



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105459/2022

Held in Glasgow on 12 July 2023

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Employment Judge S MacLean

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**Claimant
Represented by:
Mr G Bathgate -
Solicitor**

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Greater Glasgow Health Board

**Respondent
Represented by:
Ms S Wood -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

- (1) the claimant was a disabled person between August 2017 and December 2021 in terms of section 6 of the Equality Act 2010; and
- 20 (2) the claimant's age discrimination claim is struck out under rule 37(a) of schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

ORDER OF THE EMPLOYMENT TRIBUNAL

25 Under rule 29 of schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 the Employment Tribunal orders that the claimant's application to amend dated 19 July 2023 is allowed and the respondent has 21 days from receiving this order to respond by providing additional information to the response.

REASONS

Introduction

1. This public preliminary hearing was listed to determine the following issues:
 - 5 a. Whether the claimant is “disabled” as defined in section 6 of the Equality Act 2010 (EqA).
 - b. The respondent’s application for strike out under rule 37 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules of Procedure) or failing which, an application for deposit order under rule 39 in respect of the sex and age
10 discrimination claims.
2. The claimant was represented by Mr Bathgate, solicitor. She gave oral evidence on her own account about the first issue. She also referred to a file of documents that included a disability impact statement, GP records and occupational health reports.
- 15 3. Ms Wood, solicitor represented the respondent. She cross-examined the claimant. No witnesses were called for the respondent.
4. It was agreed that we would deal with the first issue as it involved hearing evidence. The representatives would then make submissions on the first issue and the second issue.
- 20 5. In respect of disability status Ms Wood referred to the case of *Morgan Stanley International v Posavec* UKEAT0209/13/BA. It was agreed that Mr Bathgate would be given an opportunity to comment on the respondent’s submission in relation to this case within seven days. I suggested to Ms Wood that she should only provide further comments to Mr Bathgate’s comment if she did
25 not feel that it was adequately addressed in her original submissions. In the meantime, I reserved judgment.
6. I subsequently invited comments from the parties as I was considering issuing an anonymity order. This is dealt with separately.

7. By email sent on 19 July 2023, Mr Bathgate provided comments on the respondent's submission in relation to *Morgan Stanley International* and the proposed anonymity order. He also made an application to amend the sex discrimination case as set out in an amended statement of claim. By email sent on 24 July 2023, Ms Wood advised that the application to amend was opposed and set out the reasons for so doing.
8. I decided to deal with the issue of disability status first. I then considered the application to amend before considering the respondent's applications for strike out or deposit order.

10 **Disability status**

9. In the claim form the claimant alleges acts of disability discrimination (subjecting her to a disciplinary process in respect of allegations in the disciplinary outcome letter and imposing a disciplinary sanction). The alleged discriminatory acts followed an investigation into a collective grievance (made on 24 November 2020) under the respondent's Once for Scotland Workforce Investigation Process culminating in an investigation report on 7 November 2021 recommending referral to the respondent's Once for Scotland Workforce Conduct Policy under which a disciplinary hearing took place in March/April 2022; a disciplinary sanction issued in the outcome letter dated 29 April 2022; an appeal hearing on 10 and 11 November 2022 and outcome letter dated 21 December 2022.
10. The claimant also asserts that "at all material times" she is and was a disabled person within the meaning of the EqA. She suffers from symptoms relative to the menopause. In particular she suffers from dysregulation of temperature, inconsistent behaviour, anxiety, insomnia and inability to focus.
11. In relation to the disability status, the issues that I had to determine were:
- a. Did the claimant have a mental or physical impairment? The claimant asserts that she experienced symptoms relative to the menopause. She refers to physical and mental impairments. The respondent did not dispute that the claimant suffered from symptoms relative to the

menopause. However the respondent did not accept that all the symptoms to which the claimant referred in her disability impact statement were attributable to the menopause in particular symptoms of painful and heavy bleeding. The respondent accepted that the claimant had physical impairments relative to menopause but not mental impairments.

- b. Did the impairment affect the claimant's ability to carry out normal day to day activities?
- c. Was the adverse condition substantial? The respondent says that the impairments do not meet the statutory test.
- d. Was the adverse condition long term in that it has lasted 12 months; it is likely to last for at least 12 months; or is likely to last the rest of the life of the person affected? The respondent says that the impairments do not meet the statutory test.

The relevant law

12. Section 6(1) of the EqA provides that a person has a disability if they have 'a physical or mental impairment; and the impairment has a substantial and long term adverse effect on the person's ability to carry out normal day to day activities.' The burden of proof is on the claimant to show that she satisfies the definition.
13. The statutory definition of 'substantial' in section 212(1) of the EqA is, 'more than minor or trivial'.
14. Supplementary provisions for determining whether a person has a disability are found in part 1 of schedule 1 to the EqA. For example, schedule 1, paragraph 2 provides that the effect of an impairment is long-term if it has lasted at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person. Further if the impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is treated as continuing to have that effect if it is likely to recur.

15. Schedule 1 paragraph 2(2) provides that if an impairment ceases to have a substantial adverse effect, it is treated as continuing to have that effect if that effect is likely to recur. In that context, “likely to” has been defined as “could well happen”, rather than “more likely than not” (*SCA Packaging Limited v Boyle* [2009] ICR 1056).
16. Schedule 1 paragraph 5 provides that an impairment is treated as having a substantial adverse effect on the ability of the person concerned if measures are taken to correct it and, but for that, it would be likely to have that effect.
17. The definition of disability in section 6(1) of the EqA requires that the adverse effects on a person’s ability to carry out normal day to day activities arises from some ‘physical or mental impairment’.
18. There is no statutory definition of either ‘physical impairment’ or ‘mental impairment’ nor is there government guidance.
19. The Court of Appeal held in *McNicol v Balfour Beatty Rail Maintenance Limited* [2002] ICR 1498 that ‘impairment’ in this context bears its ordinary and natural meaning. “It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the [claimant] has a physical or mental impairment with the stated effects.”
20. The Government has issued ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ (2011) (the Guidance) under section 6(5) of the EqA. This stresses that it is important to consider the things that a person cannot do, or can do with difficulty (the Guidance, B9, confirmed in *Aderemi v London & Southeastern Railway Limited* [2013] ICR 391).
21. Day to day activities are things people do on a regular or daily basis, such as shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing an eating food, walking and travelling by various forms of transport, and taking part in social activities. This includes work related activities, such as interacting with

colleagues, using a computer, driving, keeping to a timetable etc. (the Guidance, D2-D7).

22. The Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment (2011) (the Code), which has some bearing on the meaning of 'disability' under the EqA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.
23. The time at which to assess the disability (i.e. whether there is an impairment that had a substantial adverse effect on normal day to day activities) is the date of the alleged discriminatory act *Cruickshank v VAW Motorcast Ltd* [2002] ICR 729, EAT. This is also the material time when determining whether the impairment has a long-term effect.
24. The long term requirement relates to the effect of the impairment (which must be a substantial adverse effect on the ability to carry out normal day to day activities), rather than merely the impairment itself (*Seccombe v Reed in Partnership Ltd* EA-2019-000478-OO).
25. Where there is more than one condition causing an adverse effect, the claimant must plead each condition (see *Morgan Stanley International v Posavec* UKEAT 0209/13).

Findings in fact in relation to disability status

26. The claimant was born in 1975.
27. The respondent has employed the claimant for more than twenty years and continues to do so.
28. When the claimant first developed a menstrual cycle at age 12 her periods were heavy. In her early 20s she was prescribed a contraceptive pill during which time her periods were regular and light. When she got married in her early 30s the claimant came off the contraceptive pill as she wished to start a family. She underwent IVF treatment. The claimant has not given birth.

29. Around April 2015 the claimant, aged 40, consulted her general practitioner (GP) as her periods had become insufferable. They were heavy and painful. She experienced flooding, hot flushes, sleep disturbance and difficulty concentrating.
- 5 30. By April 2016 the symptoms were intensifying. Her periods lasted up to three weeks with acute pain. She experienced flooding regularly and would bleed through her clothing. The claimant became anxious about this occurring. The claimant found this humiliating especially when it happened in meetings with colleagues or members of the public. The claimant had difficulty sleeping.
10 She had hot flushes and sweating. She was tired during the day and had difficulty concentrating.
31. The claimant's GP referred her to a gynaecology clinic for assessment. Her blood pressure was within normal range. The claimant was also prescribed Tranexamic acid tablets 50mg for bleeding and pain. The claimant was
15 advised that she was perimenopausal.
32. The claimant received a gynaecology scan in October 2016. The gynaecologist recommended a Mirena intra uterine device to manage her pain and menorrhagia. This was attempted but was unsuccessful as the claimant could not tolerate the procedure. The symptoms persisted.
- 20 33. The claimant and her husband adopted a young child in autumn 2016. The claimant took adoption leave until summer 2017.
34. The claimant's continued to have disturbed sleep at night. She was hot, uncomfortable, and sweating profusely. She had to change her bedclothes during the night. She became anxious and ruminated about what she had to
25 do. She was tired during the day. Her periods were irregular and she suffered regular hot flushes during the day. Around March 2017 the claimant's mood dipped. She consulted her GP.
35. By August 2017 the claimant found that her symptoms were exacerbated. She continued to experience painful heavy bleeding. She had hot flushes
30 several times a day resulting in feeling nausea and sweating profusely. Her

face would turn beetroot red in colour. Her sleep was disturbed. She was anxious and pondered repeatedly about what she had to do. The claimant became chronically fatigued and anxious.

36. The claimant's mental health deteriorated to the extent that she was prescribed antidepressants by her GP. She did not take the tablets as she felt that it they were "a sticking plaster" rather than dealing with the underlying cause of her symptoms which she considered was hormonal. The claimant was at the end of her tether. She asked her GP to refer her to a specialist menopause clinic.
37. The claimant continued to sweat profusely at night. Her bedclothes would be drenched in sweat. She did not feel herself. She lacked confidence in doing previously routine tasks that she had been undertaking for years. She continually checked and rechecked any work.
38. The claimant continued to experience severe flushing and sleep disturbance. The claimant was fatigued and had difficulty concentrating on activities. She would literally cry over spilt milk.
39. The claimant's husband was compassionate. He was aware of the claimant being anxious, tearful and fearful of doing things wrong. The claimant would overreact and become upset about insignificant matters such as dropping eggs on the kitchen floor. She was irritable and was less tolerant. He would attempt to put situations into perspective for her.
40. The claimant found that her disturbed sleep during the night caused her to struggle to get out of bed to get her child ready for school. The claimant became too anxious to drive. Having chosen adoption she felt that she was letting the family down. She lacked confidence in undertaking activities like shopping. She became increasingly isolated from friends and family. The claimant felt terrified for her child. She pinned her hopes on hormone replacement therapy (HRT).
41. Around November 2019 the claimant's periods stopped. She continued to experience severe flushing, sleep disturbance and abdominal pain. The

claimant spoke again to her GP about referral to a menopause clinic. The GP agreed that the claimant should be on HRT for bone/CV protection and symptom control until the age of natural menopause. The claimant made an appointment with her GP to start on HRT. At the consultation the claimant was advised that her blood pressure (which has always previously been stable) was very raised.

42. In late November 2019 the claimant had a panic attack at work. The claimant was hyperventilating, her clothes were soaked with perspiration. The claimant was signed off as being unfit to work from 26 November 2019 to 6 January 2020. The claimant could not cope with the mounting pressures at work.

43. The claimant underwent renal tests to exclude secondary causes for the increase in BP. The claimant had no significant past medical history for high BP. The tests were normal. The claimant tried lifestyle changes.

44. On 3 January 2020, the claimant's GP recorded that if the claimant's BP came down a bit the claimant "could try HRT cautiously as menopause symptoms/anxiety problems are contributing to BP".

45. The claimant returned to work in January 2020. She discussed reducing her workload with her line manager.

46. By February 2020 it was agreed that the claimant would commence medication for her BP so that she could commence HRT. The claimant was unable to receive optimal treatment (HRT) due to medical contraindications with her high BP. The medication prescribed had limited success in reducing her BP.

47. The claimant continued to have very disturbed sleep. She had to sleep alone as she could not tolerate any other body heat. She had to sleep with windows open which was uncomfortable for her husband. She had trouble falling asleep and would jump about the bed.

48. During the day she would feel tired and struggled to concentrate. Her tasks at work took her longer as she continually checked and rechecked her work. The claimant avoided driving where possible as she was overly cautious

which was likely to cause an accident. The claimant was flushed and her face was red.

49. As the claimant and her husband were key NHS workers their child attended a hub during the COVID restrictions so that they could work. The claimant felt guilty and terrified about the risks that she was placing their child. After work she would rush to the hub and then go home to put her child to bed.
50. The claimant was anxious about making decisions and giving her opinion. She constantly rechecked her work.
51. The claimant continued to have hot flushing making her face red. She was conscious of this and felt anxious and paranoid about it. She would go for the weekly shop and forget items like bread and milk. She would burst out crying for something incidental like dropping eggs on the floor. She would respond by being uptight and frustrated until it was pointed out that it was just a mess on the floor or not a big deal. That was not how the claimant felt in the moment.
52. The claimant struggled to concentrate in meetings. If she had hot flushing she would pause, breathe, and try to get herself under control.
53. Around November 2020 a collective grievance was raised against the claimant. There followed an investigation.
54. The claimant avoided social interaction with friends and close family. She did not reply to text messages as she had no interesting conversation and did not feel. She did not visit her mum often. She lacked motivation. She was not up for social events. She just about managed to do "Santa".
55. The claimant continued to experience nightly sleep disturbance, flushing and sweating profusely. The disturbed sleep had an impact on her ability to function the following day. She felt tired, anxious and had "brain fog". She was mortified when people commented on her flushing.

56. The claimant found it difficult to manage the stress at work. Her mood was low. She took longer to produce work and lacked confidence in what she was producing. The claimant's symptoms persisted.
57. An investigation report was submitted in November 2021 which resulted in disciplinary proceedings and a disciplinary sanction.
58. The claimant continued to have disturbed sleep and sweats. The intensity abated from around December 2021 and was less troublesome.
59. The claimant was absent from work from May to October 2022 due to anxiety and depression.
60. The claimant stopped flushing towards the end of 2022.
61. Around May 2023 the claimant started HRT. She continued to have sleep disturbance. Her sweating has reduced in frequency and intensity. Her anxiety and low mood have become worse for which she is taking medication.

Observation on evidence

62. I considered that the claimant gave her evidence in a straightforward measured manner. She did not seek to sensationalise her symptoms or their effects. She made reference to the medical evidence that was available to me. While she elaborated on the disability impact statement that she had provided earlier, this was in response to direct questions in relation to day to day activities beyond those undertaken while at work. I considered that she answered these questions honestly and candidly and I found her to be overall an honest witness.
63. Ms Wood had prepared her outlined submissions before the preliminary hearing which focused on the disability impact statement and medical records which she had analysed forensically.
64. While the medical records were an important relevant factor, I noted that they referred to a selection of healthcare professionals. I did not consider that the absence of repeated consultations with her GP in 2020 to 2022 was enough to infer that the claimant's oral evidence was not reliable. I was mindful that

it was challenging to obtain a consultation with GPs during this period and they tended to be telephone consultations. By 2020 the claimant knew that she was unable to receive optimal treatment for her menopausal symptoms because of the interactions with the medication that she had to take for her high BP. The claimant knew that until her BP was lower, there was little that her GP could do for her. Once her BP was under control the claimant was prescribed HRT which has reduced the intensity and frequency of her flushing. Her sleep has improved but is still disturbed.

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65. Ms Wood submitted that the medical records made reference to certain pre-existing gynaecological conditions. I considered that the medical records reflected a summary of what was discussed at ten minute consultations. I accepted the claimant's evidence that the referral to the gynaecological clinic contained some inaccuracies. For example, that the claimant had undergone two unsuccessful IVF attempts rather than one. I therefore considered that the claimant's evidence about her gynaecological history was more reliable. She explained that in her youth, she had heavy periods. This changed when she was on the contraceptive pill in her early 20's. The claimant did not describe her periods being painful in her youth or that they were painful and heavy when she came off the contraceptive pill in her early 30's. There was no reference to painful periods until 2015. The painful and heavy periods occurred in her late 30's/early 40s when accompanied with clots and flooding lasting five to six days in every 21 days.

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66. Ms Wood also made submissions in relation to the claimant's condition of hypertension in November 2019. She submitted that there was no evidence that the claimant's symptoms of hypertension were attributable to the menopause. She referred to the disability impact statement in which the claimant said the hot flushing also manifested itself on a daily basis with her face appearing red, exacerbated by ongoing hypertension symptoms. These hypertension symptoms impacted what treatment her GP was able to prescribe for the menopause. The claimant also said in the disability impact statement that, "in addition my high blood pressure caused nausea, dizziness and impacted on my concentration".

67. My understanding of the medical records was that the claimant had no prior family or personal history of hypertension. Indeed, at various stages, her blood pressure had been tested and was often well within normal parameters. It was only around November 2019 when the claimant was to be placed on HRT that unexpectedly her blood pressure was found to be high. Tests undertaken to ascertain whether there was some secondary cause for this but none was identified. The claimant's GP recorded in January 2020, "the menopausal symptoms/anxiety were probably contributing to raised blood pressure."
68. There was evidence in relation to the extent to which the claimant's flushing was attributable to hypertension. The claimant (who is not a doctor) said that the flushing was exacerbated by the high BP and the hypertension was exacerbated by the flushing. My difficulty in relation to this was that there was no medical evidence and from the facts, it appeared that the flushing/red face occurred well before the claimant was diagnosed with hypertension. I was unable to make any assessment as to what extent, if any having hypertension would contribute to or exacerbate the red face. Indeed, many people are often unaware that they have hypertension as there are no obvious symptoms. There was no suggestion that the claimant (or her GP) thought that the claimant had hypertension. To the contrary, the GP was intending to prescribe HRT at that consultation where the claimant was shocked to discover she had hypertension.
69. It was also apparent that the claimant became anxious. Once again, there was no evidence that the claimant had any prior medical history of this or indeed low mood. The claimant first mentions anxiety in April 2016 in the context of break through heavy bleeding. She also refers to this in March 2017 and August 2017 as other symptoms (flushing and heavy painful periods) were intensifying. The claimant also refers to anxiety in November 2019 in the context of work related stress and being diagnosed with hypertension. The claimant referred to her BP being stabilised on medication and to other symptoms (disturbed sleep/sweating) other than anxiety abating since being prescribed HRT.

70. Ms Wood said that there was no direct evidence that the claimant was experiencing anxiety or that since 2019 that anxiety was as a result of the menopause rather than work related stress or distress that she was feeling due to hypertension.

5 71. I accepted that there was no reference in the medical records or the medical report to the claimant having a condition of anxiety. There was reference however in January 2020 to the claimant's "menopausal symptoms/anxiety probably contributing to BP".

10 72. I considered from the medical evidence there was an interrelationship between the claimant's experience of the perimenopause and menopause and her medical condition of hypertension. The claimant was going through the perimenopause from April 2015 during which she was experiencing heavy and painful periods, flooding, flushing, sweating, sleep disruption and anxiety and the menopause since 2019 during which she was experiencing flushing, sweating, sleep disruption, fatigue and anxiety. She has also had
15 hypertension from November 2019 which caused nausea and dizziness. This condition impacted on her ability to take HRT for the menopausal symptoms. This no doubt impacted on her feelings of anxiety that she felt about the menopausal symptoms.

20 *Deliberation*

73. The material time for establishing disability (i.e., whether there is an impairment which has a substantial and long-term adverse effect on normal day to day activities) is the dates of the alleged discriminatory acts. This is also the material time when establishing whether the impairment has a long-
25 term effect.

74. The test is functional and not a medical test, directed to what a claimant cannot or can no longer do at a practical level.

75. The burden of proving disability lies with the claimant. My assessment of her situation must be taken at the time she says the claims arose. The alleged
30 discriminatory acts took place after the raising of the collective grievance in

November 2020 until the conclusion of the disciplinary proceedings in December 2022. My understanding is that the claimant alleges that the behaviours for which she was disciplined arose in consequence of her disability. It was not clear to me exactly when the behaviours occurred, but my understanding is that it was between 2018 and 2020.

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76. Impairment bears its ordinary and natural meaning and may result from an illness or consist of an illness. There is no need to establish a medically diagnosed cause for the impairment. What is important to consider is the effect of the impairment not the cause. Disability may include someone who is not in fact disabled if without medical treatment they are receiving they would suffer that disability.

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77. This case relates to “menopause” which means “the last menstrual period”. Menopause is a natural event. However, the timing and symptoms are different for everyone. Menopause can occur due to certain surgeries or cancer treatments. This can sometimes cause symptoms to be more sudden and in some cases more severe.

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78. Perimenopause is the time from the start of the menopausal symptoms until after the last period. Periods will usually start to become less frequent over a few months or years before they stop altogether. They might become more irregular or become heavier or lighter. For some they can stop suddenly. Post-menopause is the time after the last period. A person is said to be post-menopausal when they have not had a period for 12 months.

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79. People experience the menopause in different ways. Some experience minimal or no symptoms going through the menopause. However, many experience menopausal symptoms that can significantly impact their quality of life.

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80. I did not understand there to be a dispute that the claimant has been going through the menopause. As it is not an illness it is difficult to identify a precise date for the onset of her symptoms. I accepted the claimant’s evidence that she was perimenopausal from April 2015.

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81. The claimant stopped reporting having heavy, painful periods from 13 November 2019. She explained that she went for say ten months and then would have a period and the clock would be reset. It was unclear at what exact point the claimant became post-menopausal. This was likely to be in
5 late 2020/2021.

82. The claimant has had menopausal symptoms since April 2015. The symptoms varied depending on the stage of the menopause. Some occurred at the perimenopausal stage such as flooding, painful and heavy periods. Other symptoms occurred throughout such as sleep disruption, flushing,
10 sweating and anxiety although the frequency and intensity varied. There were occasions where she experienced all the symptoms at the same time. Some have continued continue such as disturbed sleep, sweating and anxiety despite being on HRT. These symptoms (other than anxiety) have been alleviated by HRT. Some of the symptoms such, as anxiety and flushing, may
15 have contributed to hypertension. Other symptoms such as nausea and dizziness were associated with hypertension rather than the menopause.

83. I refer to the list of issues that I had to determine.

Did the claimant have a physical or mental impairment?

84. The claimant's position is that the symptoms relative to the menopause for
20 which she suffered composed both physical and mental impairments. The respondent accepts that the claimant suffered from some symptoms relative to the menopause. The respondent's position is however that not all symptoms are attributable to the menopause.

85. While the respondent maintained that the claimant had heavy and painful
25 periods, this was a pre-existing gynaecological condition. I did not accept that evidence for the reasons stated above.

86. The respondent also argued that the hot flushing experienced by the claimant
in 2017 is attributable to the menopause. The respondent did not however consider that the hot flushing described by the claimant in 2019 was
30 attributable to menopause rather than the separate condition of hypertension.

87. As explained above, there was no underlying cause for the claimant hypertension. From the medical evidence the claimant's menopausal symptoms/anxiety may have contributed to it. Further, while the claimant indicated in her evidence that an increase in her BP may have affected her hot flushing and red face (or vice versa), that did not explain why she had these symptoms when her BP was in normal range and why they continued when her BP was under control.
88. In relation to sleep disturbance, the respondent's position was that there was no direct medical evidence of the claimant's fatigue and impairment of concentration, agitation or anxiety, ability to focus and hypertension being attributable to the claimant going through the menopause.
89. I agreed that there was no evidence that the claimant's hypertension was cause by the menopause. She did, however in my view, have symptoms which predated her hypertension and postdated when it was under control. These were all symptoms associated with going through the perimenopause, the menopause, and post menopause.
90. The respondent's position was that the only symptoms attributable to the claimant's "pled" disability were those of hot flushing in 2017. I did not agree. It appeared to me that the symptoms were interrelated. The claimant was having heavy and painful periods with flooding. She had disturbed sleep with hot flushes and sweats which led to having to get up during the night. The following day she would be tired and have difficulty concentrating. She became anxious. She continued having a disturbed sleep, flushing, and sweats.
91. The issue for me was whether or not the claimant had a mental or physical impairment rather the specific medical causes of it. I was satisfied that in relation to physical impairment, the claimant's physical impairment was sleep disturbance and profusely sweating. Her mental impairments were lack of concentration and anxiety.

Did the impairments have an adverse effect on her ability to carry out normal day to day activities?

92. My focus was not on what the claimant could do but what she could not do or could only do with difficulty.

5 93. For the most part the claimant was able to attend work. This was not definitive in my view. She worried about making mistakes. She could not concentrate, checking and rechecking her work. The claimant struggled getting out of bed and getting her child ready for school. She avoided driving as she was overly cautious. She had difficulty completing household tasks like doing the shopping and dealing with routine mishaps in the kitchen. She avoided social
10 interaction. These are normal day to day activities.

Was the effect substantial?

15 94. In my view the claimant started to experience symptoms caused by the onset of the menopause in April 2015. The symptoms varied depending on the stage of the menopause. There was an uptick in the intensity and severity of the symptoms from August 2017. While the claimant did not have significant absences from work, that itself is not conclusive. Throughout the period from August 2017 to December 2021 her disturbed sleep, flushing, sweating profusely, anxiety and inability to focus was more than minor or trivial. There
20 was evidence as to how disturbed sleep during the night caused her to struggle to get out of bed and to get her child ready for school. The claimant became too anxious to drive. She had difficulty coping with being at work while her son was at the hub; emotionally dealing with routine chores and her reluctance to socialise and isolating from friends and family. The fact that the
25 claimant did not wish to take medication that was prescribed for her anxiety (antidepressant) did not in my view mean that the effect was not more minor or trivial. The claimant explained her reluctance to take medication was because she did not consider that it would be anything other than a sticking plaster.

30 95. In my view, when the cumulative effects of the claimant's impairments on the alleged activities is considered, the claimant has established this point.

Was the substantial adverse effect long term?

96. I must also consider if the substantial adverse effect was long term. The claimant started to suffer symptoms caused by the onset of menopause in April 2015. While I did not doubt that the painful and heavy periods along with flooding was debilitating and had a significant impact on her quality of life, it was from August 2017 that the cumulative effect of the menopausal symptoms caused an adverse effect on her day to day activities.
97. Based on the evidence provided this substantial adverse effect continued and the intensity of the symptoms increased until sometime after November 2019 when her periods stopped. Other symptoms particularly the sleep disturbance, flushing, sweating, and anxiety continued in intensity and had a substantial adverse effect on the claimant's day to day activities. The evidence is that from the end of 2021 the claimant symptoms, other than anxiety, had abated and were much less troublesome.
98. As I am considering the period November 2020 until the conclusion of the disciplinary proceedings in December 2022 this is more than long term.
99. I concluded that the claimant met the criteria of disability in the period August 2017 to December 2021.

Application to amend the sex discrimination claim

Relevant law

100. Rule 29 of the ET Rules of Procedure 2013 provides that the Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order.
101. The general approach to be taken by a Tribunal in exercising its discretion is set out in *Cocking v Sandhurst (Stationers) Limited* [1974] ICR 650. In *Selkent Bus Limited v Moore* [1996] ICR 836, the EAT drew on that part of the guidance in *Cocking* which referred to the need to consider the balance of the justice or hardship which would result from the amendment or the refusal to allow. The EAT went on to give guidance of the relevant factors.

102. The importance of the paramountcy of the test of weighing the balance of hardship or the prejudice to either party on granting or refusing the amendment has recently been stated by the EAT in *Vaughan v Modality Partnership* [UKEAT/0147/20], it is reiterated that the *Selkent* factors should not be taken as a checklist but were factors to be taken into account in conducting the fundamental exercise of balancing the justice and hardship of allowing or refusing an amendment.

The application and objection

103. The claim form presented on the claimant's behalf on 7 October 2022 includes claims of discrimination relying on the protected characteristics of age, disability, and sex. The alleged discriminatory acts took place between November 2020 and December 2022.

104. The case was initially sisted for the conclusion of internal procedures. There have been two preliminary hearings for case management (8 March 2023 and 5 May 2023). The parties provided additional information to the claim form and the response. This preliminary hearing was arranged to decide, among other things, whether the age and sex claims should be struck out or a deposit order made. The respondent asserted that the hypothetical comparators identified by the claimant were flawed. A final hearing has not been arranged.

105. At this preliminary hearing there was discussion about the comparator relied upon for the direct sex discrimination claim set out in paragraph 9 of the statement of claim. The claimant asserts that she was disciplined as result of behaviours which she says were in the main caused by her symptoms of her menopause. The claimant says that the respondent would not have treated a male in the same age bracket as the claimant in the same way. The claimant says that any such male would not have exhibited the same behaviours as the claimant. She was therefore treated less favourably because of her sex.

106. On 19 July 2023 the claimant applied to include an actual comparator in relation to the sex discrimination claim. The claimant invited me to grant the application as it would be consistent with the overriding objective in dealing

with the claim justly and fairly. Further, that the claim is at an early stage with no final hearing fixed. The respondent would not be prejudiced in replying to the claim now asserted given that the main comparator is their employee and that the respondent conducted the investigation into his asserted behaviours.

5 Should the amendment not be granted, then there was a risk that the claimant's discrimination claim on the grounds of sex would be struck out on the grounds of no reasonable prospect of it succeeding.

107. The respondent objected to the amendment on the basis that the claimant's representative was not invited by the Tribunal to make an application to amend following the preliminary hearing. The claimant's representative had given no indication as to why the application for amendment was not made earlier. The respondent's position was that the claimant ought to have known about the comparator's conduct before the preliminary hearing on 12 July 2023 and this is not a case where new facts or information have only just come to light. It was argued that had the amendment been made timeously, the respondent would have dealt with the appropriateness of the proposed comparator at the preliminary hearing which included consideration of the issues to strike out or order a deposit in relation to the complaints of direct discrimination on the grounds of sex and/or age. The respondent argued that allowing the application would not be in keeping with the overriding objective to deal with cases fairly and justly.

Deliberation

108. In determining whether to grant an application to amend, I must carry out a careful balancing exercising of all relevant factors having regard to the interests of justice and to the relative hardship that would be caused to the parties granting or refusing the application. The relevant factors include the nature of the amendment, the applicability of time limits, and the timing and the manner of the application. I was mindful that the *Selkent* factors are a list of examples of factors which are likely to be relevant in striking the fundamental balance of injustice and hardship in allowing or refusing the amendment. It is not a checklist.

109. I started by considering the claim form to which I was referred at the preliminary hearing on 12 July 2023 at which there was discussion about the hypothetical comparators relied upon by the claimant. There was no suggestion by Mr Bathgate that there was an actual comparator upon which the claimant could rely. I reserved my judgment. The representatives were aware that I would not be issuing a judgment in the intervening period. Further, during that time, I raised on my own initiative the issue of an anonymity order.
110. While I did not invite Mr Bathgate to make an application to amend, I have power to consider such an application under rule 29 at any stage in the proceedings. While I appreciate Ms Wood's frustration at the timing, she has been given an opportunity to comment not only in relation to the anonymity order but also in relation to the application to amend.
111. While it might have been helpful to have been aware of the proposed amendment application at the preliminary hearing, my impression from Mr Bathgate's comments at the time was that he was unaware of an actual comparator. Had he been so, I consider that it was highly likely that he would have sought to amend the claim form given the comments being made in relation to the hypothetical comparators. Had that application been made, I consider it highly unlikely that the respondent would have been in a position to immediately respond and would need time to do so.
112. While there has been a preliminary hearing, this case is at an early stage and no final hearing has been fixed. If the application is refused, then for the reasons set out below, it is highly likely that the claimant's sex discrimination claim will be struck out. If the application is allowed, then the respondent will still have an opportunity to amend its response and make further submissions in relation to the prospects, reasonable or otherwise, of the sex discrimination claim.
113. In all these circumstances, I considered that the balance of hardship was in the claimant's favour and that it was appropriate to allow the application to amend subject to the respondent having an opportunity to respond by

providing additional information to the response within 21 days of receiving this order.

Application for strike out

5 114. Having allowed the application to amend, I did not consider that it was appropriate to go on to consider the submissions that were previously made in relation to the sex discrimination claim.

10 115. However, I did not understand that the amendment related to the comparator in the direct age discrimination claim. That is set out in paragraph 10 of the statement of claim: “hypothetical female colleagues in younger and older age brackets not suffering from menopausal symptoms would not have been treated in the same way as the claimant as they would not have exhibited the same behaviours as articulated” and the respondent therefore treated her less favourably because of her age.

The relevant law

15 116. Rule 37 of the ET Rules of Procedure deals with striking out. It states that a Tribunal may strike out all or part of a claim if it has no reasonable prospects of success.

20 117. The test is not whether there is absolutely no chance of success, but whether there is no real or reasonable chance of success (*Balamoody v United Kingdom Central Council for Nursing* [2002] IRLR 289 at 39).

25 118. Tribunals ought not to be deterred from striking out claims, including discrimination claims, on the basis of no reasonable prospects of success, even where a dispute of facts is involved “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” (see *Ahir v British Airways plc* [2017] EWCA Civ 1392 at paragraph 16, per Underhill J).

119. In *Sivanandan v Independent Police Complaints Commission and another* UKEAT/0436/14, the EAT upheld a Tribunal's decision to strike out a claim on the basis that even on the claim as pled at its highest, there was no reasonable prospect of establishing discrimination had occurred.
- 5 120. Rule 39 of the ET Rules of Procedure provides that a Tribunal may make an order requiring a party to pay a deposit as a condition of continuing to advance an allegation or argument in a claim that has little reasonable prospects of success.
- 10 121. Section 13 of the EqA sets out the definition of direct discrimination. The section requires that the claimant has been treated (by the respondent) less favourably than the respondent treat or would treat others, because of a protected characteristic.
- 15 122. Section 23 of the EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.
- 20 123. Section 136 EqA deals with the burden of proof and provides that where a claimant proves primary facts from which the Tribunal could conclude in the absence of other explanation that there has been an act of discrimination, the burden will pass to the respondent to show that the protected characteristic played no part whatsoever in their reason for acting.

The application and the objection

- 25 124. The comparator relied upon for the direct age discrimination claim is set out in paragraph 10 of the statement of claim. The claimant asserts that she was subject to the disciplinary process and disciplined and this was less favourable treatment because of her age. She says that the respondent would not have treated female colleagues in younger and older age brackets not suffering from menopausal symptoms in the same way as they treated the claimant. In particular the hypothetical comparators would not have appeared angry when they were not, they would not have been irritable on account of sleep deprivation. They would not have been guilty of inconsistent behaviour
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nor appeared anxious or disturbed. They would not have appeared defensive and intimidating as they were not suffering from the same symptoms as the claimant.

- 5 125. The respondent argued that the hypothetical comparator identified by the claimant was fundamentally flawed. In terms of section 23 of the EqA, that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

Deliberations

- 10 126. I did not understand the claimant to dispute that she was disciplined because of her behaviours (which she says was caused by her symptoms of the menopause).

- 15 127. I considered that if the Tribunal found that a female in a different age bracket from that of the claimant, who was not exhibiting the menopausal symptoms was treated in the same way as the claimant it would be difficult to infer that was because of age and not because of the behaviours. I therefore agreed with Ms Wood's submission that in relation to the direct age discrimination claim the hypothetical comparator proposed by the claimant was flawed and that the correct hypothetical comparator would be someone in a different age bracket than the claimant who had exhibited the same behaviours as she did and were treated more favourably than her.
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128. I considered that the direct age discrimination claim which the claimant was offering to prove did not have reasonable prospects of success. Accordingly, I concluded that the age discrimination claim should be struck out as having no reasonable prospect of success.

129. Having reached that conclusion, I did not go on to consider the application under rule 39 of the ET Rules of Procedure.

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Employment Judge: S Maclean
Date of Judgment: 18 August 2023
Entered in register: 21 August 2023
and copied to parties

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