Case No: 1403031/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss Sullivan**

Respondent: **Ascensos Limited**

Heard at: **Bristol (by video)** **On:** **8 & 9 March 2023**

Before: **EJ Danvers**

Representation
Claimant: In person
Respondent: Mr Singh, solicitor

JUDGMENT

1. The Claimant did not have a disability at the relevant time within the meaning of s.6 Equality Act 2010. The Claimant's claims of discrimination arising in consequence of disability under s.15 Equality Act 2010 therefore fail and are dismissed.

2. The Claimant has permission to amend her claim to include a claim of direct perceived disability discrimination under s.13 Equality Act 2010.

3. The Claimant's claims for automatic under dismissal under s.101A and s.104 Employment Rights Act 1996 have no reasonable prospects of success and are struck out.

4. The Respondent's other applications for strike out or a deposit order are not successful.

REASONS

BACKGROUND

1. The Claimant worked for the Respondent from 3 / 6 May 2021 until her dismissal on 19 July 2021 as a Customer Service Advisor. The Respondent is a company which operates call centres across the UK.

2. The claimant notified ACAS of a claim on 19 July 2021 and ACAS issued a certificate on 20 August 2021.

3. By a claim form submitted on 30 August 2021, the Claimant brought claims against the Respondent of, amongst other things, discrimination arising from disability under s.15 Equality Act 2010 ('EqA 2010').

4. The Respondent submitted a response on or around 18 October 2021 and a copy was sent by the Respondent's solicitors to the Claimant. The Respondent denied the claims and in particular denied that the Claimant was disabled within the meaning of s.6 EqA 2010 at the relevant time.

5. On 30 of October 2021, the Claimant submitted an application to amend her particulars of claim. The application was to add a claim of direct disability discrimination under s.13 EqA 2010, as well as to make two additions to the chronology of events which she had attached to her particulars of claim.

6. At a preliminary hearing on 4 August 2022, EJ Cadney ordered that a further open Preliminary Hearing take place over two days starting on 8 March 2023 to consider:
   a. whether the Claimant was at the relevant times a disabled person within the meaning of s.6 EqA 2010;
   b. the Claimant's application to amend;
   c. whether any claim should be struck out as having no reasonable prospect of success or whether a deposit should be ordered; and
   d. case management.

7. Those matters were dealt with sequentially at the two-day hearing on 8 & 9 March 2023 and oral reasons were given in respect of each of (a) to (c). At the end of the hearing written reasons were requested by the Claimant. Those written reasons are set out below. The Case Management Orders discussed at the hearing are set out separately.

DISABILITY

The issues

8. In determining whether the Claimant was disabled I have to focus on the 'relevant time'. In this case the Claimant's claims of disability discrimination under s.15 EqA 2010 span the entirety of her employment so the relevant time is early May 2021 (3rd or the 6th) until 19 July 2021.

9. I must consider whether during that period:

   a. The Claimant had a physical impairment. She asserts that she suffered from asthma and Wolff-Parkinson-White syndrome.

b. Did any impairment(s) have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

c. Were such effects long-term? In particular:
    i. did they last at least 12 months, or were they likely to last at least 12 months?
    ii. if not, were they likely to recur?

Procedure and submissions

10. I was provided with an agreed PDF bundle running to 149 pages. This included a disability impact statement from the Claimant. I heard evidence from the Claimant who was cross-examined by Mr Singh. I also heard submissions from both parties.

11. For the Respondent, Mr Singh submitted that the Claimant had provided limited medical evidence in support of her assertions of disability and none of the evidence provided indicated she satisfies the definition under s.6 EqA 2010. The Claimant asserted she was disabled in a separate claim she brought in 2017 and was found not to be disabled and has provided no evidence to show the position had changed. The Claimant was ordered to provide her GP records and did not do so. Further that none of the matters that the Claimant referred to in her disability impact statement amounted to a substantial adverse effect on her day-to-day activities caused by her impairments. In particular, he said that many of the things referred to, like not going out due to Covid-19 or dietary restrictions were the Claimant's choice rather than an effect of her physical impairments.

12. The Claimant disputed the Respondent's contention that she had not supplied the evidence she was required to supply. She said that the Respondent had all relevant medical information relating to her disability and she had disclosed everything relevant. She noted her latest GP letter gave information as to relevant attendances and the use of medication. She submitted that what she said about Covid-19 in her impact statement was her honest view on the situation and that she was not the only one working from home at the relevant time. She set out her history of various different health issues and that she was not sure what would happen if she drank alcohol, but that she was 'not so stupid as to try'. She said her condition was the same as it was in 2017 when she was assessed as 'disabled' for the purposes of a disability student allowance albeit it sometimes flared up in response to triggers. She noted that the assessment was done by an assessor and GP against the test under s.6 EqA 2010.

13. I have carefully considered the submissions of both parties and all of the evidence I have reviewed.

Findings of fact

14. I accept, and it did not appear to be challenged by the Respondent, that throughout the relevant period the Claimant had asthma and Wolff-Parkinson-White ('WPW') Syndrome. The latter is a heart condition that can cause the heart to beat abnormally fast for periods of time.

15. During the relevant period the Claimant used inhalers for her asthma. At times, although not during the relevant period, she has also had to take steroid tablets to treat her asthma.

16. The Claimant previously asserted as part of a Tribunal claim that she met the definition of disability during a period of employment in 2016. She was found not to do so by EJ Reed on 20-21 September 2017. She was also found to qualify for a disabled student allowance award in July 2017. I do not consider either of these assist me in determining whether she was disabled at the *relevant period* with which I am concerned.

17. However, I note that the Claimant was familiar with what would be considered at a hearing such as this. Further she had been given detailed Orders as to what she should include in her impact statement and the disclosure she must give of her medical records. In particular, the Claimant was ordered by EJ Dawson on 1 December 2021 to explain in her impact statement 'the nature of [the disability's] effects upon day-to-day activities at the time that the claim relates to'. The Claimant repeatedly asserted that she had provided all relevant medical evidence and I therefore conclude that there were no relevant attendances on her GP that would have been demonstrated by her medical records.

18. In her impact statement, the Claimant included a heading 'Day-to-day activities (asthma and wolf-Parkinson-White Syndrome)' and listed various matters underneath that heading.

19. My findings of fact in respect of those matters are as follows:

<u>Covid-19</u>

20. The Claimant stated that since the Covid-19 outbreak and risks of Covid-19 were published in early 2020, she has predominantly stayed at home and she set out various impacts on her activities as a result of the pandemic.

21. While I accept the Claimant's evidence that since the Covid-19 outbreak her day-to-day activities have been substantially curtailed, I do not find that these effects were caused at the relevant time (directly or indirectly) by the impairments on which she relies. The Claimant has provided no medical evidence to show that because of the asthma or WPW syndrome she had been advised to stay inside at the relevant time or take the other steps she

has chosen to take to minimise the chance of her getting Covid-19. By a letter dated 20 January 2022 her GP stated [120]:

> She would like also to pass the information that she has presently limited activities including time outdoors to once in every two to four weeks due to concerns regarding COVID , and she sticks to working from home when these jobs are available.
> Many thanks

22. Her GP does not indicate that the Claimant's approach is medically necessary or advisable due to her asthma or WPW syndrome. In cross-examination, the Claimant herself said that she was not clear why the Respondent's representative was focussed on Covid-19 and that it 'had nothing to do with her asthma or heart condition at all'.

Employment

23. The Claimant also gave examples of employment scenarios that affected her impairments. These included employment that involved direct exposure to certain chemicals, working in extreme temperatures, repeatedly having to lift as a core requirement of a job, or doing a sales or service job that involved talking for prolonged periods when her condition was aggravated (for example by the cold).

24. I accept her evidence that these types of employment could have aggravated her asthma. I also accept that during the relevant period she did have some aggravation of her asthma at times due to prolonged talking as part of her role. However, the Claimant did not specify any particular effects of such aggravation on her day-to-day activities other than those discussed above and below.

Fatigue

25. The Claimant said that her conditions, and particularly, when she had chest inflammation, an asthma attack or palpitations, caused her to experience fatigue and difficulty sleeping. However, in her oral evidence she noted that the issues with sleep appeared to be particularly linked to the work she was doing. In particular, the nature of the work at the relevant time dealing with angry customers and the lack of support she received at work. She said that were she doing an administrative role it may have been a different scenario. The Claimant did not provide any medical evidence to support the contention that her sleep was impacted at the relevant time (or any other time) by her asthma or WPW syndrome.

26. I therefore find that although at times her asthma WPW syndrome may have impacted somewhat on her sleep occasionally, which then caused her some fatigue in the day, this was impacted to a greater extent to issues unrelated to her disability, in particular the nature of work she was undertaking.

27. The Claimant did not put forward any evidence to suggest that her sleep or fatigue issues had such an impact on her that she sought any medical assistance for them, although in evidence she did say that she generally tended to avoid seeking medical assistance (which she described as 'ambulance dodging').

<u>Dietary</u>

28. The Claimant outlined that she did not smoke, drink alcohol, take narcotics, consume energy drinks or coffee or attend nightclubs or pubs in the evening. She accepted in cross-examination, and I find, that this was as a result of lifestyle choices, as opposed to effects of her physical impairments.

<u>Exercise</u>

29. Finally, the Claimant indicated that she did not undertake some forms of exercise because it might bring on chest pain or breathlessness such as, running, swimming, gardening with machinery and repeated lifting of weights. I accept this evidence, which was not challenged. However, in a letter dated 26 October 2016 Dr Williams only says that the Claimant's asthma and WPW syndrome 'restricts her ability to swim and run long distances' as these activities could bring on chest pain. Therefore, I do not find that *any* amount of running or swimming was impossible or very difficult due to pain or breathlessness: the issue is with running or swimming long distances.

<u>Other matters</u>

30. On reviewing the medical evidence provided by the Claimant and the additional matters (not dealt with above) referred to in her impact statement under the heading 'symptoms', I make the following further findings:

    a. Per the assessment of Dr Doggett on 26 April 2017 [102], as a result of her impairments the Claimant suffers from 'reduced peak flow, which varies from day to day and causes shortness of breath and chest pain'.

    b. She also suffers from some coughing and wheezing from her asthma from time to time.

    c. The Claimant has sometimes vomited and had muscle strain injury to her neck, which she links to her asthma. However, she provided no medical evidence to support that this was caused by either of her impairments and I do not find that it was so caused. Further, her evidence was that this was occasional and not during the relevant

period. She did not provide any evidence so suggest this was likely to recur.

d. In November 2021 (after the relevant period) she had episodes of an increased heart rate.

e. Per the letter of Dr Ogundiya on 20 January 2022, the Claimant attended A&E for chest pains in November 2015 and in December 2015 on two occasions due to chest symptoms and in 2019 on account of chest pain following bereavement, stress and overexertion. These were not attributed in the evidence I saw to either of the conditions she relies on.

31. While the various letters or reports from medical practitioners do mention other potential symptoms which can be caused by asthma and WPW syndrome, I do not find that any of these other symptoms were in fact suffered by the Claimant as they were not relied on in her impact statement or mentioned in the medical evidence as issues the Claimant specifically had encountered.

32. In relation to the use of inhalers, the Claimant said, and I accept, that if she did not use them her shortness of breath and chest pain would probably get worse.

The law

33. s.6 Equality Act 2010 provides:

> (1) A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
> …
> (6) Schedule 1 (disability: supplementary provision) has effect.

34. Per Schedule 1, para 2:

> (1) The effect of an impairment is long-term if—
> (a) it has lasted for at least 12 months,
> (b) it is likely to last for at least 12 months, or
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

> (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.
>
> (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

35. Per Schedule 1, para 5

> (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—
> (a) measures are being taken to treat or correct it, and
> (b)but for that, it would be likely to have that effect.
>
> (2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
>
> (3) Sub-paragraph (1) does not apply—
> (a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;
> (b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

36. 'Substantial' means more than minor or trivial (s.212 EqA 2010).

37. The ***Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability*** ('the ***Guidance'***) explains that factors that may be relevant to considering whether an impact is 'substantial' include matters such as the time taken and way in which an activity is carried out, the cumulative effects of an impairment or impairments, how far a person can reasonably expected to modify her behaviour and the extent that environmental factors impact on effects.

38. The ***Guidance*** says that in general, 'day-to-day activities are things people do on a regular or daily basis' (D3) and can include general work-related activities. It further provides:

> D4. The term 'normal day-to-day activities' is not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to- day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning.

39. And:

> D8. Where activities are themselves highly specialised or involve highly specialised levels of attainment, they would not be regarded as normal day-to-day activities for most people. In some instances work- related activities are so highly specialised that they would not be regarded as normal day-to-day activities.

40. There must be a causal link between the impairment and the substantial adverse effect, although it need not be direct (***Sussex Partnership NHS Foundation Trust v Norris EAT 0031/12***; ***Primaz v Carl Room Restaurants Ltd t/w Mcdonald's Restaurants Ltd and ors [2022] IRLR 194***).

41. When considering the potential effects of an impairment in the absence of treatment, 'likely' should be interpreted as 'could well happen' (***Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)*** [2009] ICR 1056).

Conclusions

Did the Claimant have a physical impairment at the relevant time? She asserts that she suffered from asthma and Wolff-Parkinson-White syndrome.

42. I accept that the Claimant suffered from asthma and WPW Syndrome at the relevant time. I further conclude, and the Respondent did not appear to challenge, that these amounted to physical impairments within the meaning of s.6 EqA 2010.

Did the impairments have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?

43. I have considered carefully whether these syndromes had a substantial adverse effect on the Claimant's ability to carry out day-to-day activities at the relevant time and have had regard to the need to consider whether the impairments would have such an effect but for measures taken to treat or correct the impairments.

44. In this case, I have found for the reasons set out above in respect of my findings of fact that the asthma and / or WPW syndrome had the following adverse effects on the Claimant's normal day-to-day activities:

    a. Some chest pain and shortness of breath which varies from day to day and some coughing and wheezing.

    b. Some occasional interference with sleep and associated fatigue.

c. A limitation on the types of exercise the Claimant could do as certain exercise might bring on chest pain or shortness of breath in particular a restriction on: running and swimming long distances, gardening with machinery and repeated lifting of weights.

45. I do not consider that avoiding the types of employment she identified, such as working in extreme temperatures or undertaking a job with prolonged periods of talking amounts to be an adverse effect on a normal day-to-day activity under the Equality Act 2010. In my view working in extreme temperatures, doing repetitive lifting, or doing a sales job with prolonged periods of talking is not a normal day-to-day activity. Further in respect of the sales job, the Claimant *did* undertake such a job so did not avoid it entirely and I do not find that, even when undertaking such a job, her impairments caused an adverse effect on her normal day to day activities beyond the fatigue identified above.

46. For the reasons given in my findings of fact, I do not consider the matters referred to by the Claimant in her impact statement in respect of Covid-19 and dietary factors were adverse effects caused (directly or indirectly) by the impairments.

47. In respect of whether the effects identified above were 'substantial' adverse effects on the Claimant's ability to carry out normal day to day activities, I have concluded:

a. Beyond saying that the she suffered from some shortness of breath, chest pain, coughing and wheezing, the Claimant did not identify that this therefore affected her ability to do certain things, or meant it took longer or impacted the way she had to do things. In those circumstances I do not consider that suffering from those symptoms from time-to-time amounted to a substantial adverse effect on her ability to carry out normal day to day activities.

b. The impairments themselves did not have a substantial effect on the Claimant's sleep and fatigue. The main factor impacting her sleep appeared to be external on her own evidence. Further the Claimant had not sought medical assistance with the sleep or fatigue. In those circumstances the overall issues the Claimant had with sleep and fatigue at the time do not appear to have been substantial and the adverse effect on sleep and fatigue caused by the impairments were not more than minor or trivial.

c. The limitation of the types of exercise she could do, in case of suffering from chest pain or shortness of breath was not a substantial adverse effect on her day-to-day activities. Dr Williams described this as a restriction on being able to run and swim long distances,

which I do not consider to be a normal day to day activity, nor is gardening with machinery or repetitive weight-lifting. If I am wrong on that, I nonetheless do not consider that the limitations on exercise as a whole were 'substantial' given that they only arose on particularly strenuous activity.

48. I have considered whether the impact on the Claimant's day-to-day activities would have been substantial but for her use of inhalers. The Claimant has put forward no evidence of what the impact would be if she did not use her inhalers and in her own evidence only suggested this might increase her shortness of breath and chest pain. I do not consider that some increase in shortness of breath and chest pain would mean that the effect on her sleep and fatigue would be substantial or that the limitations on the exercise she could undertake or other day to day activities would be substantial.

Were the effects of the impairment long-term? In particular: did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

49. Although I do not strictly need to consider whether the effects of the impairment were long term, I accept that such effects as there were, were long term. She has had asthma and WPW for many years (and at the relevant time for over 12 months). Her evidence, which I accept, is that the effects of her impairments while fluctuating in degree, have been present or recurred since she has had the impairments.

AMENDMENT APPLICATION

The issues

50. Following discussion with the Claimant and the Respondent's representative it was agreed that the Claimant did not need to apply to amend the chronology of events attached to her particulars of claim and could instead simply include the further matters she referred to in her application to amend at points (2) and (3) in her witness statement as they amounted to further evidence she wished to rely on in support of her claim rather than new facts or claims which needed to form part of the pleaded case.

51. Accordingly, the only application to amend that I was required to consider was her application to amend to include the claim of direct disability discrimination by perception. The claim she applied to add was an argument in the alternative, if she was not found to be disabled, that she was treated less favourably by the Respondent because the Respondent perceived her to have a disability under s.6 EqA 2010.

52. The matters she seeks to rely on as amounting to less favourable treatment are:

a. the Respondent’s failure to provide equivalent training to a colleague, Mr Matthew McCallum, when the claimant started in her employment;
b. the Respondent’s request on 30 June 2021 that the claimant increase her working hours from 40 per week;
c. the Respondent’s conduct at a meeting on 19 July 2021 held in the claimants absence which led to her being dismissed for gross misconduct.

53. On the case as pleaded, these were the matters she relied on as acts of discrimination arising from disability under s.15 EqA 2010.

Procedure and submissions

54. I read the Claimant’s application to amend and the Respondent’s objection and heard from both parties in the hearing.

55. The Claimant submitted that the facts giving rise to the claim were pleaded, she was seeking to include the claim now because the Respondent had indicated in its Response that it had acted at the time on the basis that the Claimant was a disabled person albeit now denied that she was disabled. She said that she was not a legal representative and did not have the knowledge of matters the Respondent suggested, she provided a basis on which she said her claims did have good merits and noted that she thought there was a previous e-mail from the Respondent’s representative who said that the application was not out of time.

56. The Respondent argued that: the Claimant was a sophisticated litigant in person and had given no explanation as to why she had not initially included this claim in her pleadings, the amendment was more than merely relabelling, the first act was out of time, and the amended claims had low prospects of success. Further, that two relevant witnesses had now left the employment of the Respondent, costs and time would be involved in responding to the amended claim and so the balance of hardship weighed in favour of rejecting the amendment.

The law

57. The core test in considering an application to amend is where the balance of injustice and hardship lies in allowing or refusing the application and the focus should be on the practical consequences (***Vaughan v Modality Partnership*** [2021] ICR 535).

58. Relevant factors may include the nature of the application, time limits, and the timing and manner of the application (***Selkent Bus Co Ltd v Moore*** [1996] ICR 836).

59. Per ***Transport & General Workers Union v Safeway Stores Ltd*** UKEAT/0092/07, time limits are not the only decisive factor in deciding whether to allow an amendment even if the amendment amounts to more than mere re-labelling.

60. The Court of Appeal in ***Abercrombie & Others v Aga Rangemaster Ltd*** [2014] ICR 209 said per Underhill LJ:

> 48. Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are C already pleaded permission will normally be granted.

Underhill LJ continued:

> 50. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the D statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded - and a fortiori in a re-labelling case - justice does not require the same approach.

61. Reference may also be had to the prospects of success of the amended claim and applications to include claims that have no reasonable prospects of success should not be allowed (***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** [2022] EAT 132 at para 65). Further, even if there are more than ‘no reasonable’ prospects of success, low merits can properly be taken into account when exercising the discretion to amend although the Tribunal should proceed with care and caution and not be drawn into conducting a mini-trial (***Kumari*** at paras 65 & 88).

62. I was also referred by the Respondent to ***Reuters Ltd v Cole*** [2018] 2 WLUK 378, in which the EAT held that an amendment to include a claim of direct discrimination in respect of matters already pleaded as a claim under s.15 EqA 2010 was more than a mere ‘relabelling’ as the nature of the enquiry under the two heads of claim is different. S.13 imposes a more stringent test both to knowledge and causation and also involves a comparative exercise.

Conclusions

63. I have decided to allow the claimants application to amend. My reasons for reaching this decision are as follows:

64. The matters that the Claimant seeks rely on as acts of less favourable treatment are matters which were pleaded in her claim, this is not a case where she's seeking to make an amendment to include a new claim arising out of wholly new facts. She had also pleaded that the Respondent was aware that she was a disabled job applicant and employee at para 60 of her details of claim.

65. Accordingly, while I accept that the amendment does not amount to mere re-labelling for the reasons given in ***Cole***, the amendment is not wholly different to the claims already pleaded involving an entirely different scope of enquiry than that which would have been involved by virtue of the pleaded claim. The amendment is closely connected to the pleaded claim, in that the allegations are in respect of acts of detriment that are already pleaded.

66. Although the first detriment relied on may be outside the three-month time limit (by reference to the date of the submission of the amendment application), it arguably might form a continuing act with the later, in time, detriments. In any event the time limits are potentially subject to a just and equitable extension. In this case I consider that those are matters which should properly be determined by the Tribunal at the final hearing having heard evidence.

67. I have carefully considered the Respondent's points on merits but have concluded that the Claimant's amended claim is not of such low merits as to indicate there would be no or very little hardship in the amendment being refused. In particular:

    a. In relation to the first detriment, she has identified a comparator who was not perceived to be disabled who she says was treated more favourably, even though he was also working remotely. The Respondent says that he was not in the same circumstances, but this is a factual matter that will need to be determined having heard evidence.

    b. On the second detriment the Respondent says it is hard to envisage that being offered extra hours is a detriment. However, the Claimant explained her case is that it was suggested she do the extra hours as part of her contractual hours instead of doing them as paid overtime as she had been doing up to that time. Further, that this was in contrast to other employees who were not perceived to be disabled but also had to catch up on work and did not have a contract change suggested to them.

c. Finally, in respect of the third detriment, she said she considers that she was dismissed because she was perceived to be disabled because there was no other explanation for the Respondent's decision to end her probation early and given that they pushed ahead with the meeting without giving her a chance to speak to her union. Although unreasonable behaviour alone (if established) cannot shift the burden in a discrimination claim, unexplained unreasonable behaviour is something a Tribunal *may* be able to draw an inference from.

68. In those circumstances I did not consider the Claimant's amended claim had no reasonable prospects or such low prospects as to suggest that the balance of hardship was clearly in favour of not allowing the amendment.

69. The application to amend was made at a very early stage of the proceedings, before the first preliminary hearing. Although allowing the amendment will mean that the Respondent may wish to amend its Response to deal with the amendment, I anticipate that this would only be a very small amendment denying the alternative reason for treatment asserted by the Claimant, as there are no new acts of detriment to deal with.

70. On questioning, the Respondent's representative confirmed that the Respondent could still contact the two employees who had left the business. I therefore conclude that the timing of the amendment application has not caused practical prejudice to the Respondent in that respect. I am not of the view that the inclusion of the amended claim will add to the length of the listed final hearing.

71. I note that given I have found that the Claimant was not disabled the Respondent would, without the amendment being allowed, not be required to lead evidence on the detriments relied on by the Claimant in her particulars of claim. However, the Claimant made her application to amend *prior* to the finding she was not disabled and as an argument in the alternative in case she was found not to be disabled having seen the Respondent's response denying disability status. Although she has some experience as a litigant in person, I accept that considering arguments in the alternative is quite complicated and that the need to plead the alternative might reasonably not have been apparent to her until she saw the Respondent's Response. Once she realised the potential issue, her application was prompt.

72. Although the Respondent will now have to deal with and lead evidence on the amended claim that hardship, such as it is and taking into account all the relevant circumstances, is outweighed by the hardship to the Claimant were I not to allow the amendment.

STRIKE OUT / DEPOSIT ORDER

The issues and procedure

73. Following a discussion at a preliminary hearing ('PH') on 4 August 2022, EJ Cadney set down this Preliminary Hearing to deal with several matters, including:

> Whether any claim should be struck out as having no reasonable prospect of success and/or whether a deposit should be ordered as a condition of the claimant being permitted to pursue any claim having little reasonable prospect of success;

74. This was set out in the Case Management Orders sent to the parties on 12 August 2022. At the start of this hearing the Respondent confirmed it was only seeking strike out and / or deposit order in relation to some of the claimant's claims / allegations, in particular:
    a. the assertions that Disclosures 2 & 3 were protected;
    b. Automatic Unfair Dismissal pursuant to:
        i. s.10 & 12(3) Employment Relations Act 1999;
        ii. s.152 Trade Union and Labour Relations (Consolidation) Act 1992;
        iii. s.104 Employment Rights Act 1996; and
        iv. s.101A Employment Rights Act 1996.

75. The Claimant objected orally and in writing to me proceeding to hear those applications at this hearing on the basis that she had been provided with no written application for strike out by the Respondent and the Respondent had not included any documents relevant to strike out in the bundle, despite including a bookmark of 'strike out' in the PDF bundle, so she thought the applications were not being pursued.

76. I noted that under Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the 'ET Rules 2013') there is no obligation for an application for strike out to be made in writing and strike out can been considered at any stage of the proceedings on the tribunal's own initiative or on the application of a party. However, a claim may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or at a hearing.

77. In this case EJ Cadney, following discussion at the last PH, gave the Claimant notice in August 2022 that this PH would be to consider potential strike out or deposit order in relation to *any* of her claims. Accordingly, she had a long period of notice that such matters would be considered at this hearing.

78. In order to ensure she understood the points the Respondent would be making and to give her additional time to prepare her response to those points, I invited Mr Singh at the end of the first day of the hearing to briefly outline which specific claims / allegations he would be seeking strike out of / a deposit in respect of and on what basis. I then summarised in relation to each, what the Claimant would have to address. The Claimant was also given permission to submit any further documents she wished to, although I explained (and Mr Singh agreed) that I was unlikely to be considering a dispute of facts in any detail because her case (in particular in the context of considering strike out) would be taken at its highest.

79. The Claimant sent in further documents overnight, although in the event did not take me to any specific documents in response to the applications.

80. The hearing was not reconvened until 11.30am on the second morning to give the Claimant some additional time to consider the applications and in order for me to deliberate on the amendment application.

81. In those circumstances I was of the view that the Claimant had been given a reasonable opportunity to make representations on the applications.

82. Mr Singh set out the basis for his applications claim by claim and the Claimant was given a chance to respond to each (save for two on which I did not need to hear her), she was also given an additional break when she requested one. The submissions the parties made are referenced in my conclusions below.

The Law

<u>Strike out</u>

83. Rule 37 ET Rules 2013 provides:

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

> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

84. If a question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate; the Claimant's case must be taken at its highest knowing what the claims and issues are (***Cox v Adecco and ors*** [2021] ICR 1307). Care must particularly be taken in respect of cases involving litigants in person and there should be a proper analysis of the pleadings and any core documents in which the Claimant seeks to identify the claim as well as to what is said by the Claimant in a hearing (***Cox****)*.

85. Particular care should be taken before striking out fact sensitive cases such as discrimination and whistleblowing cases and if prospects are more than merely fanciful, strike out is not appropriate (***Ezsias v North Glamorgan NHS Trust*** [2007] ICR 1126).

86. However, this does not amount to a blanket ban on strike out in fact sensitive cases Mitting J in ***Patel v Lloyds Pharmacy Ltd*** UKEAT/0418/12/ZT held as follows:

> 19 Neither Anyanwu nor Maurice Key LJ's observations, however, require an Employment Judge to refrain from striking out a hopeless case merely because there are unresolved factual issues within it. In such a case I believe that the correct approach is that which I have adopted, namely to take the Claimant's case at its reasonable highest and then to decide whether it can succeed. There is a further possibility that discrimination case are, by their nature, so sensitive and for the individuals concerned and for society as a whole, so important, that they should be allowed to proceed simply because on the Micawber principle something might turn up. This was an issue canvassed in ABN Amro Management Services Limited v Royal Bank of Scotland UKEAT/0266/09/DM . A submission was made by counsel for the employer that it was wrong in principle to allow an apparently hopeless case to proceed to trial in the hope that "something may turn up" during cross-examination. No clear answer to that proposition was given by Underhill J because it was unnecessary, because, as he observed, there was no basis for supposing the cross-examination could advance the claimant's case.
>
> 20 In my judgment, the proposition made by counsel for the respondent in that case is right. In a case that otherwise has no reasonable prospect of

> success, it cannot be right to allow it to proceed simply on the basis that "something may turn up".

Deposit Order

87. Rule 39 ET Rules 2013 provides:

> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
>
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
>
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
> (b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
> otherwise the deposit shall be refunded.
>
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

88. When determining whether to make a Deposit Order a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case, and, in doing so, to reach a provisional view as to the credibility

of the assertions being put forward (***Van Rensburg v Royal Borough of Kingston-upon-Thames*** UKEAT/0095/07). However, there must still be a proper basis for doubting the likelihood of the party being able to establish facts essential to the claim or response.

89. A Deposit Order may be made in respect of continuing each allegation which the Tribunal considers to have little reasonable prospect of success (Rule 39(1)) ET Rules 2013).

90. Just because a claim has little reasonable prospect of success, does not mean a deposit has to be made, the Tribunal has a discretion as to whether to exercise the power to be exercised in accordance with the overriding objective.

91. The Tribunal should give reasons for setting a deposit at a particular amount (***Adams v Kingdom Services Group Ltd*** EAT 0235/18) it should not be set so high as to impede access to justice and amount to a strike out but should stand as a warning that the matter has little prospects of success.

Conclusions

Protected disclosures 2 & 3 (paras 45 – 47 of EJ Cadney's CMOs)

92. In respect of Disclosure 2, Mr Singh, on behalf of the Respondent argued that on the Claimant's own pleading, what she relied on as amounting to criminal conduct or concealment was an attempt by a customer to evade a delivery charge. He said it would be common knowledge this was not criminal and so obviously the Claimant's belief, if genuine, was not reasonable and further such disclosure was obviously not in the public interest. The Claimant said she considered the information was disclosed in the public interest because the customer was part of a company that was listed on the stock exchange and / or because the conduct would have implications for the team she was working with, her company and the client company.

93. I have concluded that the question of whether the Claimant reasonably believed the matters she disclosed tended to show a criminal offence had been committed or was likely to be committed, or that a matter had been deliberately concealed and / or that her disclosure was in the public interest is a fact sensitive question. I have considered the Respondent's comments but do not take the view that the points raised indicate there are no or little prospects of success in the Claimant establishing she made a protected disclosure by way of Disclosure 2 and therefore I am not striking out that allegation or making it subject of a deposit order.

94. The Respondent did not pursue any application in relation to Disclosure 3.

Automatic unfair dismissal under s.10 / 12 (3) Employment Relations Act 1999 (para 49-50 of EJ Cadney's CMO)

95. In respect of the claim under s.10 / 12(3) ERA 1999, Mr Singh made the submission that s 10 (the right to be accompanied) is only engaged if a worker 'is required or invited by his employer to attend a disciplinary or grievance hearing' (s10(1)(a)). On the Claimant's case as set out at para 172 of her claim, the invite she received was for an early probationary review meeting not a disciplinary meeting.

96. However, it is not in dispute that following the relevant meeting, which took place in her absence on 19 July 2021, the Claimant *was* dismissed for gross misconduct. Further, on her case she was told in the invite to the meeting that it might result in her dismissal.

97. The Tribunal will therefore have to consider whether such a meeting, albeit described as an 'early probationary review meeting' was in fact a 'disciplinary meeting' within the meaning of s.10 ERA 1999. I do not consider there are no or little reasonable prospects of it being so found and therefore do not allow the Respondent's applications in respect of this claim.

Automatic unfair dismissal under s.152 TULR(C)A 1992 (para 51 of EJ Cadney's CMO)

98. The Respondent only sought a Deposit Order in respect of this claim. Mr Singh argued that taking the Claimant's pleadings at their highest, there is no mention of the Claimant referring to being a member of a union or that she felt this was the underlying motive. He said the matters she sets out as the reason for dismissal are those at paras 176-172 of her chronology, which don't mention trade union activities.

99. The Claimant said that she had indicated to the Respondent that she was a member of a union and asked that the 19 July 2021 meeting be delayed so she could get her union representative to attend and that thereafter was dismissed. She also said that later, when it came to her appeal hearing, the Respondent did not include her union representative, and this supported her case that the Respondent was anti-union.

100. I find these were matters referred to in the Claimant's claim (see p25-26 of the PH Bundle (para 32-33), p29, p32-33 and amongst others paras 138 and 173 of the Chronology enclosed with the Details of claim).

101. The question of what the principal reason for the Claimant's dismissal was is a question of fact that will need to be determined at the final hearing. The Claimant has set out a basis on which an inference *could,* subject to the evidence, potentially be drawn that it was the union activity / membership

(ie., the timing of events). Accordingly, I do not consider the claim has little prospects such as to be the appropriate subject of a deposit order.

Automatic unfair dismissal under s.104 ERA 1996 (para 52 of EJ Cadney's CMO)

102. The Claimant's claim in this regard is that she had alleged that Ms Diaz had attempted to increase her hours to above 40 hours per week on 30 June 2021 and, in so alleging, she had made an allegation that her employer had infringed a relevant statutory right for which she was dismissed.

103. S.104 ERA 1996 states:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
> (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
>
> (2) It is immaterial for the purposes of subsection (1)—
> (a) whether or not the employee has the right, or
> (b) whether or not the right has been infringed; but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
>
> (4) The following are relevant statutory rights for the purposes of this section—
> (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,
> (b) the right conferred by section 86 of this Act. . .
> (c) the rights conferred by sections 68, 86, 145A, 145B, 146, 168, 168A, 169 and 170 of the Trade Union and Labour Relations (Consolidation) Act 1992 (deductions from pay, union activities and time off)
> (d) the rights conferred by the Working Time Regulations 1998, the Merchant Shipping (Maritime Labour Convention) (Hours of Work) Regulations 2018 (S.I. 2018/58)], the Merchant Shipping (Working Time: Inland Waterway) Regulations 2003 [F10, the Fishing Vessels (Working Time: Sea-fisherman) Regulations 2004 or the Cross-border Railway Services (Working Time) Regulations 2008] and
> (e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

…

104. Mr Singh referred me to the case of ***Spaceman v ISS Mediclean Limited*** UKEAT/0142/18/JOJ in which HHJ Richardson held that to satisfy s104(1)(B) there must be an allegation by an employee that there has been an infringement of a statutory right, not merely that an employer may or has threatened to infringe such a right. This was also reiterated in the case of ***Simoes v De Sede UK Limited*** UKEAT/0153/20/RN, to which I was also referred. Although Stacey J made it clear in that case that for the purpose of an alleged infringement of a right under the Working Time Regulations 1998, it is not necessary that the relevant shift had actually been worked, provided that there had been an instruction to do something in breach of the employee's statutory rights.

105. Mr Singh took me to the relevant part of the Claimant's pleadings which set out the Teams message she says she made an allegation about (para 137 p 55 of the PH bundle):

[18:06] Ashleigh Lima Diaz - Hi Phyllis, just seeing if you wanted to permanently change your hours? Happy to increase them to more than 40 if that's helps at all?

[18:09] Phyllis Sullivan - Hi Ashleigh, No, I have many other things to complete so I cannot at the moment. I will just keep logging my hours at the end of each week but thank you for asking.

106. Mr Singh said that taking the Claimant's case as pleaded, this did not amount to an instruction to do anything. It was merely an offer which the Claimant, taking it as such, declined. Accordingly, she cannot have made an allegation that a right of hers had been infringed based on this pleaded exchange.

107. The Claimant said she understood the point the Respondent was making, that at the time she took it as them wanting her to work more although later the operations manager said it was just a friendly suggestion.

108. On reviewing the Claimant's pleadings and the exchange she has set out therein (ie., assuming she establishes the facts she has set out), I conclude the Claimant has no reasonable prospects of establishing that she alleged that the Respondent had infringed a right of hers under s.104(1)(b) as interpreted by ***Spaceman***. On the Claimant's own case, her operation manager had merely asked if she would like to change her hours and the Claimant's allegation was just about such a suggestion being made.

109. I therefore consider this claim has no reasonable prospects of success and strike it out.

Automatic unfair dismissal under s101A ERA 1996 (para 53 of EJ Cadney's CMOs)

110. Again, the Claimant's claim under this heading is founded on the message from Ms Diaz set out above.

111. S.101A ERA 1996 provides:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
> (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
> (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,
> (c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations, or
> (d) being—
> (i) a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or
> (ii) a candidate in an election in which any person elected will, on being elected, be such a representative, performed (or proposed to perform) any functions or activities as such a representative or candidate…

112. Mr Singh's argument was that on the Claimant's own case the Respondent did not seek to 'impose' a requirement to work more than 40 hrs. Further, working over 40 hrs is not a breach of the WTR 1998 and the Claimant did not refuse to comply with a requirement imposed (or proposed to be imposed) in contravention of the WTR 1998 nor did she refuse to forgo a right conferred on her by those regulation as there was no request or insistence that she forgo such a right. Accordingly, her case does not fall within s101A(1)(a) or (b) as alleged.

113. The Claimant said she also saw the point being made in respect of this claim and that at the time she was not clear whether the suggested change would be to just more than 40 or more than 48 hours per week, but she noted that she had not opted out of the right not to work more than 48 hours. She said maybe this was more of a National Minimum Wage issue, but that the law was complex, and she would leave it to me to consider.

114. Having considered this matter carefully and in light of the exchange set out above, I am of the view that there are no reasonable prospects of the Claimant establishing that her response amounted to her: (a) refusing (or proposing to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time

Regulations 1998; or (b) refusing (or proposed to refusing) to forgo a right conferred on her by those Regulations. Taking her case as pleaded, no such requirement was imposed on her by the Respondent nor was she asked to forgo a right under the WTR 1998 which she then refused to forgo. There was no suggestion in Ms Diaz's message of a requirement to work over 48-hours or that she was being asked to forgo her right not to work more than a 48-hour working week.

115. I therefore consider this claim has no reasonable prospects of success and strike it out.

Employment Judge Danvers
Date: 21 March 2023

Judgment & Reasons sent to the Parties:
05 April 2023

FOR THE TRIBUNAL OFFICE