EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000821/2024

Held in Edinburgh on 25 October 2024

Employment Judge Sutherland

Charles Backhouse	**Claimant** **Represented by** **Ms McLaughlan,** **Solicitor**
Bowen Fluid Engineering Limited	**Respondent** **Represented by:** **Mr Philp, Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal in respect of the complaint of failure to make reasonable adjustments prior to 25 July 2024 is that:

1. The respondent's application for strike out is refused;

2. The respondent's application for a deposit order is refused

REASONS

Introduction

1. The claimant has made complaints of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment. The claimant asserts disability by reason of a basal ganglia haemorrhage (a stroke) on 15 March 2023 which caused paralysis of his left arm and rendered him unable to walk and dependent upon a wheelchair. The respondent accepts disability status and knowledge thereof but otherwise denies the complaints.

2. In their ET3 response the respondent made an application for strike out

failing which a deposit on the basis that: “The Claimant has been absent from work continuously, due to ill health, from 15th March 2023. There has been no indication that he is able or capable of returning to work since that time. He has continued to submit fit notes, and medical reports, confirming that he is unfit for any form of work for the foreseeable future. This claim has no prospects of success and should be struck out. Alternatively, it has little prospects of success. The Claimant should be ordered to pay a deposit as a pre-requisite of proceeding with same.”.

3. On 17 October 2024 the claimant made an application to amend which was opposed by the respondent to the extent that it pertained to any complaint of a failure to make reasonable adjustments prior to 25 July 2024. The respondent clarified that their application for strike out failing which deposit did not apply to a complaint for failure to make reasonable adjustments from 25 July 2024 to the date of amendment.

4. The Claimant’s application for amendment and the respondent’s application for strike out failing which deposit were to be determined at a preliminary hearing listed for today on the following direction -

“The Employment Judge (d'Inverno) upon consideration of the Claimant's Representative's Application dated, 17th October 24 , for Leave to Amend in terms of the accompanying Proposed Amendment, and of the Respondent's Representative's response thereto dated 23rd October 24: (FIRST) Determines that the equivocal terms of the Respondent's Representative's response fall to be construed as intimation of opposition, in whole or in part, to the Application for Leave to Amend, (SECOND) Directs that matters to be considered and determined at the Preliminary Hearing set down to proceed in the case on 25th October will be expanded to ;- a) First Hear parties in support of and in opposition to and for determination of the Claimant's opposed Application for leave to Amend in terms of the proposed Amendment ; and , thereafter, time permitting, b) to hear parties, on a contingent basis if appropriate let it be assumed that the Hearing Judge is not in a position to issue an Oral Determination of the Application to Amend for Leave to Amend and reserves Judgement, on the Respondent's

Opposed Application for Strike Out of the existing complaint of alleged breach of duty to make Adjustments".

5. Following detailed discussion at the start of the hearing regarding the nature of the proposed amendment, having regard to the original claim and the agenda which had been accepted as further particulars, the respondent withdrew their opposition and accordingly the application to amend was accepted in its entirety. The respondent shall provide any adjustment to their response in light of that amendment within 28 days.

6. Accordingly the only issue to be determined was the application for strike out failing which deposit in respect of the complaint of failure to make reasonable adjustments prior to 25 July 2024.

7. Parties had prepared a joint bundle of documents. No witness gave oral testimony at this hearing. Both parties made oral submissions.

The complaints

8. The claim (as amended) is in an unhelpful narrative style but the following complaint regarding a failure to make reasonable adjustments prior to 25 July 2025 can reasonably be inferred having regard to the pleadings and the agenda which was previously accepted as further particulars -

   a. The respondent required him to attend site in order to be provided with work or be paid. He was prohibited from attending site and was accordingly not provided with work or paid. It would have been reasonable to allow him to work from home to address that disadvantage from 6 January 2024 onwards (i.e. after expiry of the last fit note given to the respondent prior to lodging of the claim). Not to do so amounted to a failure to comply with the first requirement under Section 20(3).

   b. The respondent premises have a lack of wheelchair access and welfare facilities. This physical feature puts the claimant as a wheelchair user at a substantial disadvantage of struggling to attend site and therefore not being provided with work or paid. It would have

been reasonable allow him to work from home to address that disadvantage from 6 January 2024 onwards. Not to do so amounted to a failure to comply with the second requirement under Section 20(4).

c. The claimant but for the provision of voice activated computer software struggles to undertake work on account of his left arm paralysis. This put him to the substantial disadvantage of not being provided with work or paid. It would have been reasonable to provide this auxiliary aid from 6 January 2024 onwards. Not to do so amounted to a failure to comply with the third requirement under Section 20(5).

d. The respondent might reasonably have been expected to make those adjustments within 2 months and in any event the respondent did an inconsistent act on 13 February 2024 when Mr Bowen required him to leave site and stated that he should not return until he was “back on his feet”.

e. The claimant was fit to return to work with adjustments from 6 January 2024 onwards following expiring of the last fit note given to the respondent prior to lodging of the claim. The claimant had in any event indicated that he was fit to work with adjustments: at a return to work meeting held on 24 October 2024; and by inference from the almost daily calls made by the claimant to Mr Bowen in the context of an absence of fit notes certifying him unfit.

Facts not in dispute

9. The following facts were not in dispute -

10. The Claimant has been employed by the Respondent as an Umbilical Delivery Manager from 1 September 2021 and his employment is continuing.

11. On 15 March 2023 the claimant a basal ganglia haemorrhage (a stroke) which caused paralysis of his left arm and rendered him unable to walk and

dependent upon a wheelchair. He was hospitalized for 25 weeks until 7 September 2023.

12. From 15 March 2023 to 5 January 2024 the claimant was certified as unfit for work by his GP on account of that stroke and these fit notes were provided to the respondent upon issue.

13. In March and April 2023 the claimant received payment of his wages described by the respondent as a "goodwill gesture".

14. On 24 October 2023 the claimant met with Andy Bowen, Managing Director and David Westwood, Senior Projects Delivery Manager to discuss his return to work.

15. On 10 January 2024 the claimant's occupational therapist sent an email to the respondent looking to discuss reasonable adjustments for his absence from work.

16. On 5 February 2024 the respondent advised the claimant that they needed to hold a welfare meeting with him and required a medical report from his GP.

17. On 13 February 2024 the claimant attended site but was told to leave.

18. On 9 May 2024 the claimant's GP provided a medical report regarding his fitness to work with adjustments.

19. The claimant engaged in ACAS Early Conciliation from 2 April to 15 May 2024. The claimant lodged his ET1 claim including a complaint for failure to make reasonable adjustments on 12 June 2024.

20. On 12 July 2024 claimant provided to the respondent fit notes dated 5 January 2024 and 21 March 2024 certifying him as unfit for work from 6 January to 5 June 2024. No fit notes were obtained or provided in respect of the period from 6 June to 24 July 2024.

21. On 25 July 2024 the claimant obtained a fit note of the same date which stated: *"you may be fit for work taking account the following advice"* which was provide to the respondent upon issue.

Contemporaneous documentation

22. The contemporaneous documentation contained with the bundle of documents provided by the parties is as follows –

23. On 10 January 2024 the claimant's occupational health therapist sent an email to Mr Bowen stating:

"I am an occupational therapist and have been working with Charlie Backhouse for the last 4 months since he was discharged from hospital. One of the main goals Charlie has been aiming to achieve is to return to work so I am just wanting to reach out and start some communication around this. I have recently provided Charlie with another Med 3 fit note to sign him off from work again but on the agreement that we would start to discuss what reasonable adjustments he may require, in order to return in the near future. It is likely that Charlie will require a phased return to work and the exact details of this will need to be considered in conjunction with yourself but likely to require a reduction in hours/days initially".

24. On 5 February 2024 the claimant emailed Mr Bowen seeking a meeting to discussion his return to work in line with their meeting back in October 2023.

25. On 9 May 2024 the claimant's GP provided a report dated 16 April 2024 which stated:

"[the claimant] has had extensive occupational rehabilitation input, with Lois Watt – Occupational Therapist, PRI – and she has recently advised he would be fit to return to work with reasonable adjustments as she has already communicated."

26. Attached to that report was a note from the occupational therapist which stated:

"I have completed another Med 3 Fit note for [the claimant] to extend is time off sick by 3 months. Things are also changing currently with his employment status as he is unable to return to his work and he has been seeking legal advice. My input with [the claimant] is reducing so I may refer him back to yourself to discuss a fit note in the future. I have informed [the claimant] that he can be referred to employment services to support him with vocational options when the time is right"

27. On 10 July the claimant provide copies of fit notes dated 5 January 2024 and 21 March 2024 stating: "the attached should bring you up to date. As of June this year I no longer receive fit notes, as they serve no purpose."

28. On 25 July 2024 the claimant provided a fit note of the same date which stated: *"you may be fit for work taking account the following advice". Attached to that was an AHP Health and Work Report which stated:*

> *"It is strongly advisable that there is a conversation regarding making reasonable adjustments to enable [the claimant] to return to work. This was advised in January 2024 by myself when considering his fitness to work at that point. Unfortunately this will have delay his ability to return to work before now".*

Financial circumstances

29. By agreement of the parties further information shall be sought regarding the claimant's financial circumstances in the event of a finding that the complaint has little reasonable prospects.

The law on strike out

30. 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.

31. 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).

32. 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.

No reasonable prospects

33. 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.

34. 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"

35. 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."

36. 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".

37. 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".

38. 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"

39. 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

40. 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.

41. 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.

42. 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.

43. 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)*.

44. 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)*.

45. 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.

46. 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

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

a. The duty to make reasonable adjustments is only triggered when the claimant is fit to return to work with adjustments or there is some indication of a specified return date which is objectively reasonable – there must be "some sign on the horizon that the claimant would be returning" (*NCH Scotland v McHugh UKEATS/0010/06/MT)*.

b. Where "medical opinion evidence was plain and unchallenged by the claimant" that he was not fit to work in any role even with adjustments "this is one of those rare cases where the facts were not materially in dispute so that a full hearing before ET was not necessary" (*Conway v Community Options Ltd UKEAT/0034/12/SM*).

c. The duty to make reasonable adjustments was not triggered where medical certificates were to the effect that the claimant was not fit for any work and there was no indication from the claimant that she was fit to return to work if adjustments were made for her (*Doran v Department for Work and Pensions [2024] UKEEAT0017_114_1411)*.

"*the duty to make reasonable adjustments is not triggered during a period when the claimant was certified as unfit for work and had not given an indication of when he would return. A general statement of desire to return to work or even a general request to return to work was not sufficient to trigger the duty. Where the employer and*

employee had not got to a stage of fixing a return to work then there were no measures that could be taken"

(*Anderson v Anderson UKEATS/0013/16/JW*)

d. In circumstances were there was a dispute between the assessment of the fit notes and an expert opinion, the tribunal was entitled to prefer the treating physician's contemporaneous opinion; "against a background of long standing certification by the GP in relation to the claimant's unfitness for work, it would have been for the claimant to produce something to the contrary if seeking to persuade the respondents that he could return" (*Anderson*)

e. By virtue of fit notes issued on 5 January and 21 March 2024 the claimant was certified as unfit for any work by his GP for the period from 5 January to 5 June 2024. No fit note was issued for the period from 6 June to 24 July 2024 but the claimant did not attend work. The claimant therefore has no reasonable prospects of establishing that he was fit to work with adjustments in the period from 5 January to 24 July 2024.

f. It must reasonably be inferred that the claimant's GP made an error when he stated the occupational therapist had advised he would be fit to work with reasonable adjustments because in recent her communication to the GP she had stated that she had extended his time of sick by 3 months and he is unable to return to work.

g. The claimant did not give an indication that he would be fit to return to work with adjustments on a specified date and in any event his subjective assertion was without reasonable foundation because he was certified as unfit to work. "something more than the claimant's bald assertion of wanting to return to work would be required before any duty to make reasonable adjustments could be triggered" (*Anderson*). The occupational therapist merely stated "in the near future" which is insufficiently specific.

h. The claimant cannot reasonably rely upon his own failure to submit fit notes certifying that he was unfit.

Claimant's submissions

48. The Claimant's oral submissions were in summary as follows –

a. There is a high burden on the respondent to show that the case has no reasonable prospects and strike out should only be made in the most obvious and plain cases where there is no factual dispute (*QDOS Consulting v Swanson UKEAT/0495/11/RN).*

b. There is a factual dispute in this case as to whether the claimant was fit to work with adjustments or had given a clear indication which can only be determined by hearing the evidence (per *Anderson*).

c. The fit notes must not be considered in isolation: "the Tribunal required to deal with the various sources of evidence and conflicts within the evidence of individual witnesses in determining this central issue of whether the claimant had been fit to return to work during the relevant period" *(Anderson*).

d. At the meeting in October 2023 the claimant had indicated that he would be fit to return to work with adjustments following the expiry of his fit note on 5 January 2024 and he will give evidence to this effect. In January 2024 the occupational therapist advised that he would be fit to return to work with adjustments in the near future. This was confirmed in the GP report received May 2024. Its terms are clear but any dispute should be resolved by witness testimony from OH and/or the GP.

e. The claimant did not require to specify a return date merely to give a clear indication that there is "some sign on the horizon". The claimant will give evidence that he sought to discuss his return without success which is why he withheld his fit notes. In the absence of those fit notes, the respondent received a clear indication from the occupational therapist in January 2023 that he was fit to return to work with adjustments in the near future and clear advice in the GP report received May 2024 that he was fit to return to work with adjustments.

f. There is a dispute on the facts as to whether the claimant was fit for work or had given an indication that he would be fit to work in the near future which can only be resolved by hearing witness testimony.

g. The claimant will give evidence to the effect that he tried he made almost daily calls to the respondent to discuss his return without success and the respondent should not be able to capitalize on this by saying they did not receive a clear indication.

h. The complaint is stateable and documentary evidence supports an inference that he in fact has reasonable prospects rather than no or little reasonable prospects.

i. The tribunal require to express an opinion on "the adminicles of evidence that supported a different conclusion on the claimant's fitness or otherwise to work"

Discussion and decision

Strike out

49. The respondent made an application for strike out of the complaint of failure to make reasonable adjustments prior to 25 July 2024 on the ground of no reasonable prospects of success because the claimant was certified as not fit for work and further the claimant had not reasonably indicated a specified return date. The claimant asserts that he was fit to work for the respondent with reasonable adjustments in the period between 6 January and 24 July. Fit notes were issued in respect of the period to 5 June certifying that he was not fit work.

50. A fit note is a form which can enable an individual to access certain state benefits. According to the publicly available government guidance the fit note is not binding on the employee or employer – where certified as "not fit for work" "[an employee] can go back to work at any point when they feel able to do so, even if this is before their fit note expires"; likewise, the "may be fit for work" advice "is not binding upon [the employee] or their employer but help to give them a broad idea about changes to discuss."

51. Whilst a fit note may well be relied upon as evidence that an employee is not fit for work it cannot be conclusively determinative because the medical professional will not be appraised of all the relevant facts. Whether an employee is fit for work requires knowledge of their medical conditions and the impact upon them and their work and any adjustments that would be reasonable, and therefore depends upon knowledge held by the medical professional, the employee and the employer. Accordingly a medical professional may certify an employee as unfit for work where adjustments can in fact reasonably be made or as potentially fit when adjustments cannot in fact reasonably be made.

52. Furthermore the fit notes should not be considered in isolation. In January 2024 the claimant's occupational therapist ('OT') emailed the respondent stating that she had provided the claimant with another fit note on the basis that discussions would commence with regard to reasonable adjustments so he could "return in the near future". In April 2024 the GP's medical report appeared to confirm that he would be fit to return with reasonable adjustments. The respondent asserts that the GP acted in error in light of the OT's accompanying statement that she had completed another fit note and that he is unable to return to his work. Looking to the context of her statement and the reference to legal advice it could reasonably be inferred that the OT was stating he was unable to return to work because the respondent were refusing to accommodate reasonable adjustments. And this interpretation appears to be supported by the statement made by the OT in July 2024.

53. Furthermore and in any event the claimant was not certified as unfit for work in respect of the period from 6 June to 24 July 2024 (no fit note was ever issued for that period and in respect of the period from 25 July he was certified as potentially fit).

54. Accordingly the claimant's assertion that he was fit to work with adjustments is not totally and inexplicably inconsistent with the undisputed contemporaneous documentation and is instead a disputed fact which should be determined at a final hearing in light of oral testimony.

55. In the alternative the claimant asserts that he had indicated when he would return at the meeting in October 2023 and by communication in January 2024 and this would have been clear to the respondent since they were not provided with any fit notes for the period starting 6 January 2024. The respondent asserts that any such indication had no reasonable foundation given the existence of fit notes certifying him as unfit. However this assertion requires to be considered in the context of the opinion expressed by the OT. Accordingly issue of whether the claimant had reasonably indicated a specified return date a disputed fact which should be determined at a final hearing in light of oral testimony.

56. The respondent's application for strike out of the complaint of a failure to make reasonable adjustments prior to 25 July 2024 on the ground that it has no reasonable prospects of success is therefore refused.

Deposit

57. Notwithstanding the fit notes issued for the period from 5 January to 5 June 2024 it cannot reasonably be said that there is little prospect of the claimant proving that he was fit for work with adjustments in the period from 5 January to 25 July 2024 given the opinion expressed by the OT in January 2024 that he would be fit to return to work in the near future, given the apparent frustration expressed by the OT in July 2024 regarding the delay to his return, and given that he was not certified as unfit in respect of the period from 5 June to 24 July and was certified as potentially fit to work with adjustments thereafter. In light of this his prospects of success are not merely fanciful. There is no 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.

58. The respondent's application for deposit in respect of the complaint of failure to make reasonable adjustments prior to 25 July 2024 on the ground that it has little reasonable prospects of success is therefore refused.

Employment Judge: M Sutherland
Date of Judgment: 6 November 2024

Date sent to parties 07/11/2024