EMPLOYMENT TRIBUNALS

Claimant: Ms P Janjua

Respondent: Tesco Stores Limited

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: via CVP **On: 21 September 2020**

Before: Employment Judge Milner-Moore (sitting alone)

Appearances

For the claimant: Ms C Darwin (Counsel)

For the respondent: Ms D Masters (Counsel)

Reserved Judgment

(1) The application, pursuant to rules 37 (1)(b) and (d) that the claim should be struck out is refused.

Reserved Reasons

Introduction

1. This case was listed for a full merits hearing due to take place between 14 and 25 September 2020. On 15 July 2020, the Claimant's representative, Ms Franklin made an application to postpone that hearing on grounds of the Claimant's ill health. That application was opposed by the Respondent. On 2 September 2020, the Respondent made an application to strike out the claim in its entirety. In summary terms, the application was made on the basis that there had been unreasonable conduct on the part of the Claimant and/or that the case was not being actively pursued.

2. On 3 September 2020, EJ Gumbiti Zimuto conducted a telephone case management hearing. By that time the Respondent had come to accept that the

full merits hearing could not proceed as listed and so was acceding to the postponement. However, the Respondent contended that the obstacle to the hearing going ahead was not the Claimant's ill health but rather the Claimant's unreasonable conduct in failing to prepare the case for hearing. EJ Gumbiti Zimuto therefore vacated the full merits hearing and listed the matter for an open preliminary hearing to consider "*(1) whether in the light of the claimant's present medical condition it was not in the interests of justice for the hearing that was listed to take place between 14-25 September to proceed as listed. (2) The application to strike out the claim made by the respondent. (3) the matters arising from the correspondence between the parties since July 2020".* In fact, it proved possible only to deal with the first two points.

3. Both parties produced skeleton arguments and Counsel had helpfully cooperated to produce a joint authorities bundle including **Blockbuster Entertainment Ltd v. James** [2006] EWCA Civ 684. In addition to the case reports in the authorities bundle, I was also referred to **De Keyser v Wilson** [2001] IRLR 324 and **Bolch v Chipman** [2004] IRLR 140 as providing an aid to the proper understanding of the principles summarised in the **Blockbuster** case.

4. The respondent produced a 750 page bundle for use at the preliminary hearing divided in to three parts, Part A (consisting of the pleadings, case management orders and the applications to postpone and to strike out), part B (consisting of inter partes correspondence) and part C (consisting of medical reports including reports from Dr Poole (the jointly instructed medical expert) and Dr Woolfson (the consultant psychiatrist treating the Claimant)). The Claimant produced a supplementary medical report from Dr Woolfson and a witness statement from Ms Franklin (the solicitor with conduct of the case on the Claimant's behalf). The parties agreed that it was not necessary for Ms Franklin to give live evidence or to be cross examined.

5. It was agreed by Counsel that my reading could focus on Ms Franklin's statement, the Claimant's application to postpone of 15 July 2020, the case management order made by EJ Gumbiti Zimuto on 3 September 2020, the medical reports of Dr Woolfson of 6 July and 18 September 2020 and The respondent's strike out application of 2 September 2020. I also read the documents specifically referenced in the skeleton arguments and/or referred to in the course of submissions. Ms Masters also submitted an email chain after the hearing (no objection was raised to this) evidencing that the Respondent had first raised the possibility that supplementary questions be put to Dr Poole in February 2019.

The claims being advanced

6. It is common ground that the Claimant is a disabled person within the meaning of the Equality Act 2010 ("the Act") by reason of depression and anxiety. Her depression and anxiety first began to manifest in 2013. On 24 October 2017, the Claimant brought claims of unfair dismissal and disability discrimination after being selected for redundancy by the Respondent. She alleges that she has been subjected to indirect discrimination, discrimination arising from disability and failure to make reasonable adjustments.

7. It is not necessary to set out her complaints in detail here but it is relevant to record two matters. The first is that one of the grounds of complaint is that the Claimant received adverse scores in the redundancy selection process because of what was said to be a blunt and unpleasant communication style. The Claimant's case is that, in so far as there were problems with her communication style, these arose from her disability. The second point to note is that the claim form contains some narrative that relates to events as far back as 2013, but the events that feature as specific grounds of complaint began in summer 2016 and the dismissal itself took effect on 4 September 2017.

The factual and procedural history

8. The case was originally listed for hearing in February 2019 but that hearing was rescheduled to April 2019 because one of the Respondent's witnesses was unavailable. The parties then consented to the postponement of the April 2019 hearing to enable a judicial mediation to take place. That mediation was unsuccessful and was followed by a further case management hearing at which the case was listed for a ten-day hearing to begin on 14 September 2020. Orders were made for the provision of disclosure by 20 August 2019 and exchange of statements by 14 January 2020. It appears that disclosure took place but the exchange of witness statements was delayed by mutual agreement between the parties. By March 2020, Ms Franklin had prepared a draft witness statement for the Claimant. The exchange of statements was, however, pushed back by mutual agreement to the end of June 2020.

9. Dr Poole was instructed by the parties as a joint medical expert and produced his first report on 17 December 2018. One of the matters that he was asked to address was whether the issues regarding "communication style", for which the Claimant had been adversely scored, were attributable to her disability or whether they predated this and were a feature of her personality. The report indicated that there was in all likelihood a causal link between the Claimant's difficulties with interactions and her depression and anxiety. However, he indicated that there was a limited amount of evidence from which he could assess the Claimant's personality before these conditions became significant. That conclusion was obviously unhelpful to the Respondent's case, which was that these matters were not related to disability. From February 2019, the Respondent raised with the Claimant on a few occasions the possibility of putting to Dr Poole further evidence of the Claimant's personality before the onset of her depression and anxiety so that he could address this issue in greater detail. No agreement was reached as to the terms of any further instruction of Dr Poole. Dr Poole did update his report in July 2019 to provide an indication of the Claimant's likely prognosis so that this could be used to inform the judicial mediation discussions. However, he was not, at that stage, asked to address the "disability versus personality" issue. The possibility of his doing so was raised by the respondent with the claimant again in November 2019 but not pursued with any vigour at that time. No order was sought from the Tribunal to provide for the possibility that Dr Poole could be further instructed to produce an addendum to his report.

10. Towards the end of June 2020, the Respondent's solicitors raised again their wish for Dr Poole to produce a further report. The Claimant's representative raised no objection to this in principle but there was no agreement as to how this

report would be obtained or what evidence Dr Poole would see, In particular, there was a disagreement as to whether he would need to see the claimant in order to produce the further report. At this time, there were some discussions between the parties about the viability of the hearing given the pandemic. The possibility of a hybrid hearing appears to have been mooted. On 24 June 2020, the Respondent's solicitor emailed Ms Franklin proposing an "action plan" for pre hearing steps as follows: Ms Franklin should schedule an appointment with Dr Poole for the Claimant, the parties should send a joint letter of instructions which should be accompanied by the Respondent's witness statements and exchange of statements should take place on 17 July 2020. At around this time the Respondent also provided over a 100 pages of further disclosure to the Claimant's representative. Thereafter it is evident that the Respondent chased Ms Franklin on a number of occasions in an attempt to confirm the proposed "action plan". Ms Franklin did not agree the Respondent's plan of action but gave no indication that she objected to the principle of Dr Poole producing a further report to address these matters. A number of emails and messages to Ms Franklin went unanswered over this period. As a result, the respondent took steps to book an appointment for the claimant to be seen by Dr Poole on 18 August 2020.

11. Ms Franklin's statement explains something of the difficult personal circumstances that she was grappling with at this time. In February 2020, her daughter had died in hospital after a very short period of illness. A coroner's investigation was required in order to establish the cause of death and Ms Franklin received the outcome of the investigation and the death certificate in July 2020. She recognises, in retrospect, that these matters impacted on her ability to cope.

12. By 3 July 2020, Ms Franklin had been made aware that there were concerns about the claimant's fitness to attend a hearing. Dr Woolfson was asked to produce medical evidence addressing the question. He produced a report which the Claimant's representative received on 13th July 2020. An application to postpone the hearing was made on 15th July 2020 in reliance on this report.

13. The report is not as clearly expressed as one might wish and, as a result, the parties seem to have formed quite different views as to how the report is to be understood. I have set out what I consider to be the most important parts of the report and marked parts of particular importance in bold text.

    a. Dr Woolfson records that he has seen the claimant since November 2015 and that she presented with "*a history of reactive phobic anxiety and fluctuating* ***mild to moderate depression which had waxed and waned for many years and frequently manifested with severe panic attacks, high levels of tension and anxiety*** *in the setting of her now highly vulnerable personality and low stress threshold*".
    b. He noted that her mental health had worsened during lockdown and that "*she has had* ***a more severe recurrence of*** *bouts of anxiety, tension and depression*".
    c. He recorded that the Claimant was "*currently deeply concerned because she has learnt that she may have to have a hybrid hearing in place of an in person hearing before a Tribunal. That has put her once again in to a*

panic state. She maintains that she is unable to attend alone and would need to have her support network to help her and be with her during the Tribunal. ***Her view was that her ability to control her emotional state is currently so poor that the tension engendered by a court appearance of any kind would result in her becoming hysterical, acutely panicky and tense and anxious so she would hardly, if at all, be able to answer questions asked of her or give coherent logical responses. I am in full agreement with this bearing in mind her current mental state today. In my view having a hybrid hearing with her could possibly make the situation even more tension producing.***"

d. He went on to state "***if she were to attend the hearing at this time it is highly likely that the stress engendered by her vulnerable personality would seriously raise her level of anxiety, panic attacks and post traumatic stress residual symptoms. The presence of a support network or having periods of recess would be of little help in reducing her symptoms***". He did not consider that it would be possible to assist the claimant with medication without impairing her cognitive ability.
e. He went on to say that the claimant was "*an intelligent, perceptive woman who is sensorially intact" and "thinks clearly*" and that he was "*hopeful that she will remain calm and anxiety free if ..given adequate support*" and "*after further intensive treatment*".
f. He considered that the claimant not have a "*hybrid hearing as this could impede her level of equilibrium and significantly increase her levels of stress, anxiety*" and that the tribunal should be postponed for 6 months for further intensive management because the claimant was "*psychologically unfit to present herself for a ten day trial".*

14. On 15 July 2020, Ms Franklin made an application to postpone the hearing. The primary ground was that "*the claimant's condition has deteriorated in recent months and, as such she is not currently fit to attend a Tribunal hearing*". She also contended that a fair hearing in September was not possible. She argued that the respondent's delay in providing disclosure, operating in combination with the Claimant's health issues, meant that the claimant's statement could not be completed. She also argued that the respondent's belated wish to instruct Dr Poole to produce a revised report would prejudice the claimant as any such report would be available only shortly before the hearing so that the claimant would be deprived of the chance to clarify the report. The letter concluded by stating that "*the claimant would not be able to attend a hearing in person without her support network present with her. A hybrid hearing, where she was in effect present with only her Counsel for support is imply unworkable. Furthermore as a member of the BAME community she is one of the higher risk categories in terms of COVID 19 (as are the members of her support network) and hence a hearing in person at this stage is not desirable and would further heighten the Claimant's already extreme anxiety.*"

15. The respondent contends that Dr Woolfson's report established only that the claimant was unfit to attend a *hybrid* hearing and that this was how the report was understood by the claimant's representatives at the time, hence the reference her inability to attend a hybrid hearing in the letter seeking the

postponement. The claimant, however, maintains that Dr Woolfson's letter established that the she was not medically fit to attend *any* hearing and that this understanding is reflected in the postponement application. I consider that, although the report could have been more clearly expressed, Dr Woolfson's opinion was that the claimant's depression and anxiety had deteriorated significantly during lockdown such that she was unfit to attend any hearing at all at that time and that, were the case to proceed as a hybrid hearing, she would be even less able to cope.

16. On 20 July 2020, the respondent wrote opposing the application to postpone and proposing, in the alternative, that the September hearing dates be preserved for reading in and for the respondent's witnesses to give evidence, with the Tribunal then listing the matter for additional dates scheduled to take place 6 months after the September hearing, on which dates the claimant could give her evidence. This was in the expectation that, by then, the claimant's health would have improved and the risks of the pandemic lessened, such that attendance at a hearing in person would be possible. The respondent considered that there would be no need for the claimant to attend the September hearing, either in person or through remote means. In addition, the respondent sought an Unless Order in relation to the claimant's statement and an order permitting it to put further questions to Dr Poole should the claimant fail to attend the appointment scheduled for 18 August.

17. During the remainder of July and August the Respondent's representatives continued to press the Claimant's representative to complete case preparation so that statements could be exchanged and the updated report from Dr Poole obtained. Some communications from the respondent's representatives went unanswered over this period.

18. On 10 August a draft letter of instruction to Dr Poole was sent to the claimant's representative for comment. Ms Franklin says that it was only on sight of this letter that she properly understood the nature of the Respondent's proposed approach to Dr Poole. However, she raised no objection to the letter at that time. She indicated that she hoped to be able to exchange statements by 21 August. However, subsequently statements were not exchanged and the Claimant did not attend the appointment booked with Dr Poole. It is clear that the claimant and her representatives do now object to the manner in which the respondent proposes to instruct Dr Poole to provide a supplementary report.

19. Ms Franklin's statement indicates that she considered that, having received evidence that the claimant was unfit to attend a hearing and consequently made the application for postponement, it was appropriate to put case preparations "on hold".

20. On 2 September 2020, the Respondent made its application to strike out on the grounds that the claimant's representative's conduct had been unreasonable and/or that there was a failure actively to pursue the claim. The Respondent relied in particular on the failure to agree a date for exchange of statements, the failure to cooperate with the process of instructing Dr Poole to provide an updated report and the fact that the tone and infrequency of communications on the Claimant side led the Respondent to think that the Claimant did not intend the

hearing to proceed despite the fact that the postponement application had yet to be adjudicated on.

21. Dr Woolfson has produced an addendum to his report dated 18 September 2020 in which it is recorded that the claimant's mental state has not changed significantly since his July report and that "***her concentration is very poor and she is very forgetful*"** and that she has PTSD symptoms which remain heightened with the expectation of having to go to court. "*I do not think that her mental state is such that she could cope with appearing in Court either subjectively in person of even a hybrid hearing via video link*". He indicates that he is hopeful that with further CBT and other treatment the claimant could be well enough to participate in a hearing in three months' time.

Law

22. The Tribunal's power to strike out a claim or a response is set out in rule 37 of the 2013 Procedure rules.

> ***Striking out***
>
> *37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *……*
>
> *(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *……..*
>
> *(d)that it has not been actively pursued;*

23. In **Blockbuster Entertainment Limited v James** Lord Justice Sedley set out the approach to be adopted by a Tribunal when considering an application to strike out on the basis of unreasonable conduct.

> "*This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC*

167 and of the EAT in De Keyser v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed. …..

24. He offered further guidance on how a Tribunal should approach considering whether a strike out is proportionate.

> *"It is not only by reason of the Convention right to a fair hearing vouchsafed by Article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E–H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."*

25. The approach to be adopted to considering an application for strike out for want of prosecution has been summarised by Lord Justice Elias in **Abegaze v Shrewsbury College of Arts and Technology** [2009] EWCA Civ 96. After summarising the principles applicable to a strike out for unreasonable conduct in similar terms to those set out in the **Blockbuster** case etc he went on to state.

> *"The strike out for failing actively to pursue the case raises some different considerations. In Evans v Metro- politan Police Commissioner [1992] IRLR 570 the Court of Appeal held that the general approach should be akin to that which the House of Lords in Birkett v James [1978] AC 297 considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents".*

Submissions

26. The respondent's primary submission was that the claimant's case should be struck out on the grounds of unreasonable conduct – specifically, the claimant's failure to exchange witness statements, or to cooperate with the respondent so that an updated joint expert's report could be obtained in time for the September hearing, or to cooperate so that the hearing could proceed in September as a split hearing. The respondent considers that these matters amounted to a deliberate and persistent disregard of procedural steps: arguing that the claimant's representative had simply "downed tools" after making the postponement application despite the fact that the application had yet to be determined. The respondent maintained that these matters necessitated the postponement of the hearing and meant that a fair trial could not now take place because the state of the Tribunal's lists meant that the case was unlikely to be heard until 2022. The respondent pointed to a number of prejudicial consequences of such delay. Allegations which the witnesses are required to address relate to events occurring in the period 2013 to 2017 and witnesses' recollections are likely to be impaired by the passage of time since such events took place. One witness has left the respondent's employment and, although currently still willing to give evidence, their position may change and/or there must be a possibility of others leaving employment and being less cooperative. Delay would also result in increased legal costs. The respondent also argued that the medical evidence did not clearly establish that the claimant would be fit to attend a hearing in future. The respondent argued that there was no other means of addressing the prejudice caused save for an order for strike out. Alternatively, the respondent relied on the same matters as warranting a strike out for failure to actively pursue the litigation on the basis that the claimant was in intentional default, or guilty of inordinate and inexcusable delay, such as raised a substantial risk that a fair trial would no longer be possible or that the respondent would be caused substantial prejudice.

27. The claimant maintains that there was no unreasonable conduct. Preparation of the claimant's statement was well underway at the point that it was derailed by the service of additional disclosure and by the deterioration in the claimant's mental health. The claimant could not be expected to finalise her statement and respond to additional disclosure given the medical evidence that assessed that she was "*psychologically unfit to present herself for a ten-day trial*". The claimant's failure to cooperate with the respondent's efforts to secure a further report from Dr Poole were also not unreasonable. There was no order dealing with the obtaining of a further report from Dr Poole and so the claimant had not breached any order by failing to do so. Whilst the claimant had not initially raised an objection to such a step, in principle, the respondent had only belatedly made clear that it proposed to ask Dr Poole to comment on the "untested" statements of its witnesses. The claimant does now object to such an approach. The claimant contended that there had been no unreasonable failure to cooperate to enable the September hearing to proceed. The claimant's representative had made a prompt application to postpone the hearing in light of medical evidence that the claimant was not fit to attend. Delays replying to correspondence were not

unreasonable given Ms Franklin's personal circumstances and the impact of the claimant's condition on the ability of representatives to obtain instructions. Given the nature of the evidence it was inevitable that the hearing could not proceed. The claimant maintained that a fair trial remained possible and that the claimant had only sought a 6-month delay – the fact that this might result in a longer delay in practice, because of the Tribunal's backlog, could not be ascribed to the claimant's actions. The claimant maintained that a strike out would not be proportionate in all the circumstances.

28. The claimant also denied that there had been any failure to actively pursue the claim. The delay in exchanging statements (due on 17 July 2020) and in facilitating an updated report from Dr Poole (from 11 or 18 August 2020) was not lengthy nor was it inexcusable given the circumstances (the claimant's health, Ms Franklin's circumstances and the emerging disagreement as to the terms on which Dr Poole should be instructed). The delays resulting from the claimant's actions have not caused substantial prejudice or endangered a fair trial. Delays occasioned by the Tribunal's backlog should not be visited on the claimant.

Conclusions

Whether in the light of the claimant's present medical condition it was not in the interests of justice for the hearing that was listed to take place between 14-25 September to proceed as listed

29. I consider that the postponement of the hearing as listed was necessary in light of the medical evidence that the claimant was unfit to attend a Tribunal hearing by reason of a significant deterioration in her mental health. In the circumstances it was not in the interest of justice that the hearing should proceed as listed when the claimant would not have been fit to attend and give coherent evidence. Whilst Dr Woolfson's report could have been clearer, I consider that read as whole, it does not suggest that the claimant was unfit to attend only a hearing of the hybrid variety. It was stating that she was unfit to attend any hearing.

30. Nor do I consider, for reasons set out below, that it would have been in the interests of justice for the hearing to proceed on the altered basis proposed by the respondent, with the respondent's witnesses proceeding to give evidence first and the hearing proceeding without the claimant being present to hear that evidence and provide instructions as necessary to her representatives.

Strike out on grounds of unreasonable conduct

31. I do not consider that the claimant can be said to have engaged in unreasonable conduct in the form of deliberate and persistent disregard of procedural steps or that the claimant's conduct has rendered a fair trial impossible.

a. I do not consider that the failure to exchange witness statements was unreasonable in the circumstances. The medical evidence establishes that the claimant's mental health had deteriorated to a significant degree by July 2020, such that, at the time that statements were being concluded, she had been assessed as unfit to present herself for a hearing. The respondent relies on Dr Wollfson's description of the claimant as "sensorially intact" in his July report to suggest that the claimant was nonetheless fit to complete her witness statement. It is not entirely clear how this passage of the July report is consistent with what is said elsewhere unless, as seems likely, it is describing the claimant's state before the deterioration in her mental health. However, it is clear from the September addendum to that report that the claimant's concentration and memory had been significantly adversely affected by the deterioration in her mental health. Were the claimant to produce a statement for exchange in such circumstances there must be a significant risk of that she would fail to set out evidence that was, in so far as it could be, complete and accurate from her recollection. It was not therefore unreasonable for the claimant and her representative to consider that exchange of statements should be deferred until her mental health improved sufficiently to finalise a statement.

b. Nor do I consider the claimant's failure to agree to the respondent's proposed instruction of Dr Poole to be unreasonable. Whilst this possibility had been raised earlier in the litigation there had been no agreement between the parties about how this should be done. When the matter was raised again by the respondent in July 2019, the claimant did not initially raise any objections. It is clear that the claimant's position changed during the course of July and August, in part because of the claimant's health and in part because once the respondent's proposed approach became clear the claimant objected to it. It was reasonable for the claimant to object to the respondent's proposed approach the instruction of the joint expert. The respondent was, after all, seeking clarification of an aspect of the joint expert's report which was helpful to the claimant, when the orders made by the Tribunal to date envisaged no such step and where the proposed approach was to put the untested witness evidence of only the respondent side to the joint expert for comment. The proposal to seek a further report was also being raised somewhat belatedly. The respondent could have pursued such a request with the claimant at an earlier stage once it was clear that the mediation had failed. However, it had delayed raising the issue until July 2020, by which time any report would have been made available only very shortly before the hearing leaving little time for the claimant to seek further clarification of the report if required. It is true that the claimant's representative did not inform the respondent that their position had changed, and they ought to have done so. However, I do not consider that the failing was material in the circumstances.

c. Nor do I consider that it was unreasonable for the claimant not to have acceded to the respondent's proposal that the hearing could proceed in September as a split hearing, with the claimant giving evidence at a later date. The respondent approached this on the basis that the claimant need not have attended the hearing (whether in person or virtually) and could have left matters to be dealt with by her representatives. However, it was not unreasonable for the claimant to object to such a proposal. It would not ordinarily be in the interests of justice to proceed in the absence of a party who is unable to attend through no fault of their own. Proceeding in the claimant's absence would have meant that the parties were not on a level playing field. The claimant's participation would have been required in order to provide instructions to her representatives in relation to the evidence given by the respondent's witnesses. However, the medical evidence establishes that the claimant's concentration and memory are significantly affected by the deterioration in her mental health and this would be likely to impact on her ability to participate even in that limited respect.

d. The respondent also contends that Ms Franklin's statement establishes unreasonable conduct on her part. The respondent considers that she admits to having "downed tools" once the postponement application had been made rather than continuing to prepare the case whilst awaiting the outcome of that application. It is the case that the claimant's representatives failed to engage properly with the communications from the respondent during July and August. However, I do not consider that the evidence shows that the claimant's representative "downed tools" merely because a postponement application had been made. I consider that the picture is more nuanced. I consider that case preparation was not completed because of the impacts of the claimant's health on case preparation (witness statements), because the claimant side objected to the respondent's proposals (instruction of Dr Poole and proposed split hearing) and because it was expected that the postponement would be granted. As I have concluded above it was not unreasonable to take the view that the claimant's statement could not be finalised given the deterioration in her mental health, nor that the hearing could not proceed on a split basis. Nor was it unreasonable to object to the instruction of Dr Poole on the basis proposed by the respondent.

Deliberate and persistent disregard of procedural steps

32. Even if I am incorrect in concluding that the conduct on the claimant side was not unreasonable, I do not consider that the conduct can properly be characterised as a deliberate and persistent disregard of procedural steps. The claimant's representative made a prompt application to postpone the hearing

once it became clear that the claimant's health had deteriorated to a significant degree such that she was unfit to attend. Given the evidence as to the impacts of the deterioration in her health it was not unreasonable for the claimant and her representatives to take the view that they could not continue to prepare her witness evidence or accede to a proposal that a split hearing should proceed in her absence. There was, as I have recorded, no order requiring the claimant to cooperate in relation to the further instruction of the joint expert and so no disregard of procedural steps in that respect.

Fair trial impossible

33. Nor do I consider that the claimant's conduct has rendered a fair trial impossible. The mere possibility that some of the respondent's witnesses may move on from the respondent's employment, or that a witness who is an ex-employee may in future become unwilling to cooperate are not matters that render a fair trial impossible. Nor is the possibility that there may be changes to the respondent's legal team and that this may result in increased costs a matter that renders a fair trial impossible. I recognise that the passage of time will impact on witness recollections on both sides, the dismissal in this case occurred in 2017 and some of the events relied on occurred earlier still. However, the delays which occurred between October 2017 and September 2020 occurred with the agreement of both parties, in part because of their understandable wish to undergo judicial mediation. The period of delay sought by the claimant due to her own ill health is 6 months. Any further delay that occurs in relisting this case will not be due to any conduct on the part of the claimant but will arise as a result of the backlog in the Tribunal's lists and in consequence of the impact of the Covid pandemic on that backlog.

Proportionality

34. Even if I am incorrect in the conclusions set out above, I do not consider that it would be proportionate to strike out. As the **Blockbuster** decision makes clear strike out is a draconian remedy. This is not a case where there has been a history of non-compliance by the claimant with orders, or of repeated requests by the claimant for postponements. Until July the delays to the case, whether as to the scheduling hearings or as to compliance with directions, occurred with the agreement of both parties. Whilst I recognise that the delay will have adverse consequences for the respondent, in particular the potential for fading witness recollection and increased costs, the claimant is likely also to be adversely affected by such matters to some degree. In circumstances where the necessity for the postponement arose due to a significant deterioration in the claimant's mental health, a matter over which she has no control and in respect of which she is not at fault, it would be disproportionate to penalise the claimant by striking out her claim. That is particularly so when this is the first occasion on which the claimant has sought such a postponement.

35. The respondent contends that there is no guarantee that the claimant's health will improve sufficiently for a hearing to take place in future and points to the fact

that the claimant has been under treatment by Dr Woolfson for several years now without any permanent improvement being achieved. However, the only medical evidence before me is that the claimant's condition fluctuates, that it has deteriorated significantly during the lockdown but that her Doctor nonetheless expects it to improve with intensive treatment such that the Claimant is likely to be able to attend a hearing after March next year. If the case is relisted and Dr Woolfson's prediction proves incorrect, such that a further postponement is sought on the grounds of the claimant's health, then the balancing exercise on that occasion may well be different.

Strike out for failure to actively pursue

36. I have set out my reasons in relation to this second limb of the strike out application more briefly, given the overlap with the matters arising for consideration in relation to the first limb of the strike out application.

Intentional or contumelious default

37. For the reasons set out above, I do not consider that the claimant was in intentional or contumelious default of the Tribunal's orders. The claimant's ill health meant that she was not in a position to comply with the order for exchange of statements or to attend the hearing and this was not a matter within her control. There was no order for the obtaining of a supplementary report from Dr Poole and so the claimant was not in breach in failing to cooperate with the respondent's plans to instruct Dr Poole.

Inordinate or inexcusable delay

30 I do not consider that this is a case where there has been inordinate or inexcusable delay on the part of the claimant. Prior to July 2020 any delays that have occurred (whether as to compliance with directions or as to the scheduling of the hearing) occurred by mutual agreement. It is only since July that the claimant's ill health has impacted on compliance with directions and necessitated the postponement of a hearing. In the circumstances, for the reasons given above, I consider that such delay is neither inordinate nor inexcusable.

Causing a fair trial to be impossible /substantial prejudice to the respondent

31 For the reasons set out above, I consider that a fair trial of this case remains possible. I accept that there will be some prejudice to the respondent arising from the postponement of the hearing, in particular the impact on witness recollections. However, the postponement sought by the claimant is for good reason and is not lengthy (6 months). To the extent that the Tribunal's backlogs result in a delay of more than 6 months before the case can be heard the claimant will not be the cause of such delay.

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Employment Judge Milner-Moore

Dated 10 November 2020

Sent to the parties on: 18/11/2020

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For the Tribunal:

Jon Marlowe