EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102907/2022

Open Preliminary Hearing held over CVP on 16th May 2023

Employment Judge McFatridge

Ms C Connolly-Brown	**Claimant** **Represented by:** **Mr Kadirgolam**
The City of Edinburgh Council **.**	**Respondent** **Represented by:** **Mr Scott Milligan - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1 The claim of unfair constructive dismissal is struck out under rule 37 (1) (a) and 37(1) (c) of the Employment Tribunal (constitution and rules of procedure) regulations Schedule 1.

2 The claim of direct disability discrimination under s13 of the Equality Act 2010 is struck out under rule 37 (1) (a) and 37(1) (c) of the Employment Tribunal (constitution and rules of procedure) regulations Schedule 1.

3. The claim of a failure to make reasonable adjustments is struck out in respect of all the claims save the claim that the respondent failed to comply with a duty to provide mental health training. This claim is made on the basis that certain of the claims are time barred and in terms of s37(1) (a) of the Employment Tribunal (constitution and rules of procedure) regulations Schedule 1.

4. The remaining claims under s15 of the Equality act and in respect of a failure to make reasonable adjustments by failing to provide mental health training shall proceed to a final hearing

REASONS

Background

1. The claimant submitted a claim to the Tribunal on 26th May 2022. She ticked the boxes in section 8.1 to indicate she was claiming that she had been unfairly dismissed and discriminated against on grounds of disability. In the paper apart to the claim she noted that she was claiming constructive dismissal and that she was claiming under section 13, 15 and 21 of the Equality Act. In paragraph 7 of the paper apart she narrated the history of her employment. In paragraph 9 she noted various reasonable adjustments which had been requested by her. In paragraph 12 she states that:

> "The claimant has found the treatment and actions of the respondent in response to her requests for reasonable adjustment were very stressful and she has been affected mentally. Her anxiety increased and her mental health illness has deteriorated to the extent the claimant could not continue carry out her work duties and she eventually had no choice but to resign."

2. The respondents submitted a response in which they denied the claim. They raised the preliminary issue of time bar in relation to specific parts of the claim which predated 18th December 2021. They also confirmed they did not

accept the claimant was disabled. They sought further specification of the claimant's claim. They then set out their chronology in terms of the Equality Act and set out their position in respect of each of the claims being made. A Preliminary Hearing took place on 27th July 2022 before EJ McManus. Various Orders were made with a view to the claimant further specifying her claims. This was to be complied with by 24th August 2022. The claimant subsequently applied for this deadline to be extended to 31st August 2022. On 31st August the claimant responded to the Orders (pages 57-61). On 2nd September the respondents wrote to the Tribunal. They indicated they were happy that the claimant had complied with Orders 1 and Orders 3. With regard to Order 2(2)(a)-(d) I noted that absolutely none of the specific questions asked by EJ McManus had been addressed. They noted the remaining paragraphs within the document were exact replicas of the ET1 pleadings.

3. The respondents applied for an Unless Order. The application was objected to by the claimant and a Preliminary Hearing took place on 2nd November 2022 following which the Tribunal made an Unless Order requesting the same information as that set out by EJ McManus following the Hearing on 27th July. During the course of that Hearing on whether to grant the unless order there was specific discussion of exactly what the claimant had to do in order to comply with the Order. During the course of discussion EJ Bradley in his Note confirms that he fully agreed with the respondents that the Orders had not been complied with. EJ Bradley made specific reference to the case of **Johnson v Oldham Metropolitan Borough Council** (UKEAT0095/13) and the need for fair notice. The terms of the Unless Order were as follows:

> "Unless the claimant sends to the respondent and the Tribunal by no later than 16th November 2022 her written response to the Order 2(2)(b) of EJ McManus dated 27th July 2022 the claim under section 15 of the Equality Act 2010 shall be dismissed ..
>
> (3) Unless the claimant sends to the respondent and to the Tribunal by no later than 16th November 2022 her written response to Order

2(2)(c) of EJ McManus dated 27th July 2022 the claim under sections 20 and 21 of the Equality Act 2010 shall be dismissed …

(4) Unless the claimant sends to the respondent and the Tribunal by no later than 16th November 2022 her written response to Order 2(2)(d) of EJ McManus dated 27th July 2022 the claim of breach of contract shall be dismissed …

Unless the claimant sends to the respondent and the Tribunal by no later than 16th November 2022 her written response to Order 2(2)(a) of EJ McManus dated 27th July 2022 the claim under section 13 of the Equality Act 2010 shall be dismissed …"

4. The claimant duly produced a response which bore to be in response to the unless Order on 16th November 2022.

5. On 7th December 2022 the respondent responded to the information provided noting that whilst the claimant had complied in fundamental terms with the Unless Order by providing a written response, many aspects of the response were lacking in terms of specification and the claimant was called upon to further specify the claim. On 23rd December 2022 the claimant had a further attempt to specify the claim. On 1st February 2023 the respondents wrote to the Tribunal noting the information which they considered still to be outstanding and to be essential before the case could proceed to a Hearing. This was discussed at the Case Management Preliminary Hearing which took place on 1st February 2023 before EJ Porter. The Note from this is lodged (pages 86-88). It was determined that the respondents would apply for an Order under Rule 31 for the outstanding information and that any failure on the part of the claimant to comply with the Order would found the basis for future procedure such as a PH on strike out/Deposit Order or indeed the granting of a further Unless Order (page 87).

6. On 20th February 2023 an Order for further specification was issued. The terms of this Order are set out at pages 92-93. The claimant responded to

the Order on 13th March 2023. Her response is to be found at pages 93-95. Following this on 23rd March 2023 the respondents applied for a Strike Out Order in respect of the claims of direct discrimination (section 13), failure to make reasonable adjustments (section 21) and unfair constructive dismissal. The Hearing to determine this application was fixed for 16th May. Prior to this EJ Porter had written to the respondents formally asking them whether any other remedy such as an application for an Unless Order had been considered by the respondents (page 102-103). The respondents set out their position in response to this letter in a document lodged at pages 104-106.

7. A Preliminary Hearing took place on 16th May and both parties made submissions. No evidence was led.

Respondents' Submissions

8. The respondents' representative confirmed that he was seeking a strike out which failing a Deposit Order in respect of the claim of direct discrimination under section 13 of the Equality Act and the claim relating to reasonable adjustments under section 20 and 21 of the Equality Act. He was also seeking strike out, which failing a Deposit Order in respect of the claim of unfair constructive dismissal. Furthermore and in any event it was his position that certain parts of the claim relating to reasonable adjustments should be struck out on the basis they were time barred. He made no motion in respect of the claim under section 15 of the Equality Act of discrimination arising from disability. He set out the history of the matter. With regard to the section 13 claim his position was that this claim should be struck out under section 37(1)(a) on the basis that as currently set out it had no reasonable prospect of success. He indicated that the claimant's latest attempt to specify the claim was still woefully insufficient. The claim entirely lacked specification. He pointed out that all that was alleged was simply that the disability process had been handled badly. He noted this was not a case where the claimant was seeking to represent herself. The claimant had been represented by a qualified solicitor from the outset. Despite this the

respondent faced a claim based on shifting sand. He referred to the case of **Johnson v Oldham** and the need for fair notice.

9. All that the respondents knew about the claim of direct discrimination was that "the less favourable treatment that the claimant relies on is her disability at the workplace had not been handled properly by the respondent." It is noted that the less favourable treatment is said to have occurred between November 2019 until the date the claimant's employment terminated on 8th May 2022 (page 93). The answer goes on to state:

> "The claimant requested the respondent to consider her disability and provide her with reasonable adjustments to assist her carry out her work duties because of her disability. The respondent failed to consider the claimant's request and failed to provide the reasonable adjustments as requested."

10. The respondents' representative pointed out that there is a difference between a claim of direct discrimination and a claim of a failure to make reasonable adjustments. Even taking matters at its very highest the claim made little sense. It did not offer anything like a reasonable prospect of success. In his view it should be struck out under section 37(1)(a).

11. It was also the respondents' position that the claim of direct discrimination should be struck out under section 37(1)(c). He pointed out that the claimant had been ordered to provide the information sought as far back as July 2022. The claimant had not complied. There had then been a Hearing as to whether or not an Unless Order should be granted. At this Hearing the Tribunal had repeated to the claimant in absolutely no uncertain terms what was required of her in order to comply. Whilst the claimant had thereafter provided a document which did provide answers and met the bare terms of the Unless Order, the answers themselves did not provide the additional information sought. It was the respondents' position that a fair trial was simply not possible on the basis of the claim as currently stated. The claimant had clearly shown that she was not in a position to provide any

additional specification which would meet the terms of the statute. The respondents' representative made reference to the letter from EJ Porter and confirmed the view set out in the correspondence that there was really no other remedy other than strike out. There was absolutely no reason to suggest that another Unless Order would be any more successful than the first one had been. The difficulty with granting another Order would be that essentially an Unless Order is binary. Either a claimant complies with the bare bones of the Order or they do not. If they do not the claim is automatically struck out. The position with the first Order was that there had been compliance in the sense that answers had been provided. The difficulty was that the answers did not meet the legal requirements for specifying a valid claim. In his view the claimant had been given ample opportunity to address the issues and had clearly chosen not to.

12. The respondents' representative indicated that if the Tribunal was not with him in granting an Unless Order which he appreciated was a draconian remedy then he was seeking a Deposit Order. This would be on the basis that the claim had little reasonable prospect of success. He repeated essentially the same arguments as he had in respect of his application for strike out under Rule 37(1)(a).

13. With regard to the claim of a failure to make reasonable adjustments the respondents' representative indicated that this application was solely based on Rule 37(1)(a). It was his position that the claim as set out had no reasonable prospect of success. The claimant had outlined 6 failures at pages 74-77. These were:

(a) a Wellness Action Plan/Support Plan
(b) quiet place to work
(c) noise cancelling headphones
(d) specialist chair
(e) mental health training
(f) clarity on work responsibilities.

14. The respondents' agent noted that these had all been pled under section 20(3) on the basis that the duty arose where a provision, criterion or practice of the respondent put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. He noted that in his most recent correspondence on page 105 the claimant's representative does make some fleeting reference to certain items being auxiliary aids but it was his position that there was currently no claim under section 20 (5) before the Tribunal. The claimant had been ordered to provide details of the provision, criterion or practice allegedly carried on by the respondent which put the claimant at a particular disadvantage. It was the respondents' position that despite this request being clear the claimant had entirely failed to provide this. The respondents' representative made reference to the case of **Secretary of State for Justice v Prospere** LIKEAT 0412/14and noted that it was a key part of any claim for reasonable adjustments that the provision, criterion or practice alleged was clearly identified. In the case of **Secretary of State for Justice v Prospere** UKEAT/0412/14 the key role of the PCP was set out. In his view it must be set out in the claim that it was not for the Tribunal to try to piece this together.

15. With regard to the Wellness Action Plan the PCP was said to be that the respondent did not provide such a Plan at the workplace to a disabled person like the claimant. The respondent referred to the case of **McCue v Glasgow City Council** 2023 UKSC1. This recent Supreme Court case reaffirmed the principle that a PCP must be applicable to all. Given that the PCP identified stated that the PCP was only applied to disabled people like the claimant it could not be a valid PCP for the purposes of this claim.

16. With regard to number 2 -a quiet place to work -the claimant's position (page 94) was that "the policy and practice management of the respondent at the working place did not provide the claimant with a quiet place to work. As noted above a PCP must be something applied to everyone which places a disabled person at a disadvantage. It was their position this could not be a PCP. With regard to numbers 3 and 4 noise cancelling headphones and the specialist chair the PCP was said to be simply not providing these to the

claimant. Once again this cannot be a POP. The respondent made the point that there was no suggestion that the claim was to be made under section 20(5) and there had been no application to amend so as to state that these claims were in respect of a failure to supply auxiliary aids.

17. With regard to point 5 the claimant had stated that the respondent was aware of the claimant's mental health illness and the policy and practice management of the respondent did not provide the mental health training at the workplace. It was the respondents' position that no specific PCP had been identified.

18. In respect of clarity on work responsibilities the claimant had stated:

> "The claimant requested clarity on her work responsibilities due her disability. The policy and practice management at the working place did not provide clarity on the work responsibilities to a disabled person like the claimant. It is once again the respondent's position that this was insufficiently clear.

19. It was the respondents' position that the claimant had further confused matters when they stated at page 111 that the failure to make the reasonable adjustments amounted to a PCP that indirectly discriminated against the claimant. It appeared to them that the claimant was conflating her reasonable adjustments claim with a claim under section 19 which was currently not pled. It was the respondents' position that the claim was not properly articulated and as such had no reasonable prospect of success. In the alternative the respondents sought a Deposit Order.

20. The respondents' position was that the claim of constructive unfair dismissal should also be dismissed under Rule 37(1)(a) as having no reasonable prospect of success. It was the respondents' position that the claimant had not identified the alleged breach of contract which they say entitled the claimant to resign. It was their position that the most succinct summary of this was contained on page 83 which was the response made to the

respondents' request for further information dated 7th December 2022. This stated:

> "The respondent did not follow the policy and procedures referred to in the employment contract. The alleged breach occurred between November 2019 and May 2022."

The claimant had had another attempt to answer the question at page 95 following the Case Management Order issued on 20th February 2023. This confirmed that the claim was based on the respondent having breached term 15 of the employment contract and the policy and procedures on the Equalities and Diversity Policy referred to in the employment contract. The respondents had lodged a copy of the claimant's terms and conditions of employment. Paragraph 15 is on page 124 and states:

> "Your terms and conditions of employment (including certain provisions relating to your working conditions) are covered by Council policies and existing national and local collective agreements negotiated and agreed with specified trade union or trade unions recognised for collective bargaining purposes in respect of the employment group to which you belong. The national collective agreements are embodied in the Scottish Joint Council for Local Government Employees National Agreement on Pay and Conditions of Service known as the Red Book as adopted by the City of Edinburgh Council . . ."

The Equality and Diversity Policy was also lodged and this extends for some 37 pages. It was the respondents' view that there had been a complete failure to provide them with reasonable fair notice of this claim. They were also concerned that the claimant appeared to be saying that at page 111 in the most latest communication to the Tribunal that the claim is not solely based on breach of contract. The respondents' position was that it was trite law since **Western Excavating v Sharp** that in order to make a claim of constructive dismissal the claimant must show that the respondent has been

in repudiatory breach of contract. It was the [respondents' position that this claim had no reasonable prospect of success as currently pled and should be struck out. It was also their position that given the claimant's complete failure to comply with the Case Management Orders which had been made and repeated on various occasions. The claim should also be struck out under Rule 37(1)(c). As matters stood there was no prospect of a fair hearing taking place in respect of this claim given that the respondents did not have fair notice of what the claim was.

21. Finally it was the respondents' position that irrespective of the Tribunal's decision as to whether or not certain parts of the claim should be struck out under Rule 37 it was their view that certain of the reasonable adjustments claims were time barred and the Tribunal did not have jurisdiction to hear them. They pointed out that in this case the claimant was not suggesting that it would be just and equitable to extend time and accordingly those claims which had been submitted outwith the 3 month period prior to the commencement of early conciliation were time barred. It was the respondents' position that those incidents which predated 18th December 2021 were time barred unless they could be shown to be part of a course of conduct extending into the period subsequent to this.

22. With regard to the claim of a failure to make reasonable adjustments in respect of a quiet place to work the ET1 at page 25 makes it clear that the last date the claimant worked at the respondents' premises at Waverley Court was 16th March 2020. (Page 25). Any claim based on her time at Waverley Court would therefore have to have commenced no later than 15th June 2020. This claim is therefore time barred by around 18 months.

23. With regard to the noise cancelling headphones the claimant's ET1 states that she purchased her own pair on 24th October 2019 and then received the pair from the respondent approximately one month later i.e. in November 2019. It would appear that a claim based on a failure to provide headphones is hopelessly time barred.

24. With regard to the specialist chair, on page 26 the claimant accepted that the specialist chair was provided on 16th December 2021. Any claim would require to have been lodged by 16th March 2022. Early conciliation was not started until 18th March and this claim is therefore time barred by 2 days. The respondents rejected the suggestion that these individual matters could be regarded as part of a continuing course of conduct as appeared to be being suggested by the claimant's representative. The respondents referred to paragraph 19 of the Judgment in **Corr v University of Edinburgh.** The claimant had to set out a reasonably arguable basis for the contention that specific acts were part of a continuing act. In this case it was absolutely clear that these were single events. The claim was of a failure to provide reasonable adjustments. It was the claimant's own case that these had been provided and it could in no sense be argued that the failure to provide was continuing after the reasonable adjustments had been made even if it was the claimant's position that other acts of disability discrimination were ongoing.

25. The respondents' position was that it would be possible for the Tribunal to simply strike out these 3 claims without hearing any evidence. If on the other hand the Tribunal was not with them and decided that it was not self evident that these were not part of a continuing act then the respondent wished to reserve their position to argue at any subsequent Hearing that these matters were time barred on the basis that they were not part of a continuing act.

26. The claimant began by pointing out that the claimant had 4 claims and that no challenge was being made in respect of the claim under section 15 of the Equality Act for discrimination arising from disability. The claimant's representative made the point that this was a serious claim. He appeared to be under the impression that the respondents were basing their application on there being insufficient evidence to support the claim. I indicated to him that that was not what the respondents had said and that this Hearing was not dealing with evidence. The claimant's representative then went on to state that with regard to the claim of direct discrimination the claimant had provided the reason why she felt discriminated against by the respondent. He said that disability was at the centre of the claim. He said that the

claimant had advised the respondents at the outset of her employment that she had a mental illness and that the respondents knew this from at least November 2015. He said that even prior to November 2019 the claimant was off twice with mental health for substantial periods. He said the respondent should have known that.

27. I intervened with the claimant's representative in order to have him seek to answer the points made by the respondents' representative. Unfortunately the claimant's representative did not do so. After some interventions from myself he indicated that if I felt that the pleadings were defective then he would wish to apply for the opportunity to amend his claim so as to deal with the points made.

28. I suggested to the claimant that the difficulty was a complete lack of specification. With regard to the section 13 claim the claimant appeared to be saying that she had been treated less favourably than a hypothetical non disabled comparator would have been treated had that non disabled comparator been subject to a disability process. I indicated that I found this concept difficult. I explained that at the moment the respondents had no idea who to bring to the Hearing. If the Hearing progressed then as soon as the claimant tried to give evidence in relation to the detail of her section 13 claim it was likely that the Tribunal would be faced with the invidious choice of either adjourning so as to allow the respondent to take instructions or upholding the respondents' objection to the evidence being led on the basis that there was no notice. Despite this the claimant's representative continued to entirely fail to address the issues involved.

29. He went on to say that there was a chain of emails which could be lodged. It was his position that the acts had been continuous from November until the claimant resigned in May of 2022. He said that with regard to the reasonable adjustments claim that a Wellness Action Plan had been requested by the claimant and by Occupational Health and had never been provided and that that act continued. He indicated that there were 5 separate Occupational Health Reports which he would be referring to. He then said that the

Wellness Action Plan had not been provided but even if it had been provided it had never been implemented. He said that the claimant had requested a quiet place to work and after a few months was put in a hot desk place that did not meet her requirements. He repeated what was said in the ET1 claim form but did not try to change what was said about all this having stopped in March 2020. Again he said that if the claimant could not provide the correct PCP then the Tribunal could easily identify this. If not he asked that the claimant be allowed to make amendments. He said that with regard to the suggestion that the 3 of the reasonable adjustment claims were really claims about auxiliary aids rather than about a PCP then the claimant should be allowed to amend her claim so as to make it a claim under section 20(5). This was simply a relabelling and no new facts were being pled. He said that it was simply the fact that the word auxiliary aid had not been mentioned.

30. With regard to the constructive unfair dismissal he referred to the latest note from the claimant. He then went on to say that her constructive unfair dismissal was not based on a breach of contract. It was based on the fact that she had been ignored over a lengthy period and that the respondents had failed to handle the case properly from November 19 until she resigned. He referred again to over 30 email exchanges over this period. I intervened at this point to indicate that I agreed with the respondents' position that it was a basic tenet of employment law that in order to make a claim of constructive dismissal an employee must identify a repudiatory breach of contract by the employer. The claimant's representative then went on to state that he was relying on section 15 of the contract as previously stated. He said that the respondents did not follow their own policies. He said that it was not section 15 itself per se but that section 15 set out that all of the policies were part of the contract. He referred to the Equality and Diversity Policy which specifically said that employees should not be discriminated against. He said that the claimant required mental health training which had not been provided. He then asked for clarity in her work. This would assist her mental health and had not been provided by the respondents. He said that section 15 of the employment contract said which policies the employers would follow and that this had been breached. He then went on to refer to the

discrimination arising from claim under s15 which I indicated was not being challenged. He indicated that it was his position that there was one overall course of conduct of disability discrimination and that this had extended to 4th May 2022 when there was an email from a Laura Manson. He reported that this was the last meeting in respect of a Wellness Plan which had been provided on 7th January but never implemented due to various problems. It was his view that the claims could not be time barred given that the course of discriminatory conduct continued until 4th May 22. He mentioned the various authorities including **Ezsias v South Glamorgan Health Board.** This indicated that discrimination cases should only be struck out rarely and should not be struck out if they were disputed facts. It was a high test and in his view it would be unfair at this stage for the claimant's claim to be struck out. He again indicated that if the Tribunal was of the view that the information provided by the claimant so far would not allow a fair Hearing to be heard then he would provide further information. He noted that he could apply to amend. With regard to the Deposit Order he confirmed that the claimant's financial circumstances were as set out in correspondence. She was in receipt of legal aid. She was on benefits and had no capital. It was his view that she could not pay anything at all by way of a Deposit Order.

The Respondents' Counter Submission

31. The respondents' representative noted that the claimant had offered to provide further information to the Tribunal by way of amendment. The respondent's representative stated that this would be completely unsatisfactory. He noted that there had been considerable case management since July last year. There had been considerable efforts to move the case to a stage where it could be heard. He felt that it could not possibly be the case that it was in line with the overriding objective to allow the claimant yet another attempt. He stated that the responses of the claimant's representative gave little confidence that the appropriate legal test would be dealt with properly. With regard to the suggestion that the claimant could seek to amend their reasonable adjustments claim to a claim under section 20(5) in respect of auxiliary aids he pointed out that no such

application had been made either prior to the Tribunal or indeed at today's Hearing. Any such application would be opposed by the respondent if it were made. With regard to the claim of constructive unfair dismissal the respondent noted that there had been some further attempt to specify the claim as being an allegation of breach of the Equality Policy but he noted that this was not in any pleadings and there was absolutely no fair notice of what this claim was about. With regard to the general point made by the claimant's representative that he could provide more information if the information so far provided was unacceptable this entirely missed the point. The problem was not the provision of insufficient information. The problem was the inability to meet the relevant legal tests. He said fairness has to work both ways and that the claimant has to give fair notice of the claim. With regard to the Deposit Order he indicated that a Deposit Order was simply a warning of limited prospects of success and that there would be an application for expenses if the claim continued. He considered that if the claimant was legally aided then the Legal Aid Board might pay the deposit and in this case he would suggest a figure of £250. If not, even if the claimant had little money he would wish the sum to be a reasonable one such as £25. The claimant's representative was given the last word and repeated again that this was a serious case for the claimant. She had been off 5 times with her illness, the last time for 170 days. He considered it would be unjust for her claim not to be heard. He noted that the fourth claim under section 15 would be proceeding in any event and again stated that if there was problems with the pleading then the claimant could make an application to amend.

Discussion and Decision

32. It was clear that as stated by the EAT in **Balls v Downham Market High School and College** UKEAT/0343/10 strike out is a draconian power that should only be exercised after careful consideration of the available material including all matters put forward by the parties and the documentation in the Employment Tribunal's file. It is an extremely high test in that the Tribunal must be satisfied there is absolutely no reasonable prospect of success. The case of **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330 makes

it clear that where facts are in dispute it would only be very exceptionally that a case would be struck out without hearing evidence so as to determine these facts. In that case it was stated that Tribunals should not be striking out claims as having no reasonable prospect of success unless the facts as alleged by the claimant disclose no arguable case in law.

33. It was the respondents' position that certain aspects of the case made out by the claimant met this very high test. It is as well to deal with each of the claims which the respondents say meet this test in turn.

Section 13 Claim of Direct Disability Discrimination

34. This is a claim under section 13 of the Equality Act. Direct discrimination is defined as taking place where "a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others. …" As can be seen the essence of the claim is that the claimant is saying that she has been treated less favourably than a comparator because of her disability. In this case the claimant has confirmed she is relying upon a hypothetical comparator and therefore in order to succeed the claimant requires to show that she was treated less favourably than the respondents would have treated someone who was not disabled. The first difficulty for the claimant is that in order to succeed with this claim she will require to lead evidence as to what the unfavourable treatment was. We would agree with the respondent that, at the moment, despite being represented by a solicitor and there being over 10 months of case management the only factual averments which the claimant has made which are relevant to this would appear to be the statement at page 93 that "her disability at the workplace had not been handled properly by the respondents.". Whilst the claimant has at various times set out a number of factual averments most cogently it would appear in paragraph 7 of the paper apart to the original ET1 these facts would appear to relate to a claim under section 15 for discrimination arising from disability. There are absolutely no averments in respect of any incidents where it is said the claimant was treated less favourably than the respondents would have treated a non

disabled person because of her disability. As I indicated to the claimant's representative at the Hearing the difficulty for the Tribunal is that the respondent is entitled to fair notice of the claims being made against them. To simply say that the respondents did not handle the claimant's disability properly over the period between November of 2019 and May 2022 does not give that fair notice. If it is the case that the claimant does have some factual averments to make which are relevant to this claim then she has clearly not made them. If she wished to refer to them at the Hearing she would not be permitted to since the respondents' representative would no doubt resolutely object.

35. The second difficulty for the claimant is that even the bare statement which has been made makes absolutely no sense as a claim of direct disability discrimination. In order to succeed the claimant is going to have to persuade the Tribunal that the claimant was treated less favourably than a comparator. The comparator would presumably be a non disabled person who was being subject to being managed for their disability. This simply does not make any sense.

36. Whilst I can appreciate that the claimant may wish to "tick all the boxes and include a claim of direct discrimination as well as her claim under section 15 it appears to me from looking at the correspondence as a whole and the various attempts to deal with this claim that unless there is something that the claimant could have pled which is being missed out there is not a claim of direct discrimination here. For this reason it is my view that the claim under section 13 has no reasonable prospect of success and should be struck out under Rule 37(1)(a). I will deal with the application under section 37(1)(c) below.

37. With regard to the claim of a failure to make reasonable adjustments I note the respondents' arguments and would agree that the claimant has failed to specify a POP in respect of 5 of the 6 reasonable adjustments identified. With regard to one of the adjustments namely the provision of mental health training my view is that the claimant has just and only just passed the

threshold of identifying a POP. It is not immediately clear from the pleadings just what exactly is meant by the term mental health training. The PCP is said to be "the respondent was aware of the claimant's mental health illness. The policy and practice management of the respondent did not provide the mental health training at the workplace.". In submissions the claimant's representative made reference to various Occupational Health Reports and suggested that this need had been identified there. I have not seen these Reports and do not know if this is the case but if it is not I presume the respondents would be in a position to ask for further particularisation of this point if it is not already known to them. The fact is that the claimant is saying that there is something called mental health training at the workplace and that this would have been of some benefit to the claimant. The claimant is offering to prove that the respondents had a policy of not offering this. In my view they have just and only just identified a PCP and I cannot say that this claim has no reasonable prospect of success.

38. With regard to the other 5 adjustments mentioned I would agree with the respondent that no PCP has been properly identified.

39. That having been said my view is that I would not be prepared to strike out the claims relating to the reasonable adjustments described as noise cancelling headphones and specialist chair purely on the basis that no pep has been identified. Whilst I would agree with the respondent that right up to today's date the claimant's representative has made no attempt to plead these claims properly as a claim under section 20(5) relating to auxiliary aids my view is that if the claimant did apply to amend his claim in order to categorise these claims as being claims under section 20(5) rather than claims under section 20(3) such an amendment would almost certainly be allowed by the Tribunal. The matter is fairly academic since as can be seen below I consider both of these claims to be time barred and I do not see any point in an amendment process but for that reason I would not be striking out those 2 claims under Rule 37(1)(a).

40. I do however strike out the claims of failure to make reasonable adjustments in respect of the Wellness Action Plan/Support Plan and the quiet place to work and clarity of work responsibilities for the reasons given by the respondent. The claimant has not identified a PCP and given the law as set out in the case of "Prospere" the claimant's claim cannot succeed without this and it is not for the Tribunal to try to piece together their own PCP from the facts.

41. With regard to the claim of constructive unfair dismissal I would simply record that I entirely agree with the respondents that the case of **Western Excavating EEC Limited v Sharp** makes it clear that in order for a claimant to be regarded as dismissed under section 95(1)(c) of the Employment Rights Act 1996 (i.e. claim constructive dismissal) there required to be established that the respondents' conduct has amounted to a repudiatory breach of contract.

42. Somewhat surprisingly although the somewhat sparse facts narrated by the respondent might have been pled as a breach of the implied term of trust and confidence the claimant has not done this. I have considered carefully whether I should treat this as a drafting error but I also note that there is nothing in the factual averments which would actually support the various factual points amounting to a breach of trust and confidence. By this I mean that the claimant has not anywhere averred that the respondents' actings amounted to a breach of this implied term. What the claimant has said in paragraph 12 of her ET1 is

> "The claimant has found the treatment and actions of the respondent in response to a request for reasonable adjustments were very stressful and she has been affected mentally, her anxiety increased and her mental health illness has deteriorated to the extent the claimant could not continue to carry out her work duties and she eventually had no choice but to resign."
>
> What this is saying is that the claimant resigned because her health had deteriorated albeit she appears to be stating the reason for that

deterioration can be laid at the door of the respondent. At the Hearing the claimant's representative was at first extremely vague about what the breach of contract was. His initial position indeed was that their resignation was not caused by a breach of contract. When the law was pointed out to him he nailed his colours firmly to the mast of paragraph 15 of the claimant's terms and conditions of employment. I understood his position to be that paragraph 15 meant that the respondents' Equality and Diversity Policy was imported into her contract and that the respondents had been in breach of this.

43. I required to look at this case taking it at its highest and decide whether it has any reasonable prospect of success. My view is that it does not. The first point is once again the issue of fair notice. In order to succeed in her claim the claimant will have to adduce evidence of factual incidents which have taken place which are in breach of this term. She would have to identify a last straw if it was her position that this was a continuous course of conduct and there was a last straw which led her to make her decision to resign. She has not done so. More fundamentally the Equality and Diversity Policy is not actually referred to in paragraph 15. It appears to me that in order to establish her claim and succeed the claimant would require to give evidence of matters which are not foreshadowed in the pleadings and which could clearly be objected to by the respondent. Given this it is my view that the claim should be struck out under Rule 37(1)(a).

Rule 37(1)(c)

44. It was also the respondents' position that if I was not with them that certain of the claims should be struck out under section 37(1)(a) then the claims of direct discrimination and unfair constructive dismissal should be struck out under Rule 37(1)(c) given the claimant's continued failure to comply with the various Orders made. In this connection I would refer to the timetable of events set out above in the background section. The claimant was first ordered to provide the necessary information on 27th of July following a

Preliminary Hearing at which it was clearly stated that these claims required additional specification. There was no compliance. There was then a further Hearing as to whether an Unless Order should be granted. Once again at this Hearing the claimant's representative was clearly advised that the pleadings were defective and what would be the likely consequence if these defects were not dealt with. I would agree with the respondents that the answers given to the Unless Order were unsatisfactory albeit I can understand their decision not to seek a strike out at that time which would possibly have resulted in an unnecessary Hearing. I note that Ms Porter would appear to have agreed with the fact that additional information was still required. The claimant's representative was then given the benefit of a very detailed Questions Order drafted by the respondents' agent and at the end of the day we are in a situation where the essential information underpinning those 2 claims has not been provided.

45. In deciding whether or not to strike out for non compliance with an Order I am required to have regard to the overriding objective. I am required to consider all relevant factors including the magnitude of the non compliance, whether the default was the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and whether a fair Hearing would still be possible and whether some lesser remedy would be an appropriate response to the disobedience. I must consider whether strike out is a proportionate response to the non compliance. In the case of **Blockbuster Entertainment Limited v James** [2006] EWCA Civ 684 makes it clear that it takes something very unusual indeed to justify striking out on procedural grounds.

46. In this case I consider that the failure to specify the claim of direct discrimination has been an extremely serious failure to comply. It has gone on for some time despite numerous attempts by 3 Employment Judges to clearly advise the claimant's solicitor what is required. It has been disruptive in that almost a year after the claim has been submitted the case is not yet ready to proceed to a Final Hearing. I note in this connection the respondents indicated that all but one of their anticipated witnesses has left

the respondents' employment. It may be of course that if the claimant did eventually specify a relevant claim other witnesses would be required but at the moment neither the Tribunal nor anyone else would know who these are.

47. I am required to look at the issue of whether the non compliance was the fault of the agent or the claimant. In this case I am unable to make up to come to a decision on this. On the basis of what is currently in the pleadings there does not seem to be a claim of direct discrimination on grounds of disability or at least one that the Tribunal could adjudicate on. As the claimant's representative notes there is a claim of discrimination arising from disability and it appears to me that subject to some minor matters of specification this could proceed straight to a Hearing. I think it would be unwise of me to place blame on the claimant's representative when it may simply be that the claimant's representative is making the best he can of the facts available to him. The main issue for me to determine is whether or not a fair trial of the direct discrimination claim is possible. In my view it is not. As noted above if there are any facts on which a claim of direct discrimination can be hung then the moment the claimant tried to give evidence in relation to these facts the Tribunal would be faced with a strenuous objection from the respondents' representative on the grounds that there is no fair notice. In my view any Tribunal hearing the case would require to uphold this objection. The only other possibility would be to further adjourn any Hearing so as to allow the claimant time to properly specify the claim. I think this is unlikely. I did consider whether the offer by the claimant's representative to provide further information by way of amendment/Further Particulars would assist. My view is that it would not. The claimant's representative has been given ample opportunity and clearly told what is required. There is absolutely nothing to suggest that this would change if any further time was allowed. For this reason it is my view that even if I was not striking out the claim of direct discrimination under section 37(1)(a) then I would be striking it out under section 37(1)(c) also.

48. With regard to the claim of constructive unfair dismissal similar considerations arise. The claimant has had ample opportunity to properly specify this claim.

The claimant has not done so. The claimant's pleadings actually suggest at paragraph 12 that the claimant resigned not in response to any breach of contract by the respondent but due to her deteriorating health. She has not provided the information sought in order to provide fair notice of a claim of constructive unfair dismissal. Once again at this stage I simply cannot say whether that is because none exists or because the claimant's representative has decided for some reason not to provide it. The legal basis of the claim has been clearly stated by the claimant's representative and in my view, as stated above has no reasonable prospect of success. There is nothing before me to suggest that the various defects in the pleadings are likely to be resolved. As was stated by EJ Langstaff in **Johnson v Oldham Metropolitan Borough Council** UKEAT0095/13 at paragraph 3 "cases where one party defiantly refuses to accept a judicial view of what is needed to ensure a fair Hearing such that no fair Hearing can be arranged resulting in the dismissal of the case without a Hearing on the Merits will be rare particularly were case management powers have been exercised with a view to holding a just Hearing." In my view the claimant's claim of constructive unfair dismissal is just such a case. The claimant and her representative have been clearly told from the outset what is required. They have refrained from doing so. My view is this claim should also be struck out under Rule 37(1)(c) as well as 37(1)(a).

Time Bar

49. It was the respondents' position that the claim relating to a failure to make reasonable adjustments in respect of a quiet place to work, noise cancelling headphones and specialist chair should be dismissed on the basis that the Tribunal had no jurisdiction to hear these as these claims were time barred. In my view it was clear that early conciliation had been started more than 3 months after the date each of these adjustments had been implemented by the respondent. It was my view that it was clear that the early conciliation would have been required to have been made within 3 months of the implementation dates in order for the Tribunal to have jurisdiction to hear it. The respondents' position was that these matters could all be regarded as

one continuing act. I entirely disagreed. I was referred by the respondent to the case of **Kaur v Edinburgh City Council.** I note at paragraph 19 that it is clearly stated that it is not enough for the claimant to make a bare assertion that specific acts are part of a continuing act. The claimant has to set out a reasonably arguable basis for that contention. In my view the claimant has not done so in this case. In my view it is not necessary for the Tribunal to hear evidence on this point. An employer who has implemented a reasonable adjustment has stopped failing to make that reasonable adjustment on the date they implement it. The matter is complete. The claimant does not refer to any authority for the proposition that repeated delays to implement reasonable adjustments is a failure encompassed within section 21. The duty is to make the adjustment and on the claimant's own case the respondents made these adjustments more than 3 months before the date early conciliation commenced. In my view it is quite clear that the Tribunal has no jurisdiction to hear these claims no matter what else was allegedly going on at the time.

50. For the above reasons it is my decision that the claims of direct discrimination under section 13 be struck out in its entirety under section 37(1)(a) and section 37(1)(c) of the Tribunal Rules. The claim of unfair constructive dismissal is struck out in its entirety under Rule 37(1)(a) and 37(1)(c). The claim of a failure to make reasonable adjustments is struck out apart from the claim that the respondents were under a duty to provide mental health training and fail to provide it. All other claims are struck out. The claim in respect of a Wellness Action Plan/Support Plan, quiet place to work and clarity of work responsibilities are struck out under section 37(1)(a). The Tribunal has no jurisdiction to hear the claims relating to noise cancelling headphones and specialist chair on the basis that these claims are time barred.

51. I indicated to the parties at the end of the Hearing that I could see no point in discussing further case management since this would depend on the outcome. Given my Judgment it is my view that this case can now proceed to a Final Hearing to deal with the remaining claim under section 15 of the

Equality Act and the one outstanding claim relating to reasonable adjustments. A date listing stencil should be sent to the parties with a view to listing this claim.

Employment Judge: **I McFatridge**
Date of Judgment: **12 June 2023**
Entered in register: **12 June 2023**
and copied to parties