EMPLOYMENT TRIBUNALS

Claimant: Mr S Baber

Respondent: Royal Bank of Scotland

Heard at: Birmingham **On:** 4 February 2019

Before: Employment Judge Findlay

Representation
Claimant: In person
Respondent: Ms N Owen (Counsel)

JUDGMENT having been sent to the parties on 6 February 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues:
1. On 17 January 2019 I listed this case for an open preliminary hearing to consider whether to strike out the claimant's claims on the following grounds:
(a) That the manner in which the proceedings have been conducted on behalf of the claimant is unreasonable; and/or
(b) for non-compliance with the tribunal's orders of 5 June 2018 and/or 23 August 2018 (the last date is an error and referred to Employment Judge Woffenden's order of 23 *November* 2018; the claimant clearly understood that I was referring to Employment Judge Woffenden's order of 23 November because he refers to it in an email sent to the tribunal on 1 February 2019 at 16.46 pm.);
(c)because the claims are not being actively pursued and/or
(d)that it is no longer possible to have a fair hearing in respect of the claim and
(e) (if necessary)to give further directions as required.

2. I gave directions for the parties to agree a single bundle of documents for the purposes of the open preliminary hearing no later than 14 days before the hearing and for them to exchange witness statements (at least seven days before that hearing) in respect of any witness upon whom they wished to rely in respect of the preliminary issues. In the event, there was no agreed bundle, but I received a bundle running to 429 pages from the respondent (the claimant said that he had only received it days before, but it largely consisted of

correspondence between the parties and Orders of the Tribunal and Employment Appeal Tribunal ("EAT"), together with a chronology, table of "Orders missed and Hearings vacated" and written submissions.

3. From the claimant I received a bundle running to 172 pages, together with an email dated 1 February 2019 with a letter from Dr P Turpin dated 29 January 2019,screen shots of a reminder for a medical appointment for the claimant dated 7 January 2019, a record of GP appointments for the claimant between July 2018 and January 2019, a letter dated 7 December 2018 requesting that the claimant make an appointment at the Dental Hospital, a letter confirming that the claimant had cancelled an appointment at the Queen Elizabeth Hospital for 11 December 2018 and rearranging it for 19 February 2019, a letter dated 9 January 2019 notifying the claimant of an appointment at the ENT Clinic at Heartlands Hospital on 4 February 2019 and a further appointment with a Gastroenterologist at Heartlands on 22 January 2019.

4. The claimant arrived approximately 20 minutes late, as he had on the previous occasion. The tribunal waited for him to arrive before starting. At the start of the hearing I checked that the claimant was comfortable with the lighting, a desk lamp having been provided. I also asked the clerking team to ensure that the claimant had a separate room to use when not in tribunal and asked him regularly if he needed a break. There was a break between 11.25am -12.05pm (after the respondent's opening submissions), for the respondent to familiarize themselves with the claimant's bundle and a further opportunity for the claimant to think about his submissions and familiarize himself with the index for the respondent's bundle. There was a further break for lunch between 1pm and 2pm. At 1pm I told Mr Baber he could have from 2pm until 2.25 to complete his submissions, he having commenced doing so at 12.05pm (and the respondent having been afforded approximately 1 hour for their opening submissions). In fact, I allowed him to continue until 2.35pm having reminded him how long he had left at (approximately) 2.20 and 2.30pm.

Factual background

3. The claim for unfair dismissal and/or disability discrimination was brought on 29 December 2013 after the claimant was dismissed with effect from 30 September 2013.
4. The claimant has previously appealed against strike out of his claim to the Employment Appeal Tribunal, and following the hearing on 18 January 2018 (which the claimant did not attend, previous EAT hearings having been postponed at his request) the (then) President of the Employment Appeal Tribunal, Simler P., allowed the appeal.
5. In her judgment, she made it clear that "*any further or continued delay would be inimical to fairness and the interests of both sides, and will serve only to make it harder for the fact-finding process to take its course*." (Paragraph 2).
6. At paragraph 60 of her reasons, she said that if the respondent considered that the strike out application should be pursued, it would have to start afresh on the basis of state of affairs existing at the date of the application.
7. I have been mindful of those words, even though the hearing today was listed by me rather than on application by the respondent, and have considered the question of whether a fair hearing is possible in the light of the current situation.

8. The procedural history (so far as the Employment Tribunal is concerned) is set out in the Appeal Tribunal judgment between paragraphs 17 and 43. It sets out the history of non-compliance with tribunal orders by the claimant, of the need for unless orders, of the striking out on a previous occasion of the claim after the claimant had not copied documents to the tribunal, of the reinstatement of the claim subsequently, of the postponement of the first final hearing due to delays in preparation by the claimant, of the loss of a second final hearing listing because of the first strikeout, of the subsequent re-listing (a date which was lost due to the second strikeout). The second strikeout, by Employment Judge Gaskell, occurred because the claimant (who, at that stage, was represented) had failed to comply with directions relating to information about his reasonable adjustments claim and to comply with disclosure within time (or within an agreed extension of time).

9. As a result the respondent applied for strikeout (or alternatively, an unless order or provision of further information). Employment Judge Gaskell believed that by a letter dated 8 May 2015 the tribunal had given the claimant opportunity to make representations or request a hearing as to why the claimant should not be struck out because of his failure to comply with the order of the tribunal dated 8 May 2015. A request for reconsideration followed the strikeout judgement, but was refused. The respondent accepted that, at least by the date of reconsideration, the claimant had complied with the order of 8 May 2015 – paragraph 37 of the appeal judgement. The judge had refused to reconsider strikeout.

10. At Paragraph 58, the President states that '*unless orders made at earlier stages had… achieved full compliance with the relevant order and, there is no reason to suppose that a further unless order would not have been complied with. .. It is clear that by 9th July, as Mr Campbell concedes, the further outstanding matters were dealt with by the claimant's solicitors who confirmed compliance with the order of 8th May and produced the response to the request dated 29 April 2015. There is nothing in the material provided to me that would indicate that a fair trial was not possible at that stage*.'

11. After the strikeout judgment was set aside on appeal, the case was remitted, and I heard a closed preliminary hearing on 5 June 2018. At that stage, the claimant was again represented by Mr Pettifer, his solicitor. The claimant attended, albeit late – I waited 20 minutes for him to arrive before starting the hearing and he arrived shortly after the start.

12. The respondent's representative at that hearing, Mr Kennan, said that the allegations were "worryingly vague". There was a Scott schedule and addendum; it was clear that the respondent was still disputing disability, and that it would contend that some of the matters in Scott schedule were not covered by the initial claim. In May 2015, the parties had agreed that the tribunal dealing with the final hearing would have to decide whether an amendment was required (and if so, whether it should succeed) before some of those allegations could be considered.

13. Having scrutinized the Scott schedule and addendum, I adjourned for a short period and asked the claimant's representative to provide details of the provisions, criteria or practices relied upon in the context of the reasonable adjustments claim, as these were unclear from the information provided at the earlier stage of the proceedings (in 2015). He was able to do so whilst I waited.

14. There were some details of the disability claims which were manifestly unclear and which Mr Pettifer was not able to clarify on the day of the hearing. On 29 April 2018 the respondent had requested further information about which condition(s) the claimant relied upon in respect of each disability claims, and in respect of the reasonable adjustments claims. On 18 May 2018, they had asked the claimant to identify the protected acts relied upon for the victimization claims. The claimant had already produced a 9 page Scott schedule and 10 page addendum to it, in response to the orders of Judges Dawson and Gaskell in 2014/2015) which were referred to at the Employment Appeal Tribunal hearing, but in the respects identified above they were still unclear.

15.Before the hearing on 5 June 2018, the claimant had replied with the assistance of his solicitor, but in relation to request 2.2 (particulars of the disadvantage to which the claimant said he was subjected by each provision, criterion or practice complained of in the context of section 20(3) of the Equality Act 2010), the claimant had simply replied " *Scott Schedule Section 6 : see the response in relation to the* [9 page] *addendum",* so that it was not possible to identify which parts of the addendum were relevant, and he had done the same in relation the disadvantages said to arise from the matters set out in sections 14 and 16 of the Scott schedule and section (a) of the addendum to it. I considered that it was not in the interests of the overriding objective for the respondent and the tribunal to have to guess at the disadvantage asserted in each case and that it would be proportionate to direct the claimant to clarify this (a matter which should have been within his own knowledge) before disclosure occurred and witness statements were exchanged, as it was something the respondent (as well as the claimant) may need to address in evidence. I therefore directed the claimant to provide clarification of the parts of the Scott schedule and its addendum being referred to (at paragraph 3.2 of the Order).

16. Secondly, there had been no reply to the request that the claimant identify the protected acts relied upon for the victimization claims; I took the view that as this was a basic matter (and an essential ingredient of the victimization claim) that the respondent should know the case it had to meet, again before disclosure or exchange of witness statements, and made a direction that the claimant identify the relevant protected acts – order 3.3 of the order of 5 June 2018.

The respondent may well have had some relevant documentation about these matters as well as the claimant.

17. I therefore gave directions that the claimant should comply with these Orders by **4:30 PM on 26 June 2018** I observed, in paragraph 4 of the case management summary which preceded those Orders, that when those details were provided, it was likely that this was as much information as the respondent was likely to get from the claimant ahead of exchange of witness statements. I deliberately restricted my directions to those matters about which I considered the respondent (and Tribunal) required information in order to understand the claims being advanced by the claimant.

18. There was no suggestion by Mr. Pettifer at the time (almost 5 years after the claimant's dismissal) that any further amendment to the claim would be required. Mr Pettifer did not suggest that the timescales given for compliance were unrealistic.

19. A copy of the case management summary and directions is attached to these reasons. I directed that **Schedule of Loss** be produced by **9 July 2018** (this included a direction at **paragraph 4.2** that the schedule must include information about whether the claimant had obtained alternative employment, and if so when and what employment; about how much money the claimant has earned since dismissal and how it was earned; and full details of Social Security benefits received as a result of dismissal.)

20. I directed that the parties were to send each other copies of all other relevant documents by **9 July 2018** (direction 5.1). This was because the parties indicated that full disclosure had not yet occurred, although previously directed in 2015.

21. The parties were directed to agree the contents of a final hearing bundle by **24 September 2018** (direction 6.1), and to exchange witness statements by **29 October 2018** (direction 7.1).

22.The time estimate for hearing was 7 days, and the final hearing was listed (for the fifth time) between **18 and 26 February 2019**. At that time, this was the earliest that a listing of that length could be achieved in the Region.

23. As a precautionary measure, I listed a further preliminary hearing to ensure compliance with my previous orders. This was listed for 26 November 2018 and was to be in person. By direction nine, the claimant was also to provide a draft chronology to the respondent by **26 November 2018**.

Events following the last preliminary hearing

24. On the 12th and 13th of June 2018, respondent wrote to the tribunal to say that one of its witnesses, Sarah Williams, would be unavailable for all but one of the hearing days. As the respondent did not have dates of availability for all of its witnesses available at the preliminary hearing on 5 June 2018, I had given permission to write in if the dates upon which the hearing was listed were not achievable, provided reasons were given. On 20 June 2018, the respondent's solicitor wrote again to say that an unnamed witness was due to start a period of maternity leave on or around December 2018.

25. On 9 July 2018, the claimant wrote to the tribunal (copying in the respondent and his own solicitor) saying that the parties had agreed to extend the deadline to comply with paragraph 4 .1 of the orders to 4:30 PM on **12 July** rather than **9 July** 2018 (this referred to the schedule of loss).

26. The claimant also stated that he was not interested in participating in judicial mediation. On 12 July at 15.59 pm (so 31 minutes before the agreed deadline), the claimant wrote again, making reference to the fact that he was legally represented and that his solicitor was on record, and saying that he had sought a further extension from the respondent, so as a precaution he was writing to the tribunal to say that he and his solicitor were working on his schedule of loss and that his breach of the order was (in his opinion) "*a minor one and can easily be fixed*". He said that the respondent had previously been given a detailed schedule of loss and that only a few "tweaks" were required.

27. The claimant said that to keep costs down (and making reference to the overriding objective criteria) that he would be taking *an active role* in the

proceedings, although not *exclusively* writing to the tribunal and the respondent. He said that he now hope to get the schedule of loss completed by **16 July** and said that (again, in his view) there could be little or no prejudice to anyone and that (contradicting what he had said earlier about little further work being required) that the documentation that the claimant was going through was "rather voluminous and time-consuming." He pointed out that the tribunal order provided for extension of time limits (by agreement) of up to 14 days.

28. The claimant asked that the tribunal and respondent should copy correspondence to him in addition to his solicitor in the future, giving his opinion that this should cause little extra work.

29. On the same day at 1645, the claimant's solicitor emailed the tribunal to say that the respondent had agreed to extend time to comply with the order for *further disclosure* until 16 July so that no application needed to be considered.

30. On 16 July at 16.18, the claimant emailed the tribunal, saying that he had copied the respondent, and attaching a schedule of loss. He said that it was likely that he needed to write to 3rd parties to get the required documents in order to give details of mitigation. He said "*the next schedule of loss (pursuant to 4.3 of her order) should contain these deductions*". In fact, the order of 5 June 2018 provided that the claimant should provide not only the schedule of loss but also any additional relevant documents (including those related to remedy, and specifically to mitigation) by **9 July 2018 – paragraph 5.1**. The reference to paragraph 4.3 was to the updated schedule of loss, which was intended to follow the respondent's counter schedule, which was due on **23 July 2018**. The claimant said "no application is being made at this point in time.".

31. The schedule of loss which was provided on 16 July stated that it should be '*less earnings from other employment: TBC in the final schedule of loss*." This is a clear breach of the order made on 5 June 2018.

32. On **23 July 2018**, the respondent produced a counter schedule including the figure for earnings by the claimant of which it was aware at that point. The respondent said that it wished to reserve its position on amending the counter schedule.

33. On **24 July 2018** (one day late) the respondent said that it would be interested in participating in judicial mediation. Judicial mediation is only ever considered, however, if both parties are interested in participating, and the claimant had said he was not.

34. Also on 24 July 2018, the claimant said that he would oppose the respondent's application to postpone the final hearing dates. He accused the respondent of failing to comply with the tribunal's order of 5 June by not copying the claimant (as opposed to his solicitor) when it sent the counter schedule. There was no order for the respondent to send documents to the claimant in addition to his solicitor, however. He also complained that the respondent had not informed him if it was interested in judicial mediation, despite the fact that he had said he was not interested.

35. On 26 July 2018, the claimant sent the tribunal a nine page letter to oppose any postponement of the final hearing. He referred to previous hearings, and one

occasion when he said a trial date had been moved because of the unavailability of one of the respondent's witnesses (referring to EJ Gaskell's Order of 8 May 2015, which resulted in a hearing listed for 1-3 and 6 July 2015 being postponed). In that case the claimant agreed to the postponement and EJ Gaskell found that as 7 days rather than 4 were required it was in the interests of the overriding objective to postpone. The claimant referred to the Employment Tribunal President's guidance on postponements and quoted some case law. He also applied for a preparation time order, and complained about the respondent not copying him in to its letter about judicial mediation (at a time when his solicitor was still on record as representing him).

36 On **30 July** 2018, the respondent's solicitor wrote apologising for not copying the claimant to correspondence with his solicitor, pointing out that the respondent had been given until 12 June 2018 to say whether any of their witnesses were unable to attend the final hearing. She attached a copy of one witness's holiday booking, which showed that she would actually be out of the country until 22 February 2019, and confirmed the name of the witness who would be on maternity leave from December 2018.

37. The respondent's solicitor pointed out that the claimant had still not complied with paragraph 3 of the order of 5th June 2018, which had directed the claimant to provide further information about his reasonable adjustments and about the alleged protected acts relied upon for the victimisation claim by **26th of June 2018.** The respondent asked that the claimant be reminded of this. The letter was copied to both the claimant and his solicitor.

38. On 2 August 2018, at 1205, the claimant sent a further seven page letter to the tribunal in reply to the respondent's letter. He complained again about the respondent being a day late in its response to the order about judicial mediation and about the respondent providing details of further witnesses who could not conveniently attend the hearing in February 2019 after 12 June. Claimant pointed out that "*as a litigant in person"* he had notified the tribunal when he was not going to be able to comply with directions. He gave further reasons for opposing any postponement and referred again to rule 37. He referred to case law on strike out and to the EAT judgement, where the President had said that any fresh application to strike out the claims made by the respondent should be pursued on the basis of the facts as they are at the time the application is made. He said it was an error of law to consider changing trial dates.

39. He quoted a letter he had sent to the respondent's solicitor about his own non-compliance with paragraph 3 of the order of 5 June. He said that on 19 July 2018 (so, more than 3 weeks after he should have complied with the Order) he had written as follows:" *for the purposes of 3.3 of the recent orders by the tribunal,* ***it would not be appropriate at this stage to respond to the victimisation and harassment claims until the addendum to the Scott schedule has been granted by the tribunal once an application has been made by the claimant****.* ***Any response that has already been sent by my solicitor to that order will be in addition (and if allowed by the tribunal) to what I shall submit in due course.*** *Any potential application made by the respondent about this matter runs contrary to the claimant's case will be vigorously resisted."* [Emphasis added]. No clarification of any harassment claim was directed on 5 June 2018.

40. In this letter of 2 August 2018, also, the claimant notified the tribunal for the first time that he intended to write to the tribunal to ask for permission **to amend his Scott schedule** "*in due course*". He said that if his anticipated application was not granted (following any reconsideration request or appeal) "*the claimant can then look to provide information requested by the respondent. The claimant is currently waiting on the respondent provide him with further information and documents following his requests. It is only once these have been provided would he be able to properly respond to their requests in terms of the harassment and victimisation claims. It would not be appropriate here to make any application for amendment Scott schedule… Or to give any further allegations*..".

41. It is clear from this passage that the claimant was ignoring the fact that he had been directed to provide the information in paragraph 3 of the 8 June order and was characterising it as a "*request by the respondent*", rather than a matter that was necessary so that not only the respondent but the tribunal could properly understand his case. Furthermore, he was not actually making an application to amend, but simply indicating that he intended to "in due course". There had been no indication either at the preliminary hearing on 5 June 2018 nor, so far as I can see, at the Employment Appeal Tribunal hearing in January 2018 that any further amendment of the claim would be required.

42. At the hearing in June 2018 it had been agreed that the claims that were being advanced were of unfair dismissal, under section 15 of the Equality Act, of failure to make reasonable adjustments, of harassment related to disability and of victimization. In his letter of 2 August, the claimant said that in addition he was proposing to make complaints of direct and indirect discrimination and of perceived disability discrimination. Again, there had been no indication of that at the hearing (at which the claimant was represented) on 5 June 2018.

43. Also in his letter of 2 August, the claimant said that he was applying to limit the number of witnesses to be called by the respondent, and said that he was now "formally informing the tribunal" that his schedule of loss was subject to amendment. He indicated also that he was asking the tribunal *to vary order 3* of the order of 5 June 2018.

44. In a subsequent email that day (at 14.05), the claimant said, for clarification that he was not making an application to strike out the response. He said he had inadvertently "cut and pasted" text when he was trying to learn about the rules of procedure. He pointed out that he had no formal legal training.

45. There was then a further email to the tribunal at 1614, when the claimant asked that the email timed 1405 be ignored. He said that having read them again he realised that the rules were "correct and were applicable to his application".

46. On 13 August 2018, the respondent's solicitor, copying in the claimant and his solicitor, wrote to the tribunal to say that the respondent objected to the claimant being given any more time to comply with order 3. She said that the claimant had all the information he needed to be able to provide information and had ample opportunity to do so. She pointed out that the claimant's claims were set out in Scott schedule and that the respondent would oppose any application to amend the claim at this late stage in the proceedings. The respondent objected to the claimant's applications for a preparation time order or to being required to limit the number of witnesses called.

47. ON 13 August 2018 at 1519 the claimant sent a further five page email to the tribunal, copied to the respondent's solicitors. The claimant confirmed that he ***was not at that point applying to amend his Scott schedule*** and said that he had written to the respondent's solicitor saying that he anticipated making an ***application to amend shortly*** after he had received information requested from the respondent. He complained that the respondent had not replied to his recent request for information and had previously said that her client was in the process of searching for the documentation requested from the recruitment department and others. The respondent's solicitor had pointed out that the information requested was of a historic nature.

48. The claimant then went on to say that it would not be appropriate to "*comply fully with order 3 within the recent orders of the tribunal*" as, in his view, this would "*plainly and grossly prejudice the claimant*" (this despite the fact that his solicitor had agreed to the timescale involved). He said that it was the respondent who wanted to know what victimisation and harassment claims were, ignoring the fact, again, that the tribunal had ordered him to produce this basic information about the victimization (not the harassment) claim. He said that six months before the final hearing he "*was in no position to respond at this stage*" (to Order 3). This was the basic information about disadvantage said to be caused to the claimant by the provisions, criteria and practices previously identified, and of what the protected acts were said to be. This information should have been readily available to the claimant – he would have known how the PCPs affected him and what he alleged he had said or written that amounted to a protected act.

49. I pause here to reflect that without knowing the nature of the basic allegations, it is difficult to see how the parties could adequately comply with the directions for disclosure, agreement of the bundle and exchange of witness statements that had previously been given.

50. The claimant complained about the volume of emails he was being sent by the respondent. He referred to a previous comment by Judge Gaskell in 2015, which had referred to the considerable correspondence between the parties and the tribunal which "ought not to have been necessary". It will be clear that most of the correspondence to the tribunal had emanated from the claimant himself since the hearing on 5 June 2018.

51. On 14 August 2018 at 1805 the claimant was again contacting the tribunal, saying that he was making no application at this point in time but the tribunal may wish to comment or take further action in respect of emails which he attached. He alleged that the respondent was causing prejudice to him and that he was upset by its actions. He enclosed an email he had sent dated 30 July 2018 referring to documents previously received in a redacted form, and asking for unredacted information, because he intended to file a complaint to the Information Commissioner's office, and also because he believed that unredacted material was important the tribunal hearing. He included a reply from the respondent's solicitor dated 14 August where the solicitor confirmed that the respondent's Subject Access request team no longer had an unredacted copy of the documents the claimant been sent. She said that the claimant should, if he wished to have an unredacted copy of a specific document, provide full details of the document requested so that she could find out whether it would be possible to retrieve the email or document electronic archives. Again this was not an issue

raised at the preliminary hearing at which the claimant was represented on 5 June 2018, and it is difficult from the correspondence to see the relevance of specific documentation to the claimant claims. The claimant had clearly spent much time making these requests rather than complying with the Tribunal's directions.

52. Unfortunately, because of volume of work and reduced administrative support at this office, the correspondence subsequent to the hearing on 5 June was not referred to me until 17 August 2018. I gave directions on 20 August, amongst other things asking the respondent to explain what was the relevance of the evidence the witness who was to be on maternity leave could give, and asking what her date of confinement was, and pointing out that the other witness could give evidence in the last days of the hearing and that this would be accommodated by the tribunal. The case remained listed for the dates in February 2019.

53. I also directed that the claimant was to state whether he remained represented or not, and I directed that if he was represented communication would take place via his representative as it was disproportionate to expect the tribunal to copy both him and his representative. He was to reply within seven days. *My note concludes by saying that the claimant was to comply with direction three by 17 September 2018*.

54. Unfortunately, tribunal staff did not implement my directions until 3 September 2018, and the letter which was sent out (which was not shown to me prior to being sent) did not include my direction extending the time for compliance with direction 3 to 17 September 2018.

55. I have focused on the correspondence between the parties (mainly the claimant) and the tribunal between 5 June and 3 September 2018. I was also taken to many emails between the claimant and the respondent (originally with the claimant complaining about lack of contact from his solicitor but displaying that he was aware of the tribunal's orders and of the time to comply – for example *page 108 on 9 July refers to the imminent need to comply with direction 4)*. On 12 July, page 118, the claimant refers to the email he sent on 12 July to the tribunal, saying he was not making any applications but was "just updating them (sic). He said "*as you know I do not know how the tribunal will take their orders not being complied with and I'd rather not take the risk (even if minor) given the history of this case. Already I am not in the best of light given past delays.*" This shows that the claimant was well aware of the need to comply with the Tribunal's Orders .

56. By 17 July, however, the claimant was saying that he was "actively dealing with the proceedings" on his own behalf and only wanted the respondent to copy his solicitor to important documents. He said that he was reserving some matters regarding the schedule of loss " for the next schedule" despite the contents of the order of 5 June –p128. On the same day, the respondent's solicitor wrote to both the claimant and his representative asking for all of the documentation and information had been directed in paragraphs 4 and 5 of that order.

57. As we have seen, by 13 August the claimant was saying that it would "not be appropriate" to comply fully with order 3 of the 5 of June order. By **20 August** 2018 (page 221) the respondent asked the claimant to confirm that the only

earned income he had received from his dismissal in September 2013 was as set out in an attached document. The claimant was asked to provide copies of his GP records from 2014 onwards, and, again, he was asked for copies of any other mitigation documents as per the tribunal's order. The respondent's solicitor said that any documentation which the claimant had in relation to mitigation should be disclosed at this stage, rather than at any later date. This was simply a reiteration of the order of 5 June, which had required production of the schedule of loss, mitigation documents and disclosure by 9 July 2018.

58. The claimant replied on 20 August (page 223 respondent's bundle) reminding the respondent that he had said that he would provide the information requested by 4 February 2019. In other words, he was, again, choosing to ignore the requirements of the order of 5 June, both in respect of providing details of mitigation and documents in support. He said that his mitigation documents were "still a work in progress" and that he hoped to provide medical records in due course "nearer the time of the hearing", and that by waiting it would save the claimant "work, time and costs".

59. On 22 August 2018, the respondent's solicitor wrote to the claimant regarding transcripts of recordings the claimant had made at an earlier stage (while still employed). These had been referred to by the EAT; the claimant's solicitor had provided the original CD-Rom and transcripts in 2015. There had been some discussion about these transcripts between the parties, and she asked the claimant to provide any different version within 14 days if he was not satisfied with those currently available. She asked that the claimant provide any further documents that he wanted to be included in the bundle within seven day (this should have been done by 9 July 2018, some 6 weeks before. On the same day, the claimant replied, saying that he objected to producing revised transcripts within 14 days. He said that there was little prospect of him giving her the documents that he wanted in the bundle, and that he "could not time travel".

60. On **23rd of August**, however, the claimant's tone had changed and he wrote to the respondent as follows: "*I do not know if my solicitor has given you the information you have sought as per order 3.1 and 3.2 of 3. If he has not, I apologise wholeheartedly to you and your client"*. It will be remembered that the claimant had previously said (13th August) that it would be "inappropriate" to provide this information (about what disadvantage he allegedly suffered due to PCPs). He apologised for the way the Scott schedule and addendum was drafted. He said that if he had not heard from his solicitor **by 24 August** 2018 he would attempt to respond to 3.1 and 3.2 by 27 August 2018. He said he had already given one example in relation to order 3.3. He said that by the Monday he would give further particulars for his harassment and victimisation claims, but that he thought that "making his application to the tribunal for leave to do so first may be a better prospect". He said that he was troubled by his need to comply with the orders or receive clarity on the subject. The reference to obtaining leave seems to be a reference to the proposed amendment referred to in previous correspondence.

62. In a further email 24 August the claimant was querying whether the respondent had heard from the tribunal, and *saying that he had not heard from his solicitor recently*. He apologised if he had upset the respondent's solicitor in the past.

63. On 27 August, the respondent's solicitor again wrote to the claimant asking him to provide full details of sums he had earned since his dismissal and reminded him of the order that he supply this information by 9 July 2018.

64. On 27 August, the claimant emailed the respondent's solicitor in summary saying that he had not yet complied with orders 3.1 and 3.2 as promised because he had "not realized" that 27 August was a bank holiday. He had not thought that the respondent's solicitor would be working and in his words did "*not see any urgency of the matter that I could not have addressed tomorrow… In addition I am waiting for the order that I also recently referred to so I can find out what the tribunal requires of me. For that reason I have decided to postpone a few things*." In other words, the claimant was again choosing not comply with the tribunal's orders from the June hearing, of which he had pre4viously seemed well aware.

65. The claimant continued that he had been in touch with his solicitor, who may be in touch with the respondent, but if not the claimant would personally give a response if necessary. He gave his opinion that he had complied with the recent orders but that he was expecting to have further documentation. He said "***I am not willing to comply with orders and sections "all over the place"***[emphasis added]. He continued "*all administrative issues with respect to the schedule of loss can and should be remedied by February 2019 (and in plenty of time before the hearing).* ***I have far more pressing issues that need resolving as per this case and these must be actioned by me asap***." [emphasis added].Despite all this, he confirmed that "my duty is to comply with tribunal orders".

66. On 29 August, the claimant wrote to the respondent's solicitor asking her to clarify what she expected from him that was still outstanding from the previous orders, so that he could action those asap "where appropriate".

67. 30 August the claimant wrote the tribunal asking if there had been any update to the orders following the most recent applications by both parties. Unfortunately, probably due to the volume of work being experienced by the tribunal, the clerk confirmed that there was no update to the order, although I had by that stage also give given directions referred to above. The claimant again asked that the tribunal write to him at his email address as well as his solicitor..

68. On 30 August 2018, the claimant wrote to the respondent's solicitor again saying that he had realised he had made an important mistake which he must correct. He said he had reread the recent orders (that is, the order of 6 June 2018) and that some paragraphs did require clarification in accordance with directions 3.1 and 3.2. He said that he apologised for his reading the orders and that his solicitor should have been responding because he had drafted the Scott schedule. He said that he had asked his solicitor to respond by the end of the week, and that if he did not do so, the claimant would respond by the following Tuesday. He again said that he may be altering the Scott schedule and that he did not think that the respondent would be at any disadvantage.

69. On 3 September, as noted above, the tribunal wrote to parties apologising for the delay and (with the omission set out above) relaying my directions.

70. On 3 September, the claimant again apologised to the respondent as his solicitor had not responded to paragraph 3 of the orders and he said that he would ***provide a response as far as he could buy 4:30 PM on 4 September***.

He complained that his computer was failing to "boot" and said that he had not been feeling well recently. On 4 September the claimant told the respondent's solicitor that his "main" PC had suffered a "catastrophic failure". At the hearing on 4 February, the claimant told me that he had this repaired within a matter of days, however, and an e-mail at page 237 of the respondent's bundle refers to the fact that the claimant still had a laptop which was working but which, he said, took him longer to use. He said he would try to finish his work on paragraph 3 of the order of 5 June by 9 AM on 5 September.

71. On **5 September** 2018, the claimant's solicitor wrote to him (page 238 of the respondent's bundle) saying that he had not yet provided the further particulars requested (by order 3) and that he should be able to complete this by the end of the week. He attached a copy of the tribunal's letter of 3 September. On 5 September, the claimant wrote to the respondent's solicitor expressing his dissatisfaction with the order and saying that he could not agree "*with the learned judge on this matter. I cannot see why sending a letter to my solicitor and then simply copying me in by email is a disproportionate use of tribunal time*." He said he would ask for a reconsideration. In fact, it is not tribunal policy to send out ordinary letters or orders by email without a specific direction, and where a party is represented it is very unusual to copy in the represented party, hence it is something which could easily be overlooked by busy Tribunal staff. The claimant expressed his opinion that communication between the tribunal and the parties was "infrequent". In this respect I simply refer to the paragraphs above, which show the extraordinary volume of correspondence received on this case, even since June 2018, at a time when the tribunal is experiencing a very challenging workload. The claimant said he had been unable to respond to order 3 of the 5 June order by 9 a.m. as promised "*due to a number of valid reasons*" but he hoped to complete his work by "*today or tomorrow*".

72. On **7 September**, the claimant wrote to the respondent's solicitor saying that he had his "*main PC up and running again*". He said that he hoped to have his response to paragraph 3 of the order of 5 June with the respondent "*by early next week*" and that it was partially drafted. He said that he was "minded to submit" his request to amend the Scott schedule next week, at the same time as responding to paragraph 3. He said he had been taken away the previous day on an important matter.

73. On 7 September the respondent sent a copy of a paginated bundle to the claimant's solicitor. The respondent's solicitor said that they were in the process of reviewing the transcripts of the recordings previously provided by the claimant and would let him know if an additional copy of the transcripts (with any amendments) should be included in the bundle.

74. On **7 September 2018**, the respondent also wrote to the tribunal copying in Mr Pettifer and the claimant (p242-244, R's bundle). They referred to paragraphs 3 and 4 of the order of 5 June. They pointed out that the claimant had not complied with the orders despite being requested to do so. They referred to the fact that the claimant had said he would comply with paragraph 4 of the Order by February 2019, instead of complying with the order to do so by **9 July 2018**. The respondent complained that it was being prejudiced, and was not on an equal footing because of the claimant's defaults. They record that, having been flexible in communicating with the claimant as well as his solicitor, the claimant had sent them 23 emails in July 2018, 21 in August 2018 and 3 "to date" in September

2018. The respondent was seeking a preliminary hearing to avoid or reduce the cost of dealing with all of this correspondence by email. In the alternative they were applying for unless orders (specifically in respect of orders 3.3 and 4.2 of the order of 6 June 2018). They also renewed an application for a medical report in respect of the claimant's assertion that he has a disabled person within the meaning of section 6 of the Equality Act 2010.

75. On **9 September 2018**, although he had not complied with the order of June 2018, the claimant applied (p245-248, R's bundle) for a reconsideration of my direction that the tribunal would not copy correspondence to both him and his representative. If reconsideration was not granted he asked for permission to appeal that direction. He said that ***not having heard from his solicitor he now wished all communications to be referred to himself at his land and email addresses, and said that he would be a litigant in person going forward***. He again asked for a preparation time order, and said that if it had not been granted, he wanted permission to appeal. This email was not copied to his solicitor, who remained on record.

76. He said that he would *comply with paragraph 3 of the order of June 2018 by 10 September 2018*. He apologised for his delay and said that his delay was justified and said he would explain why in his next correspondence. He said his claim "could easily proceed without his victimisation and harassment claims" but, at the same time, stated that if a discrimination claim was dismissed that would be a draconian measure which should only be used as a last resort, and which the appeal tribunal and higher courts "would not allow".

77. In respect of direction 4 of the 5 June Order, he said "he could not give what he did not have" but he would "aim" to produce other documentation by February 2019. He said that a preliminary hearing may not be required. He said that, going forward, he would only write to the respondent's representatives when he needed to write to the tribunal or request anything. He resisted the respondent's application for a medical report and said that in his next correspondence he would also ask for *permission to amend the Scott schedule*. He said that he would write again by midweek of the week commencing 17th September "*or, if not, **by 22 September**"* (emphasis added). He said that he was being negatively affected by medication for ADHD and that he had a "huge task" ahead of him in the next week or two.

78. On 21 September, the claimant wrote to the tribunal (not copying the respondent's solicitor) saying that he had been unable to get his applications and response to the previous order done by 21st of September and *he hoped to do so by **28 September***. On 26 September 2018, the respondent's solicitor wrote confirm that she had not received any correspondence from the claimant since his email of 10 September. In other words, he had not, as promised, complied with the order of June 2018 by 22 September.

79. On **27 September 2018**, the claimant wrote to the tribunal, not copying the respondent, to say that he would give all his documents (and in particular his response to the victimisation and harassment claims) together with the application to amend that he had previously referred to, to the tribunal office. He said "*I really cannot understand why the respondent is so eager for this information as I have informed them early on… I am looking to amend the Scott schedule that may make some matters redundant. I regret my short delay in*

getting my correspondence out to you, but I do have serious troubles with time management and other issues due to no fault of mine." He said he would hand deliver or post documents to the tribunal by early the following week and would send the bundle and applications electronically to the respondent. He said that an appeal to the appeal tribunal was now imminent irrespective of the outcome of both parties' applications. "*There are multiple reasons for this including new points of law (if valid and accepted) but I wish to raise and this case does need guidance. I have done an injustice to HHJ Simler's written judgement, but also very grave injustice to myself(due to compelling reasons when my appeals were heard at the relevant time). I hope to now also correct that and the narrative*."

80. On **8 October**, the claimant wrote to the tribunal (again not copying the respondent) saying that he would now respond to the Order of 5 June "*by the end of the working week, Friday, 12 October*". He said he had been ill but "*I have also had a few unexpected issues that have taken their toll on me. These issues can easily be evidenced. I am finishing off the tasks I had hoped to have given you by now."*

81. On **25 October** 2018, the respondent wrote to the tribunal asking for an extension of time to exchange witness statements. The order of 5 June 2018 had given the date of 29 October for that take place. The respondent asked for an extension until 7 January 2019. The respondent submitted that this would be in the interests of the overriding objective, and in addition stated that the respondent had not yet received full specification of the claim from the claimant pursuant to the tribunal's earlier order. In other words, the claimant had still not complied with paragraphs 3, 4 and 5 of that order.

82. On **26 October 2018**, the claimant replied to the tribunal, this time copying the respondent's solicitor saying that he did not object to there being an extension of time for witness statements. He said that to exchange at that point would cause serious prejudice to him, and make any trial unsafe. He said that the matter should be discussed at the preliminary hearing scheduled for 30 November 2018 (in fact, 26 November). He said that guidance was required and that it was his "firm view" that an appeal to the appeal tribunal may soon be imminent. In addition he would be making an application to "debar the respondent", and for the response to be dismissed. He said that he had "held back" in complying with the June 2018 order so that he could make all his current applications (including in respect of relevant documents) "in one go". He said that his pending applications should be made "*sometime next week*".

83. On 29 October 2018, the parties' correspondence from 30 August 2018 was referred to me, but placed on the wrong shelf in error. It was subsequently referred to me by 5 November 2018, and a letter was sent to the parties the following day. The claimant was asked to clarify whether he was still represented by Davies and partners or not (his solicitor had not come off the record at that stage). The parties were asked to confirm which parts of my orders from June 2018, (numbered 3 to 7) had been complied with, and where they had not been complied with, why that was. The parties were asked to confirm the position by **13 November**. The claimant was told that any application for costs or preparation time orders would be dealt with at the conclusion of the proceedings if appropriate. The claimant had copied ACAS correspondence to the tribunal and he was informed that he must not do so. He was also told that I would not reconsider previous case management orders as he had not shown that it was in

the interests of justice for me to do so. He was told that any application for appeal should be made direct to the Employment Appeal Tribunal, and that the preliminary hearing remained listed for 26 November 2018.

84. Subsequently a further email from the claimant dated **31 October 2018** was found by the administration and referred to me on 6 November. The claimant asked for a full day for the preliminary hearing and said that the claimant and respondent would make a number of applications and the claimant wished to apply for a restricted reporting or anonymity order. He said that the respondent's legal representative had sent a copy of the trial bundle to to his former solicitor on 20 September 2018. The claimant said that **he had received it** on 21 September. He said that he was returning the trial bundle to the respondent because he did not agree with it. He said that he would give the tribunal and the respondent his agenda for the case management hearing two days in advance.

85 I caused a further letter to be sent to the parties on 6 November 2018, saying that the preliminary hearing on 26 November would be extended to 3 hours. As I had determined that it would be a case management hearing, focused on getting the case (as it had been presented to me in June 2018) ready for hearing the following February, three hours should be sufficient. I informed the claimant that restricted reporting orders and anonymity orders are only granted in exceptional circumstances and that I would give any necessary directions at the hearing. I urged the claimant to focus on complying with the tribunal's directions rather than sending a disproportionate amount of correspondence to the tribunal.

86. On 5 November 2018, the claimant had written to the respondent's solicitor. He repeated that he did not accept the bundle and said that his medical notes must not be given to the respondent's employees (other than documents they had seen before). He said that his request for a restricted reporting or anonymity order was relevant to this. He said he would be asking for directions about this at the forthcoming preliminary hearing. On 12 November 2018, the respondent's solicitor replied, saying that the documents in section 9 of the bundle had not been shared with the respondent's witnesses, but that documentation relating to "Unum" (an Occupational Health provider) was relevant as it related to the claimant's contact with that organisation during the claimant's employment. Further training records were supplied which were to be added to the bundle, together with an updated index.

87. On **6 November 2018**, the claimant's solicitor had formally notified the Tribunal that he was ceasing to act (p273, R's bundle), nearly 2 months after the claimant had written to say he would be acting as a litigant in person. As the claimant's letter of 9 September 2018 had not been copied to his solicitor, it is not clear when exactly the solicitor was told that the claimant would act "in person".

88. On 12 November also, the respondents wrote to the tribunal, confirming that paragraphs 3.2 and 3.3 of the order of 6 June 2019 not been complied with by the claimant, and that although a draft schedule of loss had been supplied, paragraph 4.2 of the order had still not been complied with; nor had paragraph 5.1, in that the claimant had not provided all the documents that he sought to rely upon in relation to the litigation. The respondents said that they had been told by the claimant that he would provide those documents in February 2019. The respondent pointed out that it was important that the respondent had fair notice of the documentation in relation to remedy. There were other documents which the

respondent said that the claimant had failed to produce in breach of the direction about disclosure. In the absence of full disclosure, it was not possible to fully comply with direction 5, it was not possible to fully comply with direction 6, but the respondent said that it had complied with order 6.1 as far as possible by sending a paginated bundle to the claimant's representative in hardcopy and electronic form on 24 September 2018 (see above – the claimant accepted that he had received this in September but was sending it back). The parties had not yet exchanged witness statements in accordance with paragraph 7.1 of the order; I observe that it would not be possible to produce the comprehensive witness statements directed without compliance with the other Orders by the claimant.

89. The respondent proposed draft directions to enable witness statements to be exchanged by 21 January 2019, given the delays that had occurred. The respondent said that the witness who was on maternity leave prior to the trial was due to give birth on 13 January 2019.

90. On 13 November 2018, the tribunal acknowledged the most recent correspondence and clarified that the date given in the notice of hearing (26 November 2018) was the correct date. The parties were told that the directions would be discussed at that hearing. On 13 November, the claimant sent a 3 page letter to the tribunal, saying that he would give a "final response" the following day. He repeated that the bundle was not agreed, and said that he had asked for further documents. He said that the respondent was 'fishing for information" in relation to their request for documents regarding Unum PLC.

91. On 14 November 2018, the respondent's solicitor asked the claimant clarify which documents in the bundle he said were legally privileged, and which the claimant said were unnecessary. She repeated that she was open to discussing the contents of the bundle. The following day, the claimant replied that "at that point" he could not go through the bundle and discuss it. He made various points about disclosure said he was feeling "much better today" and would send clarifications to the Scott schedule on **16 November 2018**.

92 On 16 November 2018, the claimant wrote to the respondent, saying that the bundle should have been sent to him as he '*went on record on 9 September confirming that he was a litigant in person again".* It is to be noted that the claimant's solicitor had not come off record at that stage, and that the claimant had in any case admitted having received it on 21 September "to much surprise" in his email of 31 October 2018. He asked for an electronic copy of the appeal tribunal bundle and details of any authorities that were to be referred to at the preliminary hearing. He said that he could "not necessarily" get the Scott schedule clarifications to the respondent that day as "*I was taken ill last evening along with other reasons. The Scott schedule is rather self-explanatory as are the allegations…*" (p287, R's bundle).

93. 21 November, the respondent's solicitor replied that a (further) bundle would be sent direct to the claimant that day (confirmation of that appears at page 289). She said she did not have an electronic copy of the appeal tribunal bundle and did not intend to refer to any authorities at the preliminary hearing, unless the Judge referred to any on the day. She said that she would be the only person attending the preliminary hearing on behalf of the respondent.

94. On 23 November 2019, the Friday afternoon before the listed preliminary hearing, the claimant wrote to the tribunal (R's bundle p292-294), asking to have the preliminary hearing listed for 26th of November 2018 "postponed". He said that medication with which he had been prescribed for ADHD was having a devastating impact on his health. He said that after his medication had run out he had been greatly distressed, which he suspected was due to withdrawal symptoms. He gave details of the effects that this medication (Elavanse) had previously had upon him. He said that he had been diagnosed as autistic and had been told that individuals who are autistic are more sensitive to stimulant medication. He said that he also had sciatica and dental issues, and that he had been referred to hospital for physiotherapy and pain relief. He referred to an order of Slade J to the effect that it would take a litigant in person more time "to consolidate authorities".

95. He had copied and pasted what he said was a section of his patient records from his GP surgery, which appeared to show a reference on 20 November to a pain clinic at a hospital, and details from 1 May 2018, showing a lumbar disc prolapse, from 27 September 2018, saying that the claimant had been seen in a rheumatology clinic, on 18 October an entry simply saying that the problem reported was fibromyalgia, and on 16 November stating that the claimant had been prescribed 28 x 10 mg amitriptyline tablets, one to be taken at night. This email was sent at 1432 on the afternoon of Friday 23rd of November. By that stage, the respondent's solicitor had already booked flights to attend the hearing, and this was confirmed just after 3 PM.

96. EmploymentJudge Woffenden directed that the hearing on 26 November 2018 be postponed having seen the claimant's email, and directed that the claimant must provide medical evidence from a medical practitioner to confirm that in their opinion, the claimant was unfit to attend the hearing, giving a prognosis of the condition and indicating when that state of affairs (the claimant's unfitness to attend) may cease. The claimant was asked to reply by 30 November 2018, ensuring that the respondent was also copied in (page 304, bundle). Despite his previous application, just before 4.30pm that afternoon the claimant produced a case management agenda and sent it to the Tribunal and respondent. This included applications to amend the Scott schedule and debar the respondent, and to dismiss the response.

97. One difficulty that the claimant faces is that in his own bundle, which was produced for the hearing today, at page 147, he has included an email that, (although part of the address is obliterated) appears to have been sent to an NHS Trust on **20 November 2018**. He said that he had managed to get his renewed prescription (of Elvanse 70 mg) the day before. He described having had two days of withdrawal symptoms the previous week, following which he said that he felt he was "*getting back to normality (which was far from perfect anyway but was psychologically better than the last 1.5 years) and prior to 1st taking these medications some 1.5 years ago*". He said "*since not taking Elvanse (and stimulant medications)(and it seems so far)*

- *my headaches have stopped and/or reduced*
- *I am waking up earlier and having better sleep. It seems to be getting better*
- *insomnia is getting better now. Actually, I am sleeping more now.*
- *Less fatigue, and seem to be getting more energy. Actually since Sunday, 18 November 2018, I actually sat in the living room and watched*

some television with a few family members. I did the same yesterday. The last time I did this was about 1.5 years ago and prior to taking the stimulant medications. As of today, I actually sat down and started to use the laptop downstairs. I used to do these things before. I started to come down more often rather than stay in my room and my psychological well-being seems to be improving (although still far from ideal). Better, that I am not just in one room.

- *Spots are going away and/or reduced*
- *seem to have less agitation, tenseness and anxiety*
- *my psychological well-being seems to be improving gradually*
- *less anger, and less sensitive to noise and disturbance (although of course far from ideal)*
- *had a walk yesterday (and went to Tesco) and which did improve my mindset*
- *getting more active, even getting ready more often"* [goes on to give details of personal care].

The claimant said he would stop taking Elvanse until he heard from the medical practitioner in question.

98. In other words, three days before the claimant wrote to request a postponement due to the state of his health, he was apparently telling a medical practitioner that he was feeling much better than he had when he attended the Tribunal hearing in June 2018.

99.The claimant did not comply with the directions of Employment Judge Woffenden which were sent on 23 November 2018. At the hearing today, when I asked him why that was the case, he said that he had suffered from "colds and flu" sciatica and dental issues.

100. On **1 February 2019**, the claimant sent an email to the tribunal saying that on **21 January 2019** he had asked one of his GPs to produce a response to the tribunal's order dated 23 November. He said that his GP could produce a "letter of fact" in his support which could be produced, but that it may take up to 21 days for this to be actioned. He said that on 29 January 2019 he saw Dr Turpin, who had produced a letter which was attached. The claimant said that prior to this he had booked at least one appointment to see Dr John, but that he had needed to cancel this on the grounds of ill-health. He said that he had been referred to hospital for a number of conditions. He said that he had asked two other organisations for support in terms of providing some evidence, but had not received anything but these would only be in addition to what his GP had or would provide. He said he would provide further explanations and evidence at the hearing. He said that he wanted his application to debar the respondent also dealt with at the hearing I had listed.

101. The letter from Dr Turpin dated 29th January reads as follows: "*Mr Baber tells me he did not attend an employment tribunal on 26 November 2018. He did not see me at the time but I have no reason to believe this non-attendance was on purpose. He does suffer from a condition called attention deficient hyperactivity disorder and people with this condition often have problems with organising themselves and attending appointments for instance. He is receiving some treatment (atomexitine) from the ADHD clinic and I understand this is helping, several other treatments have had to be discontinued due to side effects*". The Doctor goes on to give a list of medical problems that the claimant

had been treated for, the most recent of which was fibromyalgia on 18 October 2018. A list of medications from 30 November 2018 appears to show that on 18 January the claimant was prescribed medication called Atomexitine 25mg, but no other tablet form medication is recorded as of 29 January. The claimant also attached copies of an appointment reminder for 7 January with Dr John and a list of other appointments with the practice, although none is recorded between 16 November 2018 and 21 January 2019.

102. I was also provided with some evidence of dental appointments today.

103. The letter from Dr Turpin does not satisfy the terms of the directions given by Judge Woffenden. It goes nowhere near saying that the claimant was unfit to attend on 26 November 2018, and the doctor appears to have obtained the impression from the claimant that he had accidentally overlooked the hearing listed for that date. The letter does not indicate that the claimant is unfit in any way to attend the tribunal or deal with his claim. Having listened to the claimant today, I accept that he may have suffered from various minor illnesses such as colds, flu and toothache, and possibly other aches and pains (A letter from consultant dated 15 October 2018 suggests that the claimant "might have" fibromyalgia, although tests for other conditions were ruled out – C's bundle p150). There is nothing in the evidence before me, however, to suggest that he was incapable of visiting his doctor to comply with Judge Woffenden's order either between the 26th and 30th of November, or thereafter until 21 January 2019.

104. On the evidence available to me, I simply do not accept that what the claimant asserted in his application to the Tribunal dated 23rd of November 2018- that his health had been "devastated" by the medication he had been taking so that he was unfit to attend - was true. It is contradicted by his letter to an NHS Trust written three days previously, which suggested that any "withdrawal symptoms" lasted only 2 days and that by 20 November he was much better. His email to the tribunal suggest that he was unfit to attend, his email to the NHS trust suggests that he was much better than he had been when he attended the tribunal in June 2018.

105. On 26 November 2018, the day the preliminary hearing to deal with case management should have taken place, the claimant returned the bundle of documents by courier to the respondent's solicitor. He said that the respondent had been behaving unreasonably and that he may seek costs. On 29 November, the claimant emailed the respondent's solicitor saying that Scott schedule was incomplete and that he wished to amend it. He said that there were "*more than several (important) allegations that need particularizing*". He said he had found other documents that needed to be added to the bundle. He hoped to get these to the respondent by close of business that day.

106. On 30 November, the claimant sent a request for information and for additional documents to the respondent.

107. On 5 December, the claimant sent a variety of documents to the respondent including a revised Scott schedule running to close on 100 pages, which cross referred to a number of other documents. It is very different to the Scott schedule and addendum which was available to me at the preliminary hearing in June and includes unhelpful comments such as "*I refer you to information already supplied*"

and says at the start "*this will be expanded upon as soon as possible*". I note that these incomplete revisions were sent more than four months after the claimant first suggested he may wish to amend. The document sent included partial compliance with paragraph 3 of the order of sixth of June 2018. I say partial compliance because it is very difficult to ascertain what, if anything in the paragraphs referred to by the claimant are said to amount to protected acts for the purposes of any victimisation claim. For example, on page 314, the claimant says that the basis of his claim that the respondent feared that he may do a protected act is to be found somewhere in the 13 paragraphs between page 338 and 340 of the respondent's bundle (which are headed "**reply to 6.1**"). At the end of those paragraphs, the claimant asserts "*this covers some of the incidents. I advise the ET1 was poorly constructed and missed out other events of importance. Accordingly, and in time, I will expand on it. I will seek leave to do so."*

108. 21 December 2018, the respondent's solicitor wrote to the tribunal asking for an "unless" order because of the claimant's non-compliance with paragraphs 4 and 5 of the order of 5 June 2018 and recording the claimant's lack of cooperation in terms of agreeing a bundle of documents. On 24 December, the claimant replied resisting the application and saying he had offered to go to Scotland to try to agree the bundle with the respondent. In respect of Judge Woffenden's order dated 23 November, the claimant said that he was mindful of his need to comply with that. He said that after the respondent was granted, he had to cancel a GP appointment and also a hospital appointment as he had a bad cold. He said he was waiting to see the GP again and would forward evidence to comply with Judge Woffenden's order "promptly". He said under the heading "Court of Appeal" that a trial "could still be had" (presumably, meaning fair trial) and that strikeout would amount to an error of law, suggesting that the case was nearly ready for trial. He asked permission to respond by 2 January.

109. On 8 January 2019, still not having complied with Judge Woffenden's order, the claimant wrote to the tribunal again. He said he had been ill recently and said that after "brief respite from a cold" he had a chesty cough. He said that he had endured sleepless nights may have a chest infection or bronchitis (p422). He said he wanted to apply to debar the respondent made further points about the bundle. He said that the respondent's solicitor ought to have known that he was conducting the proceedings not his solicitor (although the claimant's solicitor had not objected during September 2019 when the bundle was sent to him and was still on record at that point.

110. The correspondence was then referred to me and I gave directions, listing an open preliminary hearing to consider whether to strike out the claimant claims as above (see page 424 of the respondent's bundle). This was sent out by the tribunal on 17 January 2019 and the hearing was listed for 4 February 2019, time estimate 1 day.

111. On 21 January 2019, the claimant sent some of his mitigation documents to the respondent.

115. On 24 January 2019, the claimant wrote again to the tribunal saying that he was in the process of getting the evidence required to demonstrate he had not behaved unreasonably, and saying there were compelling reasons why there had been a delay. He said that his default, if any, was not so great as to justify

strikeout. He wished to have my order, saying that there would be a hearing to consider a strike out, set-aside.

RELEVANT LAW

1. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides (so far as relevant) as follows:

(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;

(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…"

2. It is made clear at the foot of page 4 of the EAT judgement (paragraph 11) that non-compliance with tribunal rules or a tribunal order is one express ground for a strikeout decision, but that there is nothing automatic about a decision to strike out, and it will not be granted automatically.

3. In deciding whether to strike out a claim, the tribunal must have regard to the overriding objective (as set out in rule 2 of the 2013 rules). This sets out that the overriding objective of the rules is to enable the Employment Tribunal to deal with cases fairly and justly. This includes, so far as practicable –

- ensuring that the parties are on an equal footing;
- dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- avoiding unnecessary formality and seeking flexibility in the proceedings;
- avoiding delay, so far as compatible with proper consideration of the issues; and
- saving expense.

4. A tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by the rules. The parties (and any representatives) shall assist the tribunal to further the overriding objective and, in particular, shall cooperate generally with each other and with the tribunal.

5. As set out in paragraph 12 of the EAT judgement, in the context of non-compliance with the rules, the overriding objective requires consideration of all the circumstances and, in particular: the magnitude of the non-compliance; whether the failure was the responsibility of the party or his or her representatives; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the failure in question.

6. Even where the conduct under scrutiny consists of deliberate failure is, the fundamental question for any tribunal considering whether to strike out a claim is whether the party's conduct has rendered a fair trial impossible – **Bolch v Chipman [2004] IRLR 140 EAT**. In that case, Burton P said that firstly, there must be a finding that a party is responsible for a default falling within rule 37(1); secondly, if so, the tribunal must consider whether a fair trial is still possible. Save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.

7. Even if a fair trial is not possible, consideration must be given to whether strikeout is a proportionate sanction, or whether there is a lesser sanction that can (and ought) to be imposed.

8. In **James v Blockbuster Entertainment Ltd,** Sedley LJ pointed out that the power to strikeout is Draconian in nature and should not be exercised readily. In the case of unreasonable conduct, the tribunal must either be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. He repeated that even where the conditions for making a strikeout order are fulfilled it is necessary to consider whether the sanction is a proportionate response in the particular circumstances, taking account of whether there is time for orderly preparation to take place so that the claim can be tried, or whether a fair trial cannot take place.

9. The claim (or response) cannot be struck out unless the party in question has been given a reasonable opportunity to make representations (at the hearing if the requesting party has asked for one - or in this case, as directed by the tribunal).

10. At paragraph 15 of the EAT judgment, it is pointed out that a failure to comply with the notice requirements before striking out claim will render any order to strikeout invalid.

Application of law to facts:

1. Focusing on what has occurred since the Employment Appeal Tribunal hearing in January 2018, we have gone from a situation where the issues were relatively clear (subject to some clarification) to one where they are manifestly unclear (given the claimant's declaration that he intends to apply to amend his claim in accordance with the very much expanded schedule of allegations, which he sent to the respondent in early December 2018). Even that is said by the claimant to be incomplete.

2. The respondent contends that many of the issues referred to in the most recent Scott schedule were not included in the original claim, and this would be

unsurprising given the relative length of each of the documents. If the claimant did intend to pursue the amendments, as he has stated that he does on numerous occasions, it would take a significant part of the seven days allocated simply to disentangle which are new claims which are not, and to deal with any amendment application that results. This would result in the time estimate being totally inadequate. I have no confidence that if the question of amendment were to be dealt with separately, and if the claimant were to be given a deadline to set out a comprehensive list of the amendments that he seeks, he would comply (or comply with sufficient clarity for the matter to be dealt with proportionately).

3. **Magnitude of non –compliance:**Turning to legal tests that I must apply, and focusing on the order made on 5 June 2018 at the preliminary hearing, the response to order 3.2 set out in the claimant's amended Scott schedule sent to the respondent on 5 December 2018 is far from clear. The same is true in respect of order 3.3, as mentioned above. In my view, it is not reasonable (or sensible) to expect the respondent (or tribunal) to trawl through several pages of text in an attempt to deduce what is said to be a protected act. That is a matter the claimant should be able to identify.

4. There has still not been full compliance with direction 4, as the claimant accepts that relevant documentation is missing, and he has still not confirmed his earnings during the period since his dismissal by the respondent.

5. The claimant has not complied with order 5.1 of the order made on 5 June (when he was present) either. There are still documents which he has declared that he possesses (in correspondence), and which he has not disclosed.

6. The parties have not yet agreed which documents are going to be used at final hearing, in accordance with paragraph 6.1 of that Order. Although the claimant seeks to blame the respondent, the respondent has sent him all of its relevant documents, and the bundle cannot be agreed because of the claimant's failure to specify in detail his objections (although he has managed to specify many other complaints in detail) and because of his failure to confirm whether he is content with the transcription of his own recordings and to produce all relevant documents that he has (as set out above). He admitted that he received a copy of the bundle in September 2018 (above) but he did not spend time going through it so that he could identify what he thought was missing or should be added, but sent it back to the respondent.

7. The respondent has indicated that, all things being equal, if the claimant had been in a position to rapidly comply with the other orders, it would have ensured that its witness statements were ready for exchange prior to final hearing. By contrast, the claimant told me today that he would need "a few more weeks" to produce a witness statement (even if everything else could be done to get the matter ready), so that there is no possibility that they would be ready before (or even during) the period for which the final hearing is listed. In any case, the repeated his intention to apply to amend the claim in accordance with the amended Scott schedule, which runs to tens of pages.

8. I am excluding for the moment, in the context of rule 37(1)(c) at least, the failure to comply with Judge Woffenden's order of 30 November 2018, as it was very unfortunately attributed the wrong date in the Order sent out by the tribunal.

Just dealing with the failure to comply with the order of 5 June 2018, it seems to me that there has been a really serious failure to comply by the claimant. The delay has been lengthy and deliberate; the correspondence I have referred to above shows that the claimant was well aware of his obligation to comply with the order but chose not to comply with it, saying either that he considered order 3 to be "inappropriate" when his representative had consented to it in his presence, or that he had other important matters to attend to which had precluded compliance or that he was choosing to comply with order 4 in the two or three weeks before the final hearing rather than 6 months earlier, as directed.

9.As I have indicated above, he has still not fully complied with orders 3 and 4, so that the respondent and tribunal cannot clearly understand the disadvantage to which he says he was put by the relevant provisions criteria and practices in the context of the reasonable adjustments claim, and and it is still unclear which are the protected acts relied upon, an essential ingredient of victimisation claim. As I have previously indicated, both of those matters are likely to need to be addressed in evidence by the respondent as well as by the claimant, and it may yet be that the respondent (as well as the claimant) has relevant documentation in respect of these matters.

10. It is difficult to say how much documentation has so far been withheld by the claimant, and so is yet to be disclosed, but the failure to do so, and in particular the claimant's failure even to start to draft a witness statement are very serious defaults. I am not satisfied, on the evidence before me that the claimant has suffered more than minor ailments in the last eight months; he was certainly able to produce very lengthy emails, quoting relevant law, which were sent to both the respondent and tribunal in the intervening period.

11. **Reason for non-compliance:** Although to begin with, up to about August or early September 2018, the claimant was complaining about his solicitor (and difficulty in contacting him), by 23 August 2018, the claimant was showing, in his correspondence with the respondent's solicitor, that he was fully aware of his obligations in respect of the order of 5th June, and was intending to comply with it himself. By 9 September 2018, he had notified the tribunal (although not apparently his solicitor) that he was intending to represent himself. It is clear that the respondent had written to the claimant on many occasions clarifying what parts of the order he had failed to comply with. He made repeated promises that he would comply with paragraph 3 of the order of 5 June 2018, but has failed to do so with any clarity. He had said quite clearly from an early stage that he was not intending to comply with paragraph 4 of the order (as early as 16 July 2018). His failure to comply has continued since 6 November 2018, when it was absolutely clear (if had not been before) that the claimant was no longer represented by his solicitor. My conclusion is that the claimant does not intend to comply with the Tribunal's Orders, nor to further the overriding objective, but rather to follow his own agenda of obfuscation and delay, for whatever reason.

12. **Effect of failure to comply**: In the context of failure to comply with the order of 5 June 2018, in my view it is absolutely clear that this failure has caused significant unfairness, disruption and prejudice to the respondent. At this stage, almost six years after the claimant's dismissal from a post in which he was employed for 17.5 hours per week, it still does not have clear details of the case has to meet, and due to the claimant's own default, it seems to me that postponement of the final hearing is inevitable - apart from anything else, on the

claimant's case, he has not begun to draft his witness statement. Given its likely length, and his own declaration that it will take several more weeks before he can complete it, so that (as he said) it will not be ready by the time that the final hearing is listed, it would not be possible to conduct a hearing on those dates. I believe that this is the 5th time the final hearing has been listed, and on 3 occasions the fact that the claimant has not complied with the tribunal's directions has contributed (at least) to that decision. This has caused disruption and expense not only to the respondent and its witnesses, but has delayed the hearings of other litigants at a time when Tribunal time is at a premium.It is easy to forget that each time a final hearing is listed, the witnesses have to make sure they are available and remind themselves of events so long ago.

13. I have kept in mind the President's words, in her judgment on appeal, that "*any further or continued delay would be inimical to fairness and the interests of both sides and will serve only to make it harder for the fact-finding process to take its course."*

14. After more than 5 years, with the issues still not clear, it is easy to see how the delay that has occurred since last June (and the postponement of the final hearing once again) will prejudice the respondent. If the case were to continue, even if the claimant finally complied fully with direction 3, and even if any application to amend were refused, it is likely that the respondent would still have to ask its witnesses for the first time about details of disadvantage suffered by the claimant and about alleged protected acts. Even in respect of matters where the issues are relatively clear, it would be well over 6 years since the relevant events before the witnesses were questioned about them (if, contrary to experience in this case, a listing in early to mid 2020 was actually effective) As a matter of common experience, this would be extremely disadvantageous to the respondent's witnesses. As Simler P pointed out, such a delay does not assist the claimant either, but at least he has the benefit of knowing the nature of his own claim.

15. The need to postpone the final hearing again will be extremely disruptive – the claimant has not prepared but the respondent has briefed its witnesses and arranged for them to be available to attend the trial. If the matter proceeds, there will be further disruption and it is probable that an even longer listing will be required.

16. **Is a fair trial still possible**? in the context of rule 37(1)(c) and (e),I do not consider that, now, a fair trial is still possible, whether that is commencing on 18 February 2019 or at a later date when this hearing can be relisted (realistically, in approximately one year's time; cases of this length are currently being listed into February 2020 in this region).

17. Despite having had not one but two attempts to clarify his schedule of allegations, the claimant has expanded it by a factor of four or five since the last hearing (although he says it is still incomplete), so that the issues are manifestly unclear. If the claimant were given a deadline to supply the respondent and tribunal with full details of the amendments he is seeking I consider it very likely that he would simply choose not to comply, as he has chosen on a number of occasions since June 2018. I have set out the correspondence at length above because it demonstrates that a number of occasions the claimant has declared

that he is not going to comply with tribunal's orders because he does not consider it to be appropriate.

17. Even if I am wrong, and were the claimant to attempt to comply with such a direction, I consider that a preliminary would be necessary to clarify the allegations, identify which of the allegations are within the original claim, which require an amendment if they are to be pursued and in respect of which the amendment should be granted. I would anticipate that such a hearing would take at least 3 days (judging by the pace today), and that at the end of it the claimant may yet seek to challenge the outcome and attempt to add yet further complaints. All of this would need to take place before the issues of disclosure could be concluded and exchange of witness statements could occur. In my view, it is highly likely that further case management preliminary hearings would be required to ensure that appropriate disclosure had taken place and that the claimant completed his witness statement (s).

18. I do not consider that such intensive oversight by the tribunal (at this stage in the proceedings, and given all of the hearings which have occurred before) would be proportionate or appropriate, given not just the effect on the respondent and its witnesses, and on the costs of these proceedings but also the effect on other litigants waiting to have their cases heard. In the absence of such intensive involvement by the Tribunal (which is unlikely to be feasible given current resources even if it were appropriate) a fair trial is simply not possible within a reasonable period – the issues are too unclear, it would be impossible to say whether the claimant has complied substantially with disclosure and given the claimant's unwillingness to comply, it is likely the next hearing would have to be vacated, also.

19. I bear in mind that I should only consider the situation as of now, taking account of what has occurred since the previous appeal hearing in January 2018. I am well aware how Draconian an order to strike out the claim is, and that it should be used only as a last resort. I have considered seriously whether to simply postpone the final hearing and give further directions for a preliminary hearings to deal with amendment and to clarify the issues, as mentioned above, then to direct further disclosure and exchange of witness statements (and to order yet a further case management hearing to try to ensure they are complied with before a lengthy final hearing).

20.As I have said, however, bearing in mind the volume and nature of the correspondence in which Mr Baber has indulged since the last hearing, I simply do not consider that it is at all likely that it would be possible to carry all of this out in a proportionate manner. Mr Baber has been unable or unwilling to comply with the relatively straightforward orders that I made on the last occasion, despite the fact that he was represented for part of that period and has raised all sorts of other issues. Mr Baber's submissions today, and his conduct to date, gives me no confidence whatsoever that we would be in a better position in 6 to 12 months' time than we are now.

21. In my view, the intervening year since the appeal hearing has shown that rather than being intent on progressing his case, the claimant has sought to obfuscate and delay. The single clearest example of that is the claimant's misleading application to the tribunal on 23 November 2018, on the Friday afternoon before a preliminary hearing which I had deliberately listed to ensure

that the case was kept on track for final hearing starting in February 2019, to postpone that hearing, and his subsequent failure to comply with Judge Woffenden's order regarding the production of medical evidence, when she granted that application.

22. I say that it was a misleading application, because the claimant's own evidence reveals that only three days before, he was writing to an NHS practitioner saying that his health was currently much better than it had been for some considerable time - he made reference to a previous period of about 1.5 years when he said he had an adverse symptoms due to medication which he had, by then, stopped. The medical evidence which the claimant produced today did not show that he was unfit to attend on 26 November 2018, but rather suggested that he had overlooked it. He clearly had not, as he wrote applying for postponement on 23 November 2018.

23. Had the claimant attended on 26 November 2018, I would have made appropriate directions to get the case ready for trial in February 2019, including quite possibly by making "unless" orders. The claimant's conduct, in obtaining a postponement in November 2018 on a false premise, persuades me that this would no longer be an appropriate course. I do not consider that the claimant is committed at all to bringing this matter to hearing. If he was, he would have complied with the relatively simple directions I gave in June 2018, and would have started drafting his witness statement many months ago. After all, his witness statement should only contain information which is already within his possession.

24 Instead, the claimant has focused on peripheral matters, such as whether the respondent was one day late in confirming its interest in judicial mediation, or whether the tribunal should copy correspondence both to him and his solicitor, and has said in terms that he is choosing not to comply with the tribunal's directions at a particular time – see for example the claimant's letter to the Tribunal dated 2 August 2018. It is correct that in August the claimant had applied to vary paragraph 3 of the order of fifth June, and it is very unfortunate that the tribunal clerk failed to transcribe my direction that the time for compliance with order three extended to 17 September 2018, but the claimant continued to fail to comply with that direction thereafter, and only partially complied in December 2018. Had he attended on 26 November I would have made a direction (quite probably an unless order) that he comply with it within a further period of no more than 14 days. By obtaining a postponement of that hearing on false pretenses, that opportunity was lost, and by conducting himself in that way, the claimant has destroyed any confidence I may have had that a further unless order would be an effective tool. I note that on the previous occasions when there was some compliance with unless orders, the claimant was represented by a solicitor. He is not now, and his own conduct is such that I do not consider that such an order would be effective – it is likely that the claimant would comply to some minor extent such that further clarification was required or would then make some other application so that enforcement of the unless order was not appropriate, and this would simply delay, in my view, the inevitable, and cause further prejudice, delay and cost.

25. I have considered whether a strike out order is in accordance with the overriding objective and whether, in particular, it is proportionate to use this sanction of last resort. I conclude that it is: if matters were to proceed, the parties

would not be on an equal footing. The claimant, who has been represented for large periods of time, would know what his case is, and would have access to all available relevant material. The respondent would not. If I were to make unless orders and order further preliminary hearings, in my view this would be far from a proportionate use of the Tribunal's resources, and would go far beyond what can reasonably or sensibly be expected, given all of the circumstances, including the history of the case. The issues are complex and discrimination cases are always important, but in my view the claimant has had a more than fair opportunity to make his case, which he has not taken.

26. I have to avoid unnecessary formality and manage cases flexibly, but, essentially, the respondent and tribunal and to know what the claimant's case is, and that all relevant material had been made available, in order for the parties to be on an equal footing and there to be a fair hearing. I have no confidence that, taking all reasonable steps to manage it, that can be achieved in this case.

27. Importantly, I should avoid delay so far as compatible with the proper consideration of the issues and should seek to save expense. I find that prolonging this claim will lead to unconscionable delay and will only serve to further amplify the costs, which must be very substantial already.

28. For all of those reasons I have decided to strike out this claim under rules 37(1) (c) and/or (e), on the basis that the claimant has not complied with the Order of the Tribunal dated 5 June 2018 and/or that a fair trial of the claim is no longer possible. Had it been necessary, I would also have found that the manner in which the proceedings were conducted by or on behalf of the claimant were unreasonable, for the reasons set out above.

Employment Judge Findlay
Date 25 April 2019