlough rather than dismiss the claimant were also acts of direct disability discrimination. These are part and parcel of the assertion that the decision to dismiss the claimant was an act of direct discrimination. For the same reasons as set out above in relation to paragraphs 5 and 6 I consider the allegation has little reasonable prospect of success and will make a deposit order.

41. I took oral evidence from the claimant as to her financial means to pay a deposit order. Whilst she has obtained alternative employment she was unemployed for a time. Her new job started at the end of August 2020. Her new salary is £15,950 per annum. She has had to consolidate debts and took a mortgage holiday during the pandemic. From September she will be supporting two children at university. However, her husband is in relatively well remunerated employment and is able to contribute to the household outgoings. In those circumstances I apply a deposit of £200 as a precondition of pursuing the claim for failure to make reasonable adjustments. I make a separate deposit order of £200 as a precondition of pursuing any of the section 13 direct discrimination claims.

42. In summary therefore, the claims of victimization contrary to section 27 EA 2010 and the claim of discrimination arising from disability (section 15) are struck out. The claim of a failure to make reasonable adjustments is made the subject of a deposit order of £200. The claim of direct discrimination contrary to section 13 is made the subject of a separate deposit order of £200. In order to pursue both the s13 and the s20 claims the claimant will therefore have to pay a total of £400. (She can, of course, choose to pay either, both or neither of the deposit sums). There is no indirect discrimination or harassment claim pleaded. The unfair dismissal claim is unaffected by this judgment and will proceed to a final hearing.

43. The case will be listed for a further preliminary hearing for 90 minutes following expiry of the deadline for payment of the deposit order. At that hearing the Tribunal will obtain any further clarification of the remaining claims and will make case management orders in order to progress the case to a final hearing.

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Employment Judge Eeley

Date: 17th June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE