EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110455/2021

Preliminary Hearing held in Glasgow on 13 January 2022

Employment Judge Ian McPherson

Ms Irene Sneddon	**Claimant** **In Person**
Erskine Hospital	**Respondents** **Represented by:** **Mr Liam Entwistle** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The **reserved** judgment of the Employment Tribunal, having heard the claimant in person, and the respondents' solicitor, in Preliminary Hearing, is that: -

(1) the respondents' opposed application for Strike Out of the claim in its entirety is **granted**, and, accordingly, the whole claim against the respondents is dismissed by the Tribunal on the basis that it has no reasonable prospects of success in terms of **Rule 37(1) (a) of the Employment Tribunals Rules of Procedure 2013;** and

(2) as regards the respondents' application for an award of expenses against the claimant, the Tribunal **orders** the respondents, if so advised, to intimate a formal application for expenses in terms of **Rules 74 to 84 of the Employment Tribunals Rules of Procedure 2013,** within 28 days of issue of this Judgment, and the claimant shall have a period of no more than 7 days thereafter to intimate to the Tribunal, with copy at the same time to the

respondents' solicitor, by email, any comments or objections to the respondents' application, following which the Tribunal will determine any further procedure to address any such application for expenses.

REASONS

Introduction

1. This case called before me for the third time on the morning of Thursday, 13 January 2022, at 10:00am, for a public Preliminary Hearing on Strike Out, previously intimated to both parties by Notice of Preliminary Hearing in Person (Preliminary Issue) issued by the Tribunal, on 25 November 2021, with one day set aside for this Hearing.

Claim and Response

2. The claimant, acting on her own behalf, presented her ET1 claim form in this case to the Tribunal, on 20 July 2021, following ACAS early conciliation between 23 June and 7 July 2021. She complained of unfair dismissal from her evening housekeeping job at the respondents' Edinburgh Home on 21 June 2021, that she had been discriminated against on grounds of disability, and that she was owed holiday pay. In the event of success with her claim before the Tribunal, she sought an award of compensation against the respondents. Her claim was accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 22 July 2021.

3. Thereafter, on 17 August 2021, an ET3 response, defending the claim, was lodged, on the respondents' behalf, by Mr Liam Entwistle, solicitor with Wright Johnston & Mackenzie LLP, Glasgow. The respondents explained that the claimant had resigned from their employment with immediate effect, on 21 June 2021, when she was the subject of an ongoing disciplinary procedure, and they denied unfair dismissal by constructive dismissal. They denied that the claimant was discriminated against in relation to the protected characteristic of disability on any ground, and they further denied that she

was due any holiday pay, explaining that she was paid for holidays accrued but not taken in her final salary payment.

4. That ET3 response was accepted by the Tribunal administration, on 20 August 2021 and, at Initial Consideration by Employment Judge David Hoey, on 23 August 2021, it was ordered that the case proceed to the listed telephone conference call Case Management Preliminary Hearing scheduled to be held on 15 September 2021.

Case Management Preliminary Hearings

5. The case first called before me on 15 September 2021 for that telephone conference call Case Management Preliminary Hearing, held in private, and remotely given the implications of the ongoing Covid-19 pandemic. I heard from the claimant, and the respondents' solicitor, and I made various case management orders, which were set forth in my written Note & Orders dated 16 September 2021, as issued to both parties under cover of a letter from the Tribunal.

6. Specifically, I then made orders for further and better particulars of the claims made by the claimant to be provided within 4 weeks, as well as for a disability impact statement, and a schedule of loss regarding her claim for compensation against the respondents, and, of consent of both parties, the case was continued to another date (17 November 2021) to be relisted for a further telephone conference call Case Management Preliminary Hearing. As is my practice, with unrepresented, party litigants, I signposted the claimant to various organisations and their online websites where she might be able to access free advice or representation.

7. On 17 November 2021, the case called again before me, for the second time, for that further telephone conference call Case Management Preliminary Hearing, held in private, and again remotely given the implications of the ongoing Covid-19 pandemic. I heard again from the claimant, and the respondents' solicitor, and I made further case management orders, which were set forth in my written Note & Orders dated 22 November 2021, as

issued to both parties under cover of a letter from the Tribunal dated 24 November 2021.

8. Specifically, I then ordered that the case be listed on 13 January 2022 for a discreet public Preliminary Hearing on time-bar, and Strike Out of the claim, to be held in person at the Glasgow ET, rather than remotely by CVP, as the claimant is unable to participate by video conferencing through the Tribunal's Cloud Video Platform.

9. Further, to put the claimant on an equal footing with the respondents' solicitor, in terms of the overriding objective under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, I ordered Mr Entwistle to prepare and intimate to the claimant, at least 14 days before the start of this Preliminary Hearing, a written skeleton argument (with hyperlinks to any case law authorities being cited and relied upon) setting out the factual and legal basis of the respondents' application for dismissal by reason of time-bar regarding the discrimination heads of complaint, and otherwise Strike Out of the claim under **Rule 37(1)(a) and / or (c)** on the grounds of no reasonable prospects, and / or failure to comply with the ET Rules of Procedure and Orders of the Tribunal.

Preliminary Hearing before this Tribunal

10. At this Preliminary Hearing, held in public within a Tribunal hearing room at Glasgow Tribunal Centre, the claimant again appeared on her own behalf, unrepresented, and unaccompanied. The respondents again enjoyed the benefit of legal representation through Mr Entwistle, who was likewise unaccompanied.

11. When the claimant stated, at the start of this Hearing, at around 10:20am, that she had been unable to secure representation, I reassured her that the Tribunal is well used to dealing with unrepresented party litigants, and it has an obligation to ensure a fair hearing under its overriding objective, as set out in **Rule 2**, as detailed and reproduced for her in full in my first PH Note dated 16 September 2021.

12. Indeed, on 2 December 2021, on my instructions, the clerk to the Tribunal had written to the claimant, further to her email exchange with the Tribunal and Mr Entwistle, on 30 November 2021, when she had stated that she found the Tribunal's emails "***a bit confusing"***, and that she intended to try again for advice and assistance. Mr Entwistle had explained to her that it was not for him to advise her on how to present her case, but the Preliminary Hearing was on Strike Out of the claim and time-bar, and not a full hearing of the merits of her claim.

13. In the Tribunal's letter dated 2 December 2021, written on my instructions, and sent to the claimant, with copy to Mr Entwistle, it was reiterated, as a reasonable adjustment to assist the claimant's understanding of the process, the salient points in 10 bullet points for the claimant. In particular, it was clarified that no witness evidence would be heard, as this Hearing is to address preliminary issues only and, if not struck out, further procedure would be directed by the Judge.

14. Further, on 24 December 2021, on my instructions, the clerk to the Tribunal had written to the claimant, asking her to confirm, by no later than 4pm on Wednesday, 5 January 2022, that she had received Mr Entwistle's 3 separate emails of 23 December 2021, with Skeleton Note of Argument for the Respondents, Appendix, and Inventory of Productions, and that she had been able to open those emails, and attachments, and print them off, if required.

15. The claimant was signposted to the fact that the respondents' legal arguments were set forth in the Skeleton Argument and that, further to my PH Note & Orders of 17 November 2021, and the Tribunal's email of 2 December 2021, I would hear first from Mr Entwistle with his oral submissions on 13 January 2022, speaking to his detailed, written skeleton argument, following which the claimant would have her opportunity to reply, and Mr Entwistle to respond.

16. The claimant did not reply to the Tribunal's letter of 24 December 2021 sent to her by email. She apologised and stated that she had received Mr Entwistle's emails and attachments, and she had read them. However, she

had attended at this Preliminary Hearing without any papers at all, and nothing to write on to take notes.

17. To assist her, I provided her with a copy of Mr Entwistle's Skeleton Argument, and Inventory of Productions, as also a pen, and I encouraged her to carefully listen to Mr Entwistle, as he made his oral submissions, and take note of what points she wanted to challenge, and then raise them, and the points she wanted to make, when addressing me in her own oral reply.

18. I confirmed that I had timetabled this Hearing to allow Mr Entwistle one hour for his oral submissions, with the same time allocation for the claimant, then a reply by Mr Entwistle, with a view to trying to finish by lunchtime. In the event, Mr Entwistle exceeded his one hour time allocation, but I allowed him more time, as it was in the interests of justice to do so, against a background where the case had been set down for a one-day sitting of the Tribunal, and both parties should have a reasonable opportunity to deliver their oral submissions to me to take into account in coming to my judicial determination on the respondents' opposed application for Strike Out of the claim.

Submissions for the Respondents

19. As per the Tribunal's previous interlocutory rulings, I called upon Mr Entwistle to address the Tribunal first. He opened by explaining that he had prepared fuller submissions than usual, given that the claimant is a party litigant, and he stated that his analysis of the claimant's case is not a critique, but to set out her case at its highest from the various documents in which it is set forth by her.

20. I pause here to note and record that Mr Entwistle's **Skeleton Note of Argument,** dated 14 December 2021, as intimated to the claimant and Tribunal on 23 December 2021, extends to six discreet sections, over 11 pages, and it covers the following matters: -

    (1) The overriding objective, the purpose of pleading and better and further particulars orders;

(2) Strike Out – General Observations;

(3) No reasonable prospect of success: the discrimination case - analysis; & the whistleblowing case - analysis;

(4) Failure to comply (with Tribunal orders);

(5) Time limit; and

(6) Summary.

21. As Mr Entwistle's written submissions are held on the Tribunal's casefile, it is not necessary to repeat their full terms *verbatim* here, but, in these Reasons, I do, however, as and when required, detail from their skeleton arguments, the main points which he made to the Tribunal. There was a typographical error, in his paragraph 3.1.5, where the second reference to "***Section 26"*** should read "***Section 27***", and also in his paragraph 5.3.6, where the word "***not***" had been critically omitted, and these two errors were noted for correction.

22. Mr Entwistle also relied upon the "***Analysis of Claimant's Case***", which he produced as the Respondent's First Inventory of Productions, extending to 6 typewritten pages, where he reproduced the details of the original claim in the form ET1; the claim categories at section 8 of the ET1 ; the date of cessation of employment being 21 June 2021, and the facts relied upon in section 8.2, and the claimant's averments which, taken at highest, could relate to her claims; her additional information at section 15, and then her responses to Tribunal orders for further and better particulars, analysing her emails of 8 November 2021 at 14:31; 13 November 2021 at 13:09; 13 November 2021 at 15:37 ; and 16 November 2021.

23. Again, as Mr Entwistle's analysis is held on the Tribunal's casefile, as are the documents referenced in it, it is not necessary to repeat their full terms *verbatim* here, but, in these Reasons, I do, however, as and when required, detail from their content.

24. Even with a party litigant, Mr Entwistle submitted that there is an obligation on parties in a case to give fair notice of their case, not to set out all of the evidence, but enough for the other side to rebut the case put forward, or adduce their own propositions. He added that he very rarely asks for Strike Out, as there is a high bar to be met, but submitted that this is an appropriate case to be struck out.

25. Further, Mr Entwistle added, the Employment Tribunal does not ask lightly for further and better particulars from a claimant, and that is related to the overriding objective under **Rule 2 of the ET Rules of Procedure 2013.** He submitted that fair notice is a fundamental principle of the overriding objective, as well as that of natural justice, so that a respondent goes into a full hearing on the merits with a clear understanding of the case they have to face, and if further and better particulars are ordered, then they should be provided to the Tribunal.

26. In making his oral submissions, Mr Entwistle referred me to the various case law authorities cited by him, which I detail later in these Reasons under "***Relevant Law***", and advised that he was treating this Preliminary Hearing like a legal Debate in another forum, namely the Sheriff Court. No evidence was being led at this Hearing by either party, as that was not the purpose of this Preliminary Hearing.

27. Mr Entwistle submitted that if he as the respondents' representative does not know what the claimant's case is, then neither logically does she, and so her case fails the test, and although it is a serious step to Strike Out a claim, there is no absolute bar on it, and the time and resources of the Tribunal should not be tied up in a case about to fail, as there is, he submitted, a complete lack of clarity about what is the claimant's case before this Tribunal

28. He further submitted that the respondents have, during this case and for this Hearing, done as much as one can to be fair and fully assist the Tribunal and to the extent permitted to assist the claimant and clarify matters. He added that the respondents' request for further and better particulars was not an

artifice, nor punitive, but to help the claimant understand what the respondents feel they needed to know to have a fair hearing.

29. Further, Mr Entwistle submitted that the respondents had done what the EAT, at paragraph 31 of **Cox**, required of respondents, namely:

"Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand."

30. He also referred to, and founded upon paragraph 32 of **Cox**, where it is stated that:

"This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment

tribunal can only be expected to take reasonable steps to identify the claims and issues."

31. Further developing his submission, Mr Entwistle then submitted that the relevant basis for Strike Out is met in the present case. As per the EAT judgment in **HM Prison v Dolby,** he stated he was seeking the "***red card***" of a Strike Out, rather than the "***yellow card***" of a Deposit Order. He then focused on the recent guidance provided by Mrs Justice Ellenbogen in **E v X, L and Z,** specifically 11 of the key principles captured in his written Skeleton, at paragraph 2.4, taken from paragraph 50 of that EAT judgment.

32. Mr Entwistle then stated that, adding to his written submissions, he would like to add a "***gloss"***, highlighting these points:

(1) Look at the ET1 claim form, and the series of e-mails from the claimant.

(2) No specific acts after 2020.

(3) No discriminatory state of affairs after 2020.

(4) Strike Out and time-bar, both being argued by the respondents, are inter-linked.

(5) No ***prima facie*** case by the claimant: a small cluster of issues peter out around 18 October 2020, and no specification that there was anything continuing beyond that point. If so, we don't know about them, as it's not pled, and so the respondents have no fair notice.

(6) No reasonably arguable basis that the claimant's resignation is related to what happened in 2020 – that's just not there, as there is "***thin air***" between these two events.

(7) The respondents have no idea what is coming down the tracks, and that is not conducive to a fair trial.

(8) Taking the claimant's case at its highest, we don't need to determine facts at this Hearing.

(9) It is appropriate, at this Hearing, to look not just at the no reasonable prospects of success argument, but also the time-bar points arising.

33. He then moved on to his analysis of the discrimination case brought by the claimant, and submitted that it has no reasonable prospect of success, as per his paragraphs 3.1.1 to 3.1.5, before analysing the whistleblowing case, and making the same submission, as per his paragraphs 3.2.1 to 3.2.4, highlighting at paragraph 3.3 that both discrimination and whistleblowing cases are also at risk of time bar. Finally, as per his paragraph 3.4, he submitted that the claimant fails to set out the fundamental and repudiatory breach of contract which caused her to resign from the respondents' employment. Accordingly, her unfair dismissal case must fail.

34. In presenting his oral submissions, Mr Entwistle did so by looking at his inventory of productions, and his analysis of the claimant's case, at its highest. He gave his critique for the purposes of his submissions to the Tribunal, stating that as the claimant resigned on 21 June 2021, there was a constructive dismissal claim, but there was only a bald reference to constructive dismissal, with no specification. He commented that he was not focussing in on any one e-mail from the claimant, as he was looking at the whole picture.

35. Mr Entwistle went through the various emails provided by the claimant by way of her further and better particulars to the Tribunal, and took particular exception to two matters detailed in the claimant's email of 8 November 2021 at 14:31, as reproduced at paragraphs 3.1.1 and 3.1.2 of his analysis of the claimant's responses to Orders made by the Tribunal.

36. He described as a "***pretty scurrilous allegation***" the text of paragraph 3.1.1 where the claimant had stated as follows:

"Further details of my whistleblowing which has also still to be addressed with the authorities that deal with such allegations of false advertising and fooling the public into parting with cash for caring for veterans when no veterans are actually in the PRC Department and other houses in the building were

general public needing a care home! Also just brought to my attention that only now my old department as in Linburn and Mare & Trenchard upstairs from Linburn have now only just been sold on to now apparently accommodated soldiers! I worked there from March 2019 to June 2021 and only PRC the small end-building was accommodated by the odd soldier here and there which does not justify Erskine to claim charity for caring for veterans!"

37. Mr Entwistle described the claimant's allegations as falling into the vexatious and unreasonable conduct category, but as these were post-resignation issues, and no prior to the claimant's resignation, then he submitted that this is irrelevant as well as being vexatious.

38. Further, Mr Entwistle described as a "***very serious allegation***" the text of paragraph 3.1.2 where the claimant had stated as follows:

"Also a sex pest at work that I reported to my line manager Janet Ross before her second leave for COVID and another "who is still an employee at Erskine Edinburgh Home" reported same sexual harassment and indecency by the same male at work to our supervisor Val Taylor but both myself and the other girl were ignored, but due to a carer recently reporting him (the same male) to another manager who did act on the report the police were called and he was suspended but now resigned and has a Trial date in Court February 2022!".

39. He described that "***sex pest***" allegation as again being after the claimant's employment with the respondents had ended, and that there is no suggestion that a protected disclosure was made by the claimant, or that she suffered detriment as a result of making a protected disclosure.

40. Where, at paragraph 3.1.3, the claimant had referred to her letter from September 2020, that had not been produced, and while she referred to matters in February and March 2021, Mr Entwistle described her text as being a "***very vague and inchoate allegation***" of alleged false allegations of the claimant's serious misconduct. While, at paragraph 3.1.4, the claimant

alleged that 4 of her witnesses had not been used in Janet Ross's investigation, Mr Entwistle stated that could be a procedural issue, but the claimant did not say she had resigned as a result.

41. As regards paragraph 3.1.5, where the claimant referred to reporting certain matters, Mr Entwistle stated that the people identified by her resigned after her resignation, and there was no suggestion that the claimant had suffered any detriment. He described paragraph 3.16 as being "***very much in the claimant's style"***, where she had written as follows:

"I constantly spoke of how things were and should be for workers to my and residents to my superiors, but as usual I was again constantly ignored. I believe this was why I got picked on and all were repercussions from my thoughts and opinions and worrying more so that they all knew I was right".

42. Mr Entwistle stated that there was no suggestion that these things could be discriminatory, or protected disclosures, or that the claimant suffered any detriment as a result. At its highest, he submitted, it was a complaint that the claimant was being ignored, but that is not a detriment on its own. There is no specification of what the claimant said, and if there is more detail, we don't have it.

43. Turning then to the claimant's email of 13 November 2021 at 13:09, Mr Entwistle noted that there was no further disability statement, but the claimant had not produced the original GP report referred to by her from October 2020, and there was no suggestion how she was discriminated against as a result of her osteoarthritis and rheumatoid arthritis. She had not completed the Tribunal's PH Agenda form, but instead, her email contained requests for information from the respondents as if it were to have been on the PH Agenda form. He submitted that all of her allegations were focussed around the tenth month of 2020.

44. While she had stated she was unable to calculate compensation, Mr Entwistle referred to the Tribunal's order (6) at the first PH, and the PH Note signposting her to the CAB and how to draft a Schedule of Loss. Mr Entwistle described

this as the claimant "***refusing to quantify***" her claim, which he submitted inhibits a fair trial, as the respondents have no real idea of the value and risk element of her case, and that inhibits their ability to resolve matters extra-judicially, and that, he submitted, is not fair to the respondents.

45. He added that it was unusual to expect any respondent to go into a Hearing when they have no idea of the financial value of the case where the claimant is not seeking re-employment, and the respondents had sought an order for a Schedule of Loss, the Tribunal had granted it, but the claimant had failed to produce any idea of the *quantum* of compensation, and that, submitted Mr Entwistle, is unreasonable, and prejudices the prospects of a fair hearing.

46. As per his paragraph 3.2.6, Mr Entwistle stated that the claimant's reference (at her para 6/6.1) to "***J Ross making my working environment unsafe for my health on the 18/10/20 to accommodate a full time worker during overtime***", appeared to be suggesting something happened on that date, and things came to a head when some unidentified full time worker was accommodated in some way, and that was prejudicial or deleterious to the claimant's health, but lacks detailed specification.

47. Mr Entwistle described the claimant's email of 13 November 2021 at 15:37 as appearing to be her response to the whole of the respondents' ET response paper apart. Her first comment, "***Although Erskine may be a listed charity! I insist the care is not only to armed veterans***", he described as being an attempt to rattle the respondents, which has not worked, and her comments are vexatious and unreasonable. As regards her second comment, "***I agree vacancy was suitable for my needs"***, that appeared to be completely counter to her allegations at paragraph 3.2.4 of his analysis, while with her third comment, there was not much in the way of allegations, except a broad hint that there was some kind of plot to get rid of the claimant.

48. Further, Mr Entwistle observed, no fundamental breach of contract is specified, just more allegations, and at his paragraph 4.1.2, looking at her responses, matters seemed to be fixed on Sunday, 18 October 2020, and

while there might be a germ of a case there, it was still very light on detail, but no *prima facie* case, and nothing after that date, so the case fails on time-bar. He described her failure to specify the alleged segregation, bullying and harassment, and generally it was hard to penetrate what the claiming was saying in her email, which appeared to relate to the disciplinary proceedings rather than working arrangements. Finally, there was nothing to suggest anything wrong beyond 18 October 2020, and there was "***fresh air***" between that and her resignation on 21 June 2021.

49. Mr Entwistle stated that the claimant had narrated a sequence of events from August 2020 onwards, but these were not anchored, or connected, to any type of discrimination, and there is no suggestion that it is related to discrimination, or that the claimant resigned due to a conflict of interest due to a grievance. While the claimant mentioned November 2020, the letters she referred to had not been produced, and no details had been provided. He submitted that there was no discrimination at all described in the ET1 claim form.

50. While the respondents had asked questions of the claimant, for her to answer in further & better particulars of her claim, Mr Entwistle submitted that there was still a lack of clarity as to the claimant's case, despite her having been afforded every opportunity by the Tribunal to set out her case more precisely. He submitted that she had failed to set out a *prima facie* case of discrimination, she had not said why any acts she refers to amounts to discrimination, and indeed she concedes that the working pattern she was carrying out at the time of her resignation was suitable.

51. Mr Entwistle further stated that there is no clear reference to a detriment or the nature of any less favourable treatment or unfavourable treatment. The claimant does not identify a comparator. She does not refer to any provision, criterion or practice, nor that such would put her at a disadvantage. Indeed, he submitted, it is not really possible to ascertain at all what the claimants' case is, which is the first thing the Tribunal has to try and do in a strike out application. There is no *prima facie* case, he argued, while as regards

victimisation and harassment, the responses given to the call for specification of these claims are clearly not harassment or victimisation allegations under the Equality Act 2010, and it is difficult to see what their relevance is.

52. On whatever might be the claimant's whistleblowing case, Mr Entwistle submitted that the facts set out by the claimant, which, taken at their highest could possibly relate to a whistleblowing detriment, don't disclose a *prima facie* case. They cannot be said to have amounted to a protected disclosure, disclosed in the relevant way, and the claimant is not offering to prove that she suffered a detriment as a result of making any disclosure, or indeed, what that detriment may be.

53. In section 4 of his submissions, Mr Entwistle addressed the claimant's failures to comply with Tribunal orders, as per his paragraphs 4.1 to 4.6. Rather than paraphrase, it is convenient, at this point, to note the full written submissions at paragraphs 4.6.1 to 4.6.6, which read as follows:

"4.6 In this case, there is no doubt that the Claimant – eventually – provided a response to the order. However, it is submitted that, even after the meticulous analysis which the Respondents have set out in the Analysis of the Claimant's Case, that response adds nothing in terms of detail or sense of the Claimant's claim.

4.6.1 Discrimination - Only one cluster of averments could relate to potential discrimination, but there is no sense of why they are relevant, what is supposed to have happened, or what detriment the Claimant is supposed to have suffered. There is no sense of connection between those averments, relating to late 2020, and the Claimant's resignation six months later. The Tribunal's order has not been complied with.

4.6.2 Unfair Dismissal – There is a suggestion that witnesses for the Claimant were not examined. But we do not know who they are or what their evidence was. The Claimant will not say what fundamental

breach of contract by the Respondent was supposedly the trigger for her resignation. The Tribunal's order has not been complied with.

4.6.3 Whistleblowing – The Claimant appears to raise queries in her response which call into question the charitable work done by the Respondent. This appears to be a vexatious attempt to damage the reputation of the Respondent and has no connection to any protected disclosure made during her employment. Indeed, the only allegations which, taken at their highest, could be said to be protected disclosures (although even that is in doubt) were several months before the resignation of the Claimant, and there is no basis or connection between the two, or the detriment the Claimant says she suffered as a result. The Tribunal's order has not been complied with.

4.6.4 "Segregation", "bullying and harassment" – there is no explanation as to why the segregation allegations are relevant to any right of relief, and no detail about the actions constituting bullying or harassment or why they should give rise to a claim under the 2010 Act. The Tribunal's order has not been complied with.

4.6.5 As a result of the Claimant's failure to comply with the order of the Tribunal, The Respondent cannot properly prepare for a hearing on the merits. Allegations cannot be put to witnesses, non-parole evidence cannot be collated, and there is a real possibility that the nature of the Claimant's case may not be known until she has finished giving evidence, which would make a fair hearing impossible. This is a significant default, causing significant disruption to the proceedings and causing unfairness and prejudice to the Respondent, who has already incurred significant legal costs in teasing out the basis and nature of the claim.

4.6.6 Should the Tribunal consider that a lesser sanction was more appropriate, as an alternative to strike out, then the Respondent would seek a costs order in relation to the Preparation and attendance at the previous Case Management Conferences, and the

strike out Hearing, and that payment of those costs be the subject of an unless provision."

54. Under his section 5, Mr Entwistle addressed time limits. These are jurisdictional issues and not procedural. The claimant resigned on 21 June 2021, and her claim was brought to the Tribunal on 20 July 2021. Looking at her discrimination claim, where the act complained of is the refusal by employers to redress a grievance, time begins to run from the date on which the decision was made, and not the date when it was communicated to the claimant.

55. However, it is unclear as to whether such a refusal is what is being complained of. The claimant's allegations which, taken at their highest, may amount to a grievance being made which could possibly have been ignored have, as their latest date, November 2020, some 7 or 8 months before the claim was made. There is no suggestion from the claimant of any act continuing beyond the late 2020 "cluster" of issues. Mr Entwistle described 18 October 2020 as the "***anchor point***" of the claimant's case, although, in his paragraph 5.3.2, he had referred to November 2020.

56. Mr Entwistle submitted that the claimant has not brought a claim within 3 months of the act complained of. Unless there is an extension of time, the Tribunal does not have jurisdiction to hear the discrimination claim. While the Tribunal may grant an extension of time, if it considers that it is just and equitable to do so, the burden of persuading the Tribunal to exercise its discretion is a matter for the claimant, and, as per, the **Rathakrishnan** EAT judgment, if the claimant advances no case to support an extension of time, plainly, she is not entitled to one.

57. Here, submitted Mr Entwistle, the claimant has made no suggestion that the Tribunal should grant her an extension of time, nor has she set out the factors which she says the Tribunal should take into account. The respondents reserved their position on the detail of any such submission, save for saying that an extension of 3 or 4 months would not be just and equitable, where the claimant was able to make a claim very quickly after her

resignation and she was not otherwise unable to do so in the first months of 2021.

58. Turning then to the whistleblowing claim, Mr Entwistle submitted that any claim relating to a detriment relating to a protected disclosure must be brought within 3 months beginning with date of act or failure, unless it was not reasonably practicable to do so within that time, in which case, the Tribunal may grant an extension.

59. Leaving aside the irrelevant matters referred to by the claimant (i.e. those that are vexatious and do not form any disclosure made during employment), again, the allegations which, taken at their highest, may amount to a protected disclosure being made which could possibly have resulted in a detriment (although the detriment is not specified beyond a requirement to work) have, as their latest date, November 2020, some 7 or 8 months before the claim was made.

60. The respondents submit that there is no basis on which it could be said it was not reasonably practicable to bring a claim in the first three months of 2021, or as soon as possible thereafter. The claimant has made no suggestion that the Tribunal should do so, nor set out the factors which she says the Tribunal should take into account. Again, the respondents reserved their position on the detail of any such submission, save for saying that it respectfully submits that no such extension should be given.

61. As per his summary, but agreeing to renumber his duplicate 6.1 as 6.2, and renumber accordingly as 6.1, 6.2 to 6.3, Mr Entwistle invited the Tribunal to strike out the claim, failing which an expenses order, rather than "*costs*", the English term, as follows:

> ***6.1 The Respondent respectfully submits that there is no reasonable prospect of success in any aspect of the Claimant's Claim, and the constituent parts of her Claim should be struck out, separately or together;***

6.2 The Respondent respectfully submits that the Claimant has failed to obtemper an order of the Tribunal, and the constituent parts of her Claim should be struck out, separately or together, failing which, a costs order should be made;

6.3 The Respondent respectfully submits that the Claimant's claims of Discrimination and Whistleblowing are time barred, and the case relating to these aspects should be dismissed.

62. Mr Entwistle referred to there being a "***menu of options"*** available to the Tribunal. In terms of **Rule 75**, he accepted his reference to "***costs***" should be to the Scottish term of "***expenses***". He stated that the respondents had already incurred significant legal costs to date. He then asked for the respondents' costs for preparation and attendance at the two previous Case Management Preliminary Hearings and for this Preliminary Hearing, and for those costs, on an "***as taxed***" basis, i.e. to be assessed by the Auditor of Court, to be subject to an unless provision under **Rule 38,** stating that he could give details of a lump sum, if that would be helpful.

Claimant's Submissions

63. Mr Entwistle's submissions, having been allowed an ½ hour extension of time, concluded at 11:48, when I enquired of the claimant whether she was ready to proceed with her submissions, or did she wish an adjournment, to reflect on what had been said by the respondents' solicitor, and then reply on her own behalf. She sought an adjournment, so proceedings were adjourned, and resumed at 12:22, when I suggested to her that she reply to Mr Entwistle's submissions, and also address what she wanted the Tribunal to do by way of further procedure in this case.

64. In opening her oral submissions, the claimant invited me to consider her situation, where she had tried to get representation, and tried to do what was asked of her by the Tribunal, via Citizens Advice Scotland, a solicitor through the Law Society of Scotland, and accessing the Strathclyde University Law Clinic. She stated that she had received some help from an employment

lawyer, Colin Herbert, at Dalkeith / Midlothian CAB, who had assisted her with her ET1 claim form, and she confirmed that she wishes to proceed with her claim against the respondents.

65. The claimant stated that she was not aware of time-bar, until raised by the respondents, and she finds the respondents' Strike Out application to be "***unequivocally unjust***" to her as the claimant in these Tribunal proceedings. She stated she was not sure why Mr Entwistle, as the respondents' solicitor, did not have all of the information when there was correspondence between her and the respondents from 3 September 2020 up to her resignation on 21 June 2021, including her meeting on 18 February 2021 with the respondents' HR representative, Catherine Hughes.

66. Further, the claimant added, she did not understand why the respondents were saying that they do not understand her case at the Tribunal, and surely it would have made sense for Erskine Hospital to have given their solicitor a copy of all the letters they held on her personnel record. While she accepted she may not have produced things to the Tribunal, or Mr Entwistle, the claimant stated that she believed he would have had the copy letters from Erskine Hospital that she spoke of in her claim to the Employment Tribunal.

67. The claimant stated that she was not aware that there was a 3 month time-bar, and with Covid, there were a lot of things going on, and offices were closed, and so much was happening, which made it difficult for her to contact people. She added that offices being closed, during the Covid pandemic, was not helpful for her to get legal representation, and she had paid £360 to Digby Brown, solicitors, where she felt she had been misled, or misinformed, and she had paid a further £216 to Jackson Boyd, solicitors, but she stated that they needed £6,000 to represent her.

68. She made these statements orally, and without producing any vouching documentation to the Tribunal. She stated that she had never in her life had to do this before, and that she needed a lawyer. She described her situation as being "***like a rabbit in the headlights***", and that it was all so confusing to her.

69. Further, the claimant stated that she was aware of the respondents' Strike Out application, but added that in not complying with Orders of the Tribunal, that was not deliberate on her part, and that with Christmas shopping, and Covid, and with her having a Court attendance for her car being burnt out, she was still to attend Court in Edinburgh, and she was not in a very good place to try and deal with this Tribunal case on her own.

70. The claimant stated that she loved her job with the respondents, but she was ignored by the respondents' managers, and felt she was fighting to keep her job. She sought a "***green light"*** to get her case heard on its merits by the Tribunal, and stated that, for that reason, she opposed the respondents' application for Strike Out of her whole claim against them.

71. She stated that she also opposed any application for a Deposit Order. There was no such application before the Tribunal, from the respondents, as, at paragraph 4.6.6 of Mr Entwistle's written submissions, he had stated that should the Tribunal consider a "***lesser sanction***" was more appropriate than a Strike Out, the respondents sought costs, subject of an unless provision.

72. As it was raised by her, I read out to the claimant, from my ***Butterworths Employment Law Handbook,*** the terms of **Rule 39(1), (2) and (3)**, where the Tribunal could order a deposit if it felt any specific allegation or argument in a claim has little reasonable prospect of success. In that event, the Tribunal would make reasonable enquiries into the claimant's ability to pay as the potential "***paying party***".

73. At this point, the claimant gave information about her current circumstances. She advised that, after resigning, on 21 June 2021, from the respondents, she found a new job, starting on 6 September 2021, with Warehouse Demonstration Services, but she had been off on the sick for the last 2 months.

74. For a 13 hour per week job with them, she stated she was paid £400 gross per month, as well as her PIP (Personal Independence Payment) of £240 every 4 weeks, and Universal Credit of £78 to £121 per month. Being off sick,

she stated she got £282 SSP from her new employer, and £121 Universal Credit. The claimant further stated that her house was rented from the local Council, Midlothian Council, and that she was finding things "***very difficult***", with her outgoings exceeding her income, with her having fallen into arrears of just over £2,000 to EDF for gas and electricity, and £328 Council tax arrears. With no capital, or savings in the bank, the claimant stated that she only had £121 that morning paid in from Universal Credit.

75. When I asked her about the respondents' request for costs, or expenses, where **Rule 84** requires he Tribunal to have regard to the potential paying party's ability to pay, the claimant stated that she would not be able to pay anything towards the respondents' expenses. Further, she added that she felt she had been "***quite informative"*** in her ET1 claim form. She thought that she would have to supply her witnesses and evidence later, and while acknowledging that it is her Tribunal case, and that she had not supplied all the letters referred to by her, she did not feel pressured as she felt that the respondents would give them to their solicitor from copies on her file.

76. The claimant then stated that she had been confused, and that she did not understand, and for that she apologised. While it was no excuse, she had tried but she could not afford a lawyer, and it may be that other party litigants might be more knowledgeable than her. She had needed to get her daughters to help her with emails, describing the use of technology as a problem.

77. Further, the claimant stated that she felt technology was a "***barrier***" to her, as you didn't get to use paper and pen, and she described herself as "***old school".*** She felt that the respondents should know her case, even if she had not written it down, and while she had not sent the letters referred to by her to the Tribunal, the respondents' lawyers should have got those letters from Erskine Hospital.

78. While the letters might not be proof of everything, the claimant stated that minutes were taken at meetings, but when she went to her UNISON trade union rep, who works at Erskine Hospital, she was not allowed to join the union through Erskine Hospital, and she had to contact the union and do it

online. She added that she felt that she was being totally controlled, and with no independent representation, at meetings. As regards the time-bar point raised by the respondents, the claimant stated that she was trying to keep a good relationship with Erskine Hospital, and without repercussions.

79. Looking at Mr Entwistle's paragraph 5.3.6, and reference to the Pizza Express case of **Rathakrishnan**, in seeking an extension of time to present her discrimination case, the claimant stated that she never brought her claim sooner, as she was happy to keep good relations with her supervisor, and deal with matters informally, stating that, on 7 August 2020, she have Janet Ross, the respondents' manager, a letter to say that she was not happy with the way her supervisor was instructing her to do her job, and how she was speaking to her, telling her to "***clean the shit***", which she considered to be totally unprofessional, as her supervisor was constantly on her case. The claimant stated further that Janet Ross got Neil Patterson from the respondents' Glasgow head office involved.

80. Despite Mr Entwistle's paragraph 5.3.6, the claimant stated that she did not realise that she needed to make a case for a just and equitable extension of time. She stated that she had tried to get assistance, but had been unsuccessful, to help with her Tribunal claim. She added that she did not fully understand what she was coming to, as she had brought no paperwork to this Hearing, and that she had never, ever , done this in her entire life, but she had never found herself in a bad situation at her employment before this, and she felt that she had "***put all my cards on the table"***, and that her case should go forward to a full Hearing with evidence from both sides.

81. In closing her submissions, the claimant stated that she felt "***hurt and annoyed"*** when Mr Entwistle said some of her allegations were vexatious allegations. She stated that what she had said was not retaliation aimed at the respondents, nor that she was making it up to be horrible to them. While Mr Entwistle had mentioned 18 October 2020, and nothing after that, the claimant stated that how then does she have letters in January and February

2021, and 2 April 2021, and a meeting on 18 February 2021 to discuss her fit note expiring on 16 March 2021.

82. The claimant added that her ET1 says the last straws were affecting her health, and she had never, ever been signed off work for work related stress and anxiety, and things were being ignored by Erskine managers. She mentioned Ray Strachan, the kitchen chef, whom she said had criminal court proceedings against him in February 2022.

83. It then being 13:14, the claimant having finished her oral submissions, we adjourned for the lunch break to resume after one hour. On adjourning, I stated to Mr Entwistle that when he came to respond to the claimant's submissions, I would wish him to address the extent to which he was relying on vexatious conduct by the claimant, and for him to address me more fully on the relevant ET Rules as regards the respondents' application for expenses against the claimant.

84. In the event, we did not resume until 14:25, as although the Judge and Mr Entwistle were there and ready to resume at 14:15, the claimant was not present. She advised the Tribunal clerk that she had had to move her parked car, and top up the parking fee, at a different place, making her late in returning to the Tribunal.

Reply for the Respondents

85. When the afternoon session began, Mr Entwistle advised that the word ***"vexatious***" occurred twice in his written submissions, at paragraphs 4.6.3 and 5.4.2, and both were in relation to whistleblowing, and these related to his analysis of the claimant's case, at his paragraph 3.1.1 referring to the claimant's email of 8 November 2021. He added that these averments by the claimant were not only vexatious, but irrelevant, as they were not comments made during the claimant's employment by the respondents. They were just thrown into the process by the claimant to "***unfairly blacken***" the respondents.

86. On the matter of expenses, Mr Entwistle stated that his firms' legal fees had been issued to the respondents as client. He stated that for analysis of the claimant's further and better particulars, the 2 previous Case Management PHs, and preparation for this Hearting, including attendance, the fees totalled **£7,500**, excluding VAT. As an alternative, if he was to focus solely on analysis of the claimant's case, preparation for and attendance at this Preliminary Hearing, that would be rounded down to **£5,000**, excluding VAT.

87. Mr Entwistle, having addressed those two matters, then proceeded to reply in response to the claimant's submissions to the Tribunal. He opened by saying that the claimant had said "***almost nothing of any merit***", and as regards his application for Strike Out of the claim, and giving the claimant the benefit of the doubt, she just has not bothered to set out her case, in the hope that the respondents will fill out the blanks somehow.

88. Further, he added, there had been a failure to give proper notice of the claim, and the respondents are entitled to know what she says happened and why it is discriminatory. The Tribunal has seen the claimant's correspondence, and it is insufficient for her to say that the respondents have the letters referenced by her. As regards failure to comply with Tribunal Orders, Mr Entwistle stated that he was "***astonished***" to hear that the claimant got new employment last September, but she has never disclosed that at the last PH in November, and he stated that this again seems to be evidence of the claimant's "***you fill in the blanks, I'll keep you in the dark***" approach, and entirely ignores the questions asked about her losses.

89. While the claimant had stated that she has issues with technology, Mr Entwistle described that as exceptional, and not appropriate to use in her submissions, as she had emailed the Tribunal with her responses, but while she had set out matters at length, there was nothing relevant to her claims. On time-bar, he stated that the clamant had tried to suggest that she was not aware of any time-bar issue, but it is clear that she can move quickly when she feels the need – she got a quick ACAS early conciliation, and put in her ET claim within a month of her resignation. While she was trying to make out

that she was trying to get things done informally within the respondents, he submitted that that was not a basis for the Tribunal to exercise any discretion in her favour by way of a just and equitable extension of time.

90. As regards 18 October 2020, Mr Entwistle stated that the claimant had completely undermined her own submissions by referring to the letter in August 2020, and that we are now almost within the **Pizza Express** case territory. He noted her reference to Covid, but submitted that it's not enough of an excuse in October 2020, when ACAS and the ET were both operating, ET Hearings were ongoing, and there was no bar to Tribunal Hearings at that stage, and it has been the same since June 2021. He added that he adhered to his own submissions, and the listed outcomes that the respondents would like this Tribunal to consider.

91. Having heard the claimant, Mr Entwistle further stated that he does now harbour concerns that the claimant will feel she has an edge if this case continues. Several employees are no longer employed by Erskine Hospital, and, if the case is allowed to continue, they will have to be approached and the claimant's averments checked out with them. He further submitted that the respondents will be prejudiced in preparing for the case, and this is something he felt the claimant is aware of, so that if the case is allowed to proceed, then the claimant will get an advantage.

92. On the basis of the Court of Appeal's judgment in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5; [2021] EWCA Civ. 23** there is likely to be "***forensic prejudice***" to the respondents, and should there not be a Strike Out, there is prejudice in allowing the case to proceed. If it was to be this case going forward, there would be prejudice to the respondents as people are no longer available as employees, and anyway the respondents are struggling to see the case being made against them.

93. Further, he added, precognition of witnesses, against a sketchy case, might result in adjournment of any Final Hearing, with time and cost added, if the

case were allowed to proceed. Mr Entwistle submitted that the case is already lacking enough detail for the respondents to know what they're facing.

Final Response by the Claimant

94. It then being 14:44, I called upon the claimant to make any final reply that she felt appropriate. She stated that she could not speak out for all the other Erskine Homes, only Edinburgh, and she was only commenting about where she was working. Whether the respondents were seeking £7,500, or £5,000, by way of expenses from her, the claimant stated that she had not secured legal representation as she could not afford £6,000 quoted to her, and that she does not have resources to pay those sums to the respondents. Indeed, she commented, she does not have any ability to pay any sum to the respondents by way of expenses.

95. Further, the claimant referred to the respondents' ET3 response where it had been stated that, at the time of her resignation, she was the subject of an ongoing disciplinary procedure, the outcome of which was that she had committed an act of gross misconduct, and, but for her resignation, she would have been summarily dismissed by the respondents. She stated that she had received a letter dated 24 June 2021, on 27 or 28 June 2021, from a Dougie Beattie, at the respondents' Glasgow head office, saying if they didn't hear from her by 1 July 2021, then he would proceed with her resignation.

96. As regards her new job, the claimant stated that she did not have a clear memory whether she had mentioned this before, or not, and she stated that she could not recall if she had told the Tribunal, or Mr Entwistle. She accepted that she had not lodged a Schedule of Loss, as ordered, but that Colin Herbert at the CAB had helped her with her ET1 claim form.

97. Her ET1 claim form at section 7 refers to no new job, but she thought the Tribunal should have her **£12,300** claim. She did not indicate how or when this amount was intimated, nor how it was calculated, or if and when it had been intimated to the respondents. She stated that she had got her ACAS early conciliation certificate, and Mr Herbert at the CAB had told her how to

go about bringing her Tribunal claim. Further, she added, "***I think my ET1 is quite informative of my whole situation."***

98. Finally, the claimant stated that, as at October 2020, she did not want to go to formal action against the respondents, as she stated that she was trying to grow up, and be professional, and she trusted that, if she kept things informal, then there would be no repercussions. Until the allegations against her in April 2021, the claimant stated that she was trying her best, but things then "***jumped out of the frying pan and into a fire".*** She further stated that she was trying to be mature, fair, and grown up, although she was feeling a lot of grief.

Reserved Judgment

99. When proceedings concluded, on the afternoon of Thursday, 13 January 2022, at 3:05pm, the claimant and Mr Entwistle were advised that Judgment was being reserved, and it would be issued in writing, with Reasons, in due course, after private deliberation by the Tribunal.

100. With no opportunity that afternoon, further private deliberation has only taken place recently, on account of other judicial business. I apologise to both parties for the resultant delay in this Judgment being issued outwith the Tribunal administration's target date of 4 weeks from date of the Hearing.

Issues for the Tribunal

101. The issues before me were those identified in my PH Note of 17 November 2021, and the Notice of this Preliminary Hearing, issued on 25 November 2021, being Strike Out under **Rule 37**. I deal with these issues below, in my Discussion and Deliberation section of these Reasons.

Relevant Law

102. While the Tribunal received a detailed written skeleton argument from Mr Entwistle, with detailed statutory provisions and case law references cited by him on the respondents' behalf, the Tribunal has nonetheless required to give itself a self-direction on all aspects of the relevant law

103. The statutory provisions and case law cited to me by Mr Entwistle, and which I have taken account of in coming to my decision, were as follows:

- **Employment Tribunals Rules of Procedure 2013 (SI 2013 No.1237) as amended – Rules 2, 6, 37 and 74 to 84**
- **Employment Rights Act 1996, Sections 48 and 111**
- **Equality Act 2010, Section 123**
- **White v University of Manchester [1976] IRLR 218, [1976] ICR 419, EAT**
- **Byrne v Financial Times Ltd [1991] IRLR 417**
- **Cox v Adecco UKEAT 0339/19/0904, [2021] ICR 1307**
- **HM Prison Service v Dolby [2003] IRLR 694, [2003] UKEAT 0368_02_3101**
- **E v X, L and Z UKEAT/0079/20/RN (V) (10 December 2020, unreported**
- **Mbiusa v Cygnet Healthcare Ltd UKEAT/0119/18/BA (7 March 2019, unreported**
- **Anyanwu v South Bank Students' Union [2001] IRLR 305, HL, [2001] ICR 391**
- **Jaffrey v Department of the Environment, Transport and the Regions [2002] IRLR 688**
- **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126, [2007] 4 A11 ER 940**
- **Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT, [2014] UKEAT 0449_12_2703, [2014] ICR 747**
- **Logabax Ltd v Titherley [1977] IRLR 97, [1977] ICR 369**

- **Walker v Josiah Wedgwood & Sons Ltd [1978] IRLR 105**, **[1978] ICR 744**
- **Norwest Holst Group Administration Ltd v Harrison [1984] IRLR 419**
- **Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371, EAT**
- **Dedman v British Building and Engineering Appliances Ltd [1974] 1 All ER 205, [1974] ICR 53, CA**
- **Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24, EAT**
- **Barclays Bank plc v Kapur [1989] IRLR 387, [1989] ICR 753**
- **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327**
- **Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0320/15/DM**
- **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278**

104. I gratefully adopt Mr Entwistle's submissions insofar as they narrate the relevant law, and I am satisfied that his Skeleton Note of Argument is both comprehensive and accurate as far as a statement of the relevant law is concerned.

105. While he cited **HM Prison Service v Dolby**, at paragraph 2.3 of his written submissions, where Mr Recorder Bowers QC, in the EAT, held that the striking out process requires a two-stage test, I have also taken into account the later EAT judgment in **Hassan v Tesco Stores Ltd [2016] UKEAT/0098/16.** The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim. In **Hassan,** Lady Wise stated that the second stage is important as

it is "***a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit"*** (paragraph 19).

106. The only other case law authority which Mr Entwistle did not draw to my attention, but with which I am familiar, from my judicial experience, and its oft-repeated citation in other Strike Out Hearings, is the judgment of Mr Justice Langstaff, then President of the EAT, in **Harris v Academies Enterprise Trust [2015] ICR 617; [2015] IRLR 208**. The Tribunal must have regard to the overriding objective, and that includes having regard to the impact on the Tribunal's resources and its need to share those resources between all the claims before it. As the EAT held in **Harris**, it is part of dealing with a case justly that regard is had to the impact of a case upon the resources of the Tribunals, to ensure that one case does not exhaust a disproportionate share of them and by doing so deprive a later case of time, or delay its start.

107. Otherwise, there is nothing I can usefully add to Mr Entwistle's citation of case law authority, other than to focus on the reference in **Cox v Adecco**, at paragraph 21, to the judgment of the then EAT President, Mr Justice Choudhury, in **Malik v Birmingham City Council [2019] UKEAT/0027/19**, helpfully summarising the current, and well-settled, state of the law on Strike Out. As Mr Entwistle put to me, in his oral submissions, he was not anchoring his case just on what His Honour Judge James Tayler had stated in **Cox.**

108. In **Malik**, the learned EAT President set out the legal framework, as follows, at paragraphs 29 to 33 of that judgment: -

> *29. Rule 37 of the* ***Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013*** *provides*
>
> ***"Striking out***
>
> ***37.— (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..."

30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see ***Anyanwu & Another v South Bank University and South Bank Student Union*** *[2001] ICR 391. The applicable principles were summarised more recently by the Court of Appeal in the case of* ***Mechkarov v Citibank N.A*** *[2016] ICR 1121, which is referred to in one of the cases before me,* ***HMRC v Mabaso*** *UKEAT/0143/17.*

31. In ***Mechkarov,*** *it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*

(1) only in the clearest case should a discrimination claim be struck out;

(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

(3) the Claimant's case must ordinarily be taken at its highest;

(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and

(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In ***Community Law Clinics Solicitors Ltd & Ors v Methuen*** *UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."*

> *33. A similar point was made in the case of **ABN Amro Management Services Ltd & Anor v Hogben** UKEAT/0266/09, where it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in **Meek v City of Birmingham District Council** [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out."*

109. Having received it, in advance of this Hearing, as per my earlier case management orders, I am sure that the claimant, as an unrepresented, party litigant, will have benefitted from Mr Entwistle's clear and concise articulation of the relevant legal principles, without the need to read and digest the full case law reports also sent to her for her perusal in Mr Entwistle's 3 emails of 23 December 2021.

110. As an unrepresented, party litigant, the claimant did not understandably address me on the relevant law, and, indeed, I had no expectation that she should so address me on the relevant law.

111. I did explain to her that she was entitled to comment on the law, as presented to me by Mr Entwistle, as an officer of the Court, and in accordance with his professional duty as a solicitor, but that I would be addressing myself on the relevant law to apply to the facts of the case as I might find them to be after assessing both parties' submissions to me at this Preliminary Hearing.

112. The claimant made no legal submissions to me on the matter of any aspect of her claim against the respondents.

Discussion and Deliberation

113. Having had the benefit of time for reflection, in chambers, during my private deliberation on this disputed application for Strike Out of the claim, I start by saying that I found the claimant's submissions to me to be both confused and confusing. That stood in marked contrast to the clarity presented by Mr Entwistle in his submissions, written and oral, on behalf of the respondents.

114. I recognise, of course, that the claimant is an unrepresented, party litigant, with no previous experience of the Employment Tribunal, and its practices and procedures, and that she has been appearing on her own behalf, while the respondents have enjoyed the benefit of legal representation from a solicitor experienced in employment law, and with appearing in this forum.

115. Throughout my involvement with this case, now spread over 3 separate Preliminary Hearings, I have had regard, at all times, to the Tribunal's overriding objective under **Rule 2**, to deal with the case fairly and justly, and to do my best to put the unrepresented, non-legally qualified claimant on an equal footing with the represented employer's solicitor.

116. Mr Entwistle, as the respondent's solicitor, has sought to assist the Tribunal, and co-operate with the claimant, but despite the passage of 5 months from presentation of the ET1 to the second Case Management PH last November, he has felt it necessary to seek Strike Out of the case in its entirety. Despite his attempts to obtain clarity as to the scope of the claimant's case against the respondents, he argues that her case is still vague and uncertain, and that notwithstanding that she has been given every opportunity to set out the basis of her claim.

117. He has spelled out his concerns in his detailed Note of Argument for the Respondent, and put all his cards on the table. By contrast, despite orders of the Tribunal, the claimant has not yet provided adequate further & better particulars for the respondents to identify the factual and legal basis of the claim brought against them and, further, the claimant has failed, despite signposting on how to do so, to provide a Schedule of Loss quantifying the amount of compensation she seeks, along with an explanation of how she has calculated the amount that she seeks from the respondents.

118. Despite having had the advantage of early sight of Mr Entwistle's written submissions, the claimant did not take any steps prior to this Hearing, or even at it, to seek to address and rectify the points raised by the respondents, with a view to them perhaps agreeing that her case should proceed to be decided on its merits at a Final Hearing at a later date. However, she has still not set

out a *prima facie* case of discrimination, or whistleblowing detriment, and she has likewise failed to set out the fundamental and repudiatory breach of contract by the respondents that she says caused her to resign.

119. At this Hearing, she presented no cogent or credible explanation why, as regards the alleged discriminatory acts of the respondents, on or around her anchor point of 18 October 2020, they were not raised within 3 months, nor why it would be just and equitable in all the circumstances to allow her an extension of time.

120. The claimant has, in her submissions to this Preliminary Hearing, brought more fog to an already confused statement of her claim, and she has failed to advance any convincing argument why she has not complied with earlier orders of the Tribunals, and failed to explain why she submits that her case has reasonable prospects of success, and why her discrimination heads of claim should be granted a just and equitable extension of time. She has not adequately answered any of the many points raised by Mr Entwistle in his detailed skeleton arguments, and I can well see why the respondents are saying that they cannot get a fair Hearing if this case is allowed to proceed, in this state, to an evidentiary Hearing on the merits.

121. As I recorded earlier in these Reasons, at paragraph 77 above, the claimant, in the course of her oral submissions, advised me that she felt that "***the respondents should know her case, even if she had not written it down***". I found that to be an astonishing comment, for it is her case, and it is for her to plead it properly. In that regard, I refer her specifically to the guidance provided by Mr Justice Langstaff, then President of the EAT, in **Chandhok v Tirkey [2005] IRLR 195; [2005] ICR 527**, at paragraphs 16 to 18, as follows:

> *16. I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be*

augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which

is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

122. The claimant has made much of the fact she is an unrepresented, party litigant, who cannot afford legal representation, and that she has been impacted by restrictions imposed during the Covid pandemic, and by the use of technology. What I can say, in reply, is that so are many, many other claimants who appear before this Tribunal, and who act on their own behalf, and yet they manage to meaningfully engage with the legal process, and provide further & better particulars, and a Schedules of Loss, to better clarify and focus for all concerned (claimant, respondents & Tribunal) the list of issues that are live for judicial determination at a Final Hearing.

123. In his written submissions, at paragraph 3.1.1, Mr Entwistle referred to the EAT Judgment by HHJ Eady QC (as she then was, now Mrs Justice Eady, the newly appointed President of the EAT) **in Mbiusa v Cygnet Healthcare Ltd**. At paragraph 21, Judge Eady stated as follows:

"*Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose*

first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see ***Hassan v Tesco Stores Ltd*** *UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in* ***Hassan*** *- the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."*

124. In the present case, while the claimant is a party litigant, English is her first language, and her email correspondence with the Tribunal, and Mr Entwistle, shows that she has the technical ability (despite her comments about her difficulty in using technology) to communicate in regard to her case before the Tribunal. Further, she has been provided with plenty of opportunity to clarify the basis of her claim, and quantify it, as regards the amount of financial compensation she seeks from the respondents, yet she has repeatedly failed to do so.

125. In these circumstances, I am satisfied that the respondents have shown that the no reasonable prospects of success ground for striking out has been established, at stage 1. As such, moving to stage 2, I require to decide as a matter of discretion whether to Strike Out the entire claim, or impose some lesser sanction.

126. Unfortunately, in the circumstances of this case, I am compelled to find that the claimant has failed to meet her responsibilities as a party litigant, as defined at paragraph 32 of the EAT judgment in **Cox v Adecco**, the terms of which I reproduced earlier in these Reasons, at paragraph 30 above.

127. She has failed to provide adequate further and better particulars to date, despite opportunities afforded to her to do so. As such, I can have no confidence, that if I ordered her to do so again, she would do so in any

meaningful way. Similarly, despite clear signposting to how to do so, she has failed to quantify her claim.

128. As Mr Entwistle rightly highlighted, at paragraph 4.5 of his written submissions, the guiding consideration, when deciding whether to strike out for non-compliance with an Order, is the Tribunal's overriding objective, and he referred to the EAT judgment in **Weir Valves and Controls (UK) Ltd v Armitage.**

129. In **Weir Valves**, at paragraph 17, the EAT Judge, His Honour Judge Richardson, stated that:

"*But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been cause and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."*

130. It is relevant also to refer to **Barton v Wright Hassall LLP [2018] UKSC 12,** where the Supreme Court held that litigants in person are not entitled to any greater indulgence in complying with court rules than represented parties. That is because a repeated response from the claimant in the present case has been to say that she is self-representing. It should be noted, however, that in the current case, the claimant has already been given a degree of latitude that a legally represented party would be unlikely to receive.

131. In making this observation about the claimant's conduct in the course of these Tribunal proceedings, I do so readily recognising that it is always difficult for an unrepresented, party litigant, to remain truly objective, no matter how much they try to convince themselves that they are being objective, but they inevitably have an emotional attachment to their own case, and what they see

as their complaint against their former employer, and for them perception can become reality, and cause a sense of miscarriage of justice, conspiracy, etc, to flow, regardless of whatever may be the true factual position. Such litigants are a challenge to the Tribunal system.

132. I am not satisfied that it would be in the interests of justice to allow the claimant a further opportunity to set out her case, and properly quantify it. She has had several opportunities to date, but failed to take advantage of them being provided to her. The "***last chance saloon***" was open to her to act proactively, and meaningfully reply to the Tribunal's earlier Orders at, or in advance of this Strike Out Preliminary Hearing.

133. Whether by design, or default, she failed to do so. It is not appropriate or proportionate to allow her a yet further opportunity, when her track record to date suggests nothing will change. The interests of justice requires justice to be done between the parties but, as per **Hassan**, regard must also be had to the wider administration of justice, and the impact of this case on other users of the Employment Tribunal. It is appropriate that, by granting the respondents' Strike Out application, that this case ends, and that it ends now.

134. I did consider Mr Entwistle's alternative argument, at paragraph 4.6.6 of his written submissions, that, if I was not minded to Strike Out the claim, I might award costs against the claimant, and make payment of those costs the subject of an unless provision. However, I decided that was not an appropriate way to proceed, as it would simply involve further time and cost for all concerned, and it seemed counter-intuitive against the Tribunal overriding objective's direction to avoid delay and save expense. Further, it would have added nothing further in terms of clarity of detail and better understanding of the claim's case against the respondents.

Disposal

135. For the foregoing reasons, I have decided to grant the respondents' opposed application for Strike Out of the claim in its entirety, and, accordingly, the whole claim against the respondents is dismissed by the on the basis that it

has no reasonable prospects of success in terms of **Rule 37(1) (a) of the Employment Tribunals Rules of Procedure 2013.**

136. I appreciate that striking out a Tribunal claim, particularly one such as this one involving complaints of discrimination and whistleblowing, with disputed allegations of fact, is an exceptional thing to do and that before I will do so the respondents have to cross a very high threshold indeed. Equally, however, the Tribunal's overriding objective is not served by permitting claims that are bound to fail to continue. Doing so benefits no one, least of all the claimant. Subject to one matter, as dealt with next, these proceedings are now at an end.

137. As regards the respondents' application for an award of expenses against the claimant, I have ordered that the respondents, if so advised, shall intimate a formal application for expenses in terms of **Rules 74 to 84 of the Employment Tribunals Rules of Procedure 2013,** within 28 days of issue of this Judgment, and the claimant shall have a period of no more than 7 days thereafter to intimate to the Tribunal, with copy at the same time to the respondents' solicitor, by email, any comments or objections to the respondents' application, following which the Tribunal will determine any further procedure to address any such application for expenses.

Employment Judge: I McPherson
Date of Judgment: 22 February 2022
Entered in register: 25 February 2022
and copied to parties