EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms J Barker **v** **North Middlesex University Hospital NHS Trust**

PRELIMINARY HEARING

Heard at: Watford
On: 24 and 25 January 2024
Before: Employment Judge R Lewis

Appearances
For the Claimant: Ms A Divine, paralegal
For the Respondent: Mr L Harris, counsel

JUDGMENT

1. The claimant's application for reconsideration of part of the tribunal's judgment of 25 August 2023 is refused.

2. The claimant may clarify the claims of victimisation / public interest disclosure referred to in her ET1 claim form.

3. The claimant's application to amend her claim by introduction of a claim of failure to make reasonable adjustments is refused.

4. The following claims in the list of issues attached to the tribunal's case management order are struck out: 8(a), 8(b) and 8(e).

REASONS

Introduction

1. I gave a number of judgments during this two day hearing, on the points as they appeared in sequence. At the end of the hearing, I told the parties that I would provide these written reasons of my own initiative. It seemed to me strongly in the interests of justice to do so. By giving reasons, I wish in

particular to give the claimant and Ms Divine the time and opportunity to read and reflect on how this case presents, and how it now goes forward. In drafting this document, I have presented a narrative which follows the path of the hearing, which I hope makes this document easier for the claimant to understand.

2. This Judgment should be read with the separate Case management Order and Deposit Orders made at the end of this hearing; and in turn with the Case management Orders which I made in April 2023 and August 2023, and with the tribunal's written directions, also made by me, of December 2022.

This hearing

3. This was the hearing which I directed at the end of the second preliminary hearing on 24 and 25 August 2023. The first preliminary hearing had been by telephone on 11 April 2023, and in turn was preceded by a case management order on 11 December 2022.

4. At this hearing I had a bundle of 575 pages. A few additional items were provided in the course of the hearing.

5. Between August 2023 and this hearing, the claimant had not produced the structured explanatory documents about her case which I had directed at paragraphs 1.2 and 2.2 of the order of August. She had again, through Ms Divine, produced documents which were more diffuse general allegations rather than focussed factual allegations which the respondent could answer, and so lead to a fair trial.

6. To the extent that the claimant's claims could be understood, the respondent had in preparation for today prepared an amended grounds of resistance and a draft list of issues, on the latter of which Ms Divine had made a small number of comments.

7. It seemed to me that the best way forward must be to start off by clarifying and understanding the claims brought by the claimant. The draft list of issues was a helpful guide. I was referred to a document produced by Ms Divine called Claimant application to amend, in which she identified four types of application to amend (356). I dealt with those on the morning of the first day, and gave judgment at 2pm. Having done so, I invited the parties to amend the list of issues in the light of my conclusions. After a break, Mr Harris produced a draft, which required further clarification from the claimant in relation to her claim for reasonable adjustments. It was apparent that that could not be achieved that day, and I therefore adjourned, setting a timetable for the second day. The first step on the second day was to clarify and understand the claims for reasonable adjustment. After that had been done, a further list of issues as produced. With that document available, the next step was to hear the respondent's applications for strike out or deposit orders, give judgement on them, and then finally deal with timetabling and case management.

8. During the two days of this hearing, a number of iterations of the list of issues were produced, in light of how matters proceeded. The definitive final version is attached to the Case management Order made separately. I record the tribunal's gratitude to Ms Budge of Messrs Capsticks, whose diligent drafting kept the claimant, counsel and the tribunal up to date.

The first application to amend

9. The claimant's first application to amend was in reality not an application to amend. At the August hearing I had found that there was insufficient evidence upon which I could conclude that at the time of her employment with the respondent the claimant met the s.6 disability definition as a result of dyslexia.

10. Ms Divine submitted that I had not at that point had access to an occupational therapy report from Ms Mamode dated 4 August 2023. There was some confusion at the start of this hearing because Ms Divine mistakenly thought that she had sent it to the respondent's solicitors, and she had not done; during the morning, she therefore sent it to them, and it was forwarded immediately to counsel and to me. Ms Divine's submission was straightforward: this was important new evidence, which was not made available to me at the previous hearing, although it certainly was in existence at the time. The claimant had been in person in August, and had been unable to understand or organise the documents. Ms Divine submitted that fairness and justice demanded that I should permit the claimant, in light of this evidence, to continue with her claims based on dyslexia.

11. The document was a report from an Occupational Therapist, who said that she was unqualified to make a diagnosis of dyslexia, but identified traits within the claimant which were consistent with dyslexia. However, the difficulty was that when Ms Mamode's report came to be looked at, it turned out that the claimant had submitted the most cogent paragraphs from it to the tribunal in August. It therefore had been within the material which I considered on that occasion.

12. It seemed to me that, truly analysed, the claimant's application was an application for reconsideration under rule 70, and that it was made out of time. I accept that in August there was a mass of paperwork, and that both the claimant and Ms Divine had overlooked that the claimant had provided part of the document to the tribunal in August.

13. As a result, the fundamental of Ms Divine's application fell away: the crucial part of the "missing" evidence had not been missing and was before me when I made my decision in August. On that basis, it did not seem to me in the interests of justice to permit a decided issue to be reopened, and I declined to do so.

The second application to amend

14. What Ms Divine called her second amendment was an application to introduce a new factual complaint. It was that Mr Askari in July 2022 had brought disciplinary proceedings against the claimant, and that this was a further unlawful act.

15. The documents in the bundle, which had been written at the time, and were not disputed, showed that the date of commencement of the disciplinary investigation was 21 April 2021. By letter of that date, Mr Askari told the claimant that he had appointed another manager to investigate allegations, and to report in writing. The disciplinary process concluded with the issue of a final written warning by Mr Askari sent on 7 July 2022.

16. The claimant had acted in person when she submitted her ET1 on 6 October 2022. It included the following:

> "I have been targeted, pressured and disciplinaries brought against me in order to get rid of me since the recording. I have been victimised and bullied even though I told them I was not able to attend so many disciplinary meetings due to my health.
>
> …
>
> They have disciplinaries about themselves and the outcome is of course in their favour."

17. I must read a litigant in person's ET1 non-legalistically, giving the litigant in person the benefit of any relevant doubt, and offering them the opportunity of explanation and clarification. I accept that that general approach must apply with some force to an individual claimant who has dyslexic traits.

18. I start on the basis therefore that a complaint about the disciplinary process triggered by Mr Askari, and which concluded in July 2022, has always formed part of this claim. What Ms Divine called an amendment did not in my judgment require leave to amend. I approached her application as a request to introduce factual detail by way of clarification of the existing ET1. In my judgment, it was right to permit the clarification in principle, then to frame the claim, with Ms Divine's agreement, in light of my understanding of the clarification, and then hear any application made by Mr Harris about the re-framed claim.

The third application to amend

19. Ms Divine designated as the third amendment "to encompass events occurring after 6/10/2022. These post mentioned events significantly influence the case and are crucial for fair judgment."

20. The stated date of 6 October 2022 was the date of presentation of the ET1. It was common ground, after some discussion, that the claimant was on certificated sick leave from early July 2021, and that she remained signed off sick, never returning to work, until her resignation on 1 January 2023.

21. With that in mind, I asked Ms Divine to state what were the factual events which occurred after 6 October 2022 which she wished the amendment to cover. Her answer was, in short, that the discrimination which she alleged had caused the claimant to go on sick leave in the summer of 2021, and which was the reason she was still off sick on the date of the ET1, continued to cause the claimant to remain off sick after 6 October 2022.

22. I declined to allow any such amendment. The first reason was that the claimant had failed to identify any act of discrimination in relation to which permission could or should be granted; the second reason was that Ms Divine's submission was misplaced. She had confused the act of discrimination with the consequences of discrimination. I accept in principle that if in future the tribunal were to find that discrimination took place in the summer of 2021, it may compensate the claimant for consequences which are shown to be continuing in the autumn of 2022.

The fourth application to amend

23. The fourth and final application for amendment was an application to amend the claim by the addition of claims of public interest disclosure (also called 'whistleblowing') and victimisation under s.27 Equality Act 2010.

24. After further discussion, this claim was that the claimant made protected disclosures and / or did protected acts (1) by email of 5 January 2021 to Mr McHale (564); that she confirmed what she had said in that email in separate conversations shortly afterwards with (2) Ms Olejkova and (3) Mr Askari; and (4) that in March 2021 she repeated the disclosure in an interview with management, during which, she said, she had supported Ms Igbons' grievance**.**

25. In this paragraph, I set out my understanding of the underlying point. Nothing in this paragraph is a finding of fact which is binding on any other tribunal; it is my record of my understanding at this preliminary hearing. After some discussion, I understood the point to be that the claimant alleged that a colleague, X, frequently used racist and derogatory language to and about colleagues. The claimant said that she asked X to desist, but to no avail. The claimant said that she reported X to Mr McHale above, and two days later received an email from Mr McHale in reply, which she considered inadequate in light of the seriousness of the allegation. The claimant said that shortly afterwards she mentioned the matter in separate conversations in the corridor with Ms Olejkova and then Mr Askari. At some point Ms Igbons submitted a complaint or grievance about X. This was investigated. The claimant was interviewed as part of the investigation on 21 March 2021. The claimant's interview was audio-recorded, and a transcript was available to me. The claimant at this hearing expressed her sense of grievance at the hostile manner in which she felt she was questioned during the interview.

26. My first question was to ask whether this claim was in fact in the ET1. I attach no weight in isolation to the fact that the claimant ticked box 10 on form ET1. I noted that in the ET1 she wrote the following:

> "I was involved with a recording of a colleague saying racial things against another colleague and black and Muslim people and reported it to my team leader who crushed it under the carpet… and have been targeted, pressured and disciplinaries brought against me in order to get rid of me since the recording. I have bene victimised and bullied even though I told them I was not able to attend… I have complained but they have reached their own conclusion and said everything is alright and they haven't done anything wrong. They have disciplinaries about themselves…"

27. It seemed to me that what Ms Divine called the fourth application to amend was in exactly the same position as the second, and for the same reasons. It seemed to me that the claimant must have permission to clarify a claim which was plainly alluded to on the claim form.

Reasonable adjustments

28. In the light of the above, Mr Harris was able to make some minor drafting changes to the second version of the list of issues, and when I met the parties on the afternoon of the first day, the list of issues was well advanced in preparation, save for one matter.

29. I identified the claimant's complaints about the disciplinary investigation and process (and not requiring leave to amend) as, in proper analysis, claims brought under s.15 Equality Act. That means complaints of disability discrimination where the respondent has treated the claimant unfavourably because of something arising in consequence of disability; and where the respondent cannot justify the treatment by showing that it was a proportionate means of achieving a legitimate aim. The claimant's disciplinary process of April 2021 to July 2022 identified a number of work-related mistakes and failings on the part of the claimant. The claimant's case was that the mistakes and failings were things which she had done, arising out of her autism, leading to the unfavourable treatment of disciplinary action and a final written warning.

30. When I explained that the claimant's complaints on this point sounded to me like s.15 claims, not claims of direct disability discrimination, I also suggested that the same claims might, in the alternative, be claims of a failure to make reasonable adjustment. I am not aware that the claimant had used that phrase or referred to it in the ET1 or in any application to amend.

31. However, as I had raised a possible reasonable adjustment claim, and as I had given permission in principle for it to be included in the list of issues, Mr Harris quite fairly asked the claimant or the tribunal to analyse for the purposes of the list of issues what the claim of a failure to make reasonable adjustment consisted of. In particular he asked the claimant to clarify what was the relevant part of the respondent's system of work which, as a matter of system, put disabled people at a disadvantage.

32. Ms Divine and the claimant were unable to answer this on the first afternoon, and I adjourned at that point, so that the morning of the second day would start with consideration of their formulation of the reasonable

adjustment claim, after which I would hear Mr Harris' applications for strike out and/or deposit orders.

Clarification overnight

33. On the late afternoon of the first day, and after the tribunal had risen, the respondent sent the claimant and the tribunal a copy of the letter from Mr Askari to the claimant dated 21 April 2021, in which he advised her of the commencement of the disciplinary investigation, which led ultimately to the outcome of 7 July 2022.

34. It was clear from Mr Askari's letter that all the events which were to be investigated took place in the period between January and March 2021; and that the point made by the claimant on the first day, which was that all of these events were stale, and had been revived long after they happened once she had made her protected disclosures in January 2021, did not appear well-founded. In reply to that point, and in my understanding, the claimant shifted the ground to saying that her line manager, Lianne, in a conversation shortly after 30 April 2021, had told the claimant that she had spoken to management, who had agreed to draw a line under the same matters, but that had never been confirmed in writing. I understood that to be a new point.

35. I noted also that Mr Askari had not, as said by Ms Divine on the first day, triggered disciplinary action. He had commissioned an investigation, a phrase which implies the intervention of a second person, (in the event, Ms Besong) tasked with independently investigating, reporting, and advising on any management action.

Reasonable adjustments: continued

36. The claimant had overnight prepared a document entitled 'Reasonable adjustments', as the basis for her clarification of that claim at the start of the second day of hearing.

37. At the start of the second day, the tribunal turned to discussion of the claim for reasonable adjustments. Essentially, the point made in the claimant's formulation was that she had difficulties in understanding and communicating; that these difficulties could have been attenuated by training and further guidance about the points which gave rise to the disciplinary investigation; and that therefore the reasonable adjustment in each case would have related to training on the particular topic, eg medical confidentiality and GDPR, followed by an applied level of understanding of the claimant's difficulties at the disciplinary stage.

38. As Mr Harris correctly pointed out, what was wrong with this formulation was that the claimant could not identify a PCP; and that having regard to the guidance in Ishola v TFL, 2020 EWCA Civ 112, she could not identify a systemic issue, as opposed to an individual management issue. He submitted, correctly in my view, that the true analysis of the factual claim put forward was a claim under s.15, a matter which was covered by the work of

the tribunal the previous day. He also submitted that there was no claim for reasonable adjustment before the tribunal. Ms Divine said that the claimant had repeatedly asked for reasonable adjustments. A search of the PDF bundle showed, in nearly 600 pages, only one reference made by the claimant to reasonable adjustment, and that had been in December 2022, at a time when she had been off sick for 18 months, and was, it is now known, just under three weeks before her resignation.

39. I had in mind that this was an application to amend by introducing a new head of claim. It arose from my suggestion, and had not in fact been initiated by the claimant. It involved a substantial recasting of at least part of the claim. I considered the balance of prejudice, ie would its inclusion cause more or less harm to the respondent, when set against the harm which might fall on the claimant if it were excluded.

40. I declined to permit inclusion of a claim for reasonable adjustment in the list of issues. My reasons were that first to do so would require amendment, which I would refuse for reasons set out above; secondly, that Ms Divine's inability to formulate a viable claim within the framework of s.20 rendered the claim incapable of fair trial; thirdly, that taking Ms Divine's formulation at its best, it was a claim about individual management, which would fall foul of Ishola; and fourthly, that there was little prejudice to the claimant by excluding a claim for reasonable adjustment, because the same facts, matters and points were encompassed by her s.15 claim. I accept that the amendment would have caused some prejudice to the respondent, which would have had to give a professional response to an ill-formulated and unclear allegation.

Strike out and deposit Orders

41. On that decision being made, and communicated, we took a few minutes to finalise the version of the list of issues drafted by Ms Budge, and then adjourned so that she could produce final clean and tracked versions of the list of issues. It seemed to me necessary to have that available as the reference point for Mr Harris' submissions on strike out and deposit, and as the reference point for my order which might follow.

42. Mr Harris made his applications for strike out or deposit, stating that they were made entirely in the alternative on both grounds. He did not take the limitation (time) point, except in relation to one matter.

43. On direct discrimination Mr Harris submitted that all the allegations at section 8 of the list of issues were unconnected with disability. He accepted that that point was a very different matter from the section 15 allegations. He submitted that there was simply no link between the protected characteristic as such and any of the events, and in his submission he referred to two specific matters.

44. He pointed out that paragraph 8(a) related this allegation to dyslexia, not autism, a factor which should be taken into account in considering the application to amend.

45. On paragraph 8(b) (exchange with Ms Katakwe) he submitted that the words attributed to Ms Katakwe were on a proper reading not capable of amounting to discrimination or less favourable treatment. He submitted that the exchange was a one off event and therefore out of time, because Ms Katakwe, as an external occupational health adviser, could not be shown to be part of the continuous events of line management which formed the remainder of the case. He submitted that there would be real prejudice if the matter proceeded.

46. On the claimant's protected disclosure claims, Mr Harris submitted that there was no evidence that the conversations at 12(b) (Ms Olejkova and Mr Askari) had taken place. They were not referred to in the ET1, and had not been mentioned until the first day of this hearing, 24 January 2024. When the claimant was interviewed in March 2021 (transcript considered), at a time when the events must have been reasonably fresh in her mind, and certainly much clearer than they were in January 2024, she made no mention of either conversation.

47. In reply to my question, Mr Harris said that he understood that there was no indication of the conversations having been mentioned by Ms Olejkova or Mr Askari to the respondent during Ms Besong's investigation.

48. Mr Harris pointed out that the claimant's case on protected disclosure was counter intuitive. The complainant about racist language was Ms Igbons. Ms Barker was interviewed as a witness in March 2021. Later, the respondent asked the claimant to attend as a witness at X's disciplinary hearing in February 2022. The claimant was then in about her eighth month of sick leave. She failed to attend, for reasons for which Mr Harris said that the Trust did not criticise her. He submitted that the respondent Trust had no reason or logic to victimise a witness who supported the case brought by management. The Trust clearly found the allegations well founded, because a final written warning was issued against X as a result.

49. On the s.15 claim, Mr Harris submitted that it was not easy to see any link between the factual allegations and any disability. He also submitted, particularly as a patient safety issue was at least partly involved, that the Trust was highly likely to make out the defence of justification.

50. After Mr Harris had finished, I adjourned to give the claimant and Ms Divine time to prepare their response. In reply, Ms Divine covered a wide range of the factual issues, laying considerable weight on the claimant's feelings and perception of events, and submitting, but without any detailed reference, that there was much in the bundle from which the claimant could prove her case. She emphasised that the disciplinary investigation was triggered <u>after</u> the claimant had made her allegation of race discrimination, and submitted that the events had been dealt with and closed by line management and that there was no reason to reopen them.

<u>Outcome of the applications</u>

51. I gave judgment on the strike out and deposit applications on the afternoon of the second day. My reasoning now follows. I refer to the final 20 paragraph version of the list of issues which is annexed to the separate case management order sent after this hearing.

52. The applications were made under rule 37 and rule 39 of the tribunal's rules. Under rule 37 a claim may be struck out by the tribunal if it has no reasonable prospect of success. Under rule 39 the tribunal may order a deposit to be paid if it considers that any contention or argument has little reasonable prospect of success. The tribunal must always consider the interests of justice in deciding any application. The higher courts have ruled that the tribunal should approach strike out of a discrimination claim with great caution, having regard to the fact that discrimination claims are fact-sensitive, and may require detailed consideration of conflicting evidence.

53. Paragraph 8(a) is struck out under rule 37 because it has no reasonable prospect of success. On true analysis, this is a complaint that the claimant was disciplined for accidental action which arose from her disability. The claimant has in my judgment only a speculative prospect of showing that the event happened because of the disability as such. In my judgment she has mis-categorised this complaint. The same factual point appears in the list of issues within the s.15 framework, and will be heard and decided under that heading.

54. Paragraph 8(b) arose in the factual matrix which I have described above. In that context, I was for the first time referred to the actual email trail at 241 to 245 of the bundle, which formed the basis of this allegation.

55. The trail shows that on 20 April 2021 Ms Katakwe asked the claimant how she had got hold of her personal phone number. In reply, the claimant wrote to Ms Katakwe on 21 April at 13:00: "I am racking my brains and for the life of me I do not know how I acquired your phone number."

56. Ms Katakwe replied by email five minutes later, emphasis added:

> "Thanks for getting back to me. However, I still do not believe that you do not know how you acquired my personal number. I can tell you than when I contacted you I used the work phone not my personal phone, so please let me know how you got my number. I know that your brain is functioning well. I am really concerned and getting frustrated."

57. The email trails continued until the morning of Monday 26 April 2021, showing increasing levels of upset and anger on both sides.

58. The quotation at paragraph 8(b) of the list of issues was factually inaccurate. It should have been corrected, by either side, long before this hearing. More to the point, the trail gives the context. It was that Ms Katakwe, as an external and independent health professional, was concerned about the invasion of her personal privacy by a patient having her personal phone number. The claimant was unable to explain how she had come by the number. She used the metaphorical language (emphasis added), "I'm racking my brains." That provoked the reply from Ms Katakwe

quoted above. Ms Katakwe's use of the word 'brain' in its singular form was literal, not metaphorical, and as the claimant had confided her history to her, the claimant was offended by it: at its highest, she read Ms Katakwe as misusing the clinical information confided in her, and possibly taunting the claimant with it.

59. This was the only part of this claim with which Mr Harris pursued an application that the claim should be dismissed as out of time. The event in question was in April 2021, and the proceedings were issued on 6 October 2022. I agree with Mr Harris that Ms Katakwe, as an independent Occupational Health Practitioner, stood outside the management chain which was involved in all the other events and allegations. I agree with him that her actions cannot be correctly called part of a continuing or longer or wider act. I agree that this was a one-off event. I could see no basis on which it would be just and equitable to extend time by over a year for this allegation to be heard. This claim is struck out because it has been brought out of time.

60. Although it is not strictly necessary to do so, I add that while I recognise the claimant's strength of feeling, both in the email chain at the time, and at this hearing, the question arises as to why did Ms Katakwe use the phrase quoted above. In answering that question, the tribunal should try to apply common sense: many things said at work are not well said, and email as a medium encourages speed, not reflection. It seems to me clear from the full written context, that Ms Katakwe used the word 'brain' because the claimant herself had referred to her brains, and she simply replied. I agree that on its face Ms Katakwe's language was emotional and unprofessional. It is an interesting debate point as to whether the real problem around this point is the clash between what I have called metaphorical language and literal usage. If I had not struck out this allegation because of limitation, I would strike it out under rule 37: it seems to me to have no reasonable prospect of success.

61. I make no order about paragraph 8(c), because it seems to me that Mr McHale's response to the claimant's complaint about X is a matter of evidence which may call for an explanation.

62. I make no order in relation to paragraph 8(d), because there is a plain allegation of a defined difference in treatment, which calls for an evidential explanation.

63. As to paragraph 8(e) it is factually correct to say that Mr Askari initiated a disciplinary investigation, not that he brought disciplinary proceedings. That is an important distinction, because the investigation process pre-supposes inquiry and outcome by an independent third party. Taking Mr Askari's letter of 21 April 2021 as a whole, it is abundantly clear that the reason why an investigation was commissioned was that Mr Askari had before him a group of allegations against the claimant, all occurring within a relatively narrow time-frame, and all apparently having a common theme relating to communication and interaction with colleagues.

64. This claim is struck out partly because it appears be mis-categorised (and seems to me, truly analysed, a s.15 claim, and will be heard and decided under that heading), but mainly because I consider that it has no reasonable prospect of success. I can see no basis save speculation upon which the claimant could show that the reason why Mr Askari took the management action he did was because of her protected characteristics of disability or because of either impairment.

65. Paragraphs 12(a) and 12(c) are not the subject of any order, as I had the advantage of seeing both alleged disclosures / protected acts in writing. It seems to me that each calls for an evidential reply.

66. Paragraph 12(b) was more troubling. I was told that the allegation of protected disclosures in conversations in the corridor at NMH in January 2021 was an allegation made for the first time on the first day of this hearing, 24 January 2024. (I pointed out to the parties, from my own knowledge, that January 2021 was the month when Covid-related deaths reached their monthly peak, a fact which may have led any NHS manager to have other professional priorities than internal grievances). If that is indeed correct, and the two conversations are wholly undocumented, the allegations may well be incapable of fair trial, but one cannot know that without asking the two individuals. The respondent cannot have had the opportunity to do that before this hearing. However unlikely it seems to me, either may be able to give recollection, or may even have made their own personal note or record of a conversation. I make no order in relation to paragraph 12(b) at this stage. Although it is not a matter for me, I do not thereby preclude a fresh application being made if circumstances change.

67. Paragraph 13(a) is the complaint that the disciplinary proceedings (in reality investigation) were triggered because the claimant made protected disclosures. In her submissions on this point, Ms Divine fell into a trap which is, as I said in tribunal, one of the most frequent traps for claimants. She submitted that the later event must have been caused by the earlier event. The mistake of confusing chronology for causation is a recurrent theme in the work of the tribunal, and may well have arisen in this instance.

68. However, in my judgment this claim has little reasonable prospect of success in light of the language of Mr Askari's letter of 30 April 2021. It is plain from reading the letter as a whole that the reason why he triggered the investigation process was that stated above: there were a number of reports from different individuals of what could be misconduct at work. The events all took place within a relatively short and recent time-frame.

69. It seemed to me that the claim at paragraph 13 fell just on the 'little reasonable prospect' of success rather than 'no reasonable prospect' and that therefore the appropriate order was for a deposit rather than for strike out.

70. I attach a deposit order to the whole of paragraphs 14 and 15 together, ie to the totality of the s.15 claim. I say so because even assuming that the tribunal agrees that the actions for which the claimant was disciplined were

things which arose in consequence of disability, I can see little prospect of the balancing exercise of justification not going in favour of the respondent. I say this in particular because the claimant's action affected other colleagues, and at least one patient.

71. After I had given judgment on the above, the claimant and Ms Divine spoke briefly about the claimant's means, leading me to set the deposit orders at the level of £25.00 each. I took account of the information I was given in doing so about ability to pay.

72. NB: I have alerted the claimant to the risk created by rule 39(5), namely that when a deposit order is made, her financial exposure should not be thought of as the maximum level of the deposits, but as the risk of an order for payment of legal costs if she fights and loses either point on which a deposit has been paid.

Footnote

73. Finally, I place on record, as a footnote, four observations. First, there are some points which I have not struck out, and for which I have not ordered a deposit. I have told the claimant that that does not mean that I think that she will succeed on any of those points.

74. Next, I confirm that it is random coincidence that I have been the only judge who has managed this case since December 2022 until now. The third is to confirm that I will have no further part in this case.

75. Finally, I was delighted to hear from Ms Barker during this hearing that she is happy in her new employment. That information led me to suggest to her and Ms Divine that the claimant should give serious thought to whether it is in her own long term interests to pursue this troubling case for the very long time which it will take to reach its conclusion. In saying that, I of course acknowledge that settlement of a case is a two-way process, which usually requires a respondent to give thought to the same question.

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Employment Judge R Lewis

Date: 12 February 2024……..

Sent to the parties on:13 February 2024.

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For the Tribunal Office