



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

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**Judgment of the Employment Tribunal in Case No: 4100101/2021 (A) Issued
Following Open Preliminary Hearing Held at Edinburgh on 14th of July 2021
at 10.30 am**

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Employment Judge J G d'Inverno

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Mrs S Paterson

**Claimant
In Person**

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Voyage 1 Ltd

**Respondent
Represented by:
Mr Brockley of Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

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(First) By concession of the respondent, made at the bar by its representative upon hearing the claimant's oral evidence and upon considering, and taking instructions on, the additional documents included in the bundle at pages 39 to 56 and tendered by the claimant and received by the Tribunal at the outset of the Hearing; and separately, upon the Tribunal being so satisfied on the evidence presented at Hearing; That, at

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the material times for the purposes of her complaints, that is in the period 6th to 18th August 2020 inclusive, the claimant was a person possessing the protected characteristic of disability within the meaning of sections 4, 6 and

Schedule 1 of the Equality Act 2010 (“the EqA”), by reason of her physical impairments of:-

(i) Ischaemic Heart Disease,

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(ii) Benign Paroxysmal Positional Vertigo; and by reason of her mental impairment of

(iii) Anxiety and Depression

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(Second) That the claimant’s complaint of Direct Discrimination in terms of section 13 of the Equality Act 2010, insofar as founded upon the instances of alleged less favourable treatment listed, under the heading “**Direct Discrimination**”, in the proposed and now Agreed List of Issues, at paragraphs 1(a) and 1(c) to (h) inclusive, enjoy little reasonable prospect of success for the purposes of Rule 39 of the Employment tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 (“the Rules”).

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(Third) That the claimant’s complaint of Indirect Discrimination in terms of section 19 of the Equality Act 2010, insofar as founded upon the PCP and particular disadvantage given notice of and listed, under the heading “**Indirect Discrimination – Section 19 Equality Act 2010**”, at paragraphs 1(a), and 3(a) of the proposed, and now Agreed, List of Issues, enjoys little reasonable prospect of success for the purposes of Rule 39.

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(Fourth) The claimant’s complaint of Harassment in terms of section 68 of the EqA, insofar as founded upon the instances of alleged unwanted conduct given notice of and as listed, under the heading “**Harassment**”, at paragraphs 1(a) to (f) inclusive and paragraph 1(g)(ii) to (viii) inclusive, of the proposed and now Agreed List of Issues enjoys little reasonable prospect of success, for the purposes of Rule 39.

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(Fifth) Orders the claimant to write to the Tribunal, with a copy to the respondent's representative, within 14 days of the date upon which this Judgment is sent to the parties, providing;

- 5 (a) a written note of her weekly and monthly income from any source, together with that of any person with whom she resides on the one hand, and a note of her weekly/monthly outlays and those of any person with whom she resides, on the other.
- 10 (b) the sources of the incomes identified at (a) above.
- (c) documentary vouching of all income received weekly/monthly outlays made.
- 15 (d) details of any savings held by her either on her own account or jointly with any other person, together with copies of bank statements in relation to any such individual or joint accounts, showing the balance in those accounts as at the 14th of July 2021.
- 20 (e) setting out, in light of the Tribunal's Findings of little prospect of success in what amount she contends that Deposit Orders should be made, or alternatively,
- 25 (f) submitting that no Deposit Order should be made despite the Tribunal's Findings of no reasonable prospect of success and, in relation to the latter position, stating why.

30 **(Sixth)** Allows to the respondent's representative a further period of 14 days thereafter to write to the Tribunal, if so advised, commenting upon the means information provided and setting out why, in their consideration, the Tribunal's now awakened jurisdiction under Rule 39 should be exercised in the making of a Deposit Order/Orders.

REASONS

1. This case, which proceeded in conventional In Person format but with remote observation, called for Open Preliminary Hearing at Edinburgh on the 14th of July 2021. The claimant appeared in person. The Respondent Company was represented by Mr Brockley, of Counsel.
2. In terms of the Tribunal's Interlocutory Order (**Fourth**) of 5th May 2021 the Open Preliminary Hearing was fixed for the purposes of determining the claimant's asserted possession of the protected characteristic of Disability for the purposes of her complaints of Direct and Indirect Discrimination and of Harassment, asserted respectively in terms of sections 13, 19 and 26 of the EqA.
3. By written application dated and intimated to the claimant on 29th June 2021 (some 16 days prior to the Hearing), the respondents made application for strike out of all, or some of the claimant's claims in terms of Rule 37 on the grounds that they enjoy "no reasonable prospects of success", and, which failing and in the alternative, for the making of a Deposit Order, in terms of Rule 38, in respect of all or some of the claims on the grounds that they enjoy "little reasonable prospect of success", and further requested that the scope of today's Open Preliminary Hearing ("OPH") be expanded to include the hearing of parties anent, and the determination of, those applications.
4. The application of 29th June had been intimated to the claimant in accordance with the requirements of Rules 30(2) and 92 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations, 2013, Schedule 1 ("the Rules"). No note of objection or other comment having been received from the claimant after the expiry of a period of 8 days following intimation, the Tribunal wrote separately to the claimant seeking her comment on the respondent's proposal that the scope of the 14th July OPH be expanded to include consideration of the respondent's applications of 29th June.

5. In the course of Case Management Discussion conducted at the outset of the OPH, the claimant confirmed that she had received intimation of the 29th June application, including notice of the proposal that the applications be considered at the 14th July Hearing and further, that she had not responded by way of objection or comment. She also stated, notwithstanding, that her preparation for today's Hearing had remained focused upon the Preliminary Issue of Disability Status which was identified in the Notice of Hearing. She stated, that her preference, in those circumstances, would be for the respondent's applications of 29th June not to be considered at the OPH.
6. The respondent's representative, for his part, while recognising that no presumption arose as to the outcome of the applications if considered at the Hearing, focused the proportionality of their being so considered. The applications were competently made by the respondents in circumstances where, let it be assumed that the claimant established her possession of the protected characteristic at the material times, they were faced with the potential and substantial costs associated with resisting claims which, in his submission, and on an objective consideration of the matters which the claimant gave notice of offering to prove, enjoyed no, which failing little, reasonable prospect of success, the same for want, on their face, of one or other of the essential elements which would require to be established, in terms of the relevant statutory provisions, if such claims were to succeed. Were the claimant to fail to establish her possession of the protected characteristic of Disability then the requirement to determine those applications would fall away. On the other hand, let it be assumed that the claimant succeeded on the issue of Disability Status and assuming no change to the circumstances of the notice of her claims which she had given, the applications would require to be considered and determined. That could be most proportionately achieved, from both parties' points of view and from the Tribunal's, at today's Hearing, which had been listed with a time estimate of one day, after parties had been heard on the issue of Disability Status. The requirement that parties return on another occasion to be heard on the applications, which would be the result of their not being dealt with today, was, in comparison, disproportionate not least for the respondents by the

associated exacerbation the risk which the applications sought to mitigate. The respondent's representative drew the Tribunal's attention to the fact that in the skeleton argument which, in compliance with the Tribunal's Direction of 5th May 2021 made with a view to putting the parties on an equal footing, the respondent's representative had sent to the claimant 7 days prior to the OPH, there had been included, on a contingent basis, an outline of the arguments to be advanced in support of the applications of 29th June 2021. Thus, he submitted the claimant had received in excess of 2 weeks' notice of the applications and the request that they be dealt with at today's Hearing and, in addition, 7 days' notice of the submissions which would be made in support of them.

7. Having heard parties on the matter and upon consideration of the circumstances pertaining, including the relative notice given not only of the intention to seek that the Tribunal consider the 29th June applications at the Hearing, but also of the advance notice of the arguments to be made in support of the substance of the applications, the Tribunal determined that it was both proportionate and in furtherance of the Overriding Objective that the 29th June 21 applications be considered at today's Hearing, in addition to the primary Preliminary Issue of Disability Status, let it be assumed that sufficient time remained; and it varied its Orders of 5th May such as to extend the scope of today's OPH accordingly. In so doing the Tribunal noted, as a factor to be considered in weighing any submissions made by the claimant in opposition to the merits of the applications, the fact that notwithstanding the notice which she had received, she had not attended today's Hearing having specifically prepared to oppose the applications.

8. The Tribunal accordingly confirmed with parties the following Order of Proceedings:-

(1) The claimant to give her evidence in chief on the Preliminary Issue of Disability Status, the same to cover each of the physical or mental impairments upon which she founded for the purposes of giving rise to her possession of the protected characteristic at the

material times and including the adoption, as part of her evidence in chief, if she so intended of the "Disability Impact Statement" submitted by her in compliance with the Tribunal's 5th May 21 Orders and produced at pages 36 to 38 of the bundle matters of fact impacting upon the June 29th applications;

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(2) The respondent's representative to cross examine the claimant;

(3) The claimant to give further evidence in "re-examination" as required;

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(4) The respondent to lead the oral evidence of Ms S McNay, if to be led;

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(5) The claimant to cross examine Ms McNay if led;

(6) Re-examination of Ms McNay;

(7) The respondent's representative to address the Tribunal in submission anent the issue of Disability Status and in support of the June 29th applications;

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(8) The claimant to respond both in respect of the issue of Disability Status and in opposition to the June 29 applications.

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9. In terms of its Interlocutory Order (**Seventh**) of 5th May 2021, the Tribunal Directed:-

(a) the respondent's representative to draw up and to send to the claimant, within 21 days of the 5th of May 2021, a draft Agreed List of Proposed Issues including Sub-Issues of Fact requiring investigation and determination in the case,

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(b) further directed the claimant to revert to the respondent's representative with any proposed adjustments to the List within a further 14 days thereafter, that is within 35 days of the 5th of May 2021; and,

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(c) Ordered the respondent's representative, within a further 7 days, thereafter, to lodge the adjusted Agreed List of Proposed Issues with the Tribunal, in electronic form.

10 10. The terms of the Order (**Seventh**) of 5th May 21 were obtempered by the parties; the List of Issues being sent to the claimant, the claimant upon consideration opting not to propose any adjustments to it and the respondent's representative thereafter timeously lodging the agreed "Proposed List of Issues for the full Hearing", with the Tribunal, by email
15 dated 16th June 2021.

11. The terms of the proposed, now agreed, List of Issues, now received and approved by the Tribunal, are set out below, together with the Issues and Sub-Issues of Fact itemising, respectively under the headings of "**Direct**
20 **Discrimination**", "**Indirect Discrimination**" and "**Harassment**", the instances of alleged less favourable treatment, the PCP and particular disadvantage and the instances of alleged unwanted conduct which the claimant gives notice of relying upon for the purposes of those complaints.

25 **IN THE GLASGOW EMPLOYMENT TRIBUNAL CASE NO: 4100101/2021**

BETWEEN

MRS SUSAN PATERSON

Claimant

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AND

VOYAGE 1 LIMITED

Respondent

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AGREED LIST OF ISSUES

5 **Direct Discrimination**

1. Does the Tribunal find that the following alleged less favourable treatment occurred?

- 10 a. Incident in Flat 3 involving Frank Cearnas on 12 August 2020?
- b. Incident in the office involving Sandra McNay on 12 August 2020?
- 15 c. Dawn Ferguson telling that Claimant on 16 August 2020 in front of another staff member and service user that she was about to have Supervision?
- d. Dawn Ferguson asking on 16 August 2020 service user in front of the Claimant and a colleague(P) what he thought of the Claimant?
- 20 e. Dawn Ferguson on 16 August 2020 not giving adequate notice of when the Claimant's Supervision was taking place?
- f. Dawn Ferguson on 16 August 2020 sighed when the Claimant asked to
- 25 have her lunch break?
- g. Sandra McNay and Frank Cearnas not informing the Claimant that her supervision meeting on 18 August 2020 was a "significant one"?
- 30 h. Sandra McNay and Frank Cearnas dismissed the Claimant for her employment with the Respondent?

2. Who is/are the real or hypothetical comparator(s) that the Claimant relies on?

35 3. Was any less favourably treatment, if found, because of the Claimant's or her husband's disability?

Indirect discrimination - section 19 Equality Act 2010

1. Does the Tribunal find that the Respondent operated/applied the following PCP(s)?

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a. The requirement to undertake waking nightshifts and Working time Regulations opt out?

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b. The Respondent will say that the Claimant was never required to undertake waking nightshifts or work in excess of 48 hours.

2. If so, does the PCP in question place the Claimant at a particular disadvantage when compared to those who are not disabled (i.e. what is the group disadvantage)? What does the Claimant say was the groups disadvantage in respect the PCP in question?

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3. What is the particular disadvantage relied on? The Claimant alleges that the particular disadvantage she suffered in respect of the PCP in question was:-

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a. The requirement on 11 August 2020 to complete and sign Nightworkers Risk Assessment and Working time regulations opt out forms.

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b. The Respondent will say this is not a disadvantage. Further the Respondent will say that the Claimant was never required to undertake waking nightshifts or work in excess of 48 hours.

4. Did the PCP in question put the Claimant to a disadvantage? If so;

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5. Can the Respondent show that the PCP is a proportionate means of achieving a legitimate aim?

Harassment

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1. Does the Tribunal find that the following alleged unwanted conduct occurred? :-

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- a. On 6 August the Claimant was asked twice if she had questions, other staff only once?
- b. Dawn Ferguson shouted down the corridor to the Claimant to “start unpacking” on 12 August 2020?
- c. Sandra McNay said abruptly on 12 August 2020 “Make sure Susan’s flat is ready” and kept staring/glaring at the Claimant?
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- d. On 16 August Dawn Reynolds repeatedly said to the Claimant “be mindful” and was trying to get the Claimant to tell tales on other staff?
- e. Dawn Ferguson texted the Claimant on 17 August 2020 after 7pm asking if the Claimant had got her email about going in for a Probationary meeting the following day at 10.30am?
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- f. Dawn Ferguson texted the Claimant on 17 August 2020 and did not sign off with “regards” or her name, which the Claimant felt was rather curt?
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- g. During Probation Meeting on 18 August Sandra McNay and Frank Cearnas:
- i. did not wear masks?
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- ii. made the Claimant sit on a chair very close to a wall at the opposite side of the room from them?
- iii. spoke very quickly and did not allow the Claimant time to think or respond?
- iv. Criticised the fact that the Claimant had asked questions about service user’s lack of shower chair?
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- v. Said the Claimant threatened them by mentioning Unison in a e mail?
- vi. said the Claimant’s texts/e mails were rude?
- vii. were reading from minutes from Supervision which the Claimant had NOT seen or approved?
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- viii. they did not give the Claimant a copy when she asked for it?

2. Was the unwanted treatment related to the Claimant's or her husband's disability?
 3. If so, did the unwanted treatment have the purpose or effect of violating the Claimant's dignity and/or creating a hostile, degrading, humiliating or offensive environment for the Claimant?
 4. Was it reasonable for the conduct to have that effect?
- 10 12. The claimant confirmed, in the course of Case Management Discussion conducted at the outset of the Open Preliminary Hearing, and in the course of her evidence, that she had received the proposed List, had considered it and concluded that there were no other instances of treatment, conduct, provision, criterion or practice or particular disadvantage which she sought to give notice of and which were not included in the List.
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13. It was accepted by the respondents, for the purposes of the Open Preliminary Hearing, that the claimant's husband was a person possessing the protected characteristic of Disability at the material time for the purposes of her complaints that is in the period 6th to 18th August 2020.
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Additional Documents for the Claimant

14. At the outset of the Hearing the claimant tendered and, having heard parties, the Tribunal received, and exceptionally had copied, numbered and included in the bundle at pages 39 to 56, additional documentary evidence comprising; an Occupational Health Report of Dr Knox dated 22nd of June 2016, a further such Report dated 18th April 2018, both relating to the claimant and, a letter from the claimant's General Medical Practitioner, Dr Crichton, dated 29th of June 2021.
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Concessions made in the course of Hearing

15. Following the hearing of the claimant in oral evidence in chief and in cross, including her adoption of the terms of her “Disability Impact Statement” as part of that evidence and, upon consideration of and the taking of instructions in relation to, the additional documentary evidence lodged by the claimant at the outset of the Hearing, the respondent’s representative made concession, at the bar, as reflected at paragraph **(First)** of the Tribunal’s Judgment to which this Note of Reasons is attached, viz,

(a) that the respondent concedes that the claimant was, at the material time for the purposes of her intimated claims, that is in the period 6th to 18th August 2020 inclusive, a person possessing the protected characteristic of Disability within the meaning of sections 4 and 6 and Schedule 1 of EqA qua (by reason, collectively and or individually, of) her physical impairments of:-

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(i) Ischemic Heart Disease and

(ii) Benign Paroxysmal Positional Vertigo; and

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(iii) of her mental impairment of Anxiety and Depression, while simultaneously confirming,

(b) that the respondent made no such concession in respect of the claimant’s mental impairment of Post Traumatic Stress Disorder and continued to put the claimant to her proof in respect of her possession of the protected characteristic at the material times, by reason of that impairment.

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16. In response and for her part, the claimant withdrew her previously intimated reliance upon her physical impairment of Irritable Bowel Syndrome, while confirming that she continued, notwithstanding the respondent’s concession, to assert that the condition of Post Traumatic Stress Disorder also gave rise to her possession of the protected characteristic of Disability at the material times.

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17. In relation to the primary Preliminary Issue of Disability Status there accordingly only remained at large between the parties the particular issue of whether the asserted condition of Post Traumatic Stress Disorder amongst others also gave rise to the claimant's possession of the protected characteristic of Disability in the period 6th to 18th August 2020.

Sources of Oral Evidence

18. As noted above, the claimant gave oral evidence on affirmation including the adoption, as part of her evidence in chief, of the "Disability Impact Statement" drawn by her and produced at pages 36 to 38 of the Joint Bundle. The claimant further answered questions in cross examination, questions from the Tribunal and gave further evidence in "re-examination".
19. In the event and following the concession made on the respondent's behalf, no oral evidence was led for the respondent.

Documentary Evidence

20. There was before the Tribunal at Hearing a Joint Bundle extending to 56 pages and including, amongst other documents, Forms ET1, ET3, Grounds of Resistance, Further and Better Particulars and the respondent's response thereto, and to some of which reference was made in the course of evidence and submission.

Finding in Fact

21. On the oral and documentary evidence presented, the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the determination of the one remaining element of the Preliminary Issue of Disability Status that being the claimant's contended for reliance upon Post Traumatic Stress Disorder as giving rise to her

possession of the protected characteristic of Disability in the period 6th to 18th August 2020:-

- 5 22. In her initiating Application ET1, the claimant gives notice of reliance upon the medical conditions of Ischaemic Heart Disease and Irritable Bowel Syndrome (“IBS”).
- 10 23. In her Form ET1 and in the further particularisation of her claims provided, the claimant refers to her “disability” in the singular alongside her Irritable Bowel Syndrome (IBS):- *“Voyage staff knew of my disability and IBS”* and again:- *“... and this all happened after I disclosed my disability and my husband’s”*.
- 15 24. Only the conditions of Ischaemic Heart Disease and IBS are mentioned by the claimant in the “Night Worker Health Assessment Questionnaire” completed by her and produced at page 33 of the bundle.
- 20 25. In the document provided by the claimant and entitled “Susan Paterson Health Information”, (produced by her in response to the Tribunal’s Direction that she furnish the Tribunal and the respondents with a Disability Impact Statement), the claimant refers not to two impairments but to four, these being:-
- 25 (i) IBS;
- (ii) Ischaemic Heart Disease;
- (iii) Benign Paroxysmal Positional Vertigo; and
- 30 (iv) Post Traumatic Stress symptoms
26. In her GP’s letter dated 26th March 2021, produced at pages 34 and 35 of the bundle, reference is made by the doctor to all four of the above impairments; being; Irritable Bowel Syndrome, Ischaemic Heart Disease, Benign

Paroxysmal Positional Vertigo. There is also included an historical reference to the claimant's symptoms of Anxiety having worsened, at a time not specified by the doctor, but following an assault by a patient at the claimant's previous place of work in January 2020, and to the emergence of some
5 "*PTSD type symptoms*", *flashbacks*, *situational anxiety and avoidance ...*".

27. The Occupational Health Report of Dr K Knox, signed 18th April 2018 and lodged by the claimant at the outset of the Open Preliminary Hearing, contains reference to chronic health conditions experienced by the claimant
10 including heart, and respiratory conditions, vertigo and musculoskeletal conditions affecting her neck or shoulders. The Report makes no reference to the existence or mention by the claimant of, any Post Traumatic Stress Disorder type symptoms.

15 28. The claimant has had symptoms of IBS since 1983. The claimant confirmed in the course of the Hearing that she no longer sought to rely upon her IBS as giving rise to protected characteristic of Disability.

29. The claimant has had symptoms of heart disease since 2014.

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30. The claimant has had symptoms of vertigo since about 2014.

31. The claimant has had symptoms of anxiety and depression since 2014.

25 32. The claimant has exhibited Post Traumatic Stress type symptoms from some time after January 2020.

30 33. In her oral evidence before the Tribunal the claimant stated that the basis for her asserted reliance upon PTSD as giving rise to possession of the protected characteristic was that some time in the early autumn of 2018, following upon her being injured by a male service user in April 2018, she was experiencing increased anxiety and self-referred to the Falkirk District Association for Mental Health in order to access counselling. In the course of that counselling her counsellor informed her that some of the symptoms

which she recounted as experiencing in consequence of her anxiety, were also consistent with PTSD including symptoms of: feeling anxious all the time, being hypervigilant, recurring flashbacks of her attack, being easily startled, finding it difficult to concentrate, experiencing “heart racing”, feeling emotionally numb and unsafe in new surroundings and affected sleep.

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34. When, in cross examination referred to her own account of matters as set out in the Disability Impact Statement, at page 37 of the bundle and which indicated that communication from her counsellor occurred in 2019 not 2018, the claimant confirmed that she accepted that it was in fact 2019 and, the injury which she had referred to was one which occurred in April of 2019.

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35. The claimant stated in her oral evidence that she considered she suffered from PTSD distinctly and separately from anxiety because, despite the commonality of many of the symptoms shared by the two conditions, she could experience some of those symptoms from time to time on days on which she did not otherwise feel particularly anxious.

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36. The claimant was asked by the respondents to complete a “Night Worker’s Risk Assessment Form” and a Working Time Regulations Opt Out Form, the latter being something which in terms of the claimant’s oral evidence she asserted she had, in any event, already given consent to in the written terms of contract entered into between herself and the respondents.

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37. The claimant was not required to undertake and did not undertake “waking night shifts” nor work in excess of 48 hours.

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38. The proposed List of Issues as directed by the Tribunal, had not proposed any additions to or deletions from it and that there were no instances of unfavourable treatment, unwanted conduct or descriptions of Provisions, Criterion or Practice (PCP) or of particular disadvantage, respectively in relation to the complaints of Direct Discrimination, Indirect Discrimination or of Harassment, upon which she sought to found but which were not listed in the proposed now Agreed List of Issues.

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Summary of Submissions

Summary of Submissions for the Respondent

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39. In compliance with the Tribunal's Orders of 5th May 2021, the respondent's representative had sent to the claimant, and had lodged with the Tribunal, 7 days prior to the commencement of the OPH, a written outline of arguments to be advanced and submissions to be made by him on behalf of the respondent at the OPH, both in relation to the Preliminary Issue of Disability Status and in relation to the separate applications for Rule 37 Strike Out which failing Rule 39 Deposit Orders. The terms of that written outline were available to both the claimant and the Tribunal in advance of and at the OPH and were rehearsed and relied upon by the respondent's representative in their entirety, subject only to the qualified concession made orally at the Hearing and relating to Disability Status. They are accordingly not rehearsed at length here. Rather, there is summarised below those parts of the submission which, in the circumstances presented and in the context of the concession made, informed the Tribunal's determination of the residual matters at large between the parties at Open Preliminary Hearing.

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40. In relation to the one remaining but disputed medical condition (mental impairment) upon which the claimant gave notice of founding as giving rise to her possession of the protected characteristic, the respondent's representative referred the Tribunal to the decisions in the cases of **Royal Bank of Scotland Plc v Morris UKEAT/0436/10/MAA** and **Goodwin v Patent Office [1999] IRLR 4**, and being decisions binding upon it.

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41. The decision in **Goodwin** is authority for the proposition that the Employment Tribunal's enquiry should be directed to that which the claimant states that she cannot do, or cannot do without difficulty, rather than what she can positively do. **Goodwin** also provides important direction of how the statutory question should be considered, that is by sequentially determining the following matters:-

- (i) Whether the claimant has a mental or physical impairment,
- 5 (ii) Did the impairment adversely affect C's ability to carry out normal day to day activities (causation/attribution),
- (iii) Was the adverse effect substantial, that is to say more than trivial,
- 10 (iv) Was the adverse effect long term.

42. In order to conclude that the statutory definition is met in relation to any physical or mental impairment given notice of as relied upon, the Tribunal must be satisfied that the claimant gives notice of the basis upon which she would be entitled to prove or on the presentation of evidence has proved at a Hearing that each of the above questions could be positively answered. The extent to which the Employment Tribunal is able to form a concluded view on that matter should be directly informed upon a qualitative assessment of the documentary and oral evidence which is available to it.

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20 43. Under reference to the decision of the EAT in *Royal Bank of Scotland Plc v Morris UKEAT/0436/10/MAA* and while recognising that the fundamental question to be answered by the Employment Tribunal remains a question of fact, the respondent's representative submitted in terms of any mental impairment upon which reliance may be placed, that whilst medical evidence is not bound to be adduced, it is clear from the decision in the case of *Royal Bank v Morris* that a failure to adduce such evidence may result in it not being possible for the Employment Tribunal to find in fact that a claimant suffered from a particular mental impairment at the material times for the purposes of a claim. That, submitted the respondent's representative was the position in which, on a qualitative assessment of the documentary and oral evidence available to it, the Tribunal should conclude it found itself in relation to the asserted impairment of Post Traumatic Stress Disorder.

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The Application for Strike Out

44. Insofar as the claimant's claims may be taken to include her complaint of
5 "*Automatic Unfair Dismissal by reason of an offer to prove that dismissal was
for a reason relating to disability*", as orally explained by the claimant at the
Closed Preliminary Hearing (Case Management Discussion) of 5th May 2021
and recorded at Order **(First)**(a) issued following the same viz

10 "*(a) Automatic Unfair Dismissal by reason of an offer to prove
dismissal was for a reason relating to disability*", the respondent's
representative submitted as follows.

45. As no specific statutory provision is identified as relied upon, the respondent's
representative's submission was predicated on the assumption, not
15 unreasonable in the circumstances, that the characterisation of the complaint
as one of "Automatic Unfair Dismissal", by the claimant, was intended to be a
reference to a claim under section 104 of the Employment Rights Act 1996
("ERA"). On the assumption that was the position being given notice of, the
respondent's representative's submission was in short compass namely, that
20 as a claim proceeding in terms of section 104 of the ERA was not subject to a
pre-requisite of two years continuous service, the rights upon which reliance
can be placed for the purposes of founding a section 104 Automatic Unfair
Dismissal claim are themselves specified within the section at sub-section
(4). The rights so specified do not include any right to rely upon the
25 provisions of the Equality Act 2010 ("EqA").

46. In the respondent's representative's submission, the complaint recorded as
that given notice of, absent two years continuous service but founding rather
upon a breach of the terms of the Equality Act 2010, enjoyed no reasonable
30 prospect of success. It was an apparent claim of a type for which there was
no statutory basis and which the Tribunal lacked Jurisdiction to consider. He
submitted that that claim, certainly, should be struck out in terms of Rule 37.

47. In relation to the claimant's complaints of Indirect Discrimination and in particular to the instances of those which were listed at paragraphs 1(a) to 1(h) of the proposed List of Issues and Sub-Issues of Fact produced by the respondent's representative and passed to the claimant for consideration and revision, all in terms of the Tribunal's Interlocutory Orders of 5th May 21, the respondent's representative advanced the contention that these claims enjoyed no reasonable prospect of success which failing little reasonable prospect of success on two separate grounds:-

10 (a) That the claimant did not give clear or fair notice of whether she relied upon a real or a hypothetical comparator and if the former, did not give sufficient information to identify the comparator;

15 (b) That the claimant failed to give notice of any basis upon which she would be entitled to prove or upon which the Tribunal would be entitled to infer, at a Final Hearing, that the instances of less favourable treatment complained of at the hands of the respondent's Managers, occurred because of the claimant's or
20 of her husband's disability.

48. Under reference to the case of **Madarassy v Nomura International Plc [2007] IRLR 246** and **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** the respondent's representative reminded the Tribunal, as per Mummery LJ (at paragraphs 56 and 57), that the fact that the claimant offers to prove on the one hand possession of the protected characteristic of Disability and on the other the occurrence of what she asserts was disparate or less favourable treatment, establishes only the possibility of discrimination and that something more is required. That, he reminded the Tribunal was a proposition which the claimant had accepted in cross examination. The respondent's representative submitted that in relation to each of the instances of alleged disparate treatment summarised at paragraphs 1(a) to 1(h) inclusive of the proposed now Agreed List of Issues, the claimant provided no notice either in; the written documentation

relied upon by her, the Particulars and Further Particulars of Claim or in her oral evidence before the Tribunal, of “something more” which would be sufficient, if proved, to establish the causative link between the claimant’s protected characteristic on the one hand and the treatment founded upon, on the other, or sufficient to switch the burden of proof to the respondents such that it would be for them to show that the real reason was one wholly unconnected with the claimant’s protected characteristic. On that basis he submitted that the complaints of Direct Discrimination should be struck out in terms of Rule 37 which failing, should be the subject of a Deposit Order in terms of Rule 39.

Indirect Discrimination Section 19 EqA 2010

49. In relation to the claimant’s claims of Indirect Discrimination, advanced in reliance upon section 19 EqA and, let it be assumed for the purposes of the OPH;

(a) that the claimant could demonstrate the existence of a Provision, Criterion or Practice which, Mr Brockley submitted, the claimant identifies as the requirement to “undertake waking night shifts and Working Time Regulations opt out”:-

(b) The claimant failed to give notice of any basis upon which she would be entitled to prove or to show at a Final Hearing that she was placed at any particular disadvantage in consequence of the adoption of the identified alleged PCP, the same in circumstances in which the claimant had accepted in evidence that she was not ever required to nor did she ever undertake any waking night shifts or work for a period in excess of 48 hours. The requirement that she do so being an essential element of a section 19 EqA claim, the respondent’s representative submitted that the complaint of Indirect Discrimination given notice of enjoyed no reasonable prospect of success and should be struck out in terms of Rule 37 and

which failing, should be the subject of a Deposit Order in terms of Rule 39.

Harassment Section 26 EqA

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50. In relation to the claimant's complaint of Harassment, made in reliance upon section 26 EqA the respondent's representative submitted that the claimant failed to give notice of any basis upon which the conduct, on which she relies and which is summarised at paragraphs 1(a) to 1(g) inclusive of now Agreed List of Issues, was conduct which related to either the claimant's own protected characteristic of Disability or that of her husband. The establishment of that relationship being an essential element of a section 26 EqA complaint, the complaint of Harassment, as given notice of by the claimant, enjoyed no reasonable prospect and should be struck out which failing little reasonable prospect of success and should accordingly be struck out which failing be the subject of a Deposit Order.

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51. In exercise of his duty, owed in his capacity as an Officer of Court, to the Tribunal and to the claimant, and under reference to the cases of:-

Sood v Governing Body of Christ the King School and others
UKEAT/0449/10/ZT,

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Balls v Downham Market High School and College [2011] IRLR
217, the respondent's representative reminded the Tribunal;

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(a) that strike out was a draconian measure and, in cases of discrimination certainly, its use would generally be restricted to circumstances in which there was no dispute as to the material relevant facts and in which the Tribunal could further be satisfied that on those undisputed facts, the claim enjoyed no reasonable prospect of success.

- 5 (b) That test, the test of “no reasonable prospect of success” was a high test and it would not be sufficiently met in circumstances where the Tribunal was only able to conclude that it was not likely or not probable that the claim would succeed,
- 10 (c) nor by placing reliance on the respondent’s case and concluding that the respondent was likely to discharge any burden of proof sitting with it; and
- 15 (d) that in complaints involving discrimination where the facts are in dispute complaints will generally not be struck out without the relevant evidence first being heard.

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52. The respondent’s representative further submitted, under reference to the case of **Sood**, that the extent to which expense would be saved by strike out was a relevant factor to be considered albeit that it may not infrequently the case that matters of fact, not of themselves forming the basis for the claims advanced, were examined in evidence by way of background, thus resulting in no real saving in terms of the length of scope of an enquiry.

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53. Under reference to **Van Rensburg v The Royal Borough of Kingston-Upon-Thames UKEAT/0096/07** per Elias J (P) as he then was, at paragraphs 22 and 24 (at the latter in turn under his reference to the Court of Appeal in **North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330**, Mr Brockley submitted that in reaching a decision to strike out the Employment Tribunal may and should consider the contentions of either party which broad phrase could include both factual and legal matters which the ET has to determine and thus, in principle – albeit that the cases will be very exceptional – , it would be possible for a claim to be struck out pursuant to the rule even where the facts were in dispute.

Summary of the Claimant’s Submission

54. In light of the claimant's departure from her previous founding upon the condition of Irritable Bowel Syndrome and the respondent's concession that they accepted the claimant was a person possessing the protected characteristic of Disability, in the period 6 to 18th August 2020, by reason of her conditions of Ischaemic Heart Disease, Vertigo (Benign Paroxysmal Positional Vertigo) and Anxiety and Depression, the claimant's submissions in respect of the remaining issue of Disability Status related to her reliance upon Post Traumatic Stress Disorder.

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55. The claimant submitted:

(a) that it was some time in the period September/October/November 2019 that she first formed the view that she was suffering from PTSD in addition to anxiety and depression.

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(b) that the basis for her forming that view was in turn the observation made by the person from whom, at that time, she was receiving counselling for her increased anxiety following an injury sustained by her in April of 2020, and which was to the effect that while the symptoms which she reported as experiencing were largely consistent with "Anxiety", the condition in respect of which she had self-referred to counselling, some of those symptoms were also consistent with Post Traumatic Stress Disorder.

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56. In submission, the claimant rejected the proposition, which had been put to her in cross examination, that insofar as she may be experiencing the symptoms which she recounted, these could be properly viewed as interrelated to or being an aggravation of her pre-existing condition of Anxiety and Depression rather than a distinct and separate impairment of PTSD.

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57. The claimant submitted that she did not accept that proposition because, from time to time, she experienced some of those symptoms on days upon which she did not otherwise feel particularly anxious.

5 **Strike Out**

58. In relation to the respondent's Application for Strike Out the claimant directed her reply principally to the criticism advanced by the respondent's representative as to lack of necessary causal link. That is, when taken
10 together, all of the circumstances amounting to the notice which she gave of her claims including, not only her Form ET1 but her oral evidence and the "Disability Impact Statement" document which she had adopted in evidence, the GP and other Reports, the claimant failed give notice of any basis upon which she would be entitled to prove or the Tribunal would be entitled to infer
15 (absent another explanation) that any of the conduct of which she complained, whether it be unwanted conduct for the purposes of section 26 or less favourable treatment for the purposes of section 13, occurred because of or was related to either her husband's or to her own protected characteristic, or because of or was related to any of the underlying medical
20 conditions upon which she relies as giving rise to the characteristic.

59. In response to that criticism, the claimant explained that she considered that it would not be possible for the respondents, standing the business of providing care in which they were engaged, to be so incompetent as to treat
25 her in the way that they had done for any reason other than a discriminatory reason relating to her protected characteristic of Disability and therefore, for her part, she concluded, believed and asserted that the reason must be one related to her protected characteristic and that that should be regarded as sufficient to allow her claims to go forward and to avoid any requirement for a
30 Deposit Order.

60. She stated that she was against the strike out of her claims, or any of them, because she had not yet said all that she wanted to say about the way that

she had been treated and should have the opportunity of doing so at a Final Hearing.

5 61. In response to the Application, made in the alternative, that a Deposit Order be fixed in terms of Rule 39 and the purpose of such an Order having been explained to her by the Tribunal, the claimant stated that she “was on Universal Credit and had no money”.

The Applicable Law

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62. In relation to the remaining aspect of Disability Status that is whether the claimant falls to be regarded as a person possessing the protected characteristic of Disability in the period 6th to 18th August 2020 by reason of a mental impairment of Post Traumatic Stress Disorder, the relevant primary and subordinate statutory provisions are to be found in sections 4 and 6 and Schedule 1 to the Equality Act 2010, and in the guidance of the Secretary of State (2011) and the Appendix thereto;

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63. In relation to Strike Out, in paragraphs 37(1)(a) and Deposit Orders, in paragraph 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

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64. The terms of those provisions are readily accessible on the internet and the relevant parts were referred to in detail at the Hearing. Their terms are accordingly not set out at length and in their entirety in this Note of Reasons with the exception of the terms of section 6 EqA which directly informs the Tribunal’s determination of the residual issue of Disability Status and, the terms of Rules 37(1)(a) and 39(1) and (2) of the Rules of Procedure, which inform the determination of the Applications for Strike Out which failing the making of a Deposit Order, which terms are respectively as follows:-

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“6 Disability

(1) A person (P) has a disability if—

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

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

(2) A reference to a disabled person is a reference to a person who
has a disability.

10 (3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected
characteristic is a reference to a person who has a particular
disability;

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(b) a reference to persons who share a protected characteristic is
a reference to persons who have the same disability.

20 (4) This Act (except Part 12 and section 190) applies in relation to a
person who has had a disability as it applies in relation to a
person who has the disability; accordingly (except in that Part and
that section)—

25 (a) a reference (however expressed) to a person who has a
disability includes a reference to a person who has had the
disability, and

30 (b) a reference (however expressed) to a person who does not
have a disability includes a reference to a person who has not
had the disability.

(5) A Minister of the Crown may issue guidance about matters to be
taken into account in deciding any question for the purposes of
subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.”

65. The terms of Rule 37(1)(a) and (b) and Rule 39(1) and (2) of the Employment
5 Tribunals (Constitution and Rules of Procedure) Regulations 2013
Schedule 1 are as follows:-

“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
10 a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable
prospect of success”

15 **“Deposit orders**

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
20 order requiring a party (“the paying party”) to pay a deposit not
exceeding £1,000 as a condition of continuing to advance that
allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying
25 party’s ability to pay the deposit and have regard to any such
information when deciding the amount of the deposit.”

66. Judicial guidance in relation to the finding established the possession of the
protected characteristic of Disability, the steps to be adopted by an
30 Employment Tribunal when making such a finding, of the requirements of a
relevant complaint of Discrimination and, on the application of the Rules of
Procedure relating to Strike Out and the fixing of Deposit Orders, is to be
found in decisions of the Higher Courts in the cases of:-

- (1) **Madarassy (Appellant) v Nomura International Plc (Respondents)** [2007] EWCA Civ 33
- (2) **Igen Limited v Wong** [2005] IRLR 256 CA
- 5 (3) **Sood v Governing Body of Christ the King School and others**
UKEAT/0449/10/ZT
- (4) **van Rensburg v Royal Borough of Kingston-upon-Thames and others** UKEAT/0096/07/MAA
- (5) **Shamoon v Chief Constable of the Royal Ulster Constabulary**
[2003] ICR 337
- 10 (6) **Balls v Downham Market High School and College** [2011]
IRLR 2017 (paras 4, 6 and 7)

67. Reference to those Decisions was made by the respondent's representative in the course of submission and copies of some were provided to the Tribunal and to the claimant.

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68. The Tribunal found the case authorities to which it was referred to be relevant and of assistance in its consideration and determination of the Preliminary Issue and Applications which were before it.

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69. The grounds upon which a complaint of "Automatic" Unfair Dismissal may be pursued, without meeting a requirement for a particular period of continuous service, are prescribed in section 104 of the Employment Rights Act 1996.

25 **Discussion and Disposal**

70. The Tribunal accepted as accurate, the respondent's representative's analysis of the scope of section 104 of the Employment Rights Act 1996. Reliance upon a breach of the Equality Act 2010 does not fall within the scope of section 104 of the ERA. The apparent complaint of "Automatic Unfair Dismissal" given notice of on the above grounds is a claim without statutory basis and one which the Employment Tribunal has no jurisdiction to consider. It is dismissed on that ground, that is for want of jurisdiction.

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Discussion and Disposal**Reliance upon Post Traumatic Stress Disorder as a condition giving rise to Disability**

5 71. As is recorded above the terms of section 6(1)(a) and (b) of the EqA prescribe:-

“6 Disability

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

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

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

15 72. The guidance provided in **Goodwin v Patent Office** reflects that requirement and identifies the first of the matters to be sequentially determined in answering the statutory question “Is a person disabled within the meaning of the Act” as:-

20 *“Whether C has a mental or physical impairment”, the onus of proving the existence of which (possession of an impairment) at the material time for the purposes of a claim, sits with the claimant.*

25 73. While ultimately a question of fact for determination by the Tribunal, as stated by the EAT in **RBS Plc v Morris** at paragraph 55, *“The burden is with a claimant.”*

30 74. In the whole circumstances presented and placed before the Tribunal at Open Preliminary Hearing, including not only the content of the claimant’s initiating Application ET1 but all of the documentary and oral evidence founded upon, I consider that the claimant has failed to discharge that burden of proof and has failed to establish, on the balance of probabilities and on the preponderance of the evidence, that in the period 6th to 18th August 2020 she

was suffering from the diagnosable condition of Post Traumatic Stress Disorder.

5 75. Separately, the existence or not of such a condition can very much be a matter for informed and qualified medical opinion. There is no such medical opinion presented to the Tribunal in relation to the condition of Post Traumatic Stress Disorder. Such medical evidence as is before the Tribunal either makes no mention of Post Traumatic Stress Disorder (in the case of the Occupational Health Reports) or, (in the case of the claimant's General
10 Medical Practitioner's letter of 26th March 2021), makes reference only to the fact that having been off work for a period of time due to the physical effects of an injury sustained by her in the course of work in January 2020, at some unspecified time thereafter the claimant also exhibited "*some PTSD type symptoms*".

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76. That reference falls short of what would be required to establish the claimant's possession of that particular mental impairment at the material times. Taking it at its highest, and on the assumption that it is a statement made based upon some contemporaneous and primary observation of the
20 doctor and not merely based upon a narrative account presented to the doctor by the claimant, it amounts to no more than what it says. Had the doctor been satisfied that the claimant was exhibiting (had exhibited) symptoms of PTSD rather than PTSD type symptoms then she can be expected to have said so in her Report. The qualification of the statement by
25 the introduction of the word "type" gives rise to an inference that, at the time of signing the letter, the author was not clear that the claimant had exhibited symptoms of PTSD nor if she had, when she had.

77. In fairness to the claimant, the principal basis for her belief, that in August
30 2020 she was suffering from Post Traumatic Stress Disorder, was the fact that a counsellor with the Falkirk District Association for Mental Health described some of the symptoms of anxiety which had caused the claimant to self-refer to the Association, as being symptoms which were also consistent with PTSD. There was no evidence placed before the Tribunal as to the

experience or qualifications of the counsellor in question, nor the terms of any written report prepared by her and considered by and commented on by the claimant's GP. While noting the claimant's assertion, made in oral evidence, that PTSD once present does not simply go away, there is little or no evidence before the Tribunal as to recurrence of the symptoms said to be indicative of PTSD beyond September/October/December 2019, or in the event that such recurrence did occur in relation to when such recurrence took place.

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- 10 78. While I accept the genuineness of the claimant's asserted belief that she was suffering from the mental impairment of PTSD in the period 6th to 18th August 2020, I considered that the claimant has failed to establish that fact on the preponderance of the evidence and on the balance of probabilities and accordingly hold that the claimant was a person possessing the protected
- 15 characteristic of Disability within the meaning of sections 4 and 6 of the Equality Act 2010, in the period 6th to 18th August 2020 inclusive, by reason only of, her physical impairments of Ischaemic Heart Disease and Benign Paroxysmal Positional Vertigo and by reason of her mental impairment of Anxiety and Depression, but not, by reason of the mental impairment of Post
- 20 Traumatic Stress Disorder; and the complaints of discrimination, in so far as based upon that last named condition, are dismissed.

Application for Strike Out Rule 37(1)(a)

The Complaint of Automatic Unfair Dismissal

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79. Where a complaint of Unfair Dismissal is presented and proceeds in terms of section 98 of the Employment Rights Act 1996 ("ERA") and where an employer fails to establish as the reason or, if more than one the principal reason, for dismissal as one of the potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (section 98(1)(b)), then the dismissal will fall to be regarded as automatically unfair without the requirement to consider the reasonableness of the employer's actings in terms of section 98(4).
- 30

80. The potentially fair reasons for dismissal, which are identified on the face of section 98 ERA, do not include dismissal for a reason relating to disability. Thus, were the claimant's apparent complaint of unfair dismissal advanced in terms of section 98 of the ERA, and were she to prove, as she offers to, that the reason for her dismissal was a reason relating to disability, that dismissal would fall to be regarded as an automatically unfair dismissal.
81. The claimant however lacks Title to Present and the Tribunal would lack Jurisdiction to Consider a complaint of Unfair Dismissal in terms of section 98 because Parliament has currently conferred that right and jurisdiction respectively on individuals and the Employment Tribunal, in circumstances where the party making the complaint has accrued not less than two years of continuous employment with the party against whom the complaint is directed or, under continuity of employment provisions, with that employer and a previous employer, as at the date of first presentation of the complaint.
82. Section 104 of the ERA identifies, both expressly and by reference to other sections of the Employment Rights Act and or certain Regulations, circumstances in which a person may bring a complaint of Unfair Dismissal notwithstanding the absence of two years of continuous employment, often referred to in common parlance as "automatic unfair dismissal", where the offer to prove that the reason for the dismissal was, amongst others, that the claimant had asserted a statutory right of the type specified in section 104.
83. The rights expressly set out in section 104 or otherwise incorporated into it by reference, do not include rights under the Equality Act 2010 and thus, while an offer to prove the reason for dismissal as being a reason relating to disability might lead to a finding of automatic unfair dismissal in terms of section 98, it does not give rise to a competent and relevant complaint of "automatic unfair dismissal" in terms of section 104 of the ERA in respect of which there is no requirement that the employee have been so employed for a continuous period of two years.

84. I am satisfied therefore that the complaint given notice of of “*automatic unfair dismissal by reason of dismissal being for a reason related to disability*”, is an apparent or non-complaint for which no statutory basis is disclosed. Neither is it a complaint which the Tribunal has jurisdiction to consider and it falls to be dismissed on that ground.

The Complaints of Direct Discrimination Section 13

85. For a complaint of Direct Discrimination to succeed in terms of section 13 of the Equality Act 2010, the party bringing the complaint must prove, and for the purposes of the Application of Strike Out must be seen to offer to prove, that the less favourable treatment complained of occurred because of the protected characteristic (in this case of disability) possessed by the claimant, or because of her husband’s protected characteristic of Disability). That is to say, that the claimant must be seen, on a consideration not only of the terms of her initiating Application ET1 but of all the circumstances presented to the Tribunal at the Open Preliminary Hearing including, the oral evidence given by her and any relevant Findings in Fact made, to give notice of a basis upon which she would be entitled, at a Final Hearing, to prove the existence, among other essential elements, of such a causal connection; and to go either expressly, or to establish primary facts from which the Tribunal would be entitled, in terms of section 136 of the EqA “burden of proof”, to infer and thus hold established, in the absence of any other explanation, the existence of that causal connection.

86. In respect of the instances of the occurrence of alleged less favourable treatment of which the claimant gives notice as founding upon and which are listed at paragraph 1.(a) to 1.(h) of the Agreed List of Issues, and setting aside for immediate purposes the respondent’s representative’s criticisms of the lack of clarity on the issue of whether the claimant relies upon an actual or a hypothetical comparator and, if the former, the identity of that comparator, the respondent’s representative seeks Strike Out of the complaint of Direct Discrimination insofar as it relies upon all of those listed instances, for want of notice of a basis upon which the necessary causal

connection could be proved or inferred by operation of the provisions of section 136 of the EqA.

5 87. For the purposes of considering such a submission, the claimant's averments, her description of alleged instances of conduct, are to be taken as proved in the terms in which they are set out, notwithstanding the fact that the respondent puts the claimant to her proof in respect of some of that detail. Thus, the respondent's representative's proposition is that even if the claimant has established that all of the instances of alleged less favourable treatment which she gives notice of complaining of, did occur, those 10 instances as given notice of, and thus what will have been proved at a Final Hearing, include no element of the necessary causal connection, nor of primary facts from which the Tribunal could infer, in the absence of another explanation, that such a causal connection existed.

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88. I reject that submission insofar as it relates to the incident listed at paragraph 1(b) of the Proposed, now Agreed List of Issues viz "*Incident in the office involving Sandra McNay on 12th August 2020*". Taking into consideration the whole circumstances presented, what the claimant offers to prove in regard of that incident is that the respondents, including Sandra McNay knew not only 20 of her own disability but of the fact that her husband was disabled and further that what Sandra McNay said to her was "*Go home to your husband and do something useful instead of doing something here*". I consider that the direction to "*Go home to your husband and do something useful*" in 25 circumstances where Sandra McNay were to be shown to have known that the claimant's husband was disabled and cared for by the claimant, would amount to primary facts from which, if proved, the Tribunal would be entitled to infer and thus decide, in the absence of any other explanation, a causal connection between the claimant's husband's protected characteristic and the 30 alleged less favourable treatment. That of itself is sufficient, bearing in mind all that was said by the Lady Smith in **Balls v Downham Market High School**, to prevent me from concluding that the complaint of Direct Discrimination insofar as founded upon the alleged incident listed at

paragraph 1(b) of the Agreed List of Issues, enjoys no reasonable prospect of success.

5 89. In relation to the remaining incidents founded upon, that is those listed at paragraph 1(a) and paragraphs 1(c) to 1(h) inclusive, I considered that there was considerable force in the submissions made by the respondent's representative on one view, and taking the listed summarised descriptions of the incidents as proved in those terms it might be said that there was no or few material factual dispute between the parties and thus that these might be 10 instances falling within that very exceptional category, identified by the English Court of Appeal in **North Glamorgan NHS Trust v Ezsias** where it would be possible for claims to be struck out under the now equivalent Rule even where some facts were in dispute.

15 90. In the instant case the respondent puts the claimant to her proof, in respect of some of the instances of conduct listed as relied upon, as to the precise detail of what was said or done in relation to them all. Thus, at a Final Hearing evidence and additional evidence would be led on those matters and bearing in mind the strong recommendations of the Higher Courts that in cases of 20 discrimination claims should be struck out only after the hearing of evidence, I consider myself unable and decline to hold, at this relatively early procedural stage, that the complaint of Direct Discrimination, insofar as founded upon any one of the remaining listed instances enjoys no reasonable prospect of success. In so doing, I am conscious also of the requirement under the 25 Overriding Objective that cases be conducted justly and of the fact that the claimant is a litigant in person and regardless of whether she ought to have been in terms of the notice given to her of the Applications, her position at the outset of the Hearing was that she had not come prepared to address the Tribunal on the Applications for Strike Out. There may have been more 30 which she might have said in evidence and which she might yet say at a Final Hearing, albeit, based on the notice which she currently gives subject to objection on the part of the respondents and thus with the potential to be excluded by the Hearing Judge, for want of fair notice.

91. For the above reasons, I decline, at this juncture in proceedings, to Strike Out the complaint of Direct Discrimination insofar as founded upon the instances of conduct listed at paragraphs 1(a) and 1(c) to (h) inclusive of the Agreed List of Issues.

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92. I have no such difficulty in concluding that the complaint insofar as founded upon those same instances listed at paragraphs 1(a) and 1(c) to 1(h) of the proposed List of Issues are claims which enjoy “little reasonable prospect of success” for the purposes of Rule 39. While I cannot be satisfied at this stage in proceedings that it is impossible that the complaints so far as founded on one or more of those instances could succeed, the absence of notice of a basis upon which the claimant would be entitled to prove at a Final Hearing the necessary causal connection which failing primary facts from which the Tribunal might infer, in the absence of another explanation, the existence of that causal connection, does result in the complaints of Direct Discrimination in so far as founded upon them enjoying little reasonable prospect of success.

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The Complaint of Indirect Discrimination in terms of section 19 of the EqA

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93. If the claimant’s complaint of Indirect Discrimination in terms of section 19 of the EqA is to succeed, she will require to establish at Final Hearing, for consideration of today’s Application give notice of a basis upon which she would be entitled to prove at Final Hearing, that the provision, criterion or practice relied upon by her was one which would put the claimant at a particular disadvantage when compared with persons to whom it was also applied but who do not share the claimant’s protected characteristic.

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94. The alleged PCP of which the claimant gives notice of founding upon, is that set out at paragraph 1(a) of the proposed, now Agreed, List of Issues namely “A. *The requirement to undertake waking night shifts and Working Time Regulations Opt Out.*” The respondent’s representative submits that it is a matter of agreement and is not in dispute between the parties that the claimant, in the relatively short period of her employment with the

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respondents was never required to undertake and did not undertake any waking night shifts nor was she required to nor did she work for any period in excess of 48 hours (Working Time Regulations Opt Out). It is submitted that the claimant will be unable to establish, at a Final Hearing for the purposes of her claim, that she was in fact placed at any particular disadvantage in consequence of the Application of the specified PCP to, amongst others, her, let it be assumed that the claimant establishes the specified requirement as a relevant PCP and further that she was required to complete and sign a Night Worker's Risk Assessment and a Working Time Regulations Opt Out form, albeit that the respondent disputes whether her being so required constitutes a disadvantage.

95. While that argument is attractive insofar as it goes, the fact that the claimant, during the currency of her relatively short period of probationary employment with the respondent was not actually required to undertake any waking night shift work or to work in terms of the Working Time Regulations Opt Out form which she was required to sign, does not preclude the possibility that she might have been either during the period of her employment or, had her employment continued in circumstances where her probation was not terminated, at some future point in time.

96. Let it be assumed that such requirements would put the claimant and persons like her at a particular disadvantage, it is sufficient, in terms of the wording and for the purposes, of section 19(2)(b) and (c) that they would do so. In these circumstances I am unable to conclude, at this juncture in proceedings, that the claimant's complaint of Indirect Discrimination enjoys no reasonable prospect of success and I accordingly decline to strike it out on that ground.

97. I do however consider that the claimant's complaint of Indirect Discrimination, as given notice of, is one which enjoys little reasonable prospect of success. **Van Rensburg v Royal Borough of Kingston-upon-Thames and others**, is authority for the proposition that when considering an Application for a Deposit Order the Employment Tribunal is entitled to have regard to the likelihood of facts being established. In that context there arises a real

possibility that the claimant will be unlikely to establish that there was ever applied to her a real requirement to undertake waking night shifts or to work in excess of the number of hours fixed under the Working Time Regulations, and thus that any such PCP was in fact applied to her. I consider in those
5 circumstances that the complaint of Indirect Discrimination enjoys little reasonable prospect of success.

Harassment

10 98. Although, unlike in a complaint of Direct Discrimination, the terms of section 26 of the EqA do not require that the claimant establish that the unwanted conduct was “because” of her protected characteristic, or that of her husband, the section does require that it be established that the conduct was “related to” the characteristic. Although for the same reasons rehearsed in relation to
15 the complaints of Direct Discrimination I am unable to hold, at this juncture in proceedings, that the complaints of Harassment as presented enjoy no reasonable prospect of success, I am satisfied, with the exception of the complaint insofar as founded upon the alleged conduct listed at paragraph 1(g)(i) of the proposed List of Authorities viz

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(i) *“During probation meeting on 18th August Sandra McNay and Frank Cearnnes did not wear masks”,*

that the claims enjoy little reasonable prospect of success, for the purposes of section 39 of the EqA

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99. In relation to the conduct listed at paragraph 1(g)(i) under the heading “Harassment”, establishing that the respondent’s Managers did not wear masks at a meeting with the claimant in circumstances in which they were aware, amongst other matters, of her protected characteristic arising by
30 reason of her Ischaemic Heart Disease and thus, impliedly of her “vulnerability” if exposed to Covid-19, would amount to establishing primary facts from which, if proved, the Tribunal would be entitled to infer, in the absence of another explanation, that the conduct was related to the claimant’s protected characteristic. I further consider in those circumstances

that the claimant would be reasonably entitled to perceive such conduct as conduct violating her dignity or creating an intimidating, hostile or offensive environment for her, all in terms of section 26 of the EqA.

5 100. In relation to the remainder of the instances of conduct upon which the
complaint of harassment is founded, the absence, in relation to any of them
of notice of a basis upon which the claimant would be entitled to prove at a
Final Hearing the requisite discriminatory relationship, or primary facts from
10 which the Tribunal would be entitled, in the absence of any other explanation,
to infer that relationship, results in the complaint of harassment, insofar as
founded upon the instances of alleged unwanted conduct listed under the
heading of "Harassment" in the Agreed List of Issues at paragraphs 1(a) to (f)
inclusive and paragraph 1(g)(ii) to (viii) inclusive, enjoying little reasonable
prospect of success.

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The Making of Deposit Orders

20 101. The terms of Rule 39 provide:-

"39 Deposit Orders

25 *(1) Where at a Preliminary Hearing (under Rule 53) a 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.*

30 *(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."*

102. In terms of the Findings which I have made and the conclusions which I have reached, my discretion to make a Deposit Order in respect of the complaints of Direct Discrimination, Indirect Discrimination and Harassment, insofar as founded upon the instances of conduct which I have identified as having little reasonable prospect of success, is awakened.
103. I am conscious that in addressing the Application for the making of Deposit Orders advanced at the Open Preliminary Hearing, the claimant's position was that she had not attended prepared to do so. Such response as she felt able to make at the Hearing, in those circumstances was restricted to indicating that she had no money and was "on working tax credit".
104. My determination that certain of the claimant's complaints enjoy no reasonable prospect of success does not lead automatically to the making of a Deposit Order but rather awakens my discretion in that regard allowing me to consider whether an Order should be made. On the respondent's representative's Application, I require to so consider whether such an Order/Orders should be made and, if so deciding and when fixing the amount of any deposit, to make reasonable enquiry into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit.
105. I have accordingly directed that the claimant to write to the Tribunal, with a copy to the respondent's representative, within 14 days of the date upon which this Judgment is sent to the parties, providing;
- (a) a written note of her weekly and monthly income from any source, together with that of any person with whom she resides on the one hand, and a note of her weekly/monthly outlays and those of any person with whom she resides, on the other.
 - (b) the sources of the incomes identified at (a) above.

- (c) documentary vouching of all income received weekly/monthly outlays made.
- 5 (d) details of any savings held by her either on her own account or jointly with any other person, together with copies of bank statements in relation to any such individual or joint accounts, showing the balance in those accounts as at the 14th of July 2021.
- 10 (e) setting out, in light of the Tribunal's Findings of little prospect of success in what amount she contends that a Deposit Order/Deposit Orders should be made, or alternatively,
- 15 (f) submitting that no Deposit Order should be made despite the Tribunal's Findings of no reasonable prospect of success and, in relation to the latter position, stating why.

106. There has been allowed to the respondent's representative a further period of 14 days thereafter to write to the Tribunal, if so advised, commenting upon
20 the means information provided and setting out why, in their consideration, the Tribunal's now awakened jurisdiction under Rule 39 should be exercised in the making of a Deposit Order/Orders.

25 107. The information and reasons provided by the claimant together with the respondent's response will then be considered by the Employment Judge in the exercise of his discretion under Rule 39. The Tribunal will thereafter inform the parties in writing of whether the Employment Judge has made a Deposit Order/Orders and in what amount, together with his reasons.

Employment Judge: Joseph d'Inverno
Date of Judgment: 11 August 2021
Entered in register: 13 August 2021
and copied to parties

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**I confirm that this is my Judgment in the case of Paterson v Voyage 1 Ltd
and that I have signed the Judgment by electronic signature.**