EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100324/2019

Held in Glasgow on 24 June 2019 (Preliminary Hearing)

Employment Judge I McPherson

Miss Morag Jardine	**Claimant** **In Person**
The Scottish Ministers (Rural Payments and Inspections Directorate)	**Respondents** **Represented by:** **Dr Andrew Gibson - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

(1) In light of the claimant's email to the Tribunal, sent at 16:00 on 10 June 2019, withdrawing that part of her claim making whistleblowing complaints against the respondents (under **Sections 103A and 47B of the Employment Rights Act 1996**, being alleged automatically unfair dismissal by the respondents for her having made a protected disclosure, and for her having allegedly been subjected to a detriment by the respondents on the ground that she had made a protected disclosure), and her oral submissions and amended section 8.2 of the ET1 claim form as intimated at this Preliminary Hearing, withdrawing those whistleblowing complaints, and any complaint of a health and safety case against the respondents under **Section 44 of the Employment Rights Act 1996**, where she was allegedly subjected to a detriment by the respondents, those parts of her claim, having been withdrawn by her, in terms of **Rule 51 of the Employment Tribunals Rules of Procedure 2013**, are dismissed by the Tribunal under **Rule 52,** leaving only before the Tribunal her claim against the respondents, insofar as based on her complaint of her being

unfairly dismissed and suffering discrimination by perception, as set forth in her revised paper apart submitted to the Tribunal on 21 June 2019, contrary to the **Equality Act 2010**.

(2) The claimant having failed to establish that she was exempt from notifying ACAS about early conciliation before presentation of her claim to the Tribunal, as required by **Section 18A of the Employment Tribunals Act 1996,** and the **Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014**, the Tribunal, having considered parties' written and oral submissions made at this Preliminary Hearing, and after private deliberation thereafter in chambers, holds that the claimant has failed to establish that the exemption in **Section 18A(7)** applies on the facts of her case, and, accordingly, the Tribunal has no jurisdiction to consider this claim, and accordingly it is dismissed by the Tribunal.

(3) Further, and in any event, the Tribunal, having also considered parties' other written and oral submissions made at this Preliminary Hearing, and after private deliberation thereafter in chambers, holds that the claim, even if it had not been so dismissed for failure to give provide early conciliation notification to ACAS prior to presentation of the ET1 claim form, would have been dismissed on the basis that the Tribunal regards this claim as time-barred, and having regard to **Section 123 of the Equality Act 2010**, the Tribunal does not find that it is just and equitable to allow the claim to proceed, although late.

(4) Separately, further, and in any event, the Tribunal also holds that the claim has no reasonable prospects of success, and in bringing this claim, following upon her earlier claim against the respondents, under case number **4103492/2017**, where her **Equality Act** claims were withdrawn, the claimant has conducted proceedings against the respondents in these proceedings unreasonably and vexatiously, and so the claim should be struck out on that basis anyway.

REASONS

Introduction

1. This case called again before me on the morning of Monday, 24 June 2019, at 10.00am, for a one-day public Preliminary Hearing, previously intimated to both parties by the Tribunal by Notice of Preliminary Hearing (Preliminary Issue) dated 3 May 2019, to consider Strike Out / Deposit Order, as preliminary issues.

2. While I reserved Judgment, following the close of this Preliminary Hearing, there has subsequently been an unfortunate, but unavoidable, delay in my Judgment being progressed. The delay in this Judgment being issued, since 24 June 2019, had initially been down to my other judicial commitments, as well as some annual leave, and for that delay on my part, I offer my apology to both parties.

3. Yet further delay was thereafter occasioned by my sick leave absence from 16 September 2019 to 25 November 2019. Parties' representatives were advised of that absence by the Tribunal on 16 September 2019, at which stage it was not clear when I would return to work, and be able to progress this Judgment and Reasons. I apologise to parties for this further delay.

4. While a Strike Out application under **Rule 37 of the Employment Tribunals Rules of Procedure 2013** is, as per **Rules 53(1)(c) and 56**, a public, rather than a private Hearing, while an application for a Deposit Order, under **Rules 39 and 53(1)(d)**, shall be conducted in private, **Rule 56** provides that the Tribunal may direct that the entirety of a Hearing be in public, and that is what I ordered, on 5 April 2019, as per standard practice in cases where there are both Strike Out and Deposit Order applications before the Tribunal.

5. Its listing for this Preliminary Hearing followed upon a Case Management Preliminary Hearing held before me, in private, on Friday, 5 April 2019, following which my written Note and Orders of the Tribunal, dated 9 April 2019, were issued to both parties under cover of a letter from the Tribunal of 10 April 2019.

6. I made a number of case management orders at that stage, including order No. (11) where I provided that this Preliminary Hearing was fixed:

"***to address the respondents' opposed application to the Tribunal to consider Strike Out of the claim, under Rule 37 of the Employment Tribunals Rules of Procedure 2013, on the basis that the claim, as pled in the claimant's ET1 claim form, has no reasonable prospects of success, which failing to seek a Deposit Order of up to £1,000 per allegation or argument against the claimant, under Rule 39, on the basis that the respondents contend that the claim, as so pled, has little reasonable prospects of success. For the avoidance of any doubt, those preliminary issues include the respondents' specific argument that the claimant has failed to comply with the requirement under Section 18A of the Employment Tribunals Act 1996 to contact ACAS before instituting proceedings in the Employment Tribunal."***

Claim and Response

7. The claimant, acting on her own behalf, presented her ET1 claim form to the Tribunal, on 21 January 2019, and it was accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 25 January 2019. At section 2.3 of her ET1 claim form, the claimant replied in the negative to the question whether she had an ACAS early conciliation certificate number, explaining that she did not have this number as: "***My employer has already been in touch with ACAS***."

8. She complained of various matters arising from termination of her employment as a probationer Agricultural Officer on 21 April 2017. Specifically, she indicated that she had been unfairly dismissed, discriminated against on the grounds of disability and sex, and that she was owed other payments. She had previously raised an earlier claim against the respondents under case number **4103492/2017**, which was then (and indeed still is) ongoing before the Tribunal.

9. The claimant referred to that previous claim in this ET1 claim form, stating that it had been submitted in August 2017, following issue of a certificate by ACAS. At section 15 of her ET1 claim form in this new case, the claimant

submitted that this claim fell within the permitted time frame as it was originally submitted in time, aspects of the claim were incorrectly withdrawn without authority by her former representative, and as Judge managing that original claim, I had issued an order on 4 September 2017 which stated that the claims could be submitted under a fresh application as they had not been dismissed.

10. Monday, 21 January 2019 was day 1 of 6 in the listed Final Hearing of the claimant's previous claim against the respondents. The full Tribunal in that case, which I chaired, refused the claimant's application to postpone / continue that Final Hearing to another date, and to conjoin it with this new claim. The claimant notified ACAS of this new claim on 21 January 2019 at 23:47, having submitted her ET1 claim form online at 04:49 that morning. She emailed the Tribunal, and the respondents' representative, to advise them.

11. Thereafter, once she had received her ACAS early conciliation certificate **R107813/17/71** issued to her by email on 23 January 2019 at 09:42, she forwarded that email and ACAS certificate to the Tribunal and respondents' representative. Accordingly, when her ET1 claim form was subject to the standard, pre-acceptance check by Tribunal staff, it was confirmed, as per **Rule 10 of the Employment Tribunals Rules of Procedure**, that it had been submitted on the prescribed form, and it contained the minimum information required as, while no ACAS early conciliation number had been entered, an exemption box had been ticked by the claimant. As such, the claim was accepted, rather than rejected, by the Tribunal staff.

12. There being no substantial defects, there was no judicial referral to an Employment Judge under **Rule 12**. Any issue about the claimant's ability to rely on the ACAS certificate in the original claim, if she was not entitled to exemption from ACAS early conciliation, was considered superceded by the Tribunal's receipt of the fresh ACAS certificate issued on 23 January 2019.

13. On 25 January 2019, as well as issuing Notice of Claim, the Tribunal also issued to both parties its standard "***Claim Accepted Out of Time***" letter, as

the claim appeared to have been submitted outwith the relevant periods within which claims of the type brought by the claimant, for unfair dismissal, and discrimination, should normally be brought.

14. On 22 February 2019, an ET3 response was filed on behalf of the respondents, defending the claim, through their legal representative, Dr Andrew Gibson, associate with Morton Fraser LLP, Glasgow. That response was accepted by the Tribunal on 25 February 2019 and a copy sent to the claimant and ACAS.

15. In their ET3 response, the respondents raise a number of preliminary or jurisdictional issues, as per paragraphs 1 to 6 of the grounds of resistance included in their ET3 response, including ***res judicata***, failure to comply with **Rule 10 of the Employment Tribunal Rules of Procedure 2013**, and making a false assertion about ACAS early conciliation, time-bar, Strike Out for unreasonable and vexatious proceedings, lack of specification, and the claim in its entirety having no reasonable prospect of success.

Respondents' Outline Written Skeleton Argument

16. As part of the case management orders made by me, at the Case Management Preliminary Hearing on 5 April 2019, I ordered that, on or before 4.00pm on Friday, 3 May 2019, the respondents' solicitor was to intimate to the Glasgow Tribunal office, with copy sent at the same time to the claimant, an outline written skeleton argument of their submissions to the Tribunal, identifying relevant statutory provisions and case law to be relied upon in argument at that Preliminary Hearing on Strike Out / Deposit Order, so as to give the claimant, as an unrepresented party litigant, advance fair notice of the legal arguments being presented to the Tribunal by the respondents' solicitor.

17. I further ordered that the respondents' solicitor was to send to the claimant, with a copy provided to the Tribunal at the same time, a list of all the legal authorities which the respondents' solicitor refers to or relies upon in the course of his outline written skeleton argument, and include a hyperlink to the cited cases on ***Bailli***, or an equivalent free, online website, e.g. Employment

Appeal Tribunal website. This was to allow the claimant, as an unrepresented, party litigant, time, before submitting her own outline written skeleton argument, to consider the relevant case law, read the authorities cited by the respondents, and decide whether she wished to refer the Tribunal to any additional authorities not cited by the respondents.

18. In compliance with my orders, on 3 May 2019, the respondents' solicitor, Dr Gibson, emailed to the Glasgow Tribunal office, with copy sent at the same time to the claimant, the respondents' skeleton written submissions and list of authorities with ***Bailli*** hyperlinks, as ordered by the Tribunal, for use at this Preliminary Hearing.

19. The respondents' skeleton written submissions read as follows:

> *"Res Judicata*
>
> *The Claimant's claim for automatic unfair dismissal in terms of section 103A of the Employment Rights Act 1996 should be struck out on the grounds that it is res judicata.*
>
> *The concept of res judicata is based on two principles. Firstly, it is in the public interest for there to be finality of litigation and secondly, Respondents should not be harassed twice in respect of the same set of circumstances.*
>
> *A party is precluded from raising in subsequent proceedings matters which were not, but could and should, have been raised in earlier proceedings.*
>
> *The Claimant seeks to introduce further protected disclosures which she did not, but could have, relied upon in her claim Case Ref. No. 4103492/2017.*
>
> *The Claimant could and should have raised all these additional alleged disclosures in her previous claim.*

In not doing so the Claimant cannot now claim that the reason for her dismissal were further and additional alleged disclosures which could and should have been considered at the previous hearing.

This cause of action will soon be extinguished once judgment has been given upon it in the Employment Tribunal (Case Ref. No. 4103492/2017). A party is precluded from raising in subsequent proceedings matters which have been raised in earlier proceedings.

ACAS Early Conciliation

Section 18A (1) of the Employment Tribunals Act 1996 states that:

Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

This is subject to subsection (7).

Section 18A (7) of the Employment Tribunals Act 1996 states that:

A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

The cases that may be prescribed include (in particular)—

cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;

cases where proceedings that are not relevant proceedings are instituted by means of the same form as proceedings that are;

cases where section 18B applies because ACAS has been contacted by a person against whom relevant proceedings are being instituted.

If section 18A (1) is not complied with and no section 18A (7) exemption applies then an Employment Tribunal does not have jurisdiction to hear that claim and it must be struck out. This is a

mandatory regime providing that a Claimant cannot competently institute relevant proceedings without a EC certificate. The entire early conciliation process was initiated by the Claimant and concluded by ACAS after the Claim had been lodged.

But for the Claimant's falsehood the Tribunal would have rejected this claim in terms of Rule 10(1)(c)(i) and (iii) of the Employment Tribunals Rules of Procedure 2013 because at the point of lodging it did not contain an early conciliation number and one of the early conciliation exemptions did not apply.

But for the Claimant's falsehood the Tribunal would have rejected this claim in terms of Rule 12(1)(d) of the Employment Tribunals Rules of Procedure 2013 as being one which institutes relevant proceedings on a claim form which contains confirmation that one of the early conciliation exemptions applies and an early conciliation exception does not apply.

The Claimant has ticked "No" to question 2.3 of the ET-1 Form.

The Claimant's answer to the Question "If no, why do you not have this number?" is "My employer has already been in touch with ACAS". This is a false assertion.

The Respondent has never had any contact with ACAS with respect to this Claim. There is no requirement that evidence is heard on that point. It can be determined on the incontrovertible timeline of events. It would not have been possible for the Respondent to have had any contact with ACAS with respect to this Claim, because the Claim was lodged prior to the Claimant contacting ACAS.

The only contact the Respondent has ever had with ACAS is in respect of the claim Case Ref. No. 4103492/2017.

This claim should have been rejected. It has only been accepted on the basis of a false assertion made by the Claimant.

The Claimant lodged this claim on 21 January 2019 at 04:49:06 hours.

On Monday 21 January 2019 at a Merits Hearing before Employment Judge McPherson in regards to Claim reference number 41034921/2017 the Claimant make an application to conjoin this case with Claim reference number 41034921/2017. This application was refused. The Claimant stated to Employment Judge McPherson that she had not contacted ACAS.

On Monday 21 January 2019 at 20:22 hours the Claimant wrote to the Respondent's representative stating:

"Dear Dr Gibson,

Please find a copy of the ET1 form submitted today.

I will contact ACAS to start the mediation/conciliation process.

Regards

Morag"

On Tuesday 22 January 2019 at 00:03 hours the Claimant wrote to the Tribunal and the Respondent's representative stating:

"Dear Sirs,

Please find ACAS notification form (R107813/19) for the above claim attached.

Claim Reference: M6W2-6WJY

regards

Morag Jardine"

A document was attached to this e-mail showing that the Claimant had submitted her notification of early conciliation on Monday 21 January 2019 at 23:47 hours.

The early conciliation certificate was then not issued by ACAS until 23 January 2019.

The Claimant has failed to comply with the requirement to under the Employment Rights Act 1996 s18A to contact ACAS before instituting proceedings in the Employment Tribunal.

The Claim must be struck out on that basis.

Time Bar

The claim in its entirety should be struck out on the grounds that it is time barred.

The Claimant initiated ACAS early conciliation on 21 January 2019.

The Claimant was required to initiate ACAS early conciliation within three months (less one day) of her dismissal and/or any alleged detriment and/or any discriminatory act.

The Claimant's alleged acts which are said to have taken place prior to 22 October 2018 are time barred.

The entirety of the allegations made by the Claimant took place long before 22 October 2018.

The Claimant was dismissed on 21 April 2017. There are no other allegations made by the Claimant which post-date her dismissal.

The Respondent's position is that it was reasonably practicable for the Claimant to have raised these claims in time and/or it would not be just and equitable to extend the time limit for submitting these claims.

Even allowing for the fact that the Claimant was only informed by Judgment dated 4 September 2018 that the Respondent's application for a dismissal Judgment in respect of the withdrawn Equality Act 2010 claims in case reference number 4103492/2017 had been refused, the Claimant still waited until 21 January 2019 to lodge a new claim. She

has not lodged her claim as soon as was reasonably practicable after being aware that it was time barred.

It would not be just and equitable for the Respondent to have to answer claims which relate to facts and circumstances which are now over two years old.

It should also be noted that but for the Claimant's solicitor withdrawing part of claim reference number 4103492/2017 a time bar argument would have been taken in respect of parts of that claim.

Unreasonable Conduct

The claim in its entirety should be struck out on the grounds that the manner in which proceedings have been conducted by the Claimant have been unreasonable and vexatious in terms of Rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013.

The Claimant lodged a Claim (Case Ref. No. 4103492/2017) with the Tribunal on 29 September 2017.

The ET-1 Form indicated that she was bringing claims of unfair dismissal, age discrimination, disability discrimination, sex discrimination and a claim for other payments owed.

The pleadings were woefully unspecified and at best gave notice of a claim for automatic unfair dismissal in terms of section 103A of the Employment Rights Act 1996.

The Respondent submitted their response on 2 October 2017 taking issues of time bar, lack of specification and no reasonable prospects of success in respect of the Claimant's discrimination claims.

The Claimant then sought the services of Mr Stewart Healey of Livingstone Brown Solicitors.

On 10 November 2017 Employment Judge Hendry at a preliminary hearing ordered the Claimant's solicitor to provide further and better

particulars. At this preliminary hearing the Claimant's solicitor had stated that the ET-1 had been lodged with minimal assistance from his firm as it had been very difficult to take instructions from the Claimant.

On 28 December 2017 the Claimant's solicitor complied with Employment Judge Hendry's order.

On 25 January 2018 the Respondent submitted their response to the further and better particulars and queried whether they were meant to replace the original ET-1 paper apart in its entirety or supplement it.

On 20 February 2018 the Claimant's solicitor stated that the Claimant's claim was now for automatic unfair dismissal for making a number of protected disclosures, having withdrawn her Equality Act claims and her claims under section 12(3) of the Employment Relations Act 1999.

On 22 March 2018, for reasons not entirely clear to the Respondent, the Claimant's solicitor withdrew from acting.

The Claimant then instructed Mr Steven Smith of Beltrami & Co.

Between February and May 2018 three preliminary hearings were postponed at the Claimant's request.

A preliminary hearing did take place on 16 August 2018.

Employment Judge McPherson dismissed a complaint under section 12(3) of the Employment Relations Act 1999 it having been withdrawn on 28 December 2017, but the remaining parts of that claim, excluding any claims under the Equality Act 2010, which were similarly withdrawn on 28 December 2017, remain standing and would proceed to a Final Hearing assigned for 21 to 28 January 2019.

Employment Judge McPherson refused the Respondent's application to dismiss the Claimant's Equality Act 2010 claims ruling that it was not in the interests of justice to do so.

Employment Judge McPherson ruled that the Claimant had expressed a wish to reserve the right to bring a further claim raising the same complaints against the same respondents, and the Tribunal was satisfied that there was a legitimate reason for doing so, but only in respect of any claim under the Equality Act 2010.

Employment Judge McPherson also commented that as there was no other claim at present, it was not possible to combine any claim with the present claim but, if and when the other claim is raised, parties representatives could then discuss when might be appropriate time to consider asking the Tribunal about combining both claims.

Dates were fixed for January 2019 in August 2018 to allow for such consideration not take place.

However, nothing was done until 21 January 2019 the day of the final hearing.

Further, the claim lodged on 21 January 2019 did not simply restrict itself to disability and sex discrimination claims, but sought to pursue other claims not even mentioned in the first claim and which went beyond what Employment Judge McPherson had specifically said the Claimant had a legitimate reason for raising.

This is an unreasonable way to conduct litigation.

It is contrary to the interests of justice for the Respondent to have to defend this second claim given the way in which it has been conducted.

Certainly, anything which goes beyond a disability and/or sex discrimination claim within the second claim should be struck out on the grounds that it goes beyond that which Employment Judge McPherson ruled that the Claimant had a legitimate interest in bringing and it is unreasonable and vexatious conduct on the part of the Claimant to seek to raise claims she has no legitimate interest in being allowed to do so.

Lack Of Specification

The claim in its entirety should be struck out on the grounds that is lacks specification and has no reasonable prospect of success.

The Claimant's pleadings run to some 63 pages.

It is impossible to comprehend the nature of the Claimant's claims from these unfocused pleadings.

The Respondent has the right to have fair notice of the Claims brought. They have not received fair notice and it would not be in the interests of justice to allow the Claimant a further opportunity to amend."

20. In the list of authorities for the respondents, Dr Gibson headed them up with the case number and parties' names from a totally different Aberdeen case but, following enquiry by the Tribunal, on my instructions, on 7 May 2019, he clarified, on 8 May 2019, that this was an error on his part, and the list provided on 3 May 2019 was for this case. He referred to the following cases:

Res Judicata

Virgin Atlantic Airways Ltd v Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited) [2013] UKSC 46

ACAS Early Conciliation

Akhigbe v St Edward Homes Ltd [2019] UKEAT 0110_18_0803

Time Bar

Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576

British Coal Corporation v Keeble [1997] UKEAT 496_96_2603

Unreasonable Conduct

Bolch v Chapman [2003] UKEAT 1149_02 _1905

Sud v London Borough of Hounslow [2015] UKEAT 0156_14_2310

Claimant's Reply

21. As part of the case management orders made by me, at the Case Management Preliminary Hearing on 5 April 2019, I allowed the claimant a period of no more than 4 weeks, following receipt of the respondents' solicitor's outline written skeleton argument, to intimate to the Tribunal, with a copy sent at the same time to the respondents' solicitor, the claimant's own outline written skeleton argument, with her written comments / objections to the respondent's applications for Strike Out / Deposit Order, and to set forth the facts and circumstances on which she intended to rely, in evidence, to argue that this claim is not time-barred or, if the Tribunal decided it is time-barred, in whole, or in part, why the Tribunal should nonetheless allow it to proceed, although late.

22. If the claimant intended to refer or rely upon any further legal authorities, other than those identified by the respondents' solicitor, I also ordered that she was to provide a list of those cases to the Tribunal, and to the respondents' representative, and including a hyperlink, as soon as possible, and certainly to be received by them by no later than 4 weeks after intimation of the respondents' list.

23. Following receipt of Dr Gibson's skeleton argument and list of authorities for the respondents, on 3 May 2019, the Tribunal acknowledged their receipt by email on 7 May 2019, issued on my instructions, when the claimant was reminded that she had 4 weeks, i.e. until 4.00pm on Friday, 31 May 2019, to submit her responses in terms of my previous case management orders set forth in my written Note and Orders.

24. In the event, the claimant did not submit her response to the respondents' skeleton argument and list of authorities until she emailed the Tribunal, at 00:01 on 1 June 2019, with copy sent at the same time to Dr Gibson, enclosing (1) tracked changes to Dr Gibson's skeleton written submissions, with her responses, and (2) her tracked responses to Dr Gibson's list of authorities, where she cited one further case on her own behalf, being **Onyango v Berkeley (t/a Berkeley Solicitors) UKEAT/0141/09.**

25. Following referral to me, on 4 June 2019, I accepted the claimant's two documents, as it was in the interests of justice to do so, notwithstanding their late intimation.

26. In her 1 June 2019 response, the claimant made tracked changed responses to Dr Gibson's skeleton written submissions for the respondents. I do not repeat them here, as, in the event, they were later superceded, and replaced by a further document submitted by the claimant to the Tribunal, with copy sent to Dr Gibson for the respondents, by email sent at 12:57 on the afternoon of Friday, 21 June 2019, entitled "***2. Revised Applicant Response to Respondent Submissions (clean copy)".***

27. I have reproduced her full, revised response of 21 June 2019 below, and in doing so, I note and record that while I have used the claimant's clean copy, as submitted to the Tribunal, some of her paragraph numbers are duplicated. In the section on ***res judicata***, there are paragraphs 1 to 11, followed, in the section on ACAS early conciliation, by paragraphs 12 to 19, but when it continues then to give the next section, on ET1 form, the paragraph numbering reverts to 1, and runs up to 38, before concluding with her final section, on lack of specification, at paragraphs 39 to 43.

28. I also note and record here that where the claimant refers, at paragraphs 3 and 4, under "***Res Judicata***", and paragraph 6 under "***ET1 Form***", to the Preliminary Hearing of 16 August 2017 and Judgment / Order of 4 September 2017, she is in error, and these were both 2018. With that preface, her response reads as follows:

> *"Res Judicata*
>
> 1. *The applicant agrees with the respondent **only** on the point of the protected information disclosures already contained within the further and better particulars for ET case **4103492/2017.** The applicant acknowledges that, according to the legal principle of 'Res Judicata', some of the claims within this case **4100324/2019,** duplicate claims made within case **41034921/2017** and should be withdrawn.*

2. *A large number of valid disclosures, equalities and health and safety claims were cleansed from the further and better particulars submitted in December 2017 by Livingstone Brown without the applicant's consent.*

3. *The applicant has attempted to reintroduce the protected information disclosures, equalities and health and safety claims to the fresh claim now being placed before the ET but now recognises not all of these claim categories are covered by the ruling of Judge I MacPherson following the preliminary hearing of 16 August 2017 on case **41034921/2017** and should be withdrawn.*

4. *This revision corresponds with the disposal at point 42 (lines 20 to 28) of Judge I MacPherson's Orders under case ref: **4103492/2017** issued on 14 September 2017 following the preliminary hearing held on 16 August 2017, which ruled there was a legitimate reason for bringing a further claim against the respondents but **only** in respect of claims made under the Equalities Act 2010.*

5. *The applicant wishes to withdraw all claims made in the fresh ET1 and paper apart, except for claims which relate to the Equalities Act 2010. However, details of protected disclosures made and health and safety concerns raised are retained within the detail of the paper apart as helpful context as to the circumstances under which the Equalities Act 2010 was breached.*

6. *Had the respondents acted fairly and appropriately when matters of health and safety, the environment, public interest disclosures and equalities act breaches were first raised internally, this matter would not have gotten as far as ET. The respondents were also given the opportunity to amend their breach of employment law during the internal appeals process.*

7. *The equalities act complaints have not yet been considered by the ET at a final hearing, nor have many of the disclosures so res judicata does not apply. Thompson Reuters practical law defines "res judicata"*

as a matter 'already judged', which neither the Equalities matter nor many of the disclosures (disclosure details now being provided for context only) have been subject to.

8. *Dr Gibson attempts to expand and create his own all encompassing version of what he would like res judicata to mean in this case.*

9. *The equalities claims were raised in the earlier proceedings as an 'in time' claim and have not been dismissed. The Equalities issues were referred to in the ET1 first submitted on 29 August 2017, which was accepted by the ET and is a live matter which has not been dismissed.*

10. *It is already a matter of record that I objected to the version of further and better particulars submitted by Livingston Brown on 28 December 2017, which cleansed the health and safety, equalities and many of the full disclosures from my case.*

11. *The respondents are making an assumption on a matter which is still to be communicated to the claimant and respondent, and even then is still potentially subject to appeal by either party.*

ACAS Early Conciliation

12. *The equalities claim has already been considered by ACAS and the respondent as part of the first claim. When ACAS was notified of the second claim they issued the ACAS form straight away on the basis that the conciliation process for the equalities had already taken place with the employer and in effect my "employer HAD already been in touch with ACAS" regarding this matter.*

13. *Therefore, my employer already being in touch with ACAS regarding this complaint is not a false claim, as asserted by the respondent's representative, Dr Gibson.*

14. *My employer was already in touch with ACAS regarding this matter, as per the certificate issued on 31 July 2017 Reference No. R155154/17/32.*

15. *There is no dubiety as to whether the matter of equalities was considered by ACAS at that time because I raised the equalities matter during the appeal process at points 8, 11, 12, 15, 16, 17 and particularly point 18 of my internal appeal letter dated 20 May 2017. It is therefore clear that I notified my employer that I believed I was being discriminated against during the appeal process and this belief was based on events which occurred on a number of occasions throughout my employment, some of which only became known to me on receipt of written SAR documentation. Therefore the discrimination is not merely imagined but is known and can be evidenced through production of written documentation.*

16. *I also referenced and appended written evidence of this discrimination to my appeal letter. I clearly notified my employer of the discrimination in the appeal letter submitted to my employer, which was clearly structured with numbered paragraphs. However, my employer did not acknowledge or engage with the itemised appeal points regarding discrimination and equalities in any way. In fact, my employer further discriminated against me in its appeal decision letter of early July 2017. This is evident within the language and statements used to communicate the appeal decision and by the employer seeking to redefine my appeal according to its own, more narrowly defined heads of appeal decision, which failed to directly acknowledge my points of appeal.*

17. *Not only did the employer fail to remedy or directly acknowledge or address the discrimination and equalities being raised during my appeal, the employer further discriminated against me during communication of the appeal decision.*

18. *As the last stage in the internal process prior to proceeding to ACAS and Employment Tribunal, this detail was surely clearly evident to both parties and the ACAS conciliation team when my employer **was previously in touch with ACAS** regarding my claims of unfair dismissal on the basis of making protected information disclosures,*

raising health and safety concerns and breaches of the Equalities Act 2010.

19. *It is inflammatory and unreasonable for Dr Gibson to claim that I am being untruthful, although I have witnessed many examples of false behaviour and conduct from Dr Gibson during the final hearing for case* ***41034921/2017.***

ET1 Form

1. *If there was no circumstance under which an ET1 might be submitted without an ACAS claim form then surely there would be no provision on the ET1 form design to submit an ET1 without an ACAS form whereby the "No" box might be checked and adequate explanation provided. The option, "My Employer Has Already Been in Touch With ACAS" is the applicable explanation in this case and that is why I checked that box on the form.*

2. *If not having the ACAS form at the time of submission deemed the ET1 ineligible in ALL ET1 submission circumstances then surely ET administration would automatically refuse every claim submitted without an accompanying ACAS form and the ET1 form design would not include provision to explain any absence of an ACAS form.*

3. *I have simply complied with the circumstances of this case. The matter had already been considered by ACAS, under the earlier claim, my employer had already been in touch with ACAS regarding the matter. For that reason, ACAS subsequently issued a second form automatically regarding the furtherance of this second claim under the same matter already subject to the conciliation process.*

4. *This has been explained above. It is not a false assertion. Dr Gibson should have sought explanation from me before using this kind of language. Again this highlights Dr Gibson's unreasonable and conflict driven manner and his lack of regard for mediation. However, to be fair to Dr Gibson, it may be that he is simply doing his best to act on*

the unreasonable instructions of an unreasonable client, which is driving ever more extreme, desperate and inflammatory behaviours.

5. *As described above, my dismissal appeal made it very clear that discrimination was an element of my appeal. The respondents are unreasonably refusing to acknowledge this.*

6. *This is a separate ET1 claim but the equalities claim in and of itself is still live, has not been dismissed by the Judge and was part of the matter the employer was previously in touch with ACAS about. The basis for this separate claim being brought relies upon a judgement issued in the first case 41034921/2017. However, it was never said that a fresh claim MUST be adjoined to the first case, only that there were valid reasons for bringing the second claim and therefore the same matter is being brought under a separate case reference, as permitted by the Judge's orders made following the preliminary hearing of 16 August 2017.*

7. *Therefore, the cases are at present still linked insofar as this fresh claim relies on an order made in the previous case to survive strike out, but would thereafter requires to be considered separately.*

8. *This is a misleading statement by Dr Gibson. It is simply not possible for the applicant to be in possession of and have submitted an ACAS certificate for the first and now for this second case (in January 2018) if the applicant had not been in touch with ACAS. The claimant has relied on the fact that the employer had already been in touch with ACAS regarding this matter, and immediately approached ACAS in w/c 21 January 2019 who automatically issued a fresh certificate because the matter had already been through conciliation.*

9. *A conciliation process based on the fact that the employer had already been in touch with ACAS regarding this matter, as per the valid explanation on the ET1 form for not having the ACAS form.*

10. *The equalities claim, which is now my sole claim does not require to be struck out on that basis as it has been considered by ACAS as part of an early conciliation process prior to submission of the ET1 form on 21 January 2019. The early conciliation reference number for that, which applied to the previous case is no: R155154/17/32 (5 July to 31 July 2017) and this is the reason why ACAS automatically issued the second conciliation form no: R107813/19.*

11. *The original ACAS early conciliation DID take place within the 3 months less one day time bar period.*

12. *HR only began to take action against me after 3 months had passed since the discrimination which occurred during the recruitment process and the discrimination relating to the relocation package.*

13. *I believe they deliberately and consciously timed this out. The office principal requested my dismissal in December 2016 but they did not take action until March 2017.*

14. *This is untrue. The respondents are lying. The equalities claim was substantially made on the basis of receiving SAR documentation in May and June 2017 which revealed colleagues and management made discriminatory remarks on the basis of perceived disability. I only became aware of these on receipt of the SAR documentation. The discrimination claim was included in the letter of appeal dated 20 May to my employer and further included in the 'in time' claim submitted to the ET in August 2017, Written evidence to support the claim was also provided to my former employer and mentioned in my grievance letter submitted on 20 April 2017, the day before my dismissal.*

15. *This is untrue. I received a large volume of SAR documentation, some of which evidenced to me for the first time the discriminatory behaviour of staff. I included discrimination claims at points points 8, 11, 12, 15, 16, 17 and particularly point 18 of my internal appeal letter dated 20 May 2017.*

16. *I raised the claim as soon as was practically possible suffering from depression and fatigue at having to prepare the detriments list and go through everything again.*

17. *It would have been more just and equitable for the respondents to have handled the matter entirely differently, which would have avoided the need to bring a last resort claim in the first place. The employer had ample opportunity to address the clearly evidence complaints, acknowledge and remedy these during the internal appeal process.*

18. *Dr Gibson clearly acknowledges and concedes here that the respondent's solicitor was responsible for withdrawing part of the equalities claim, which WAS in time. This validates my right to bring this fresh claim because I did not consent to the withdrawing of that aspect of my case. An aspect which has not been dismissed.*

19. *I believe I have acted appropriately at all times but do believe the assertion that I am lying in any way to be entirely vexatious behaviour by the respondent, echoing the false claims and allegations made regarding my conduct during employment. This is a convenient 'perceptive, subjective' way to disguise an objective and very serious matter of fact where the Equalities Act 2010 has been breached. Not only has the law been broken but may also be considered a form of disclosure, as per my evidenced appeal letter dated and submitted to my employer on 20 May 2017.*

20. *This is false. The claim was lodged on 29* ***AUGUST*** *2017.*

21. *A paper apart was submitted which provided fuller detail of the claims, which were also mentioned most specifically at points 8 and 18 of the appeal letter.*

22. *The other payment is the flexi system positive balance which was not paid back to me. This was only an hour or two at best but this is a matter of principle because my line manager falsely claimed and*

exaggerated that I was arriving late and leaving early or taking long lunch breaks all the time.

23. On only one or two occasions, usually after she upset me just prior to lunchtime, including the day I received the written probation report, I took longer than one hour at lunch, although, due to the flexi system there was no set lunch hour or time and this was completely in line with the SG flexible working system.

24. The claimant was working as a grass cutter in Uist with no internet access at the time the claim was submitted, which had to be done using wi-fi in a local pub. However, a substantial volume of paperwork had been provided to Livingston Brown, who should have been capable to picking out the key merits of the case, not least from the clearly structured appeal letter.

25. Livingstone Brown's submission on 28 December 2017 did not reflect my instructions and this is backed up by email correspondence. The further and better particulars also cleanse out a lot of the disclosures I wished to bring, including the health and safety and equalities.

26. This was not according to my instructions. The respondent is well aware that I objected to the solicitor's statement. It is acknowledged above that the solicitor withdrew my equalities claims without my consent.

27. The solicitor withdrew from acting because they did not wish me to include the equalities claims and objected to my contacting the tribunal to object to their unauthorised withdrawal of the equalities claims.

28. This is not true. I requested postponement after Livingston Brown withdrew from acting the day before the hearing after not providing me with sufficient detail of where and when it was taking place. I requested more time to find a new solicitor so that I may be represented. I subsequently struggled to find representation, being

told that if a solicitor withdraws from acting it is more difficult to find a new solicitor.

29. *The claimant requested more time to find representation, having lost representation immediately before the preliminary hearing.*

30. *I would advise any judge sitting on this case to review the PH orders for the hearing on 16 August 2017. I am not clear what Dr Gibson means by part of the complaint being dismissed. Perhaps he means the part where I complained that the appeal officer who heard my first case was not sufficiently independent to have been considered an appropriate person to hear the case.*

31. *Correct, I agree with this statement, which can be found at point 42, lines 20 to 28 of the ruling on the PH Hearing of 16 August 2017*

32. *This sentence makes no sense. A final hearing for the first case was set for January 2018.*

33. *The applicant's solicitor did nothing and withdrew from acting in early January 2019. Both the respondent and the applicant's solicitor failed to follow the orders of the PH 16 August 2018 to prepare a statement of facts and joint bundle.*

34. *Dr Gibson only provided a (solely comprise) joint bundle 7 days before the final hearing and issued the 492 page bundle electronically, which the applicant did not have the resource to print and read in time for the first day of hearing on 21 January 2019. It also being difficult to read and regard detail which is only available electronically. A hard copy was only provided by the respondent on Friday 18 January 2019 before Monday hearing.*

35. *I was advised by Beltrami to submit detriment claims because this should have gone into the original ET1 and it was acknowledged as a factor by SG's legal advisor, Kirsty Stevens.*

36. *If the respondent is suggesting that Beltrami and Co's advice was unreasonable then the respondent should take up that matter with Beltrami and Co. I believe that it is unreasonable of the respondent to ignore correspondence regarding the joint bundle, prepare a 'joint' bundle singlehandedly, fail to collaborate to produce a joint statement of facts.*

37. *Dr Gibson concedes that the equalities claim should be considered and the rest struck out.*

38. *I have stated above that I wish to proceed on the basis of the equalities claim only. However, all of the protected disclosure claims are relevant to the context of why I was being portrayed and perceived as a person with a disability. I believe this was a malicious attempt to discredit me and undermine my credibility as a whistleblower. It is not clear if HR were also acting maliciously or whether they simply took what colleagues wrote about me, made assumptions and discriminated according to perception.*

Lack Of Specification

39. *The original appeal letter to the employer and the paper apart is structured and specific. Dr Gibson is being obtuse in that he suggest the claim lacks specificity but fails to suggest what specificity he requires. He is being disingenuous in refusing to consider any further information which might support his comprehension and understanding. It is quite clear that this case applies to the Equalities Act 2010 and has been raised within the context of making protected information disclosures.*

40. *The paper apart specifies why this case has a reasonable prospect of success.*

41. *A lot of wrongdoing, bullying and disclosure events were fully detailed in the detriments timeline. This evidences the substantial nature of this*

case and the volume of issues occurring with my former place of employment.

42. The pleadings are clearly structured and set out a) timeline, b) detriments c) disclosures d) employment law being referenced and under which the claim is brought.

43. The respondent had fair notice when the original disclosures were made, when the grievance and appeal letter was submitted and when the ACAS conciliation procedure was initiated."

29. Further, in her 1 June 2019 response to the respondents' list of authorities, which she stood by and adopted at this Preliminary Hearing, the claimant wrote as follows (hyperlinks removed, and the claimant's comments shown underscored, for ease of reading):

APPLICANT'S TRACKED RESPONSES TO THE RESPONDENT'S LIST OF AUTHORITIES

Res Judicata

Virgin Atlantic Airways Ltd v Zodiac Seats UK Limited (formerly known as Contour Aerospace Limited) [2013] UKSC 46

Res Judicata may be referred to in this case but the case concerns the issue of patent, not whistleblowing. There are specific legal conditions which apply to both whistleblowing and the Equalities Act 2010, including whistleblowing that the law is being broken by failure to follow the Equality Act 2010. A whistleblower can be protected by disclosure even following dismissal, see :

(Onyango v Berkeley (t/a Berkeley Solicitors UKEAT/0141/09), which relates to post employment detriment, and detriment has been experienced in this case due to breaches of the Equality Act 2010 which were reported during employment and during the appeal process. When the appeal was rejected, this in itself was a contravention of the Equality Act (2010) because it again failed to

follow the Equality Act (2010) in remedying the earlier events of discrimination and their being reported.

(Onyango v Berkeley (t/a Berkeley Solicitors UKEAT/0141/09)

ACAS Early Conciliation

Akhigbe v St Edward Homes Ltd [2019] UKEAT 0110_18_0803

The circumstances of this case are different because the same claim was brought - and specified - in the first case ***41034921/2017*** *and the employer had already been in touch with ACAS regarding that same issue.*

Time Bar

Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576

British Coal Corporation v Keeble [1997] UKEAT 496_96_2603

The discrimination claim was made in time so this case law does not apply. Being told a male candidate had scored better than me and being told the relocation package did not exist, would on the face of it appear to be out of time but those matters were also disclosed to the employer and the employer further discriminated at appeal stage by not upholding the complaints in relation to this matter. The discriminatory comments regarding mental health were inferred constantly in correspondence written regarding the employee throughout her employment but much of that material plus explicitly comments regarding mental health only became known to the employee following dismissal in May and June 2017 and were within time of the first ET1 being submitted.

Unreasonable Conduct

Bolch v Chipman [2003] UKEAT 1149_02 & UKEAT_1905

Dr Gibson simply seeks to transfer unrelated questions of conduct and apply them onto this case in a desperate fashion. Dr Gibson's narrative of conduct is very selective, heavily biased and not entirely accurate. It is very apparent that Dr Gibson regularly employs a strategy of using inflammatory language and has already accused the applicant of misconduct on trivial matters such as making applications to submit evidence, which is perfectly allowed under the Tribunal Rules of Procedure. Other examples include being accused of sacking two solicitors when in fact both solicitors withdrew from acting and falsely representing precedent regarding covert recordings. The case law on close reading revealed that tribunals had actually been criticised for now allowing recordings and also permitted recordings transcribed by applicants as long as originals were provided. Therefore, it is difficult to take any case law or arguments presented by Dr Gibson at face value and there is no similarity between the questions of conduct presented by this piece of case law and this Equality case.

Sud v London Borough of Hounslow [2015] UKEAT 0156_14_2310

I do not see the relevance of this case law but do recall that Dr Gibson requested an early finish on one of the days of the final hearing in order that he might attend the dentist for a broken front tooth.

Claimant's Statement of Means and Assets

30. As part of the case management orders made by me, at the Case Management Preliminary Hearing on 5 April 2019, I ordered that the claimant was to, on or before 4.00pm on Friday, 3 May 2019, intimate to the Glasgow Tribunal office, with copy sent at the same time to the respondents' solicitor, a statement of means and assets relating to the claimant, detailing and vouching her whole income and expenditure, and any capital assets and savings, so as to give the Tribunal and respondents' solicitor advance fair notice of the claimant's whole means and assets, and her ability to pay if any Deposit Order is to be made by the Tribunal.

31. She failed to do so, and she had to be remined by the Tribunal, by email sent to her, on my instructions, on 4 June 2019, when I ordered, of new, that she should do so, as soon as possible, and in any event by no later than 4.00pm on Monday, 10 June 2019. She was advised that I had granted her an extension of time to do so, acting on my own initiative under **Rule 5**, the original time limit having expired on 31 May 2019. It was explained that, if she failed to do so, by the extended date for compliance, then the Tribunal would have no information available to it in terms of **Rule 39(2),** about the claimant's ability to pay, should the Tribunal decide it is appropriate to make any Deposit Order.

32. Dr Gibson was requested to clarify whether he intended to cross-examine the claimant on her statement of means and assets, or whether (subject to appropriate vouching lodged by her) he was prepared to accept its terms. If evidence was to be taken from the claimant in that regard, Dr Gibson was asked to clarify the respondents' position, as soon as possible, and certainly no later than 4.00pm on Monday, 17 June 2019, so that the Judge could timetable that into the running order for this Preliminary Hearing. Dr Gibson did not respond, in writing, to that request for clarification, so I had to address this matter at the start of this Preliminary Hearing.

33. When the claimant intimated her statement of assets and means, by email of 10 June 2019, at 16:00, copied to Dr Gibson for the respondents, she there stated as follows:

> *"I write to confirm that I have very few asset and means which would provide any meaningful form of security against the £1,000 [ONE THOUSAND POUNDS] deposit order on each claim requested by Dr Andrew Gibson on behalf of the respondents.*
>
> ***I am aware that if the Judge decides to place a deposit order against the claims brought in this case then the case has been deemed as, and is being signposted as, having no prospect of success.***

Therefore, it makes no difference to me whether you place a £1 [ONE POUND] or £1,000 [ONE THOUSAND POUNDS] deposit order against the case. If the case has a deposit order placed against it then the case will be withdrawn.

I believe this request by Dr Gibson is simply an attempt at further intrusion into my life by the Scottish Government, and a continuation of the harassment begun when Ewen McPherson first began asking me inappropriate questions when I joined SGRPID at Portree.

I confirm that I have suffered financial, emotional and employability detriment, as well as the detriment of having to work away from home since being unfairly dismissed from my post as an Agricultural Officer with SGRPID.

At present I am liable for the payment of rent and bills both at home and at the place where I work away. I rent my home address because the croft house associated with the croft tenancy was burnt down in act of arson shortly after a church was built on my croft. The responsible person for this has not yet been identified.

I am also in dispute with Beltrami and Co, my former solicitors, who have tried to claim I owe them a sum far in excess of services provided to me and in neglect of any attempt to set up or review a reasonable payment agreement. Beltrami and Co have progressed this matter to Court and I am progressing this matter to the Scottish Legal Complaints Commission. I understand the ET can take no view on this and I only mention this in the context of my means and assets. One possible outcome of this situation is that I could be declared bankrupt and if this happened I could also lose my croft tenancy.

Items I own outright are:

A 2002 Volkswagon (sic) *Golf car with c307,000 [THREE HUNDRED THOUSAND AND SEVEN] miles on the clock (MOT'd, taxed and insured) – this was a gift from a relative in 2016.*

An oldish, entry level specialized road bike, also a gift, from a fellow runner (although have not done much running lately) because the person was not using the bike and simply altruistically requested that the kindness be paid forward. The bike is of great value to me as I did not own a car since relocating to the island in 2011 and this was my main means of transport.

I confirm that I do not claim any agricultural subsidy and this is not a source of income. I did submit an IACS form shortly during 2016 but withdrew the application when I lost my job and could not afford to invest in stock but I am not very minded to do this anyway, given what I now know about SGRPID

I own, if a person can really own land or an animal, 3 sheep, gifted in exchange for grazing.

Other means and Assets

An education

My health (still being recovered following SGRPID employment and the stress of this case).

Clear conscience

A rounded skill set acquired through a variety of temporary and fixed term work held both during and following university.

Ability to see through the lies of the Scottish Government and Dr Gibson

Employment

You are already aware of my current earnings, although I do not believe I can sustain employment with my current employer for much longer. I have been in my present role since March 2018, prior to that being unemployed between 21 April 2017, experiencing reactive stress and anxiety for 3 [THREE] months, then becoming employed as a seasonal grass cutter, part time waitress, cleaner, briefly a canteen assistant at Stirling Mart, where I had to serve pie, chips and beans to glaring SGRPID Saughton House staff, then a full time administration assistant from 23 October 2017 onwards.

Other than this I do not believe any further detail is required.

***I am aware that if the Judge decides to place a deposit order against the claims brought in this case then the case has been deemed as, and is being signposted as, having no prospect of success**.*

As stated above, it makes no difference to me whether you place a £1 [ONE POUND] or £1,000 [ONE THOUSAND POUNDS] deposit order against the case. If the case has a deposit order placed against it then the case will be withdrawn.

I believe this request by Dr Gibson is simply an attempt at further intrusion into my life by the Scottish Government, and a continuation of the harassment begun when Ewen McPherson first began asking me inappropriate questions when I joined SGRPID at Portree.

I am aware that if the Judge decides to place a deposit order against the claims brought in this case then the case has been deemed to, and is being signposted as, no prospect of success

I also wish to state that this may appear to be little of means and assets to the perspective of some persons but it is still more than many, and I am grateful for every privilege and kindness I have ever received in my life, not least living in a country where human rights abuses, fraud

and malpractice can even be brought to the attention of an Employment Tribunal. Plus being educated enough to make an attempt to continue with a case when the solicitor lets you down. The means and assets held by a person should not be used to form any prejudice or judgement as to the motivation for bringing a claim to Tribunal."

Withdrawal of Part of the Claim intimated by the Claimant

34. In submitting her statement of assets and means, in her email of 10 June 2019, sent to the Tribunal at 16:00, and copied to Dr Gibson for the respondents, the claimant had stated as follows:

"With reference to the above, please find a statement of means and assets attached.

If a deposit order is placed against this case I confirm I will withdraw the case regardless of whether £1 or £1,000 is placed against any claim.

I confirm that I am withdrawing all of my whistleblowing claims and include their detail in my revised paper apart as evidence of motivation for colleagues maliciously and falsely depicting me as a person with a disability and suggesting I should be dismissed for mental health issues.

The only claim I am bringing is the claim for discrimination by perception, both intentionally and unintentionally - and maliciously to undermine me for making protected information disclosures and in failing to make reasonable adjustments which were being provided to other staff, in the event of genuinely believing I had a disability.

This can be evidenced by SAR documentation and the appeal outcome letter.

I reserve the right to further clarify my revised paper apart and skeleton strike out responses up until 7 days before the strike out hearing on Monday 24 June 2019."

35. In her revised paper apart, dated 10 June 2019, the claimant stated that:

"On the grounds of breach of the Equalities Act (2010) only – I confirm that I am withdrawing all claims except those which relate to claims brought under the Equalities Act (2010). The detail in this document demonstrates the protected disclosures made, which provided motivation for colleagues HR and management to perceive and portray me as a person with mental incapacity."

Preliminary Hearing before this Tribunal

36. When the case called before me, for this Preliminary Hearing, the claimant was in attendance, unrepresented, and unaccompanied, as a party litigant. Dr Gibson, solicitor for the respondents, attended on their behalf, unaccompanied.

37. I had before me the Tribunal's casefile in this case, containing the ET1 claim form and ET3 response, parties' written submissions of 3 May and 1 June 2019, as also the claimant's email of 10 June 2019, with her statement of assets and means, and her revised paper apart, extending to some 53 unnumbered pages, comprising section 1 - background, section 2 - timeline of events giving rise to claims, and section 3 - unfair dismissal claims.

38. I also had before me the claimant's email sent at 12:57 on Friday afternoon, 21 June 2019, and copied by her to Dr Gibson, enclosing four separate attachments, being (1) revised Applicant Response to Respondent Submissions (tracked copy); (2) revised Applicant Response to Respondent Submissions (clean copy); (3) Revised Paper Apart; and (4) Copy of Appeal Letter submitted to employer on 20 May 2017 (not incl. attachments).

39. In her email of 21 June 2019, the claimant had apologised for these documents being late, and she explained that she had been "***unwell over the course of the last week***." No further specification was provided by her.

She did not seek any postponement of this Preliminary Hearing on the basis that she was unwell, and / or unable to participate effectively in this Hearing.

40. In the revised paper apart, submitted, 21 June 2019, the claimant had revised the terms of what she had previously written on 10 June 2019. For ease of reference, and so far as material, for present purposes, I have inserted the additional wording added by her, and underscored it, as follows: -

> ***"On the grounds of breach of the Equalities Act (2010) only – I confirm that as per the preliminary hearing order (item 42) of linked but separate case 4103492/2017, I am withdrawing all claims except those which relate to claims brought under the Equalities Act (2010). The detail in this document demonstrates the protected disclosures made, which provided motivation for colleagues HR and management to perceive and portray me as a person with mental incapacity."***

Clarification of Issues before the Tribunal

41. At the start of this Preliminary Hearing, just after 10.00am, Dr Gibson stated that he had seen the claimant's email of 21 June 2019, with her four attached documents, but he was not sure that he followed it. As it appeared that she was saying she was withdrawing parts of the claim, and she was not pursuing anything but the Equality Act claims, that was noted, and he indicated that he would restrict his arguments accordingly.

42. Dr Gibson also confirmed that he would not cross-examine the claimant on her statement of means and assets, but, if the claim was not struck out, he was insisting on the respondents' application for a Deposit Order, the amount of which he submitted was a matter for the Tribunal.

43. Further, at the start of this Preliminary Hearing, when clarification was sought whether the claimant was withdrawing her claims for automatically unfair dismissal and detriment for whistleblowing, the claimant apologised that she did not have with her a copy of her ET1 claim form to peruse, but she confirmed that she was withdrawing all her claims, except those relating to

the **Equality Act**. Dr Gibson asked that the claimant clarify what she meant by her remaining **Equality Act** claims.

44. I asked the claimant to clarify what she was withdrawing, and if she was reserving her rights under **Rule 52**, as her emails of 10 and 21 June 2019 did not expressly reserve a right to bring a further claim raising the same, or substantially the same, complaints as were being withdrawn. I stated that the Tribunal did not wish to dismiss any withdrawn complaints, if she sought to reserve the right to bring a fresh claim, and, in those circumstances, she agreed to a short adjournment for her to consider her position and to clarify, for the avoidance of any doubt, those parts of this claim that she sought to withdraw. Proceedings adjourned at 10.24am for that purpose.

45. When the Preliminary Hearing resumed, at 10.40am, the claimant having been provided with a copy of her ET1 claim form by the clerk, the claimant then stated that everything that she had marked with a (X) and scored through on the copy of the ET1 claim form, section 8.2, which she dated and signed, and handed to the Tribunal clerk, and which the clerk copied for Dr Gibson and myself, with copy placed on the casefile, was withdrawn.

46. The revised text, as amended by the claimant, and shown here with tracked changes, for ease of reference, to show her manuscript additions and deletions, read as follows:

> *"I Morag Jardine (claimant) wish to make the following claim against The Scottish Ministers (respondents):* *Amended M Jardine 24 June 2019*
>
> *(1)* ~~*?*~~ *Automatic unfair dismissal as a result of making protected disclosures* *regarding breaches of the Equalities Act (2010).*
>
> *(2)* ~~*?*~~ *detriments suffered as a right of making* ~~*a*~~ *disclosure**s relating to the Equalities Act (2010)***
>
> ~~*(X) ? failure of the employer to have regard for my health and safety*~~
>
> ~~*(X) ? refusing to endanger my own health and safety;*~~

(X) ? dismissal for exercising a statutory right ;

(3) ? unfair procedure regarding my dismissal ; and relating to my Equalities Disclosures.

(4) ? being unfairly dismissed and suffering discrimination by perception, as defined by the Equalities Act 2010.

Under the Employment Rights Act 1996 as follows:

(Retain) Section 43B? for making qualifying protected disclosures Section 98A? Procedural Fairness

(X) Section 44 ? Health and Safety Cases

(X) (c) being an employee at a place where ?

(X) (i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety

could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

A paper apart has been attached (Please see updated paper apart.)

This claim has already been submitted in August 2017, following the issue of a certificate by ACAS, and I reserve the right to bring the claim as the earlier claim was accepted and no parts of the claim have been withdrawn.

The previous claim number is 4103492/2017

On 4 September 2017, Judge Ian Mcpherson made an Employment Tribunal Order that it was an option to me to make a fresh claim."

47. The claimant clarified that she wished to keep items 1, 2, 3 and 4, with her additional wording at 1, 2 and 3, but everything marked (X) was withdrawn. The part marked (Retain) would become 5, but she stated that it was the same as 2. Dr Gibson, having heard the claimant's clarifications, stated that as the automatically unfair dismissal was still there, he would make his ***res judicata*** argument. He added that he did not know what the additional wording added by the claimant meant, and further he commented that he was now left with more lack of specification, and so he would pursue all of his stated arguments against the claimant.

48. In reply, the claimant stated that her withdrawal of parts of her claim was "***conditional***", as she understood that my previous Judgment (in the original claim, dated 14 September 2018, following a Preliminary Hearing held on 16 August 2018) had stated that she could only seek to reintroduce the Equality Act claims, and so there were now two cases, separate, but linked, before the Tribunal.

49. Under reference to her second claim, updated response, intimated on 21 June 2019, the claimant referred me to what she had labelled "***Equalities Act (2010) Specified Claims"***, listing 15 specific matters, after stating : "***I RESERVE THE RIGHT TO FURTHER SPECIFY WHICH PARTS OF THE EQUALITIES ACT (2010) THE CLAIMS SPECIFICALLY RELATE TO – SHOULD THIS CASE GO TO FULL HEARING."***

50. She thereafter listed 20 separate disclosures, reserving the right to revise them, as well as providing a detailed events timeline, with 85 events narrated, from June 2016 to 15 March 2017, as well as producing a copy of her 13-page appeal letter to the Scottish Government, People Directorate, submitted on 8 May 2017, as revised 20 June 2017, appealing internally against her dismissal on grounds of unsatisfactory conduct during probation.

51. The claimant further stated that she wished to withdraw all her claims, except those she got from the Subject Access Request ("SAR") documentation obtained from the respondents, but as she cannot get legal advice until she has the outcome of her first case against the respondents, it was difficult for her to clarify her position, other than to say that she received that SAR documentation in June 2017, so she was withdrawing everything else "***unconditionally***", and as her appeal to the respondents, and the appeal decision letter, were further discrimination against her, she experienced ongoing discrimination and detriment.

52. Further, the claimant then observed that because matters are "***narrowly focused",*** it would assist if she redrafted her paper apart to make it shorter and more concise, if her case proceeds to Final Hearing. She submitted all these events were within time from the previous claim's ET1 being raised, and she then stated that she was only retaining her heads of claim 3 and 4, and deleting the text added to 3, and that 1 and 2 should now be Xs, i.e. not proceeding and so withdrawn.

53. At that stage, given the **Rule 51** withdrawal of those parts of the claim intimated by the claimant, and a **Rule 52** dismissal judgment to the respondents being sought by Dr Gibson in respect of those withdrawn parts of the claim, the claimant not having reserved her rights, the claimant confirmed that she did not object to the respondents getting a **Rule 52** judgment on that basis.

54. In noting the withdrawal and dismissal of her **Section 103A, 47B and 44** complaints, and their dismissal, Dr Gibson stated he would not pursue his **res judicata** argument, but he would otherwise maintain the respondents'

arguments as stated, and add in that he needed the claimant to clarify what is the protected characteristic she relies upon, and what are the heads of claim being pursued by her under the **Equality Act 2010**.

55. Dr Gibson and I had both noted that, in her email of 10 June 2019, the claimant had referred to : *"**The only claim I am bringing is the claim for discrimination by perception, both intentionally and unintentionally - and maliciously to undermine me for making protected information disclosures and in failing to make reasonable adjustments which were being provided to other staff, in the event of genuinely believing I had a disability."*** – which seemed to suggest that the protected characteristic being relied upon was disability, as paragraph 1 of 15 of her specified claims stated : "***I BELIEVE I HAVE BEEN DISCRIMINATED AGAINST USING DISABILITY BY PERCEPTION IN RELATION TO THE EQUALITIES ACT 2010."***

56. In writing up this Judgment, in light of the claimant's email to the Tribunal, sent at 16:00 on 10 June 2019, withdrawing that part of her claim making whistleblowing complaints against the respondents (under **Sections 103A and 47B of the Employment Rights Act 1996**), and her oral submissions and amended section 8.2 of the ET1 claim form as intimated at this Preliminary Hearing, withdrawing those whistleblowing complaints, and any `complaint of a health and safety case against the respondents under **Section 44 of the Employment Rights Act 1996**, those parts of her claim, having been withdrawn by her, in terms of **Rule 51 of the Employment Tribunals Rules of Procedure 2013**, are dismissed by the Tribunal under **Rule 52,** leaving only before the Tribunal her claim against the respondents, insofar as based on her complaint of her being unfairly dismissed and suffering discrimination by perception, as set forth in her revised paper apart submitted to the Tribunal on 21 June 2019, contrary to the **Equality Act 2010**.

Oral Submissions for the Respondents

57. It then being 11.09am, I invited Dr Gibson to make his oral submissions to the Tribunal, which he proceeded to do, under reference to his written

submission already provided to the Tribunal on 3 May 2019, as reproduced earlier in these Reasons at paragraph 19 above, but starting with ACAS Early Conciliation, rather than **Res Judicata**, given the claimant had now withdrawn her whistleblowing complaints.

58. He referred to **Section 18A(1) of the Employment Rights Act 1996**, and submitted that as, subject to **subsection (7)** , before a person presents an application, they must provide prescribed information to ACAS, that left little or no discretion to the Employment Tribunal, and if no notification to ACAS and no exemption applies, then the Tribunal does not have jurisdiction and the claim must be stuck out. Here, he submitted, the claimant had committed a falsehood by advising the Tribunal that an exemption applied, when she stated that ACAS had been contacted by the respondents.

59. Dr Gibson submitted that while the respondents may have contacted ACAS about the claimant's 2017 claim, she only notified ACAS 19 hours after lodging her ET1 claim form in this case, and so the Tribunal has no discretion, and it must strike out her claim. He had considered caselaw, but he had not found anything that might assist the Tribunal in this case, and the EAT judgment in **Akhigbe** was on entirely different facts from the present case.

60. He submitted that this was an entirely new claim by the claimant to proceed with those **Equality Act** heads of claim which had previously been withdrawn by the claimant's solicitor in her first claim. Even if the respondents had been in touch with ACAS, in the first claim, and they probably were, Dr Gibson stated that the Tribunal still cannot find that there was an exemption to getting a new ACAS certificate for a whole new claim, as that would be an abuse of process, and he submitted that the claimant had not complied with **Section 18A(1)** in this case, and that her first ACAS certificate was not valid and applicable to this second claim.

61. Further, Dr Gibson submitted, the present case is an entirely new claim, to seek to raise matters when previously withdrawn by the claimant. He added that she had withdrawn her previous **Equality Act** claim, and raised this new claim, based on the September 2018 decision by the Employment Judge in

the first claim, and in this new claim, the claimant had not stated that her old ACAS early conciliation certificate is valid for this clam but, instead, she claims an exemption which, he submits, is not applicable. Additionally, he added, given the extraordinarily poor specification of the new claim, it is not clear that it is an **Equality Act** claim.

62. Dr Gibson then noted how "***relevant proceedings***" is the term used in **Section 18A(1),** and he thought this is where the respondents have a "***heads up"*** that a new claim is coming, and there is no basis, he submitted, for the claimant's argument that the respondents contacted ACAS to settle a claim coming their way. In his view, this is a "***strict liability rule***", and not one where the Tribunal has any discretion.

63. It then being 11.30am, Dr Gibson addressed time-bar, and why the respondents were seeking strike out of the claim as time barred, as the entirety of the claimant's allegations were long before 22 October 2018. Further, he added, the claim was 18 months after the last act, if 21 April 2017 was taken as being the last act, being the claimant's dismissal by the respondents. When, as presiding Judge, I asked about the claimant's internal appeal against dismissal having been rejected, and whether that was not the last act, Dr Gibson accepted that it was, and that was 3 July 2017.

64. Dr Gibson submitted that it was reasonably practicable for the claimant to have made **Employment Rights Act 1996** claims within time, even after the 4 September 2018 judgment that the respondents' application for a dismissal judgment in respect of the withdrawn **Equality Act 2010** claims in the first case had been refused by the Tribunal, and that it would not be just and equitable to extend time for the claimant submitting this second claim.

65. Referring to the case law authorities of **Keeble**, and **Bexley**, Dr Gibson submitted that the claims were now 2 years old, and the respondents' witnesses had already given evidence in the first case which, he was sure, would be the same as they would give in this claim if it goes ahead, and so they would be repeating themselves, to answer spurious claims that have already been adjudicated upon by the Tribunal. In his submission, it would

not be just and equitable to extend the time limit for the **Equality Act** claims, after there has already been 6 days of evidence in the first case, a case based on the same facts and circumstances.

66. Dr Gibson stated that he knows that the claimant says she is in dispute with her former solicitors regarding the instructions given to them in the first case, but she did have those claims there in her first case, and they were clearly withdrawn by her solicitors, and he queried whether it is just and equitable to then be able to resurrect them some time later after their withdrawal, and some four and a half months after being told by the Tribunal, in the first case, that she could seek to bring a fresh claim.

67. Further, Dr Gibson asked why did the claimant wait until 21 January 2019 to raise these claims when she had received the Tribunal's judgment in her favour of 4 September 2018? Also, he added, there had been no explanation for that delay, and the claimant had not stated that she was unwell, and she was legally represented at that time, as Mr Stephen Smith (of Beltrami & Co) did not withdraw from acting until January 2019.

68. Dr Gibson submitted that the claimant had clearly not acted with due diligence herself in this matter, and time bar would have been pled in the ET3 response in the first claim, and so the claimant knew that the respondents would take issue with time-bar from the first ET3. As such, he invited the Tribunal to find that all her claims in the present case are time-barred, and it is not just and equitable to extend the time limit.

69. It then being 11.40am, Dr Gibson started to address his arguments that the claim should be struck out for unreasonable conduct by the claimant. Under reference to the case law authorities of **Bolch** and **Sud**, he conceded that there is a high test, but, he argued, the serious conduct of the claimant in the present case has reached the threshold of being unreasonable and vexatious in raising these new claims.

70. Dr Gibson referred to the Tribunal's judgment of 4 September 2018 in the first case. I pause here to note and record that what he was referring to was not

a judgment of that date, but orders made by me in a supplementary Note and Orders of the Tribunal, dated 4 September 2018, stating as follows:

(1) *The Tribunal notes and records that, on 28 December 2017, by her former representative, Mr Stewart Healey, Livingstone Brown, as per the further and better particulars for the claimant intimated on that date, the claimant withdrew the following parts of her claim, namely: to the extent that the claimant's ET1 claim form, accepted on 4 September 2017, raised any claim under the **Equality Act 2010**, and / or any claim under **Section 12(3) of the Employment Relations Act 1999** (dismissal for seeking trade union representation at a disciplinary meeting), those complaints were withdrawn.*

(2) *Having considered the respondents' representative's oral application at this Hearing, and the oral objections made by the claimant's representative, the Tribunal finds that it is not appropriate to grant a Dismissal Judgment in terms of **Rule 52,** in respect of any claim under the **Equality Act 2010**, it not being in the interests of justice to do so, because the claimant has now expressed a wish to reserve the right to bring a further claim raising the same complaints against the same respondents, and the Tribunal is satisfied that there is a legitimate reason for doing so.*

(3) *Accordingly, the Tribunal **refuses** the respondents' representative's application that the Tribunal should issue a Dismissal Judgment in the respondents' favour, in respect of those withdrawn **Equality Act 2010** parts of the claim, but **grants** the application in respect of any claim under **Section 12(3) of the Employment Relations Act 1999** (dismissal for seeking trade union representation at a disciplinary meeting), the claimant not having expressed a wish to reserve the right to bring a further claim raising that same complaint against the*

*respondents. A **Rule 52** judgment in that regard has been issued under separate cover.*

71. Further, added Dr. Gibson, the claimant had had two solicitors advising her, first Livingstone Brown, and then Beltrami & Co, and, for the life of him, he could not understand why we are where we are. Mr Healey, from Livingstone Brown, had withdrawn these claims, and confirmed that they were withdrawn, and it was only a whistleblowing claim. Dr Gibson stated further that he did not believe the claimant when she says that she did not give Mr Healey those instructions. He stated that he thinks that the claimant has changed her mind, and that she is telling this Tribunal another falsehood, in saying that she did not instruct Mr Healey to withdraw these claims. That, in his view, is unreasonable conduct by the claimant.

72. Further, submitted Dr Gibson, the claimant has wasted a considerable amount of time and money in trying to go back to then, and it is contrary to the interests of justice to have the respondents defend this second claim, given the way it has been conducted by the claimant.

73. It then being 11.48am, Dr Gibson addressed the lack of specification in the present claim. He stated that he thought the claim was now restricted to an **Equality Act** claim related to disability by perception, and sex discrimination, but he had only just seen the new 36 pages (rather than the previous 63 pages) submitted by the claimant, on 21 June 2019, and he had found it "***impossible to comprehend***."

74. Dr Gibson further submitted that the respondents have a right to fair notice of the case against them, and it is not in the interests of justice to allow the claimant a further opportunity to amend her claim, and the revised paper apart intimated by the claimant, on 21 June 2019, is not technically an application by her for leave to amend. He submitted that her claims are not specified at all and, while he knows she is not legally qualified, he stated that she had had two solicitors before, and at least one had advised her she had no prospects of success, they withdrew from acting, and she had then changed her mind, and brought this second claim.

75. Further, Dr Gibson submitted that sexual harassment is completely different to discrimination on the grounds of sex, and the claimant here had referred to disability by perception, but she had not stated what is that disability. He submitted that she had not given any identifiable heads of claim, to set out clearly whether she was complaining of direct or indirect discrimination, harassment, or victimisation, and he queried "***what is it?".***

76. Dr Gibson added that her case against the respondents is not known from these pleadings, and there is something there about marital status, but it was not clear if that was a protected characteristic being relied upon by her. In short, Dr Gibson stated that***: "Who knows – I can't work out what her claims are."***

77. While knowing that an unrepresented claimant will usually get an opportunity from a Tribunal to lodge further and better particulars, at a first Case Management Preliminary Hearing, Dr Gibson stated that this claim was still not set out clearly by the claimant, and the respondents were not clear what they are being accused of as regards breaches of the **Equality Act**.

78. Dr Gibson stated that the claimant had had three opportunities already to set out her case against the respondents, but the respondents are still unclear of the specific breaches of the **Equality Act**. As such, he submitted, the claim should be struck out for lack of specification, as while the claimant has set out many facts, she has not set out how those facts give her a legal case, and there is no link between her facts, and a legal breach complained of by her. He added that the claimant should not be given a further opportunity to submit her claim, and he confessed to being not quite sure exactly what she would submit.

79. Continuing with his oral submissions, Dr Gibson stated that his principal point is that related to the ACAS early conciliation, and the claim should be struck out on that basis alone, but the Tribunal should consider his other arguments if it wished to do so.

80. It then being 11.55am, Dr Gibson stated that his application for a Deposit Order relates to his argument that the claim, if not struck out, has little

prospects of success, if the Tribunal takes the case at its highest as it is pled now in the ET1 claim form. He observed that the revised paper apart submitted by the claimant is not an application to amend her ET1 claim form. Looking at the discriminatory acts and detriments, set out in section 2.2 of the paper apart, he stated that he did not see anything there about perceived disability, but it might be there, as it runs to 63 pages.

81. He noted that the claimant had stated that she would withdraw her claim if a deposit order was made, and he hoped that she would do so. Dr Gibson then added that he was not concerned about the amount of a deposit order, and that may be **£100** would be enough of a deterrent for the claimant to withdraw her claim.

82. Even taking account of the claimant's revised paper apart, submitted on 21 June 2019, Dr Gibson stated that he cannot see any basis on which these alleged acts would give rise to a finding of a breach of the **Equality Act** by the respondents, and he was not sure what the claimant's argument was as regards alleged disability by perception. In closing, he submitted that this claim has little prospects of success, and that therefore a Deposit Order is appropriate.

Oral Submissions for the Claimant

83. Dr Gibson's oral submissions having concluded, at 12.05pm, a comfort break was offered to, and accepted by, the claimant, to allow her time to gather her thoughts in reply to the respondents' submissions. When this Preliminary Hearing resumed, at 12.14pm, the claimant proceeded to address the Tribunal with her own oral submissions.

84. In opening her submissions, the claimant started by saying that she felt it was "***inflammatory***" of Dr Gibson to accuse her of lying, and she commented that she had submitted information to ACAS to the best of her knowledge, as an unrepresented party, and that she had not done so in some way misrepresenting facts. Having looked at the **Akhigbe** case cited by the respondents' solicitor, she stated that it is different on its facts, and that her

original ET1 had quoted from SAR evidence proving her case, and breaches of the **Equality Act**.

85. The claimant then described Dr Gibson's ACAS point as being "***a technical point",*** and she further stated that an ACAS certificate was issued straight away, as there had been discussion with the respondents after the first claim, where there had been conciliation between 5 and 31 July 2017. She commented that it was her impression that ACAS considered no further conciliation possible, and that is why she ticked the box on the ET1 claim form in this case as her employer had already been in touch with ACAS. It was part of her old 2017 claim, and the respondents had been in touch with ACAS about that 2017 claim.

86. Further, added the claimant, she might be technically incorrect in what she did, but she refuted that she had acted falsely and made a falsehood. She stated that she had raised **Equality Act** points in her internal appeal letter dated 20 May 2017, and she had told them that she believed that she had been discriminated against by them. She added that this discrimination was known, and it can be evidenced through production of written documents. She had appended evidence to her appeal letter, clearly structured, but her employer did not acknowledge this, and there was further discrimination upon her in the respondents' decision letter of 3 July 2017, in the language used to refuse her appeal.

87. The claimant further stated that at that time her solicitor, Mr Healey from Livingstone Brown, spoke to ACAS on her behalf, and the letter of 3 July 2017 had stated that she appeared to be totally unaware of things, and disregarded her comments about being portrayed as mentally unstable. She added that her employer was in touch with ACAS about the first claim, but the **Equality Act** allegations were then withdrawn, but without her consent, by her solicitor.

88. She described Dr Gibson's comments as inflammatory and unreasonable, and stated that while she had had a Final Hearing in the other case, the fact that it and this case were not conjoined is irrelevant, as this was submitted as

part of a separate claim. She described it as not a second claim, but it is all part of the first claim.

89. Further, the claimant stated, her **Equality Act** claims remain a live issue, which has not been dismissed, and where the respondents now seek strike out of her second ET1. She stated that she had ticked "***No***", and provided an adequate explanation of the exemption, being an option open to her on the ET1.

90. She stated that she could appreciate that her subsequent emails to the Tribunal are confusing, but ACAS had issued a second early conciliation certificate on 23 January 2019, and that informed her impression that there was no wrong doing in what she had done. Her ET1 was not rejected by the Tribunal. While she did not believe that she needed a second early conciliation certificate, she then asked for it, and she got it.

91. The claimant further stated that she had not made any false assertions, and she denied that she is a liar. She described Dr Gibson as unreasonable, and with highly conflict driven ways, and stated that he was doing his best for an unreasonable client. Further, she added, her original ACAS early conciliation certificate did take place within three months, less one day, from her dismissal by the respondents, but there had been a lack of regard for her health and wellbeing as an employee, and the respondents had timed out her original disclosures that the **Equality Act** had been breached regarding a relocation package.

92. Referring then to the clean copy of her updated submission responses, intimated on 21 June 2019, the claimant acknowledged that her paragraphs were numbered, but not all consecutively, and that there was some duplicate numbering, and some of her points are repetitive, but she stated that the respondents had portrayed her in a discriminatory and insulting fashion, which was less than fair treatment by the respondents.

93. She added that HR took colleagues views as read, and at face value, and she accepted that her claim could be better specified, and that she would welcome an opportunity to provide further and better particulars of her claim,

as it is a very serious matter. She referred to "***perceptive discrimination***" by the respondents' HR, and alleged that there was a malicious intent to undermine her, with actual and perceived discrimination by HR. She added that she had raised that with a senior Director in the Scottish Government, Elinor Mitchell, as she regarded it as a deflection away from the respondents' practices, and while, privately, she believed, in good faith, that her concerns were being acted upon, reference to documents showed that they were not being acted upon.

94. As between 4 September 2018 and January 2019, the claimant stated that she was being represented by Beltrami & Co, and Mr Stephen Smith of that firm, and she didn't see any need to do things on her own, as they had been representing her since August 2018. She then divulged, but without any further specification, that she has been offered *pro bono* support if this case survives the respondents' strike out application.

95. By way of further information, the claimant then advised the Tribunal that she had been off work ill, after being dismissed by the respondents, but still with an ongoing battle with stress, fatigue and depression, as she had highlighted at the private Case Management Preliminary Hearing in the first case on Friday, 18 January 2019.

96. The claimant further stated that all the case work in connection with that first claim had been left to her to decipher, as they (her solicitors) had asked her to complete a list of detriments, and she stated that she found that stressful, when trying to hold down a full-time job, and working away from home. She felt the respondents should have dealt with it differently, and when she entered her complaints, the respondents did not meaningfully acknowledge them or deal with her complaints during their appeal process. The claimant stated that she was left with no option but to bring her case against the respondents.

97. Further, the claimant stated that her solicitor was responsible for withdrawing her **Equality Act** complaint, as she did not consent to withdrawal of that part of her claim, and she further stated that she has evidence for that should that

become necessary. She stated that there was open speculation as to why she is now not represented, and it was very unusual and a mystery to her why Livingstone Brown withdrew the **Equality Act** aspects of the claim. She added that they had withdrawn their representation of her as they objected to her raising the issue with the Employment Tribunal, and she further stated that her subsequent representative at Beltrami & Co did recognise the validity of her **Equality Act** complaints, but then they withdrew in January 2019 prior to the Final Hearing into the first claim.

98. As regards the case management orders made in that first claim for a Joint Bundle, the claimant stated that they were to be co-produced by Beltrami & Co and Dr Gibson, but none of those things happened, and she was left with bulk preparation of her case which was really difficult. She had noted, at paragraph 19 of her clean copy submissions, that she believed she had acted appropriately at all times, and that the respondents were saying she was vexatious as a way to "***disguise"*** their behaviour in breach of the **Equality Act.**

99. Further, the claimant stated that the respondents' views should be contrasted with my closing remarks, at paragraph 48 of the Case Management Preliminary Hearing Note and Orders from 5 April 2019, where I had recorded that the claimant was doing her best as an unrepresented, party litigant, to explain her position. She denied that she has been acting vexatiously, or inflammatory, towards the respondents, and she submitted that her claims had been brought within time, as the evidence only became known to her in June 2017 following upon her dismissal, and they were part of her original ET1, within time, in August 2017.

100. On the matter of her alleged unreasonable conduct of these proceedings, the claimant referred me to her written submissions, in reply to Dr Gibson's submissions about case law, after **Bolch**, and she stated that she recalled how Dr Gibson had been on his mobile phone during closing submissions on 30 April 2019 (in the Final Hearing of her first claim), and how he had had what she described as "***a fit***" and walking out on her when they should have jointly been addressing the Joint Bundle.

101. The claimant then stated that she was not convinced that the **Akhigbe** precedent cited by Dr Gibson applies in the present case, and that she put in this claim to the Tribunal as soon as it was reasonably practicable for her to do so, when she was left on her own, i.e. after her solicitor had withdrawn from acting for her. She added that she was tasked by Mr Smith to compile a list of all detriments, and a detailed timeline, stripping out a narrative, as there was no detailed timeline in the Joint Bundle.

102. Further, the claimant stated that she was working away from home, with all the things associated with that, and she feared her new employment might become involved, as she had a stigma of having been sacked from her old job with the respondents. From August 2018 to January 2019, she stated that she was represented by Beltrami & Co, and they had arranged things to suit their holidays, and it was only when she phoned the Tribunal office that she became aware that she had been misled by her solicitor.

103 While, in his submissions, Dr Gibson had stated that his witnesses from the respondents, if they returned to give evidence in this case, would be asked to go over the same things, the claimant emphasised that the Final Hearing in the first case did not have the **Equality Act** claims as a feature. Further, things were entered in written documents, and all in the paperwork that recorded their dealings.

104. When, as presiding Judge, I enquired whether she felt there would be any forensic prejudice if witnesses were to be asked questions years after the events, the claimant stated that she believed David Wright was no longer working for the respondents, but there is a wealth of SAR documentation which negates any issue of time that has passed, and it can be amply evidenced in documentation, although she needed to better plead and specify her case.

105. The claimant then stated that she had objected to her claims being withdrawn, and this was not seen as an issue on 4 September 2018, and that she did act with due diligence, and maybe it's a bit muddy, and it should be made more concise, but her new claim is not vexatious, or clutching at straws, but she

was latching on to the Tribunal ruling given to her on 4 September 2018. She described it as ***"incredible***" that the Scottish Government wrote about her after only 8 months employment, when she stated that she was doing her best, and she described it as part of the "***tactical strategy***" of the respondents to "***bury me in white noise***", so her voice becomes unheard, and her claim unseen.

106. She then stated that she was working in South Uist, with limited Internet access, and that it was difficult to complete and return documents to Mr Healey, and that she had had to go to a local pub and submit her original ET1 from there. She further stated that Dr Gibson had painted an alternative picture, and he had not quoted in full what Mr Healey had said in the correspondence file in the 2017 case, and she "***absolutely refuted***" Dr Gibson's suggestion that she might be lying about the withdrawal of claims by Livingstone Brown.

107. The claimant then stated that fair notice was given to the respondents as part of the internal appeal process, and her ET1 had clearly stated the equality issues, and quoted from SAR documentation. Further, she stated that she was making an application to amend, if this case survives strike out, as she was very confident that she could better specify and rely on robust evidence of her claims and relevant legislation to make it as clear as possible what she means by her **Equality Act** claim.

108. Further, the claimant added that she felt "***under duress***" by having the other case ongoing, and it is stressful not knowing what the outcome is in that other case. The claimant further stated that she had approached a source of legal representation, that she did not identify, but whom she stated are willing to assist her if this case goes forward, and that will assist the clarity of her pleadings going forward.

109. The claimant then stated that she was not sure if **Res Judicata** applied to her **Equality Act** claim, and that she had no other reported case law authorities to refer this Tribunal to. She described Dr Gibson's unreasonable conduct allegation as "***just malicious***", and she commented that his strongest point

was the technical issues about ACAS early conciliation. When I asked her what she meant by vexatious, given the NIRC in **Marler** had defined it as doing something out of spite to harass the respondents as a former employer, the claimant stated that it was the respondents' behaviour that was to undermine her credibility, and she stated that the respondents had been malicious towards her. She flipped my query to make it focus on what she thought of the respondents, rather than addressing why they might have regarded her claim as vexatious.

Reply for the Respondents

110. It then being 1.22pm, I asked Dr Gibson if there was anything that he wished to say to the Tribunal by way of reply to the claimant's submissions to me. He stated that the claimant had referred to ACAS issuing the early conciliation certificate "***straight away***", but it was actually 2 days after the ET1 was lodged with the Tribunal. Further, he added, the fact that ACAS issued that certificate on 23 January 2019 does not support the claimant's position that the respondents had contacted ACAS.

111. While the claimant had referred to the ACAS point being "***technical***", Dr Gibson stated that he took issue with that description, as there is good reason why ACAS has to be contacted before raising proceedings, and Parliament had required that system to be put in place. He submitted that the claimant wanted the claims included in the Final Hearing on 21 January 2019, and that's why she submitted the ET1 online at 04:00am, and that's why she did not comply with the ACAS early conciliation requirement. He submitted that she was "***motivated not to comply with the process properly***".

112. Where, at paragraph 37 of the claimant's clean copy submissions, she had stated that Dr Gibson "***concedes that the equalities claim should be considered and the rest struck out***.", Dr Gibson made it clear that he had made no such concession, and he stated that this was an example of how the claimant behaves, making a statement and presenting things in a misleading way.

113. While the claimant was arguing it would be just and equitable to let the **Equality Act** claim proceed to a full merits Hearing, if it was held to be time-barred, Dr Gibson submitted that even if the claimant was suffering depression and fatigue, she was represented by Beltrami & Co, solicitors, from 4 August 2018 to 7 January 2019, and between 21 and 28 January 2019, she was well enough to conduct a full Final Hearing representing herself, yet she wants the Tribunal to believe that she could not have lodged this claim earlier, when she had the support of a solicitor at that point.

Matters raised by the Judge with both Parties

114. The respondents' reply having concluded, and it then being 1.29pm, I raised a few matters with Dr Gibson, as the respondents' representative. He confirmed that he was familiar with the EAT judgment in **Hemdan v Ishmail [2017] ICR 486,** although it was not in his list of authorities, and that he was not looking for a huge amount by way of any Deposit Order, but he was looking for the Tribunal to tell the claimant that her claim has little prospects of success.

115. Again, while not in his list of authorities, Dr Gibson confirmed that he was familiar with the EAT judgment in **H M Prison Service v Dolby [2003] IRLR 694**, about the yellow and red card options of Deposit Order and Strike Out, and the latter being a Draconian option.

116. Dr Gibson stated that the claimant had had the opportunity to raise and pursue this claim already, and with no specification, and no credible evidence, and the Tribunal had heard evidence in the other case, and while he did not know what the Tribunal's decision will be, strike out of this claim might be viewed as Draconian, but it would prevent the respondents from having to defend spurious claims that are out of time, brought in an unreasonable manner, and which have already been adjudicated upon, under a different head of claim in the first case.

117. While this is an **Equality Act** claim of alleged discrimination by the respondents, and strike out is a Draconian step, the particular facts and circumstances of this case meet that high test, submitted Dr Gibson, and he

submitted that this claim should be struck out by this Tribunal. The respondents should not be required to defend it again, under a "***re-packaged claim".***

118. Dr Gibson submitted that the claimant had had a Hearing in her whistleblowing claim in the other case already, and this new claim has not been brought again in a timely or specified manner, and it has left the respondents in a situation where they will have to spend time and money, with stress and inconvenience, in defending something which should be time-barred, lacks specification, and it has already been defended, albeit on a different head of claim in the first case, and that what the claimant was doing was to try and "***shoehorn the same facts and circumstances into the new claim."***

Reply by the Claimant

119. It then being 1.37pm, I asked the claimant if there was anything further she wanted to say to the Tribunal. Under reference to **Hemdan**, the claimant stated that it did not surprise her that Dr Gibson wishes a Draconian measure applied, but she stated, in reply, that she has credible evidence of **Equality Act** breaches, and that they have not been ventilated or considered by a Tribunal, and these are serious matters, which stand alone as serious breaches of the **Equality Act**.

120. Further, the claimant added, she does not believe these claims are time-barred and, even if they are, justice and equity should allow her a "***green light to go to a Final Hearing".*** She denied that this case is vexatious, but she stated that it is being brought out of concern that the Scottish Government should be leading by example, and not treating employees in this way, and she described that as "***a Human Rights issue***." In closing, at 1.40pm, the claimant stated that she opposed the respondents' application for Strike Out, and for a Deposit Order and, instead, she sought for a Final Hearing to be fixed by the Tribunal.

Issues before the Tribunal

121. The issues before this Tribunal were to determine the respondents' opposed applications for Strike Out of the claim, which failing a Deposit Order against the claimant, and, if required, to determine any further procedure before the Tribunal.

Relevant Law: ACAS Early Conciliation

122. **Section 18A (1) of the Employment Tribunals Act 1996** provides:

> *"Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter."*

123. **Section 18A (4)** provides:

> "*If (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant."*

124. **Section 18A (8)** provides:

> *"A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4)."*

125. However, **Section 18A (1)** is subject to **subsection (7). Section 18A (7)** provides for exceptions to that procedure, and those exceptions were enacted in the **Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014**.

126. **Paragraph 3(1)** of those 2014 Regulations provides:

> "*A person (A) may institute relevant proceedings without complying with the requirement for early conciliation where –*

….

(c) A is able to show that the respondent has contacted ACAS in relation to a dispute, ACAS has not received information from A under section 18A (1) of the Employment Tribunals Act in relation to that dispute, and the proceedings in the claim form relate to that dispute;"

127. **Rule 10(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** provides:

"*The Tribunal shall reject a claim if – …*

(c) It does not contain all of the following information – (i) an early conciliation number; (ii) confirmation that the claim does not institute any relevant proceedings; or (iii) confirmation that one of the early conciliation exemptions applies."

128. **Rule 12(1)** provides:

"The staff of the tribunal office shall refer the claim form to an Employment Judge if they consider that the claim, or part of it, may be – …

(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies."

Discussion and Deliberation: ACAS Early Conciliation

129. The ET1 claim form was accepted by the Tribunal because the claimant had confirmed, by ticking the appropriate box, that one of the exemptions applied, and that is why she did not have an ACAS early conciliation certificate number. The *pro forma* claim form does not indicate that it is a requirement of the exemption that the employer had only been in touch with ACAS in circumstances in which the claimant had not themselves contacted ACAS about the relevant matter. Rather it would appear from the wording on the claim form that provided the employer had already been in touch with ACAS

an exception to the requirement to provide an early conciliation number applied.

130. The 2013 Tribunal Rules of Procedure do not contain any specific provision for the Tribunal to ascertain whether or not a proposed respondent has in fact contacted ACAS, and it is not the practice of the Tribunal to seek such information from a claimant. **Rule 12** is clearly drafted on the basis that the procedure applied at the outset of a claim. **Rules 8 to 14** inclusive all come under the heading '***Starting a Claim'***.

131. I am required to apply the provisions of **Section 18A of the Employment Tribunals Act 1996** and the **2014 Regulations** and not an understandable interpretation of the wording on the claim form. The exemption provided for in the Regulations requires the employer to have initiated the contact about the relevant matter with ACAS and the prospective claimant had not contacted ACAS about it, and it does not apply to a situation in which the employer is responding to early conciliation initiated by the prospective claimant.

132. In section 2.3 of the ET1 claim form, the claimant ticked the box to state that she did not have an ACAS early conciliation certificate number. The standard reason as on the form was: "***My employer has already been in touch with ACAS***." Because the exemption identified by the claimant on the claim form does not apply, as she has not been able to show that the respondents had contacted ACAS in relation to a dispute, and an early conciliation certificate had not been issued before the claimant's presentation of this claim, the Tribunal does not have jurisdiction to entertain it. It follows that I am obliged to strike out the claim.

133. At this Preliminary Hearing, the respondents disputed the claimant's assertion, "***My employer has already been in touch with ACAS***.", which they described as "***false***". Having considered parties' written and oral submissions made at this Preliminary Hearing, and after private deliberation thereafter in chambers, I have decided to hold that the claimant has failed to establish that the exemption in **Section 18A (7)** applies on the facts of her

case, and, accordingly, the Tribunal has no jurisdiction to consider this claim, and accordingly it is dismissed by the Tribunal.

134. As the claimant had claimed an exemption, under **Rule 10**, the claim form was not referred to an Employment Judge. It contained the minimum information required, and, by the time it was accepted by the Tribunal staff, the ACAS early conciliation certificate had been obtained. As such, the Tribunal staff had no cause, under **Rule 12**, to refer the claim to an Employment Judge to reject the claim for a substantive defect.

135. Had they done so, and had a Judge rejected the claim form, the claim form would, in terms of **Rule 12(3),** have been returned to the claimant, together with a notice of rejection giving the Judge's reason for rejecting the claim, or part of it, and advising how the claimant could apply for a reconsideration of the rejection, in terms of **Rule 13**.

136. If the ET1 claim form had been rejected, in whole or in part, under **Rule 10 or 12,** then the claimant could have applied for a reconsideration on the basis that either (a) the decision to reject was wrong, or (b) the notified defect can be rectified. As an ACAS certificate with a proper number had been received by the Tribunal, at the stage of pre-acceptance vetting, there was no issue for the Tribunal to take action upon.

137. If the Judge had decided under **Rule 13(4)** that any original rejection was correct, but that the defect had been rectified, the claim would have been treated as presented on the date that the defect was rectified. None of that, of course, happened in the present case because, where, as here, a claimant ticks the exemption box, unless the Tribunal staff can identify that an exemption does not apply, and refer it to a Judge under **Rule 12**, which did not happen here, the exemption claimed is taken at face value, unless and until there is a challenge by the respondents as to the Tribunal's jurisdiction.

138. As I see it, the wording of **Section 18A (1)** is absolutely clear. Subject to **subsection (7),** it is a mandatory requirement that a prospective claimant must commence the early conciliation procedure. **Subsection (7)** then authorises the making of regulations. **Regulation 3(1)(c)** of the 2014

Regulations provides that the prospective claimant can show that the respondent has contacted ACAS in relation to the dispute. The claimant here was and is not able to show that was the case simply because the respondents had not contacted ACAS. The exemption does not apply, and therefore **Section 18A (1)** does apply.

139. Finally, I do not consider that what has occurred is a defect which can be rectified for the purposes of **Rule 13**. One cannot turn the clock back and pretend that contact was made with ACAS and a certificate obtained before the claim was presented as required by **Section 18A (1).** Whatever flexibility is included in the 2013 Rules cannot affect the clear wording of a statute.

140. Outside the exemption, there is no discretion afforded to an Employment Judge as the requirement for ACAS conciliation is absolute and strict, and thus the Tribunal has no discretion in this area. If, at the time a claim form is presented, the prospective claimant has not completed the process of early conciliation through ACAS, and obtained an ACAS early conciliation certificate, then the Tribunal may not consider the claimant's complaints, unless one of the exceptions under **Section 18A (7)** apply, which is not the case here.

141. It is clear that, as a result of the claimant's failure to obtain an ACAS early conciliation certificate, the Tribunal has no jurisdiction to hear these proceedings. That lack of jurisdiction flows from the provisions of **Section 18A of the Employment Tribunals Act 1996.** It is not a matter of discretion. It is an absolute statutory requirement that a conciliation certificate be obtained unless the claim falls within the "***prescribed cases***" listed at **Regulation 3 of the 2014 Regulations** cited above. Therefore, as a result of the claimant's failure to obtain an ACAS conciliation certificate, prior to presenting her ET1 claim form, the Tribunal has no jurisdiction to hear her claim and I must strike it out.

Relevant Law: Time Bar

142. **Section 123 of the Equality Act 2010**, which specifies time limits for bringing employment claims, provides so far as relevant that:

"(1) … proceedings on a complaint … may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

143. The claimant was dismissed from the respondents' employment on 21 April 2017, and her internal appeal against dismissal was rejected on 3 July 2017. Her ET1 claim form in this claim was presented to the Tribunal on 21 January 2019. As such, any alleged acts which are said to have taken place prior to 20 October 2018 are time-barred. In short, the entirety of the claimant's allegations in this ET1 claim form are time-barred, unless the Tribunal decides that it is just and equitable to allow her claim to proceed, although late.

144. **Section 123(1)(b)** gives the Employment Tribunal a wide discretion to do what it thinks is just and equitable in the circumstances, as the Court of Appeal held **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050:**

**"*18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not*

leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras [30]-[32], [43],[48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para [75].

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see Robertson v Bexley Community Centre t/a Leisure Link [2003] EWCA Civ 576; [2003] IRLR 434, para [24]."

145. In **Robertson v Bexley Community Centre [2003] IRLR 434**, at paragraph 25, Lord Justice Auld held that:

> ***"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. …"***

Discussion and Deliberation: Time Bar

146. In her submissions, the claimant argues that her 2019 claim is not time-barred, as her withdrawn **Equality Act** heads of claim were originally contained within her 2017 claim to the Tribunal, which was presented on time. She leaves to the one side that those heads of claim were withdrawn by her then solicitors, and while that withdrawal brought those heads of claim to an end, in that claim, the respondents' application for a **Rule 52** judgment was refused by my ruling in the first case dated 4 September 2018.

147. While, in her oral submissions at this Preliminary Hearing, the claimant sought to persuade me that her claim is not time-barred, I do not accept that proposition, for it is well out of time, and the issue for consideration is whether, in the circumstances, it is just and equitable to allow her an extension of time.

After careful reflection, I have decided that it is not just or equitable to allow her an extension of time. The length of the further delay is a significant factor in refusing her an extension of time, for it is longer than the normal statutory period of three months to bring a Tribunal claim, and the claimant has shown no good cause for that delay. With the passage of time from events away back in 2016/17, there is also the distinct possibility that memories will have faded, and while contemporary documents may still exist, documents often need explanation of context by witnesses, some of whom may no longer be available, or accessible. The passage of time is therefore likely to have an impact on both parties having a fair trial.

148. While she has referred to matters between 16 August 2018, when I heard parties' representatives in Preliminary Hearing, resulting in my judgment of 4 September 2018 in the first case, and the date of this Preliminary Hearing, the basic fact remains that it was only on 21 January 2019 that this fresh claim was presented by her to the Tribunal, despite the leave given to her, on 4 September 2018, when I decided that it was not appropriate to grant a dismissal judgment in terms of **Rule 52**, in respect of any claim under the Equality Act 2010, it not being in the interests of justice to do so, because the claimant, through her solicitor, Mr Smith, had then expressed a wish to reserve the right to bring a further claim raising the same complaints against the respondents, and I was satisfied that there was a legitimate reason for doing so.

149. As I stated in paragraph 49 of the supplementary Note and Orders of the Tribunal, dated 4 September 2018, I was not expressing any view on the prospects of success for any fresh claim, and it was for Mr Smith and the claimant to discuss that matter, in light of Dr Gibson's position that any such fresh claim would be resisted by the respondents. In granting her that leave, it was my expectation that any fresh claim would be intimated in good time to allow it to be considered by the respondents, and by the Tribunal, prior to the Final Hearing fixed in the first case.

150. Further, at paragraph 52, I recorded that as there was then no other claim, it was not possible to combine any new claim with the first claim, but, if and when another claim was raised, parties' representatives could then discuss when might be an appropriate time to consider asking the Tribunal about combining both claims. Again, it was my expectation that, if any fresh claim was intimated, any argument by the respondents about whether or not it should be allowed to proceed would have been addressed by parties and the Tribunal in good time to allow both claims to proceed to the same Final Hearing fixed in the first case, if the second claim was allowed in.

151. The claimant did not, however, submit her second claim until 21 January 2019, on the morning of day 1 of 6 in the Final Hearing in her first claim, and her application to conjoin both cases was refused by this Tribunal on 21

January 2019. The ET1 in this present case was presented on 21 January 2019, despite the fact that those Hearing dates had been fixed as far back as August 2018. The timing and manner of her new claim being presented also links into the other matter on which the respondents sought Strike Out of her claim, and that is her alleged vexatious or unreasonable conduct of these proceedings.

Relevant Law: Strike Out and Deposit Order

152. Within the **Employment Tribunal Rules of Procedure 2013, Schedule 1,** the relevant provisions are to be found within **Rule 37** on Strike Out, and **Rule 39** on Deposit Orders, while, clearly, the other Rule that is relevant is **Rule 2,** the Tribunal's "**overriding objective",** to deal with the case fairly and justly. While both parties have cited some case law authorities for my consideration, as per their lists of authorities, detailed earlier in these Reasons, I have given myself a self-direction on the relevant law.

153. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances. Even if the Tribunal so determines, it retains a discretion not to strike out the claim. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances.

154. A Tribunal can exercise its power to strike out a claim (or part of a claim) '**at any stage of the proceedings'** - **Rule 37(1).** However, the power must be exercised in accordance with **"reason, relevance, principle and justice": Williams v Real Care Agency Ltd [2012] UKEATS/0051/11** (13 March 2012), **[2012] ICR D27,** per Mr Justice Langstaff at paragraph 18.

155. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13, [2014] I.R.L.R. 14**, the learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

156. However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosures, the circumstances in which a claim will be struck out are likely to be rare. In general, it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

157. Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Students' Union and anor 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.

158. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126,** the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

159. Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezsias** in **Balls v Downham Market High School and College [2011] IRLR 217,** stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

160. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in

submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

161. In **Balls,** at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

> "***to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached."***

162. Although not cited to me by either party at this Preliminary Hearing, I am aware that in a reported EAT judgment by Mrs. Justice Simler DBE, the then President of the Employment Appeal Tribunal, in **Morgan v Royal Mencap Society [2016] IRLR 428**, she helpfully analyses the principles laid down in the case law, and their application, at paragraphs 13 and 14 of her judgment, where, at paragraph 14, she states that the power to strike out a case can properly be exercised without hearing evidence.

163. Again, while not cited to me, by either party, I am also aware that in **Lambrou v Cyprus Airways Ltd [2005] UKEAT/0417/05**, an unreported Judgment on 8 November 2005 from His Honour Judge Richardson, the learned EAT Judge stated, at paragraph 28 of his judgment, as follows:

> **"*Even if a threshold ground for striking out the proceedings is made out, it does not necessarily follow that an order to strike out should be made. There are other remedies. In this case the other remedies may include the ordering of specific Particulars and, if appropriate when Particulars are ordered, further provision for a report which, in furtherance of the overriding objective, will usually be by a single expert jointly instructed. A Tribunal should always consider alternatives to striking out: see HM Prison Service v Dolby [2003] IRLR 694."***

164. So too have I considered **Dolby**, where, at paragraphs 14 and 15 of the judgment, Mr Recorder Bowers QC, reviewed the options for the Employment Tribunal, as follows:

> ***"14. We thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put it, "the yellow card"). Fourthly, they may decide at the end of the case that the application was misconceived, and that the Applicant should pay costs.***
>
> ***15. Clearly the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the Tribunal must adopt a two-stage approach; firstly, to decide whether the application is misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application***

for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point."

165. I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, an unreported Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to **"*a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

166. Under **Rule 39(1),** at a Preliminary Hearing, if an Employment Judge considers that any specific allegation or argument in a claim or response has "***little reasonable prospect of success***", the Judge can make an order requiring the party to pay a deposit to the Tribunal, as a condition of being permitted to continue to advance that allegation or argument.

167. In **H M Prison Service v Dolby [2003] IRLR 694,** at paragraph 14 of Mr. Recorder Bower' QC's judgment on 31 January 2003, a Deposit Order is the **"yellow card**" option, with Strike Out being described by counsel as the "**red card**."

168. The test for a Deposit Order is not as rigorous as the "***no reasonable prospect of success"*** test under **Rule 37(1) (a),** under which the Tribunal can strike out a party's case.

169. This was confirmed by the then President of the Employment Appeal Tribunal, Mr. Justice Elias, in **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07,** who concluded it followed that ***"a Tribunal has a greater leeway when considering whether or not to order a deposit"*** than when deciding whether or not to strike out.

170. Where a Tribunal considers that a specific allegation or argument has little reasonable prospect of success, it may order a party to pay a deposit not

exceeding £1,000 as a condition of continuing to advance that allegation or argument.

171**. Rule 39(1)** allows a Tribunal to use a Deposit Order as a less draconian alternative to Strike Out where a claim (or part) is perceived to be weak but could not necessarily be described by a Tribunal as having no reasonable prospect of success.

172. In fact, it is fairly commonplace before the Tribunal for a party making an application for Strike Out on the basis that the other party's case has ***"no reasonable prospect of success"*** to make an application for a Deposit Order to be made in the alternative if the '***little reasonable prospect'*** test is satisfied.

173. The test of '***little prospect of success'*** is plainly not as rigorous as the test of '***no reasonable prospect'***. It follows that a Tribunal accordingly has a greater leeway when considering whether or not to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim – **Van Rensburg** cited above**.**

174. Prior to making any decision relating to the Deposit Order, the Tribunal must, under **Rule 39(2),** make reasonable enquiries into the paying party's ability to pay the deposit, and it must take this into account in fixing the level of the deposit.

175. As stated by Lady Smith, in the unreported EAT judgment of 10 January 2012, given by her in **Simpson v Strathclyde Police & another [2012] UKEATS/0030/11,** at paragraph 40, there are no statutory rules requiring an Employment Judge to calculate a Deposit Order in any particular way; the only requirement is that the figure be a reasonable one.

176. Further, at paragraph 42 of her judgment in **Simpson**, Lady Smith also stated that:

> **"*It is to be assumed that claimants will not readily part with money that they are likely to lose – particularly where it may pave the way to adding to that loss a liability for expenses or a***

preparation time order (see rule 47(1)). Both of those risks are spelt out to a claimant in the order itself (see rule 20(2)). The issuing of a deposit order should, accordingly, make a claimant stop and think carefully before proceeding with an evidently weak case and only do so if, notwithstanding the Employment Tribunal's assessment of its prospects, there is good reason to believe that the case may, nonetheless succeed. It is not an unreasonable requirement to impose given a claimant's responsibility to assist the tribunal to further the overriding objective which includes dealing with cases so as to save expense and ensure expeditious disposal (rule 3(1)(2) and (4)."

177. Lady Smith's judgment was referring to the then **2004 Rules**. Further, at paragraph 49, she also stated that: "***it is not enough for a claimant to show that it will be difficult to pay a deposit order; it is not, in general, expected that it will be easy for claimants to do so."*** Talking of Lady Smith, I also pause here to note and record the EAT's judgment in **Shields Automotive Limited v Greig [2011] UKEATS/0024/10,** which held that a claimant's whole means and assets (in that case, in an application for expenses / costs) includes any capital resources. In my view, the same basic principles apply when assessing a potential paying party's ability to pay any deposit.

178. Further, I wish to note and record that in the EAT's judgment in **Wright v Nipponkoa Insurance (Europe) Ltd [2014] UKEAT/0113/14,** dealing with the quantum of Deposit Orders, it was held that separate Deposit Orders can be made in respect of individual arguments or allegations, and that if making a Deposit Order, a Tribunal should have regard to the question of proportionality in terms of the total award made.

179. Her Honour Judge Eady QC discusses the relevant legislation and legal principles, at paragraphs 29 to 31, and in particular I would refer here to the summary of HHJ Eady QC's judgment at paragraph 3, on the quantum of Deposit Orders, and that if making a number of Deposit Orders, an Employment Judge should have regard to the question of proportionality in

terms of the total award made. Paragraphs 77 to 79 of the **Wright** judgment refer.

180. Finally, although I was not referred to it by either party, I have taken into account the judicial guidance from Her Honour Judge Eady QC, in **Tree v South East Coastal Ambulance Service NHS Foundation Trust [2017] UKEAT/0043/17**, referring to Mrs Justice Simler, President of the EAT, in **Hemdan v Ishmail & Another [2017] ICR 486 ; [2017] IRLR 228**, and Judge Eady QC holding that when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim.

181**.** **Hemdan** is also of interest because the learned EAT President, at paragraph 10, characterised a Deposit Order as being "***rather like a sword of Damocles hanging over the paying party",*** and she then observed, at paragraph 16, that: "***Such orders have the potential to restrict rights of access to a fair trial."***

182. Mrs Justice Simler's judgment from the EAT in **Hemdan**, at paragraphs 10 to 17, addresses the relevant legal principles about Deposit Orders, and I gratefully adopt it as a helpful and informative summary of the relevant law, as follows: -

> **"*10.*** ***A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by***

requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts

essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13. The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.

14. We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through

an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried

out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely Aït-Mouhoub v France [2000] 30 EHRR 382 at paragraph 52 and Weissman and Ors v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following: -

> ***"36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.***
>
> ***37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical***

and effective, the Court reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …

42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …"

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

183. For the purposes of this Judgment, I do not need to address the differing approaches identified by Lady Smith in **Simpson**, and Mrs Justice Simler in **Hemdan**. I suspect, however, that it will only be a matter of time before another Employment Judge somewhere else, in another case, will have to wrestle with the competing views of these two learned EAT Judges, and decide what is the correct approach under the current 2013 Rules.

184. It is not necessary for me to do so in the present case. For any future case, however, I note from the ICR law report, and the list of cases cited in argument before Mrs Justice Simler in **Hemdan**, as listed at **[2017] ICR 487 C/F,** that Lady Smith's unreported judgment in **Simpson** was not cited, although various other unreported EAT judgments were cited in argument before her, and **Simpson** is not referred to in the EAT's reported Judgment in **Hemdan.**

Discussion and Deliberation: Strike Out and Deposit Order

185. In considering this aspect of the present case, I have had regard to parties' submissions, the relevant law, and my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly. I consider that, in terms of **Rule 37(2),** the claimant has been given a reasonable opportunity at this Preliminary Hearing to make her own representations opposing the respondents' written application for Strike Out, which failing Deposit Order, which she has done by way of written, and now oral, submissions to me.

186. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances, paragraphs (a) to (e). Here, the respondents' submissions focus their application for Strike Out of the claim under **Rule 37(1) (b)** on the basis that the manner in which the proceedings have been conducted by the claimant has been "***unreasonable and vexatious***".

187. It is not submitted that they have been "***scandalous***", either under paragraph (a) or (b). Under the banner of "***Lack of Specification***", it is submitted that the claim in its entirety should be stuck out on the grounds that it lacks

specification and has "***no reasonable prospects of success***", being an application under paragraph (a).

188. After the most careful consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to earlier in these Reasons, I am satisfied that this is one of those cases where it is appropriate to Strike Out the claim, which should not proceed to be determined on its merits at a Final Hearing.

189. While, ordinarily, in a discrimination case, where there is a core conflict of facts, it is not generally in the interests of justice to Strike Out the claim, without hearing evidence, the respondents have persuaded me that this claim, already held to be time-barred by this Judgment, also has **no** reasonable prospects of success, on the basis of the claim as pled in the unamended ET1.

190. The revised paper apart submitted by the claimant, on 21 June 2019, simply adds fog and confusion, rather than light and clarity, to whatever is the basis of the claim brought against the respondents. While, at paragraph 40 of that response, the claimant states: "***The paper apart specifies why this case has a reasonable prospect of success",*** I do not read it in the same way as she clearly does. Similarly, I cannot accept her assertion, at paragraph 42, that: "***The pleadings are clearly structured and set out…"***

191. Further, the claimant's statement there, at paragraph 37, that: "***Dr Gibson concedes that the equalities claim should be considered and the rest struck out"***, is a misrepresentation of his position which was, and only ever was, to have the claim struck out, which failing a Deposit Order.

192. I did consider whether, rather than Strike Out, I could seek to get clarity in her case by an alternative disposal, e.g. an order for Further and Better Particulars, but I took the view, based on her attempts to date, that a further opportunity, even if granted, was unlikely to produce anything that provided fair notice and proper specification of both the factual and legal basis to her claims under the **Equality Act 2010**, whatever was produced was likely to require further procedure, and therefore further time, effort and cost to both

parties and to the Tribunal, and therefore I discounted that, and decided upon Strike Out.

193. Separately, further, and in any event, I have also decided that in bringing this claim, following upon her earlier claim against the respondents, under case number **4103492/2017**, where her **Equality Act** claims were withdrawn, the claimant has conducted proceedings against the respondents in these proceedings unreasonably and vexatiously, by delaying so long before making this fresh claim to the Tribunal, and then by revising her position on 10 and 21 June 2019, and again at this Preliminary Hearing, and so the claim should be struck out on that basis anyway.

194. I agree with Dr Gibson that this is an unreasonable way to conduct litigation. At this Preliminary Hearing, I specifically asked the claimant whether her claim was "***vexatious***", drawing her attention to the well-known judicial guidance from the then National Industrial Relations Court in **Marler.**

195. '***Unreasonable***' has its ordinary English meaning and is not to be interpreted as if it means something similar to '***vexatious***' — **Dyer v Secretary of State for Employment EAT 183/83.** It will often be the case, however, that a Tribunal will find a party's conduct to be both vexatious and unreasonable.

196. The term '***vexatious***' was defined by the National Industrial Relations Court in **ET Marler Ltd v Robertson 1974 ICR 72.** In considering the present Strike Out application, I have referred to the judgment of Sir Hugh Griffiths in Marler, and in particular the paragraph, at page 76E/F, where the learned Judge of the NIRC had stated:

> "***If the employee knows that there is no substance in his claim and that it is bound to fail, or if the claim is on the face of it so manifestly misconceived that it can have no prospect of success, it may be deemed frivolous and an abuse of the procedure of the tribunal to pursue it. If an employee brings a hopeless claim not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive, he acts vexatiously, and likewise abuses the procedure. In such***

cases the tribunal may and doubtless usually will award costs against the employee."

197. Further, it is helpful to note, at page 76H, the learned Judge also stated:

"It is for the tribunal to decide if the applicant has been frivolous or vexatious and thus abused the procedure. It is a serious finding to make against an applicant, for it will generally involve bad faith on his part and one would expect a discretion to be sparingly exercised".

198. In the final paragraph of his judgment in **Marler,** at page 77B, Sir Hugh Griffiths stated:

"Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the combatants when they took up arms".

199. Accordingly, for conduct to be vexatious there must be evidence of some spite or desire to harass the other side, or the existence of some other improper motive. Simply being '***misguided***' is not sufficient to establish vexatious conduct — **AQ Ltd v Holden 2012 IRLR 648**, EAT.

200. However, the Court of Appeal in **Scott v Russell 2013 EWCA Civ 1432**, a case concerning costs awarded by an Employment Tribunal, cited with approval the definition of '***vexatious***' given by Lord Bingham in **Attorney General v Barker 2000 1 FLR 759, QBD (DivCt).**

201. According to Lord Bingham, '***the hallmark of a vexatious proceeding is… that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'.***

202. Viewed against that definition by Lord Bingham, I am satisfied that the claimant's conduct of these Tribunal proceedings in the present claim is both unreasonable and vexatious, which is why I have included that as a basis for striking out the whole claim.

Deposit Order

203. As I have struck out the whole claim, strictly speaking, I do not need to go on and consider parties' competing arguments about a Deposit Order. But, as parties have addressed me upon that matter, I think it only right that I say something further here. Had I not struck out the claim, I would have made a Deposit Order, as with no properly stated claim, there can be no likelihood of the claimant being able to establish facts essential to winning her case. On a summary assessment, which is all that I can do, at this stage, without hearing evidence, I consider that this claim has little reasonable prospects of success.

204. While Dr Gibson was open and candid that he sought that more as a warning to the claimant, and he left the amount of any deposit to my discretion, although he suggested maybe **£100**, I have to say, having regard to the claimant's statement of means and assets, as provided to the Tribunal, I would not have ordered a deposit at that low a level. As Lady Smith observed, in **Simpson**, the issuing of a Deposit Oder should make a claimant stop and think carefully before proceeding with an evidently weak case.

205. The claimant did not, despite the clear and unequivocal terms of the case management order made on 5 April 2019 provide a detailed and vouched statement of her whole income and expenditure, and thus she did not give notice of her whole means and assets. Contrary to her assertion that "***this request by Dr Gibson is simply an attempt at further intrusion into my life by the Scottish Government"***, that information was sought by the Tribunal, in terms of **Rule 39(2),** so that it might have information available to it, as regards her ability to pay, if the Tribunal decided to make a Deposit Order.

206. Her statement of assets and means, provided on 10 June 2019, as reproduced earlier in these Reasons, at paragraph 33 above, is lacking in any

detailed or vouched statement of her income and expenditure, capital assets and savings. She states: "***You are already aware of my current earnings***", which I take to be a cross-reference to the evidence a full Tribunal heard in her first case about her circumstances post-dismissal by the respondents, and related to her schedule of loss in that other case.

207. The claimant's statement reads more as a plea in mitigation that if a Deposit Order is to be made, it should not be £1,000, as she says she has very few assets and means, and there is a possibility that she might be declared bankrupt. What is of note, in her statement, is her statement that "***it makes no difference to me"*** whether the Tribunal places a £1 or £1,000 deposit, as if a deposit is placed against the case, "***then the case will be withdrawn.***"

208. In terms of the relevant law, and **Hemdan** in particular, I have to recall that the purpose of a Deposit Order is not to make it difficult to access justice, and it must be one that is capable of being complied with. On the very limited information made available to the Tribunal, by the claimant, I consider that a deposit of £250 would have been proportionate and appropriate in all the circumstances.

Further Procedure

209. Given my decision to Strike Out the whole claim, there is now no further procedure to be determined by the Tribunal.

Employment Judge: I McPherson

Date of Judgement: 11 December 2019

Entered in Register,

Copied to Parties: 16 December 2019

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