



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4100059/2021

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Open Preliminary Hearing (Edinburgh) held via CVP on 25 November 2021

Employment Judge: R McPherson

10 Ms Abbeigh N Harris

Claimant
Represented by
W Guldberg

15 Adecco UK Ltd

Respondent
Represented by
D Baker
Counsel
Instructed by
B Bacharach
Solicitor

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Amazon UK Services Ltd

Respondent
Represented by
A Francis
Counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Employment Tribunal is that:

- (1) Having considered parties representatives, in the Open Preliminary Hearing, and having issued oral decision, in light of parties' competing submissions, the Tribunal, **refuses** the first respondents application for **Strike Out** and **grants** the **first respondents'** opposed application for a **Deposit Order** to be made, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, requiring the claimant to pay a deposit as a condition of continuing to advance her **specific arguments in relation to Person of Contact in respect of s 13 Equality Act 2010 (EA 2010)** (direct disability discrimination) in her claim against the first respondents.
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- 5 (2) Having considered parties representatives, in the Open Preliminary Hearing, and having issued oral decision, in light of parties' competing submissions, the Tribunal **refuses** the **first respondents'** opposed application for **Strike Out failing which Deposit Order** to be made, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, requiring the claimant to pay a deposit as a condition of continuing to advance her specific arguments **in respect of termination of employment in respect of s 13 Equality Act 2010** (direct disability discrimination) in her claim **against the first respondents**.
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- 15 (3) Having considered parties' representations, the Tribunal **refuses** the second respondent opposed application for **Strike Out**, but **grants** the **second respondents'** opposed application for a Strike Out failing which Deposit Order to be made, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, requiring the claimant to pay a deposit as a condition of continuing to advance her specific arguments in respect of **termination of employment s 13 Equality Act 2010** (direct disability discrimination) in her claim **against the second respondents**.
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- 25 (4) Having considered parties' representations, the Tribunal **grants** the **first respondents'** opposed application for Strike Out, in terms of **Rule 37 of the Employment Tribunals Rules of Procedure 2013**, of the claimant's arguments in respect of **s15 Equality Act 2010 (discrimination arising from disability)** in her claim against the **first respondents**.
- 30 (5) Having considered parties' representations, the Tribunal **refuses** the **first respondent's** opposed application for **Strike Out** and **grants** the second respondents' opposed application for a Deposit Order to be made, in terms of **Rule 39 of the Employment Tribunals Rules of Procedure 2013**, requiring the claimant to pay a deposit as a condition of continuing to advance her specific arguments in respect of **s 20 & s21 Equality Act 2010 (reasonable adjustments)** in her claim against the second respondents.

- 5 (6) Further, taking into account the information provided by the claimant to the Judge, at this Preliminary Hearing, about her ability to pay a deposit, if ordered by the Tribunal, the Tribunal **orders** that, the deposit to be paid by the claimant shall be **£5 (five pounds)** in respect of the claimant's argument in respect of Person of Contact against the first respondent in respect of **s13 Equality Act 2010** (Direct Disability Discrimination).
- 10 (7) Taking into account the information provided by the claimant to the Judge, at this Preliminary Hearing, about her ability to pay a deposit, if ordered by the Tribunal, the Tribunal **orders** that, the deposit to be paid by the claimant shall be **£5 (Five pounds)** in respect of the claimant's argument in respect of termination of employment against the **second respondent only**, in respect of **s13 Equality Act 2010** (Direct Disability Discrimination).
- 15 (8) Taking into account the information provided by the claimant to the Judge, at this Preliminary Hearing, about her ability to pay a deposit, if ordered by the Tribunal, the Tribunal **orders** that, the deposit to be paid by the claimant shall be **£5 (Five pounds)** in respect of the claimant's argument against the **first respondent** in respect of **s20 and s21 Equality Act 2010** (Direct Disability Discrimination).
- 20 (9) A Deposit Order, requiring the claimant to pay a deposit of **£5 (Five pounds)** (in respect of s13 EA 2010, Person of Contact argument against the first respondent), is issued under separate cover, to be paid by the claimant to HMCTS Finance Centre, Bristol, by **Thursday 27 January 2022**, in terms of the Deposit Order signed by the Judge, and issued with guidance notes, along with this Judgment.
- 25 (10) A Deposit Order, requiring the claimant to pay a deposit of **£5 (Five pounds)** (in respect of s13 EA 2010 termination of employment argument against the second respondent), is issued under separate cover, to be paid by the claimant to HMCTS Finance Centre, Bristol, by **Thursday 27**
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January 2022, in terms of the Deposit Order signed by the Judge, and issued with guidance notes, along with this Judgment.

- 5 (11) A Deposit Order, requiring the claimant to pay a deposit of **£5 (Five pounds)** (in respect of s20 and 21 EA 2010 argument against the first respondent), is issued under separate cover, to be paid by the claimant to HMCTS Finance Centre, Bristol, by **Thursday 27 January 2022**, in terms of the Deposit Order signed by the Judge, and issued with guidance notes, along with this Judgment.

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REASONS

Summary

- 15 (1) The claimant appeared via CVP in person supported by her mother Ms Gulberg who has supported in earlier hearings. Neither the claimant nor her mother have been previously involved in equivalent Tribunal procedure prior to the present claim. The first respondents were represented by D Baker Counsel instructed by Mr Bacharach Solicitor. The second respondent were represented by A Francis Counsel. The hearing took place via CVP as previously directed. During this hearing parties were afforded breaks.
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- (2) This Preliminary Hearing was appointed to determine the first and second respondent's applications; for Strike Out under Rule 37 of the ET Rules of Procedure 2013 (the 2013 Rules) for strike out on the ground that it was asserted that the claims had no reasonable prospect of success; or for
- 25 Deposit Order for £1,000 under Rule 39 of the 2013 Rules for the claimant to continue with the proceedings, on the ground that the claims had little prospects of success.
- (3) The first respondent provided a File which is referred to below.

- (4) It is considered appropriate to set out the respective parties' positions broadly and, so far as may be relevant to this hearing, although no findings of fact are made.

The employment relationship as set out by the claimant

- 5 (5) The claimant in her March Further Particulars describes having started with the second respondent "*through*" the first respondent on Tuesday 5 May 2020. In her April 2021 Further Particulars, the claimant describes at para 2 that she "*commenced her employment with Respondent Adecco on the 5 May 2020. Adecco is outsourced to employ staff to work at*
10 *Amazon's premises.*".

The employment relationship as set out by Adecco

- (6) For the first respondent, Adecco in their skeletal argument, it is argued that the claimant was employed by Adecco on **Thursday 30 April 2020**, that she was assigned by Adecco on **Thursday 7 May 2020** to work at
15 Amazon's premises in Dunfermline.

The claimant's allegations.

- (7) The claimant in her March Further Particulars (at paragraph 15) sets out what she describes is a First Incident on **Friday 2 October 2020** describing events which resulted in her putting in a grievance to Adecco.
- 20 (8) The claimant alleges that a subsequent meeting took place **Friday 9 October 2020** with **Adecco's Site Manager** at which the claimant described her condition as Borderline Personality Disorder and from which Adecco agreed to put in place what are described "*two points of contact*" following which the claimant returned to work on **Friday 16**
25 **October 2020.**
- (9) The claimant in her March Further Particulars had in earlier paragraphs under heading Background 1 to 10 *also* describes a subsequent event on Thursday 22 October 2020 as First Incident. In respect of that **Thursday 22 October 2020** Incident, the claimant argues that she was approached

by a named Amazon shift manager in connection with an allegation that she appeared in a video recorded on Amazon's premises which had been uploaded by a colleague. While having regard to the Rule 50 it is not considered necessary to name that colleague in this Judgment beyond the use of initials.

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(10) The claimant describes that she was suspended for filming within Amazon's premises following the **Thursday 22 October 2020** Incident. The claimant asserts that the video, which is said to have made within a restricted work area, was made by a colleague NM. The claimant further asserts that the allegation against her was subsequently changed to one of distribution by the claimant (of that video) on social media with the colleague NM having both admitted to the filming and uploading to social media. I understand that it is not in dispute that the (what Adecco refer to an) assignment of the claimant's colleague NM was not terminated.

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(11) The claimant describes that she was dismissed by **Adecco** on **Sunday 25 October 2020** for filming within an area of Amazon premises (the Thursday 22 October 2020 Incident) and that she submitted an appeal against that dismissal.

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(12) The claimant alleges that she had asked that her mother be permitted to accompany her at the Appeal Hearing on Wednesday 4 November 2020, but that her request was refused. The claimant describes that request (at para 20 to 21 of the March Further Particulars) as reflecting a reasonable adjustment.

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(13) The claimant describes correspondence with Adecco on 4 November 2020 regarding the grievance which was followed by a meeting on **Monday 9 November 2020**.

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Adecco's response to the allegations

(14) Adecco argue that following an incident on **Friday 16 October 2020** which involved allegation that she had misused Amazon equipment, potentially harassed another Adecco employee and disclosed Amazon confidential

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information to third parties without authorisation the claimant was suspended. It is argued by Adecco that following investigation the claimant's assignment was terminated and the claimant subsequently resigned from Adecco. Adecco argue that NM (who is not argued to be similarly disabled) was treated differently because of NM's engagement with the process and this difference did not arise due to the claimant's disability.

Amazon's response to the allegations

(15) For Amazon it is argued, in their skeletal argument (at para 6) that Adecco has conceded it was responsible for the decision to terminate the claimant's assignment.

(16) For Amazon it is noted that that the claim (s13 EA 2010 only) appears to be brought against Amazon on the basis, as set out in the **May 2021 CM Note** paragraphs 31 and 32 that the claimant alleges that Amazon put pressure on Adecco to terminate the assignment. That allegation is denied. It is noted in the May 2021 CM Note that the claimant "*was told by email that it was Amazon's decision to terminate her contract.*"

General Summary

(17) No witness evidence was adduced, although documents contained in the File (or Application Bundle) were referred to for their content, including the ET1 several Further and Better Particulars and ET3s. The file also contained what are said to be notes of investigatory meetings, a grievance by the claimant, a formal warning issued to a colleague, the claimant's doctor report, and a signed and dated written statement by the first respondent's Site Manager (who did not speak to same at this hearing). The first respondent's written submissions were provided, which referred to the File and case law (decisions of the Employment Appeal Tribunal and Court of Appeal). In addition, written submissions were also provided by the second respondent, which again referred to case law and, while broadly so far as relevant to the second adopting the arguments of the second respondent, argues that they should be removed from the present

claim. Where I consider it relevant to matters for this judgment, I have referred to case law below.

5 (18) In relation to such written witness statements, I note that Rule 41 of the 2013 Rules provides greater flexibility on the admissibility than may exist in the civil courts in Scotland than section 2 (1) (a) of the Civil Evidence (Scotland) Act 1998 (CESA 1988). However, I consider that caution remains appropriate on the weight to be given to such statements where the author is not present to be cross-examined.

10 (19) I further reminded myself of the existing guidance in **Tayside Public Transport Co v Reilly** [2012] CSIH 46 9 (**Tayside**) and **Mechkarov v Citibank NA** [2016] 0041/16 (which was cited for Adecco as 2016 ICR 1121) (**Merchkarov**) that it would not be appropriate for the Tribunal to conduct an impromptu mini-trial of evidence to resolve core facts.

15 (20) In all the circumstances and while noting the witness statement, no weight is placed upon same in the absence of the claimant having the opportunity to cross-examination same.

20 (21) After the discussion at the conclusion of this hearing, I confirmed that I would issue a written judgment, including setting out the detail of the matters considered in the Tribunal's consideration of the Applications for Strike Out failing which Deposit Order. This judgment sets those matters out.

General Overview

25 (22) The claimant presented her ET1 on **Thursday 7 January 2021**, against

1. the first respondent company following ACAS Early Conciliation (ACAS certificate, identifying receipt of EC notification **Thursday 20 October 2020** and issue of the ACAS Certificate on **Wednesday 9 December 2020**).

2. the second respondent company following ACAS Early Conciliation (ACAS certificate, identifying receipt of EC notification **Thursday 19 November 2020** and issue of the ACAS Certificate on **Saturday 19 November 2020**).

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(23) ET3's for both respondents were submitted timeously. Both respondents resist the claims, set out their respective positions in ET3, including the first respondent arguing that the claimant's assignment was terminated by the first respondent for conduct-related reasons.

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(24) Following case management Preliminary Hearing on Wednesday 10 March 2021, a Note signed Monday 15 March 2021 was issued to the parties on Monday 15 March 2021 (the **March 2021 PH Note**), setting out that the claimant had been ordered to;

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(i) provide (by Wednesday 24 March 2021) Further and Better Particulars of her disability discrimination claim; and

(ii) intimate (by Wednesday 31 March 2021) all medical evidence in her possession to the Tribunal and respondents relating to her disability, being borderline personality disorder; and

(iii) intimate (by 24 March 2021) a (Disability) Impact Statement.

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(25) The March 2021 PH Note set out that it was agreed that Further and Better Particulars were required to identify which provisions of the Equality Act 2010 (EA 2010) the claimant relied upon. It was described that the claimant would have 14 days from the hearing to provide Further and Better Particulars and set out what the claimant will provide in formulating claims of

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1. Direct Disability Discrimination (s 13 EA 2010); and

2. Discrimination Arising from Disability (s15 EA 2010); and

3. Indirect Discrimination (s19 EA 2010); and

4. Reasonable adjustments (s20, 21 EA 2010); and

5. Harassment (s26 EA 2010); and

6. Victimisation (s27 EA 2010).

(26) The claimant subsequently provided two documents (on Thursday 31 March 2021), one headed Disability Impact Statement, and a second Further and Better Particulars (the claimant's **March 2021 Further Particulars**).

(27) On **Thursday 8 April 2021**, the first respondent set out that the responses were not in accordance with the Order. In particular, it was unclear which of the allegations related to which legal claim and described that they could not sensibly respond due to a lack of clarity in the pleadings.

(28) On **Wednesday 14 April 2021**, the claimant submitted Further Particulars (34 paragraphs) (the claimant's **April 2021 Further Particulars**).

(29) On **Wednesday 28 April 2021**, the first respondent applied for an Unless Order.

(30) A further case management Preliminary Hearing took place on Wednesday 5 May 2021. The note was issued to the parties Tuesday 11 May 2021 (**the May 2021 PH Note**).

3. The May 2021 Notes sets out that the claimant **withdrew** claims of harassment (**s26** of Equality Act 2010 [EA 2010]) and victimisation (**s 27** EA 2010) and

4. The May 2021 Note (paragraph 23) describes that the claimant's representative **did not insist** on any claim in terms of **s19 EA 2010** (Indirect Discrimination); and

5. The May PH 2021 Note (paras 20 and 21) describes that the claimant **is** pursuing claims in terms of **s13 EA 2010** (Discrimination Arising from Disability). The first respondent described (at para 26 to 27) that the

claimant had not explained why what she described as less favourable treatment than that afforded to a colleague (who having regard to the operation of Rule 50 and principles of open justice, is referred to in this Judgment as) NM, took place on the grounds of disability.

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6. The May 2021 PH Note (paragraph 22) describes the claimant pursuing a claim in terms of **s15 EA 2010** (Discrimination Arising from Disability) against the first respondent. The first respondent described, it was noted at para 28, that the claimant had not addressed the elements necessary to establish a basis upon which it could be said that that claimant had been treated.

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7. The May PH 2021 Note (paragraph 27) describes that the respondent understood from the Further and Better Particulars that the claimant **insisted** upon a claim in terms of **s20, s21 EA 2010** (reasonable adjustments). The first respondent (set out at para 27 of the May 2021 Note) described that claimant appeared to include complaints in relation to reasonable adjustments and appeared to conflate the two separate claims under section 13 EA 2010. At paragraph 29, it was described that the argument the first respondent had failed to provide (what is described as) a Person of Contact was already known to the first respondent, but failure to make a reasonable adjustment (failure to allow the claimant mother to accompany her to appeal hearing) was a new claim and the first respondent considered that this amounted to an application to amend the claim.

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5 8. The May PH 2021 Note (paragraph 27) set out that the claimant confirmed that she wished to maintain the (sole) claim against the second respondent (s13 EA 2010), on the basis, she was told by email that it was the second respondents' decision to terminate her contract (that is, it was third party pressure). The second respondent (at para 31) intimated that they wished to seek their client's instructions, this being the subject of an application for Strike Out. At this 10 (November 2021) hearing, the claimant described (although it is not set out in any Particulars for the claimant) that she did not rely upon the issue of an email, but that she had been told by an employee of Adecco that it was the second respondent's 15 decision.

26. On **Tuesday 11 May 2021**, the first respondent provided to the Tribunal and the claimant an application for Unless Order and Draft Order (**the May 2021 first respondent request for Unless Order**)

20 (31) On **Monday 17 May 2021**, the claimant provided Further and Better Particulars and a document headed Unless Order (both of which documents are treated for this hearing as the claimant's **May 2021 Further Particulars**)

25 (32) On **Thursday 8 July 2021**, the claimant provided a document responding to communication from the first respondent (which had set out a Draft Unless Order) and which the claimant has headed "*Response judge and respondents 8/7/2021*" (which is read in association with the first respondent request for Unless Order and is treated for this hearing as the claimant's **July 2021 Further Particulars**).

30 (33) On **Tuesday 4 November 2021**, the first respondent applied for Strike Out of all claims, failing which a Deposit Order should be issued by the Tribunal requiring the claimant to pay **£350** in respect of **each** claim that

is not struck out; and that the second respondent be removed from the proceedings.

5 (34) On **Friday 9 November 2021**, the Tribunal changed this (November 2021) hearing to an Open Preliminary Hearing to consider the first respondent's applications, including Strike Out.

(35) On **Monday 22 November 2021**, the first respondent provided written submissions.

(36) On **Wednesday 24 November 2021**, the second respondent provided written submissions.

10 **Parties position today.**

The first respondent, supported by the second respondent, argues in essence that the claimant's initial evidential burden in such a discrimination claim is upon the claimant. The contemporaneous documentation does not support the claimant's position. Further, the claimant has not given appropriate notice of the basis of her arguments.

15 (37) The second respondent's position is rather starker. They describe that the claimant is aiming at the wrong target. The second respondent notes that the email identified in the May 2021 PH Note has never been provided.

20 (38) The claimant, supported by her mother, argues that she has responded to the requests for further information, and her claims should proceed. The claimant does not offer to withdraw any existing arguments.

25 (39) The claimant additionally raised a matter relating to documentation. In particular, she contends that she has not been provided by the first respondent what she regards as accurate Minutes of a Meeting on **Thursday 22 October 2020**. The first respondent's position is that the Minutes (although not headed as Minutes) have been provided with the Notetaker having directly typed the provided document, while the claimant had left the meeting early. No determination is made. It is considered that

this is essentially a factual dispute which is not apt for resolution at such a Preliminary Hearing.

Strike Out & Deposit Order Rules

(40) In relation to the application for Strike Out and Deposit Order, I consider that it is helpful to set out both of the relevant Tribunal Rules:

a. Rule 37 of the 2013 Rules provides:

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;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(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).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

b. Rule 39 of the 2013 Rules provides:

39 Deposit orders

5 *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that*
10 *allegation or argument.*

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

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

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out,
20 *the consequences shall be as if no response had been presented, as set out in rule 21.*

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given
25 *in the deposit order—*

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

5 *(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

10 (41) I further consider that it is helpful to set out the terms of Rule 76 of the 2013 Rules:

76 When (an expenses in Scotland; costs in England & Wales) order or a preparation time order may or shall be made

15 *(1) A Tribunal may make a (expenses) order or a preparation time order, and shall consider whether to do so, where it considers that—*

*(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise **unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or***

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(b) any claim or response had no reasonable prospect of success.

Strike Out

General Discussion

25 (42) In terms of **Rule 37** of the 2013 Rules, where the party against whom Strike Out is being considered has been given a reasonable opportunity to make representations either in writing or at a hearing, the Tribunal may

Strike Out all or any part of a claim on the basis that it has no reasonable prospect of success.

5 (43) Rule 37(1)(a) of the 2013 Rules provides that a claim may be struck out on the ground that it has **no** reasonable prospect of success. Striking out a claim is a draconian measure that should only be taken in the clearest cases.

10 (44) Strike Out may be appropriate, as described in **Ezsias v North Glamorgan NHS Trust** [2016] 0705/05 & 0612/05 (also at [2007] ICR 1126) (**Ezsias**), where the facts sought to be established are inexplicably inconsistent with undisputed contemporaneous documentation. However, while there is no rule that discrimination cases cannot be struck out, where the basis of the application to strike out is not one of jurisdiction, limitation, or another clear point of law, extreme hesitation would require to be exercised in doing so and may indeed be an error of law to pre-empt the determination of a full hearing. As Lady Smith described in **Balls v Downham Market High Street and College** [2010]0342/10 (also at 2011 IRLR 217) (**Balls**) at para 6, *“there must be no reasonable prospects.”*

20 (45) I note reference for the first respondent, to Underhill LJ’s comments in the Court of Appeal in **Ahir v British Airways Plc** [2017] EWCA Civ 1392 (**Ahir**) where he describes that that (his) use of the phrase *“on the face of it”* invites the response that the problem with a Strike Out is that the claimant has no chance to explore what may lie beneath the surface through cross-examination at a final hearing. He went on to say that
25 *“where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it”*
30 (paragraph 19).

(46) For the first respondent, reference is made to the recent Employment Appeal Tribunal (EAT) decision **Mechkarov v Citibank NA** [2016] 0041/16 (cited as 2016 ICR 1121) (**Merchkarov**), which provides that;

- 5 1. Only in the clearest case should a discrimination case 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,
- 10 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,
- 15 5. A Tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core facts (Indeed, as the EAT noted in **Merchkarov** in Scotland, the Inner House decision in **Tayside** already precluded such an approach).

Deposit Order

General Discussion

(47) I do not consider it necessary to set out the first and second respondent's
20 submissions in detail.

I am satisfied from the timing of the written submissions, which were copied to the claimant, and the history of the claim that the claimant has had a reasonable opportunity to consider the submissions. She was afforded the opportunity to articulate her position at this hearing. I do not,
25 however, consider it necessary to set out her position at length rather, I refer to parties' respective positions in this Note where I consider relevant to the exercise of my discretion.

(48) For the present purposes in terms of **Rule 39** of the 2013 Rules, where the Tribunal considers that any *specific* argument in a claim has little

reasonable prospect of success, the Tribunal may make a **Deposit Order** requiring a party (*“the paying party”*) to pay a deposit **not exceeding £1,000** as a condition of continuing to advance that argument.

5 (49) I considered that several arguments arise from the present claim. While the first respondent seeks a deposit of **£350** for each argument, the terms of Rule 39 of the 2013 Rules permit the *higher* figure of **£1,000** for each individual argument.

10 (50) As above, a Deposit Order may be made if a Tribunal the specific allegation or argument has *little reasonable prospect of success*. In **Hemdan v Ishmail** [2016] 0021/16 (and [2017] IRLR 228) (**Hemdan**) Simler J, described the purpose of a Deposit Order *‘is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails’* (para 10), and that the purpose *‘is emphatically not to make it difficult to access justice or to effect a strike out through the back door’* (para 11). As a Deposit Order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response, several such orders can be made against a claimant or respondent in the same case.

20 (51) I have reminded myself of the EAT guidance in **Tree v South East Coastal Ambulance Service** [2017] UKEAT/043/17 (**Tree**) that a Deposit Orders may not be appropriate where a claimant’s case is simply unclear, and Further and Better Particulars may be appropriate.

25 (52) Amazon and Adecco are entitled to fair notice of the claimant’s claim by reference to the ET1 (and Further and Better Particulars). Similarly, the claimant is entitled to fair notice of any position adopted by a respondent by reference to the ET3. The Tribunal notes that the EAT observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of the ET1 and ET3 *“...is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it”*, and further in

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Chandhok and Another v Tirkey [2015] IRLR 195 (**Chandhok**)
Langstaff J, commented at para 18 parties are expected to set out the
essence of their respective cases in the ET1 (including Further
Particulars), and ET3 and “... *a system of justice involves more than*
5 *allowing parties at any time to raise the case which best seems to suit the*
moment from their perspective. It requires each party to know in essence
what the other is saying, so they can properly meet it”.

(53) It is understood that both the representatives of Adecco and Amazon had
restricted their request to £350 for each argument based on their
10 understanding of the claimant’s present employment position reflected in
the ET1, which describes that the claimant had secured alternate
employment. The claimant at this hearing, however, clarified that she is
not presently in receipt of employment income following a period of
absence, which resulted in the expiry of her entitlement to statutory sick
15 pay and her current weekly income of around £60 reflects a disability
benefit from which she requires to meet gas and electricity and other day-
to-day living expenses.

(54) Both respondents at this hearing intimated that they would not insist on
the £350 figure for each argument, it being left to the discretion of the
20 Tribunal in light of this further information while maintaining that a Deposit
Order would be appropriate.

The second respondent intimated that it should be made clear to the
claimant that, where a Deposit Order has been ordered, if at any stage
following the making of such an order, the Tribunal decides against the
25 paying party (the claimant in this case) in relation to that specific allegation
or argument for substantially the same reasons as those it relied on when
making the Deposit Order, the claimant would automatically be treated as
having acted unreasonably in pursuing that specific allegation or
argument for the purposes of **Rule 76** of the 2013 Rules (unless the
30 contrary is shown) in terms of **Rule 39 (5) (a)** of the 2013 Rules. This
means that the Tribunal would be *required* to consider whether it was

appropriate and proportionate to make an Expense Order or preparation time order (PTO) against that party under **Rule 76(1)**.

Issues between the parties

5 (55) **Disability Status is not in dispute.** While the issue of whether the claimant qualifies under s6 EA 2010 is not a matter of argument, the respondent(s)'s knowledge, at what may be a relevant time, is, however, not agreed upon. The first respondent plead (ET3 para 33-35 and 58) that it was not aware of the claimant's condition until Friday **9 October 2020**. I understand at this hearing that this may be argued later day of Tuesday 10 **20 October 2020**. However, no current issue arises from the same for the present judgment. The claimant (at this hearing) argues that the respondents were aware when she requested a shift change on **Sunday 9 August 2020**.

15 (56) I simply observe at this stage that, if, the claimant seeks to rely as fair notice upon para 3 and 4 of her **May 2021 Further Particulars**, that does not give specification including of the specific date, who within (it is presumed the claimant alleges Adecco) is said to have "*accepted claimants Mental Health*" and what condition that phrase is meant to give notice of.

20 (57) Beyond the question of knowledge (actual or presumed) of disability status, as above the claimant asserts **several arguments**:

- 25
1. **s13 EA 2010 Direct Disability Discrimination** with first respondent describing two arguments against the first respondent and one argument against the second respondent and
 2. **s15 EA 2010 Discrimination Arising from Disability**, against the first respondent only and
 3. **s20, 21 EA 2010 Reasonable Adjustments** against the first respondent only.

Present Applications

(58) Both Strike Out, and Deposit Order applications were intimated as set out above.

5 (59) The first respondent stated it wished to insist upon the application for Strike Out failing which Deposit Order for this hearing.

(60) The second respondent expressly stated it wished to insist upon the application for Strike Out failing which Deposit Order for this hearing.

10 (61) The first respondent's application has the effect of inviting the Tribunal to make a deposit order of **£350** for each of the separate arguments against the first respondent under the statutory heads of claim **s13** Direct Disability Discrimination, **s15** Discrimination Arising from Disability, and **s20, 21** reasonable adjustments; all EA 2010.

15 (62) The second respondent's application has the effect of inviting the Tribunal to make a deposit order of **£350** for the **s13** Direct Disability Discrimination argument against the second respondent rather than £1,000 for that sole argument.

The Arguments + Discussion and Decision

20 (63) I consider that I required to consider each of the identifiable arguments separately, with a preliminary comment on the issues for the Tribunal for each of the statutory heads of claim.

(64) **S13 EA 2010 EA 2010 Direct Disability Discrimination**

25 (65) The claimant argues breaches of **s13 EA 2010 Direct Disability Discrimination** in respect of the first respondent and the second respondent. It is the only identifiable claim against the second respondent (as identified in March 2021 PH Note paragraphs 31 and 32).

(66) It is considered useful to note the essential elements of s13 EA 2010 (direct discrimination because of *the* protected characteristic of disability) claims:

- a. It would be for the Tribunal, absent agreement on each alleged incident, to make findings in fact on each alleged treatment relied upon by a claimant (whether each incident occurred).
- b. Thereafter, the Tribunal would require to consider was that treatment, where the incident was found to have occurred "*less favourable treatment*", i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?
- c. The Tribunal would require to consider what actual or hypothetical comparators the claimant (has given notice of) it relies upon.
- d. The Tribunal would require to consider, if so was this because of the claimant's protected characteristic of disability and/or because of the protected characteristic of disability more generally?

(67) For the sake of clarity, for the remainder of this element of the judgment, I refer to the first respondent as "Adecco" and the second respondent as "Amazon."

(68) **S13 EA 2010 Person of Contact Argument against the first respondent**

Discussion and Decision

(69) For Adecco, it is observed that what the claimant relies upon as treatment is a failure to put in place what is described as Person of Contact for her return to work on Friday 16 October 2020. They deny that they failed to do so. They assert that they put in place two Persons of Contact for the claimant's claimant return to work which they argue took place on Monday 12 October 2020.

(70) That is a factual dispute between the claimant and Adecco and would not, of itself, give rise to questions relevant to Strike Out or Deposit Order.

(71) However, Adecco also observe that for such an s13 EA 2010 claim, the claimant would require to establish such treatment was *because* of the

claimant's treatment. Thus, Adecco noted that the claimant, for s13 EA 2010 would require to satisfy the Tribunal that Adecco would have put in place a Person of Contact for, for instance, a hypothetical comparator in materially the same circumstances as the claimant but who did not have the protected characteristic of disability (Borderline Personality Disorder).

(72) Adecco argue that on their pled case, the claimant cannot succeed. That is essentially a factual dispute as described above.

(73) However, Adecco also rely upon:

a. what is said to be the claimant's contemporaneous email of Friday 23 October 2020 in which the claimant states she was not comfortable with her "*arranged point of contact*"; and

b. the claimant own May 2021 Further Particulars in which she sets out at 4(f) "*the claimant was informed that two managers names [i.e. Stephen Hunter and Andy MaCleod had been substitutes as point of contact [PoCs] without claimant's prior discussion and agreement and therefore without the claimant's agreement this cannot be a reasonable adjustment*"

(74) For Adecco, it is observed that the complained of treatment (of which notice is said to be given), of a failure to put in place **any** Person of Contact for her return to work (whether it be Monday 12 October or Friday 16 October 2020) is contradicted by both (what is stated to be) the claimant's own email and, more critically, the claimant's own pled case.

(75) Adecco further criticise the claimant's failure to clarify, in effect, her comparator and, as they note that there is no identified comparator, it would be inferred the claimant relies upon a hypothetical comparator. For Adecco, it is noted that the claimant describes in her July 2021 Further Particulars a White Female Single Disabled comparator. That, say, the first respondent could not amount to a relevant comparator. I agree a relevant comparator for such a direct disability discrimination claim cannot be a person who also has a disability.

- 5 (76) For Adecco, it is observed that the Tribunal would require, for this claim, to consider was that treatment (where the incident was found to have occurred) "*less favourable treatment*," i.e., did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?
- 10 (77) While I agree with the criticism on the proposed comparator, a Tribunal may conclude, after evidence, that an appropriate (possibly) hypothetical comparator can be identified and that the treatment amounted to less favourable treatment. Taking the claim at its highest, I do not agree that the argument as set out, can be said to have no prospect of success. I, therefore, refuse the application for Strike Out.
- 15 (78) I consider, however, that in the absence of any offer to identify any comparator (including hypothetical), the claimant has little prospect of success in this argument.
- (79) Rule 39(2) of the 2013 Rules provides that the Tribunal shall make reasonable enquiries into the party's ability to pay and have regard to any such information. The information available to me indicates that the claimant's ability to pay is limited.
- 20 (80) While the ET1 indicated that the claimant had secured alternate (albeit at a reduced level) employment upon reasonable inquiries being made of the claimant at this hearing, she confirmed that she has been absent for some time and any entitlement to pay has expired. Her current income, from which she requires to meet gas, electricity, and council tax and the cost of driving (although not rent), is around £60 per week.
- 25 (81) While the purpose of a deposit order is to identify at an early stage claim with little prospect of success, it should not, I consider, operate to restrict disproportionately the fair rights of the paying party or impede access to justice. In all the circumstances, I consider that anything beyond a Deposit Order for a relatively nominal **£5** in relation to the claimant's s13 Direct Disability Discrimination argument against the first respondent may
- 30 operate to restrict disproportionately the fair rights of the paying and

impede access to justice. In the circumstances, I make a Deposit Order in relation to s13 EA 2010 person of contact argument of **£5.00**

(82) **S13 EA 2010 Termination of Employment Argument against the first respondent**

5 **Discussion and Decision**

(83) For Adecco, it is set out that for this claim to succeed, the claimant would need to establish that Adecco terminated the assignment on 25 October 2020 because of the claimant's disability. For Adecco, it is argued that absent direct evidence, the claimant would need to establish that Adecco did not terminate NM assignment, who was involved in the same incident, because NM did not have the claimant's disability.

(84) For Adecco, it is noted that nowhere in the claimant ET1, or in the March, April, May, or July Further Particulars has the claimant set out why she alleges that her assignment was terminated because of her disability.

15 (85) For Adecco, it is argued that the position is simply that they dismissed because of conduct set out in paragraphs 39-41, 43, and 46 of Adecco's (unamended) ET3 paper apart. Further Adecco, offer to establish that the comparative treatment of NM (she was not dismissed) is because NM did not tamper with Amazon equipment and co-operated in the investigation.

20 (86) On this basis, Adecco argue that the s13 EA 2010 termination argument should be Struck Out, failing which a Deposit Order should be issued on the basis that such a claim has little reasonable prospect of success.

(87) I do not agree that this s13 EA 2010 argument can be said to meet the test for Strike Out. It is essentially a question for a Final Tribunal of competing arguments. The claimant sets out in her Further Particulars what she asserts are differences in treatment in her May 2021 Further Particulars at 2 a to 2 e.

(88) I do not agree that this s13 EA 2010 can be said, at this hearing, to have little reasonable prospect of success before the evidence is adduced. It is

clear there is a factual dispute between the claimant and Adecco. The claimant argues that an identified non-disabled individual NM involved in the same incident was not dismissed, and there were differences in the process. Adecco, argue that the reason for the difference in treatment was the comparative actions of the claimant and NM, including their engagement in the investigation. That is a matter of fact.

(89) In the circumstances, no Deposit Order is made against the claimant in respect of her s13 EA 2010 termination of employment argument as against Adecco.

(90) **S13 EA 2010 Termination of Employment Argument against Amazon**

Discussion and Decision

(91) The claimant is said to maintain (her only) claim against Amazon, arguing that Amazon brought third-party pressure upon Adecco. That is summarised in paragraphs 31 and 32 of the May 2021 PH Note. The May 2021 PH Note at paragraph 31 describes the claimant maintains she “*was told by email that it was Amazon’s decision to terminate her contract.*”

(92) For Amazon, it is pointed out that Adecco expressly plead (at paragraph 50 of their ground of resistance) that Adecco was responsible for the decision to terminate the claimant’s assignment. Adecco at paragraph 50 describe that its Site Manager “*discussed the*” incident on Friday 16 October 2020, and “*corresponding investigation with*” Amazon’s Workforce Staff Manager “*.. informed... that in light of the*” incident and Adecco’s investigation “*... it was Adecco’s intention to terminate the Assignment*” Amazon’s Workforce Staff Manager “*did not object to this course of action.*”

(93) Further it is noted that Amazon in their ET3 describe including from paragraph 3.11 to 3.20 and thereafter, provide a narrative of events giving notice of their position that Adecco suspended the claimant, investigated, terminated the assignment, and indeed operated the appeal.

- (94) The Tribunal further notes that while the May 2021 PH Note seeks to articulate the claimant's position, that is not reflected in the ET1 at 8.2, it is not set out in the claimant's March 2021 Further Particulars. The claimant describes briefly at paragraph 32 of her April 2021 Further Particulars, in the context of a criticism of Adecco's alleged delay in issuing a P45 that "*This delay was because Adecco had not in fact dismissed her and stated that Amazon had insisted upon her dismissal.*" In the claimant's May and July 2021 Further Particulars, the allegation is not repeated, nor does the claimant offer to clarify, as she did in this hearing, that she does not rely upon any email, but upon what she now says, but does not plead with any specification as to identity and date, she was told by a person within Adecco.
- (95) The initial question for s13 EA 2010 is to consider what alleged treatment is relied upon by a claimant. The treatment is considered to be that set out briefly at paragraph 32 of her April 2021 Further Particulars, in the context of a criticism of Adecco's alleged delay in issuing a P45 "*Adecco had not in fact dismissed her and stated that Amazon had insisted upon her dismissal.*"
- (96) The claimant does not go on to describe any actual or hypothetical comparator in her limited narration at paragraph 32 of her April 2021 Further Particulars. The claimant does not offer to clarify the position in her May 2021 Further Particulars.
- (97) The claimant does not offer to argue that this treatment (the pressure) was indeed less favourable treatment for the purpose of s13 EA 2010, nor that Amazon treated the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances.
- (98) Having regard to **Ahir, I** consider that the claimant can, with limited justification, say that she has set out a reason for her belief. She has, however, failed to give any specification despite being afforded the repeated opportunity to do so. In the circumstances, I am not satisfied that her s13 EA 2010 claim against Amazon has no reasonable prospect of

success. What parties describe is a different factual analysis. I am not satisfied that it can be said there is no reasonable prospect of success, and the request for Strike Out is refused.

5 (99) On the basis that the claimant has not taken any steps to date, to give written fair notice of the basis for her assertion is that “*Amazon had insisted upon her dismissal,*” taken together with it being inconsistent with the express pled position by Adecco, I consider that the claimant’s (sole) claim against Amazon places it beyond that described in **Tree** as merely being unclear (in which case Further Particulars would remain
10 appropriate) and satisfies me that the claimant has little prospect of success in her claim against Amazon.

(100) In relation to the s13 EA 2010 argument against Amazon, I am required to make reasonable enquiries into the paying party’s ability to pay a Deposit and have regard to any such information when deciding the
15 amount of the Deposit.

(101) Again, the purpose of a deposit order is to identify claims with little prospect of success at an early stage. It should not operate to disproportionately restrict the fair rights of the paying or impede access to justice. In all the circumstances outlined above concerning the claimant’s
20 current circumstances, I consider that a nominal Deposit Order is appropriate, in relation to the claimant’s s13 EA 2010 argument against Amazon, of **£5** payable as directed above.

(102) **s15 EA 2010 (Discrimination Arising from Disability) against Adecco.**

Discussion and Decision

25 (103) A number of issues arise for a s15 EA 2010 claim:

- a. It would be for the Tribunal, absent agreement, to make findings in fact on whether the respondent treated the claimant in a particular manner as asserted. (e.g., by dismissing a claimant). In relation to this issue, no comparator is required.

- b. The Tribunal would require to consider what are the thing(s) the claimant gives notice of, as arising in consequence of the claimant's disability? e.g., the claimant's number of days' sickness absence between date and date?
- 5 c. The Tribunal would require to consider whether the respondent treated the claimant unfavourably, e.g., Did the respondent dismiss the claimant because of any of those things. e.g., sickness absence?
- d. If so, the Tribunal would consider whether the respondent shown that the unfavourable treatment relied upon, e.g., dismissing the claimant, was a proportionate means of achieving a legitimate aim? In relation to this element, it would be for the respondents to give notice as legitimate aim(s) they rely upon.
- 10 e. Further, the Tribunal would consider whether the respondent has shown that it did not know, and could not reasonably have been expected to know at the material time, that the claimant had the disability?
- 15 (104) The claimant asserts that being back on medication is the “*something arising*” she relies upon in relation to an alleged failure on the part of the first respondent to carry out what the claimant asserts was a proper investigation. The claimant describes, in her **July 2021 Further Particulars** para 3(ii), that “the *something arising*” was that the “*Claimant had been off medication and is now back on them.*”
- 20 (105) It may be envisaged that being placed back on medication (by her treating physician) could arise in consequence of her disability (in the sense of her it being a treatment for BPD). However, the claimant does not offer to plead a causal link between being back on medication and the alleged failure, which she relies upon, on the part of the first respondent to carry out what the claimant asserts was a proper investigation before terminating the assignment on **Sunday 25 October 2020.**
- 25

- (106) Further, as the first respondent observes on the contemporaneous documents, there is evidence of a process including gathering evidence, holding investigatory meetings, and taking statements including from the claimant.
- 5 (107) In addition, the first respondent points to the claimant's contemporaneous evidence (her consultant letter of Thursday 5 November 2020 to her GP *authorised* Friday 6 February 2020) contained in the File sets out that the claimant was only prescribed medication (that is placed back on medication) from **Friday 6 November 2020**, around 12 days after the date
10 upon which the claimant's temporary assignment at the second respondent was terminated.
- (108) In the course of this hearing, the claimant set out that her assertion of the "*something arising*" in her **July 2021 Further Particulars** arose through an error. That is to say, it is not what she intends to rely upon.
15 The claimant did not offer to set out what, if anything, the correct "*something arising*" she relies upon.
- (109) The respondent is entitled to fair notice of the claim they are expected to meet. The March 2010 PH Note was explicit in Ordering that the claimant provides Further and Better Particulars (in effect) by Wednesday 24
20 March 2021, including in respect of the s15 EA 2010 claim. The March 2010 PH Note set out the constituent elements for s15 EA 2010 (at page 3 within paragraph 5).
- (110) The claimant has not complied with that Order, in the March 2021 Further Particulars, in the April 2021 Further Particulars, nor in the May or indeed
25 July 2021 Further Particulars. It is not sufficient for the claimant to say her position on her s15 EA 2010 claim is in error and argue that she should be permitted to proceed to a Final Hearing on such a claim.
- (111) While recognising that this is a discrimination claim, the claimant's **s15 EA 2010** claim meets the requirement of Rule 37 of the 2013 rule, including
30 having regard to **Ezsias** and **Merchkarov**. It has no reasonable prospect of success.

(112) The claimant's **s15 EA 2010** (Discrimination Arising from Disability) argument against Adecco is struck out.

(113) **s20 and s 21 (reasonable adjustments) against the first respondent**

Discussion and Decision

5 (114) The issues for the Tribunal under these provisions would include;

a. Did the respondent know, or could it reasonably have been expected to know the claimant was a person with a disability?

10 b. A "PCP" is a "*provision, criterion or practice*" applied by an employer to its workforce. Did the respondent have / or apply specific PCP(s) which the claimant gives notice they rely upon (e.g., a physical feature or indeed a failure to provide an auxiliary aid)?

15 c. Did the PCP for which notice is given/relied upon put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, and in what way?

d. If so, did the respondent know, or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

20 e. If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The Tribunal reminds itself that the burden of proof in this question does not lie on the claimant, although it is helpful to know what steps the claimant alleges should have been taken.

25 f. If so, would it have been reasonable for the respondent to take those steps at any relevant time?

(115) The claimant argues (by reference to the July 2021 Further Particulars) that "*A Person of Contact was agreed at a meeting with*" Adecco's Site

Manager for her return (whether, for present purposes, that was on Monday 12 or Friday 16 October 2020).

- 5 (116) For Adecco, it is argued that the claimant cannot establish the central issues the claimant requires for this head of claim, including relying upon what is said to be a contemporaneous email from the claimant and further the claimant's own pleadings, in particular, her May 2021 Further Particulars quoted above where she describes that she was informed that two managers had been substituted as Person of Contact without her agreement.
- 10 (117) In relation to the relevant provision, criteria or practice applied by Adecco to its employees, for Adecco, it is argued that any failure to follow an arrangement which was entered into to provide a Person of Contact at most amounts to a one-off act. In her July 2021 Further Particulars, the claimant describes in response to the question of what PCP operated by Adecco that she relies upon, that "*A Person of contact was agreed at a meeting with*" Adecco's Site Manager on Friday 9 October 2020. It is, however, considered relevant to note in the next paragraph of the July 15 2021 Further Particulars, the claimant offers a description of Adecco "*not putting in place the person of contact.*"
- 20 (118) Adecco refers to the Court of Appeal decision of **Ishola v Transport for London** [2020] A2/2019/0014 (cited as [2020] ICR 1204) (**Ishola**) to the effect, that a practice must refer to how things were (or would be) generally done. For Adecco, it is argued that a failure to follow a course of action which it would otherwise have done (a failure to put in place a Person of Contact where it ordinarily would have done) would amount, at 25 most, to a one-off act in dealing with the claimant.
- 30 (119) In **Ishola** at paragraph 35 in which, giving the leading judgment, Lady Justice Simler noted in relation to the concept of a PCP: "*it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words and did not use the words "act" or "decision" in addition or instead*".

(120) At para 36 of Ishola Lady Justice Simler continued, “*The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.*” She went on to find that “*all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again...Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.*” She distinguished an earlier decision on the basis that it was “*readily understandable as a decision that would have been applied in future to similarly situated employees*”.

(121) For Adecco, it is argued that the alleged failure, which the claimant asserts “*left claimant open to situations which ultimately saw the claimant being Dismissed*” is implausible to the point of being absurd. For Adecco, it is argued that the claimant’s position is that had a Person of Contact been in place, the claimant would not have (as is alleged) breached Amazon policies and or failed (as is alleged) to co-operate during the investigation. I disagree. That is the analysis that Adecco offer. Taken at its highest, the

claimant argues that any alleged failure to co-operate arose from a failure to implement what is alleged to have been agreed. The claimant responds to the question of what the PCP is, commenting that a Person of Contact was agreed at a meeting with Adecco's Site Manager and describes that it was not put in place in the next paragraph. It is imprecisely expressed.

5

(122) For Adecco, the submissions (at 48.2) fairly and, in my view, reasonably anticipate "*any alleged failure by Adecco*" would amount to at most a one-off act in dealing with an individual.

10

(123) I consider that applying **Merchkarov**, the claimant case must be taken at its highest. That includes reading the PCP to refer to an alleged failure to implement the agreement at the meeting with Adecco's Site Manager for a specific agreed Person of Contact. On that analysis, it would be for the claimant to satisfy the Tribunal that such an approach would be taken again if a similar hypothetical case arose.

15

(124) However, and while applying that reading, it is not clear why and on what basis (taking into account the claimant's July 2021 Further Particulars, which describe the substantial disadvantage as leaving the claimant open to situations which ultimately saw the claimant being dismissed), such a PCP (if it was held to be such) of failing to implement such an agreement, would have any impact on what is alleged by Adecco as the conduct of failure to co-operate during the investigation. On this basis, it appears the s20, 21 EA 2010 claim against Adecco has "*little reasonable prospect of success.*"

20

25

(125) While not achieving the level required for strike out (**Ezsias** and **Merchkarov**), the s20 and s21 claim against Adecco meets the test for a Deposit Order here.

30

(126) In relation to the claimant s20, s21 EA 2010 argument, I am required to make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(127) Again, the purpose of a deposit order is to identify claims with little prospect of success at an early stage. It should not operate to disproportionately restrict the fair rights of the paying or impede access to justice. In all the circumstances and for the reasons expressed above regarding the claimant's current financial position, I consider that a nominal Deposit Order is appropriate in relation to the s20, 21 EA 2010 argument of **£5** payable as directed above.

Conclusions

(128) **Unless** the claimant **pays the relevant deposit** as directed above, the **s13 EA 2010** argument in respect of Person of Contact against the **first respondent** to which the **Deposit Orders** relate **will be Struck Out** by the Tribunal.

(129) **Unless** the claimant **pays the relevant deposit** as directed above, the **s13 EA 2010** argument in respect of termination of employment against the **second respondent** to which the Deposit Orders relate **will be Struck Out** by the Tribunal.

(130) The claimant's **s15 EA 2010 argument** (which is directed only against the first respondent) meets the requirement of Rule 37 of the 2013 Rules and **is struck out** as having no reasonable prospect of success.

(131) **Unless** the claimant **pays the relevant deposit** as directed above, the **s20, 21 EA 2010** argument against the **first respondent** to which the Deposit Orders relate **will be struck out** by the Tribunal.

(132) If she seeks to have the Deposit Order varied, suspended, or set aside by the Tribunal, then the claimant must make a written application to the Tribunal, with cc to the respondent's representative, as soon as possible, and before the time limit for payment expires.

(133) If the claimant decides **not** to proceed with **any** of the arguments in respect of which Deposit Order has been made (s13 EA 2010 Person of Contact against the first respondent, s13 EA 2010 Termination of Employment against the second respondent, and s20 & 21 EA 2010

against the first respondent), she should give written notification to the Tribunal identifying which argument including which of the section of the Equality Act 2010 the argument relates, with a copy to the respondent's representatives.

5 (134) If the Deposit is paid as directed above, her s13 EA 2010 argument in respect of Person of Contact argument against the first respondent will proceed to the next case management Preliminary Hearing and as further directed.

10 (135) If the Deposit is paid as directed above, her (sole) s13 EA 2010 argument against the second respondent will proceed to the next case management Preliminary Hearing and as further directed.

(136) If the Deposit is paid as directed above, her s20, 21 EA 2010 argument against the first respondent will proceed to the next case management Preliminary Hearing and as further directed.

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Employment Judge: R McPherson
Date of Judgment: 21 December 2021
Entered in register: 05 January 2022
and copied to parties