EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms P Naluwuta	**v**	**London Borough of Brent**

Heard at: Watford **On** 10 December 2020

Before: Employment Judge R Lewis

Appearances

For the Claimant: No attendance or representation
For the Respondent: Mr P Lockley, Counsel

JUDGMENT

The claim is struck out in accordance with Rule 37 of the Employment Tribunal Rules of Procedure.

REASONS

1. These reasons are given of the tribunal's own initiative. It is in the interests of justice to do so, as the claimant did not attend this hearing.

This hearing

2. This was the preliminary hearing in public which I directed at the telephone hearing on 11 September 2020. The claimant did not take part. A copy of the tribunal's order was sent by email and hard copy to her on 16 September. She has replied to it extensively, and there can be no doubt that she received it and read it, and therefore had just under three months notice of this hearing.

Adjournment

3. The most recent communication received by the tribunal from the claimant before this hearing was sent by her on the afternoon of 8

December. The claimant gave no assurance in that letter that she would attend or take part in this hearing. Shortly before 10am, and in accordance with rule 47, I asked a member of the tribunal staff to telephone the claimant. There was no reply.

4. Mr Lockley made no application for an adjournment. I could see no reason to adjourn of the tribunal's initiative, and proceeded.

The framework

5. This hearing proceeded under the provisions of rule 37 of the tribunal's rules. The relevant portions state so far as material:

> "(1) .. A Tribunal may strike out all or part of a claim or response on any of the following grounds –
> (a) .. that it has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted .. has been scandalous, unreasonable or vexatious; …
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing.

Factual outline

6. I heard no evidence, and found no facts. The claims are of disability discrimination only (168). I understand that the respondent employed the claimant for just under a year in 2015-16. Her work consisted of assessing claims for housing benefit. That work is part of the delivery of an essential service to a section of the public which is largely vulnerable. The work required accurate management of paperwork and calculations. The respondent admits that by virtue of dyslexia (but not other impairments) the claimant meets the s.6 definition of disability. There is dispute as to the nature and extent of reasonable adjustments (if any) provided to the claimant by the respondent. She was in due course dismissed for poor performance. The respondent considered that she had failed to attain or sustain an acceptable level of accurate assessments.

7. The litigation history is accurately summarised in the respondent's chronology. It is comprehensive, and accurate so far as I have been able to see. For technical reasons, I regret that I have been unable to append it to this judgment. This was the sixth preliminary hearing in this tribunal. There have also been a number of appeals and hearings in the EAT, and at least one application to the Court of Appeal.

Paperwork for this hearing

8. The respondent had, in accordance with my September order, sent the tribunal by email on 30 October, copies of a chronology,

skeleton argument, and the most recent version of the list of issues, dating from November 2017. The email was copied to the claimant, and stated that a hard copy was also posted to her the same day. At this hearing I was provided with a paper bundle of nearly 400 pages. It contained a copy of the skeleton argument and chronology. I was told that a hard copy of the bundle had been posted to the claimant.

9. Mr Lockley's submissions took about 1 ¼ hours. I adjourned for 45 minutes and then gave judgment. I asked Mr Lockley to ask his client to inform the claimant of the outcome of this hearing, as I anticipated some delay in these reasons being available.

10. This judgment should be read in conjunction with my orders made following hearings on 31 January 2020 in person (272) and 11 September 2020 by telephone (279). The claimant did not attend the former and did not take part in the latter. At this hearing I was not asked to consider any of the factual matters arising before the presentation of this claim on 5 January 2017. I add for complete avoidance of doubt that before the hearing on 31 January 2020 I had had no previous dealings with the present case.

11. Mr Lockley applied for the claim to be struck out under each and any of the four sub-rules under rule 37(1) which are quoted above. In this Judgment, I consider each application separately.

Rule 37(1)(a): The claimant's absence

12. Mr Lockley's primary submission, as I understood it, arose out of paragraphs 25 to 32 of my September order which I quote here, although paragraphs 30, 31 and 32 are the heart of the point:

"Past matters

25. I note from the correspondence that the claimant refers to events and decisions of previous judges, who have conducted previous preliminary hearings in this case (as I understand it, Judge Smail in April 2017, and Judge Manley in September and November 2017). There have since then been judgments of the EAT.

26. I am concerned that these points about the past are not now useful or constructive. The priority of the parties must be to prepare the case as it now presents for a hearing listed in six months' time. It is not useful or proportionate to devote further resource to disputing the history of this litigation.

Rule 37

27. Rule 37 of the Employment Tribunal Rules states so far as material:

> "At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –
>
> (a) That it… has no reasonable prospect of success;"

28. I raise this point of my own initiative for one reason only. I have quoted above what the claimant has written about non-attendance at the tribunal. She expresses herself there clearly and trenchantly. She has acted on her words. It appears from the file that the claimant has not attended any hearing at any level in her case since February 2018, when she was present at the EAT. She did not attend the EAT on 22 May 2019 or 1 July 2019. She did not attend this tribunal on 31 January 2020, and she did not take part in this hearing.

29. In my judgment, this case still requires active case management, for which I have given directions below. If it proceeds after that, it will be to a lengthy hearing of claims of disability discrimination. The respondent defends the claims, and the burden of proving many elements of the claim rests on the claimant. The claimant's sworn evidence will be an essential part of her claim, upon which Mr Lockley has the right to cross examine her. When the respondent calls witnesses, the claimant will have the right to cross examine them. There will then be closing submissions on evidence and law.

30. While the claimant has the right not to attend the hearing, and to participate by written submissions only, I am duty bound to draw to her attention at least some of the practical difficulties which would follow if she takes that course. I do so, not to advise the claimant what is in her own best interests – that is not a matter on which a judge can advise a party – but to draw to her attention some practical implications which she may not have thought of.

31. The basic point is simple. A trial or hearing is a form of contest between two sides. In any setting, a contest between a side which attends against a side which is absent is not likely to go in favour of the absentee.

32. The tribunal proceeds on the sworn evidence of witnesses. In the claimant's absence, written submissions are not evidence on oath; they cannot

be cross examined in the absence of the writer; and they cannot cross examine the respondent's witnesses. Written submissions cannot predict what will be said at the hearing, so cannot reply to unexpected points. All that is a general observation about written submissions in any case, but an additional issue arises from the claimant's style of written submission. My reading suggests that her submissions are often not easy to understand, and that they focus on points about which she feels strongly, rather than on objective analysis of the factual and legal questions which the tribunal has to decide."

13. I approach the rule 37(1)(a) application through a number of stages and questions. Broadly they are:

(a) Is there any prospect of the claimant attending and taking part in the hearing listed in March 2021?
(b) If not, what are her reasons?
(c) Can the tribunal fairly, and in accordance with our rules, address the reasons, so that the claimant is likely to attend and take part?
(d) If not, what are the consequences?

Absences and reasons for them

14. As I have previously commented, the claimant has not attended any hearing since the hearing in the EAT on or about 27 February 2018 (218). In response to my January 2020 order, the claimant wrote to the tribunal at length on 18 May 2020 (295). She used a number of phrases to make the point that she would not take part in another hearing until certain conditions had been met. She had been asked to confirm whether or not she intended to withdraw. I quote briefly from her reply (bold font in original throughout):

> "I have been **hounded** out of court and unfairly denied the **effective** right of access to a court in civil proceedings. This is evident herein and my past complaints. Unless the i**mbalances** are eradicated as demonstrated herein to ensure a levelled ground, this case cannot proceed in a meaningful way… **I hereby call upon the judge to exercise his discretion and refer my matter to the watchdog commission** ... In the circumstances this is the effective remedy. It will make it possible to conduct a neutral fact checking process regarding all the complaints I raised in this matter, including those that I filed with higher courts."

15. The claimant on 16 June asked, among many others, for the reasonable adjustment of recording hearings and being permitted, "to attend hearings via telephone conference including those that require attendance in person" (321).

16. On 11 July the claimant repeated her language of 18 May (328),

> "Since ET has not confirmed that it will eradicate the imbalances there is **no point in relisting the hearing and/or continuing with this case."**

17. On 7 August she emailed the tribunal to state, "I will not attend the hearing of 24 August 2020" (320) (the original date for the September hearing, which had to be postponed).

18. In my September order I wrote that I would in principle, and subject to conditions, agree to the parties recording a telephone hearing. I quote from the Order (281):

> "My view of the point before this hearing was that I was prepared in principle to agree to the claimant recording this one hearing, subject to a number of conditions.
>
> I had in mind, subject to the views of both parties, the conditions (1) that permission was granted for this hearing, and that separate permission would have to be requested to record any other hearing; (2) that to ensure equality of arms and fairness, either the respondent would agree that it would also record the hearing, or the claimant would agree to send a copy of her audio file to the respondent after this hearing; and (3) that the parties confirm that as this is a private hearing, any audio recording will only be used for the preparation and conduct of this case, and for no other purpose.
>
> If the claimant were to agree those conditions, it seemed to me in principle a reasonable adjustment to permit her to record today's telephone hearing."

19. On 9 October and in reply to the September order (341), the claimant repeated her point:

> "It does not follow that EJ is effectively seeking me to confirm whether I will attend hearings…when I already **repeatedly** demonstrated that ET has hounded me out of court/tribunal, hence I cannot continue to pursue this case in a meaningful way."

20. She repeated the point on 20 October (363),

> "I cannot continue to pursue this case in a meaningful way, this includes attending further hearings."

21. This sequence concluded with the claimant's letter of 8 December which states,

> "At all material times all parties ought to have known and still know that I can't continue to partake in these proceedings in a meaningful way and why. It's preposterous to plainsail (*sic*) this case to **yet another** hearing in the circumstances."

22. It follows that for a period since May 2020 at the earliest, but probably for the previous 27 months (ie since her final appearance in the EAT) the claimant has stated, then acted upon, a settled and concluded decision not to attend any tribunal hearings. I therefore answer my question 13(a) above in the negative.

The claimant's reasons for absence / Can they be addressed

23. I now turn to my questions 13(b) and 13(c). In her letter of 18 May, which Mr Lockley was at pains to analyse carefully, the claimant has given some explanation of her decision to absent herself, and some indications of what might be done, which might lead her to a different view. It seems to me right to address the major points, so far as I understand them. In so doing, I note that I am at the disadvantage of relying on written submissions by the claimant which are not always easy to follow. I am grateful to Mr Lockley for his assistance. I understand the major points to be the following.

24. The claimant has asked the tribunal to eradicate what she describes as imbalances as a pre-condition of her attendance at and participation in these proceedings. The word 'imbalances' is not well used in this context. It is apparent that a number of these 'imbalances' consist of inviting the tribunal to revisit case management decisions made several years ago, which have subsequently been upheld by the EAT; to take steps which the claimant has repeatedly been advised it has no power to do; to reopen matters concluded by the EAT, which it has no power to do given the clear direction of the EAT; and effectively to depart significantly from clear statutory language. I give brief examples of each.

25. The claimant has repeatedly asked that the burden of proof be reversed, eg as to proof of disability where it is in dispute (301) or as to the reasonable adjustments which would have been required and potentially effective. This demand cannot be met because it is in direct contravention of the clear language of the Equality Act.

26. The claimant has repeatedly asked that the tribunal adopt from CPR the procedures of, at least, notice to admit facts (298); interim payment; and committal proceedings. The employment tribunal rules do not provide for any of these to take place. I do not accept that the latter two fall within the tribunal's general case management powers at rule 29.

27. The claimant has returned to and revisited these issues, despite clear direction on them from the Employment Appeal Tribunal, from which this tribunal has no power to depart.

28. Furthermore, the claimant has in the broadest sense shown no respect or understanding for the self-discipline which is required as an aspect of the overriding objective in conducting litigation. I accept Mr Lockley's submission that the list of issues before me, which was plainly not fit for the purpose of the hearing, has not progressed for some years, and that the observations which I made in my January order about preparing a useable list of issues have not progressed. I note with concern that the claimant's response to my having in January 2020 listed a 10 day hearing in March 2021, so as to avoid yet further delay, was the following (300),

> "It is not a fair trial to diminish the list of issues just so it fits in the allocated time. Sufficient time should be allocated to properly address **all** of the issues at hand."

That is the opposite of the tribunal's approach, which, in accordance with the overriding objective, places value on the proper use of the finite time and resource of the tribunal and the other party.

29. Drawing these points together, my conclusion is that the claimant's decision not to attend a tribunal hearing, and not to participate in a meaningful way, has been stated by her to be reversible only if certain conditions are met. Although I have called them conditions of participation, or reasons for absence, Mr Lockley used the right word, when he called them 'demands.'

30. I deal first with the practical answer. Almost none of the claimant's demands can be met. I say "almost" because if all else were properly and fully prepared, a request for video hearing would be accommodated, but not a request to conduct a 10 day contested trial by telephone. However, demands to re-write the statute, displace the burden of proof, disregard the judgment(s) of the EAT, assume powers which the tribunal does not have, and, in 2021, revisit three years of case management, cannot be met.

31. Although the previous paragraph is conclusive on the point, I add that it would be profoundly undesirable in principle, and not in accordance with the tribunal's duty of fairness to all parties, to proceed in the manner required by the claimant. It is right for the tribunal to make adjustments and show flexibility to as to assist a member of the public to access the system of justice. There is however a boundary between those steps, and permitting a party to dictate the conditions on which she will conduct her own case.

32. I answer my question13(c) in the negative. I therefore find that there is no prospect of the claimant attending or participating in the proceedings, and turn to my question 13(d).

Absence from the final hearing

33. The list of issues which I saw indicates a large range of matters which require the claimant's oral evidence, and / or on which she has the right to test the respondent's evidence by cross examination. The list is inordinately long and diffuse, and I quote only a few examples of points which are in dispute. I stress that this selection is by no means exhaustive, or in order of priority.

34. It is disputed that the claimant meets the section 6 definition of disability by reason of dyspraxia and/or depression. It is for the claimant in the first instance to prove that she has each impairment, and that each has a substantial adverse effect on day to day activities. The respondent is entitled to challenge the claimant's evidence on all such points by cross examination.

35. It is disputed that the respondent had knowledge of disability (it being incumbent on the claimant to show how the knowledge was conveyed). An employer of thousands of staff cannot prove the negative of lack of knowledge: it is for the claimant to prove by evidence that it knew, or ought to have known.

36. It is for the claimant to prove that she was at a substantial disadvantage; and what reasonable adjustments would have been effective. The latter limb is of particular importance, in light of the extensive pleading by the respondent of its case on the adjustments which it did make, and of their failure to raise the claimant's performance to an acceptable level.

37. It is for the claimant to prove the basic elements of a claim of direct discrimination, including the facts of less favourable treatment and the characteristics of a comparator; and to prove each of the elements of the statutory definition of harassment, including the role of the protected characteristic, the event which took place, and the statutory effect on the claimant.

38. In the absence of oral evidence from the claimant, and without her participation on these matters, the claim cannot be the subject of a fair trial, <u>and</u> has no reasonable prospect of success.

39. I have considered whether that view is changed by the possibility of the claimant proceeding by way of written submission in place of personal participation. There are two very definite reasons why not. The first is that the extensive material which the claimant has written since 201 is so unclear, and consistently so unfocussed on any issue which the tribunal might have to decide, and so lacking in the discipline of litigation, that I find with confidence that her claim cannot succeed if presented in writing only. I add, secondly, a wider reason of principle, namely that discrimination claims are fact sensitive, and cannot properly proceed to paper determination. That point underpins the body of authority which cautions the tribunal against strike out of discrimination claims just because they appear weak on paper.

40. I answer my question 13(d) by finding that the consequence of my previous discussion is that the claim has no reasonable prospect of success.

Rule 37(1)(b): Unreasonable conduct: language

41. In the alternative, Mr Lockley asked me to consider that the matters which I have set out above, along with the manner in which the claimant has expressed herself, constitute unreasonable conduct of the proceedings in accordance with Rule 37(1)(b).

42. Mr Lockley referred me to a body of material which showed that the claimant has since first appearing in the tribunal in 2017 responded to any adverse decision of any judge by allegations of racism and institutionalised discrimination, and that she has not respected the authority of the tribunal or the EAT either in her language or conduct of the proceedings.

43. I agree that the claimant has used language which owes more to emotion and to political rhetoric, including that of the Black Lives Matter movement, than to objective legal analysis. I agree with Mr Lockley that the claimant's response to a judicial decision which displeases her has been to accuse the decision-maker of racism, and to write, repeatedly and at length, in attempts to re-open the points on which she has been disappointed by the tribunal outcome.

44. I separate this submission into two limbs. While I can see force in Mr Lockley's points about the claimant's use of language, I think it right to disregard it completely. The claimant is entitled to her opinions, however well or badly expressed. She is entitled to apply a consistent political interpretation to her experience in and outside the tribunal. Many litigants who express themselves poorly or emotively on paper conduct their hearings courteously and correctly. Mr Lockley's point, if accepted, might give rise to a concern that I had taken a personalised view of this matter, or of the claimant's disagreements with case management decisions, or that I might be penalising the claimant for expressing robust opinions with which I may disagree. I do not find that the claimant's use of language alone constitutes unreasonable conduct within rule 37(1)(b), and Mr Lockley's application to that effect fails.

Rule 37(1)(b): Unreasonable conduct: approach

45. The second limb of this application relates to the claimant's conduct of the proceedings, and in particular her failure to adhere to the structure and discipline of the litigation. Mr Lockley relied heavily on letters from the claimant, and in particular on her long letter of May 2020. That letter is important, because of its length and detail, and because it was written over three years after issue of this claim. This limb overlaps closely with Mr Lockley's application under rule 37(1)(d). I set out a number of the points which illustrate this submission.

46. The claimant's approach is open ended, and fails to respect the discipline of the tribunal process: she demanded to update her list of issues in May 2020 (employment having ended in September 2016), writing that if she cannot 'it will be pointless for me to continue' (300). Having repeatedly been told that the Notice to Admit Facts procedure arises under CPR, not the tribunal rules, she wrote in May 2020 (304),

> 'In fact I need to modify the NTAF to add more issues. NTAF is a tool that is essential in circumstances such as this to ensure a fair trial.'

47. Her approach shows self contradiction and unwillingness to accept accommodation. In May 2020, she required, 'the list of issues should be written in lay man language' (301); the following August, responding to an attempt by Mr Lockley to do just that, she wrote (336),

> 'Firstly I thank R for its so called layman's language list of issues but **no thanks.**'

48. The claimant persists in her disregard of the burden of proof. She wrote in May 2020 that one issue should be 'whether R can prove that claimant was not disabled' (301); later in the same document she wrote (303),

> 'It should also be listed as **a fact** that R was aware at the material time that I was disabled .. This issues should only be on the agenda for merit hearing if R submits **proof to show otherwise**.'

49. She has shown repeated disregard of authoritative judicial guidance. I cite two examples. The claimant wrote in May 2020, 'It is crucial to take the necessary steps to commence committal proceedings in respect of R's violation disclosure obligations' (305). The claimant has been repeatedly advised that the tribunal has no committal powers. Judge Smail's reasons of 12 June 2017 say exactly that, and comment that he had explained the absence of this power to the claimant on 19 April 2017.

50. Secondly, in May 2020 the claimant wrote, 'There was no reason whatsoever as to why EJ Manley asked me to consider withdraw indirect discrimination, the strongest part of my claim, but to kill my case' (300). A year previously, HHJ Auerbach had written about Judge Manley's Order (252), 'The Order does not require her to withdraw the complaint, but merely to indicate whether it is still pursued' (252), and at paragraph 34 of his judgment, he gave the reasons for that approach.

51. The claimant has repeatedly re-opened matters which are concluded, or tried to do so. In May 2019 HHJ Auerbach wrote that he could see 'nothing arguably wrong' (249) with how Judge Manley

had managed a routine point about papers tabled shortly before the preliminary hearing in September 2017. A year later (and nearly three years after the event) that issue was still live in the claimant's letter of 18 May 2020 (308).

Rule 37(1)(d) Not actively pursued

52. Mr Lockley submitted in the further alternative that the claimant had fallen foul of Rule 37(1)(d), in that the claim was not actively pursued. I was at first sceptical of this submission, but having heard it I can see the force more clearly. Mr Lockley's point was not that the claimant has been inactive: certainly the claimant has demonstrated intermittent activity. However, her activity has not been pursuit of the claim: it has been the repeated pursuit of her erroneous understanding, in disregard of the guidance and judgements of this tribunal and the EAT. Mr Lockley's point was that a claim must be pursued properly, in accordance with the structure and discipline of the law, the rules and the presiding tribunal, and that that involves accepting the structure and disciplines referred to above. I agree that the claimant has not done so.

53. I also accept in principle that there is no reason to believe that issues of health or representation enter into this consideration. Although I referred at the January hearing to a medical report, and I accept the claimant's general submission that this litigation has affected her health, I have no material before me to indicate that there should be delay or a stay pending health enquiries, or that the claimant's decision not to participate is attributable to medical advice. Although the claimant has repeatedly referred to the need for representation, Mr Lockley correctly drew to my attention a striking event at the EAT on 22 May 2019 (242) when the claimant had been afforded pro bono support under the ELAAS scheme, but could not take advantage of it because, contrary to the scheme's rules, she had not attended the EAT in person. The EAT recorded that counsel was present at the hearing, but in the claimant's absence he was unable to represent her.

54. I conclude that the claimant has conducted the case unreasonably in accordance with rule 37(1)(b), and / or failed actively pursue the claim under rule 37(1)(d), by virtue of the approach set out and illustrated at paragraphs 45-53 above.

Rule 37(1)(e): Fair trial

55. Finally, I ask whether a fair hearing is possible in accordance with Rule 37(1)(e). I find that it is not. I draw together and reiterate the points already made. A fair hearing is one in which among others both parties accept the discipline and structure of the process, in accordance with the overriding objective, in a structured and proportionate manner which will enable finality to be achieved to their dispute within a reasonable timeframe.

56. The claimant's pursuit of peripheral issues, and her convictions about her treatment, are such that the claim is in December 2020 scarcely advanced beyond the stage which it had reached at the first hearing before Judge Smail in 2017. There is little prospect of it being capable of proceeding effectively or efficiently in March 2021 (the listing which it received 14 months in advance).

57. The escalating backlog in the tribunal system indicates that if adjourned it would not be relisted until 2022. The claimant's employment terminated in September 2016 and while I have little confidence that the minutiae of her daily interactions at work in 2015 and 2016 are capable of reliable evidence so long after the event, I do not consider that I have current information on the point to warrant a strike out.

58. I do find that I have no reason whatsoever to believe that anything which could be said or written by way of case management might modify the conduct or change the approach which the claimant has brought to this case to date and which underpin my findings above. If the claimant were to attend and take part therefore, I do not consider that she would do so in a manner which would enable a fair trial to take place.

The overriding objective

59. As I am asked to exercise discretion I must do so in accordance with the overriding objective and the interests of justice. The tribunal is conscious of the balancing exercise to be undertaken in providing a system of justice which is readily accessible to the public without legal representation, and should be usable within a reasonable timeframe of workplace events. It must balance the principle of open access with the duty to safeguard respondents from unmeritorious claims or disproportionate conduct of them; and it must have regard to the duty of the tribunal system to use its limited resource effectively, particularly at a time when members of the public face unacceptable delay in achieving even the most straightforward of hearings.

60. It is in that context that I am entitled to have regard to how the claimant has conducted the proceedings to date. I agree with Mr Lockley that she has shown no acceptance of the need to modify her misunderstandings and demands so that her hearing can proceed in accordance with the law and the rules of the tribunal. It is unacceptable that almost no progress towards effective case management has been achieved by the time of a sixth preliminary hearing in four years (not including hearings in the EAT and an application to the Court of Appeal). The claimant has had the opportunity since at least January 2020 this year to reflect on how matters proceed, to take and accept advice and to prepare, and to reframe her approach to these proceedings. She has not done so.

61. I recognise that a decision to strike out a claim is, in principle, the most severe sanction available to the tribunal, because it concludes a case without a hearing having taken place. In light of all the findings in this judgment, I am firmly of the view that it is not in the interests of justice that this claim should proceed, and that it is right to strike it out

Conclusion

62. It follows that in my judgment the application to strike out succeeds under each of Rules 37(1)(a) and (1)(b) and/or (1)(d) and (1)(e). I find, for avoidance of doubt, that each group of findings under each sub rule, taken with the overriding objective, would in isolation have led me to the same conclusion.

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Employment Judge R Lewis

Date: …12/01/2021…………..

Sent to the parties on: 13/01/2021.........

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