



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs V Ashton  
**Respondent:** Marks and Spencer PLC  
**Heard at:** Exeter Employment Tribunal  
**On:** 10 October 2024 and 31 January 2025  
**Before:** Employment Judge Volkmer

## Representation

**Claimant:** In person, accompanied by Mr Walker, her partner  
**Lithuanian Interpreter:** Ms De Ladue (10 October 2024) / Ms Hill (31 January 2025)  
**Respondent:** Ms Defriend (counsel)

## RESERVED JUDGMENT

1. The Claimant was not disabled at the relevant time. Her disability discrimination complaints are dismissed.
2. The Respondent's strike out application is dismissed.
3. As a condition of being permitted to continue to advance those allegations, and on the basis that they have been found to have little reasonable prospect of success, the Claimant must pay the following deposits within **28 days** of the date of this judgment being sent to the parties.
4. The Claimant is ordered to pay £30 by way of deposit in relation to each of the three allegations at paragraphs 3.2.1, 3.2.2 and 3.2.4 of the List of Issues (a total of £90).
5. If she does not do so, the relevant allegations will be struck out.
6. The remaining parts of the Respondent's deposit order application are dismissed.

## Background

1. The Claimant was employed by the Respondent between 21 October 2012 and 8 November 2023 as a Customer Assistant in the Respondent's Torbay store. The Claimant commenced the Early Conciliation process with ACAS on 22 November 2023. The Early Conciliation Certificate was issued on 3 January 2024. The Claimant issued two claims: one presented on 10 January 2024 (1400494/2024) and one presented on 26 January 2024 (1400495/2024).
2. A Preliminary Hearing took place on 6 August 2024 before Employment Judge Self. At the hearing, Employment Judge Self discussed the issues in relation to the claim with the parties. They are set out at the end of the Case Management Order from that hearing, dated 14 August 2024 and sent to the parties on 16 August 2024 (I will refer to this as the "List of Issues"). The Case Management Order set out at paragraph 9 that if either party thought the List of Issues was wrong or incomplete, they should write to the Tribunal within 14 days of the order being sent out, saying that if they did not, the list would be treated as final save in exceptional circumstances. Neither party wrote to the Tribunal raising any issue with the List of Issues.
3. I went through the List of Issues with the Claimant, via the interpreter, in the first part of the hearing. This had been sent to the parties on 14 August 2024. The Claimant stated that she did not read emails because she was a disabled person. Initially the Claimant said she disagreed with it and that it had been created by the Respondent. I explained that it was drafted by EJ Self. I explained the issues set out in that document. The Claimant did not seek to make an amendment application or say anything which might be understood to have that effect. Certainly in the period between the hearing being adjourned and restarted, the Claimant would have had plenty of time to read the List of Issues.
4. This Public Preliminary Hearing was listed to consider:
  - a. any outstanding matter in relation to the List of Issues;
  - b. whether the Claimant was a disabled person pursuant to section 6 of the Equality Act 2010 (EqA) at the material time;
  - c. whether any of the discrimination claims have been lodged outside of the three-month statutory time limit and if so whether they form part of conduct extending over a period and, if any claim is outside of the time limit and not deemed to be part of an act continuing over a period, whether it would be just and equitable for time to be extended; and
  - d. whether any allegation should be struck out as having no reasonable prospect of success;
  - e. whether any allegation should be the subject of a deposit order as it has little reasonable prospects of success; and
  - f. timetabling to any required final hearing.

5. The Case Management Order of 14 August 2024 made clear that it was for the Employment Judge dealing with the matter to determine in what order the issues outlined above were dealt with indeed whether all matters should or could be dealt with and that it may be that not all matters are capable or appropriate to be dealt with on.
6. As set out in the List of Issues, the Claimant relies on her heart condition as a disability and brings complaints of:
  - a. ordinary unfair dismissal in relation to her dismissal on 8 November 2023;
  - b. direct race discrimination and harassment related to race in relation to alleged acts taking place between 21 November 2019 and 8 November 2023 (the same five acts are alleged for both complaints);
  - c. direct disability discrimination, harassment related to disability and a failure to make reasonable adjustments, all of which relate to one alleged act in May 2023.
7. The Respondent provided a hardcopy hearing bundle. This contained the Claimant's documents, the Respondent's documents, the Respondent's skeleton and an authorities section. The documents brought physically by the Claimant were identical to those which the Respondent had already received and included in the hardcopy bundle. The Respondent revised the hard copy bundle for the resumed hearing to include the Claimant's documents at the end (a total of 286 paginated pages). Page references in this judgment are references to that hearing bundle.
8. The Claimant submitted two statements, which are at pages 91 and 247. The Claimant brought a third witness statement in hardcopy to the hearing (now at page 110). She stated this had been sent to the Respondent by email and it had only just been noticed that it had not left her outbox.
9. Initially Ms Defriend indicated that she did not wish to cross examine the Claimant. I stated that I intended to ask the Claimant some questions at the beginning of the evidence in order that she had the opportunity to put forward facts relevant to time limits and disability. I set out the Claimant's responses below in relation to the facts. In light of this, Ms Defriend stated that she did wish to cross examine the Claimant.
10. As the Respondent had not seen the third witness statement prior to the hearing, it was agreed with Ms Defriend that she would start cross examination after a 30 minute break to allow her to review the new statement. She was happy to proceed on this basis.
11. On 10 October 2024, following the Claimant's evidence, at around 3 PM, midway during the Respondent's submissions, the Claimant asked for a break. Following this her partner Mr Walker stated that she was feeling very unwell and asked for an adjournment. The matter was adjourned to 31 January 2025.
12. On 31 January 2025, there were problems in relation to the Lithuanian interpreter arriving. No Lithuanian interpreter was available until 2pm. As such, the hearing did not resume until 2pm on 31 January 2025. Tribunal decided to hear submissions

only and reserve this judgment. Since the Respondent's submissions had been stopped half way through, the Respondent was able to re-start submissions.

## The Issues

13. The issues to be determined by the Tribunal were set out at in the Case Management Order of 6 August 2024 as follows.

### 1. Time Limits

1.1. *The claim form was presented on 10 January 2024. The claimant commenced the Early Conciliation process with ACAS on 22 November 2023 (Day A). The Early Conciliation Certificate was issued on 3 January 2024 (Day B).*

1.2 *Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*

1.2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?*

1.2.2 *If not, was there conduct extending over a period?*

1.2.3 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*

1.2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*

1.2.4.1 *Why were the complaints not made to the Tribunal in time?*

1.2.4.2 *In any event, is it just and equitable in all the circumstances to extend time?*

### 2. Unfair dismissal

2.1 *Was the Claimant dismissed?*

2.2 *What was the reason for dismissal? The Respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s. 98 (2) of the Employment Rights Act 1996.*

2.3 *Did the Respondent hold a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?*

2.4 *Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?*

2.5 *Did the Respondent adopt a fair procedure?*

2.6 *If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?*

2.7 *If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.*

**3. Direct race discrimination (Equality Act 2010 section 13)**

3.1 *The Claimant describes herself as Lithuanian / non-native English speaker.*

3.2 *Did the Respondent do the following things:*

3.2.1 *On 21 November 2019 did Isla Fawcett humiliate the Claimant by refusing to allow the Claimant to use toilet facilities when she was experiencing heavy menstrual periods causing her clothes to be soaked with blood and instructed the Claimant to have a meeting first.*

3.2.2 *In December 2020 Isla Fawcett started an investigation into the Claimant not wearing a mask during Covid.*

3.2.3 *On 25 August 2023 did the Claimant experience no support from her line manager (Laura Beattie) in respect of alleged racial abuse against her.*

3.2.4 *Laura Beattie not believing that the Claimant had a heart condition on 10 May 2023 following meetings on the second and the fourth of the same month.*

3.2.5 *Dismissing the Claimant.*

3.3 *Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who she says was treated better than she was and therefore relies upon a hypothetical comparator.*

3.4 *If so, was it because of race?*

3.5 *Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race?*

**4. Harassment related to race (Equality Act 2010 s. 26)**

4.1 *Did the Respondent do the things set out at 3.2.1 to 3.2.5:*

4.2 *If so, was that unwanted conduct?*

4.3 *Did it relate to the Claimant's protected characteristic, namely her race?*

4.4 *Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the*

*claimant? [this is added as it appears to have been omitted in error from the issues set out at in the Case Management Order of 6 August 2024]*

*4.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. [this is added as it appears to have been omitted in error from the issues set out at in the Case Management Order of 6 August 2024]*

## **5. Disability**

*5.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:*

*5.1.1 Whether the Claimant had a physical or mental impairment. The Claimant relies upon her heart condition.*

*5.1.2 Did it have a substantial adverse effect on the Claimant's ability to carry out day-to-day activities?*

*5.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?*

*5.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?*

*5.1.5 Were the effects of the impairment long-term? The Tribunal will decide:*

*5.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?*

*5.1.5.2 if not, were they likely to recur?*

## **6. Direct disability discrimination (Equality Act 2010 section 13)**

*6.1 The Claimant describes herself as disabled on account of her heart condition.*

*6.2 Did the Respondent do the following things:*

*6.2.1 In May 2023 the Claimant was asked to go to the Food Hall / café to work.*

*6.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who she says was treated better than she was and therefore relies upon a hypothetical comparator.*

*6.4 If so, was it because of disability?*

*6.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?*

## **7. Harassment related to disability (Equality Act 2010 s. 26)**

*7.1 Did the Respondent do the following things:*

7.1.1 As per 6.2.1

7.2 If so, was that unwanted conduct?

7.3 Did it relate to the Claimant's protected characteristic, namely her disability?

7.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## **8. Duplication of Harassment and Direct Discrimination**

8.1 Numerous of the claimant's complaints relating to race and /or disability are presented as both harassment and/or direct discrimination. The tribunal will determine these allegations in the following manner.

8.2 In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.

8.3 If the factual allegation is proven, then the tribunal will apply the statutory test for harassment under s. 26 Equality Act. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under s. 212 (1) Equality Act the definition of detriment does not include conduct which amounts to harassment.

8.4 If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

## **9. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)**

9.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

9.2 A "PCP" is a provision, criterion, or practice. Did the Respondent have the following PCP:

9.2.1 Asking / Requiring the Claimant to work in the café / food hall.

9.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that she was unable to cope with the heavier work in those areas on account of her heat condition and the request in itself caused her distress and anxiety.

9.4 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

9.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:

9.5.1 Not to ask / require the Claimant to work in the café / food hall

9.6 Was it reasonable for the Respondent to have to take those steps and when?

9.7 Did the Respondent fail to take those steps?

14. The issues were discussed with the parties at the beginning of the hearing. Since the Claimant's employment ended on 8 November 2023, ACAS conciliation commenced on 22 November 2023 and the claim was presented on 10 January 2024, the unfair dismissal complaint was within the primary three month time limit. The question of time limits was only relevant to the discrimination complaints. The ACAS notification was on 22 November 2023 and the certificate was issued on 3 January 2024 (42 days). The Claim was presented on 10 January 2024, any act which took place prior to the 23 August 2023 was potentially out of time in relation to the primary limitation period.

## The Facts

15. In July 2009 the Claimant was admitted to hospital with palpitations and presyncope. This was diagnosed as being paroxysmal atrial fibrillation ("PAF"), as set out in a letter dated 3 August 2009 (page 87).

16. The Claimant was employed from 21 October 2012 in the Respondent's Torbay store.

17. A letter from the Claimant's GP surgery dated 20 December 2013 states that the Claimant's "*heartbeat beats very fast, and she gets chest pain. She finds that the cold makes it particularly worse*" (page 88 of the Respondent's documents). A further letter from her GP dated 14 July 2015 refers to intermittent irregular heartbeats being precipitated by stress (page 89).

18. The Claimant's Documents 6 (page 254), an outpatient clinic report dated 20 May 2014 states that the Claimant had daily palpitations lasting up to 10 minutes and occasionally when they were bad, these were accompanied by lightheaded spells.

19. In November 2019, the Claimant alleges that the first act of discrimination took place. It is alleged that Isla Fawcett did not allow the Claimant to use toilet facilities when she needed to because of menstrual bleeding, causing distress and humiliation to the Claimant.

20. The Claimant was aware of the existence of the Equality Act 2010. However she was not aware of the three month primary limitation period. However, she had discussed matters with her USDAW (union) representative from 2019 onwards. Based on the Claimant's oral evidence, she knew the Respondent's treatment of her had been



unlawful in November 2019. The Claimant later tried to deny that she had said this, but this was the clear note that I and Ms Defriend had made of the evidence given.

21. Based on the Claimant's oral evidence, a claim against the Respondent had been in contemplation in her discussion with the union in 2019 because she stated that she was told to gather evidence during this period. The Claimant spoke to her union again in around March 2020, and then based on their advice raised the matter internally at the Claimant. The Claimant could not explain why she had not asked about bringing a claim at that point.
22. The Claimant said that she did not know why she had not done an internet search such as to Google the process for bringing a legal claim. If she had known of the three month limit, she would have complied with it.
23. Following this discussion in March 2020 the Claimant and other staff were put on furlough. On her return the key individual, Ms Fawcett, had been moved to the Plymouth store. However, she later returned to the Torbay store where the Claimant worked.
24. The Claimant alleges that in December 2020 Ms Fawcett discriminated against her again by commencing an investigation into the Claimant not wearing a face mask (as required during Covid).
25. A fit note dated 17 September 2021 refers to "chest wall pain", but there was no evidence that this was related to PAF.
26. Following a disciplinary meeting in February 2023 the Claimant was given a written warning in relation to an altercation with a customer during a bra fitting appointment. It was to stay live on her file for 12 months.
27. A letter from the Claimant's GP dated 10 February 2023 stated "*this is to confirm that Vilma is currently suffering from stress.... She also has a history of paroxysmal atrial fibrillation which can be triggered by stress and insomnia*". There was no mention of the Claimant having PAF symptoms at the time of this letter nor did it refer to any effect on her activities.
28. In around May 2023 the Claimant was asked to work in the Respondent's food hall.
29. Documents 12 (page 268) and 14 (page 275) are records of workplace meetings between the Respondent and the Claimant on 2 May 2023 and 4 May 2023. In both meetings the Claimant was asked about the impact of the PAF on her, and the Claimant refused to answer the question other than stating that the stress and cold could trigger it causing her heart rate to speed up.
30. Following these meetings, Ms Beattie, the Claimant's line manager sent her a letter dated 10 May 2023 (page 281). In it Ms Beattie sets out that the Claimant provided Ms Beattie with only limited information regarding her PAF – she showed Google results but would not discuss the effect on her day-to-day, what her treatment was, and in addition refused an occupational health referral. Ms Beattie concluded in relation to the Claimant's request not to have to work in the cold temperatures in the food hall that "*Reviewing your condition following the meeting, I found that there is no link between A-fib and the cold. Therefore I do not believe that there is a need to*

*make such an adjustment*” (page 282). Ms Beattie further concluded that working in the café appeared to her to be similarly stressful to the retail area in which the Claimant already worked, and asked for a letter from the Claimant’s doctor to explain why the Claimant could not work in the café as she felt that no reasonable reasons or evidence had been provided by the Claimant. This letter forms the basis of an act of alleged race discrimination at paragraph 3.2.4 of the List of Issues.

31. A further GP letter on 31 October 2023 (page 90) refers to the Claimant being off sick with stress – stating that this is due to an accumulation of stress in her personal life.
32. The Claimant’s statements at pages 91 and 247 of the Respondent’s documents are undated (although clearly post-dating the presentation of the Claim) and written in the present tense, referring to dizziness and fatigue and saying this affects her ability to grip or hold anything, be in cold environments, carry groceries to climb stairs or walk any distance. There is also reference to fatigue following an episode which can last hours or days, affecting the Claimant’s ability to perform daily tasks.
33. The Claimant’s witness statement dated 10 October 2024 (page 110) has one incident mentioned in which she says on 25 August 2023 after an alleged altercation at work the Claimant went to her doctor and was assessed to have high blood pressure and her heart rate being too fast. However this consultation is not reflected in the medical notes and does not refer to effect on day-to-day activities.
34. Following a disciplinary investigation undertaken by Perry Carter, the Respondent initiated a disciplinary procedure in relation to the Claimant’s conduct, which was said to arise as a result of two customer complaints. The Claimant was invited to a disciplinary hearing which took place on 7 November 2023. In relation to one of the allegations regarding an incident on 25 August 2023, the Claimant’s position was that she had been racially abused by the relevant customer.
35. Georgia Webster, the disciplinary manager, did not uphold the first allegation but upheld the allegation in relation to 25 August 2023. She decided to dismiss the Claimant for gross misconduct as a result. The dismissal was upheld on appeal by Emily Owen, the disciplinary manager.

### **Disability: the Law**

36. Section 6 and schedule 1 of the Equality Act 2010 (“the EqA”) provides that a person P has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. A substantial adverse effect is one that is “*more than minor or trivial*” (section 212 EqA), and a long-term effect is one that has lasted or is likely to last for at least 12 months or is likely to last the rest of the life of the person (Schedule 1 paragraph 2(1) EqA).
37. Schedule 1 par 2(2) EqA provides that “if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur”.
38. “*Likely*” should be interpreted as meaning “*it could well happen*” rather than it is more probable than not that it will happen (*SCA Packaging Limited v Boyle (2009)* ICR

1056).

39. The burden of proof is on the Claimant to show that he is a disabled person in accordance with that definition.

40. In Goodwin v The Patent Office [1999] IRLR 7, at paragraphs 26-29, it was held that there are four key questions that need to be asked:

- a. *“Does the applicant have an impairment which is either mental or physical?”*
- b. *“If so, does the impairment affect the applicant’s ability to carry out normal day to day activities?”*
- c. *“If so, is the effect on the same substantial?”*
- d. *“If so, is the effect on the applicant’s ability to carry out normal day to day activities long term?”*

41. J v DLA Piper [2010] IRLR 936, at paragraph 40 it was held:

*“It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin. However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant’s ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.”*

42. I am also mindful of the “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) (Guidance) and the Equality and Human Rights Commission (EHRC) Code of Practice on Employment (2015) and specifically Appendix 1(Code). 50. The meaning of “*normal Day-to-day activities*” is not set out in statute but helpful guidance is included in both the Guidance and the Code.

43. Paragraph D3 of the Guidance states that: In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities.

44. The Code states that day to day activities include – but are not limited to – activities such as walking, driving, using public transport, cooking, eating, lifting and carrying everyday objects, typing, writing (and taking exams), going to the toilet, talking, listening to conversations or music, reading, taking part in normal social interaction or forming social relationships, nourishing and caring for one’s self. Normal day-to-day activities also encompass the activities which are relevant to working life.

45. The material time for considering whether the impairment had (or was likely to have) a long term effect is the date of the alleged discriminatory act (*All Answers Ltd v W [2021] EWCA Civ 606, CA*) and events occurring after the date of the alleged discriminatory act should not be taken into account in considering if the effect of the impairment was long term. Whether an impairment is 'long term' is directed to the effect of the impairment, rather than the underlying impairment itself: *Seccombe v Reed in Partnership Ltd, EA-2019-000478-00*, at paragraph 29.

### **Disability: Discussion and Conclusions**

46. The Claimant's disability discrimination complaints relate to being asked to work in the food hall/café in May 2023. Therefore the relevant time for establishing disability is May 2023.

47. It is accepted that the Claimant has a heart condition which constitutes a physical impairment.

48. The Claimant did not provide a copy of her medical records as was indicated at paragraph 13.1 of the Case Management Order would be relevant. This paragraph also sets out that evidence should be relevant to the question of whether the Claimant had the disability *at the time of the events the claim is about* (emphasis added).

49. The medical evidence provided by the Claimant was historic, the most recent relevant record being in July 2015. The Claimant declined to provide her full GP record. The Claimant's evidence as to the effect of her impairment on day-to-day activities related to the time after she presented the claim.

50. The Claimant had been sent the Respondent's skeleton in advance which set out clearly that the Respondent's position was that evidence was lacking in relation to the Claimant's heart condition having a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities at the material time, namely May 2023.

51. I asked the Claimant in oral evidence whether she wanted to respond to the Respondent's position that no evidence had been provided as to disability at the time of the allegations, and that the majority of medical documents provided were old. The Claimant responded that all of the documents were in the bundle and that she had been diagnosed in 2009 and told the Respondent about her illness. She had been told by the doctor that the condition was untreatable. The Claimant stated that she did not wish to pay for a new letter from her GP.

52. When asked whether she had anything she wished to say in relation to the Respondent's submission, the Claimant did not offer any oral evidence in relation to the effect of her heart condition on her ability to carry out day to day activities at the material time. It would not have been appropriate to press the Claimant further to do so as it would have been prejudicial to the Respondent if the Tribunal were to lead the Claimant to give this type of evidence.

53. The Respondent's oral submissions regarding the question of whether the Claimant was disabled at the relevant time were given on 10 October 2024, and translated by the court appointed translator. There was no attempt made by the Claimant between

that time and the resumed hearing on 31 January 2025 to adduce further evidence (e.g. the Claimant's full GP record).

54. Overall I consider that I do not have sufficient evidence to make findings about what the effects were on the Claimant's day-to-day activities in May 2023 and the 12 months prior to that, or what the effects were anticipated to be at that time for the 12 months following May 2023.
55. It is the Claimant's burden of proof to prove that she is disabled. No oral or written evidence was provided in relation to effect on day to day activities at the time of the alleged acts of discrimination. I gave the Claimant the opportunity to add to her evidence orally in response to the Respondent's written submissions and she did not do so. Whilst the Claimant is not a native English speaker, she had the assistance of a Lithuanian translator, ample time to consider matters put to her in writing and the assistance of her friend who attended both hearings with her.
56. I cannot simply assume, without any evidence, that the effect on day-to-day activities described by the Claimant as affecting her at the time of presenting the Claim were the same between May 2022 and May 2023 or where expected to continue for 12 months from May 2023.
57. As such, the Claimant has not met the burden of proof to show that the heart condition had a substantial long-term effect on her day-to-day activities.
58. I find that the Claimant is not disabled for the purposes of section 6 of the Equality Act 2010. On that basis, the Claimant's disability complaints are dismissed.

### **Time Limits/Strike Out/Deposit Orders: the Law**

#### ***Time Limits***

59. Section 123 of the Equality Act 2010 ("EqA") provides that:

*123 Time limits*

*(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

60. Section 140B EqA permits an extension of time where ACAS early conciliation is undertaken in certain circumstances not relevant to this claim (as set out in paragraph 14 above).
61. This determination relates to section 123 (1)(b) EqA: whether the claim has been brought within "such other period as the employment tribunal thinks just and equitable".

62. The Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 summarised the position at paragraphs 18 and 19:

*“[18] ... It is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the equality act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list ... [19] that said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”*

63. Legatt LJ went on to say [25] *“As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it “thinks just and equitable” is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.”*

### **Equality Act Complaints**

64. The Claimant has brought complaints of direct race discrimination and harassment related to race.

65. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

66. Direct discrimination is based on comparative treatment. It must be established that the Claimant was treated “less favourably” than someone else, who will be either an actual person or a hypothetical person. Either way, a comparator must be in materially the same circumstances (see section 23(1) EqA which provides: “on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case”).

67. In relation to the complaint of harassment under section 26 EqA, a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).

68. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

### **Strike Out**

69. Rule 38 of the Employment Tribunal Rules of Procedure 2024 sets out the following in relation to strike out.

*"38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—*

*(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

*(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;"*

70. As set out in *Malik v Birmingham City Council UKEAT/0027/19*:

*"30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121, which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.*

*31. In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*

*(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."*

*32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be*

*struck out and that “the time and resources of the ET’s ought not be taken up by having to hear evidence in cases that are bound to fail.”*

71. In Cox v Adecco Group UK & Ireland [2021] ICR 1307, EAT HHJ Tayler set out the following summary of principles established by the authorities:

*“(1) No-one gains by truly hopeless cases being pursued to a hearing;*

*(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;*

*(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;*

*(4) The Claimant’s case must ordinarily be taken at its highest;*

*(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can’t decide whether a claim has reasonable prospects of success if you don’t know what it is;*

*(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;*

*(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;*

*(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;*

*(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.”*

72. Once there is a finding that a claim has no reasonable prospect of success, the employment judge should go on to consider whether to exercise their discretion as to whether the claim should be struck out: Hasan v Tesco Stores Ltd UKEAT/0098/16.



## Deposit Orders

73. Rule 40 of the Employment Tribunal Rules of Procedure 2024 sets out the following in relation to deposit orders.

*40.—(1) Where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim, response or reply has little reasonable prospect of success, it may make an order requiring a party (“the depositor”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument (“a deposit order”).*

*(2) The Tribunal must make reasonable enquiries into the depositor’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

*(3) The Tribunal’s reasons for making the deposit order must be provided with the order and the depositor must be notified about the potential consequences of the order.*

*(4) If the depositor fails to pay the deposit by the date specified by the deposit order, the Tribunal must strike out the specific allegation or argument to which the deposit order relates.*

74. The guidance set out in *Adecco v Cox* in relation to the process of analysing the claim also applies in relation to assessing the prospects when considering whether to make a deposit order: *Amber v West Yorkshire Fire and Rescue Service 2024 EAT 146*.

75. Like with a strike out, the Tribunal must go on to consider whether to exercise its discretion as per *Hemdan v Ishmail [2017] IRLR 228, EAT*:

*“Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.” [15]*

## Time Limits/Strike Out/Deposit Order: Discussion and Conclusions

76. The earliest complaint of race discrimination is in November 2019 and the latest is on 8 November 2023.

77. The first two allegations of race discrimination in the List of Issues are alleged to have been acts of Ms Fawcett (paragraphs 3.2.1 and 3.2.2 of the List of Issues). Ms Fawcett was transferred to Plymouth for a period after the Claimant returned from

furlough. The Claimant's position is that when Ms Fawcett returned the discrimination started again.

78. Two allegations, one in May 2023 (paragraph 3.2.4 of the List of Issues) and August 2023 (paragraph 3.2.3 of the List of Issues) refer to Ms Beattie, the Claimant's line manager, as the perpetrator. In relation to the Claimant's dismissal as the final alleged act of race discrimination (paragraph 3.2.5 of the List of Issues), Perry Carter conducted the disciplinary investigation, Georgia Webster was the dismissing manager and Emily Owen conducted the appeal. The Claimant's position is that Ms Fawcett was behind all of the alleged acts of race discrimination in which she is not named because she was friends with the other managers. She did not point to any other evidence of a link.
79. The Respondent invited the Tribunal, as an alternative to determining time issues in the circumstance, to strike out or make a deposit order on the basis of the prospects of the Claimant establishing that the complaints were in time.
80. In order to establish whether the race discrimination complaints which happened more than three months before the ACAS notification (i.e. those at paragraphs 3.2.1, 3.2.2 and 3.2.4 of the List of Issues) are "in time", part of the assessment is to consider whether they form part of an act extending over a period. In order to determine this, it is a relevant but not conclusive factor is whether the same or different individuals were involved in those incidents. The Claimant contends Ms Fawcett has motivated other members of staff to act as they did and that this forms the link between, in particular, the very historic allegations in 2019/2020 and those three years later in 2023. However, this involves an examination of the motivation of those involved. As such I consider that I am not able to determine without hearing all of the evidence, whether the acts of race discrimination are a course of conduct such that they are brought within time. On that basis, I do not consider I can deal with jurisdiction in relation to the race discrimination complaints at this stage.
81. In relation to considering the prospects of success for the purposes of striking out or making a deposit order, the allegations at paragraphs 3.2.1 and 3.2.2 of the List of Issues do on their face appear to be very historic and unrelated to the more recent acts complained of. The Claimant did not point to any evidence of a link other than the friendship of relevant managers. It therefore appears the prospects of showing there was a continuing act are low given there are different individuals involved, the acts are of a different nature and there is a significant gap of around three years between the first two pleaded acts and the later acts.
82. The Tribunal will then go on to consider whether it is just and equitable to extend time. Although there are factors counting against the Claimant such as early knowledge and access to advice, the Respondent did not in its submissions point to any particular prejudice it might suffer as a result of an extension of time. I consider therefore, that it is reasonably arguable that there should be an extension of time. It will be for the Tribunal at the final hearing to balance the relevant factors. On that basis, I do not strike out the allegations at paragraphs 3.2.1 and 3.2.2 of the List of Issues nor do I make a deposit order in relation to them as regards time limits.

### Strike Out/Deposit Order on the Merits

83. The Respondent sought to strike out all of the race discrimination allegations save for that at paragraph 3.2.3 of the List of Issues on the basis that the Claimant had not given any reason why they had occurred for reasons relating to nationality. The Respondent's position was that the Claimant had not pointed to anything to demonstrate those involved were motivated by her race. This was against a background of a written warning being in place and two allegations of misconduct, with only one being upheld against her (which demonstrated fairness in the process). The documents were before the Tribunal including statements taken from multiple witnesses which corroborated the upheld allegation. On that basis, the Respondent argues, the Claimant has no reasonable prospect of establishing that the dismissal was because of her race.
84. In relation to the allegation at paragraph 3.2.4 of the List of Issues, the Respondent pointed to the letter at page 281 of the Hearing Bundle, which the Respondent said demonstrated that what the Claimant alleged had simply factually not happened. In any event it demonstrated that the reason why Ms Beattie did the act was that the Claimant had not provided any evidence, rather than being motivated by the Claimant's nationality. This is in reality a mislabelled reasonable adjustments complaint.
85. I take into account the Claimant is a litigant in person and that English is not her first language. Nevertheless, the Claimant had the Respondent's very clear written submissions which included a comprehensive explanation of the legal position, as well as the Respondent's position as to the weaknesses it had identified. The Claimant had the time before the first part of the Preliminary Hearing on 10 October 2024 and further time when the hearing was adjourned on 10 October 2024 and then resumed on 31 January 2025 to consider these without time pressure.
86. It is the Claimant's burden to identify a reason why they say the conduct was discriminatory (in this case because of the Claimant's race) rather than just being unfair in the ordinary sense, even if they are not in a position to prove it yet. The Claimant's submissions were essentially that she had not been supported when suffering racial abuse from customers, including in one instance where it was recorded on an electronic system, "Honeywell". This relates to the allegations at paragraphs 3.2.3 and 3.2.5 of the List of Issues. In relation to the latter (dismissal) this is because the Claimant says that the alleged misconduct took place after she had been subjected to racial abuse by the relevant customer. Taking the Claimant's claim at its highest, as well as the public policy reasons underpinning the transferring burden of proof in relation to discrimination complaints, I consider that it is not possible at this stage, without hearing evidence, in relation to paragraphs 3.2.3 and 3.2.5 of the List of Issues to conclude that the Claimant has little or no reasonable prospects of establishing that this constituted direct race discrimination, or more probably, harassment related to race.
87. In relation to the historic allegations against Ms Fawcett set out at paragraphs 3.2.1 and 3.2.2 of the List of Issues, the Claimant did not identify any basis for saying Ms Fawcett's motivation was the Claimant's race. The mere fact that managers are friends with one another, or that they treat people unfairly, does not mean that they are motivated by racism. I consider that the Claimant has little reasonable prospect,

without anything to point to which might transfer the burden of proof, of succeeding in showing that the “reason why” was her nationality.

88. In relation to the allegation at paragraph 3.2.4 of the List of Issues, the letter at page 281 of the Hearing Bundle states “*we discussed your ill-health condition which is Paroxysmal Atrial Fibrillation*”. I consider there is no reasonable prospect of establishing the allegation that this letter demonstrates that Ms Beattie did not believe that the Claimant had a heart condition. Allowing for the Claimant’s status as a litigant in person as well as potential communication difficulties, I consider the real complaint here relates to Ms Beattie not accepting the need to make adjustments to the Claimant’s role. This is in reality a mislabelled reasonable adjustments complaint. However, I have found that the Claimant is not disabled and so it has already been dismissed as a complaint of a failure to make reasonable adjustments. The undisputed facts are that the Claimant did not provide information such as medical evidence and refused to answer questions about the effect of the impairment on her day-to-day activities, as well as refusing an Occupational Health referral. Against this background, I consider there is little reasonable prospect of a finding that this failure to accept the need for adjustments to the Claimant’s role was due to her nationality, rather than her refusal to provide information or medical evidence.
89. I consider it is appropriate in all of the circumstances to exercise my discretion to make a deposit order in relation to these allegations, in particular the need to focus on the real issues in the case: namely the more recent events leading to the Claimant’s dismissal.
90. I therefore make a deposit order in relation to the allegations at paragraphs 3.2.1, 3.2.2 and 3.2.4 of the List of Issues.
91. The Claimant was given the opportunity to make representations regarding her means. No evidence of the same was included in the bundle (such as bank statements, evidence of income, outgoings, savings or similar). The Claimant’s submission was that she had not worked in the period since her dismissal and so had very limited means. When asked the amount that she could afford to pay, she said £100.
92. Taking the Claimant’s stated means into account, she is ordered to pay £30 by way of deposit in relation to each of the three allegations at paragraphs 3.2.1, 3.2.2 and 3.2.4 of the List of Issues.
93. There is no obligation to pay a deposit. Claimant has a choice of whether or not to make the deposit payments. If she does not do so, those parts of her claim will not proceed and will be struck out. The Claimant may choose to pay one or more of the deposits and not others.
94. If the Claimant does decide to proceed with the complaints in relation to which the deposit order was made, she also has a greater risk of being ordered to pay the Respondent’s legal costs if she is unsuccessful in these complaints, because she is now on notice that these complaints have little reasonable prospect of success.

**Case Number: 1400494/2024**

**Employment Judge Volkmer  
5 February 2025**

Sent to the parties on:  
26 February 2025

For the Tribunal Office