EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000074/2022

Preliminary Hearing Held at Inverness on 29 November 2023

Employment Judge A Kemp

Mrs G Rabbeth	**Claimant** **Represented by:** **Mr T Cooper,** **Trade union official**
Royal Mail Group Ltd	**First respondent** **Represented by:** **Dr A Gibson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The claimant is a disabled person under section 6 of the Equality Act 2010.**

2. **The application for strike out of the claim under the Fixed Term Workers Regulations 2002 under Rule 37 is refused.**

REASONS

Introduction

1. This Preliminary Hearing was held in Inverness in person, and had been fixed to determine (i) whether or not the claimant was a disabled person as defined by section 6 of the Equality Act 2010 ("the Act") and (ii) whether or not to strike

out a claim pursued under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the Regulations"). The claimant is represented by her union official Mr Cooper, and the respondent is represented by Dr Gibson.

2. There had been an earlier Preliminary Hearing on 16 November 2022 before EJ Hendry. Thereafter the claimant provided a document titled Better and Further Particulars. The respondent provided an amended Response Form. The amendment, which it was said was to re-label an age discrimination claim as one of disability, was allowed unopposed on 10 January 2023, when it was also decided that the present hearing should take place. There was thereafter correspondence with the parties with regard to dates. An initial Notice of Preliminary Hearing was issued for 20 February 2023 then postponed due to the ill health of a representative, and after another date was postponed the present date was intimated.

3. The claims made are for

(i) discrimination arising out of disability under section 15 of the Act,
(ii) indirect discrimination under section 19 of the Act, on the protected characteristics of age, disability and sex.
(iii) reasonable adjustments under sections 20 and 21 of the Act, and
(iv) breach of the Regulations.

4. At the commencement of the hearing I asked Mr Cooper whether he had experience of Employment Tribunals in Scotland, which he confirmed that he did. I explained that, as referred to in an email of 29 September 2023, the disability status issue would be addressed first, and that after that had been done the strike out application would be heard.

5. After hearing evidence and submissions I conducted some research into the law, and after doing so asked the clerk to send a message to the agents on two occasions to allow them to comment on the matters that arose from that research, which the parties each then did.

(i) Disability status

Issue

6. The issue to determine was whether or not the claimant was a disabled person at the relevant time in terms of section 6 of the Equality Act 2010.

Evidence

7. I heard evidence only from the claimant. There were documents that the parties had prepared in a single bundle, most but not all of which were spoken to.

Facts

8. I found the following facts, material to the issue, to have been established:

Parties

9. The claimant is Mrs Gillian Rabbeth. Her date of birth is 21 November 1968.

10. She was employed by the respondent, Royal Mail Group Ltd, as a Postwoman and commenced employment in September 2021.

Impairments

11. In 2018 the claimant had first noticed symptoms of memory loss. She consulted her GP. On 13 April 2021 she was diagnosed as having symptoms of the menopause. Those symptoms were memory loss, difficulty in concentration (referred to by the claimant as “brain fog”), fatigue and poor sleep. She also experienced sweating and itchy skin. She had an appointment with her GP on 26 April 2022 following development of her symptoms and then commenced hormone replacement therapy to treat the symptoms of the menopause on 3 May 2022.

Circumstances

12. The claimant lives with her son, now aged 24, and her granddaughter, now aged 13 and for whom she is the principal carer. She manages the household

for them. She picks her granddaughter up from school. She does shopping for food and other items for the household. She drives a car.

13. The claimant has had, and continues to have, intermittent but regular episodes of memory loss as a symptom of the menopause. On regular occasions of about once every two days she has an issue of memory loss, for example that she forgets what other people, often family members, have said to her during conversations, or she loses her train of thought in a conversation, or forgets where she had placed her mobile phone, and had family members call it to find it.

14. On one particular occasion (on a date not given in evidence) she was due to pick up her granddaughter and forgot to do so at the time, but remembered shortly afterwards. On another particular occasion (also on a date not given in evidence) she was shopping at a supermarket and arrived at the till having forgotten where she had left her basket. She was able to retrieve the basket with the shopping in it shortly afterwards.

15. These symptoms cause the claimant embarrassment, stress and anxiety. She uses a notebook or similar method to remind herself of matters that require to be attended to. She is able to carry out those tasks but it is more difficult and more stressful for her to do so than in the absence of such symptoms, and it may take longer to complete some tasks than would have been the case in the absence of such symptoms.

Work

16. When employed by the respondent the claimant attended their premises for her duties when required to do so, sorted out parcels, prepared them for deliveries, matched the parcel to the delivery address, made the delivery or wrote out a calling card if the recipient was not in, and returned to the respondent's premises. She was aware of her memory problems and prepared details of what she was to be doing each day in her role in a notebook, as a reminder of what she required to do. Her performance in the role was not called into question by the respondent, save in February 2023 as referred to below.

17. The claimant had an accident in the van she used when working for the respondent on 15 January 2022. She collided with a metal pole hidden by overgrown vegetation when exiting a property. She reported it to her manager, and followed the process he suggested to her for reporting it further. There was no disciplinary action taken against her.

18. On 4 February 2022 she had another accident in the van, when she was coming down a hill, came across ice, and did not stop before a minor collision with a vehicle which had stopped at a junction ahead of her. She thought that there was no damage, and spoke to the other driver who appeared to agree with that after looking at the rear of his vehicle using a torch. She did not report the accident that evening, as it had occurred around 6.30pm and when she returned to the premises it was 7.30pm there was no manager present to speak to. She then forgot to report the accident to a manager when reporting for work the next day, a Saturday, and on the following Monday and Tuesday. The accident was a matter raised by the insurer of the other vehicle by email to the respondent, which then raised it with the claimant on 9 February 2023.

19. The claimant had forgotten about the accident and the requirement to report it to the respondent as a result of the said memory problems, one of the symptoms she experienced as a result of the menopause.

Dismissal

20. An investigatory meeting was held on 18 February 2022 at which the claimant accepted that she had not reported the second accident to a manager, explained that she had forgotten to do so, and referred to her having memory problems as a result of the menopause.

21. The claimant was dismissed by the respondent at a disciplinary hearing on 13 May 2022. She appealed that decision, and as a part of that appeal a report was obtained from Dr Richard Archer, Occupational Health Physician, dated 16 June 2022. It stated, *inter alia* “In my opinion Mrs Gillian Rabbeth is not covered by the Equality Act in respect of any disability”. He added that “Studies indicate that of symptoms reported by women during the menopause, memory

lapses are one of the most commonly and consistently reported symptoms. This is thought to be due to the impact of oestrogens on brain function…."

Claimant's submission

22. The following is a basic summary of the submission. The claimant should be held to be a disabled person. The impairment was the menopause resulting in memory loss and concentration issues. The symptoms met the statutory test. Reference was made to a case of ***Merchant v BT Case Number 14013/11***, heard in the Bristol Tribunal and decided in 2012.

Respondent's submission

23. The following is a basic summary of the submission, which was set out in full in writing and supplemented as referred to above. There was a challenge to some aspects of the claimant's evidence, said to be not credible. The statutory test had not been met. The menopause was not an impairment. There was not an adverse effect on the ability to carry out normal day to day activities, and that effect was separately not substantial. It was accepted that the effect if any had been long term. Reference was made to authority, including a number of first instance decisions, one of which - ***Kelly v DWP ET/2500881/2021*** - was argued to be the closest to the facts of the present case and one in which disability status had not been held established. The Tribunal should find that the claimant was not a disabled person. In so far as those matters referred to in the emails sent on behalf of the Judge were concerned no issue was taken with the law as set out there but the claimant did not meet the test.

Law

24. Disability is one of the protected characteristics provided for by section 4 of the Equality Act 2010 ("the Act"). Section 6 of the Act defines disability as follows:

> "(1) A person (P) has a disability if-
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

> (2) A reference to a disabled person is a reference to a person who has a disability."

25. "Substantial" means more than minor or trivial under Section 212(1) of the Act.

26. Further provisions are set out at Schedule 1 of the Act, and paragraph 6 sets out prescribed medical conditions that are a disability. Further provision on such prescribed conditions is made in the Equality Act 2010 (Disability) Regulations 2010. No mention is made in either provision of those who are suffering symptoms of the menopause.

27. The Act implements a number of EU Directives and is to be construed purposively, an obligation which remains as retained law under sections 2 – 4 of the European Union (Withdrawal) Act 2018. The European Framework Directive (2000/78/EC), Article 1 states:

> "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

28. Disability is not defined in that Directive. It was held by the European Court of Justice in ***Chacón Navas v Eurest Colectividades SA: C-13/05, [2006] IRLR 706*** that the word "disability" was to cover those who have a

> "limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".

29. In 2009 the European Union approved the UN Convention on the Rights of Persons with Disabilities. The Convention provides, in recital (e), that

> "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

30. The Directive must be interpreted in a manner consistent with the Convention: ***H K Danmark acting on behalf of Ring v Dansk almennyttight Boligselskab C-335/11 [2013] IRLR 571***, ***Z v A Department*: C-363/12, *[2014] IRLR 563***, and ***Milkova v Izpalnitelen director na Agentsiata za privatizatsai I sledprivatizatsioen control*: *C-406/15, ECLI:EU:C:2017:198*, *[2017] IRLR 566*).**

31. The Equality Act 2010 may be interpreted taking into effect the Convention indirectly, but the Convention does not have direct effect – ***Britliff v Birmingham City Council [2020] ICR 653***.

32. In ***Goodwin v Patent Office [1999] IRLR 4*** the Employment Appeal Tribunal held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

    a. Does the person have a physical or mental impairment?

    b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

    c. Is that effect substantial?

    d. Is that effect long-term?

33. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

34. The term "impairment" is not defined in the Act. In ***Rugamer v Sony Music Entertainment UK Ltd and another 2002 [ICR] 381*** the EAT referred to "some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition." In ***McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 1498*** the Court of Appeal held that the term bears its ordinary and natural meaning.

35. As for what is relevant to the determination of this question, a broad view is to be taken of the symptoms and consequences of the disability as they appeared during the material period, ***Cruickshank v VAW Motorcast Ltd [2002] IRLR***

24 which also held that the Tribunal must determine disability status as at the date of the act (in this case the dismissal).

36. What are normal day to day activities has also been considered in authority. The Court of Appeal in ***Chief Constable of Norfolk v Coffey [2019] IRLR 805*** approved the approach of the EAT in that case, that "the phrase 'normal day to day activities' should be given an interpretation which encompasses the activities which are relevant to participation in professional life". Underhill LJ preferred the term 'working life' rather than 'professional life'. Two cases illustrate that approach being applied.

37. The first is ***Banaszczyk v Booker Ltd [2016] IRLR 273***. The employee had a back condition which was 'long term'. He could lift and move items weighing up to 25kgs in the warehouse in which he worked; however, he could not meet the 'pick rate' of 210 cases per hour. The Employment Tribunal did not consider him to be 'disabled'. The EAT held that the day-to-day activity in question was lifting and moving objects up to 25 kgs and that the claimant suffered a substantial adverse effect because his back condition meant he was significantly slower than non-disabled comparators, such that he could not achieve the necessary "pick rate". The employer's submission that achieving the pick rate was not a 'normal day to day activity' was rejected as confusing the relevant activity with the speed at which it is required to carry it out. The claimant's back condition in rendering his work rate slower hindered his full participation in his working life, and the EAT substituted a finding that he was disabled within the 2010 Act.

38. The second is ***Igweike v TSB Bank Plc [2020] IRLR 267***, where it was held that an effect on normal day-to-day activities may be established if there is a requisite effect on normal day-to-day or professional or work activities, even if there is none on activities outside work or the particular job. The EAT commented that "in many, perhaps most successful cases, disabled status is established because the requisite effects are found on normal day to day activities outside work, or both outside and in work".

39. In ***Coffey*** reference was made to ***Chief Constable of Lothian and Borders Police v Cumming [2010] IRLR 109***. The claimant was a civilian police employee who was also a special constable. She suffered from amblyopia in one eye, resulting in mildly impaired vision. She applied to become a police officer and was rejected because her eyesight did not meet the prescribed standard. She brought a claim for direct disability discrimination. The Tribunal found that her impairment had a substantial adverse effect, on two alternative bases – (a) that her rejection as a police constable recruitment itself constituted a substantial adverse effect and (b) that in any event the effect of the amblyopia on her vision was substantial. The EAT allowed the Chief Constable's appeal. Lady Smith stated in respect of (a)

> "The status of disability for the purposes of the [then 1995 Act] cannot be dependent on the decision of the employer as to how to react to the employee's impairment yet that is, in essence, the argument that the claimant seeks to advance."

40. In ***Ahmed v Metroline Travel Ltd UKEAT/0400/10*** the EAT cautioned against carrying out a balancing exercise between what a person can and cannot do. It quoted from ***Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19***, in which the EAT stated:

> "Whilst it is essential that a Tribunal considers matters in the round and makes an overall assessment of whether the adverse effect of an impairment on an activity or a capacity is substantial, it has to bear in mind that it must concentrate on what the Applicant cannot do or can only do with difficulty rather than on the things that they can do. This focus of the Act avoids the danger of a Tribunal concluding that as there are still many things that an applicant can do the adverse effect cannot be substantial."

41. The assessment required is to determine what the person cannot do, or only do with difficulty, then assess that against the statutory test. That was also the finding of the EAT in ***Aderemi v London and South Eastern Railway***

Ltd [2013] ICR 591, in which it stated the following as to the meaning of "substantial":

> "It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

42. In ***Rooney v Leicester City Council EA-2021-00256*** the claimant argued that she was a disabled person, and suffered from symptoms from the menopause. A list of symptoms was given that included losing personal possessions, forgetting to put the handbrake on, forgetting to lock her car, leaving the cooker or iron on, leaving the house without locking it, and spending prolonged periods in bed due to fatigue. The EAT held that such a person might be a disabled person under the Act, that there had been an error of law by the Tribunal when determining that the claimant was not a disabled person which it had done partly by considering what she could do, and remitted the determination of that issue to the Tribunal.

43. ***Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011***) provides guidance on the matters which are to be taken into account (account of which may be taken under Schedule 1 to the Act, paragraph 12) and ***The Equality and Human Rights Commission Code of Practice: Employment*** which also has guidance on the question of disability status, at paragraphs 2.8 – 2.20 and Appendix 1 (account may be taken of it where it appears to be relevant under section 15(4) of the Equality Act 2006).

44. ACAS has issued non-statutory guidance with regard to the menopause and work.

Discussion

45. I was satisfied that the claimant was a credible and reliable witness. She gave her evidence candidly, and clearly. I did not accept Dr Gibson's submission that particular parts of her evidence should not be accepted. It appeared clear to me that the claimant had first noted memory loss as a symptom in 2018, that she had seen her GP about it then, but that it was not until April 2021 that the menopause had been diagnosed as the cause of it.

46. What was not before me however was either a full report from her GP, or medical records. There was a very brief GP report but that only stated that she had symptoms of the menopause, not the detail or extent of them, or anything about the effect that the symptoms had on her, or the extent of that effect. There was an occupational health report with an opinion to the effect that the claimant was not a disabled person under the 2010 Act, but its author did not give evidence.

47. Within a document titled "Better and Further Particulars" was a section headed Impact Statement, which related to her disability, to which she spoke in evidence, but both the document and evidence about it was somewhat brief and did not contain much in the way of detail. For example it referred to tasks taking longer because of the symptoms of the menopause, but which tasks that referred to, how much longer they took, and with what if any practical impact was not explained either in that document or the oral evidence save by the reference to using a notebook.

48. It appeared to me that although there was no evidence directly before me as to what the menopause was, that was a matter within judicial knowledge. Some aspects of it are referred to in the ACAS guidance. There is reference to it in ***Rooney.*** The menopause is generally experienced by women aged 45 – 55, and is accompanied by changes to hormone levels, particularly oestrogen. Symptoms commonly include issues with memory and concentration, or what is often referred to as "brain fog", as well as others including sweating or flushes, difficulty sleeping, and others.

49. The first question is whether or not the claimant has an i**mpairment**. I am readily satisfied that she does, and that it is occasional memory loss, difficulty in concentration, fatigue and difficulty sleeping, as a result of the menopause. These are I consider a mental impairment for the purposes of section 6. It appears to me to be within the terms of the Guidance and Code of Practice to so find, and it is also consistent with the decision in ***Rooney***. I reject the respondent's contention that there was no such mental impairment, or that the menopause "does not easily fit into the definition of impairment at all. There is no damage, defect, disorder or disease present." Those words are taken from ***Rumager***. But they are also followed by a comparison with another person with mental equipment in normal condition, and I consider that issues of memory and concentration can be a "defect" in that sense in any event.

50. The cause of an impairment does not matter in this context. In the later case of ***Walker v Sita Information Networking Computing Ltd UKEAT/0097/12***, a case about obesity, the then President of the EAT held that "an impairment may be caused as a consequence of a condition which is itself excluded from the scope of the definition of disability". Memory loss and concentration difficulties are clearly a mental impairment, in my opinion. The claimant also spoke in her evidence of sweating and itchy skin but not that they had had any effect at work or more generally. The focus of her evidence was on mental impairment. The other matter she spoke of was fatigue including not sleeping well, but not in the context of that having a material effect on any of her day to day activities. I have concluded that in this case the evidence before me is sufficient for a mental impairment.

51. The second question is whether it caused an **adverse effect on day to day activities**. I am satisfied that it did. The claimant was less well able to carry out activities that required memory, including those at work for which she used a notebook as a method of reminding herself of what was to be done, but also those such as shopping, collecting a child, and having conversations. She also forgot to report an accident which occurred during work, as I accept occurred because of the symptoms from menopause, which I consider also falls within a day to day activity for these purposes, given the analysis set out above. A

day to day activity can include something undertaken at work in appropriate circumstances, as I consider is the position here. That is I consider evidence that her memory problems did hinder her ability to carry out her working life to an extent. That she required to use a notebook to record tasks to be done at work meant, I consider, that she was able to do those tasks with difficulty as that term is used in ***Leonard***. She had other incidents involving an adverse effect of some kind from memory loss, such as repeating what she had said during a conversation because she had forgotten what she had earlier said, which others noted, or losing her mobile telephone and asking others to call it to find it.

52. The third question is whether the effects have been **substantial** (as defined in section 212). This is, in this case, the key issue in my view. Substantial means more than minor or trivial. It is therefore not a particularly high threshold, but the threshold is there. What I must do is to assess the matter on the basis of the evidence before me. Symptoms of the menopause can be such as to meet the statutory test for disability, as ***Rooney*** makes clear, but the simple fact of having symptoms of the menopause does not mean that an employee is a disabled person under that test. Equally, simply because the respondent dismissed the claimant for not reporting the second accident, for reasons I have found are based on memory issues as a result of the menopause, does not mean that she meets this aspect of the test. It is a question of fact and degree.

53. I consider that this case is near the cusp of what is substantial in this context. There are arguments both ways. Dr Gibson made his arguments eloquently. He argued that the evidence does not demonstrate that the effect has been substantial.

54. My conclusion is that the claimant has established that the adverse effect of the impairment is substantial, in the sense of more than minor or trivial. I raised with her during her evidence (without objection from Dr Gibson, when I raised my proposal to do so with him to seek to ensure that the parties were on an equal footing where Mr Cooper is not legally qualified, and had not addressed the statutory test in detail in his questions) whether she could give some details

of the matters referred to in her Better and Further Particulars document, but she was not able to do a great deal more than essentially repeat what was there. The approximate dates of the examples she spoke to were not given as she could not remember that. The frequency of when one of the said symptoms happened was, she said, to be every day or two, which appeared to be mostly in the context of some aspect of memory loss like forgetting what had been said in a conversation, rather than a specific incident such as the one at the supermarket or not collecting her granddaughter when she should have. I accepted her evidence on that.

55. Some of the matters raised were I consider minor ones if looked at in isolation. Forgetting what you have said on occasion, losing a train of thought, sometimes forgetting where a phone has been left, or occasionally forgetting where your shopping is or that you had to pick someone up, is not I consider more than a minor matter when looked at individually. But it is necessary to look at the picture in the round. Where some of these matters arise about every second day they start to assume in my opinion a level of adverse effect which is more than minor or trivial.

56. I appreciate that there are limitations to the evidence given. There was no suggestion that she had forgotten which parcel to deliver where, or when to arrive for a shift, or matters of that kind. The impact on working life was two fold, firstly her using a notebook to record the tasks she required to undertake, and secondly forgetting to report the second accident. The impact on daily life was not to the same extent as in ***Rooney***. There was no evidence of an impact on daily life by for example forgetting to attend a medical appointment, forgetting to lock a house or car when leaving it, or things of that nature. Whilst she might forget something said by her during a conversation, that appeared simply to be pointed out to her, and not have a material effect on the conversation which continued. But the focus is not on what the claimant can do, nor is it appropriate to seek to balance what she can do against what she cannot.

57. Here the evidence was not only of there being lapses in memory during conversations, but also that she used a notebook to write things down as a prompt of memory (both in work and outside it), which clearly meant taking the time to do so, that she could lose her mobile phone and needed someone to help find it by ringing it, and that in day to day life there were occasional problems when shopping or picking someone up. Each of those matters in isolation is I consider minor, but taking them collectively on the basis that one of the memory loss symptoms happens about every second day I consider that they are not minor or trivial.

58. There is also one example of an effect that I consider is, in isolation, other than minor or trivial, which was when she did not report the second accident, as she had forgotten to do so over a period of about four to five days. The reaction by the employer is not to the point in this context. What is I consider relevant is that the memory loss of this incident was in the circumstances of that being the second such accident, and that forgetting that she required to report it (having done so for the first accident) lasted four or more days. In such a situation forgetting to do so appears to me to be not minor or trivial, although I appreciate that it occurred only once. That is not sufficient by itself to establish that the adverse effect on day to day activities is substantial, but is then a matter considered with all of the other evidence. I have concluded that the claimant does, just, meet the statutory test in this regard.

59. I also took into account the fact that the claimant's GP prescribed her hormone replacement therapy as a result of what his report called a "development" of her symptoms, and that that occurred prior to the dismissal. It appears to me unlikely that such a prescription would have been given if the adverse effect of those symptoms was minor or trivial. I consider that it supports the view that the adverse effect on day to day activities was substantial in the statutory sense.

60. In addition I took into account the matters referred to above in relation to European law principles, particularly its reference to an effect on working life. It appeared to me that in reaching a conclusion on whether the effect in

question was substantial I should seek to do so in a manner consistent with ***Navas,*** as well as the definition in the Convention. I considered that it when construing the word "substantial", in the statutory sense, the terms used in ***Navas*** and the Convention were relevant. The former concentrates on working life, the latter on the non-working life, but each is I consider potentially relevant, as the case law including ***Coffey*** refers to***.***

61. The memory loss and concentrations symptoms did, I consider, hinder the participation of the claimant in her professional or working life. That was evident from her using a notebook, which meant that it was more difficult for her to carry out her work duties than for someone without memory problems, and her forgetting to report the second accident for a period of at least four days which she had a duty to report which is unlikely to have happened to someone without such memory problems. Her symptoms did, I consider, hinder her full and effective participation in society on an equal basis with others, as her memory problems and concentration issues affected her interaction with others and ability to carry out tasks such as communicating with others, shopping and looking after a child for whom she cared, to some extent. I considered that these matters favoured the finding that the effect in question was substantial.

62. I considered the 2011 Guidance, and noted that under the heading "Effects of behaviour" there is reference to coping strategies, which using a notebook clearly is. But it appears to me that the Guidance has limits in this regard, including that it has not been amended to take account of the authorities referred to above to the effect that a matter arising at work can be relevant to the assessment of whether or not a person is disabled, that a coping strategy might in any event require to be taken into account where it arises from the effects of the impairment, and that the factors can include the greater difficulty in carrying out a task, which dependent on the facts a coping strategy may still be.

63. The Appendix to the Guidance has an illustrative and non-exhaustive list of examples of factors which, if experienced, it would be reasonable to regard as having a substantial adverse effect on day to day activities. One is "persistent

distractibility or difficulty concentrating". There are other examples using the word "persistent". Some of the matters of which the claimant gave evidence were, in my view, persistent albeit not falling directly within the examples given. Some instances that the claimant spoke to in evidence were more properly described as isolated incidents. There is another list of factors which would not be reasonable to regard as meeting the test. One is "occasionally forgetting the name of a familiar person such as a colleague". The claimant did occasionally forget something, such as picking up her granddaughter or her shopping basket. I concluded that the claimant met in general terms some aspects of some of the examples from both of the lists, such that the Guidance did not really assist me. In any event, it is guidance only, and gives way to the statutory provisions ***- Elliott v Dorset County Council [2021] IRLR 880.*** Those statutory provisions are to be construed purposively as referred to above.

64. I also considered the Code of Practice. Appendix 1 has further provisions, but I did not consider that anything within them assisted me in my assessment in the present case.

65. Whilst Dr Archer's written opinion to the effect that the claimant is not a disabled person is admissible evidence (under Rule 41) it is not determinative, the issue being one of fact and law, not medical opinion. He did not give evidence before me and it is not fully apparent on what factual basis he reached his opinion. I had the benefit of evidence and submissions on the matter. I decided that his opinion was not something that should cause me to change the view that I had otherwise formed.

66. For completeness I should state that I did not find assistance from the various first instance cases to which I was referred by the respondent. They are in any event at best persuasive, not binding. Each case is one to be judged by its own facts and circumstances (as Dr Gibson correctly stated in his submission). The position in law is set out above. I had been referred to one Tribunal case by Mr Cooper which I have attempted to obtain, but without success. It was a Judgment issued before an online Register of decisions was established.

Given that it is a first instance decision, and my comments above, it appeared to me that it was appropriate under the overriding objective to issue this Judgment without the delay that seeking a copy of it further would involve.

67. The fourth question was whether the said effects have been, or will be, **long term**, and that was conceded by the respondent.

Conclusion

68. In conclusion, I consider that the claimant has discharged the onus on her to prove that she falls within the terms of section 6 of the Act.

(ii) Strike out

Respondent's submission

69. The following is a basic summary of the submission, which was again made in writing. The claimant did not suggest that she was being disadvantaged compared with a permanent member of staff. Her claim was bound to fail as a result.

Claimant's submission

70. The following is again a basic summary of the submission. The claimant understood that vacancies for permanent positions were not advertised, but given to other fixed term members of staff.

The law

71. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

72. Rule 37 provides as follows:

"**37 Striking out**

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response 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……

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)

73. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out

the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

74. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

> "For my part 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."

75. Lord Hope of Craighead stated at paragraph 37:

> " … 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."

76. Those comments have been held to apply equally to other similar claims, such as to public interest disclosure claims in ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603, (***with that principle in my view extending to claims in respect of Fixed Term Workers as here). The Court of Appeal there considered that such cases ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success

without hearing evidence and considering them on their merits. The following remarks were made at paragraph 29:

> "It seems to me that on any basis 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."

77. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

> "Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian ***(Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). 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 Man 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 (***ED & F Man … ; Ezsias …).*** 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 (***Ezsias*** … Maurice Kay LJ, at para 29)."

78. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

79. That it is competent to strike out a discrimination claim was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias stated that

> "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."

80. If it is not possible for the claim to succeed on the legal basis put forward it may be struck out – ***Romanowska v Aspiration Care Ltd UKEAT/0015/14.***

81. In ***Mechkarov v Citi Bank NA [2016] ICR 1121*** the EAT summarised the law as follows:

> "(a) only in the clearest case should a discrimination claim be struck out;
> (b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
> (c) the claimant's case must ordinarily be taken at its highest;
> (d) if the claimant's case was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it could be struck out;
> (e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

82. A further summary of the law as to strike out was provided by the EAT in ***Cox v Adecco and others [2021] ILEAT/0339/19.*** It referred to the level of care needed before a claim was struck out, with commentary also on the difficulties faced by a litigant in person (known in Scotland as a party litigant), as the claimant in that case was, in seeking to address matters at an oral hearing. The claimant here is not a party litigant, but is represented by someone not legally qualified.

83. The Regulations implement in UK law the terms of Council Directive 99/70. The duty to implement them purposively remains as retained law as referred to above. The Regulations provide that a fixed term worker has the right not to

be treated by his employer less favourably than the employer treats a comparable employee in relation to, amongst other matters, a detriment under Regulation 3(1), which includes under Regulation 3(2) "the opportunity to secure any permanent position in the establishment.". Who is a comparable employee is provided for in Regulation 2, and is a permanent employee employed by the same employer and engaged in the same or broadly similar work, at the same establishment. Regulation 3(6) provides for a right to be informed of available vacancies in order to ensure that the employee is able to exercise the right under Regulation 3(1). There is a potential defence of objective justification, such that the right is not an absolute one. Provision is made for making a complaint to an Employment Tribunal under Regulation 7.

Discussion

84. I am concerned that the respondent's position may be correct, but have concluded that I should not strike out the case. That is because firstly the Regulations implement an EC Directive and are to be construed purposively, with clause 6 stating "Employers shall inform fixed-term workers about vacancies which become available in the undertaking or establishment to ensure that they have the same opportunity to secure permanent positions as other workers". That basic principle implementing that is found in Regulation 3. There may be argued to be a discrete right to receive notices of any permanent vacancy, separate to the issue of what may be a comparable employee (whether or not there is such a discrete right is a matter on which I express no opinion).

85. Secondly the issue is a narrow one based on limited facts, in circumstances where there is to be a Final Hearing on the claim of indirect sex discrimination and as to disability discrimination in any event. The prejudice to the respondent in having to address this issue is very limited. If it is satisfied as to its position in law it need lead no evidence, but it may do so if that is considered appropriate. If the facts are not disputed they can be agreed in a Statement of Agreed Facts. If they are disputed it appears to me that the evidence relevant to this issue is likely to be in very short compass. It also appears to me that this

might be an issue which has a material bearing on the losses claimed by the claimant, in the event that her argument succeeds, as if so the losses could be argued to be on the basis of a permanent position or the opportunity of that rather than the unexpired period of a fixed term. Again no opinion is expressed as to whether or not such an argument is correct.

86. I have therefore refused the application for strike out.

Employment Judge: A Kemp
Date of Judgment: 20 December 2023
Date Sent to Parties: 20 December 2023