EMPLOYMENT TRIBUNALS

Claimant: **Ms Eunice Awala**

Respondent: **The Financial Ombudsman Service**

Heard at: **East London Hearing Centre**

On: **9 June 2021**

Before: **Employment Judge Tobin**

Appearances
For the claimant: Ms S Bullen Manson (counsel)
For the respondents: Mr R Hignett (counsel)

RESERVED JUDGMENT
FOLLOWING PRELIMINARY HEARING (OPEN)

1. **The claimant's claim is struck out under rule 37 of the Employment Tribunals Rules of Procedure on the basis that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious.**

2. **There is no order in respect of costs.**

REASONS

The hearing

1. This has been a remote hearing. There had been no objections to the Employment Tribunal's proposed cloud video platform "CVP" or video hearing by the claimant or the respondent. All the participants were remote (i.e. no-one was physically at the hearing centre). A face-to-face hearing was not held because it was

not practicable in the light of the coronavirus pandemic and the Government's restrictions. The hearing was listed as a Preliminary Hearing (Open) and all the issues could be determined in this remote hearing.

2. This determination should be read with my record of the hearing of 8 & 9 December 2020.The respondent has made application to strike out the claim on the basis that: (a) the manner in which proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious pursuant to the Employment Tribunal Rules; and (b) that it is no longer possible to have a fair hearing in respect of the claim. The respondent has also applied for reimbursement of part of the costs which it incurred (i.e. counsel's fees) at the hearing of 8 & 9 December 2020.

3. Before commencing the hearing, I clarified whether reasonable adjustments would be necessary. The claimant said that she was satisfied with short, clear questions and breaks when appropriate. These were the adjustments indicated by Employment Judge Gardiner as far back as 18 November 2020 and which I had also identified on day 2 of the previous hearing. Although I was not sure whether such adjustments were strictly necessary, such measures were readily available, easily agreed and could apply to any hearing.

The law

4. The respondent made applications under rules 37(1)(a), 37(1)(e) and 76(1)(a) of Schedule 1 The Employment Tribunals Rules of Procedure of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. Mr Hignett withdrew his application under rule 76(2) as he accepted that the last hearing had not be adjourned upon the application of a party (the respondent had pressed for the hearing to continue with an order excluding the claimant, which the Tribunal refused, and we adjourned the case under the Tribunal's own motion, pursuant to our general case management powers contained in rule 29).

<u>The overriding objective</u>

5. It is worth restating the overriding objective contained within rule 2:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

<u>Striking out</u>

6. Rule 37 provides:

> (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)…
> (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) …
> (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).

7. Scandalous means irrelevant and abusive of the other side. it does not mean shocking: *Bennett v Southwark London Borough Council 2002 ICR 881*. Vexatious includes anything that is an abuse of process: see *Attorney General v Barker 2000 1 FLR 759 QBD (Civ Div)*. Furthermore, a party may also find that her claim struck out on these grounds if she has conducted her case in an "unreasonable" manner. For a Tribunal to strike out for unreasonable conduct, it has to be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; in either case the striking out must be a proportionate response: *Blockbuster Entertainment Limited v James 2006 IRLR 630 CA*.

8. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a Tribunal must take into account whether a fair trial is still possible: *De Keyser Limited v Wilson 2001 IRLR 324 EAT*.

9. Applying *Bolch v Chipman 2004 IRLR 140 EAT* before making any strike out order under rule 37(1)(b), I must:

1. Find that the claimant has behaved scandalously, unreasonably or vexatiously when conducting the proceedings.

If I make such a finding, then

2. I must consider if a fair trial is possible, as a strike out should not be regarded merely as a punishment (save as in exceptional circumstances).

Even if a fair trial is unachievable,

3. I should consider the appropriate remedy in the circumstances as it might be appropriate to impose a lesser penalty, e.g. by making a costs order rather than striking out the claim.

10. This approach was reinforced by *Laing O'Rourke Group Services Ltd & Ors v Woolf & Anor EAT 0038/2005* where the Employment Appeal Tribunal said, "*Courts should not be so outraged by what they see as unreasonable conduct as to punish the party in default in circumstances where other sanctions can be deployed and where a fair trial is still possible*". In this instance the defaulting party was the respondent and the EAT felt a more proportionate sanction could have been allowing the hearing to proceed without the evidence of the employer.

Costs

11. Rule 76 provides:

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted…

12. *Gee v Shell UK Limited [2003] IRLR 82* set the culture for ordering costs and set out an important public policy consideration:

> It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to ordinary people without the need of lawyers and that in sharp distinction from ordinary litigation in the United Kingdom losing does not ordinarily mean paying the other side's costs.

This is a sentiment often repeated in subsequent appeal decisions over the years.

13. Costs remain the exception rather than the rule in the Employment Tribunal. However, on the other hand, employers should not be subject to expensive, time consuming, resource draining claims or conduct that are or is wholly without merit.

14. "Unreasonable" in respect of costs is to be attributed its ordinary and natural meaning (and not to be interpreted as if it means something similar to, "vexatious" see *Dyer v Secretary of State for Employment UKEAT/183/83)*.

15. *Yerrakalva v Barnsley Metropolitan Borough Council [2012] ICR 420* emphasised that the Tribunal has a broad discretion and should avoid adopting an over-analytical approach, for instance by dissecting the case in detail or attempting to compartmentalise the relevant conduct under separate headings such as "nature", "gravity" and "effect". The words of the rule should be followed, and the Tribunal should:

> … look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.

16. Although causation is undoubtedly a relevant factor, it was not necessary for the Tribunal to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed.

17. Whilst the threshold test is the same whether a party has been represented or not, the exercise of discretion should take into account whether the party in question has been professionally represented. A litigant in person should not be judged by the same standards as a professional representative; the self-representing may lack the objectivity of law and practice that a professional representative will (or ought to) bring to bear. See *AQ Ltd v Holden [2012] IRLR 648 [which deal with the previous rules of procedure]*:

> The threshold tests in r40(3) are the same whether a litigant is or is not professionally represented. The application of those tests should, however, take into account whether a litigant is professionally represented. A tribunal cannot and should not judge a litigant in person by the standards of a professional representative… Justice requires that tribunals do not apply professional standards to lay people, who may be involved in legal proceedings for the only time in their life… lay people are likely to lack the objectivity and knowledge of law and practice brought by a professional legal adviser. Tribunals must bear this in mind when assessing the threshold tests in r 40(3). Further, even if the threshold tests for an order for costs are met, the tribunal has discretion whether to make an order. This discretion will be exercised having regard to all the circumstances. It is not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice.

> This is not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity…

18. As for the amount of costs that we may order should be paid, rule 78(1) provides that we may:

> *(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;*
>
> *(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;"*

19. Rule 84 provides that the Tribunal may have regard to the paying party's ability to pay and it is put as follows:

> *In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

20. The Tribunal has a discretion, not an obligation, to take into account means to pay. If I decide not to take into account the party's means to pay, I should explain why. If I decide that I will do so, I should set out my findings about the ability to pay and what impact that has had on my decision as to whether to award costs. If I do decide to award costs, I should explain what impact the paying party's means had on my decision as to how much those costs should be, see *Jilling –v- Birmingham Solihull Mental Health NHS Trust EAT 0584/06*.

The evidence

21. The parties provided a joint hearing bundle of 228 pages. As I had chaired the adjourned hearing on 8 & 9 December 2020 I was familiar with the documents; nevertheless, before the hearing commenced, I re-read: the Claim Form and Response and other relevant pleadings (which were not in the hearing bundle); the Tribunal Orders contained within the hearing bundle [HB1-33]; the respondent's strike out application of 16 December 2020 [HB34-45]; and the claimant's response of 22 December 2020 [HB73-86]. I had not received all of the hearing bundle before we commenced the hearing, so the respondent's solicitor re-sent this to the Tribunal, which I received promptly, and I thank her for her efforts in this regard. I had a short break for further preliminary reading, which the parties identified as follows: the claimant's statement [HB192-205]; 3 letters from Dr Salpadoru [HB91, 92, 196-178]; the claimant's email to the Tribunal of 8 December 2020 [HB146]; the claimant's partially completed form EX140 [HB180-191] from the hearing bundle and a chronology, summary impact statement – witnesses and Mr Hignett's summary of the claimant's allegations which were sent to me separately. I read all of the documents referred to me before we commenced the hearing and I ensured that the parties and I were working from the same documents. Following the hearing I went through the hearing bundle to ensure that I had not missed anything important.

22. The claimant gave evidence through a good internet connection. She was engaged and fluent in her evidence. She responded to questions without any difficulty in understanding, although she declined to answer (either fully or at all) some questions from Mr Hignett that I regarded as more challenging to her case. The claimant had a paper bundle of documents and negotiated this with ease. She declined my offer of a break part way through and remained relaxed throughout.

23. At the hearing I was concerned that the claimant raised a number of points about her ill-health, yet she refused to disclose her GP notes. I had previously spelt out the need to disclose this important corroborative medical information both at the adjourned hearing and in my summary and ensuing orders. The respondent had pursued the claimant's non-provision of her GP notes [HB222]. The claimant's solicitor responded by selectively misquoting my orders [HB223]. In any event, this important evidence was not made available to me and there was no good reason why not.

24. The claimant's GP, Dr Salpadoru, provided a longer letter, dated 4 February 2021. The letter largely reports what the GP has been told by the claimant. The letter provides surprisingly little critical analysis. The letter mooted a number of reasonable adjustments for future hearings. The first adjustment proposed was for written questions in advance of the hearing. The claimant refused to address many of Mr Hignett's written questions, despite being chased on this, and in particular, the claimant refused to answer the most helpful and relevant questions (for the Tribunal). So, the claimant undermined the assessment and evaluation of her GP's input on this important point. Her GP's evaluation was further undermined when, upon questions from Mr Hignett, the claimant accepted that half-day hearing sittings were not necessary for future hearings and she would not need to turn off her camera in the future. The only remaining reasonable adjustment proffered by Dr Salpadoru was in respect of limiting the claimant's participation at any future hearing and it was difficult to see how this purported adjustment could work if, as is likely, the claimant could not find a representative for a future hearing.

25. The respondent's solicitor prepared a document entitled *summary impact statement – witnesses.* The 5 respondent witnesses indicated were not called to give evidence; nevertheless, I accept that this is an accurate record of the position of these 5 respondent witnesses before, during and after the adjourned hearing. The information contained within this document appears credible and consistent with what I would have expected these individuals to say had they been called to give evidence. Accordingly, I am prepared to give weight to the effect that the postponement has had (as described by Ms Akhtar) on these individuals.

Findings of fact

26. In assessing the evidence and making findings of fact, I placed particular reliance upon contemporaneous documents and as an accurate version of events. I also placed some emphasis (and drew appropriate inferences) on the absence of documents that I expected to see as a contemporaneous record of events. Witness statements are, of course, important. However, these stand as a version of events that was completed after the events in question and are drafted through the prism of either advancing or defending a particular issue. So, I regard statements with a degree

of circumspection as both memories fade and the accounts may reflect a degree of re-interpretation. When determining certain findings of fact, where I consider this appropriate, I have set out why I have made these findings.

27. The claimant's letter dated 22 December 2020 (which contained her reply to the respondent's application) caused me concern. This response both attempted to argue further points already addressed at the hearing and raised new points that had not been raised when we determined to adjourn the hearing. However, I was troubled that this letter gave an inaccurate, and misleading, account of what had in fact transpired at the adjourned hearing. I dealt with this at the commencement of this Preliminary Hearing. I inform Ms Bullen Mason that I had written to the claimant (and copied the respondent) expressing my concern in respect of her re-casting of events. I understand that the claimant's unreliable account of the previous hearing gave rise to the respondent requesting that I deal with this hearing personally. I reaffirmed in correspondence that my record of hearing was accurate, and I rejected the claimant's contended corrections. Of significant relevance, I did not accept that the claimant could turn off her camera for the duration of the hearing. I made it quite clear at the hearing that this was a matter that the Tribunal could consider but that we needed to be convinced that this was a reasonable adjustment. By speaking to the claimant with her camera off, I was attempting to get her to engage with the previous hearing, which she rebuffed.

28. The claimant wrote a clear and detailed statement and response to the respondent's application to strike out and for cost. She confirmed that she was aware of the questions that Mr Hignett asked at Annex A to the respondent's application (at pages 43 to 45 of the hearing bundle). The claimant said she was aware of the views expressed by the Tribunal as to the relevance and appropriateness of answering those questions. The claimant did not respond to various questions in respect of her childcare arrangements, her health and her financial means. Other than saying that she had not been ordered to answer these questions, the claimant proffered no adequate explanation as to why she would not provide such relevant information. I took this into account when I determined that the claimant was an unreliable witness.

Childcare

29. During questions from Mr Hignett the claimant confirmed that she was ready to proceed with the hearing on day 2 and that the only obstacle to continuing the hearing was the breakdown in her childcare arrangements. This was also set out in her statement at paragraphs 18 and 19. The claimant's mother had a kidney condition and high blood pressure and the claimant said that her mother was ill during the night of 8/9 December 2020, which caused the necessity for an adjournment.

30. The claimant confirmed that her mother had never looked after her 2 children for any period equivalent to the length of hearing. Following a discussion of the claimant's mother's ill-heath, Mr Hignett put to the claimant that this illness and the ensuing disruption was entirely foreseeable. He said that the claimant should not have arranged for a sick relative to look after her children. The claimant accepted that her mother's illness had been foreseeable.

31. When asked about a possible childcare back-up plan, the claimant said that one of her sisters was away on holiday at that time of the hearing and that her other sister was aged 14, so she was at school and could not look after her children. The claimant said that she could not get a place in nursery for her children. She said all nurseries were closed in between lockdowns due to the covid-19 restrictions. When I queried this, the claimant changed her evidence and admitted that, despite saying to the contrary, she had not approached any nursery in respect of possible childcare. She later added that she did not feel comfortable in leaving her children with any nursery.

32. The claimant confirmed that she had not approached any friends or childminders or mum's support networks or explored any other possible childcare arrangements for both the adjourned hearing and this hearing. She said the arrangements for any future hearing will be the same as those in place at the original adjourned hearing. The claimant could not explain why her mother (or her sisters) could provide a short statement confirming what the claimant told me or even a letter to verify the future childcare arrangements.

33. When I asked her to explain her childcare arrangements at the last hearing, the claimant refused to answer my questions. I asked her as calmly as possible offering reassurance. The claimant did not offer a satisfactory explanation at this hearing why she would not answer me. The medical evidence, such as it is, does not deal with this refusal to engage and there was no medical history of selective disengagement or selective mutism.

<u>Ill health</u>

34. It was made obvious in the orders and correspondence that there is an issue that the seriousness of the anxiety contended by the claimant after the adjourned hearing does not correlate with the limited medical evidence disclosed, the disability impact statement and the claimant's substantive statement.

35. As stated in my earlier determination, I accept the claimant suffers from anxiety and depression. However, her anxiety and depression dates back to 2016. More recently, the claimant was able to issue these proceedings, she prepared a detailed statement and she dealt with matters in the interim. Since the adjourned hearing the claimant has prepared a very detailed response to the respondent's application and a lengthy statement arguing her position for this Preliminary Hearing.

36. The claimant's GP's letter of 24 November 2020 said that the claimant reported an exacerbation of her anxiety and depression over months, yet the claimant did not seek medical advice during that period. Such contended deterioration was not mentioned to Judge Gardiner despite his specific enquiries about the claimant's mental health. When asked by Mr Hignett why the claimant had not sought medical treatment or raised this with her solicitor or the Tribunal in September, October, November or December last year the claimant could not proffer a satisfactory response.

37. The claimant was still not able to explain why she refused to turn on her camera. The only explanation she would give was that she felt overwhelmed. The last GP's letter reported that the claimant said just after the hearing that she had a panic attach at the adjourned hearing; however, the claimant's contention was not analysed or evaluated in her GP's report, what she said was merely relayed by Dr Salpadoru.

38. The claimant refused to disclose her GP records (which I said could be redacted, if necessary). This important evidence was sought by the respondent. I made the Tribunal's position clear at the adjourned hearing and in my summaries, i.e. that I was not going to order the claimant to provide further information. This was because I was not confident in the claimant's compliance, and I did not want the focus of any further hearing to be the claimant's disregard of Tribunal orders. However, it was made plain that if the claimant failed to provide the full information and corroborative documents then I would take this failure into account and draw appropriate inferences.

39. The claimant has now been prescribed a low or starter dose of anti-depressant medication. In addition, she said that does yoga and exercise and she hopes to undertake some counselling in the future but she has not had any such therapy in the 6-months following the adjourned hearing. So the evidence of a significant deterioration of the claimant's mental health is thin, often contradictory and inconsistent.

Financial details

40. The claimant said that she was not working and had not worked since her employment with the respondent ended. She said that she intended to look for work in the future but that she had not given this much thought in the last 1 to 2 years. She mooted that she might look for work in retail maybe 10 hours per week as this would fit in with her childcare. The claimant said that she had savings but that these ran out in November 2020.

41. The claimant did not provide details of her bank account, nor did she provide the bank statements indicated in both my summary document and in the subsequent orders made. When asked (twice) about the failure to provide bank statements the claimant gave no answer nor explanation for her default. When asked how many bank accounts the claimant said she had "only one active" bank account. When asked how many "inactive bank accounts?" the claimant said that she had "no inactive bank accounts" only one bank account. This subsequent answer was not consistent with her earlier answer, nor was this a credible response.

42. The claimant was also asked about her car expenses [B188]. She said that her car cost £331 per month, but upon further enquiry, she said that the car was returned in November 2020, as she could not afford the balloon payment. Yet she still included this on the expenses declaration, which although not dated was completed after she said that she returned her car.

43. The claimant confirmed that she was paying for her barrister for this hearing; she said that she was paying by instalments but when this was queried by Mr Hignett,

she said that she had not discussed any instalment plain with her counsel nor her chambers. This is not believable.

Professional representation

44. This is relevant because part of the reason the claimant previously sought an adjournment was that she contended that it was not fair (and breached her human rights under the European Convention of Human Rights) to proceed without a representative. This was the basis of her Article 6 application, which I found to be unmeritorious. Despite her strong human rights protest, the claimant said at the hearing that if she could not get a representative to act at the final hearing then she was resolved to represent herself.

45. In contrast to this assertion, the claimant has never personally conducted any of the numerous hearings in this claim. I note that she is not self-representing for this 1-day hearing. The claimant said she still intends to instruct a professional representative for any possible re-scheduled hearing. She confirmed that Ms Bullen Manson would not be her trial representative. The claimant said that she had taken steps to secure a representative but when asked, she would not detail the steps taken. This is surprising, as at all previous hearing, Ms Clarke, had consistently maintained that she would not be the representative at the final hearing.

46. When asked how she could afford to pay for a professional representative for a final 8-day hearing the claimant said that she would pay in instalments from her universal credit or borrow the money. This is not feasible, if I accept that the financial details provided by the claimant represents a true picture, then she has no money to instruct a solicitor, barrister or unqualified professional representative – even for this 1-day hearing. It is wholly unlikely that a representative would undertake such a long and complex case on a *no win, no fee* basis.

47. The claimant said that she had not looked into getting a representative because of her mental health difficulties. This is clearly not true because her solicitor wrote to the Tribunal on 25 November 2020 setting out the claimant's recent steps through the bar public access scheme [HB206]. When this document was put to her the claimant said she could not remember what steps she took.

The respondent's costs.

48. Mr Hignett explained that he's brief fee for the December 2020 hearing was £12,000 plus a refresher for day 2 of £1,350. He explained that the brief fee was to secure the booking in his diary and to provide for the considerable preparation required. The amount of £10,350 claimed represents the costs that have been "wasted" i.e. those costs directly attributed to the adjourned hearing only. Should the case reconvene for a further final hearing then Mr Hignett's retainer provides for a 25% discount on his next brief fee (hence amount claimed of £9,000 plus £1,350). The respondent has not sought to claim its solicitors' costs because that was not billed internally, and it would be difficult to properly quantify this cost to the organisation. Furthermore, the respondent did not seek reimbursement of the time "wasted" for its

employee witnesses to prepare for and attend the adjourned hearing (as set out in the respondent's witness impact summary document).

49. Ms Bullen Manson accepted that Mr Hignett's fees were reasonable, but she argued that as the hearing was adjourned on day 2 only the claimant should not be responsible for the respondent's fees on day 1. I reject the argument as any future Tribunal will need a full day's reading into the case and the claimant's further application to adjourn on day 1 did not advance the proceedings in any discernible manner. Although I am not obliged to determine a precise causal link between the unreasonable conduct contended and the specific costs being claimed, I find that the adjournment occasioned by the claimant's conduct directly caused the £10,350 loss claimed by the respondent.

My determination

50. Ms Bullen Manson asked that I treat the claimant as a litigant in person so as to attract a more favourable discretion when considering costs. The claimant was represented for this hearing, and she has been represented at all attended hearing, or, at least, all significant hearings. The claimant said that she personally wrote the response to the respondent's strike out and costs application, without input from anyone else, which I struggle to believe as this document refers to the Employment Tribunal Rules of Procedure, she quotes case law and she addresses legal tests. If the claimant wrote this document herself then it displays a capacity and confidence to dispute facts and engage and advance legal arguments. So, for what difference it makes (if any), I do not hold the claimant to a lower standard because she purports to be self-representing.

51. Ms Bullen Mason conflated the reasons for adjourning the last hearing. The claimant's application to adjourn was rejected by Judge Gardiner. The claimant sought to challenge this, and I chaired a full tribunal which dealt with her further application on day 1 (i.e. 8 December 2020). This application was largely based on the claimant's ill-health and the application was rejected for the reasons I set out in detail in my record of hearing.

52. I am satisfied that the claimant was determined that the hearing commencing 9 December 2020, would not proceed. The claimant refused to engage in any dialogue with the Tribunal. I spoke in a calm, supportive and non-threatening manner; yet the claimant refused to reply or engage. The Tribunal considered all sorts of measures, on our own imitative, to accommodate the hearing proceeding, and shared this with the claimant. This is recorded in my note of the hearing. The claimant was steadfast in her non-engagement and her refusal to discuss how we might be able to proceed.

53. Mr Hignett contended that a pattern has emerged of the claimant not attending hearings and resisting efforts to ensure the proper preparation and hearing of this case. She has a history of ignoring Tribunal Orders, significantly the recent orders of Judge Gardiner. The documented history of this whole sorry saga indicates that the claimant was determined to avoid the hearing proceeding. She disrupted the rest of day 1 with an agitated baby on a mobile phone (when she had a laptop available). Despite assurances to the contrary from her erstwhile solicitor this disruption was carried forward onto day 2.

54. I reject that this hearing was adjourned because of the claimant's ill-heath as this was dealt with on day 1. Day 2 centred upon the claimant's childcare arrangement and her refusal to co-operate with the Tribunal's enquiries. There is no satisfactory corroborative evidence that the claimant's behaviour on day 2 was a manifestation of her anxiety and depression.

55. The claimant was untruthful and unreliable. The claimant sought to mislead a future Tribunal as to the circumstances of the events at the postponed hearing. She was not truthful in her evidence of making enquiries with nurseries prior to the adjourned hearing. She attempted to mislead on her evidence of her car payments. Her evidence in respect of her bank account(s) was contradictory and unreliable and I do not believe what she said with regard to paying for her barrister as this was not credible. She lied in saying that she had not made efforts to obtain representation for her final hearing. In such circumstances, I regard her refusal to provide her GP notes, bank statements and other financial records together with her refusal to answer the respondent's written questions as an attempt to mislead the Tribunal. I am sorry to say that because of my profound dissatisfaction with the claimant's evidence, I am unwilling to accept any part of the claimant's account that is not corroborated.

56. For the reasons I set out above, I do not regard the claimant's GP's input as illuminating or persuasive. However, the claimant further undermined Dr Salpadrou's clinical judgment by disregarding her proposed reasonable adjustments.

57. The claimant said the adjournment on day 2 was caused by the failures in her childcare arrangements. If she can be believed that her mother was ill, then this was foreseeable. On her account, the claimant had no back up plan and that was unacceptable in the circumstances.

58. Under the circumstances, I reject any contention that the previous adjournment was caused by the claimant's ill-health, and I reject any contention that the claimant's behaviour on orchestrating the adjournment was due to her depression or anxiety. The claimant has been represented throughout proceeding and despite having 11-months' notice of the last hearing, she found herself self-representing for a substantial and complex 8-day hearing which she was determined to get out of. The claimant's conduct on day 2 (i.e. 9 December 2021) as described in my previous note was vexatious because she sought an adjournment at all costs and this was an abuse of process. It was also unreasonable under rule 27(1)(b).

59. The case was in a position to proceed 6 months ago. Given that both sides agreed that the hearing need not be extended to more than 8-days, it is unlikely to be accommodated until late 2022 but more likely early 2023. This will be over 5 years from when the discrimination allegedly started and between 3½ to 4 years from when the claimant's constructive dismissal. I accept Mr Hignett's submission that this is not a case easily determined by documents. Memories of events and interactions are key, and nuances are important and difficult to recall after this period of time. Disputes over what was said cannot be easily reconciled by the documents nor can disputes over the alleged falsification of documents.

60. Most of the allegations (20 out of 27) are made against respondent's witnesses RS and DG. RS has taken voluntary redundancy and DG will be made compulsory redundant in early August 2022. JH responds to 1 allegation of discrimination and her employment with the respondent will also terminate imminently. These are allegation that could severely damage the reputation of the respondent witnesses as well as blight future careers. The respondent has a genuine and substantial fear that those leaving its organisation will not want to participate in these proceedings further, particularly in respect to events that took place so long ago. I accept that there is a considerable chance that in the next 1½ year or so the respondent may lose contact with key witnesses, or such witness will not want to participate in the respondent's defence. Ms Bullen Mason point that "*it's their problem*" is trite but fails to recognise that this is a substantial problem and disadvantage caused by the claimant's behaviour. The possibility of witness orders does not adequately address this issue.

61. I thought of reviewing the position in say, November or December 2022. However, this would only create uncertainty and incur additional costs and complexity. I do not consider that this would be consistent with the overriding objective. So, I need to make a decision now, and, on balance, I determine that the effluxion of time would have a significant detrimental effect upon memories and the uncertainty of witness availability would also have the effect that a fair trial would not be possible.

62. Although I was frustrated by the claimant's conduct at the adjourned hearing and I was concerned about her honesty at this Preliminary Hearing, I remind myself that it is not my role to be punitive. That said, my decision may have a punitive effect though that is not my intention. I am not outraged by the claimant's behaviour as Judges often deal with disruptive parties and unreliable witnesses. The claimant was otherwise courteous, and her conduct was no slight upon the Employment Tribunal.

63. The claimant made various and multiple claims in respect of flexible work, disability discrimination, pregnancy discrimination and constrictive dismissal. The claimant's allegations ranged over approximately 1½ years from November/ December 2017 to May 2019. All but the claims of constructive unfair dismissal appear to be out of time. I observed previously that because of the far-ranging nature of the discrimination allegations, which are directed at several different individuals, it may be difficult to persuade a Tribunal that some or all of these form part of a continuing act of discrimination. Many of the claims engage the more restrictive *reasonably practical* test. There is considerable dispute in respect of the facts of this case. Having undertaken 1-day's reading for day 1 of the adjourned hearing, my preliminary assessment is that the claimant has a difficult case to prove. I have not heard any oral evidence, so I am somewhat cautious but from reading the key papers, I do not regard this as a particularly strong claim. If I was satisfied that the claimant had a particularly good case on its merits, then this would feature in my assessment of proportionality. So, I disagree with Mr Hignett that this is obviously a weak claim. I cannot say that the claimant has pursued an obviously meritorious claim, and this carries some limited weight in my overall assessment.

64. I do not believe that the claimant is either willing or able to represent herself at any future hearing so I have considerable concerns that we may be in the same circumstances in future, i.e she tries to pull the plug at the last minute. This will also

apply to both the claimant's childcare arrangement and her health condition. There is no significant change at this hearing in respect of the claimant's mental health or her childcare that gave me any confidence that the events of 8 and 9 December 2020 would not reoccur.

65. I cannot think of other sanction that can be deployed in lieu of striking out the claimant's claim. Although I disregard the claimant's evidence in respect of her financial affairs, on an objective analysis, she is a mother of 2 children who is not working. So there could be the chance that a financial penalty, however appropriate, might have adverse impact upon her children. Under the circumstances, proportionality dictates that I strike out this claim rather than order the appropriate financial penalty.

66. In any event, because I conclude that a fair hearing is not likely to be possible, and because I have no confidence that a late adjournment would not happen again, I cannot allow this claim to proceeding. It is not a proportionate sanction to debar the claimant from giving evidence and allow the claim to proceed.

67. For the reasons set out above, I also find the claimant's behaviour at the adjourned hearing amounted to abusive, disruptive, and otherwise unreasonable conduct under rule 76(1). The claimant was requested to provide full details of her financial affairs with appropriate corroboration. She refused to disclose her bank statements for the last 6-months which is essential to undertake any meaningful financial appraisal. Even with Mr Hignett's brief cross-examination, the claimant's evidence on significant outgoings (such as her car and the payment of her barrister) was most unsatisfactory. Consequently, I can make no reliable assessment of the claimant's ability to pay.

68. I make no order in respect of costs. I strike out the claimant's claim and that is a sufficient and proportional response in the circumstances. If I allowed the claimant's claim to proceed then it would be wholly disproportionate not to award the respondent the £10,350 proportion of its costs claimed. That would not do justice to the situation. However, had the claimant's case continued, then even if I had determined that the claimant had little money available, I still would have made and order against her for the full costs sought by the respondents. The claimant behaviour in orchestrating the adjournment was such that the Tribunal really needed to mark that conduct as unacceptable and such an award would have done justice to the respondent and have made the point appropriately.

Employment Judge Tobin
Date: 23 June 2021