EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S McKechnie	**v**	DPD Group UK Limited

Heard at: Cambridge **On**: 18, 19 and 20 January 2021

Before: Employment Judge K J Palmer

Members: Ms L Durrant and Mr M Brewis

Appearances
For the Claimant: In person
For the Respondent: Mr J Gidney, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

JUDGMENT

Pursuant to a CVP remote Hearing

It is the unanimous Judgment of this Tribunal that the Claimant's claims are struck out under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

REASONS

1. This matter came before this Tribunal listed as a 5 day Hearing to take place by Cloud Video Platform (CVP), to commence on 18 January 2021.

2. The Tribunal had received an electronic Bundle and various other documents sent electronically, including witness statements and a skeleton argument lodged on behalf of the Respondent.

History of this Matter

3. The Claimant presented a claim to this Tribunal under an ET1 dated 29 July 2019. The claim was home made and the Claimant was not legally represented.

4. The Respondents filed an ET3 on 27 September 2019.

5. A Preliminary Hearing in person, took place before Employment Judge Cassel, sitting alone on 13 February 2020. A detailed summary entitled 'Case Management Summary' pursuant to that Hearing was sent to the parties on 5 March 2020.

6. That Order sought to clarify the issues and set out the Claimant's claims. They consisted essentially of a claim for unfair dismissal, a claim for direct discrimination because of a disability, a claim for monies in lieu of untaken annual leave at termination under the Working Time Regulations 1998, a claim for unlawful deductions under Section 13 of the Employment Rights Act 1996 and a claim for notice pay, for breach of contract or wrongful dismissal.

7. That Case Management Summary indicated that at the Hearing on 13 February 2020, the claim was listed for a 5 day Hearing commencing on 18 January 2021.

8. That Summary contained at numbered paragraph 3 of the Orders, the usual note that should either of the parties consider the contents of the Order to be in any way inaccurate and / or incomplete in any important way, they must inform the Tribunal within 14 days of the date the Order was sent to them, that is by 19 March 2020.

9. There is no evidence before this Tribunal that any such complaint was raised by either party.

10. The Order also contained a reminder to the parties of Rule 92 which specified that where a party sends a communication to the Tribunal, it shall send a copy to all other parties and state that it has done so. It reiterates that if when writing to the Tribunal, the parties do not comply with this rule, the Tribunal may decide not to consider what they have written.

Disability Issue

11. In his Order, Employment Judge Cassel Ordered that by 13 March 2020 the parties serve on each other copies of any medical notes, reports, Occupational Health assessments and other evidence in their possession and / or control, relevant to the issue of whether the Claimant was at all material times a disabled person under the Equality Act 2010. The Claimant was Ordered to provide the Respondent, by 13 March 2020, with a witness statement, or statements, identifying what physical and mental

impairment he was relying upon, dealing specifically with a reference to Schedule 1 of the Equality Act 2010. The Claimant was referred to the Presidential Guidance issued on general Case Management matters and more specifically that area of that guidance that relates to disability.

12. The Respondent was then Ordered by 27 March 2020, to inform the Tribunal of the extent to which the disability issue was conceded and if not conceded in full, the reasons why.

13. The Claimant obtained a report from a Consultant Orthopaedic and Spinal Surgeon dated 11 February 2020, dealing with the history of the Claimant's lumbar disk prolapse going back to October 2018, including discussing surgery the Claimant underwent on 28 November 2018. It concluded that he had a continuing issue with permanent numbness and some weakness in his left foot. It opined that he would not be able to do a job which involved bending and twisting, but he could do a job without lifting. It opined that the neurological dysfunction in the left leg was unlikely to improve further. It gave details of medication that he was taking, including Gabapentin, Naproxen and Tramadol. It did not give details of the doses.

14. Significantly, there was no mention of any mental impairment.

15. On 11 March 2020, the Claimant sent to the Employment Tribunal's Administration, to comply with the Order of Judge Cassel, his disability impact statement talked in terms of his Cauda Equina Syndrome.

16. This statement also mentions in one line that the Claimant considers himself to be disabled with a mental condition being memory loss, depression and anxiety due to the medication he was taking. No medical evidence was supplied to support this one line assertion.

17. Pursuant to the Claimant's compliance with the Order of 13 March 2020, the Respondent's Solicitors wrote to the Tribunal confirming that they accepted the Claimant was a disabled person for the purposes of the Equality Act 2010, Section 6, on the basis of a physical impairment being Cauda Equina Syndrome.

18. They went on to comment that they did not accept that the Claimant had a mental impairment. They pointed out that he did not mention this at the Preliminary Hearing before Judge Cassel. They say they make no concessions in that respect.

19. The Tribunal file before us is then silent as to the issue of disability, but there is much toing and froing concerning disclosure and various accusations of failure to comply with disclosure by both sides.

20. This resulted in Employment Judge Postle making an Unless Order against the Claimant in respect of his index of documents, together with supporting documents, in respect of the Claimant's schedule of loss;

namely how the Claimant had mitigated his loss. The Claimant also raises various allegations that the Respondents have failed to disclose important information, but is largely unspecific as to the nature of it. I do not propose to repeat and list that correspondence and the exchanges with the Tribunal, save to say that Employment Judge Quill gave a further Order pursuant to emails from the Claimant dated 21 and 22 October 2020. Judge Quill's Order specified that the Claimant's Application to transfer his case to another region was denied and made a further Order for disclosure.

21. The Respondents then purported to comply with that Order on 11 November 2020 and prior to that, sent a letter to the Tribunal arguing that the Claimant had failed to comply with an earlier Unless Order of Judge Postle.

22. Judge Quill replied on 17 November 2020, pointing out that it had to be taken at face value that the Claimant had complied with the Unless Order of Judge Postle.

23. Witness statements were due to be exchanged in accordance with the Order of Judge Cassel on 26 October 2020, but there was some slippage of this. The Claimant wrote to the Tribunal on 8 December 2020 requesting extra time for the exchange of witness statements to go beyond an agreed variation date of 15 December 2020. This was opposed by those representing the Respondents pointing out that the Claimant had done very little to prepare for the five day Hearing due to start on 18 January 2021. Interestingly, in his Application of 8 December 2020, the Claimant mentions the intention to seek professional legal advice. Those representing the Respondent point out that the claim was issued in July 2019, some 18 months earlier and that the Claimant has had ample time to seek such advice.

24. The Claimant further wrote to the Tribunal on 9 December 2020, once again asking for the proceedings to be transferred to a different Court. Arguing that he felt that this Tribunal had been biased in their dealings with him, amongst other things. The Respondent's Solicitors responded on 10 December 2020, in this email they pointed out that despite his assertions in his email of 9 December 2020, the Claimant was not pursuing a whistle blowing claim. Further lengthy correspondence ensued.

25. No contact was made between the parties on 15 December 2020, the revised date for exchange of witness statements. The Claimant sent his witness statement to the Tribunal and to the Respondents at 1905 hours on 15 December 2020. The Respondents then served their witness statements the following morning without opening the email from the Claimant of the evening before. Therefore, simultaneous exchange did not take place, but witness statements had been exchanged by the morning of 16 December 2020. This is some 32 days before the start of the Hearing.

26. Regional Judge Foxwell, by a letter dated 20 December 2020, listed the matter for a Telephone Case Management Discussion on Monday 4 January 2021. The purpose was to deal with any outstanding Case Management issues.

27. This was subsequently postponed by a letter from the Tribunal dated 30 December 2020 and re-listed for 11 January 2021 at 10am.

28. This Tribunal understands that that Hearing took place. Sadly, and perhaps not surprisingly, at the start of this Hearing, the Notice and Summary of that Hearing was not before us and was not on the file.

29. We are therefore at a loss to know precisely what took place on 11 January 2021, but the parties inform us that the general gist was that there was insufficient time to deal with detailed Applications which the Claimant was seeking to pursue and that these Applications would be dealt with at the start of the Full Merits Hearing.

30. On 14 January 2021, the parties were written to with details of conversion of this Hearing from an In Person Hearing to a Hearing using the Cloud Video Platform ("CVP") and all attendant directions and instructions were attached.

31. On 14 January 2021, the Claimant wrote to the Tribunal again explaining that he could not attend on 19 January 2021 as he had to attend his Father's funeral, some 190 miles away. He asked for the Hearing date to be changed, in essence it appears he was seeking a postponement.

32. Employment Judge Lewis caused a letter to be sent dated 15 January 2021, indicating that any and all Applications in correspondence including the most recent Application to postpone would be dealt with at the outset of this Hearing and that this Hearing remained as listed.

The Events of 18 January 2021

33. The matter came before this Tribunal today and the Tribunal expected to deal with the Application of the Claimant for him to be excused from attendance on Tuesday 19 January 2021 to attend his Father's funeral.

34. The parties attended by CVP. The Claimant represented himself. Mr Gidney of Counsel represented the Respondents. Three witnesses: Ms Sheffield, Mr Shrimpton and Mr Golding were also present for the Respondents; and one witness Mr Richardson for the Claimant.

35. The Claimant indicated that he had a variety of Applications to make by way of Preliminary Applications. In fact, there were 7 separate Applications the Claimant wished to pursue.

The Application to Postpone the Hearing

36. The Claimant raised an Application to postpone the Hearing due to the fact that he needed to attend his Father's funeral, some 190 miles away, on Tuesday 19 January 2021. He explained that his Father had passed away last week and that he had no notice of the funeral date until he submitted his Application on 14 January 2021. He said he intended to drive to the funeral early on Tuesday morning and return in the afternoon.

37. He was seeking a postponement of the whole Hearing.

38. There was no other evidence outside the verbal submissions of the Claimant to support this Application, but of course the Tribunal were very sympathetic to the Claimant's position; as was to his credit, Mr Gidney.

39. The Tribunal considered the Application and did so on the basis of Rule 29 of the Employment Tribunal Rules of Procedure 2013, and the Guidance on postponement of the President of the Employment Tribunals, dated 4 December 2013. The Tribunal also had cognisance of the Authorities in this area, including Teinaz v London Borough of Wandsworth [2002] ICR 1471.

40. The Tribunal is mindful this matter has been in train for some 18 months and that a total postponement would be likely to not receive a re-listing in the current climate for some considerable time; possibly a year, or even 18 months. Accordingly, the Tribunal will determine that the most appropriate way forward would be to deal with the Claimant's Applications today, which was likely to take the morning and then postpone matters until Wednesday morning when a start could be made. The likelihood would be, affirmed by Mr Gidney, that much of the evidence could be got through in two days leaving the matter to then go part heard possibly for a further two days. Such part heard re-listing would much likely be a great deal sooner than the re-listing of a full five days. Such re-listing might well be in June or July of 2021.

41. Both parties were content with that suggestion. We therefore resolved to deal with the other Applications before us today, then postpone until Wednesday morning to allow the Claimant to attend his Father's funeral tomorrow.

The Other Applications

The Claimant's Application to disbar the Respondent's witnesses -

42. The Claimant wished to seek an Order from the Tribunal that the Respondents witnesses be prevented from giving evidence before this Tribunal and that their witness statements be struck out and not

considered in these proceedings. The rationale behind this Application was the fact that the Claimant said the Respondents had submitted those witness statements a day late on 16 December 2020. This was despite the fact that the Claimant himself was seeking further extension of the already extended time to exchange witness statements at the time of the Respondent's purported non-compliance.

43. Hearing from both the Claimant and the Respondent, it was common ground that the parties had not had any communication during the course of the 15 December 2020 and that was broken after hours when the Claimant sent his witness statement to the Respondent's Solicitors after the close of business at 7:05pm. The following morning, realising that they had in their in-box the Claimant's witness statement unopened, the Respondent's Solicitors then caused the Respondent's witness statements to be sent to the Claimant.

44. We accept that they did this and did not in any way have reference to the Claimant's witness statement prior to sending the Respondent's statements.

45. We see no grounds for striking out the Respondent's evidence. It would be entirely inappropriate and disproportionate of us to do so. The Tribunal must have regard to the overriding objective set out in Rule 2 of the Employment Tribunal Rules of Procedure 2013.

46. There had been slippage in the exchange of witness statements and at the time of 15 December 2020, in fact, it was the Claimant who had sought further time to exchange statements. We do not find the fact that the Claimant's witness statement sat unopened overnight in the Respondent's Solicitor's in-box to have caused any prejudice to the Claimant. The effect was that both sides had exchanged statements by 16 December 2020, well in time for preparation to be fully undertaken for this Hearing.

47. We therefore refused the Claimant's Application to strike out the Respondent's witness evidence.

<u>The Claimant's Claim in Whistle Blowing</u> -

48. The Claimant argued that part of his claim included a claim under the whistle blowing provisions of the Employment Rights Act 1996. He said that he had been pursuing such a claim as part of his claim from the very beginning. He referred the Tribunal to a paragraph in the ET1 as being in support of his assertion that his claim included a claim under the Whistle Blowing Legislation. That paragraph appeared at page 15 in the Bundle and was the sixth paragraph down that page of the Claimant's ET1. It was part of the Claimant's narrative attached to his ET1 and explained that he had given a statement in respect of another employee at the Respondent who was claiming compensation for an injury suffered at work. He argued that his statement was at variance with evidence put forward by other

employees of DPD and suggested that DPD had attempted to cover up matters in their claim.

49. We do not consider that this paragraph constitutes the raising of a claim under the Whistle Blowing Legislation. Moreover, in his ET1 at paragraph 8, the Claimant ticked only the boxes for unfair dismissal, disability discrimination, notice pay and holiday pay. The box indicating whether there were any other claims was left blank. Nowhere in the body of the ET1 is there any assertion of a whistle blowing claim and nowhere in the narrative attached is there any assertion.

50. The parties attended in person a Preliminary Hearing before Judge Cassel on 13 February 2020. The Case Management Summary makes no mention of any whistle blowing claim. The Respondent's Mr Gidney, says that no such claim was raised. The Claimant says he tried to raise it but no one took any notice of him.

51. Tellingly, the Claimant raised no complaint pursuant to receiving that summary; receipt of which he confirmed. He failed to raise any issue arising out of that Case Management Summary at any time until this morning in connection with his purported whistle blowing claim.

52. After duly considering the matter, the Tribunal concludes that no such whistle blowing claim has ever been pursued in these proceedings. The issues to be before this Tribunal are those set out in the erudite Case Management Summary of Judge Cassel, dated 13 February 2020.

<u>Application that the Claimant's claims in disability are based on a physical and mental impairment</u> –

53. The Claimant argued that he had always pursued a claim on the basis of a mental impairment. He argued that the mental impairment was the side effects he suffered from taking the medication he was taking in respect of the physical impairment of his Cauda Equina Syndrome. He argued that this should be included in the claim to be dealt with by this Tribunal.

54. The Tribunal takes the view that no such mental impairment can be part of his claim. The Respondents accept that he is a disabled person as a result of his physical impairment, pursuant to the production of medical evidence and the disability impact statement, in accordance with the Orders of Judge Cassel.

55. However, as explained above in the time line set out, a simple mention of mental impairment being a reference in one line of the disability impact statement, that was refuted by the Respondents and no further mention of it has been made since that day in March 2020.

56. The Tribunal considers that to raise it at this stage on the morning of the Hearing, is simply too late. Having regard to the overriding objective, it is simply not appropriate for the Claimant to be allowed to advance that assertion on the morning of the Hearing. Had he wished to advance that he suffered from a mental impairment as well as a physical impairment, he should have followed up the Respondent's letter of 27 March 2020 and would have needed to seek medical evidence to support that assertion. He did nothing. For those reasons his Application was refused.

The Claimant's Application to seek 7 Witness Orders -

57. The Claimant advanced, for the first time, an Application this morning for the Tribunal to issue seven Witness Orders against a variety of individuals. These were:

- James Cutts;
- John Sheridan;
- Paul James;
- Neil Dixon;
- Josh Black;
- Mike Paige; and
- Adrian (Surname unknown by the Claimant).

58. The Claimant variously advanced that these individuals, most of whom remained employees of the Respondent, could give cogent evidence in these proceedings. It is not in dispute that this was the first time the Claimant had sought to raise this Application. Although he ventured that he had tried to raise it at the Hearing on 11 January 2021; that is unconfirmed as we have no summary from that Hearing as yet. He confirmed that he had not sought to contact any of these individuals, save for one of them, John Sheridan, who he contacted on 11 November 2020 by Facebook. He said John Sheridan had agreed to give a witness statement to him, but then further attempts to contact him through Facebook had proved fruitless. It appears he did not try to contact any of the others.

59. The Claimant was not able to articulate in detail the relevant evidence that these individuals could give, although he gave some general comments that they would be able to give evidence as to the Respondents relying on false and misleading information in the dismissal process, enforcing him to work outside his contractual hours, and in illustrating that the Respondents had sought to force him out.

60. Seeking a Witness Order at such a late stage in the proceedings is most unusual. In any event, a Witness Order is only appropriate when the Claimant is seeking to adduce evidence from those witnesses. It appeared very clear from what the Claimant was saying, that he wanted those employees and the Respondent to attend so he could cross examine them. It is not the purpose of a Witness Order. In any event,

having regard to the overriding objective, the Tribunal considers that at this late state it is simply not fair and proportionate to seek evidence from seven further witnesses. This is something that the Claimant could and should have addressed at the Preliminary Hearing before Judge Cassel, or at the very least, in the intervening 18 months prior to the start of this Hearing. The Tribunal therefore refused this Application.

The Claimant's Application to remove Document 276 from the Bundle -

61. The Claimant pursued one final Application which was to remove Document 276 from the Bundle before the Tribunal. He said the reason for this was that it was a document which had been fabricated by the Respondents. In fact, the document in question covered two pages in the Bundle, pages 275 and 276. It is a Return to Work Interview form which essentially was an Absence Notification form completed by the Claimant's Manager. That Manager was Mike Paige. The form details reasons for the Claimant's absence from work on 4 April 2019 and says that the reason was the Claimant *"fell over the cat and hit his head".* The word concussion appears also. That form was completed by Mr Paige and signed on the second page by the Claimant.

62. It appears from the Respondents that the relevance of this is that dishonesty in explaining reasons for absence formed a very significant part of the reason for the Claimant's dismissal. In fact, his absence on 4 April 2019 was due to the Claimant's arrest and subsequent detention by the Police. It is very much part of the Respondent's case that the Claimant's dishonesty and failure to inform them of his arrest was a breach of their policies and part of the gross misconduct which they say justified his dismissal. The Respondents relied upon this and other aspects of the Claimant's dishonesty to dismiss him, albeit that the Claimant chose not to take part in the disciplinary process, he did not engage in it. The Respondents argue, therefore, that this document is of critical importance. We asked the Claimant what his objection was to this document and whether he doubted the truth of what was written at page 275. He said he did.

63. The Respondent's position is that part of the reason for his dismissal was that there was inconsistency with the reason given by the Claimant as to why he was absent from work on 3 and 4 April 2019. He had reported that he was unable to attend work on 3 April 2019 because of a hospital appointment and that he had fallen down the stairs and cut his head, by falling over the cat, on 4 April 2019. In fact, there was evidence to suggest that the Claimant had actually been arrested on 3 April 2019 and held in Police custody overnight. As part of the investigation process, the Claimant subsequently confirmed that on 8 December 2018 he had been involved in altercation with approximately 30 people. He confirmed that his house was attacked and when a woman had tried to climb inside his house, he had punched her. Following that incident, the Claimant had been required to report to the Police Station for questioning on 3 April

2019. This all casts some doubt on the Claimant's reason for absence on 3 and 4 April 2019 and was part of the disciplinary process, albeit the Claimant sought, after the first investigatory meeting, not to engage in that process.

64. It was unclear why the Claimant sought the exclusion of this document. If he disagreed with the fact that he had said that he fell over the cat and cut his head, he could assert that in evidence.

65. The Tribunal asked him what he meant when he said the document had been fabricated. He was asked whether he was suggesting that he had not actually signed it. At that point, having not previously ventured such an argument, the Claimant indicated that this was the case and that his signature had been forged.

66. It is worth mentioning that this Application had not at any point been raised before this morning.

67. Having considered it, the Tribunal can see no good reason for excluding the document at pages 275 and 276. They would of course be prepared to hear any evidence that the Claimant could give. The Claimant had only raised this point this morning and had at no previous point suggested that such document should not be included in the Bundle. It is simply not in the interests of the overriding objective to remove it at this stage. For that reason, the Tribunal refused this Application.

<u>The Claimant's Application for Specific Disclosure</u> –

68. In this Application pursuant to a lengthy set of emails in the Tribunal file, the Claimant argued that the Respondents had not complied with their duty of disclosure, in that he said there were documents in the Claimant's possession which illustrated that others had been treated differently when concealing criminal convictions from the Respondent. He also averred that there were documents which the Respondents had which assisted the Claimant's whistle blowing claim. He was not able to articulate specifically what those documents were. Mr Gidney, on behalf of the Respondents, said that the Respondents had completed disclosure and pursuant to the Order of Judge Quill on 11 November 2020 had complied by producing such further relevant documents by 17 November 2020.

69. The Claimant argued that there were certain files within the Respondent's business on a shared drive which contained relevant documentation. However, he was unable to articulate in any detail what that documentation was and the precise relevance of it. Mr Gidney took the Tribunal to various redacted documents in the Bundle which he said illustrated that the Respondents had complied with any duty of disclosure relating to different treatment of others who had concealed criminal activities.

70. One thing the Tribunal did not have and nor did Mr Gidney, was evidence of precisely what was disclosed by way of compliance with the Order of Judge Quill on 17 November 2020. Mr Gidney resolved to find and produce this in preparation for the start of the Hearing on Wednesday at 10am.

71. The parties agreed to disperse and reconvene at 10am on Wednesday 20 January 2021. The Claimant was given all best wishes in respect of the attendance of his Father's funeral.

Events of 20 January 2021

72. The parties reconvened this morning in the hope of moving matters forward and at least completing two days of the Full Merits Hearing in this matter.

73. However, there remained the issue of the specific disclosure sought by the Claimant's. In the interim period, Mr Gidney had produced a document illustrating what had been sent to the Claimant, pursuant to the Order of Judge Quill of 11 November 2020. This consisted of a variety of email and some sick notes, also the Claimant's grievance.

74. Before the Tribunal could consider how best to move this matter forward in the hope of getting matters started, the Claimant ventured a further Application to postpone the Hearing and re-list it at some point in the future.

<u>The Claimant's Application for postponement put forward on 20 January 2021</u> -

75. The Claimant said that due to the medication he was taking for his physical impairment, he was so badly affected in terms of memory loss and difficulty in assimilating matters mentally, that he could not proceed with the Tribunal. He said that he had resolved yesterday, the day of his Father's funeral, to stop taking his medication in the hope that he could alleviate the memory loss side effects he was suffering. He said, however, that the effects of not taking the medication in terms of the pain he would suffer, were so bad that he had resolved to start retaking his medication. He said that, therefore, the side effects of his medication was such that he could not usefully manage to attend this Hearing to represent himself and to give evidence and to cross examine the Respondent's witnesses.

76. He said that he had contacted his GP yesterday and had medical evidence to support this. It was agreed that he would send this to the Tribunal and to Mr Gidney and the Respondent's Solicitors who had not seen this evidence and who were not aware that the Claimant intended to make this Application this morning. The Tribunal therefore broke briefly, at 10:15am, to enable the evidence to be sent through and for the Tribunal to consider

it. We resolved then to hear further submissions from the parties once we had the document in front of us. The Tribunal then reconvened to hear submissions on the Claimant's Application for a postponement.

77. The document submitted consisted of a photograph of a fit note dated 19 January 2021 from the Millwood Surgery in Great Yarmouth. The fit note specified that the Claimant was unfit to work for a month and cited the Claimant's conditions as: emergency spinal surgery, December 2020; stress related issues; and memory issues reported which were under review / investigation. There was no mention of any medical assessment as to whether the Claimant was fit or otherwise to attend and conduct himself as a witness and representative at this Hearing. There was simply only this fit note.

78. The Claimant said that he had obtained this document from his Doctor yesterday, essentially by telephoning the Surgery whilst he was driving either to, or from, his Father's funeral.

79. He relied on this as good reason to postpone today's Hearing and relist the Hearing at some point in the future.

80. He said that the medication which he had returned to, gave him such difficulties in terms of his memory, that it would not be possible for him to proceed with the Hearing.

81. He was asked why he had not made this Application earlier. His operation took place in December 2020, he had been on the medication he now complained of since then and for some time before, but had not sought to raise this as a reason for postponement. His answer was indistinct and unclear.

82. What was clear, was that he had not at any point previously raised the issue that he may not be able to attend and deal with this Hearing due to side effects of his medication. The Claimant also mentioned that he was intending to now instruct a Solicitor to handle his case and that he was extremely unhappy with the decisions made by the Tribunal on the various Applications the Claimant had advanced on 18 January 2021. The Claimant was very agitated and aggressive and had great difficulty in controlling his temper. Mindful of the Claimant's condition, the Tribunal was very sympathetic and did its very best to calm the Claimant in the hope that it could deal appropriately with his Application.

83. We heard from Mr Gidney that the Respondents sought to oppose the Application to postpone. Mr Gidney said that the medical evidence was not really medical evidence to support the Application. It was simply a fit note indicating that the Claimant was not fit for work. He also said there was no evidence to support the assertion that the Claimant suffered from memory loss issues as the Doctor's note said that it was only memory issues that had been reported and were currently under investigation and review. Mr Gidney said that the Claimant would have had ample

opportunity to apply for a postponement on these grounds at any point, but had only raised this now. He said there was simply insufficient medical evidence to support the Application and referred the Tribunal to the President of the Employment Tribunals Guidance on what to do in the event of an Application by a party to postpone proceedings on the grounds of ill health. He said that that Guidance made it clear that any medical evidence purporting such an Application needed to set out the nature of the health condition concerned and include a statement from a Medical Practitioner that in their opinion the Applicant was unfit to attend the Hearing, the prognosis of the condition and an indication of when that state of affairs may change. He said that this simply had not happened in this case.

84. Mr Gidney went on to submit that a postponement would likely mean that a five day re-listing of this matter would not come before a Tribunal for at least a year, or 18 months, but that if we pressed on and dealt with as much of the case as possible in the remaining time, a re-listed part heard Hearing may come on sooner. He said it was to the great disadvantage of the witnesses in this case who were already giving evidence in respect of something which happened 18 months ago and that memories fade and that giving evidence in respect of a dismissal some three years earlier, was a great prejudice.

85. He said that the Claimant had something of a history of starting processes and not following them through. He said he attended the initial investigatory meeting prior to his dismissal, but then did not engage in the disciplinary process at all. He also failed to appeal. He said he was minded to take the view that the real reason for the postponement was that the Claimant wished to buy some further time and that he had already expressed an opinion that he wished to do that because he wished to engage a Solicitor and was planning to appeal against all of the decisions of the Tribunal made on Monday 18 January 2021. He said the real reason was not the reason advanced.

86. The Tribunal broke to consider its decision at 11:15am. The Tribunal considered and discussed the Application and the parties reconvened at 11:45am for the decision to be given.

87. The Application for a postponement is refused. The Tribunal is very mindful of that which it has heard. It is very sympathetic towards the Claimant's disability and makes it clear that to accommodate the Claimant during any proceedings by having regular breaks so as to not discomfort the Claimant. The Tribunal fully understands how difficult such matters can be.

88. However, this is an Application that has been raised only this morning. There has been no previous mention of the Claimant's inability to conduct these proceedings as representative and witness. The Claimant knew that this Hearing was listed as far back as 13 February 2020. That is nearly a year ago. In any event, the Claimant has been taking medication for some

time and the side effects he refers to, he refers to in March 2020, some 10 months ago. There has been ample opportunity to either seek a postponement or instruct others to represent him. This is his claim. It has been in train now for over 18 months. To postpone it for a further 18 months is not proportionate, or in accordance with the overriding objective.

89. We are very mindful of the fact that witnesses' memories fade. Giving evidence on something 18 months ago is hard enough, but three years ago, is even harder.

90. We are bound to say that the very late nature of this Application lends some weight to the Respondent's suggestion that the real reason may be that the Claimant now wishes to reorder his case and instruct a Lawyer. There is, however, no proper evidence of that.

91. We are very mindful of the necessity to treat the Claimant appropriately and consider his right to a fair trial. With this in mind, we have had due consideration to Authorities in this arena. More particularly Teinaz v London Borough of Wandsworth [2002] ICR 1471, where the Court of Appeal said that the right to a fair trial will usually require a postponement when a litigant cannot attend the scheduled Hearing through no fault of his or her own, however inconvenient this may be to the Tribunal or other parties. In that case, the Employment Tribunal refused an Application to adjourn on the basis of ill health, despite that Application being accompanied by a medical certificate stating the Claimant should not attend the Tribunal Hearing due to severe stress. The Tribunal doubted the accuracy of the Doctor's letter and decided that the Claimant had chosen to stay away from the Hearing. Both the EAT and the Court of Appeal ruled that this was an incorrect exercise of the Tribunal's discretion. It stated that although adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice.

92. It also said that a Tribunal Court is entitled to be satisfied that the inability of the litigant to be present is genuine, and that the onus is on the party making the Application to prove the need for such an adjournment. Where the Tribunal is not satisfied with the initial medical evidence, it has the discretion to give directions to enable such doubts to be resolved. Further guidance on the Tribunal's decision is given in the case of Andreou v Lord Chancellor Department [2002] IRLR 728. This was a case decided shortly after Teinaz.

93. Here the Court of Appeal considered that the circumstances were different from Teinaz. It said here the Tribunal adopted a sensible option of giving the Claimant further limited opportunity of making good the deficiencies in the first report.

94. We have also considered Iqbal v Metropolitan Police Service & Anor UKEAT/0186/12, which said that while the guidance in these cases has great value, it is not an error of law in itself for a Tribunal to fail to refer to

them in reason. Lord Justice Mummery spelled out in O'Cathial v Transport for London [2013] ICR 614, that there are two sides to a trial and the proceedings should be as fair as possible to both sides. The Tribunal has to balance the adverse consequences of proceeding with the Hearing in the absence of one party, against the right of the other party, to have a trial within a reasonable time and the public interest in a prompt and efficient adjudication of cases.

95. Having regard to these Authorities and the President's Guidance in the particular circumstances of this case, we do not take the decision to refuse this Application lightly.

96. However, the fact that a subsequent Hearing will not come on for some 18 months, and the paucity of the evidence before us today, combined with the other factors set out above, lead us to believe that it is in the best interests of justice and pursuant to the overriding objective, to press on and attempt to at least get through some of the evidence in the remaining time available when this matter will almost certainly go part heard and the reconvened part heard Hearing will be much nearer than a postponed relisted five day Hearing.

97. For that reason, we indicated to the Claimant that we intended to proceed today.

98. At that point, the Claimant became extremely loud and abusive. He started to rant incoherently. Despite being asked to calm down, he refused to do so. He refused to calm down despite intervention of the female who was clearly in the background where he was attending the CVP Hearing. He continued to rant and rave somewhat incoherently and lapsed into a considerable number of profanities. He continued to assert in a very aggressive and loud fashion, talking over Employment Judge K J Palmer, that this was not fair and that he was going to appeal every decision of this Tribunal.

99. He invited the Tribunal to strike out his claim and said that would just enable him to appeal the strike out and all the other decision of Monday and today.

100. The Tribunal attempted to calm the Claimant down, but he was not prepared to calm down. He kept arguing that some of the decisions of Monday, on his other Applications, were unfair. He said he had a whole page and list of further Applications he wished to make before he was prepared to start any Hearing. He continued to swear and curse and be extremely aggressive.

101. He said that he had complained about the Order of Judge Cassel despite having agreed on Monday that he had not done so. Having been invited to provide evidence that he had, he said that he would not proceed.

102. Accordingly, the Tribunal determined to attempt to give him time to calm down and we agreed to have a further break in the hope that he could calm down and that he would see sense and reason.

103. We did warn him, however, that the Tribunal did have power to strike out his claim if he continued to shout angrily and to be profane. He reiterated that he would not calm down, he would not stop shouting and that he would not proceed.

104. The Tribunal broke for 15 minutes.

105. On reconvening, the Claimant was asked whether he was prepared to continue and whether he was prepared to proceed with his claim. He continued to shout aggressively and profanely. He was asked repeatedly whether he was refusing to proceed. He seemed to be suggesting that he was refusing to proceed, but latterly, albeit very incoherently, he said that he could proceed for 20 minutes and that thereafter he needed to take his medication and that he would not be prepared to proceed after that point.

106. The Claimant was asked repeatedly whether he was only agreeing to proceed for 20 minutes and he confirmed that that was the case. He once again invited the Tribunal to strike out his claim. He said he was going to appeal against everything the Tribunal had done. He continued to shout over Employment Judge K J Palmer and refused to comply with a reasonable request to calm down.

107. The Tribunal felt that it had absolutely no alternative but to strike his case out. In the break it had considered the issues before it on strike out and had considered in detail Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Tribunal feels that it gave the Claimant every opportunity to calm down and to agree to proceed. Having heard the Tribunal's decision, given reasonably after due consideration that it wished to proceed, the Claimant in essence in a very aggressive and loud manner simply refused to do so.

108. The Tribunal therefore had no alternative but to strike out the Claimant's claim under Rule 37(1)(b) and the manner in which the proceedings had been conducted by or on behalf of the Claimant, or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious.

109. The claim is also struck out under Rule 37(1)(d), that it has not been actively pursued in that the Claimant simply refused to proceed when his Application to postpone was refused.

110. The Tribunal must stress that this is not an action it took lightly. The behaviour of the Claimant made it simply impossible for matters to proceed, and in fact, he refused to do so.

111. The reaction of the Claimant to his latest eleventh hour Application to postpone, suggests to the Tribunal that the Claimant may never really have ever intended to proceed with this action. It is now struck out.

12 February 2021

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Employment Judge K J Palmer

Sent to the parties on: 4/3/2021

N Gotecha
For the Tribunal Office