EMPLOYMENT TRIBUNALS

Claimant: Mr M Barlow

Respondent: British Gas Services Limited

Heard at: Manchester (by CVP) **On:** 23 April 2021

Before: Employment Judge A M Buchanan
(sitting alone)

REPRESENTATION:

Claimant: No attendance
Respondent: Mr Sam Proffitt of Counsel

JUDGMENT ON PUBLIC PRELIMINARY HEARING

It is the judgment of the Tribunal that all claims advanced by the claimant are struck out on the basis:

1. that there has been non-compliance with orders of the Tribunal by the claimant pursuant to Rule 37(1)(c) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules"). and
2. that the claims have not been actively pursued by the claimant pursuant to Rule 37(1)(d) of the 2013 Rules and
3. that the manner in which the proceedings have been conducted by the claimant is unreasonable pursuant to Rule 37(1)(b) of the 2013 Rules.

REASONS

Preliminary Matters

1. This matter came before me on 23 April 2021 to consider an application made by the respondent dated 2 December 2020 ("the Application) to strike out the claims of the claimant pursuant to rule 37(c) and/or rule 37(d) and/or rule 37(b) of the 2013 Rules.

2. The history of this matter is set out in the chronology which follows.

3. By a claim form filed on 4 January 2019, the claimant advanced claims of/for disability discrimination, unfair dismissal, breach of contract, unpaid holiday pay, arrears of pay, other payments, a redundancy payment and personal injury against the respondent (page 7).

4. The Tribunal had directed that the Application be considered at a preliminary hearing which had been set to take place on 13 January 2021. The rationale for the Application was that the claimant had failed to comply most recently with orders made by Employment Judge Feeney on 22 October 2020 ("the October Orders"). The October Orders had required the claimant to provide all additional information in respect of his claims by 12 November 2020, to make a further disability impact statement by 5 November 2020 and to send digital copies of recordings that he had made of meetings with the respondent, of which the respondent was unaware, by 5 November 2020. Those matters and the steps required to comply had been explained in detail to the claimant on 22 October 2020 by Employment Judge Feeney as is clearly set out in the narrative to the October Orders. The claimant subsequently requested an extension of time to comply with the October Orders to 1 December 2020, and the respondent agreed to extend time until 30 November 2020.

5. The respondent had asked for the Application to be dealt with on the papers but by a letter dated 8 January 2021 Employment Judge Leach directed that the Application should be considered at a public preliminary hearing. Employment Judge Leach vacated the hearing set for 13 January 2021 and instead set a hearing for 9 April 2021 with an estimated length of hearing of one-half day to be dealt with by Cloud Video Platform. The hearing on 9 April 2021 came before me. That hearing resulted in orders by me dated 9 April 2021 ("the April Orders") which were sent to the parties that same day. In the April Orders, I adjourned the public preliminary hearing until 23 April 2021 at 1.00pm, again by Cloud Video Platform, and I directed that, if there was to be any application from the claimant to postpone the hearing set for 23 April 2021 on the basis of his health, he should make any such application in writing by not later than 12 noon on 20 April 2021, with full supporting medical evidence.

6. I took that step because the claimant did not attend the hearing on 9 April 2021. On looking at the file I noted that the last the Tribunal had heard from the claimant before 8 April 2021 was an email on 11 November 2020 in which the claimant had asked for an extension of time until 1 December 2020 to comply with the October Orders. In the event the respondent agreed to that application, but nothing was heard by the Tribunal from the claimant thereafter. I was told by Mr Proffitt on 9 April 2021 that the respondent also heard nothing from the claimant until the day before the hearing set for 9 April 2021. I am told that there was a communication between the claimant and the respondent on 8 April 2021 in which the claimant sought a postponement of the hearing fixed for 9 April 2021. The respondent did not agree to that postponement application and wrote to the claimant to that effect. The claimant did not copy that postponement application to the Tribunal. The claimant replied by email on 8 April at 1700 hours to the respondent, which he did copy to the Tribunal, and the claimant's response to the respondent's refusal to agree to a postponement reads:

"To whom it may concern. I will respond to this odious communication as soon as my health permits. The respondent's legal representation are mocking my mental and physical wellbeing."

The claimant also wrote to the Tribunal at 1700 hours on 8 April 2021 in the following terms:
"To whom it may concern:
I wish to apologise for my unavoidable inability to attend preliminary hearing on 9 April 2021
I have been and am suffering from varying illnesses, which is affecting my mental and physical well-being
I believe some of my symptoms are due to being affected by Long Covid, from my original diagnosis over Christmas and the New Year 2020/21
I would also like to stress I feel I am being bullied and intimidated by the respondents solicitor, with ongoing threats of the case being thrown out, and myself being liable for substantial costs
This is exactly the kind of treatment I experienced from my ex employer British Gas prior to termination of my contract
I apologise that I am unable to attend said meeting, but will not apologise for experiencing quite serious health issues, that largely stem from the horrendous time I have been through since the termination of my contract and the COVID illness".

7. When I came to deal with this matter on 9 April 2021, that is all that I had received from the claimant. The claimant was not in attendance on 9 April 2021 by CVP or otherwise and I asked my clerk to telephone the claimant on 9 April 2021 at 10.00am to ascertain if he was proposing to attend. That call was made to the claimant's mobile telephone number (which he had provided to the Tribunal for communication by telephone) but there was no response and no facility to leave a message. The matter was called on and Mr Proffitt sought to persuade me to deal with the Application that morning and to strike out the claims pursuant to rule 47 of the 2013 Rules.

8. I declined to do so because I interpreted the email of 8 April 2021 as an application by the claimant (albeit expressed in extraordinary terms) for a postponement of the hearing on 9 April 2021, and I was conscious that the claimant had not had a reply from the Tribunal to that application (if that is what it was). I also bore in mind that the claimant represents himself in these proceedings. In order to fulfil the terms of the overriding objective set out in Rule 2 of the 2013 Rules to do justice between the parties, I concluded it was right for me to postpone the hearing on 9 April 2021, and I did so in the terms mentioned above.

9. The April Orders issued by me set out the history of this matter and paragraph 12 says as follows: -

"*I make it plain to the parties that if there is no further application made to postpone the hearing listed above or if an application is made which is not successful, the strike out application will be determined on 23 April 2021 as set out above. If the claimant does not attend that hearing, then he must be under no misapprehension that there is a possibility that all his claims will be struck out and that these proceedings will come to an end. This is a very serious matter, and the claimant would be well advised to consider the contents of these orders and reasons very carefully and act appropriately."*

10. The matter came before me on 23 April 2021 and again the claimant did not attend.

11. On examining the file on the morning of 23 April 2021, I noted that the April Orders had clearly set out that the hearing on 23 April 2021 was to begin at 1.00pm by CVP. I noted that the letter sent out by the administration of the Tribunal to confirm that matter had erroneously stated the hearing was to begin at 10.00am. Conscious that that might be confusing, I asked my clerk at 9.00am on 23 April 2021 to write to the parties by email to confirm the hearing would begin at 1.00pm, and the terms of the email sent to both parties reads: -

"There has been a Case Management Order and a Notice of Hearing sent to the parties with differing times for the start time of the hearing. One said 10.00am and the other said 1300 hours. To confirm, the correct start time is 1300 hours. Please join the hearing at 12.45 so I can test your connection. I have left a message on Ms Fitton's voicemail stating this, and Mr Barlow did not answer, and his number would not allow me to leave a message."

12. I directed my clerk in those circumstances to join the conference at 10.00am on 23 April 2021 and she did so for 15 minutes but no-one attended. Accordingly, I prepared for the hearing at 1.00pm but due to some technical difficulties within the Tribunal I was not able to make connection until 1.20pm. I found Mr Proffitt waiting in the lobby but the claimant neither attended nor was represented.

13. I had a bundle of documents before me for this hearing extending to 161 pages. The bundle had been provided by the respondent to the claimant and to the Tribunal. Any reference in this Judgment to a page number is a reference to the corresponding page within the hearing bundle. Given the seriousness of this matter and the fact that the claimant did not attend the hearing, I considered it appropriate to reserve my judgment, in order to give very detailed consideration to this matter. I issue this judgment with full reasons in order to comply with Rule 62 of the 2013 Rules and in order that both parties should have available to them my detailed reasoning.

The Chronology

14. A brief chronology of these proceedings is necessary, and it is as follows: -

14.1 The claimant filed the claim form in this matter on 4 January 2019 arising from his summary dismissal on 31 August 2018. The claim form was filed on the very last day of the applicable time period as extended by section 207B of the Employment Rights Act 1996. The claimant has indicated allegations predating the date of his dismissal on 31 August 2018, but those matters are still not particularised. The respondent filed a fully pleaded response dated 20 February 2019.

14.2 A private preliminary hearing ("PPH") took place on 9 September 2019 before Employment Judge Feeney when it was noted that it was not possible to ascertain the claimant's disability discrimination claims, and appropriate orders were made for the claimant to particularise them. The claimant indicated that he relied on the impairments of stress. anxiety and depression to meet the definition of disability within section 6 of the Equality Act 2010 ("the 2010 Act"). The respondent did not accept that the claimant was disabled at the material time and appropriate orders for

medical evidence and a disability impact statement were made. At that hearing the claimant had indicated to Employment Judge Feeney that he proposed to call some 15 witnesses at the final hearing. A further PPH was set for 27 November 2019. The orders made at the hearing on 9 September 2019 are hereafter referred to as "the September Orders".

14.3 On 18 November 2019 the respondent applied to strike out the claims for non-compliance with the September Orders. On 21 November 2019, the claimant asked for an adjournment of the hearing set for 27 November 2019 on the basis of his mental health and the conditions of depression, stress and anxiety from which he suffered and also on the basis of difficult family circumstances. That application was granted, and time was extended for him to comply with the September Orders and the PPH set for 27 November 2019 was relisted to 20 March 2020. In the event, it was subsequently postponed until 22 October 2020.

14.4 On 25 November 2019 the claimant filed an application to amend his claim in order to include allegations of automatic unfair dismissal and detriment on the basis of protected disclosures, and on 2 December 2019 the respondent objected to that amendment application.

14.5 On 4 December 2019, the Tribunal indicated that the application to amend would be considered at the hearing on 20 March 2020 and the parties were granted various extensions of time to 31 January 2020 and 28 February 2020 respectively to comply with the September Orders.

14.6 On 3 December 2019, the claimant filed some medical records in partial compliance with the September Orders.

14.7 On 7 February 2020, the respondent complained that the claimant had failed to comply with the September Orders as varied in relation to the provision of a disability impact statement and the provision of further and better particulars of his claim.

14.8 On 17 February 2020 the respondent renewed its strike out application on the basis that the claimant had failed to provide the disability impact statement and the further and better particulars of his claim as required by the September Orders as varied. On 28 February 2020 Employment Judge Allen reminded the claimant of the necessity to comply with orders of the Tribunal and directed that all outstanding applications would be considered on 20 March 2020.

14.9 On 3 March 2020 the respondent noted a continuing alleged failure by the claimant to comply with the September Orders and asked for a strike out or failing that a deposit order or failing that an unless order. On 10 March 2020, Employment Judge Howard issued a strike out warning to the claimant to comply with the outstanding September Orders.

14.10 As a result of that order on 17 March 2020, the claimant filed a medical certificate showing himself unfit for work by way of "*depressive disorder",* and on 16 March 2020 also objected to the strike out warning. The matter was reviewed by Employment Judge Feeney and on 18 March 2020 she stated that the claim was not struck out, but she issued an unless order (page 87) to the effect that the claimant must file his medical records and the amended disability impact statement by 2 April 2020. Employment Judge Feeney postponed the hearing set for 20 March 2020.

14.11 On 2 April 2020 the claimant filed a disability impact statement (pages 90-95) which did not fully comply with the requirements of the September Orders.

14.12 On 7 April 2020 the respondent applied for a strike out order on the basis that the claimant had filed the disability impact statement but not the required medical records. However, the claimant did file some medical records on 8 April 2020.

14.13 On 9 April 2020 the claimant wrote to the Tribunal to say he had now provided medical records and the disability impact statement and would provide further and better particulars which were still outstanding by 10 April 2020.

14.14 On 4 May 2020 Employment Judge Feeney confirmed that there would be no strike out of the claim but enquired with the respondent whether it had received the further and better particulars, and on 6 May 2020 the respondent said that it had not.

14.15 On 11 May 2020 the claimant sent some further and better particulars and as a result Employment Judge Feeney listed the matter for a further PPH on 22 October 2020.

14.16 At the hearing on 22 October 2020 Employment Judge Feeney spent a long time explaining exactly what was required of the claimant in respect of compliance with her orders, and various orders were issued as set out above (pages 119-129). A final hearing was set for 10 days to begin on 21 March 2022. That listing was on the basis that the claimant would call 15 witnesses and the respondent 5 witnesses.

14.17 On 11 November 2020 the claimant sought an extension to 1 December 2020 to comply with the orders made on 22 October 2020, and that was effectively agreed by the respondent, albeit to 30 November 2020.

14.18 Thereafter the respondent made the Application on 2 December 2020. For the reasons I have already set out above the hearing which had been set for 13 January 2021 was vacated and adjourned to 9 April 2021. Employment Judge Leach also directed that the case management orders requiring compliance by the respondent (but not the claimant) were suspended pending the determination of the Application.

14.19 At the time of the hearing on 9 April 2021, therefore, the claimant had failed to comply with any of the orders made by Employment Judge Feeney on 22 October 2020. In an email to the respondent of 8 April 2021 the claimant said that he could not reply to the respondent but would do so "*as soon as my health permits".*

14.20 On 8 April 202 the claimant wrote to the Tribunal in the terms set out at paragraph 6 above. On 9 April 2021 the claimant failed to attend the public PH set for that day and the April Orders were issued.

Submissions

15. At the hearing on 23 April 2021, I decided in light of my orders of 9 April 2021 to proceed pursuant to rule 47 of the 2013 Rules.

16. Mr Proffitt on behalf of the respondent first sought to persuade me to strike out all claims pursuant to rule 47. I considered the provisions of rule 47 and declined to do so. I decided that rule 47 of the 2013 Rules did not give me power to strike out

but did give me power to proceed to hear this matter in the absence of the claimant, and that is what I did.

17. Having told Mr Proffitt of my decision, Mr Proffitt proceeded to make submissions on the Application. I received written representations which were supplemented by oral submissions.

18. It was submitted that the hearing was to deal principally with rule 37(1)(c) and (d), which together evidenced unreasonable conduct of the proceedings by the claimant under rule 37(1)(b). It was the provisions of rule 37(1)(c) and (d) upon which Mr Proffitt principally relied. It was submitted that these proceedings had been ongoing for over two years and that the dismissal, which is the allegation latest in time, occurred in August 2018, which is almost three years ago, and that there are some still yet unparticularised allegations which apparently date from before the matters leading to the dismissal.

19. It was submitted that the claimant had had the benefit of two lengthy preliminary hearings, both before Employment Judge Feeney, at which considerable time had been taken to explain matters to the claimant and to assist the claimant to set out his claims but leaving certain matters, particularly in October 2020, for the claimant to comply with, and he had simply failed to do so.

20. During the course of the matter the respondent has had to make four strike-out applications namely in November 2019 (page 49), February 2020 (page 38), April 2020 (page 97) and December 2020 (page 146). It was accepted that the fact that applications were made does not mean to say that they were necessarily meritorious, but it was submitted that each and every one of them was meritorious. It was submitted that that history alone indicated just how bad the conduct of the proceedings had been by the claimant.

21. It was noted that the claimant had been subject to a strike out warning on 10 March 2020 (page 81), had been subject to an unless order on 18 March 2020 (page 87), and had been subject to other orders making clear to him the necessity to act, particularly the provisions of the April Orders.

22. It was submitted that the claimant had four matters to deal with arising out of the October Orders, namely the provision of an amended disability impact statement, the disclosure of recordings, the provision of additional information of the already pleaded claims and details of his application to amend to rely on protected disclosures to support a claim of detriment and automatic unfair dismissal. The claimant had not complied with or sought to comply with any of those orders. It was submitted that the respondent had behaved reasonably in granting to the claimant various extensions of time, particularly that to 30 November 2020. However, nothing had been heard from the claimant since that time, either by the respondent or by the Tribunal, save in relation to a very late application to postpone the hearing of 9 April 2021 on 8 April 2021which the respondent did not agree to and which became the subject matter of the April Orders.

23. It was submitted that the leading authority in relation to these matters was **Blockbuster -v- James 2006 (below)**, a decision of the Court of Appeal where it was said that strike out was a draconian step, and that to take such a step, the Tribunal must be satisfied either that there was unreasonable conduct of the

proceedings or that a fair trial was impossible. Reference was made to the decision of Mrs Justice Simler (as she then was) in **Bather -v- Royal Bank of Scotland [2015] (below)** at paragraph 12, and to **Evans -v- The Commissioner for Police 1993 (below)** in which Lord Justice Balcombe had said that a distinction should be drawn between intentional or contumelious conduct on the one hand or inordinate and inexcusable delay on the other hand.

24. It was submitted that there had been blameworthy disregard by the claimant of all case management orders in this case. There is no evidence of any specific mental health or physical impediment which prevents the claimant's compliance, and the period of delay from October 2020 until April 2021 is inexcusable. The Tribunal sees people with very serious medical conditions every day and they manage to correspond with the Tribunal in a timely fashion. The respondent does not accept that this claimant is disabled but even if he is, he could comply with orders but has simply not done so. What he needed to do was set out with stark clarity in the Orders of 22 October 2020 and his delay in complying is persistent and contumelious. The fault is exceptional and the worse seen by counsel for the respondent in ten years of practice. It is no answer to make vague references to ill health entirely unsupported by any medical evidence, and that is further evidence that the delay in this case is intentional and not accidental.

25. It was submitted that there is considerable prejudice to the respondent. It is over two years since the claimant was dismissed and over two years since these proceedings were begun, and the respondent has spent considerable sums in defending this matter and still does not have any clear idea of the allegations it faces. The prejudice to the respondent is very significant because it cannot prepare for any hearing. It cannot take steps to defend itself or to preserve any evidence which might be relevant because it does not know the allegations the claimant is to make. It is very probable that documentary evidence and witness evidence which it needs to rely on may now not be available, but it would have been available if the claimant had promptly pleaded his case in accordance with Case Management Orders. Even if the claimant were to comply now, it is years after the claim was brought and years after the events occurred, and evidence and recollection will have deteriorated over that time and it would have been very different had witnesses been able to be identified and told of the allegations against them in 2019, and for that reason a fair hearing is no longer possible because required evidence will have been destroyed. Even if the Tribunal cannot conclude that a fair hearing is not possible, equally it cannot conclude that a fair hearing is possible because of the claimant's intentional and contumelious delay in this matter.

26. It was submitted that the claimant had had other sanctions applied to him and the Tribunal had used its armoury of remedies in the sense of case management orders, clear directions, strike out warnings, unless orders, correspondence and finally the clearest order on 9 April 2021 which had still provoked no response from the claimant. It was submitted in the light of all those circumstances that it was appropriate to strike out on the basis that the claimant had not actively pursued this matter and had failed to comply with the orders of the Tribunal and had therefore unreasonably conducted these proceedings.

The Law

27. I have reminded myself of the provisions of rule 37 of the 2013 Rules of Procedure which reads: -

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds:

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented as set out in rule 21 above."

28. I reminded myself of the decision of **Evans -v- Commissioner of Police of the Metropolis [1992] ICR 151** where it was held that an Industrial Tribunal has power to strike out an application for want of prosecution but that power could only be exercised, if the default was not intentional and contumelious, where there had been inordinate and inexcusable delay on the part or on behalf of the applicant, and any such delay would give rise to a substantial risk that it was not possible to have a fair trial of the issues in the application or was likely to cause or have caused serious prejudice to the respondent. I note in particular the words of Lord Justice Balcombe in that decision: -

"I also agree that this appeal should be allowed. The powers of an Industrial Tribunal to strike out an application for want of prosecution are to be exercised in accordance with the principles set out by the House of Lords in ***Birkett -v- James [1978] AC 297*** *and* ***Department of Transport -v- Chris Smaller (Transport) Limited [1989] AC 1197****. These principles require that if the default is not intentional and contumelious it is necessary to show that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause or to have caused serious prejudice to the defendant, either as between themselves and the plaintiffs or between each other or between them and a third party."*

29. I have reminded myself of the decision of the Court of Appeal in **Blockbuster Entertainment Limited -v- James [2006] EWCA Civ 684** where Sedley LJ stated in relation to a strike lout order that: -

"The power, as the employment tribunal reminded itself, is a Draconic power not to be readily exercised. It comes into being if, as in the judgment of the Tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. If these conditions are fulfilled it becomes necessary to consider whether, even so, striking out is a proportionate response".

30. I have reminded myself of the decision of Mrs Justice Simler in **Baber -v- The Royal Bank of Scotland UKEAT/0301/15** and the guidance in that decision (paragraph 12) which reads: -

"*It is common ground and accepted by Mr Campbell that in deciding whether to strike out a party's case for non-compliance, Tribunals must have regard to the overriding objective of seeking to deal with cases fairly and justly. That is the guiding principle and requires consideration of all the circumstances and in particular the following factors: the magnitude of the non-compliance; whether the failure of the responsibility of the party or his representative; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some other lesser remedy would be an appropriate response to the disobedience in question."*

Conclusions

31. I have reminded myself that I must consider the application of the respondent separately in respect of each of the three grounds relied on. I propose to do so by considering the application to strike out on the basis of failure to comply with Orders of the Tribunal, then to consider if the claim has been actively pursued by the claimant and finally to consider whether the claims should be struck out on the basis of the manner in which the claimant has conducted these proceedings.

32. In looking at these matters, I have had in mind that a strike out order is draconian and not punitive. I bear in mind that I must always have in mind whether a fair trial remains possible and whether a lesser sanction could be imposed. I must always bear in mind whether a strike out of some or all of the claims is proportionate, and I note that strike out orders should only be exercised on the clearest grounds and as a last resort. I must not exercise my power to strike out in a rush or on the basis of inadequate information.

Application to strike out for failure to comply with orders of the Tribunal: Rule 37(1)(c)

33. It is appropriate to consider first whether to strike out the claims for failure to comply with orders of the Tribunal. I note that the claimant has not corresponded with this Tribunal since his email of November 2020 requesting an extension of time to comply the October Orders except for the emails of 8 April 2021 detailed above. In particular nothing has been heard from the claimant in response to the April Orders.

34. The note of the second PPH before Employment Judge Feeney on 22 October 2020 recorded that the claimant had been late in complying with the September Orders and that, when there was purported compliance, the further and better particulars of the disability claims were "*inadequate in a number of ways"* (page 121) and the disability impact statement dealt with so many extraneous matters that the claimant asked to file another such statement and it was agreed that he be given permission to do so. It was also noted that further particulars were still required of the new whistleblowing claims which the claimant wished to advance and that there may be a necessity to amend the claim form to deal with new matters detailed in the inadequate further particulars but not mentioned in the claim form itself. Employment Judge Feeney went on to set out the issues in the claims advanced but this amounted to a statement of the legal issues and in respect of all important factual matters, it was noted that the claimant still needed to plead his case.

35 As a result the claimant was ordered by the October Orders:

35.1 to provide all additional information identified in the Orders of 22 October 2020 by 12 November 2020 (subsequently extended by agreement to 30 November 2020);

35.2 to make any application to amend regarding matters not mentioned in the claim form by 3 December 2020 (that is the whistleblowing allegations and various allegations of harassment by reason of disability);

35.3 to make a further disability impact statement by 5 November 2020 (subsequently expended by agreement to 30 November 2020) and

35.4 to send to the respondent digital copies of the recordings of meetings he had had with the respondent, and of which recordings the respondent was not aware, by 5 November 2020 (subsequently extended by agreement to 30 November 2020).

36. Thus, by the time of the hearing on 23 April 2021, the claimant was almost four months late in complying with the October Orders. The magnitude of the claimant's default is very serious because the October Orders go to the very heart of the claims he is seeking to advance against the respondent and are designed to ensure the respondent knows the case it has to meet – some three years after the events in question occurred and over two years since these proceedings were instituted. The October Orders themselves are in two cases a repeat of the September Orders. The September Orders were not complied with in a timely fashion and, when compliance did take place, it was inadequate. I have to consider where responsibility lies in respect of the non-compliance and, as the claimant represents himself, it clearly lies with him. I have to consider the degree of disruption, unfairness or prejudice caused to the respondent by the non-compliance. I have considered the submissions of Mr Proffitt on behalf of the respondent in this regard summarised at paragraph 25 above. I broadly accept those submissions. The orders of which the claimant stands in breach are orders which go to the heart of these proceedings. They are not procedural matters such as the provision of a schedule of loss or a witness statement but rather orders which are designed to inform the respondent of the case it has to meet. That is important information for any respondent in order that it can gather the relevant documentary and witness evidence necessary to defend itself and I accept that, at present, the respondent is not able to take those basic steps in respect of some, at least, of the allegations it is to face. Even those allegations which

have been further particularised are still not clear to the respondent which resulted in the further orders in October 2020 detailed above. I conclude that the prejudice, disruption and unfairness to the respondent as a result of the non-compliance by the claimant with the October Orders is very considerable indeed. The respondent does not yet know, after over two years of this litigation, the case it has to meet in spite of repeated efforts to make the claimant provide the relevant details.

37. I have considered whether a fair trial is still possible in relation to any or all of the claims which the claimant advances. Unless and until the claims are clarified it is simply not possible to know whether a fair trial is possible, but everything points to that not being so when the claims advanced by the claimant are still unclear some 32 months since he was dismissed. I have considered whether some of the claims are clear. However, the failure to comply with the October Orders taints each aspect of the claims advanced. The claims of disability discrimination, howsoever advanced, are not yet clear nor has an adequate disability impact statement been filed. The claim of unfair dismissal remains unclear as the claimant is now alleging that his dismissal was automatically unfair by reason of having made a protected disclosure, but the details of that claim have not been provided. Thus, the respondent still does not know the case it has to meet in respect of any of the claims advanced and, after the time which has elapsed, the respondent does not yet know the witnesses who will be relevant or the documents which be relevant to its defence to these claims. Everything points to a fair trial of the issues not now being possible in respect of any of the claims advanced given the time which has elapsed without the necessary clarity being provided by the claimant.

38. I have considered whether a strike out of the claims is proportionate. Given the length of time the claimant has been in default and the failure to respond in any way to the April Orders, I am of the view that the non-compliance of the claimant with the October Orders is so central to the claims advanced that a strike out of the claims is proportionate. The non-compliance is stark and taints all the claims advanced. The length of the non-compliance is very considerable, there is no satisfactorily evidenced explanation of any kind advanced for the non-compliance and there has been no response to the April Orders. In the face of that degree of non-compliance, I conclude that a strike out of the claims on the basis of non-compliance with the orders of the Tribunal is proportionate.

39. For all the above reasons, I conclude that the claims of the claimant should be struck out for non-compliance with orders of the Tribunal pursuant to Rule 37(1)(c) of the 2013 Rules.

Application to strike out for failing to actively pursue the claim: Rule 37(1)(b)

40. I have considered the chronology of this matter detailed above. I have noted that the claimant has been in default of orders of the Tribunal throughout the history of this matter.as the chronology reveals. The claimant has been reminded by letter to comply with orders of the tribunal, he has been made the subject of a strike out warning to secure his compliance, he has been made the subject of an unless order to secure his compliance and he has had matters explained to him at two lengthy PPHs which should have left him in no doubt of the importance of compliance. That history of non-compliance is relevant to my assessment now as to whether the claimant's claims should be struck out for failure to actively pursue.

41. The claims cannot be said to have been efficiently pursued up to the time of the PPH on 22 October 2020 but at that point the matter was considered afresh, and new orders were made. It was indicated that there was to be no strike out of the claims at that stage. The claimant was effectively given a further chance to put his house in order and file the necessary information to make the claims ready for the final hearing then listed for March 2022. What has the claimant done since that generous chance was provided to him?

42. Other than to request one extension of time to comply, nothing was heard from the claimant after the October 2020 PPH until 8 April 2021 when a very late application was made to the respondent to postpone the hearing set for 9 April 2021. That was not the first time in the history of this matter that the claimant had made an eleventh-hour application for a postponement of an important hearing, and, for entirely understandable reasons, the respondent did not agree to it. On that same day the claimant wrote to the Tribunal to say he would not be attending the hearing set for 9 April 2021 but did not give any meaningful explanation of his non-attendance (other than vague references to ill-health entirely unsupported by any medical evidence) and no explanation at all for his failure to comply with the October Orders. The claimant knows from his experience in this litigation that he can request extensions of time if there is good reason for doing so, but he has not done so in respect of the October Orders but simply advised the Tribunal he would not be attending what was an important hearing on 9 April 2021. Giving the claimant the benefit of the doubt, I adjourned that hearing until 23 April 2021 in the terms that I have set out above. Despite the clearest warning given to the claimant as to the potential consequences of failing to attend on 23 April 2021 and telling the claimant what he needed to do if he wished to request a postponement of the public PH to consider the Application, the claimant has simply not corresponded with the Tribunal in any way. Against that background I look at the default on the part of the claimant in dealing with this matter.

43. I can only strike out for failure to actively pursue if there has been intentional or contumelious delay or the there has been inexcusable and inordinate delay which gives rise to a substantial risk that a fair trial is impossible, or which is likely to cause serious prejudice to the respondent. As I do not know why the claimant has not complied with the October Orders, I cannot expressly conclude that his delay is intentional but, absent any explanation, it is certainly contumelious in that it is disrespectful to this Tribunal to fail to comply with the October Orders and thus to fail to actively pursue the claims given the many chances the claimant has had to do so. However, I can, and I do conclude that the delay by the claimant is, absent any explanation, inexcusable and inordinate and there is a substantial risk both that a fair trial is impossible, and that serious prejudice has been caused to the respondent for the same reasons as I have set out above in respect of non-compliance with orders of this Tribunal. The claimant has brought these claims to the Tribunal and has a duty to prosecute them efficiently. Throughout the two years of this litigation, the claimant has failed in that obligation and has had chance after chance to correct his default. The final period of default from the end of November 2020 until 23 April 2021 is not explained and, absent any explanation, is inordinate. The failure of the claimant to respond in any way to the April Orders is disrespectful to the Tribunal and wholly unexplained.

44. When I consider the whole history of this matter, I conclude that all the claimant has not actively pursued the claims advanced by him and that his delay is contumelious. Furthermore, I conclude that there has been inexcusable and inordinate delay on the part of the claimant which gives rise to a substantial risk that a fair trial is impossible, or which causes serious prejudice to the respondent.

45. For all the above reasons, I conclude that the claims of the claimant should be struck out on the basis that they have not been actively pursued by the claimant pursuant to Rule 37(1)(d) of the 2013 Rules.

Application to strike out on the basis that the manner in which the proceedings have been conducted by the claimant has been unreasonable: Rule 37(1)(b)

46. I conclude, given my conclusions that the claimant has failed to comply with orders of the Tribunal and has failed to actively pursue his claims, that the manner of his conduct of these proceedings has been and is unreasonable. For the reasons given above, I do not consider that a fair trial of the issues is now possible. In addition, I do not consider that any lesser sanction than strike out is proportionate given the conduct of the claimant and his failure to engage in any meaningful way with the respondent or this Tribunal for a period in excess of 6 months. The claimant has had every opportunity throughout to comply with the October Orders and to engage constructively. He has failed to respond in any way to the April Orders. I conclude that it is proportionate to strike out all the claims on the basis of the unreasonable conduct of these proceedings by the claimant.

47. For all the above reasons, I conclude that the claims of the claimant should be struck out on the basis that the manner of the conduct of the claims by the claimant has been unreasonable pursuant to Rule 37(1)(b) of the 2013 Rules.

Conclusion

48. Accordingly, the claims of the claimant are struck out.

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Employment Judge A M Buchanan

Date: 5 June 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 June 2021

FOR THE TRIBUNAL OFFICE