EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102482/2022

Held in Glasgow on 9, 16, 30 May 2023

Employment Judge Sutherland

Miss Fiona Mclaughlan	**Claimant** **Represented by** **Mr S Smith -** **Solicitor**
Matalan Retail Limited	**Respondent** **Represented by:** **Ms K Barry -Counsel** **[Instructed by** **Mr K Nicholas]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1. The Respondent's application for strike out of the complaints is refused;

2. The Respondent's application for a deposit order is granted and a deposit order shall be issued requiring the following deposits to be paid as a condition of proceeding with the following complaints –

    a. A deposit of £15 in respect of the complaint of failure to make reasonable adjustments;

    b. A deposit of £15 in respect of the complaint of discrimination arising from disability;

    c. A deposit of £15 in respect of the complaint of unfair dismissal; and

    d. A deposit of £15 in respect of the complaint for holiday pay.

REASONS

Introduction

1. The Claimant has made complaints of unfair dismissal, discrimination arising from disability, failure to make reasonable adjustments and failure to pay holiday pay.

2. An open preliminary hearing was listed to determine the following issues –

    a. whether the Claimant was a disabled person under Section 6 of the Equality Act 2010

    b. whether the complaints of discrimination arising under Section 15 and failure to make reasonable adjustments under Section 20 are time barred

    c. whether the complaints should be struck out, failing which a deposit ordered, on the grounds of little or no reasonable prospects, or struck out on grounds of failure to comply with the orders of 13 February 2022.

3. The hearing was initially listed for a full day hearing on 9 May but two further half day hearings were required in the circumstances given the number of the issues and the nature of the discussions.

4. Each of the three issues are considered in turn.

Disability Status

5. The first issue to be determined was whether the Claimant was a disabled person under Section 6 of the Equality Act 2010.

6. The Claimant relies upon a vascular condition which at the relevant time affected circulation in her legs, causing pain and restricting her mobility and in 2020, she had three toes on one foot amputated, due to complications caused by the vascular condition. The amputation has also caused her pain and restricted her mobility.

7. Whilst the Claimant had specified the impairment relied upon she had not specified the normal day to day activity affected and the nature, duration and extent of the adverse effect. Following detailed discussion at this hearing, and during the course of a break for this purpose, the Claimant provided that specification in writing to the Respondent. She advised that: she has had the physical impairments of Reynaud's disease since at least June 2020 and atherosclerosis since at least December 2020 which continue to date; from September 2020 to June 2022 she was unable to walk, stand, lift, bend and stretch and accordingly required assistance with travel, shopping, cleaning and cooking; from June 2022 she has been able to walk and stand for short periods with the assistance of substantial pain killers but she continues to have difficulties walking, standing, lifting, bending and stretching.

8. Following receipt and consideration of that specification, the Respondent accepted that the Claimant was disabled at the relevant time on the stated grounds (they do not however accept knowledge thereof). There was accordingly no requirement for the Tribunal to determine the issue of disability status.

Time bar

9. The second issue to be determined was whether the complaints of discrimination were time barred.

10. Following discussion at this hearing it was agreed that: the relevant dates on which there was a failure to make reasonable adjustments and discrimination arising from disability was on 9 March 2022 (her dismissal) and on 9 June 2022 (her appeal); the application to amend was made on 26 September 2022; and the complaint was therefore brought about 3 ½ weeks after the expiry of the 3 month time limit; the Respondent had set out in writing the factual basis upon which an extension of time was being sought; and that the issue of time bar would accordingly be reserved to the final hearing.

Strike out / deposit

11. The third issue to be determined was the applications for strike out failing which a deposit order.

12. The Respondent made an application for strike out of all complaints pursuant to Rule 37(1)(a) on the ground that they have no reasonable prospects of success and separately pursuant to Rule 37(l)(c) on the ground that the Claimant has not complied with Orders [fifth] [seventh] & [ninth] of 13 February 2023.

13. The Respondent made an application for deposit in respect of each complaint pursuant to Rule 39(1) on the ground that they have little reasonable prospects of success.

14. Parties had each prepared lengthy bundles of documents for consideration at this hearing.

15. No witness gave oral testimony at this hearing.

16. Both parties made oral submissions.

<u>The complaints</u>

17. The Claimant has made the following complaints in her claim (as amended) –

Failure to make reasonable adjustments

18. The Claimant relies upon the following as a provision, criterion or practice ('pcp') (a) "the requirement for employees to maintain a certain level of attendances to avoid being dismissed", (b) "the requirement for employees to be able to carry out all the duties which fall within their job description and/or had been carried out previously by them, when returning to work after absence". The Respondent denies those 'pcps'.

19. The Claimant relies upon the disadvantage of being dismissed.

20. The Claimant asserts the following as reasonable adjustments: (i) "allowed the Claimant more time to return to work", (ii) "allowed her to take holidays

before determining whether or not to dismiss her", (iii) "allowed the Claimant to … undertake duties restricted to working at the till and at changing rooms", (iv) "allowed the Claimant additional breaks" (v) "provided her with a chair" (by way of an auxiliary aid).

21. Following detailed discussion at this hearing, the Claimant provided the following further particulars of this complaint: -

a. at appeal she sought to rely upon the disadvantage of not being re-instated (as well as being dismissed).

b. the relevant dates on which there was a failure to make the reasonable adjustments was on 9 March 2022 (her dismissal) and on 9 June 2022 (her appeal).

c. at the date of dismissal, and as at the date of appeal, she was not fit to work in any capacity (including restricted duties) and that accordingly sought only to rely upon adjustments (i) and (ii) (more time including taking of holidays) and that after that time she would be fit to return with adjustments (iii), (iv) and (v) (restricted duties, breaks and a chair).

d. in respect of adjustment (i), that the more time sought was 3 months at dismissal and 1 month at appeal. The Claimant advised that she was entitled to take 7 weeks holidays and that accordingly adjustment (i) (taking of holidays) was insufficient without adjustment (ii) (more time).

e. the chair would be required for use at the till (there was already a chair in the changing rooms).

f. the reference to additional breaks meant continuing to give her 3 x 10 minutes breaks instead of the standard 30 mins break.

g. as at the date of dismissal, and at the date of appeal, she was not fit to work in any capacity (including restricted duties) and she did not advise when she was likely to be fit to do so.

22. The Respondent denies that the stated adjustments would be reasonable.

Discrimination arising from disability

23. The Claimant relies upon her dismissal (and now the failure to re-instate upon appeal) as unfavourable treatment.

24. The Claimant asserts that: she was dismissed (and not reinstated upon appeal) because of her period of absence and because she was unable to undertake the duties of her role; she was absent because of her disability; she was unable to undertake the duties of her role because she was unable to stand for long periods because of her disability.

25. The Respondent denies that she was treated unfavourably because of something arising in consequence of her disability and in any event asserts that her dismissal (and the failure to re-instate) is objectively justified. At this hearing the Respondent clarified that its aim was to maintain a fit workforce who consistently attend work to run the operation properly and efficiently.

Unfair dismissal

26. The Claimant asserts that her dismissal was unfair because the Respondent:

    a. did not warn her she could be dismissed at a telephone meeting

    b. relied upon outdated medical information which the Claimant had not seen and which the Claimant was not given the opportunity to update

    c. failed to consider, or unreasonably rejected, alternatives to dismissal including the adjustments sought

    d. unreasonably insisted that she perform the full duties of her role

    e. failed to take into account her long service and experience

    f. included in the period of absence months when the store was closed

27. The Respondent denies that the dismissal was unfair.

Holiday pay

28. Following detailed discussion at this hearing the Claimant gave further particulars of her complaint for holiday pay namely that: in October 2020 her manager told her she had accrued and was due 180 hours of holiday; in holiday year 2020/21 she was paid for 48 hours of holiday; in holiday year 2021/22 she accrued 118 hours; in March 2022 she was paid holiday pay of 143.1 and 92 hours; she is therefore due the balance of 14.9 hours (180 – 48 + 118 – 143.1 – 92 hours).

29. The Respondent asserts that the Claimant was contractually entitled to 128 hours annual leave (6.4 weeks x 20 hours = 128 hours) each holiday year; there was no agreement to carry forward her holidays; in respect of holiday year 2020/21 the Claimant had accrued 128 hours, had taken 44 hours, was accordingly due to receive payment for 84 hours but instead received payment of 92 hours in error; in respect of holiday year 2021/22 the Claimant had accrued 118 hours, had taken no holidays, but instead received payment of 143.1 hours; the Claimant accordingly received an overpayment in respect of her holidays 33.1 hours (8 hours in respect of 2020/21(92 – 84 hours) and of 25.1 hours in respect of 2021/22 (143.1 – 118).

<u>Facts not in dispute</u>

30. The following facts were not in dispute -

31. The Claimant was employed by the Respondent from 22 September 2002 to 9 March 2022.

32. The Claimant was employed as a General Sales Floor Assistant ('GSA'). She worked 20 hours a week at a rate of £8.91 an hour.

33. The Respondent holiday year runs from 1 April to 31 March.

34. The Claimant was absent from work from 20 September 2020 to 9 March 2022. Her workplace was closed in November and December 2020 due to the coronavirus pandemic. Med 3 statements were issued by a GP stating that she was not fit to work in the period from 7 September 2020 to 25

August 2022 (the last statement was issued on 25 February 2022). The statements referred to various conditions including amputation of toes and peripheral vascular disease. In December 2020 the Claimant suffered amputation of her toes. She has had Reynaud's disease since at least June 2020 and atherosclerosis since at least December 2020 which conditions continue to date.

35. During the course of her absence from work the Claimant attended long term sickness absence review meetings with the Store Manager and/or the Assistant Store Manager on 13 May, 2 November, 1 December 2021 and 2 February and 9 March 2022. Meetings were held by telephone because of COVID restrictions.

36. At the meeting on 9 March 2022 the Claimant told the Respondent that she was working forward to coming back to work but was waiting for results coming back from her ct scan and if came back she would be able to do tills but wouldn't be able to stand for long periods of time due to her amputation and the nature of her illness, she loved her work and had no intentions of leaving (per her ET1 claim). Her employment was terminated at the meeting. At the time of her dismissal: the Claimant was not fit to work in any capacity (including restricted duties); she was unlikely ever to perform the full duties of a GSA; she sought restricted duties but she did not advise when she was likely to be fit to perform those restricted duties.

37. She appealed the decision to dismiss. On 18 May 2022 the Claimant attended the appeal meeting. At the time of her appeal hearing: the Claimant was not fit to work in any capacity (including restricted duties); she was unlikely to ever be able to perform the full duties of a GSA; she sought restricted duties but she did not advise when she was likely to be fit to perform those restricted duties.

38. On 9 June 2022 the Respondent advised the Claimant her appeal was unsuccessful. The Respondent also advised the Claimant that it was open to her to provide a more up to date GP report by 23 June 2022 regarding her fitness to return so that the Respondent could reconsider its decision. The Claimant did not do so.

39. The Claimant has not worked in any capacity since her dismissal.

Contemporaneous documentation

40. The significant number of contemporaneous documentation contained with the bundles of documents provided by the parties is summarised as follows -

41. During the course of her absence the Claimant attended long term sickness absence review meetings with the Store Manager and the Assistant Store Manager including on 13 May, 2 November, 1 December 2021 and 2 February and 9 March 2022. Notes were taken purporting to summarise these meetings.

42. According to the invite and outcome letters sent to her by the Respondent: the stated purpose of these long-term sickness absence review meetings was, in line with their absence policy, to discuss her current health situation, her return to work, and any reasonable adjustments that might assist her to return to work; she was advised of her right to be accompanied; the Respondent provided a summary of the meeting and enclosed the meeting notes.

43. On 13 May 2021 the Claimant attended an absence review meeting. On 20 May 2021 the Respondent wrote to the Claimant noting that at the meeting she had advised that she has been absent because of anxiety disorder, atherosclerosis and high spectrum reynaud's and toe amputations.

44. On 2 November 2021 the Claimant attended a sickness absence review meeting.

45. On 3 November 2021 the Claimant consented to a report from her GP.

46. On 3 November 2021 the Claimant completed a long term sickness questionnaire in which she stated: she has atherosclerosis, high spectrum Reynaud's, depression, anxiety, low blood pressure, IBS and 2 ½ toe amputations; that she was lucky to still be alive; she has a consultation with a surgeon on 10 November; at the moment she did not know when she might be able to return to work; at the moment she did not know of any

reasonable adjustments they could make to facilitate her to return to work; and there was nothing they could do at the moment to support her.

47. On 10 November 2021 the Respondent wrote to the Claimant to confirm the details of the meeting on 2 November. It noted that she had confirmed that the nature of her illness and had stated that her mobility is not good at the moment. It noted that "In terms of a return to work, you said you do not feel comfortable to at this time and are unsure when you would be likely to return. In terms of any reasonable adjustments, you explained you would be unable to work on the shop floor for longer than 10 minutes and are therefore unsure of any support we can offer".

48. On 9 November 2021 the Respondent wrote to the Claimant's GP enclosing a copy of the Claimant's GSA job description, and requesting a medical report on: details of any medical conditions affection her performance or attendance at work and likely timescale for recovery; details of any medication prescribed; whether the claimant is able to carry out the duties of her job; and any reasonable adjustments to her role to assist her return to work.

49. On 29 November 2021 a medical report was provided from the Claimant's GP which stated that she has peripheral vascular disease causing increasing pain; claudication pain on walking; bilateral hallux valgus and possible sleep apnoea and a depressive disorder and "At present she is unable to perform her duties and I don't see her condition changing in the very near future until these problems are addressed". It enclosed a letter from her consultant vascular surgeon dated 10 November 2021 describing worsening symptoms.

50. On 1 December 2021 the Claimant attended an absence review meeting. The notes of the meeting record that the Claimant was asked about returning to work and whether there was anything they could do to help her get back and that the Claimant replied "right now no, still not able to come back". On 7 December 2021 the Respondent wrote to the Claimant to confirm the details of the meeting on 1 December. It noted that she had stated that her mobility was still impaired and that she was still in

considerable pain, that she was unable to return to work at this time due to pain levels and that reasonable adjustments to aid her return were not appropriate.

51. On 9 February 2021 the Respondent held an absence review meeting with the Claimant. The notes of the meeting record that: the purpose of the meeting was to discuss the medical report received from her GP; the Claimant didn't get a copy of it; her manager went through it with her and asked if it was a true reflection of her current circusmtances; the Claimant was asked whether she agreed with her GP's comment that she is unable to perform her duties and didn't see this changing soon; the claimant advised that it won't get better but she doesn't want to give her job and wants to return; she doesn't know when she'll return; she doesn't think that there are any reasonable adjustments they can make but she'd like to ask about holidays; she doesn't think there is anything else they can do to help; she can't see herself being back in the next few months; the manager advised there would be another meeting within 4 weeks, that at that meeting they will be discussing how they could facilitate and support her return to work with reasonable adjustments, that all factors will be considered however "we reserve the right to consider your future employment with the company and one possible outcome may be a decision to termination your employment"; the Claimant replied "Ok, I understand".

52. On 15 February 2022 the Respondent wrote to the Claimant to advise that there would be a further long-term sickness meeting on 9 March 2022 to discuss her capability to work and how they can facilitate and support her return to work with reasonable adjustments. It noted that they reserved the right to consider her future employment with the company and one possible outcome was a decision to terminate her employment.

53. On 25 February 2022 the Claimant was issued with a Med 3 statement by her GP stating that she was she was not fit for work for the period from 25 February to 25 August 2022 by reason of peripheral vascular disease.

54. On 9 March 2022 the Claimant attended an absence review meeting. The notes of the meeting record that: the Claimant was asked how she was; she

said she had had more bad news and was awaiting biopsies and scan results, she felt a bit better and was now walking a bit more, she was unfit to return to work at the moment, she felt hounded, like they were looking to get rid of her, she won't be losing her job – she will crawl back if needed, she mentioned paid holidays; she was asked whether she agreed with the medical report; the Claimant advised that she agreed with what was said 8 weeks ago, she was waiting on results; she was advised that the GP report states she was unable to perform duties and can't see it changing in the near future; the Claimant advised that she would have to disagree; she was asked whether she could foresee a return to work; the Claimant advised "yes, I need to wait on results. Don't want to give up 19 years of service", she did not know of a potential recovery period, she could not put a timescales on her return to work; she was asked what they could do to support her role; she advised she would be able to serve on a till and at fitting rooms but not much else, she would not be able to consider a phased return over a period of 4 weeks, she has her holidays to use up; she was asked if she could do the duties of her job; the Claimant advised she won't be able to come back to do that job, she would be able to work on a till and re-shop, she would need a chair and extra breaks, she could not put a timescale on when she could do this; following an adjournment the claimant was advised that because she had been absent from work since September 2020 and at this stage she is unable to provide a return to work date she has reached a decision to terminate her employment; the Claimant expressed surprise, anger and upset about the decision and that she would give a date for coming back.

55. On 18 March 2022 the Claimant was advised that her employment was being terminated with a payment in lieu of 12 weeks' notice because she had been absent from work since September 2020, she was not currently fit to work and she was unable to provide a timescale when she would likely to be able to return to work. The Claimant was given a right of appeal against the decision to terminate her employment. The letter referred to her termination date as 4 March (instead of 9 March).

56. On 25 March 2022 the Claimant intimated her appeal on the grounds that it was unfair for her employment to be terminated based upon her considerable ill health and her being in the unfortunate position of being unable to state when she will return which is entirely out with her control and it has always been her intention to return to work as soon as possible.

57. On 18 May 2022 the Claimant attended the appeal meeting with a dual site manager and a supervisor who took notes. The Claimant declined the offer to be accompanied. The notes of the meeting record that: she advised that her current situation was that she was awaiting results, she was meeting her surgeon that day, she felt better, it wasn't her own doctor who provided the medical report, her own doctor doesn't agree with it; she was asked if she could complete the duties of a GSA, she said yes she could do the tills but not work on the shop floor, she was unable to give a return date.

58. On 9 June 2022 the Respondent wrote to the Claimant to advise that various meetings had been held with her; that she is unfit to return to her full GSA role; that she might be able to undertake till and fitting room duties but was unable to advise a date when she could return to such restricted duties; that she was unlikely to ever be fit to perform her full GSA role; and that accordingly her appeal was unsuccessful. The Respondent advised the Claimant that it was open to her to provide a more up to date GP report by 23 June 2022 regarding her fitness to return so that the Respondent could reconsider its decision. The Claimant did not provide a medical report until 27 September 2022.

59. On 27 September 2022 the Claimant provided medical report dated 12 September 2022 which disagreed with the suggestion in the prior medical report that she "would be unfit to return to her employment in the long term" and which stated that "it is correct that she currently has a serious medical condition requiring ongoing treatment but at the end of this treatment I would be confident that she would have been able to return to work. It is unfortunate in this current client that most hospital treatments have been delays." It did not specify an end date for that treatment. It also stated that "loss of that employment has been felt particularly acutely at this time when

her mental health has been poor due to dealing with the enormity of her condition".

60. According to the Respondent's records: the Claimant's annual entitlement was 136 hours; in holiday year 2017/18 the Claimant took 136 hours of holiday; in holiday year 2018/2019 the Claimant took 139.45 hours; in holiday year 2018/2019 the Claimant took 129.45 hours (leaving 6.15 hours remaining); in holiday year 2019/2020 the Claimant took 135:55 (leaving 0.05 hours remaining); in holiday year 2020/21 the Claimant took 44 hours of holiday before 6 September 2020 (leaving 92 hours remaining); on 19 April 2022 the Claimant received payment of 92 hours holiday pay in respect of the 2020/2021 holiday year; on 22 March 2022 the Claimant received payment of 143.1 hours holiday in respect of her 2021/2022 holiday year.

Procedural history

61. The claim was lodged with the Employment Tribunal on 3 May 2022.

62. At the Case Management Hearing held on 27 July 2022 the Respondent asked whether the Claimant would make available to them an up to date medical report regarding her fitness to work and, indicated that in the event that such a report confirmed that the claimant was fit to return to her duties as a General Store Assistant(GSA), the respondent would be prepared to give consideration as to whether reinstatement of the claimant was practicable. The Claimant confirmed that as at 14 July 2022 she was not medically fit to return to work, even to duties restricted to "till work."

63. By way of emails dated 12, 19 and 27 September 2022 the Claimant was reminded of the Respondent's offer to consider potential reinstatement subject to a satisfactory medical prognosis. The Claimant advised on 26 September that she no longer wished to return to the Respondent's employment.

64. On 27 September 2022 the Claimant provided medical report dated 12 September 2022.

65. An application to amend was made on 26 September 2022 and determined on 22 December 2022.

66. On 13 February 2023 the Claimant was ordered to provide: further particulars regarding her claim for holiday pay by 27 March 2023 (Order 5); a schedule of loss by 6 March 2023 (Order 7); further particulars of her assertion of disability status and documentary vouching by 27 February 2023 (Order 8); and specification of the material time of discrimination by 13 March 2023 (Order 9).

67. On 13 March 2023 and again on 24 March the Respondent wrote to the Claimant seeking compliance with the orders and provided her with information regarding her holiday pay.

68. On 15 March 2023 the Respondent made an application for strike out failing which a deposit in respect of the complaints of unfair dismissal, disability discrimination and holiday pay on the grounds of little or no reasonable prospects.

69. On 24 March 2023 the Respondent wrote to the Claimant seeking compliance with the orders.

70. On 28 March 2023 the Respondent made an application for strike out on the ground of failure to comply with order 5, order 7 and order 9 of 13 February 2023.

71. The Claimant was unable to provide the medical records prior to 20 April 2023 because of an error in those records. In light of this the Respondent no longer asserted an unreasonable failure to comply with the order for vouching.

72. The schedule of loss was provided on 5 May 2023 in late compliance with Order 7.

73. Specification of the claim of holiday pay; the material time of discrimination; and her assertion of disability status (including medical records) was provided at this hearing in late compliance with Orders 5, 8 and 9.

Financial circumstances

74. The Claimant asserts that she has been in receipt of a PIP (Personal Independence Payment) at the lower rate since September 2020 and at the higher rate since December 2022. The Claimant asserts that at the time of the hearing she was in receipt of universal credit and a PIP totaling £1111 every 4 weeks; her outgoings exhausted those payments; she has no savings other than £116; she may receive some money from the estate of her late parents but she does not know when the executory will be concluded. The Claimant provided a copy of her bank statement for January 2023 which appeared to show receipt of a PIP, no other earnings, and outgoings broadly in line with her income.

The law on strike out

75. Under Rule 37(1) of the Employment Tribunal Rules of Procedure, a Tribunal may strike out all or part of a claim or response on various grounds including-

    (a) that it is scandalous or vexatious or has no reasonable prospects of success; …

    (c) for non compliance with an Order.

76. In light of the severe consequences of strike out, such a decision is considered a draconian step which should only be taken on the clearest grounds and as a matter of last resort. Its purpose is not to punish the conduct but rather to protect the other party from the consequences of the conduct (*Bolch v Chipman [2004] IRLR 140*, EAT).

77. Before making a strike out order, the tribunal must give the relevant party a reasonable opportunity to make representations, either in writing or, if requested by that party, at a hearing.

Non-compliance with Tribunal order

78. In considering whether to strike out for non-compliance with an order, a tribunal must have regard to the overriding objective set out in Rule 2 of

seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including: the magnitude of the non-compliance; whether the default was the responsibility of the party; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out or some less punitive response (e.g. further orders including deposit or an unless order) would be an appropriate and proportionate response (*Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT*).

79. Where a claim has arrived at the point of a final hearing it would take something very unusual indeed to justify striking out (*Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684*, Court of Appeal).

No reasonable prospects

80. Having regard to the legal authorities referred to below the following is noted: strike-out on grounds of no reasonable prospects is considered by means of a summary determination; where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts; exceptional circumstances may arise where disputed facts are totally and inexplicably inconsistent with undisputed contemporaneous documentation; discrimination and unfair dismissal cases are generally fact sensitive and therefore strike out on this ground is exceptional; where there are no reasonable prospects the Tribunal must decide whether to exercise it's discretion mindful that full evidence has not been heard, although the Tribunal should not be deterred in the most obvious of cases.

81. The House of Lords in *Anyanwu and Ors v South Bank Students' union and Ors [2001] IRLR 305* per Lord Steyn (par 24):

"such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a

matter of high public interest"

82. The Court of Appeal in *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, per* Maurice Kay LJ:

(Para 27) "what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success… However, what is important is the particular nature and scope of the factual dispute in question… there may be cases which embrace disputed facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success"

(Para 29) " there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise…It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."

83. The Court of Session in *Tayside Public Transport company Ltd (t/a Travel Dundee) v Reilly [2012] Scot CS CSIH 46*, per Lord Justice Clerk –

[29] "The power of the ET to strike out a claim at a pre-hearing review may be exercised only where the ET determines that the claim "has no reasonable prospect of success"…Even if the Tribunal so determines, it retains a discretion not to strike out the claim".

[30] "the power conferred … may be exercised only in rare circumstances. It has been described as draconian ... In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid

Products Ltd v Patel (2003) CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions... But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out…"

[33]… the Tribunal will have to assess both the substantive issues…the fairness of the procedures by which the decision to dismiss was reached (British Home Stores Ltd v Burchell [1980] ICR 301; Iceland Frozen Foods Ltd v Jones [1983] ICR 17; Foley v Post Office; HSBC Bank v Madden [2000] IRLR 827; Employment Rights Act 1996, s 98(4), supra).

[34]… In my view, he should have considered whether a full Tribunal conducting a formal hearing into the claim might have fuller information before it than he had".

84. The Employment Appeal Tribunal in *Mechkarov v Citibank NA* UKEAT/0041/16/DM, having reviewed *Anyanwu, Ezsias* and *Tayside*, per Mr Justice Mitting (para 14):

"On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts".

85. The Court of Appeal in *Ahir v British Airways Pic [2017] EWCA Civ 1392* per Underhill LJ (para16):

"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment"

86. And Lord Hope (par 37):

"I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

The law on deposit

87. Under Rule 39(1) of the Employment Tribunal Rules of Procedure, where the tribunal considers that any specific allegation or argument in a claim has little reasonable prospects of success, it may order the Claimant to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

88. Whilst this is a lower hurdle than having no reasonable prospects of success (under Rule 37 on strike out), there must be a reasonable basis upon which to doubt that the legal arguments are valid or that the material facts necessary to support the allegation will be established.

89. Even if there are little reasonable prospects of success, the Tribunal retains a discretion whether to make an order for a deposit having regard to the overriding objective to deal with cases fairly and justly. Relevant factors may

include whether it will avoid delay (and save time), whether it will avoid expense (and save costs), and the importance of the issues.

90. Under Rule 39(2), when deciding the amount of each deposit, the tribunal must make reasonable enquiries into the Claimant's ability to pay the deposit and have regard to such information when deciding the amount of the deposit. Where multiple allegations or arguments are advanced (as is the case here) there may be multiple deposits ordered not exceeding £1000 each. However the tribunal should stand back and consider whether the total deposit awarded is proportionate (*Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14, EAT)*.

91. The purpose of a deposit order is to identify weak claims, to flag that weakness to a party, and to warn of a risk of expenses (costs) if they proceed. Its purpose is not to achieve strike out indirectly by ordering a deposit that cannot reasonably be complied with (*Hemdan v Ishmail [2017] IRLR 228, EAT)*.

92. Under Rule 39(4), if a deposit is ordered and the Claimant fails to pay the deposit, the specific allegation or argument will be struck out.

93. Under Rule 39(5), if a deposit is ordered and paid, the deposit shall be refunded to the Claimant unless tribunal ultimately decide to rejects the specific allegation or argument for substantially the same reasons. In these circumstances the Claimant may treated as having acted unreasonably when considering an award of expenses (costs) and further, the deposit shall be paid to the Respondent.

Respondent's submissions

94. The Respondent's oral submissions were in summary as follows -

a. The complaints are not fact sensitive. The central issues are not in dispute namely that: at the time of her dismissal the Claimant was unfit for any work (including restricted duties), she had been unfit for any work for 18 months, she was unable to advise of an expected return date; at the time of her appeal the Claimant was unfit for any

work (including restricted duties), she had been unfit for any work for 20 months, she was unable to advise of an expected return date; the Claimant continued thereafter to be unfit for any work (including restricted duties) (as confirmed by the Claimant at the PH in July 2022 and by the medical report provided in September 2022 and the Claimant at this hearing).

b. The claimant's complaints are conclusively disproved by and are totally and inexplicably inconsistent with undisputed contemporaneous documents and may therefore be struck out.

c. The Claimant did not challenge the accuracy of the notes of the meetings, or the contents of the letters, or raise any issue about not having received any letter during the course of the absence management process or the appeal.

d. It is apparent from the dismissal letter that the reason for her dismissal was that she has had a protracted period of absence, she was not fit to work in any capacity, and she was unable to advise an expected return date.

e. The Claimant was given fair warning that she was at risk of dismissal (she did not raise this issue either on appeal or in her unamended claim); she elected not to receive a copy of the first medical report but was advised of its contents; she was given an opportunity to obtain a further report; the second report was consistent with the first report; the Respondent had never refused to provide restricted duties to assist her return to work but at no time has the Claimant been fit to undertake restricted duties; the date referred to in the dismissal letter was an obvious typo.

f. After the appeal the Respondent offered to revisit their decision if the Claimant provided up to date medical evidence regarding her fitness to return but declined to do so. The Respondent expressly offered a return to work including on restricted duties. The Claimant confirmed that she remained unfit to work in any capacity.

g. The Claimant failed to specify her complaints in the specified timescale. The Claimant has produced no evidence in support of her new assertion that as at the disciplinary hearing she was likely to be fit to return within 3 months and as at the appeal hearing she was likely to be fit to return within 1 month. This new assertion is wholly inconsistent with the medical evidence available at the time and is wholly inconsistent with what was said by the Claimant at the time. In any event the Respondent didn't and couldn't reasonably have know this.

h. It is apparent from the holiday records that the Claimant did not have any accrued but untaken holidays as at October 2020 and could not therefore have reached an agreement with her manager to carry forward 180 hours of holiday.

i. In the month for which vouching was provided, the Claimant has spent over £100 on non-essential items and accordingly can afford to pay a deposit.

Claimant's submissions

95. The Claimant's oral submissions were in summary as follows -

a. Only in the clearest case should a discrimination claim be struck out. The claimant's case must be taken at its highest.

b. Core issues of fact that turn on oral evidence should not be decided without hearing. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

c. The Respondent at the time of her dismissal and at the time of her appeal focused on whether she was fit to perform the full duties of a GSA and failed to consider making any reasonable adjustments by way of restricted duties. The reason for her dismissal was because she was unfit to perform the full duties of a GSA and was likely to remain unfit to do so.

d. At the time of the disciplinary and appeal hearings the Claimant was not accompanied or legally represented and had mental health issues.

e. At a final hearing the Claimant will give oral testimony that: the managers who held the review meetings were not her line managers and had limited contact with her; at the time of her dismissal she was likely to be fit to return to work (on restricted duties with the stated adjustments) within 3 months; she did not advise the Respondent of this at the time of her dismissal because she was not aware of the risk of dismissal (she had not received the letter of 15 February 2022) and/or because their focus was on her fitness to perform the full duties of a GSA; at the time of her appeal she was likely to be fit to return to work on restricted duties within 1 month; she did not advise the Respondent of this because the decision to dismiss affected her mental health and the Respondent focus was on her fitness to perform the full duties of a GSA; she did not take the opportunity to provide additional medical evidence regarding her fitness to return to work on restricted duties because the failure to uphold her appeal further affected her mental health and their focus was upon her fitness to perform the full duties of a GSA.

Discussion and decision

Knowledge of disability status

96. The Claimant has physical impairments of Reynaud's disease and atherosclerosis which resulted in the amputation of 3 toes in December 2020, affecting her ability to walk. At the time of her dismissal the Claimant had been certified as unfit for work for over 18 months because of those conditions and she was likely to be permanently unfit to perform the job of a GSA which she had performed for over 18 years. According to the contemporaneous documents, the Respondent was aware of this. In these circumstances it cannot be said that there is little or no reasonable prospect of proof that the Respondent had actual or constructive knowledge of her disability status at the relevant time.

Failure to make reasonable adjustments

97. According to the contemporaneous documents, the Claimant's absence was managed under the Respondent's absence policy. The stated reason for her dismissal was that she had been absent from work for over 18 months, she was not currently fit for work, and she was unable to advise when she would be fit for work. In these circumstances it cannot be said that there is little or no reasonable prospect of proving that Respondent applied a PCP of requiring employees to maintain a certain level of attendance to avoid being dismissed.

98. According to the contemporaneous documents: in November 2021 the Claimant's GP was provided with a copy of the GSA job description and asked whether the claimant was able to carry out the duties of her job; at the dismissal meeting in March 2022 the Claimant was asked if she could do the duties of her job; at the appeal meeting in May 2022 she was asked if she could complete the duties of a GSA; the appeal outcome notes that she unfit to return to her full GSA role and refers to till and fitting room duties as "such restricted duties"; and the offer to consider reinstatement made in July 2022 is conditional upon an up to date medical report confirming her fitness to return to her duties as a GSA. (Contrary to the Respondent's submission, the Respondent did not expressly offer a return to work including on restricted duties.) In these circumstances it cannot be said that there is little or no reasonable prospect of proving that the Respondent applied a PCP of requiring employees to carry out all of the duties of their job description when returning to work after absence.

99. The Claimant relies upon the disadvantage being dismissed (and not being re-instated). According to the contemporaneous documents the Respondent knew that the Claimant was absent and unfit to work because of her physical impairments and the Respondent dismissed her (and did not re-instate her) because of her continued absence/ unfitness. In these circusmtances it cannot be said that there is little or no reasonable prospect of proving that the Respondent had actual or constructive knowledge that the pcp put her to the disadvantage of dismissal (and no reinstatement) in

relation to her disability.

100. The Claimant relies upon the adjustments of allowing her 3 months, at the time of her dismissal, to return to work (including taking 7 weeks holiday) (or allowing her 1 month at the time of her appeal) and, upon her return to work, allowing her to perform restricted duties at the till and changing rooms.

101. The duty is to make adjustments which are likely to have the practical effect of addressing the substantial disadvantage. It is an objective test and the process by which the adjustment was or was not considered is therefore irrelevant. Whether an adjustment was likely to be effective is considered on the basis of the Claimant's health at the time. However medical evidence obtained afterwards may cast light upon that.

102. Accordingly the issue is whether at the time of her dismissal in March 2022 the Claimant was likely to be fit to return to work to perform the restricted duties within 3 months and whether at the time of her appeal in May 2022 she was likely to be fit to perform restricted duties within 1 month.

103. The medical report provided in November 2021 advised she was unfit to perform her duties and didn't envisage her condition changing in the very near future until her medical problems were addressed. At the time of her dismissal in March 2022 the Claimant had been unfit to work in any capacity for over 18 months because of her physical impairments. At the time of her dismissal the Claimant was not fit to perform restricted duties and she did not advise when she was likely to be fit to perform those restricted duties. According to the contemporaneous documents the Claimant stated she could not put a timescale on when she could return to perform restricted duties. At the time of her appeal she was not fit to perform restricted duties and did not advise when she was likely to be fit to perform those restricted duties. According to the contemporaneous documents she was unable to give a return date. At the case management hearing in July 2022 the Claimant advised that she was not fit to perform restricted duties. The medical report provided in September 2022 sought to disagree with any suggestion in the November 2021 report that she would be unfit to work in the long term. However the September 2022 report also noted that she has

a serious medical condition requiring ongoing treatment but at the end of the treatment she would be fit to work. It did not specify an end date for that treatment but referenced delays in treatment.

104. In these circumstances it is considered highly unlikely that the Claimant will be able to prove that at the time of her dismissal she was likely to be fit to return to work to perform restricted duties within 3 months and separately at the time of her appeal she was likely to be fit within 1 month. Accordingly her complaint of failure to make reasonable adjustments has little reasonable prospects of success because the adjustments were highly unlikely to have any practical effect.

105. However it cannot be said that she has no reasonable prospects of establishing this because the arguable focus on the full duties of a GSA may possibly have had an effect on her GP's and her own assessment as to when she was likely to be fit. Contrary to the Respondent's general submission the issue of her fitness to work restricted duties remains in dispute, is fact sensitive and is not totally and inexplicitly inconsistent with undisputed contemporaneous documents. Contrary to the Claimant's submission the reason for her dismissal did not appear to wholly focused on her fitness to perform the full duties of a GSA given that both the Claimant and her GP were asked about reasonable adjustments and given the stated reasons for her dismissal. Accordingly this argument is considered to have limited prospect of success.

106. In addition to its effectiveness, the issue of whether the adjustment was otherwise reasonable will depend upon a variety of factors and it would be a matter for a full tribunal to determine appraised of all the relevant evidence.

Discrimination arising from disability

107. The Claimant asserts that: she was dismissed (and not reinstated upon appeal) because of her period of absence and because she was unable to undertake the duties of her role; she was absent because of her disability; she was unable to undertake the duties of her role because she was unable to stand for long periods because of her disability. The stated reason for her

dismissal was that she had been absent from work for over 18 months, she was not currently fit for work, and she was unable to advise when she would be fit for work. The stated reason for refusal of her appeal was that she was unfit to return to her full GSA role, she was unable to advise a date when she could perform restricted duties, and she was unlikely to ever perform her full GSA role. According to the contemporaneous documents she had been absent and was unfit to undertake the duties of her role or to perform restricted duties because of her physical impairments.

108. In these circumstances it cannot be said that there is little or no reasonable prospect of proving that Respondent dismissed the Claimant (or refused reinstatement) for something arising inconsequence of her disability.

109. It is highly likely that the aim of consistent attendance at work will be considered to be legitimate. The issue of whether her dismissal (and refusal of reinstatement) was a proportionate means of achieving that aim requires a careful balancing exercise of all the relevant factors which would be a matter for a full tribunal to determine appraised of all the evidence and therefore cannot be said to have no reasonable prospects. However given the very substantial period of absence, the absence of any stated timescales for her return, and the procedure adopted (see below) it is highly likely that the Respondent will be able to show that her dismissal was a proportionate means of achieving that aim. In the circumstances of this case the proportionality test is likely to produce the same result as the reasonable adjustment test (see above). Accordingly her complaint of discrimination arising from disability has little reasonable prospects of success.

Unfair dismissal

110. The stated reason for her dismissal was that she had been absent from work for over 18 months, she was not currently fit for work, and she was unable to advise when she would be fit for work. The Claimant accepts that her capability was the reason for her dismissal which is a potentially fair reason.

111. The Respondent held long term sickness absence review meetings with the

Claimant in May, November and December 2021 and in February and March 2022. According to the invite and outcome letters sent to her by the Respondent: the stated purpose of these long-term sickness absence review meetings was, in line with their absence policy, to discuss her current health situation, her return to work, and any reasonable adjustments that might assist her to return to work; she was advised of her right to be accompanied; the Respondent provided a summary of the meeting and enclosed the meeting notes. The Respondent wrote to her GP seeking a medical report on details of any medical conditions affection her performance or attendance at work and likely timescale for recovery; details of any medication prescribed; whether the claimant is able to carry out the duties of her job; and any reasonable adjustments to her role to assist her return to work. The Claimant was given a right of appeal and a further opportunity after appeal to provide a more up to date GP report. There is no assertion that the Respondent did not following their own absence management policy or any ACAS guidance.

112. Having regard to the contemporaneous documents it is considered highly unlikely that the Claimant was not aware of the risk of dismissal given the comments she appears to have made at the meetings in February and March 2021 regarding her future employment (which is referenced in her ET1 claim).

113. Having regard to the contemporaneous documents: the Claimant had elected not to receive the November 2021 medical report; her manager went through it with her in February 2022 and asked if it was a true reflection of her current circumstances; she obtained an updated report in September 2022. It is considered highly unlikely that she had inadequate opportunity to obtain an updated report.

114. The erroneous date in the dismissal letter is highly likely to be considered to be a typo and of no significance.

115. The store was closed due to Covid for 2 months in an 18 month period of absence and accordingly this relatively short period of closure is highly unlikely to have a material bearing on the fairness of the decision to dismiss.

116. Although the band of reasonable responses test is different to the proportionality test (above), a tribunal in this case is highly unlikely to determine that the decision to dismiss was objectively justified but substantively unfair.

117. Although the tests are different, if the adjustments sought are highly unlikely to be considered a reasonable step when applying an objective test, failure to take those steps is highly unlikely to fall out with the band of reasonable responses.

118. The issue of whether her dismissal was fair should be determined with reference to all of the relevant factors by a full tribunal appraised of all the evidence and therefore cannot be said to have no reasonable prospects. However given the procedure adopted, given the very substantial period of absence, given the absence of any stated timescales for her return, it is highly likely that decision to dismiss will be considered to fall within the band of reasonable responses. Accordingly her complaint of unfair dismissal has little reasonable prospect of success.

Holiday pay

119. According to the Respondent's records the Claimant had little or no holidays to carry forward from prior years. There is accordingly little prospect of the claimant proving that her manager told her she had accrued and was due180 hours of holiday in October 2020. However according to those records her annual holiday entitlement was 136 hours and not 128 hours as stated by the Respondent. The Respondent's initial calculation of her holiday pay (now described as an overpayment) also appeared to be based upon that 136 hours. Given that apparent discrepancy it cannot be said that her complaint failure to pay 14.9 hours of holiday pay has no reasonable prospects of success.

Non-compliance with tribunal order

120. The Claimant failed to comply with Orders 5, 7, 8 and 9 of 13 May 2023.

121. Specifically, the Claimant was ordered to provide:

a. further particulars of her complaint for holiday pay by 27 March 2023 but did not do so until this hearing in May 2023.

b. a schedule of loss by 6 March 2023 but did not do so until 5 May 2023.

c. further particulars of her assertion of disability status by 27 February 2023 but did not do so until this hearing in May 2023.

d. Specification of the material time of discrimination but did not do so until this hearing in May 2023.

122. No reasonable explanation was given for the delay. Had she complied these orders timeously time would have been saved at this hearing and her failure to do so arguably put the Respondent to some unnecessary expense. Given that she has now complied, the magnitude of non-compliance is not considered significant and a fair hearing is still possible. Having regard to the overriding objective, it would not be an appropriate or proportionate response to strike out the complaints on this ground.

Deposit order

123. The complaints of failure make reasonable adjustments, something arising from disability, unfair dismissal and holiday pay have little reasonable prospects of success.

124. The purpose of a deposit order is to identify weak Claims, to flag that weakness to a party, and to warn of a risk of expenses (costs) if the party elects to proceed. Having regard to the overriding objective of dealing with cases fairly and justly including the importance of the issues to the Claimant, the substantial time and expense involved in preparing for and attending the 9 day final hearing, and the Claimant's ability to pay any deposit or meet any award of expenses, it is considered on balance to be appropriate to exercise discretion in favour of ordering payment of a deposit in respect of each complaint.

125. Having regard to the Claimant's financial circumstances it is considered appropriate to order payment of a deposit in sum of £15 in respect of each

complaint. A total deposit of £60 is an amount that can reasonably be paid by the Claimant having regard to her very limited savings but one which highlights that these complaints are considered to have little reasonable prospects of success.

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Employment Judge: **M Sutherland**
Date of Judgment: **06 June 2023**
10 **Entered in register:** **07 June 2023**
and copied to parties