EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has been consented to by the parties. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to comprised of an agreed bundle of documents (88 pages including skeleton arguments from both parties). The orders made are described at the end of these reasons.

Claimant		**Respondent**
Ms K Oztokay	**v**	**ABM Facility Services UK Ltd**

Heard at: Watford (via CVP) **On**: 22 April 2021

Before: Employment Judge Smeaton

Appearances

For the Claimant: Ms Grossman (counsel)
For the Respondent: Mr O'Neill (solicitor)

JUDGMENT

1. The Claimant's claims of unauthorised deductions from wages ("UDW") based on an entitlement to be furloughed and/or to receive Statutory Sick Pay ("SSP") during the period 25 March 2020 to 30 June 2020 are struck out on the basis that they have no reasonable prospect of success.

2. The Claimant is ordered to pay a deposit of £1,000 not later than 21 days from the date of this Order as a condition of being permitted to pursue the argument that there was an UDW based on an entitlement to full pay during the period 25 March 2020 to 30 June 2020.

3. The Claimant is ordered to pay a deposit of £1,000 not later than 21 days from the date of this Order as a condition of being permitted to pursue the argument that the Respondent has treated her unfavourably because of something arising

in consequence of her disability by failing to pay her for her full contractual role between 25 March 2020 and 30 June 2020.

4. The Claimant's claim that the Respondent has treated her unfavourably because of something arising in consequence of her disability by asserting that as she had not had a welfare check-in meeting it was unable to determine whether she was fit to work her full hours, is struck out on the basis that it has no reasonable prospect of success.

5. The Claimant is ordered to pay a deposit of £2,000 (£1,000 in respect of each allegation) not later than 21 days from the date of this Order as a condition of being permitted to pursue the argument that the Respondent has failed to make reasonable adjustments.

6. In respect of all orders to pay a deposit, the Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

The claim

1. The Claimant has been employed by the Respondent as a cleaning operative since 8 February 2018. She was contracted to work six shifts per week (for seven hours per shift).

2. The Claimant was diagnosed with cancer in 2019. It is not in dispute that at all material times she was disabled within the meaning of section 6(1) of the Equality Act 2010 ("EqA 2010").

3. In 2019/2020 the Claimant was signed off sick from work whilst she underwent treatment for cancer. She returned to work on 3 February 2020 on a phased return. It was agreed between the parties that she would work two shifts per week, with the intention that her hours would increase incrementally until she was fit to work her full contracted hours. At no point after 3 February 2020 did her hours increase beyond two shifts per week.

4. On 28 February 2020, the Claimant's father passed away and she travelled to Bulgaria for a period of 20 days.

5. On 25 March 2020, during the first wave of the Covid-19 pandemic, the Claimant received a fit note from her GP advising her to shield for a period of 12 weeks and confirming that she would not be fit for work during that period of time. She received a further fit note in this respect on 15 June 2020 valid until 30 June 2020. Her period of shielding, and the period with which this claim is concerned, is accordingly 25 March 2020 to 30 June 2020 ("the Shielding Period"). On 1 July 2020 the Claimant was signed off with back pain. She has not returned to work since.

6. During the Shielding Period, the Claimant continued to be paid for only two shifts per week, that being the agreement immediately prior to the Shielding Period.

7. The Claimant brings complaints of UDW, discrimination arising from disability and failure to make reasonable adjustments in respect of the Shielding Period.

8. The claim, in summary, is that the Claimant ought to have been paid for her full contractual role (six shifts per week of seven hours each) or alternatively for 80% of her full contractual role during the Shielding Period. The Respondent maintains, in summary, that the Claimant was entitled to be paid for two shifts per week only.

The hearing

9. The hearing was listed to consider the Respondent's application to strike out the claim or alternatively for a deposit order.

10. Both parties appeared represented. The Claimant did not attend. At the outset of the hearing I raised concerns about the Claimant's absence given the requirement, as part of any consideration in respect of a deposit order, to make reasonable enquiries into the Claimant's ability to pay. Ordinarily, this would be done through evidence given by the Claimant.

11. Ms Grossman informed me that she had instructions on the Claimant's means and that, in any event, any deposit order would be paid by the Claimant's union who are supporting her in this case.

12. I confirmed with the parties that I had a bundle comprising of 88 pages, which they indicated was agreed. That bundle contained both parties' written submissions. The parties confirmed that I was not expected to have any other documents.

13. I drew the parties' attention to the recent case of Cox v Adecco and others UKEAT/0339/19/AT(V). In order to decide whether the claim has no real prospect of success, or little reasonable prospect of success, it is necessary to consider, in reasonable detail, what the claims and issues are. '*Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is'.* The claim had not previously been subject to any case management and no list of issues had been produced.

14. Accordingly, I took some time to identify the issues with the parties. This was not a straightforward exercise and at times it was unclear how the Claimant was pursuing her claims. The issues for any final determination were however agreed prior to consideration of the Respondent's applications and are recorded as follows:

The issues

1. Unauthorised deductions from wages

1.1 Did the Respondent make unauthorised deductions from the Claimant's wages contrary to section 13 ERA 1996 during the period 25 March 2020

to 30 June 2020 ("the Shielding Period"). Consideration of this element of the claim will require a determination of what was properly payable to the Claimant during this period. Specifically:

1.1.1 Was the Claimant entitled to her full contractual pay (six shifts of seven hours each per work) during the Shielding Period. This argument is pursued solely on the basis that, from 25 March 2020 the basis of the Claimant's absence changed so that she was absent due to shielding and not sickness absence. She relies on the Respondent's "Isolation Scenarios" document as support for her claim that, because she was absent due to shielding, she was entitled to her full contractual pay.

1.1.2 Alternatively, was the Claimant entitled to be furloughed and accordingly to receive 80% of her full contractual pay.

1.1.3 Alternatively, was the Claimant entitled to be paid full pay for the two shifts she would have worked had she not been shielding and SSP for the remaining four shifts. Consideration of this point will involve an assessment of whether the Claimant had exhausted her entitlement to SSP and/or whether there were periods of incapacity which are linked.

2. Discrimination arising from disability

2.1 Did the Respondent:

2.1.1 Fail to pay the Claimant for her full contractual role during the Shielding Period; and/or

2.1.2 Assert that as she had not had a welfare check-in meeting it was unable to determine whether she was fit to complete the full return to work period;

2.2 Did that amount to unfavourable treatment because of something arising in consequence of the Claimant's disability, namely

2.2.1 In respect of 2.1.1 the Claimant's increased vulnerability leading to a need to shield;

2.2.2 In respect of 2.1.2 the need for her to carry out reduced hours and her increased vulnerability leading to a need to shield;

2.3 If so, did the treatment amount to a proportionate means of achieving a legitimate aim. The Respondent relies on the legitimate aim of ensuring consistency in the way in which it treats employees during sickness and in respect of work performed (detailed more fully in the Grounds of Resistance).

3. Failure to make reasonable adjustments

3.1 Did the Respondent apply the following PCPs to the Claimant:

3.1.1 the decision to place the Claimant on a lower rate of pay than her contractual role during the Shielding Period (25 March to 30 June 2020);

3.1.2 the decision not to place the Claimant on furlough/a policy of not placing employees who worked at the same site as the Claimant on furlough;[1]

3.2 Did the PCPs put disabled persons at a substantial disadvantage when compared with non-disabled persons. The Claimant relies on the particular disadvantage of receiving lower pay than her contracted role.

3.3 Did the Respondent take such steps as is reasonable to have taken to avoid the disadvantage. In particular, the Claimant maintains that the Respondent ought to have paid her in respect of her full contractual pay and/or placed her on furlough leave

4. Having identified the list of issues, I heard submissions from both parties on the application. I reserved my decision, which I now give.

The law

15. The principles which I must apply were helpfully set out in both representatives' written submissions and are not in dispute. In summary they are as follows:

(1) Strike out

16. The power to strike out a claim on the basis that it has no reasonable prospect of success is contained in rule 37(1) of Sch 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") which provides, so far as is relevant:

37(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 on any of the following grounds –

(a) That it is scandalous or vexatious or has no reasonable prospect of success;

17. I recognise that strike out is a draconian step and ought only to be exercised in exceptional cases. This is particularly so when dealing with discrimination claims which must only be struck out in the most obvious cases. Discrimination claims are

[1] This element of the claim was originally pleaded under section 15 EqA 2010. At the hearing, following discussions about the difficulty with that claim, the Claimant applied to amend her claim to pursue this allegation as a claim under section 20 EqA 2010. It was clearly a matter of re-labelling. No further facts or areas of enquiry would be occasioned by allowing the amendment. The Respondent did not object to the amendment and it was effectively allowed by consent.

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, HL).

18. Detailed guidance was provided in the case of Balls v Downham Market High School and College [2011] IRLR 217, in which Lady Smith held:

'…the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether there written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.'

19. In assessing whether there are no reasonable prospects of success, I must take the Claimant's case at its highest. It is only where the case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, that it may be struck out. If there are any core issues of fact that turn to any extent on oral evidence, the matter must proceed to a final hearing (Mecharov v Citibank NA [2016] ICR 1121 EAT).

20. This does not mean that it will never be appropriate to strike out a discrimination claim, but that it will only be appropriate in rare cases. In a case where there are no relevant issues of primary fact which require direct evidence to be given, it may be appropriate to strike out the claim if it is established that it has no prospect of success (Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, CA).

(2) Deposit order

21. The power to grant a deposit order is contained in rule 39 of Sch 1 of the Rules which provides, so far as is relevant:

39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim…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.

39(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.

22. Although a less draconian step than striking out the claim, I must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response before making a deposit order. (Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors EAT 0096/07).

23. If I am satisfied that a particular allegation or argument has little reasonable prospects of success, I must only make a deposit order if I am also satisfied that it would be in accordance with the overriding objective to deal with cases fairly and justly to do so.

24. I bear in mind that the purpose of such an order is not to restrict access to justice disproportionately. Any order made must be for an amount that is affordable by a party, and can be realistically complied with – Hemdan v Ishmail and anor [2017] IRLR 228.

25. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – Adams v Kingdon Services Group Ltd EAT/0235/18.

Findings

26. Considerable time was spent during the hearing in identifying the claims and drafting the list of issues set out above. Both parties were represented and I am satisfied, having considered not only the pleadings but also the submissions made to me and the other documents in the agreed bundle, that the list of issues as set out above properly reflects the claims that the Claimant intends to bring to the Tribunal. It is against that list of issues that I consider the prospects of success of the Claimant's claims.

27. Taking the claims in turn:

(1) UDW

28. This claim is pursued on three different grounds. In considering all three grounds, the first question a Tribunal hearing the claim would need to determine is what was properly payable to the Claimant during the Shielding Period.

29. The Respondent maintains that the Claimant was entitled to payment for two shifts per week on the basis that this was the agreed pattern of work at the time she commenced the Shielding Period. The parties agree that there was a temporary variation to the Claimant's contract in this respect. The Respondent maintains that there was no further variation of that agreement prior to the end of the Shielding Period.

30. I was initially unsure whether it was accepted by the Claimant that, prior to the Shielding Period, she was only entitled to be paid for two shifts per week (the remaining four shifts attracting SSP only, which the Claimant had exhausted). Ms Grossman confirmed that that issue was not in dispute. That indication was particularly important. The Claimant's claim can only succeed if she can demonstrate that there was a further variation to that agreement entitling her to her full contractual pay.

    (i) Paragraph 1.1.1 of the list of issues

31. The Claimant's claim that she became entitled to full contractual pay (for six shifts per week) on 25 March 2020 is based solely on the argument that, on that day, the basis of her absence changed. She maintains that because she began to shield on 25 March 2020 she was entitled to be paid her full contractual pay from that date and for the duration of the Shielding Period (paragraph 1.1.1 of the List of Issues).

32. In support of that argument, the Claimant relies on an internal document produced by the Respondent in response to the Covid-19 pandemic. That document sets out the categories of those potentially affected by the pandemic, what action they should take in response to the pandemic and their entitlement to pay ("the Isolation Scenarios document"). So far as is relevant to the Claimant, the Isolation Scenarios document provides as follows:

	Action	**Entitlement**
Vulnerable person due to age, pregnancy or underlying health condition	Self-isolate for 12 weeks & seek further medical advice.	Full pay for period specified.

33. The issues for a final hearing, in determining what was properly payable to the Claimant in this respect are thus:

    (a) Did the Isolation Scenarios document have contractual force and act so as to vary the Claimant's contract for the duration of the Shielding Period; if so
    (b) What is the meaning of 'full pay' within that document. Is it to be interpreted as full contractual pay or as the full pay that the Claimant would have been entitled to had she not been shielding.

34. I have significant reservations about the prospects of the Claimant's claim in this respect. Even assuming that the answer to (a) above is yes, I think it is highly likely that 'full pay' must be interpreted as meaning the pay that the Claimant would have received had she not been shielding. The Isolation Services document cannot have been intended by the Respondent to put employees in a better position than they would have been in had they not been shielding. Ultimately, however, this is a matter upon which the Respondent will need to call evidence explaining the purpose and intention of the Isolation Services document and how it was in fact applied. Although I think the Claimant will have significant difficulty in succeeding on this point, I am unable to say that her claim has no prospect of success.

35. If the Respondent is correct, and 'full pay' is to be interpreted as meaning the pay which the Claimant would have been entitled to had she not been shielding, the Claimant's claim for unauthorised deductions from wages will fail. It could only succeed if her argument were that, had she not been shielding, she would have returned to work on her full hours on 25 March 2020 (that being the date from which she maintains she ought to have received her full pay). That is not how her claim is pleaded.

36. Given the importance of this point, I raised it on a number of occasions with Ms Grossman. I noted that the case was not pleaded as such. If Ms Grossman had indicated that the claim was intended to be pursued on this basis, I would have given consideration to ordering further and better particulars.

37. The issue has been raised by the Respondent, both prior to the claim being brought and in correspondence after it was lodged. The Respondent went so far as to indicate, in open correspondence, that if it were the Claimant's claim that she would have returned to work full-time or at least increased her hours incrementally during the Shielding Period, it would provide back pay providing that relevant medical evidence was provided in support. The Claimant did write to her GP seeking a medical opinion on the likely trajectory of her recovery during the Shielding Period, but did not obtain a response that was of any assistance.

38. The Claimant has not, in response to the Respondent's correspondence, indicated that this is how the claim is pursued. At the hearing today, Ms Grossman confirmed that she had no instructions to suggest it was pursued in this way.

39. Accordingly, the Claimant has not asserted at any point that she was entitled to full contractual pay on the basis that, were it not for the need to shield, she would have returned to work her full hours. Instead, this element of the claim is pursued on the sole basis that the Isolation Scenarios document gave her a right to be paid full contractual pay from the first day she began to shield *irrespective of* her ability to work. For the reasons set out above, I have significant doubts about the merits of such a claim.

40. I gave serious consideration to striking out this claim but have decided, after further consideration, that I am unable to say conclusively that the claim has no prospect of success. It follows that in my view it plainly has little reasonable prospect of success. The Claimant can only succeed if she is successful in establishing that the Isolation Scenarios document has contractual force and entitles her to full contractual pay irrespective of her fitness to work (distinct from the need to shield). I am satisfied in all the circumstances that it is in accordance with the overriding objective to make a deposit order in respect of this argument. I deal with quantum below.

(ii) <u>Paragraph 1.1.2 of the list of issues</u>

41. The second ground upon which the UDW claim is pursued is that the Claimant was entitled to be furloughed and to receive 80% of her pay during the Shielding Period (paragraph 1.1.2 of the list of issues).

42. In my view, there is no basis upon which this claim could succeed. There is no contractual entitlement to be furloughed. The Claimant has not identified any policy or practice within the Respondent which would entitle her to be furloughed. To the contrary, she maintains that the Respondent had a PCP of not placing employees in her area on furlough leave.

43. This is not an issue which requires determination of factual disputes or an area in which I can envisage any successful legal argument being mounted, even upon

further consideration now that the claims have been clearly identified. Taking the Claimant's case at its highest, it cannot succeed. I am satisfied, in all the circumstances and applying the tests outlined above, that the claim has no real prospect of success and must be struck out.

(iii) Paragraph 1.1.3 of the list of issues

44. The final ground upon which the UDW claim is pursued is that the Claimant was entitled to be paid full pay for the two shifts she would have worked and SSP for the remaining four shifts in her contract (paragraph 1.1.3 of the list of issues).

45. There was no dispute that, prior to the Shielding Period, the Claimant was paid only in respect of the two shifts she worked and that she (lawfully) did not receive SSP for the remaining four shifts because she had exhausted her entitlement to SSP. The periods of sickness absence are clearly linked. There can be no suggestion that the Claimant's entitlement to SSP was re-set at any point.

46. Ms Grossman did not identify any legal basis for the claim that, notwithstanding that position, the Claimant was entitled to SSP during the Shielding Period. This is a straightforward issue. If there were an argument to be made, I would have expected it to be raised before me. As above, this is not an issue which requires determination of factual disputes or an area in which I can envisage any successful legal argument being mounted. Taking the Claimant's case at its highest, it cannot succeed. I am satisfied, in all the circumstances and applying the tests outlined above, that the claim has no reasonable prospect of success and must be struck out.

(2) Discrimination arising from disability

(iv) Paragraph 2.1.1 of the list of issues

47. It is not in dispute that the Respondent did not pay the Claimant for her full contractual role during the Shielding Period (paragraph 2.1.1 of the list of issues).

48. Mr O'Neill maintains that this cannot amount to unfavourable treatment within the meaning of section 15 EqA 2010. He notes that the Claimant was allowed to return to work on a phased return as a consequence of ill-health related to her disability and that it cannot be correct to find that, having put in place a reasonable adjustment in this respect, the Respondent treated the Claimant unfavourably by paying her accordingly.

49. In support of this argument, Mr O'Neill relies on Williams v Trustees of Swansea University Pension and Assurance Scheme and anor [2019] ICR 230, SC. In that case, the employee made a successful application for ill-health retirement under the terms of the employer's pension scheme. By the time of his retirement he had had his hours reduced as a reasonable adjustment to help him cope with his disabilities. This meant that his pension was calculated by reference to his part-time salary. He was initially successful in his claim under section 15 but the judgment was overturned at the EAT. Mr Justice Langstaff held that treatment that was advantageous (here allowing the employee to work part-time hours) cannot

be said to be unfavourable because it was insufficiently advantageous. The decision was upheld by the Court of Appeal (and the Supreme Court).

50. The Court of Appeal held that, if the employee's argument was correct, it would be difficult to see why the same argument would not apply to a disabled claimant who applies for and secures a part-time job because that is as much as he or she can manage in circumstances where he or she would otherwise have worked full-time. He or she would be paid a part-time salary because of something arising in consequence of his or her disability. It cannot have been Parliament's intention that such an employee should be able to claim that he or she has been the victim of unfavourable treatment under section 15 such that the onus falls on the employer to establish that the part-time salary is a proportionate means of achieving a legitimate aim. Equally, it would be remarkable if the employee could maintain an entitlement to the same retirement pension as he or she would have received had he or she worked full time throughout employment.

51. By analogy to this claim, Mr O'Neill argues that, having permitted the Claimant to return on a phased return, it cannot be unfavourable treatment for the Respondent not to have paid her only for those shifts worked.

52. I have considerable sympathy with that argument. Ms Grossman did not have a good answer to it and, in my view, it is highly likely to succeed at a final hearing. If, however, the Claimant is successful in establishing that the Isolation Scenarios document provided her with a contractual right to be paid full pay irrespective of the fact that she was only able to work two shifts per week (an argument which, as set out above, I have serious misgivings about) it is arguable that the decision to pay her for two shifts only during the Shielding Period amounts to unfavourable treatment.

53. It follows that it is arguable that the alleged unfavourable treatment was because of something arising in consequence of the Claimant's disability, namely her increased vulnerability leading to the need to shield. Again however, I have significant concerns about the merits of this claim. The Respondent's case is that the Claimant was paid for two shifts only because that was the agreement immediately prior to the Shielding Period and because the Claimant did not, at any point, indicate that she was well enough to increase the number of shifts worked. That, in my view, is the likely explanation. It would plainly have been unfavourable treatment to pay the Claimant nothing during the Shielding Period on the basis that she was unfit for work during that period. Here, however, the Claimant was paid the same amount that she would have been paid had she not been shielding.

54. Ultimately, however, this is a matter for oral evidence at the hearing. I am unable to say that the claim has no prospect of success but I am satisfied, for the reasons, set out above, that the claim has little reasonable prospects of success and that it is in accordance with the overriding objective for a deposit order to be made in respect of it. I deal with quantum below.

(v) Paragraph 2.1.2 of the list of issues

55. The claim under section 15 EqA 2010 is also pursued on the basis that the Respondent treated the Claimant unfavourably by asserting that as she had not had a welfare check-in meeting it was unable to determine whether she was fit to complete the full return to work period (paragraph 2.1.2 of the list of issues).

56. On the face of it, this could amount to unfavourable treatment. Mr O'Neill maintains, however, that holding a meeting cannot amount to unfavourable treatment because the Claimant was not in fact well enough to increase her hours. He invites me to make this finding on the basis that no medical evidence has been provided (despite requests) to suggest that the Claimant would have been well enough to do so and that, to the contrary, at the end of the Shielding Period the Claimant did not return to work and instead reduced her shifts from two to zero per week. She was signed off completely from 1 July 2019 (for back pain, not obviously related to her disability). Had this been the only argument, I would not have accepted that the claim had no real prospect of success. It would have been a matter for oral evidence to be determined at a final hearing.

57. The difficulty with the Claimant's claim in this respect, however, is that as set out above, she makes no positive case that had a welfare check-in meeting been held, she would have been fit to complete the full return to work period. That is not how she pursues her claim. The argument is, accordingly, academic. Holding a welfare check-in meeting cannot be said to be unfavourable treatment in circumstances where it would not have led to an increase in the shifts worked by the Claimant. There is no disadvantage.

58. In light of the above, I am satisfied that this claim, taken at its highest, has no real prospect of success and must be struck out.

(3) Failure to make reasonable adjustments

(vi) Paragraph 3.1.1 of the list of issues

59. In respect of the claim at paragraph 3.1.1 of the list of issues (the PCP being the decision to place the Claimant on a lower rate of pay than her contractual role during the Period of Shielding), this faces the same difficulty with the claim under section 15 EqA 2010. The Claimant was paid for only two shifts per week because that was all that she had agreed to work. What the Claimant is seeking, through this element of the claim, is to be put at an advantage and to be paid full pay notwithstanding that she was unfit to do so. This point has been considered in cases such as O'Hanlon v Commissioners for HMRC [2007] IRLR 404.

60. Accordingly, even if the Claimant is successful in demonstrating that the Respondent applied a PCP to her which put her at a substantial disadvantage, I consider that it is very likely the Respondent will be able to justify the treatment.

61. I am unable to say that the claim has no reasonable prospects of success. Justification is a matter for evidence. I do consider, however, that the claim has little reasonable prospects of success and that it is appropriate in all the circumstances to make a deposit order in respect of this allegation. I deal with quantum below.

(vii) Paragraph 3.1.2 of the list of issues

62. The final claim brought by the Claimant (paragraph 3.1.2 of the list of issues) is that there was a failure to make reasonable adjustments in respect of the decision not to place her on furlough leave/a policy of not placing employees at the Claimant's site on furlough leave.

63. It is accepted by the Respondent that such a policy was applied. I have considerable difficulty, however, in understanding how the Claimant seeks to establish a substantial disadvantage compared with non-disabled employees as a result of this PCP. Comparing the Claimant's situation with a non-disabled employee – that employee is not furloughed and continues to work, receiving 100% of their salary. By contrast, the Claimant is not furloughed, shields due to her disability, and continues to receive 100% of the salary to which she would otherwise be entitled.

64. The reason the Claimant is not receiving 80% of her full contractual pay is not because she is not furloughed but because she is not well enough to work her full hours.

65. Ultimately, however, this is a matter which requires further consideration and is to a significant extent intertwined with the remaining claims that will proceed to final hearing. If the issue turns on justification, there will be factual issues to resolve by way of evidence. In all the circumstances, I am not satisfied that the claim has no prospect of success but do consider, for the reasons above, that it has little reasonable prospects of success. Accordingly, and taking into consideration the overriding objective, I find that it is appropriate to make a deposit order in respect of this allegation. I deal with quantum below.

Quantum

66. As explained above, the Claimant did not attend the hearing and I was unable to take evidence from her as to her means. This does not prevent me from making a deposit order. The requirement under rule 39(2) is to make reasonable enquiries into a party's means.

67. The submissions made by Ms Grossman on the Claimant's behalf were that the Claimant is of extremely limited means. She remains employed by the Respondent but has not worked for some considerable time and has exhausted her SSP. In the circumstances her union (the RMT), which is supporting her in this claim, has indicated that it will meet any deposit order made by the Tribunal.

68. I have not been given any information as to the union's ability to pay. Mr O'Neill invited me to make deposit orders in the maximum amount of £1,000 per allegation. Ms Grossman suggested that such an order would deter the union from continuing to fund the claim but did not suggest that it was disproportionate taking into account the union's means.

69. In my view, it is appropriate to make deposit orders in the maximum amount in respect of each relevant allegation. The RMT is a large union with over 80,000 members. It is reasonable to infer, as Mr O'Neill submitted, that it has adequate resources to meet this order. Ms Grossman made no submissions in response to this point. Ms Grossman's sole objection to the marking of the order in this amount, namely deterrence, is precisely the object of making a deposit order (see Hemdan v Ishmail [2017] IRLR 228. The purpose of a deposit order "*is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims"*).

70. In imposing the deposit orders above in the amount of £1,000 per allegation, I am not seeking to make it difficult for the Claimant to access justice but am seeking to ensure that serious consideration is given before pursuing the claims further. I am satisfied that the total amount of £4,000 is proportionate and reasonable.

71. If the Claimant decides to pay only part of the £4,000 ordered, she must specify which complaints she is intending to pursue. She must do so by reference to the paragraph numbers of the list of issues set out above.

72. I will exclude myself from hearing the final hearing in this matter, having given the above opinion on prospects.

Public access to employment tribunal decisions

73. All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

74. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: *www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/*

75. The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)…*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written**.

76. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.

_____

Employment Judge Smeaton

Date: 20 May 2021

Sent to the parties on:

……

For the Tribunal:

……..