



EMPLOYMENT TRIBUNALS

Claimant: Ms M Kirton

Respondent: Muraspec Decorative Solutions

**Preliminary hearing
Heard at:** Ashford

On: 19 March 2019

Before: Employment Judge Pritchard

Representation
Claimant: Mr A Korn, counsel
Respondent: Miss L Hatch, counsel

RESERVED JUDGMENT UPON A PRELIMINARY HEARING

The Claimant's claims are struck out

REASONS

1. By way of an ET1 presented on 8 October 2016, the Claimant claims unfair dismissal, disability discrimination, and unauthorised deductions from wages. The Respondent resists the claims.
2. The preliminary hearing was held to consider the Respondent's application to strike out the Claimant's claims.
3. I was provided with a bundle of the Respondent's documents, a bundle of the Claimant's documents, a bundle of documents entitled "Claimant's Additional Materials", a letter dated 28 August 2018 to the Claimant from her GP, and an unsigned witness statement by the Claimant. Neither party called witnesses to give evidence. I heard submissions from the parties, the parties amplifying the submissions set out in their skeleton arguments. In making my findings of fact, I have additionally referred to correspondence contained in the Tribunal file.
4. I was referred to a number of authorities as described below and an extract from Blackstone's Employment Law Practice 2017.

Issue

5. The issue for determination was whether, upon the Respondent's application, the Claimant's claims should be struck out under Rule 37.

Findings of fact

6. I set out here a summary of the procedural history insofar as it is relevant to the application being made. It is accordingly an abridged version of events.
7. The Claimant was employed by the Respondent from 21 February 2011 until her dismissal on 22 June 2016. She presented her ET1 claim form, but without details of her claim on 8 October 2016. A preliminary hearing took place on 6 December 2016 before Employment Judge Martin. In her case management order, Employment Judge Martin recorded the details of the Claimant's claims and confirmed that it had not been her intention to bring a whistleblowing claim. The Respondent, having been granted an extension of time, presented its response on 17 January 2017.
8. Throughout the relevant period, the Claimant was involved in other legal proceedings the details of which do not concern this Tribunal. These will be referred to as "the other legal proceedings".
9. In January 2017 the Claimant underwent back surgery.
10. It was proposed that a preliminary hearing be held on 7 March 2017 to consider the Respondent's application for a strike out and/or a deposit order. The Claimant's application for a postponement of that preliminary hearing, supported by a letter from her orthopaedic consultant, was granted. The consultant stated the Claimant had a complicated recovery following major spine surgery and would not be able to travel long distances for six months or attend court proceedings; stress would exacerbate her condition and prolong her spine rehabilitation.
11. The Claimant was asked to inform the Tribunal when she would be, or likely to be, fit to attend a hearing and to provide a medical report as to her prognosis. After being chased by the Tribunal, the Claimant sent a number of medical records to the Tribunal. Because the medical records did not assist in answering the question, the Claimant was required to reply by 12 May 2017. On 28 April 2017, the Claimant informed the Tribunal that she was in the process of gathering further medical advice and that she must not be placed under any pressurised situations, especially court proceedings, until September 2017.
12. In response to the Tribunal's request for the parties' dates to avoid, the Claimant replied that her recovery had not gone well and that her solicitor, whom she was in the process of instructing, would not be available until November 2017.
13. A preliminary hearing was listed for 31 August 2017 to determine the Respondent's application. The Claimant informed the Tribunal that she was still in a recovery period and unable to attend the preliminary hearing until she had been fully reviewed on 3 December 2017. The Claimant included a medical file

note which stated:

Ms Kirton is still 2 and a half months post-op and we will review her again in 3/12 She has undergone major surgery and is therefore still in a period of rehabilitation and anxiety / stress can slow her overall rehabilitation.

14. The Claimant added that due to complications post-surgery she had been unable to secure representation.
15. Notwithstanding the Respondent's objections to further delay, the preliminary hearing was postponed. In October 2017, the parties were informed that the preliminary hearing would take place on 10 January 2018.
16. By email dated 21 December 2017, the Claimant requested a postponement of the preliminary hearing for a further six months. The reasons given for the request concerned matters surrounding and consequent upon the other legal proceedings. Among other things, the Claimant said that she had attempted suicide. The Claimant also sent to the Tribunal a letter from her GP which stated, among other things, that the Claimant had been admitted to hospital on 20 November following a drug and alcohol overdose where she was assessed by the Liaison Psychiatric Team. A discharge summary showed that the Claimant was now fit for discharge. The Claimant had nevertheless expressed to her GP "ongoing extreme anxiety which may worsen with a Court attendance and is requesting an adjournment to enable her to recover prior to the Court case".
17. The Claimant's application to postpone the preliminary hearing was granted and proceedings stayed for six months. The Claimant was required to provide, on or before 19 January 2018, a medical report to indicate when she would be able to attend the preliminary hearing. The Claimant did not do so by the required date.
18. Nevertheless, by letter dated 29 January 2018, the Claimant's GP informed the Tribunal, among other things:

She remains in very severe chronic pain.

When I last saw her on 7 December, she was in a very distressed state due to the combination of her anxiety / depression. By any "normal" standards, I would say that at that time she was not fit to appeal before a tribunal. I have no reason to suppose that the situation would be better now, and she is therefore almost certainly still not fit to appear.

... I can make no prediction therefore as to when she may be fit to attend, or indeed if she will ever be fit to attend.

However, if she does not attend such hearings, there will be no way forward for her to get her life back and make progress.... I believe that at some point she will simply have to use her willpower to attend a hearing even though she may not be ideally fit to do so. I am afraid I have absolutely no way of predicting when she might reach this point.

19. In an email dated 2 March 2018, the Claimant informed the Tribunal that by reason of the other court proceedings and the numerous court trials, she was

suffering from extreme anxiety. She wished to pursue her claim in the Employment Tribunal but wished to get through the trials first.

20. By letter dated 15 May 2018, the parties were informed that the case would be listed for a half day preliminary hearing to consider the matter generally. By letter dated 3 July 2018, the Tribunal informed the parties that it was in the interests of justice for the matter to be progressed and that the parties would be notified of a hearing date in due course.
21. By email dated 4 July 2018 the Claimant informed the Tribunal that she had a further three major surgical procedures pending and would be unfit to attend until December 2018.
22. In July 2018 the Claimant underwent surgery on her foot. In the same month the Tribunal issued Notice of Hearing to take place on 31 August 2018 with a three hour allocation. By email dated 10 August 2018, the Claimant informed the Tribunal that she was presently out of the country convalescing following major surgery on her foot, that she was wheelchair bound and in severe pain. She questioned the necessity for a further preliminary hearing and asked for the case to proceed to a final hearing after December 2018.
23. By letter to the Tribunal dated 16 August 2018, the Respondent noted that the Claimant was able to travel abroad and asked for the preliminary hearing to proceed on 31 August 2018. By email to the Tribunal dated 16 August 2018, the Claimant stated that she was in constant pain, she was wheelchair bound, and had further surgery scheduled to take place on her other foot in October 2018. She also stated that her mental health remained fragile.
24. The Tribunal confirmed with the parties that the issue for the preliminary hearing would be to consider the Respondent's application. It was noted that the Claimant had provided no medical evidence to support her contention that she was unable to attend the hearing.
25. By email of the same date, the Claimant informed the Tribunal that she would forward medical evidence upon her return to the UK on 26/27 August 2018.
26. By letter dated 28 August 2018, the Claimant's GP wrote to her as follows:

Dear Monica

Thank you for your email of 17 August.....

You refer in the email to the letter I wrote to the Employment Tribunal back in January.

I am sure you still have a copy of that letter and I would ask you to re-read the final paragraph. You will see that I believe that if you don't attend the hearing eventually "there will be no way forward for you to get your life back in order and make progress". I refer to the vicious cycle where your inability to attend the hearing may in the long run exacerbate the problems that are actually preventing you going. Finally I've said "I believe that at some point she will simply have to use her will power to attend a hearing even though she may not be ideally fit to do so".

All our recent correspondence has been about you reassuring me that you are not mentally unwell. You have now had several psychiatric assessments that have confirmed this.

Therefore it seems to me that this is probably an ideal moment for you to go ahead with facing up to attending a tribunal.

For that reason I am unable to write a letter at this time saying that you are unfit to attend.

27. The Claimant did not disclose this letter to either the Tribunal or the Respondent. It was disclosed by the Claimant's counsel for the first time at this preliminary hearing.
28. On 29 August 2018, the Claimant sent a number of medical records to the Tribunal and reiterated that she would be unfit for any hearings until December.
29. The Claimant's application for a postponement was refused because there was no evidence that she was not able to attend. The Claimant telephoned the Tribunal to say she needed round the clock care. She followed up with an email saying:

"I am not medically fit to attend any hearing! I am unable to leave my house at present, hence I request a hearing by phone".

The Claimant's request for a telephone hearing was granted. Shortly before the preliminary hearing was due to take place, the Claimant informed the Tribunal that she had been taken ill with an infection in a major wound and that she had had no sleep the night before; the Claimant sought a postponement. Nevertheless, the Tribunal gave instructions that the preliminary hearing would proceed for case management purposes only and that it was the Claimant's decision as to whether she would dial in. Employment Judge Baron records the curious circumstances of the telephone hearing. They will not be repeated here.

30. Employment Judge Baron issued Orders following the preliminary hearing. Employment Judge Baron noted that the position was wholly unsatisfactory and that while a claimant is entitled to have her case heard, so a respondent is entitled to have a hearing with reasonable expedition. The judge further noted that it is the responsibility of a claimant to pursue her claim and that despite any medical problems which a claimant may have, there may come a time when a Tribunal concludes that it is simply not possible for there to be a fair hearing with the consequence that the claim is struck out.
31. The Claimant was required to provide to the Tribunal and the Respondent, within 14 days, a report from a medically qualified practitioner containing the following information:
 - 31.1. A brief summary of the impairment(s) currently affecting the Claimant;
 - 31.2. Whether or not such impairment(s) prevented the Claimant from attending the Tribunal on 31 August 2018;

- 31.3. Whether or not such impairment(s) prevent the Claimant from pursuing the administration of her claim at present;
- 31.4. Whether or not such impairment(s) prevent the Claimant from attending a hearing at the Tribunal;
- 31.5. If the answer to either or both of the preceding questions is in the affirmative, then when is it expected that the Claimant will be in a position to pursue the administration of her claim and attend a hearing?
32. On 6 September 2018, the Claimant wrote to the Patient Care Coordinator at the hospital where she had been treated. Among other things, the Claimant stated:

I wondered whether you could try and upload my up to date records again as previously requested, including the recent reports ... The Employment Tribunal service are being bloody minded and require all medical records to date sent electronically, to prove that I am not fit for attending court presently ... AM EXCEPTIONALLY ILL AT THE MOMENT, FOLLOWING RECENT SURGERY

THE EMPLOYMENT TRIBUNAL IS REQUIRING ORIGINAL RECORDS WITHIN TWO WEEKS...

33. On 11 September 2018, the Claimant emailed her GP's surgery asking her GP to respond to the Tribunal's orders; the Claimant wrote that she was "absolutely devastated" with the letter her GP had written to the Tribunal recently and that due to the "unsupportive letter" she ended up suffering a wound infection and became deeply depressed.
34. By email dated 14 September 2018, the Claimant informed the Tribunal that she had asked her GP and to provide up to date medical reports as required by Employment Judge Baron. On 18 September 2018, the Claimant's GP wrote to her stating, among other things:

... Most recently I have written to you saying that I am not in a position to write the letter that you were requesting.

I note that the Tribunal instruct you to obtain a letter saying whether or not you are fit to attend.

I am afraid that I have to reiterate that I don't feel that I am in a position to write a letter to say that you are not fit to attend. I believe that ultimately you have to face up to attending this Tribunal, even if you are not in 100% health. I am afraid that there will almost certainly never come a time when you are in 100% health.

However, all your most recent psychiatric referrals, including the comprehensive assessment done ... in July state that you are from a mental health point of view fit. Indeed, the letters say that you have very clearly stated this.

What I would be prepared to write is a letter stating that I believe that you

are as fit as you will ever be to attend this Tribunal but stressing the immense stress you are under.

If you want me to write such a letter I will do so. If you don't want me to write such a letter I am afraid you will have to advise Judge Baron that you are not in a position to obtain the letter you have been asked to obtain.

Clearly if the judge were to approach me directly asking me for such a letter I would have to write the letter as I see fit.

I am sorry that I know you are not going to find this satisfactory, but I am afraid I have to work according to my conscience.

35. The Claimant did not disclose this letter to the Tribunal or to the Respondent until this preliminary hearing.
36. The Claimant subsequently provided the Tribunal with a report from her foot and ankle consultant on 1 October 2018. She asked that the report be kept confidential. The consultant noted the Claimant's complex medical background in addition to her foot and ankle condition. In the interests of confidentiality, the substance of the consultant's report will not be described here: the parties are aware of its contents.
37. By letter dated 11 October 2018, the Respondent complained that the Claimant had failed to comply with Employment Judge Baron's order and sought an Unless Order. In reply, the Claimant said she had sent a full medical report to the Tribunal on 1 October 2018 and re-asserted that she had not given her permission for the Respondent to have sight of her medical records. The Respondent complained that it had not received a copy of the medical report and that the Claimant was in breach of the order. On 16 October 2018, the Claimant emailed the Tribunal saying, among other things:

I have provided the judge with all my private and confidential medical reports, as per requested, and do not give my authority to provide such to the Respondents!

I was exceptionally ill (both physically and mentally) and vulnerable at the time of the preliminary phone hearing, as you can see from my medical reports!

....I am presently still suffering , hence my present severe anxiety and physical disabilities

38. Employment Judge Baron arranged for a letter to be sent to the parties on 12 November 2018. While respecting the Claimant's request for confidentiality, she was informed that:
- 38.1. The consultant's letter did not comply with the requirements of the order;
- 38.2. Progress must be made with the claim;
- 38.3. It is the responsibility of the Claimant to do so;

39. The judge wished to relist the preliminary hearing for consideration of the Respondent's application. The Claimant was required to provide a medical report which complied with the requirements of Employment Judge Baron's order by 4 pm on 30 November 2018. She failed to do so.
40. By letter dated 11 December 2018, the Respondent made an application for the Claimant's claims to be struck out under Rule 37(1)(b)(c)(d) and (e).
41. By email to the Tribunal dated 11 December 2018, the Claimant stated that, among other things, she had not heard from the Tribunal since she had submitted her medical report. The Respondent commented that the Claimant was still failing to comply with the Order.
42. On 9 February 2019, the Claimant informed the Tribunal that she had been too ill, suffering from life threatening high blood pressure, anxiety and severe stress, to consider the Respondent's letter of 11 December 2018 in which it applied to strike out her claim. On 12 February 2018, the Claimant emailed the Tribunal as follows:

Dear Sir/Madam

I strongly refute such an application, to strike out my application.

As previously reported, I provided full medical reports, prior to the date required, however exercised my human right of confidentiality, thus such private and confidential information, to be viewed by The Judge only...

The Respondents HAVE NOW BEEN IN CONTEMPT OF COURT, by providing disparaging and misleading information, which is subject to prejudging my application and severely perverting the course of justice ...

I therefore request that my application be referred back to ACAS, for conciliation, due to the above, alongside my progressive health conditions.

I respectfully request The Judge to find my application affirmed due to SERIOUS CONTEMPT OF COURT.

Alternatively, I will have no choice, but to log a serious complaint via RESOLVER, against the Tribunal Service, and escalate such to The MOJ, Petty France!

Alternatively, I request that my case be referred to the Royal Courts of Justice, due The case being compromised / prejudiced by CONTEMPT OF COURT

43. By letter dated 27 February 2019, the parties were sent Notice of Preliminary Hearing to be held on 19 March 2019 to consider the Respondent's application for a strike out.
44. By email dated 27 February 2019 the Claimant sent to the Tribunal x rays and photographs of her foot. Her accompanying email reads as follows:

Dear Sirs

Case No: 2301981/2016

Please find attached photographic evidence in total contradiction, to those sent to the Employment Tribunal Judge, by the Respondents Solicitors, who were allegedly in contempt of court, by insinuating that I was fit to attend court in August 2018, some 3 weeks post major surgery...

....

Due to the immense pressures by Judge Baron, insisting that the Court hearing be continued by telephone, I suffered an horrendous wound infection, which alongside my severe ongoing [other legal proceedings] case, has caused my left foot to be severely disabled and disfigured and to date is causing my surgeon, Mr Malagelada, major concern of needing further surgery...

My mental health, is however improving somewhat, and thus, although still not being "good" I feel that I am now able to represent myself in court (Ashford) in the near future!

Due to the 2nd Preliminary hearing taking place by phone, I therefore respectfully request that such be a full tribunal trial (anticipated by Judge Martin, in December 2016), to be an estimated time scale of 5 days!

....

45. The Claimant also sent to the Tribunal a further copy of her consultant's report dated 26 September 2018 and a summary of her GP records/consultations.

Applicable law

46. Rule 37 provides:

- (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:
 - (a) That it is scandalous or vexatious or has no reasonable prospect of success;
 - (b) That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
 - (c) For non-compliance with any of these Rules or with an order of the Tribunal;
 - (d) That it has not been actively pursued;
 - (e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

47. In Anyanwu v South Bank Students' Union 2001 ICR 391, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

48. In De Keyser Ltd v Wilson 2001 IRLR 324, the EAT made it clear that certain conduct, such as deliberate flouting of a tribunal order, can lead directly to a striking-out order. However, in ordinary circumstances, neither a claim nor response can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.
49. The EAT held in HM Prison Service v Dolby [2003] IRLR 694 that the striking out process requires a two stage test. The first test involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim or order a deposit to be paid.
50. In Bolch v Chipman 2004 IRLR 140, the EAT set out the steps that a Tribunal must ordinarily take when determining whether to make a strike out order:
- 50.1. Before making a striking-out order under what is now Rule 37(1)(b), an employment judge must find that a party or his representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings;
 - 50.2. Once such a finding has been made, he or she must consider, in accordance with De Keyser Ltd v Wilson, whether a fair trial is still possible as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed;
 - 50.3. Even if a fair trial is unachievable, the Tribunal will have to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation time order against the party concerned rather than striking out his or her claim or response.
51. In Blockbuster Entertainment Ltd v James 2006 IRLR 630, the Court of Appeal held that for a Tribunal to strike out for unreasonable conduct, it has to be satisfied that either the conduct involved deliberate and consistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response.
52. The word scandalous in Rule 37(1)(a) is not to be given its colloquial meaning of signifying that something is shocking; rather, it means irrelevant or abusive of the other side; Bennett v Southwark London Borough Council 2002 ICR 881.
53. A vexatious claim or defence has been described as one that is not pursued with the expectation of success but to harass the other side or out of some improper motive; ET Marler Ltd v Robertson 1974 ICR 72. However, the categories of conduct rendering a claim vexatious are not closed; see Ashmore v British Coal Corporation 1990 ICR 485 CA.
54. In Evans v Commissioner of Police of the Metropolis 1993 ICR 151, the Court of Appeal held that a Tribunal's power to strike out a claim for want of prosecution must be exercised where:
- 54.1. There has been delay that is intentional or contumelious

(disrespectful or abusive to the court), or

- 54.2. There has been inordinate or inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.
55. In Sud v The Mayor and Burgesses of the London Borough of Hounslow UKEATPA/0182/14 the Employment Appeal Tribunal held that a Tribunal had not erred in law when it struck out the claimant's claim because she had lied about her medical condition and manually altered a date on a psychiatrist's report, the Tribunal thus losing trust in the claimant's veracity and that there could therefore no longer be a fair trial.
56. A Tribunal should consider whether striking-out is a proportionate sanction. A proportionate response requires the Tribunal to consider whether there are less drastic means of addressing a claimant's failures and achieving a fair trial for the purposes. See for example: Abegaze v Shrewsbury College of Arts and Technology 2009 EWCA Civ 96.

Conclusion

57. The Respondent pursued its application on four the grounds below. The application was not pursued under Rule 37(1)(a) and I have not had regard to the merits of the Claimant's claims.

Rule 37(1)(b)

58. The Claimant has sought to mislead the Tribunal with regard to her physical and or mental health and / or her ability to attend hearings.
- 58.1. It is unlikely that the Claimant was sufficiently fit to attend a hearing during 2017, having had major surgery on her spine and what appears to be have been temporary mental health issues, perhaps associated with the other legal proceedings. This much is tolerably clear from what her GP had to say in January 2018.
- 58.2. Although it is unclear how soon and to what extent she recovered in the immediate aftermath of foot surgery in July 2018, it appears that by August 2018, in all likelihood she was sufficiently well to attend a hearing. In his letter of August 2018, the Claimant's GP confirmed the Claimant's mental well-being. Although the Claimant might not have been "ideally fit" to attend a hearing, it can be reasonably inferred from the context of the GP's letter that she was sufficiently fit enough to do so.
- 58.3. The Claimant misrepresented the circumstances surrounding her health to the Tribunal. She said she was wheelchair bound and in constant pain - while at the same time she travelled abroad in August 2018.
- 58.4. Certainly, by September 2018, it became clear that the Claimant's GP was not prepared to accede to her request to provide a letter saying she was unfit to attend. The Claimant nevertheless continued to inform the Tribunal that she continued to suffer "severe anxiety

and physical disabilities". Although she had physical disabilities, there was simply no evidence to suggest she was suffering from severe anxiety or that she was unable to attend a hearing by reason of any mental or physical impairment. As late as 9 February 2019, the Claimant maintained that she was too ill to deal with the Respondent's letter of 11 December 2018. In both cases, her GP's letters strongly suggest this was not the case.

58.5. The Claimant failed to disclose the GP's letters until this preliminary hearing; she chose to hide them from the Tribunal and from the Respondent.

59. The Claimant has treated the Tribunal with contempt. She complains in February 2019 that Employment Judge Baron placed her under immense pressure insisting the hearing be conducted by telephone whereas it was at the Claimant's request.

60. I also note that the Claimant's unwarranted and inappropriate threat made in February 2019 that unless the Tribunal, in terms, finds in her favour she will lodge serious complaints with various bodies.

Rule 37(1)(c)

61. Notwithstanding any reasonable excuse the Claimant might have had for failing to comply with the Orders of the Tribunal by reason of ill health before August 2018, thereafter I am unable to identify and such reasonable excuse.

62. The Claimant failed to comply with the Order issued by Employment Judge Baron following the preliminary hearing held by telephone on 31 August 2018. The report from her consultant did not comply with the requirements.

63. Despite being given a further chance to comply by 30 November 2018, she still failed to do so.

64. I am unable to accept that the Claimant might have not have understood what was required. Employment Judge Baron's Order could not have been more clearly expressed. I also note that the Respondent provided to the Claimant a list of providers of free advice whom the Claimant could have approached if there had been any confusion on her part.

65. It is likely that the Claimant knew full well what was required. This is evidenced by the fact that she asked her GP to provide the required information. The Claimant's failure to comply was because her GP was unwilling to inform the Tribunal that she was unfit to attend the hearing when it was not true. As the GP stated: "I am afraid I have to work according to my conscience".

66. I find that the Claimant failed to comply with Orders of the Tribunal which she deliberately and consistently disregarded.

Rule 37(1)(d)

67. By reasons of my conclusions above, I conclude that there has been intentional and contumelious delay such that it can be said that the case has not been actively pursued.

Rule 37(1)(e)

68. I heard conflicting argument as to whether it was any longer possible to have a fair hearing. The Claimant refers to a detailed witness statement prepared by one of the Respondent's witnesses for the preliminary hearing on 7 March 2017 and a bundle of documents prepared by the Respondent running to some 278 pages. The Claimant says she is now fit to pursue her claim. The Claimant submits that it remains possible to have a fair hearing and suggests an appropriate allocation of seven days.

69. The Respondent makes the point that the Claimant was dismissed for gross misconduct nearly three years ago. There has only been one inter partes hearing and no further progress has been made. The Respondent submits that the claims are very fact heavy and some of the alleged complaints date back to 2015. By the time the case could be listed for final hearing, memories will have faded considerably.

70. If the case were to proceed, it would be necessary for a further preliminary hearing to be held to identify the issues in the case and for the Tribunal to make further case management order for the future conduct of the litigation. Even if a further preliminary hearing were to be listed as a matter of urgency, it is unlikely that a seven day final hearing could be listed until the middle of 2020.

71. I accept that discrimination cases in particular are generally fact-sensitive and require full examination to make a proper determination; Anyanwu. I accept the Respondent's submission that it is unlikely that the "catalogue of issues" can be safely determined on paper evidence and will rely upon the memory and recollection of witnesses. I agree with the Respondent the unlikelihood of witness memory being reliable after such a long period of time.

72. Further, as was the case in Sud, by misleading the Tribunal as to her unfitness to attend a hearing, the Claimant has caused the Tribunal to lose trust in her veracity.

73. To allow the case to proceed would not be just to the Respondent.

74. I find that it is no longer possible to have a fair trial.

Proportionality

75. If the Claimant's claims are struck out, she will no longer be permitted to pursue her claims. If the claims are not struck out, the Respondent will suffer serious prejudice: by the time the matter were to reach trial, it is likely that the Respondent's witnesses will be asked to recall events said to have taken place several years ago.

76. There is no other order or course of action which would cure the prejudice to the Respondent.

77. I conclude that the Claimant's claims should be struck out.

Case No: 2301981/2016

Employment Judge Pritchard
Date: 29 March 2019