THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Bharaj	**v**	**(1) Santander UK PLC** **(2) Mrs Alison Simmons** **(3) Mr Dean Robinson**

Heard at: London Central **On**: 4 & 5 January 2021

Before: Employment Judge Glennie

Representation:
Claimant: In person
Respondent: Mr P Nicholls QC

JUDGMENT

1. **The claim is struck out on the grounds that the Claimant has breached an order of the Tribunal.**

REASONS

1. The Claimant, Miss Bharaj, presented a claim to the Tribunal on 16 April 2018 in which she made complaints of detriments because of protected disclosures; automatic unfair dismissal; victimisation; direct discrimination because of sex; and harassment related to sex. The Respondents resist all of those complaints.

2. This Preliminary Hearing was listed for what had been intended to be the first 2 days of a 20-day full merits hearing, to consider various applications made by the parties. There was no objection by the parties to the hearing being conducted by video (CVP), and the hearing proceeded without any technical difficulties.

3. I heard and determined the Respondent's application to strike out the claim. Having done so, and having decided to strike out the claim, it was not necessary for me to hear any of the other applications.

Procedural history

4. It is necessary for me to set out the procedural history of the case in some detail.

5. As I have said above, Miss Bharaj presented her claim on 16 April 2018, having been dismissed from her employment on 2 April 2018. A Preliminary Hearing (PH) for case management took place before Employment Judge Neal on 2 November 2018. EJ Neal allowed an application to amend the claim to add a complaint of automatic unfair dismissal, noted that the full hearing was listed to commence on 24 June 2019 for 15 days, and listed a further PH on 9 November 2018.

6. At the PH on 9 November 2018 Employment Judge Henderson allowed a further application to amend the claim and made case management orders, including for exchange of witness statements by 3 May 2019, with a view to the full hearing proceeding on 24 June 2019.

7. There was a further PH on 28 May 2019 before Employment Judge Elliott, who noted that the full hearing was less than 4 weeks away. Counsel then representing the Claimant stated that she intended to apply for a postponement of the full hearing on medical grounds. EJ Elliott determined an extensive application by the Claimant for specific disclosure, but did not hear or determine an application to postpone,

8. The latter application came before Employment Judge Pearl at a PH on 17 June 2019. EJ Pearl observed that the application was "solidly based on medical evidence", and decided that, although the delay would cause prejudice to the Respondents, the full hearing should be postponed. He vacated the existing hearing and re-listed it with an increased allocation of 20 days, commencing on 17 February 2020.

9. EJ Pearl ordered that a further PH should take place on 14 October 2019, and this was heard by Employment Judge Deol. EJ Deol made further orders about specific disclosure which were the subject of an appeal which is not relevant to the matters I have to decide. He also made case management orders, including for an agreed index to the bundle by 9 December 2019, provision of the bundle to the Claimant by 16 December 2019, and exchange of witness statements by 17 January 2020.

10. There followed extensive correspondence about the bundle. It is not necessary for me to describe this in any detail, but essentially the Claimant was concerned about documents that had not been included, and about what she regarded as shortcomings in the Respondents' disclosure, while the Respondents were suggesting that the bundle could be reduced in size.

11. On 11 December 2019 (at page 38 of the documents for this hearing) the Claimant said that she had been poorly and said that she agreed to the bundle being sent as proposed by the Respondents, and that she would

address any issues with it upon receipt. A copy of the bundle was sent to the Claimant on 12 December 2019.

12. On 19 December 2019 the Claimant made an application (page 49) for an unless order directed to the disclosure order made by EJ Deol. In the application, she stated (among other things) that the failure of disclosure was obstructing the preparation of her case, including her witness statement. The Claimant asserted that the Respondents' approach to disclosure, and the litigation generally, was aggressive and unreasonable and intended to wear her down. On page 17 of her application (page 65 of the documents) the Claimant wrote:

"The parties have been directed to exchange witness statements by 17 January 2020. As it currently stands, the only option would be to consider disclosure as the first item on the agenda at the final hearing. It is unclear how long this will take and the level of disruption that this will cause, ever mind the costs if this needs to then be postponed."

13. On page 19 of her application (page 67 of the documents) the Claimant stated that if full disclosure was not provided by 31 December, she would need time to consider the documents and prepare adequately. She referred again to the date for exchange of witness statements. Although the Claimant did not say so expressly, it seems evident that she was linking the production of her witness statement to the provision of the further disclosure she was seeking.

14. The Respondents replied to the application on 24 December 2019, at pages 71 to 75, asserting that the application was unreasonable, and challenging the relevance of the documents sought. (Relevance remained at least potentially an issue in relation to the disclosure as EJ Deol's order had required disclosure "where it is relevant to the issues….").

15. Also on 24 December 2019 the Claimant wrote (page 76) repeating her request for an order to be made ordering the disclosure by 31 December 2019, and asking that, if the order could not be made until the New Year, the Tribunal should consider halting the proceedings and any case management until the issue was resolved.

16. On 14 January 2020 the Respondents wrote (at page 80) suggesting exchange of witness statements at 4pm on 17 January, the date required by EJ Deol's order. The Claimant replied on the same date, stating at page 81 that she had explained in her application why that would not be possible. The Respondents then applied (page 83) on 16 January 2020 for an unless order directed to the exchange of witness statements.

17. On 17 February 2020 another Preliminary Hearing took place, on what would have been the first day of the main hearing, this time before Employment Judge Davidson. This dealt primarily with the Claimant's own application for an unless order in relation to disclosure, which EJ Davidson refused. EJ Davidson made no reference in her reasons to the witness

statements, but she re-listed the main hearing for 20 days commencing on 4 January 2021 and made case management orders for an updated schedule of loss, and for exchange of witness statements on 13 November 2020. This order, in common with some, but not all of the earlier ones, included the following endorsement:

"Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include……(b) striking out the claim or the response, in whole or in part, in accordance with rule 37……"

18. There was further correspondence between the parties in September 2020. On 8 September 2020, at page 85, the Claimant wrote raising concerns about disclosure and the relevance of the witnesses to be called. She followed this up on 11 September, and on 14 September 2020, at page 92, the Respondents replied disputing the relevance of the documents in question and stating that it was for each party to determine witnesses that it called. The letter included the words: "You will have the opportunity to see what evidence the Respondents' witnesses will be giving when witness statements are exchanged on 13 November 2020."

19. The Claimant again expressed concern about the relevance of the proposed witnesses, and their ability to attend the hearing, in an email of 14 September 2020. On 21 September 2020, at page 102, the Claimant applied for an order requiring the Respondents to identify the relevance of each witness and to provide written confirmation that they would be attending the hearing; and for an order about disclosure and the relevance of documents. She also suggested that the Respondents' solicitors might have a conflict of interest in representing all three Respondents. The Claimant followed up her application with a further email to the Tribunal on 29 September 2020, on which date the Respondents also replied to the application.

20. During this period, the Tribunal's administration was under stress arising from the covid-19 pandemic, and regrettably the correspondence was not referred to a judge. The Claimant wrote again on 20 October 2020 on the question of the relevance of the witnesses.

21. On 11 November 2020 the Respondents wrote to the Claimant at page 121 referring to EJ Davidson's orders and proposing exchange of witness statements at 4pm on the relevant date, 13 November 2020. The Claimant replied on the same date at page 122 saying: "4pm by Friday via email is fine". On the morning of 13 November 2020 at page 124, the Claimant wrote saying that she was unable to turn on her laptop and so would not be able to exchange witness statements. She said that she was not at her own home and that many of the computer shops in the area were closed; but that she hoped that there would only be a minor delay in exchange.

22. The Claimant wrote again on 16 November 2020 at page 128 saying that she had spent the weekend trying to resolve the computer issue, and that

there was a need for parts to be ordered. She apologised for the inconvenience and said that exchange of statements would be delayed for a week, suggesting 4 pm on Monday (23 November). The Respondents replied agreeing to this, subject to the laptop being repaired.

23. On 22 November 2020, at page 134, the Claimant wrote that repairing the laptop had involved the loss of the witness statement, which she had re-drafted and completed. She continued that in doing so, a few things had emerged that required clarification or remedy prior to exchange. The Claimant then set out a number of concerns about documents and the bundle.

24. On 23 November 2020, at page 136, the Respondents asked the Claimant to confirm that she would exchange witness statements at 4pm that day, as agreed. The Claimant replied that she did not foresee exchange taking place on that day. She then again asked for the bundle to be updated. On 24 November the Respondents wrote in answer to the issues about the bundle, but also pointing out that that the only bar to exchange of witness statements had apparently been the Claimant's problems with her computer. The Claimant responded on 25 November to the effect that the problems about documents impacted on the exchange of witness statements, but also adding this (at page 147):

"I remain open to having sensible discussion on how to update the bundle / index between parties so that the witness statements can be updated and exchanged imminently after this task. It is worth noting that the time and costs wasted in writing correspondence debating the tasks required to be completed could have been exerted on completing the activity itself and possibly have exchanged already. Thus, until this work is completed properly and in advance, I do not see how exchange of witness statements can be agreed at this stage because of this.

"I am willing to consider if I send some of the w/statement and the rest be sent supplementary once the index is updated (then in turn I can update the w/statement), albeit this would have a dependency on whether your client will agree to updating and reviewing the bundle / index in a swift fashion."

25. It was evident at this point that the Claimant was declining to exchange witness statements until after the issue that she had raised about disclosure and the bundle had been dealt with. The Respondents then applied on 25 November 2020 at page 150 for an unless order requiring the Claimant to exchange witness statements, pointing out that the parties were now only 25 working days from the commencement of the 20-day hearing.

26. The Claimant replied to the application on 26 November 2020 at page 154. She asked for the application to be dismissed, and for orders to be made on her applications that the Respondents provide information about the relevance and attendance of witnesses and about the relevance of documents. The Claimant made many points, including about matters that

had affected her in the course of the case, including having to cope with the death of her sister, her mother's poor health, and the technical problem with her computer. She referred to her offer to provide a partial witness statement, to be followed by an amended updated statement once the bundle had been dealt with, saying that there had been no response to this. The Claimant made it clear that her position was that exchange of statements depended on the bundle being updated, as she wrote (at page 155):

"It is not strictly correct that I have blank refused to provide my witness statement. I have stated that this will be provided so long as the Respondents and I can work together to update the index / bundle so that all the references within my witness statement can be updated."

27. There followed some further correspondence in which the parties essentially reiterated their respective positions. On 14 December 2020 at page 165 the Respondents proposed exchange of statements by 4pm on 15 December, failing which they would apply to strike out the claim for non-compliance with the order. The Claimant responded on the same date a pages 167-168. She began, "I am more than happy to sort out the bundle and index and immediately exchange the witness statements, this has always been the case and my position has not changed." She referred to the problem with her computer and criticised the Respondents' approach to disclosure, the bundle, and case management generally. She wrote, "I do not consider it fair or just that I have to provide an incomplete witness statement simply so that assists your client for me to be unprepared;" and "If your client could please just reconsider permitting reasonable inclusions to the bundle and index this can be immediately resolved." The Claimant referred to a category of documents ("Project Orford") that she had previously maintained, and continued to maintain, were relevant and should be in the bundle.

28. Still on 14 December 2020, at page 169, the Claimant proposed an exchange of statements with gaps for page numbers, subject to two conditions. These were that the Respondents should produce a separate bundle of disputed documents, and that documents agreed to be no longer relevant or not referred to in witness statements should be removed from the bundle. The Respondents replied on 15 December 2020 at page 171, saying that the suggested conditions were not acceptable. They stated that the first could not be agreed to because the Respondents objected to production of many of the disputed documents, and that the second was impractical because it was unlikely that agreement about what should be removed would be reached. On this point, the Respondents wrote: "Despite having had the bundle for 12 months, and claiming that it is full of filler and duplicate documents, you have yet to identify any documents which you say can be removed from the bundle."

29. There were further email exchanges on 15 December 2020, leading to the Respondents stating that they were not prepared to negotiate in relation to

the terms on which the Claimant was willing to comply with the Tribunal's order.

30. The Claimant wrote to the Tribunal on 16 December 2020, addressing her email to Regional Employment Judge Wade. She pointed out that the hearing was only 2 weeks away, and expressed concern that the case was not prepared and that the Respondents were obstructing preparation of the proceedings. The Claimant stated her opposition to the proposed unless order and repeated the two conditions on which she would exchange statements. She offered to disclose her statement to the Tribunal (but not to the Respondents) in order to demonstrate that she had completed it, and the extent to which she had had to leave gaps. She asked for an unless order directing the Respondents to update the bundle. The Claimant referred again to the Project Orford documents, and asked for an unless order directed to confirmation that the Respondent's witnesses would be attending the hearing. She concluded: "If we attend the final hearing in the current state, the very real risk is that it will simply be adjourned or just chaotic. I simply just wish to be heard and have an impartial panel listen to my story with the relevant facts."

31. The Respondents wrote to the Tribunal, marking the email for the attention of REJ Wade, on 17 December 2020, at page 179. The email addressed the Claimant's contentions about documents and witnesses, and had as an attachment an application to strike out the claim (page 1 of the bundle), erroneously dated 17 November. The application asserted that there was a breach of the Tribunal's order and that the Claimant's conduct was unreasonable. The Respondents set out much of the history of the matter, and contended that the point had probably been reached where a fair trial commencing on 4 January 2021 was not possible.

32. I have already referred to the difficulties faced by the Tribunal's administration in recent months. The correspondence sent during November and December 2020 was first referred to a judge (being myself) on 21 December 2020. On my instruction, a letter was sent to the parties directing them to exchange witness statements on 22 December, which they did.

33. Exceptionally, I then corresponded directly with the parties over the Christmas and New Year period, using an anonymised email account. I asked them whether, in the light of the exchange of witness statements, it would be feasible for the hearing to commence as planned on 4 January (the first working day after the break). On 23 December I confirmed that the hearing remained listed at that point, and that a telephone hearing for case management might be arranged for one of the days 29, 30 or 31 December.

34. The parties responded on 23 December 2020. The Respondents stated that the case was not ready for hearing, essentially because of the lack of time (particularly, of working days) for preparation. The Claimant, while not accepting the Respondents' reasons, agreed that the hearing could not

proceed. I therefore directed that the witnesses could be stood down and that the current preliminary hearing would take place over what would have been the first 2 days of the main hearing.

The applicable law and conclusions

35. There were applications by both parties before me at this hearing. I decided that it was logical to hear and determine the Respondent's application to strike out the claim first, as the relevance of the other applications depended on the outcome of this.

36. Rule 37(1)(c) of the Rules of Procedure provides that a Tribunal may strike out a claim on grounds that include that the Claimant has not complied with an order of the Tribunal, and that the manner in which the Claimant has conducted the proceedings has been unreasonable.

37. I find that the Claimant did not comply with the Tribunal's order to exchange witness statements. The latest date on which she could have done so in compliance with the order, in accordance with the extensions offered by the Respondents, was 15 December 2020. That would have afforded 5 working days before exchange in fact took place on 22 December.

38. In **Weir Valves and Controls (UK) Limited v Armitage [2004] ICR 371** the Employment Appeal Tribunal considered the approach to be taken where an application to strike out (in that case, the response rather than the claim), is made on the grounds of breach of an order. The case was decided under the earlier Rules, but the approach remains applicable. The Tribunal's orders had included one for exchange of witness statements on 14 January, for a 1-day hearing to take place on 5 February. The Claimant sent his witness statements on 13 January; the Respondent then sent 4 statements on 24 January and a fifth on 31 January. The Respondent's solicitor had read the Claimant's statements on receipt, although the EAT concluded that an examination of the Respondent's statements showed that no unfair advantage had been taken arising from having received and read the Claimant's statements. The Tribunal struck out the response on the first day of the hearing, and decided the claim in the Claimant's favour.

39. In paragraph 16 of its judgment the EAT stated that, where there was no breach of an order (for example, where unreasonable conduct alone was in issue), the crucial and decisive question will generally be whether a fair trial of the issues is still possible.

40. The EAT stated in paragraph 17 that, where breach of an order is relied upon, the guiding consideration is the overriding objective. I have reminded myself of the overriding objective, which is expressed in Rule 2 in the following terms:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

(a) Ensuring that the parties are on an equal footing;
(b) Dealing with cases in a way which is proportionate to the complexity and importance of the issues;
(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) Avoiding delay, so far as compatible with proper consideration of the issues;
(e) Saving expense.

41. The EAT then continued as follows:

"This [i.e. the overriding objective] requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."

42. In paragraph 28 of its judgment the EAT observed that there would have been no injustice in going ahead with the full hearing on the day for which it was listed.

43. The circumstances if the case include the nature of the complaints made in it. These are of detriment because of protected disclosures and harassment related to sex. These are serious matters for both the Claimant and the Respondents. A Tribunal will not lightly strike out complaints of this nature. Equally, it is important that they should be heard and determined without undue delay, in accordance with the overriding objective. The events with which the case is concerned occurred in June 2017 – April 2018. The hearing has already been postponed twice. Once was without fault on either side, being caused by the Claimant's ill-health. EJ Davidson did not comment on the reasons for the postponement in February 2020, although it is apparent that witness statements had not been exchanged and that the background to this included similar issues about documents and the bundle to those that have arisen at the present stage.

44. Turning to the specific matters identified in **Weir Valves**, I first considered the magnitude of the default. This involved the nature of the default and the explanation for it.

45. The default itself is serious. Exchange of witness statements sufficiently in advance of the hearing as to allow for proper preparation by each party is fundamental to there being a fair trial of the issues. The issues in the case are extensive, as shown by the 20-day allocation for the hearing.

46. This is not, in my judgment, a case in which it could be said that the deadline had been missed by a few days, and/or that missing the deadline

made no real difference to the timetable for the case. Although the Claimant could have complied with the order on 15 December 2020, which is one week before the date on which she ultimately produced her witness statement, that period of one week (or 5 working days) was, I find, vital if the hearing date was to be retained. Exchange on Tuesday 15 December would have left just over a week (realistically up to and including Wednesday 23 December) for instructions to be taken and preparation for the hearing to be done before the start of the holiday period. Exchange in fact took place on 22 December, leaving whatever remained of that day and 23 December of that period.

47. As I have already noted, the hearing was due to commence on the first working day after the holiday period. Although one week's delay may not seem a long period, the particular week involved was crucial to the prospects of retaining the trial date. It has to be seen in the context of the original date for exchange of 13 November, and the small number of working days left before the commencement of the hearing.

48. I find the Claimant's reason for the breach of the order unsatisfactory. The problem with her computer prevented her exchanging on 13 November. Ultimately, however, it was not that problem which prevented her complying with the order: an extension to 23 November was agreed, by which time the computer problem had been resolved. At that point, the Claimant declined to exchange because of the issues about documents and the bundle.

49. The immediate difficulty about the Claimant's refusal to exchange at that point is that on 11 November she had agreed to exchange at 4pm on 13 November, without raising any caveat about the documents or the bundle. She took effectively the same stance on 16 November, when proposing exchange on 23 November. In her submissions the Claimant said that at that point she had not looked at her statement for some time: there was a lot happening in her life, including her mother having surgery and there being a preliminary hearing in the inquest concerning her sister's death. She said that it was only when she went back and looked at the statement fully that she realised how extensive the gaps were. The Claimant also stated that, had there been only a short gap between EJ Davidson's judgment and exchange, there would have been less scope for confusion.

50. I accept that the personal matters referred to would have been of obvious concern for the Claimant. She had evidently not forgotten her concerns about the documents, however, because she had been corresponding with the Respondents on this and other matters in September 2020. The Claimant unequivocally agreed to exchange on 13 November, then again on 23 November: she must have believed that, computer problems aside, she was in a position to do so. I do not accept that there was any "confusion": there was disagreement between the parties on a number of matters of case management.

51. It is evident that, when it came to the point of exchanging statements, the Claimant had second thoughts about doing so. I accept that her reason for

declining to exchange was her outstanding concern about documents and the bundle. I find that it was unreasonable for her to refuse to exchange for that reason. It is not open to a party to decide unilaterally not to comply with an order of the Tribunal. There are other things that a party in such a position could properly do: for example, apply to the Tribunal for an extension of time for exchanging and/or a postponement of the hearing, coupled with any other orders sought about documents; or exchange on the due date, addressing any problems with documents, page references, etc subsequently. On 14 December 2020 the Claimant offered to exchange, but only subject to two conditions about documents being agreed. I find that it was unreasonable at that point to seek to impose these or any conditions, and that there was no reasonable alternative to an immediate exchange.

52. As to responsibility for the default, this lies with the Claimant, who has been acting in person at the relevant times.

53. What disruption, unfairness or prejudice has been caused? There is the obvious disruption that a 20-day hearing has been rendered ineffective. If the claim remains live, the individual respondents will have the allegations hanging over them for a further period. Inquiries with the Tribunal's listings team revealed that the earliest possible dates for re-listing the hearing would be one of 2 slots commencing in either October or December 2020.

54. There is then the question whether a fair hearing remains possible. This is an important factor, although not crucial and decisive as in a case where there has not been a breach of an order. I have noted that in **Weir Valves** the EAT concluded that a fair hearing would have been possible utilising the original listing. That is not the case here, as both parties agreed that the hearing could not proceed as listed. Even in the absence of agreement, I would have accepted the Respondent's submission that a fair hearing commencing on 4 January was not possible given the lack of time (by which I mean working time and time during which witnesses could reasonably be consulted, and instructions taken) between the date on which exchange took place and the first day of the hearing.

55. I have also considered whether a fair hearing will be possible in the future. I do not consider the test to be such that I have to definitively conclude that a fair hearing will be impossible. I find, however, that the prospect of a fair hearing is jeopardised by the case not being able to proceed in the current listing slot. There is already reason to be concerned about the passage of time since the events of June 2017 – April 2018. I find that there is a real risk that the passage of further time to October or December 2021 will have an adverse effect on the ability of witnesses to recall relevant events, and thus compromise the prospect of a fair hearing.

56. There are other matters that I have considered as part of the circumstances of the case. One is that the statements have now been exchanged, and that in turn has led me to consider whether there might be some course of action that could be taken other than striking out the claim. One that I

considered was striking out the claim against the individual respondents only, as it is they who bear the burden of the outstanding allegations. As Mr Nicholls pointed out, however, taking this course would relieve them of the risk of being held liable, but would not remove the allegations or the fear of professional disciplinary consequences flowing from them. The evidential prejudice to the First Respondent arising from the passage of time would remain. I also considered whether the claim could commence later in the current listing slot, allowing proper time for the parties to prepare. Inevitably that would result in the case going part-heard, which in my judgment is as undesirable as having to re-list it altogether, involving as it does finding dates when all concerned are available, and having a gap between the Tribunal hearing some of the evidence, and then hearing the rest and reaching its decision.

57. I also raised with the parties the fact that the Tribunal had not responded to the correspondence until 21 December 2020, by which time (as it has now proved) it was too late to save the hearing date. I have concluded that I should not speculate about what might have happened if a judge had seen the correspondence at an earlier point. I accepted Mr Nicholls' submission that I should take the situation as it is. There was a warning attached to EJ Davidson's orders that failure to comply with an order might lead to the claim being struck out. The Respondents had sought an unless order in relation to exchange of witness statements in January 2020. When they did so again on 25 November 2020, the Claimant should have exchanged statements. With time so short before the hearing, further delay inevitably jeopardised the hearing and ran the risk of an application being made to strike out the claim. Furthermore, on 14 December 2020 the Respondents warned the Claimant that they would apply to strike out the claim if she did not exchange statements by 15 December.

58. Essentially, the Claimant took a decision not to exchange in accordance with the Tribunal's order, which involved taking the risk that there would be an application to strike out the claim, and that such an application might succeed.

59. Ultimately, there is a discretion to be exercised when considering whether to strike out a claim. I find that the circumstances of the case are such that, although it is not something to be done lightly, I should strike out the claim under the jurisdiction to do so where the Claimant has failed to comply with an order. It is not in the circumstances necessary for me to address the alternative ground of unreasonable conduct of the proceedings.

60. A separate case management order addresses the Respondent's application for costs.

Employment Judge Glennie

Dated:…1 March 2021……..……

Judgment sent to the parties on:

2 March 2021

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For the Tribunal Office