



IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

5

**Judgment of the Employment Tribunal in Case No: 4103771/2022 Issued
Following Resumption of Consideration on 4th May 2023 of the Preliminary
Issue of Disability Status and of the Respondent's Application for Strike Out,
upon which matters parties were heard at Open Preliminary Hearing on
10 2nd February 2023, and further to the Tribunal's Orders (First) to (Fifth)
inclusive of 2nd February and (First) to (Third) inclusive of 4th April, both 2023**

Employment Judge

15

Miss M Shearer

**Claimant
Litigant In Person**

20

**Muir Leisure Limited (part of Muir Group
PLC)**

**Respondent
Represented by:
Mr Vaughan Hart,
Managing Director**

25
30

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35

The Judgment of the Employment Tribunal, upon resumption of consideration of
the evidence presented and submissions made at Open Preliminary Hearing on
2nd February 2023, and of the claimant's response to the Tribunal's Orders of 2nd
February and 4th April 2023 is:-

40

5 **(First)** That the claimant was, at the material time for the purposes of her complaints, that is in the period 29th November 2021 up to and including 17th May 2022, a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act 2010, by reason of her physical impairment (medical condition) of Underactive Thyroid.

10 **(Second)** That the claimant's complaints of Discrimination because of the protected characteristic of Disability are struck out in terms of Rules 37(1)(a), 37(1)(b) and 37(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, with the exception of the complaint set out at paragraph (Second)(a) of this Order, which claim, only, is remitted to a Final Hearing at which the claimant's entitlement to lead evidence is restricted to the matters set out at sub paragraphs (i) to (v) of this Order (Second);

15 (a) A complaint of section 13 Equality Act 2010 ("EqA") Direct Discrimination by reason of the respondent's alleged treatment of the claimant, because of her protected characteristic, less favourably than they would have treated a hypothetical comparator being a person who was not disabled as the claimant was, but whose circumstances were otherwise substantially the same as those of the claimant and said to be evidenced by:-

25 (i) the respondent's Mr Mason taking the claimant, on one or more occasions during the first week of her employment with the respondent, *"into the back office and repeatedly talk about other staff in the same manner, that is ridiculing them, and when it became apparent to him that I wouldn't get involved ... starting to do the same with myself, that is ridiculing*

30

me, laughing at me and telling me that if I could not cope with my job he would find someone that could".

5

(ii) during the period of absence from work in respect of which the claimant had informed the respondent that her absence was due to her suffering from Covid, by the respondent's Mr Stuart Mason telling the claimant to come into work in circumstances where she "*was too unwell to even get out of my bed and was sleeping on my sofa as I didn't have the energy to walk up my stairs*".

10

15

(iii) telling the claimant, at that same time, that "*he couldn't have me off as he had no one to fall back on.*"

20

(iv) interviewing other candidates for the claimant's role while she was signed off from work at that time

25

(v) telling the claimant, on the 13th of May 2022 that she should not bother to return to work because, "*I had shown a pattern of behaviour from my previous employment that he could not take any chances because of my illness*"

30

(Third) The claimant's complaints of Discrimination because of the protected characteristic of Disability, other than that specified at paragraph (Second)(a) of these Orders, were separately struck out, as at midnight on

the 27th of April 2023, by operation of Rule 38 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1.

5 **(Fourth)** The surviving claim, which is set out at paragraph (Second) sub paragraphs (a)(i) to (v) above, is appointed to a Final Hearing at which the claimant will lead; the same to proceed at Edinburgh before a full Tribunal, in conventional "In Person" form, on dates and of a duration to be afterwards fixed by date listing stencil, in the listing window August/September/October 2023; **and the Tribunal Directs that date**
10 **listing stencils be issued to parties in that regard forthwith.**

(Fifth) Directs that the case file be referred back to the sitting Judge, together with the date listing returns once received, for the giving of Directions as to listing and the production of document bundles to be
15 referred to at the Final Hearing.

20 **Employment Judge: J d'Inverno**
 Date of Judgment: 10 May 2023
 Entered in register: 10 May 2023
 and copied to parties

25

I confirm that this is my Judgment in the case of Shearer v Muir Leisure Limited (part of Muir Group PLC) and that I have signed the Judgment by
30 **electronic signature.**

35

REASONS

1. Reference is made:-

5 (a) to the Tribunal's Interim Orders of 2nd February 2023, issued following the hearing of parties at Open Preliminary Hearing on that date, and in terms of which it reiterated the Direction that the claimant comply with the Tribunal's earlier outstanding Orders within a further 21 days from 2nd February; and,

10

(b) to the Tribunal's subsequent Orders of 4th April 2023 in terms of which it extended the time for compliance with them and the period after which the sanction of strike out would take effect, by a further 28 days from the 30th of March up to midnight on the 15 27th of April 2023.

2. Those Orders and that Note of Reasons are referred to for their terms which are held incorporated, by reference, within this Note of Reasons for the purposes of brevity. The Orders and Note of Reasons of 2nd February 2023, 20 together with the Orders of 4th April 2023, should be read in conjunction with this Note of Reasons and the Judgment to which it is attached.

3. The claimant's conduct of proceedings has been characterised by,

25 (a) a repeated disregard of and failure to comply with Orders of the Tribunal both in respect of specification of the matters upon which she relied as giving rise to her possession of the protected characteristic of Disability at the material times,

30 (b) in respect of the requirement to give the other party to the proceedings Fair Notice of the case to which they require to respond and,

(c) to give to the Tribunal Fair Notice of the case upon which it requires to adjudicate, such that it can be satisfied as to its jurisdiction.

- 5 4. As at the date of the Open Preliminary Hearing, 2nd February 2023, the claimant had been afforded multiple opportunities of complying with the Tribunal's Orders. The Tribunal had also provided the claimant with very clear guidance on what was required of her to achieve compliance.
- 10 5. The claimant was, in terms of the Tribunal's Orders of 2nd February 23, accorded a further and, by the application of the sanction of an Unless Order, a final, opportunity to comply with the outstanding Orders.
- 15 6. On 15th March 2023 the claimant sent to the Tribunal, one day late, an email in tendered compliance with the Tribunal's Orders of 2nd February which in their terms reiterated and issued, of new, the Tribunal's previous and outstanding Orders of 7th/8th September and 28th November, both 2022.
- 20 7. By correspondence dated 30th March 2023 the claimant made retrospective application for extension of time for compliance with the Tribunal's outstanding Orders.
- 25 8. By Order dated 4th April 2023 the Tribunal confirmed extension of time for a period of 28 days from 30th March to midnight on the 27th of April 2023.
- 30 9. By email dated 12th April 2023 the claimant provided specification of matters relating to her possession of the protected characteristic which the Tribunal was satisfied amounted to compliance with its Orders of 2nd February including in particular Order 2(a) and 2(b) of Judge McPherson's Orders of 7th/8th September as varied by the Tribunal's Order (Second) of 4th April. The claimant's correspondence was supported by copy extract medical records.
10. Upon resumption of consideration of the Preliminary Issue of Disability Status, including consideration of the specification and documentary

vouching ultimately submitted by the claimant in compliance with the Tribunal's Order, the Tribunal was satisfied, on the balance of probabilities, that the claimant was, at the material time for the purposes of her complaints, a person possessing the protected characteristic of Disability in terms of section 6 of the Equality Act 2010, by reason of and arising from her diagnosed medical condition (physical impairment) of Underactive Thyroid. The Tribunal has so held in terms of its Judgment of even date.

- 5
11. Following the specification tendered by the claimant on 15th March 2023 no further attempt was made by the claimant, notwithstanding the extended period of an additional 6 weeks, to provide further specification in compliance with paragraphs 1(a) and 1(b) of Judge McPherson's Orders of 7th/8th September.
- 10
12. The specification provided by the claimant is sufficient to give fair notice of a complaint of section 13 EqA Direct Discrimination because of the protected characteristic of Disability with reliance upon a hypothetical comparator but, only in respect of the matters recorded at paragraph (Second) sub paragraphs (a)(i) to (v) of the Tribunal's Judgment of even date.
- 15
13. The Tribunal's Orders of 2nd February were not complied with by the claimant in respect of the remainder of her complaints and accordingly those complaints were struck out, by operation of Rule 38, as at midnight on the 27th of April 2024.
- 20
14. The Tribunal is separately satisfied, all as recorded in its Note of Reasons attached to the Orders of 2nd February 23, that those other complaints fell to be struck out as at 2 February 23 and so remain as at today's date, variously in terms of Rule 37(1)(a), 37(1)(b) and 37(1)(c) of the Rules of Procedure.
- 25
15. The surviving complaint, that is the complaint set out at paragraph (Second)(a)(i) to (v) of the Judgment to which this Note of Reasons is attached, are now remitted to a Final Hearing in terms of Order (Fourth) of even date. The claimant's right to lead evidence at the Final Hearing is
- 30

restricted to evidence which goes to show, on the balance of probabilities, that the events described in that paragraph and those sub paragraphs, took place.

5 16. The claimant will not be entitled to seek to lead evidence about matters beyond those specified, she having failed to give fair notice of any such other matters and her other complaints having been struck out.

10 17. Once date listing stencils are returned for the period August, September, October 2023 the case file, together with the returns, should be referred to the sitting Judge for the issuing of detailed directions regarding the listing of the Final Hearing.

15

Employment Judge: J d'Inverno
Date of Judgment: 10 May 2023
Entered in register: 10 May 2023
and copied to parties

20

25

I confirm that this is my Judgment in the case of Shearer v Muir Leisure Limited (part of Muir Group PLC) and that I have signed the Judgment by electronic signature.