Case Numbers: 2601100/2019
2600881/2020

EMPLOYMENT TRIBUNALS

Claimant:	**Dr. R Nyatando**
Respondents:	**Rolls Royce Plc (R1)** **Mr. T Karim (R2)** **Mr. C Capel (R3)** **Ms. K Leedham (R4)**
Heard at:	**Nottingham**
On:	**7th February 2022**
Before:	**Employment Judge Heap**
Members:	**Mr. J Hill** **Mr. K Rose**
Representation	
Claimant:	**No attendance but written representations considered**
Respondent:	**Ms. A Niaz-Dickinson - Counsel**

JUDGMENT

Judgment having been given orally at the hearing, written reasons are now given accordance with Rule 62(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

RESERVED REASONS

BACKGROUND

1. This is a claim brought by Dr. Rose Nyatando (hereinafter referred to as "The Claimant") against Rolls Royce Plc (hereinafter referred to as "The Respondent" or "The First Respondent"). There are two Claim Forms which were consolidated to be heard together. The first of those was presented on 11th April 2019 which was against the First Respondent only. The second Claim Form was presented on 11th March 2020 after the Claimant's employment with the First Respondent had been terminated. That was presented against the First Respondent and three named individuals within its employ (together referred to as "The Respondents"). As we have already set

out above, the claims were consolidated to be heard together. The claim has been the subject of a considerable number of Preliminary hearings and we deal with that further below in respect of the chronology of the proceedings.

2. However, we are presently on day 21 of a 40 day listing. Other than reading in and discussion as to Orders previously made, the case has not advanced at all. We have heard no evidence and have not at this stage even dealt with all preliminary matters or agreed a list of the issues that we are required to determine.

3. The Respondent has applied to strike out the claim on the basis of the Claimant's non-compliance with Orders made, unreasonable conduct and the fact that it is said that a fair hearing is no longer possible. The Claimant is on notice of that application and has made written representations about it. She has also made her own application to strike out the Responses. The Claimant has not attended today. Her position is that she is unwell and cannot do so and we say more about that below. We have accordingly considered her representations as written representations under Rule 42 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations").

4. However, we should observe that those representations and application came not it seems from the Claimant but some unidentified individual on her behalf. We have not been informed of who that individual is despite the Claimant having been asked for confirmation as to whether they are representing her. We have not heard from the Claimant directly at all on that point. We only have the email address of the individual concerned and they have provided no name or details of their connection to the Claimant. Given that the Tribunal have made plain that they cannot correspond with anyone without the Claimant's permission (and as above we have not received that directly from the Claimant despite requests) we have given consideration to whether we should pay regard to the representations which are said to be made on the Claimant's behalf. Ultimately, we have determined that we should give them consideration given that the Claimant has not attended today and it is necessary for us to take account of any matters that she may seek to advance given the significance of the competing applications. Despite our concerns, we have had to approach the matter on the assumption that the Claimant has seen and given permission to the sender for the representations to be made.

5. Before dealing with those application it is necessary for us to set out a chronology of the key events in the claim which we now deal with below.

6. The Claim Form in the first claim was presented on 11th April 2019. There was a Preliminary hearing in respect of that claim on 17th September 2019 before Employment Judge Victoria Butler. At that time the Claimant was legally represented. It was identified that the Claimant was complaining of discrimination arising from disability, indirect disability discrimination, a failure to make reasonable adjustments, harassment related to the protected characteristics of race, disability and sex, direct and indirect race discrimination, sexual harassment and victimisation. Orders were made for the Claimant to provide medical evidence as to the question of disability and for further and better particulars of the claim to be provided.

7. The Claimant presented a second Claim Form on 11th March 2020 raising further complaints of discrimination, so called whistleblowing complaints and unfair dismissal – her employment by that stage having been terminated by the Respondent. The claims were consolidated and came before Employment Judge Clark for a further Preliminary hearing on 21st April 2020. That Preliminary hearing had previously been postponed on the basis of the Claimant's ill health. By that time the Claimant was no longer legally represented and was acting as a litigant in person. Again, Employment Judge Clark made Orders for further information about both claims to be provided and for further medical evidence to be disclosed. He also listed a further Preliminary hearing on 5th August 2020.

8. That hearing took place before Employment Judge Blackwell who listed a further Preliminary hearing for 2nd and 3rd December 2020 at which time the Tribunal was to consider, amongst other things, the question of jurisdiction given that some complaints relied on acts which had occurred a number of years before presentation of the Claim Forms and whether any complaints should be struck out under Rule 37 or Deposits Ordered under Rule 39 of the Regulations. That hearing was adjourned part heard, in part on the application of the Respondent. It should be noted that the Claimant opposed the adjournment and contended that a delay would likely deteriorate her health further. We should observe that that was not the only time that the Claimant has referred to a delay in the proceedings being detrimental to her health.

9. The Preliminary hearing recommenced on 4th May 2021 and took place over the course of four days. At that hearing Employment Judge Blackwell struck out complaints under Sections 100 and 104 Employment Rights Act 1996, refused an amendment application made by the Claimant and determined that the issue of time limits would be dealt with at the full hearing. He also made Orders for further information about some aspects of the claim to be provided.

10. There was then a further Preliminary hearing before Employment Judge Hutchinson at which he Ordered that the bundle that was to be used as the hearing bundle was the one that had been sent to the Claimant by the Respondent and that the Claimant should cross reference her witness statement having regard to that bundle. He also Ordered that the Claimant should identify any documents that she said were missing from that bundle. The Claimant did not comply with those Orders.

11. There was then a further Preliminary hearing before Employment Judge Clark on 14th September 2021. He extended time for the Claimant to comply with Employment Judge Hutchinson's Order to identify any documents absent from the hearing bundle prepared by the Respondent, re-affirmed that that was the bundle which was to be used and that the witness statements should refer to that bundle. The Claimant was also directed to confirm that she either agreed the list of issues prepared by the Respondent or that she provided details of what else needed to be included. The Claimant was encouraged to engage with the list of issues rather than, as she had previously, simply state that she did not agree with it without explaining why. The Claimant did not comply with those Orders.

12. Employment Judge Clark also made a Deposit Order under Rule 39 of the Regulations in respect of an application that the Claimant wanted to advance to strike out the Responses arising from issues that she had in respect of the hearing bundle. The Claimant did not pay the deposit and the application was not advanced further.

13. There was then a further Preliminary hearing on 2nd December 2021 before Employment Judge Michael Butler. That had been listed urgently because there were still said to be issues with the hearing bundle and the Claimant had presented appeals against earlier Orders to the Employment Appeal Tribunal ("EAT"). Employment Judge Butler reiterated that the bundle to be used at the full hearing was the one produced by the Respondent and he made Orders for the Claimant to cross reference her witness statement to that bundle, to confirm if she was still pursuing her appeals to the EAT and to confirm if she was well enough to participate in the full merits hearing. That was done on the basis that the Claimant had not attended the Preliminary hearing because she said that it was too short notice and she was unwell. The Claimant did not comply with the Order to cross reference her witness statement to the hearing bundle. As to the matter of the appeals, the EAT dismissed those at the sift stage. The Claimant confirmed that she was sufficiently well to participate in the full merits hearing although, as we shall come to below, she now says that that is no longer the case.

14. The hearing before this Tribunal commenced on 10th January 2022. The first four days of that hearing had been scheduled to be spent by the Tribunal reading into the considerable volume of documents and witness statements. We allocated a further day of reading in time on 14th January 2022 which was when the parties had otherwise been due to attend to address a number of preliminary matters which would need to be attended to before the commencement of the evidence.

15. By that time the Claimant had still not complied with previous Orders made to cross reference her witness statement to the bundle of documents which had been produced by the Respondent. Instead, she had sought to rely on three bundles which she had produced which contained most of the same documents which were already in the bundle produced by the Respondent. She had cross referenced her witness statement to that bundle instead and, in purported compliance with the Orders of Employment Judges Hutchinson, Clark and Butler had added a footnote to her witness statement that the documents that she was referring to might also be found in the Respondent's bundle or words to that effect. Her footnote in that regard said this:

> *"References to the Respondents' bundle are specifically stated as "may also be found in the Respondents' bundle".*

16. There was no attempt to engage with where they might be found in the hearing bundle produced by the Respondent which had been Ordered to be the one to be used by the Tribunal. The "supplemental bundles" that the Claimant wanted to rely on were considerable in size and ran to more than 2,000 pages. Those pages were all already contained in the hearing bundle and would have required considerable duplication of reading in.

17. The Claimant made an application to rely on her supplemental bundles to which she had cross referenced her witness statement. That application was refused and the reasons for that were communicated to the parties in writing on 11th January 2022 during the time that the Tribunal was still reading into the papers.

18. Our reasons for that refusal was that the Claimant was seeking to go behind the Orders of Employment Judges Hutchinson, Clark and Butler but there had been no material change in circumstances which justified varying those Orders and we would have to read over 2,000 pages of duplicated material. We made it plain that the Claimant must bring the bundles produced by the Respondent to the hearing, that she must amend her witness statement to incorporate the relevant page numbers in the actual hearing bundle and cross examine witnesses having regard to that bundle and not her own supplemental bundles. We made Orders for the Claimant to deal with that and particularly to cross reference her witness statement to the actual hearing bundles. We made it plain that we were not prepared to begin hearing the evidence unless and until the Claimant had done so. We gave the Claimant until 9.00 a.m. on 14th January 2022 to amend her witness statement to incorporate the page references to the bundles produced by the Respondent and to send a copy to the Tribunal and to the Respondent. The Claimant did not comply with those Orders.

19. We also Ordered the Claimant at the same time to comply with the Orders made by Employment Judge Clark regarding any proposed amendments to the list of issues. The Claimant had not complied with that and had done what she was strongly encouraged not to do by Employment Judge Clark as she had simply indicated that the list of issues was not agreed and submitted her own. That list of issues produced by the Claimant contained references to complaints which had already been struck out by Employment Judge Blackwell. In respect of the list of issues the Claimant also said that she was not able to comply and that the Tribunal would need to ensure that the list of issues dealt with all of the complaints that she had raised so that none were missed.

20. We had also asked the Claimant to attend the hearing centre to view the hearing room because we had concerns that the lighting may trigger her migraines because she had photo light sensitivity. The Claimant did not attend as she said that it was too short notice to do so. That was despite the fact that there should have been physical attendance at the hearing centre on 14th January 2022 but for the Tribunal taking that as a further day for reading in.

21. Given that the Claimant did not comply with the Orders that we had made we reminded her on the afternoon of 14th January 2022 of the need to do so, that her failure was placing the ability to have a fair hearing in jeopardy and that as a result we would consider of our own volition whether to strike out the claim.

22. The parties attended the hearing on 17th January 2022. That took place as a hybrid hearing with the parties attending by cloud video platform ("CVP"). That was in part due to the unresolved issue with the lighting although the Tribunal did later source lighting which we believed would be suitable based on what

the Claimant had told us over email about her requirements, albeit she never attended the hearing centre to confirm that. By this stage the Claimant had still not complied with the Orders made.

23. On 17th January 2022 the Claimant showed us a select number of pages of the electronic bundle that she was sent by the Respondent that did not appear to have full page references or otherwise were in some way distorted. We had not encountered any issue in that regard in the bundles which we had been provided with and that raised a concern that the Claimant did not appear to have the same documents that we had in some cases. The Claimant told us that this issue affected hundreds of pages of documents in the bundle that she had at that time, although she did not comply with an Order that we made to identify those so we have not been able to determine the extent of the issue.

24. The Claimant had said in an email sent to the Tribunal on Sunday 16th January 2022 that she was prepared to use the same copies of the bundle that we were using and amend her witness statement to incorporate the relevant page references. We would observe that the Claimant had previously been offered a hardcopy of the bundle as the Respondent's solicitors had noted that the quality might be affected sending it electronically. That was because the size required it to be split into 19 separate attachments. The Claimant would not provide an address for a hardcopy bundle to be sent to her. Indeed, she has been at pains to ensure that the Respondent did not have an address for her and has redacted documents during the course of the hearing to remove such references.

25. Discussion was had about how the Claimant would obtain the hardcopy bundle. She did not want the Respondent's solicitors to courier it to her and elected that she would collect the bundles which were originally to be used by the witnesses from the hearing centre. She initially contended that she may not be able to collect them until the end of the week but that was not feasible as it would mean that a week of hearing time would be lost and thereafter the Claimant still needed time to amend her witness statement. After a 30 minute adjournment the Claimant was able to make arrangements to attend the hearing centre to collect the bundles that day, albeit she did not attend until the following day because by the time that she had planned to arrive the Tribunal was closed. Instead, she attended on the afternoon of 18th January 2022 and at that time she also viewed the lighting in the hearing room and confirmed that it would not be suitable for her.

26. We had also discussed with the parties the time which the Claimant would need to amend her witness statement to comply with the Orders previously made. The Claimant said that she would be starting from scratch and would need three weeks to do that. Ms. Niaz-Dickenson on behalf of the Respondent strongly objected to that indicating that it was her view that the Claimant was seeking to place obstacles in the way of the hearing proceeding smoothly and that if she was permitted three weeks to do so the hearing would need to be postponed and relisted on another date which would be well into 2023. She told us that she had undertaken the same exercise within two days and the Claimant would be more familiar with the documents.

27. We permitted the Claimant three clear days to deal with amendment of her statement which we are satisfied was more than sufficient time because all that the Claimant needed to do was identify page numbers using the indices of both the hearing bundle and her supplemental bundles and she was already familiar with all the documents. The index of documents in the hearing bundles prepared by the Respondent was clear both in date and description and we were satisfied that it would not be a significant task for the Claimant to locate the ones that she is referring to in her witness statement.

28. Until the statement had been amended in this way, we parked consideration of the list of issues and the timetable for the hearing which we had been due to deal with as preliminary matters.

29. We made Orders for the Claimant to amend her witness statement in the way described above and to identify any documents that she had that she said were not included in the hearing bundle and any that she said had legibility issues which might cause her to have a migraine. The time provided for those things to be dealt with was by 4.00 p.m. on 20th January 2022. The Claimant did not comply with any of those Orders.

30. The hearing had been postponed on 17th January and was due to recommence on 21st January 2022. However, on 20th January 2022 at 15.10 an email was received which was apparently sent on behalf of the Claimant (from the unidentified sender referred to above) which said this:

"I am following up from the call I made earlier today at about 1.30 pm and spoke to Chris at the Employment Tribunal. Chris advised me to send an email instead so as to explain the situation.

I am emailing this on behalf of Dr Rose Nyatando who is currently unable to email or call your offices. Unfortunately, earlier in the morning she was referred to A&E (hospital) because of heavy migraines and being generally unwell. I know she was recently instructed by the court to do quite a lot of work within the last 3 days, which seems to have affected her health.

I just want to inform you that due to the above health reasons she is not able to complete a number of submissions, which are due today (3 orders in relation to bundles and witness statements). Certainly she is also unable to participate in the hearing planned for tomorrow Friday (sic). *I'll provide more information once available.*

I have copied the email you have in your system for Dr Nyatando".

31. On the back of that email the hearing listed for 21st January 2022 was postponed. The sender was told that urgent correspondence had been sent to the Claimant but that we could not substantively communicate with them without the Claimant's consent that they acting as representative. As we have observed above, we never received that consent.

32. During the afternoon of 20th January 2022 the Tribunal wrote to the Claimant by email in the following terms:

*"In view of the email received on behalf of the Claimant today, the hearing is postponed until **Monday, 24th January 2022 at 10.00 a.m**. In accordance with the Presidential Guidance on Postponements and Adjournments the Claimant must provide the following to the Tribunal and to the Respondent by no later than **2.00 p.m. tomorrow**:*

(a) Proof of her admission to hospital; and
(b) A medical opinion dealing with when she will be sufficiently recovered to participate in the proceedings along with details of any other adjustments that will need to be made during the hearing.

Upon receipt a decision will be taken as to whether there should be any further postponements and how the hearing should proceed – i.e. in person or remotely".

33. We reminded the Claimant again on 21st January 2022 as to the need to urgently update the Tribunal as to the present position with her health and to comply with the Orders made to provide medical evidence. It was made plain that the Claimant was to do so by return so that the Tribunal could determine if the hearing could proceed as listed. Nothing was forthcoming from the Claimant or anyone acting on her behalf. Accordingly, of our own volition we also postponed the hearing listed for 24th January 2022 because it did not appear that the Claimant would be attending. We wrote to the parties by email notifying them of that position on the afternoon of 21st January 2022 saying this:

"Further to the Orders made by the Tribunal yesterday and the earlier communication today it is noted that nothing has been heard from the Claimant or anyone on her behalf.

Of the Judge's own volition she is postponing the hearing listed for 24th January 2022 because it appears unlikely that the Claimant is going to be fit to attend. That is based on the current lack of contact and the fact that the Claimant previously informed the Tribunal that it takes her four days to recover after a migraine. That being the case, if 24th January remained as listed it is likely to waste time and cost for the Tribunal and the Respondent.

*However, the Claimant must still comply with the Orders made on 20th January 2022 to provide medical evidence. Unless that is done and the Claimant makes any further successful applications to postpone the hearing it will recommence at **10.00 a.m. on Tuesday 25th January 2022**. It will be conducted by CVP and the parties should not attend the hearing centre. The Tribunal will be present in the hearing centre but anyone else participating should only join via CVP. The Respondent already has the link but details are attached for the Claimant. She **must not** disseminate those to any other person. Anyone else who wishes to attend should email the Tribunal in the way previously notified to the parties.*

The Tribunal will deal at that time with preliminary matters and any applications that either party intends to make at that hearing should be made by no later than ***12 noon on 24th January 2022****".*

34. On 24th January 2022 two documents were received from the same email account that sent the email of 20th January 2022 which purported to comply with the above Orders. The covering email said this:

"I have attached the evidence for A&E admission and the recent medical records for Dr Nyatando.

On Thursday morning (20th January 2021) we called 111 and NHS ordered an ambulance because of the symptoms and concerns of a possible stroke, which needed to be checked. They advised us of long waiting time for an ambulance, therefore asked us if we could make our way to the main hospital or to the Urgent Treatment Centre in Derby. We went to the latter as it is much closer.

There she was seen by a clinician, but he said there were no specialist doctors there and booked for a video call with Urgent Treatment Centre Doctor. In this call she was checked for issues including possibility of stroke on right side, but referred to her GP for later that same day for physical examination. The GP once he examined her, he was concerned of a possible stroke or head bleeding into her neck (migraine with pain spreading to right arm which had stiffness and weakness). He advised 999 call for ambulance. The GP referred her to A&E for assessment (form attached). A&E consultants following their assessments booked her in for further physical examinations, including neurological tests and head CT scan. Following this she was cleared of the possibility of stroke, but the issue with her arm persists and for the migraines she has been prescribed with stronger medication.

Paperwork from the 2-day treatment is attached, provided by both hospital and the GP. They both said that this documentation is what they can provide at this time. We didn't know the exact court order at the time, due to health scare no emails from the ET had been seen yet. We did ask for a report or letter by the GP (everyone else referred to the GP for this), but the GP said the notes will suffice, this is indicated on page 2 of medical records he printed. See attached document). The GP stated that a report will need to be requested via the process and will take time, it cannot be done immediately. Also, the A&E will forward their test results (neurological and head CT scan) to the GP who will make arrangements for further tests if required. The request for a report will include the questions in the court order of 20th Jan (sic) *2022, but some adjustments as self-evident in the medical records attached".*

35. The first document provided at that time is said to be evidence of the Claimant's admission to A&E as referred to in the email of 20th January 2022. The Respondent pointed out a number of inconsistencies with that document and suggested that it may have been forged. Written submissions to that effect were made on 24th January 2022 and supplemented orally by Ms. Niaz-Dickinson at a hearing on 31st January 2022 to which we come below. The

Claimant did not respond at the time to the written submissions to seek to correct the position although her written submissions for today take considerable issue with that suggestion.

36. The main issue with regard to the document in question was the spelling of the word “Emergency” which was incorrectly spelt as “Emergancy” no less than three times within the document despite the fact that it appeared to be a standard template. There was also a section of the letter which appeared to have been pasted on which bore the Claimant’s name and a number which is in a different colour to the rest of the document and the date of attendance and release was plainly incorrect as these are given respectively at 21/12/22 and 22/12/22. The time of admission and release were also at odds with the information contained within the 20th January 2022 email which said that the Claimant had been referred to A&E in the morning. The time of admission on the letter is 17.50. We found it difficult to conceive how there were some many apparent errors and inconsistencies within that document and we accept the submissions of the Respondent that it did not comply with the Orders that we had made.

37. There was a second document supplied which threw up further issues. Firstly, it showed an attendance by the Claimant at the Derby Urgent Care Centre at 11.55 a.m. which refers to her needing a letter for a Court case. That of course must be these proceedings. It made no reference to a referral to A&E as the email of 20th January had said had happened. The very clear implication in that email was that the Claimant had been admitted to hospital that morning, although a slightly more consistent timeline was provided in a later email of 24th January which was also apparently sent on the Claimant’s behalf. However, that was only after the Claimant had had sight of the Orders that we had made to produce medical evidence and her first attendance at A&E only came after that time.

38. That second document made plain that the referral to A&E by her GP was not until 21st January 2022 at 17.45. That is just five minutes before the Claimant was said to have been admitted to A&E on the admission document that she has supplied, even leaving aside the incorrect date. As the Claimant was making her own way to A&E it appeared impossible for her to have had an examination at her GP practice; have travelled privately to A&E and been admitted in the space of five minutes.

39. The hearing was then postponed until 28th January 2022 to allow the Claimant time to obtain further medical evidence which did comply with the Orders that we had made. It was unfortunately not able to be heard that day because in the interim the Judge had tested positive for Covid-19 and the symptoms experienced at that time were such that she was not able to sit on that particular day.

40. However, in all events nothing had been heard from the Claimant or anyone on her behalf since 24th January. We therefore indicated that it was presumed that she was sufficiently well to resume on 31st January 2022. The parties were notified on the afternoon of 27th January 2022 of that position and the Claimant was again reminded of the need for medical evidence.

41. At 20.43 on Sunday 30th January 2022 the Claimant herself sent a further email indicating that she was not fit to attend the hearing the following day and seeking a further postponement. Her email said this:

"Please find below applications and submissions made on behalf of the Claimant (Dr Rose Nyatando).

Whilst the Claimant is in receipt of the court's intent to go ahead with the hearing on Monday (31 January), the Claimant feels the need to clarify that the assumption that the Claimant is fit to attend the hearing on Monday is incorrect.

The Claimant remains unwell and is awaiting further investigations as to her current state of health, following referral to A&E and hospital tests by specialists. In the meantime (as of Friday 28th January medical review), she has been prescribed diazepam for pain relief, which has the side effect of making her sleep for long periods of time. It also causes drowsiness. This medication is in addition to other medication already prescribed to her.

Due to her current health issues and further medical investigations required the Claimant feels unable to partake in the hearing on Monday 31/01/22. For this reason the Claimant applies for the hearing to be postponed pending medical advice, which has been formally requested per Court Order.

The Claimant has forwarded the court's orders to the GP as instructed. In turn the GP has asked that she forwards to the court their acknowledgment and response (which will be forwarded separately). The GP has declared they have by law up to 30 days to issue a medical report and, as they cannot state exactly when this will be complete, in the meantime they have provided the Claimant's medical records for the Court's attention, which they said is sufficient for excusing her from Court until the formal report is issued. This is reflected at the bottom of page 2 of medical records the Claimant has previously provided to the Court (refer to GP Dr Khan's notes of 21 January 2022 timed at 17.45).

The medical centre has informed the Claimant that the Courts are already aware of the 30-day law regarding the issuing of medical information as requested by the Court. They stated should the Court require further clarification or confirmation then the Court should contact the GP medical centre directly".

42. There was no one at the hearing centre to action the Claimant's email received late on Sunday night and it was not able to be dealt with until Monday morning. By that time, as we notified the parties, it was too late in the day to postpone the hearing without hearing from the Respondent. The parties were therefore notified that the hearing would proceed and that the Respondent could make submissions on the application made by the Claimant. The Claimant was reminded that she could attend to make representations if she wished to do so.

43. We granted the adjournment application but only to a limited degree and reasons for that were set out in the Orders that we issued after the hearing. In

short terms we did not accept that it was necessary to adjourn the hearing for the remainder of the time allocated because of issues with the bundle. Whilst the Claimant referred to needing somewhere in the region of two and a half months to amend her witness statement to incorporate the page numbers of the bundle, that was a radical departure from the three weeks that she had previously said that she needed without any rationale for that change in stance. In addition, for the reasons given below we did not consider that such a period of time was either reasonable nor necessary.

44. All that the Claimant had been Ordered to do was a simple task which involved comparing the indices of the hearing bundle and her own bundles and inserting the relevant page numbers within her witness statement. Any problems with the hearing bundles which had been provided electronically had been rectified by the Claimant having collected hardcopies from the Tribunal hearing centre. The Claimant had had those for almost two weeks by that stage and we considered that that time and a further modest postponement was more than ample time for her to complete that task, particularly given that she was already familiar with the documents concerned. We made further Orders for the Claimant to amend her statement. The Claimant failed to comply with that Order too.

45. We had also considered the position as to the Claimant's health. However, we determined that she had not complied with the Order to provide medical evidence to deal with her prognosis and ability to participate in the hearing as listed and what additional adjustments, if any, were required to be made. The GP notes did not deal with that and the most that we had was an opinion that the Claimant did not look fit enough to attend the Tribunal on 21st January 2022.

46. We did not proceed with the hearing and postponed it for a further short time so as to give the Claimant one final opportunity to provide a compliant report and amend her witness statement. We did, however, make that Order to provide medical evidence an Unless Order which had the effect that a failure to comply with it in full and on time then her applications to postpone the hearing would be dismissed and the hearing would then proceed on 7th February 2022.

47. That Order also included the need to provide further evidence as to the Claimant's admission to A&E on 20th January 2022 given the issues raised by the Respondent as to the evidence provided by that point. The terms of the Unless Order were as follows:

UNLESS ORDER – Medical Evidence

1.1 Unless by no later than ***12.00 noon*** *on* ***4th February 2022*** *the Claimant supplies to the Tribunal and to the Respondent the following documents her applications to postpone the hearing on medical grounds will stand as dismissed without the need for further Order:*

1.1.1 An extract from her hospital records showing her attendances at A&E on 20th and 21st January 2022;

1.1.2 A copy of the letter sent from the A&E Department to the Claimant's General Practitioner explaining the reasons for admission as referred to in the document sent to the Tribunal on 24th January 2022; and

1.1.3 A report from the Claimant's General Practitioner confirming the following:

1.1.3.1. Whether the Claimant is currently fit to attend and participate in a hearing scheduled from 7th February 2022 to 4th March 2022;
1.1.3.2. If the Claimant is not fit to attend what condition(s) are preventing her attendance;
1.1.3.3. If the Claimant is not presently fit to attend what is the prognosis of her being able to attend to participate in a full hearing of the claim and if she is able to participate at some point in the future when that will be likely to be (whether in the existing listing or at some future point); and
1.1.3.4. Whether there are any further reasonable adjustments that need to be considered for the Claimant (appropriate lighting has already been sourced) and if so, what those adjustments are and why they are necessary to accommodate the Claimant's disabilities.

48. On 4th February 2022 the Claimant herself sent an email to the Tribunal attaching documents that purported to comply with the Unless Order but in fact did not. The email said this:

"This is submission for court order 2.1.3, which regarding a report from the Claimant's General Practitioner.

The Claimant has been chasing this with the GP medical surgery she is registered with for a number of days (evidence attached and further will follow). The Claimant was first informed that this would take up to 30 days to process, however having managed to speak to both medical treating practitioner and practice manager (Tina Hall) she has been given updated feedback. This states that the GP cannot comply with Court Orders given indirectly through the Claimant, because the GP under NHS has not (sic) *indemnity to cover this request. However, should the Court order the GP directly then this will be a different matter (it won't be a private request in that case, the Claimant was notified only today that her request is deemed as private even if she is forwarding court orders given to her).*

Therefore, the Claimant requests and applies that the Court makes the relevant Court Orders and these are communicated directly to the GP from the Court to enable progressing of this Court Order, which remains outstanding (all items under 2.1.3).

The Claimant has asked the Practice Manager to confirm in writing the above and an email from the GP medical surgery is attached to that effect.

The GP medical surgery is copied to this communication for transparency and in order to give the court the direct contact details".

49. The email attached two documents. The first of those appeared to be an email that the Claimant had sent to her GP. It was sent at 11.45 a.m. on 3rd January – that is just over 24 hours before the deadline for compliance with the Unless Order.

50. The second document was an email to the Claimant which appears to be from her General Practitioner which read as follows:

"My previous email included documents showing all consultations and letters from 20/01/22 onwards.

This email is to confirm it is not our remit within our NHS GMS contract to provide private medical reports to patients.

This can be requested through the court directly, we will consider giving a response as appropriate".

A second email was received from the same unknown sender and said this:

"Please find below and attached on behalf of the Claimant (Dr Nyatando) regarding the following order.

UNLESS ORDER - Medical Evidence

<u>Order 2.1.1 (attendance notes)</u>

1) Attendance note to Urgent Treatment Centre in Derby on 20.01.22 is attached. Dr Nyatando was directed by NHS 111 either to this centre or to the main hospital (I explained in detail on 24.01.22, refer to my email from that date)
2) Original attendance note at the hospital in Derby on 21.01.22 is attached (resubmitted and includes the hospital's official stamp for authenticity)
3) Corrected attendance note at the hospital in Derby on 21.01.22 is attached. The hospital corrected the dates and times. The white sticker at the top is what the hospital is using to uniquely identify each hospital patient with a number. Tthe (sic) *hospital's official stamp for authenticity is also shown.*

The Claimant's address, NHS number and DOB have been redacted from the attachments for security purposes.

Regarding authenticity of documents, the hospital said that the Court can phone directly the hospital to confirm authenticity of these records if in doubt.

The Claimant's side has taken the allegations of fraud, made by the Respondents against her, very seriously and further action will be taken against the responsible individuals and the Respondents.. It should be noted that the allegations of fraud and forging of documents is not just against the Claimant but also against 20+ NHS professionals.

Further submissions will follow.

The Claimant's email address is copied".

51. The email attached three documents. The first was an attendance slip confirming that the Claimant had attended the Derby Urgent Treatment Centre on 20th January 2022 between 11.30 a.m. and 12.15 p.m. The second was a copy of the original hospital admission document with a handwritten amendment which said "corrected by Jordan" and the third was an apparently revised admission document which showed admission of the Claimant on 21st January 2022 to A&E between the hours of 18.41 with her discharge being the following day at 1.25 a.m. It was signed to "Jordan A&E Reception" rather than by a doctor as had previously been the case with the original admission slip. Oddly, the word Emergency at the foot of the document was still spelt incorrectly and read as "Emergenct" despite again that apparently being a template document.

52. The Claimant herself also sent two further emails to the Tribunal on 4th February 2022. The first of those said this:

> *"Please see below on behalf of the Claimant.*
>
> *Since the medical opinion/report from the GP is yet be to be issued (pending a direct Court Order, refer to email below) the Claimant submits her updated medical records as provided by the GP (from 21 January 2022 and onwards, medical records prior to that date were sent to the Court previously).*
>
> *The Claimant is still unwell, unable to complete Court Orders 4.1, 4.2 and 4.3 and will be unable to attend court next week. She is experiencing migraines, neck pain which spreads to her arm causing to shake, and weakness in that arm. She is awaiting further directions from the GP on further investigations and treatment. The Claimant is on dazepam* (sic) *to alleviate these issues and the pain (evident in the medical records attached). This medication makes her very drowsy and for her to fall asleep".*

53. Attached was an extract from the Claimant's GP notes showing entries between 21st January and 4th February 2022. That extract was consistent with the amended hospital admission in that it showed the Claimant being admitted to hospital on 21st January 2022 at 18.41. The only other entry of note is on 3rd February 2022 when the Claimant had attended her GP reporting that she was feeling stressed because of the Court case – a reference of course to these proceedings – and that she could not cope with the "Court wanting". That is incomplete but is presumably a reference to information that we have Ordered the Claimant to provide and the amendment of her witness statement.

54. The second email that the Claimant sent attached a letter from Trent PTS to her GP regarding her access to psychological therapy. That letter recorded that the Claimant reported that she was overthinking and overwhelmed because of the case – again a reference to these proceedings – and that she had been admitted to A&E as there was concern that she was at imminent risk of a stroke.

THE LAW

55. Rule 37 of the Employment Tribunals (Rules of Procedure) Regulations provides as follows:

    "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;

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

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

    (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

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

56. Whilst the striking out of discrimination claims should be rare because of the public interest importance of such claims being determined after examination of the evidence (see **Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638: UKEAT/0128/19/BA** – albeit in a different context) that will be a permissible step where there can no longer be a fair hearing, including within a reasonable time frame (see **Peixoto v British Telecommunications plc EAT 0222/07 *and* Riley v Crown Prosecution Service 2013 IRLR 966, CA**).

57. In **Riley** Longmore LJ said as follows:

"It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time. That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department which are as relevant today as they were 11 years ago:—

> *"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights , having regard to the terms of Article 6): they had to include fairness to the respondent. All*

> *accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days."*

It would, in my judgment, be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal."

58. Similarly in **O'Cathail v Transport for London 2013 ICR 614, CA** when considering postponement applications it was made plain that there are two sides to a trial and the proceedings should be as fair as possible to both sides. The tribunal has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within a reasonable time and the public interest in the prompt and efficient adjudication of cases.

CONCLUSIONS

59. We turn then to our conclusions as to the position with the continuation of the hearing and the competing applications made by the parties.

Whether there should be a further adjournment

60. Before turning to the applications made by the parties we need to consider whether there should be any further adjournment to the hearing. We accept the submissions of Ms. Niaz-Dickinson that the Claimant has not complied with the terms of the Unless Order. Paragraphs 1.1.2 and 1.1.3 have not been complied with. The effect of that Unless Order is that the Claimant's postponement application was dismissed.

61. However, we have considered whether we should adjourn the hearing further of our own volition to allow the Claimant a further period of time to comply with the Orders made. We have decided that we should not do so. The medical evidence provided by the Claimant is insufficient for us to ascertain that she remains unfit to attend the hearing. The most that the Claimant has provided is an extract from her medical records which recorded that she did appear fit to attend the hearing on 21st January 2022. We have nothing beyond that and also have no prognosis, if the Claimant is not fit to attend the hearing, as to when that state of affairs will cease. Whilst we have the Claimant's representations that she is unfit to attend, we need to balance those against a lack of medical evidence; the failure to provide the letter from A&E to her GP

as required as part of the Unless Order when it appears from medical records that it is in her possession; the fact that the email of 20th January was misleading at best about a referral to A&E; that tests that the Claimant says she is undergoing in an email of 24th January 2022 are not referred to at all in her medical notes and that she has provided and a general lack of candour in compliance with Orders so as to properly progress this matter. There is force in the submission of Ms. Niaz-Dickinson that the Claimant has placed barriers in the way of the smooth running of this hearing and in view of those matters we cannot simply accept the Claimant's word as to the state of her health and inability to participate. We see no reason to depart from the relevant Presidential Guidance in that regard.

62. We also have some doubts over the evidence that we have received given the still unexplained errors within the original A&E admission document. We do not consider that it is for us, as the Claimant suggests, to directly ask the hospital about that.

63. We have considered whether we should adjourn the hearing again to obtain medical evidence directly from the Claimant's GP as she contends that we should do. We do not consider that that is an appropriate course for us to take. There appears to be contradictory information within the information that we have been provided with by the Claimant from her GP about whether they provide medical reports. The email from the practice to the Claimant suggests not but that does not appear to be consistent with discussions that she was having with her GP, Dr. Khan, which appear in the GP notes that she has provided.

64. We would observe that we find it unusual in our experience for GP's to refuse to provide medical reports of this nature. Medical practitioners frequently provide urgent reports to support applications for postponements and adjournments on medical grounds. If they did not, it would be inevitable that every application would need to be determined without that medical evidence because such applications are generally made at the last minute. We see no reason to deviate from the Presidential Guidance on Postponements and Adjournments and that on this occasion and do not consider that it is for the Tribunal rather than the Claimant to obtain the relevant medical evidence.

65. In all events, we are far from certain that we would receive a report or one that gave us the necessary information within a reasonable timescale. The email merely records that "we will consider giving a response as appropriate". It does not commit to providing a report, not least one that provides us with the information that we have set out in previous Orders.

66. However, if we were to take such a course then if it is the case, as the GP appears to suggest, a report is going to take up to 30 days to provide then the hearing would be over before it was received.

67. We would then be in a position where we are in limbo awaiting a report with the Respondent continuing to incur costs until that happens. As we have already observed, there is also no certainty at all that we would in fact receive one or one that assists us with the Claimant's ability to participate effectively in these proceedings.

68. In short terms it would be necessary for us to relist the hearing for a further 40 days of hearing time. The earliest time that the hearing could be relisted would be June 2023 but that would have to be before a new Tribunal who would again have to complete the reading in from scratch. If the matter came back before this Tribunal it would be October 2023 at the earliest before it could be heard. Those dates assume that the parties and witnesses would be available which might well not be the case. However, that would be a delay of at least a further 16 months.

69. We say more about the delay in the context of whether a fair hearing remains possible.

<u>The Claimant's application to strike out the Responses</u>

70. We should observe that the one thing that the parties do agree on is that it is no longer possible to have a fair hearing. They have a significant divergence of opinion, however, on who is responsible for that state of affairs.

71. We deal firstly with the Claimant's application to strike out the Response of the Respondents. The basis of that lengthy application, in short terms, is the issues which we have already described above with the hearing bundle prepared by the Respondent's solicitors. The Claimant contends that she had not been given a copy of the bundle until after the hearing had commenced and that this had made it impossible for her to complete the preparation that she had been Ordered to do. The Claimant's position is that that was scandalous, unreasonable and vexatious conduct and that there was an abuse of process in accusing her of forgery and unreasonable conduct.

72. We have little hesitation in dismissing the Claimant's application. Whilst the Claimant had complained previously about the hearing bundle prepared by the Respondent that was only in very general terms. The Claimant has had the bundle since August 2021 in draft and in a final form since December 2021. Other than generic complaints about the legibility of the bundle she did not engage with an explanation as to precisely what was wrong with it and instead focused on repeated applications to use her own bundles that had previously been refused. We accept that the Respondent was effectively left to guess what problems the Claimant was referring to and the issues recently identified by the Claimant were not evident on the copies that the Respondent was using. Indeed, they were not present at all on the hardcopy versions and had the Claimant engaged with the Respondent to accept their offer for it to be provided that way, all this could have bee avoided. However, she did not and pressed on with requiring an electronic copy only which she had been told may result in difficulties with the quality.

73. Moreover, had the Claimant set out what the problems actually were then they could have been rectified well before now. Even as late as the Preliminary hearing on 2nd December 2021 this matter could have been rectified if the Claimant had attended and demonstrated the problems experienced as she did before us on 17th January 2022. This is therefore to some degree a situation of the Claimant's own making.

74. We have sought to remedy the issues with the Claimant's electronic bundle by way of her collection of a hardcopy and provision of time to amend her witness statement. We do not accept that the Claimant's submissions reflect the reality of the situation with regard to the hearing bundle and we do not consider that there is any basis on which to suggest that the Respondents have acted unreasonably, scandalously, vexatiously, abused the Tribunal process or rendered it impossible to have a fair hearing. Particularly, we do not accept that there is any evidence at all to suggest that there has been any falsification of documents or that the Claimant's evidence has been in any way tampered with as she suggests.

75. Whilst allegations of unreasonable conduct on the part of the Claimant have been made, as we shall come to below those are made out, and given the clear and unexplained issues with regard to the first A&E admission document, it is not surprising that Ms. Niaz-Dickinson made the submission that she did as to them having been forged.

76. It follows from what we have said that none of the grounds in Rule 37 of the Regulations are made out as against the Respondent and as such the Claimant's application that the Responses be struck out is therefore refused.

<u>The Respondent's application to strike out the claim</u>

77. The Respondent firstly contends that the Claimant has acted unreasonably in failing to comply with Orders made and secondly that a fair hearing is no longer possible.

78. We begin with the position as to whether the Claimant has conducted the proceedings unreasonably. We are satisfied that she has. She has failed and/or refused to comply with the Orders of Employment Judges Hutchinson, Clark and Butler and by this Tribunal to use the hearing bundles produced by the Respondents and to cross reference her witness statement to them.

79. Whilst we have identified that there were some issues with the electronic copy of the hearing bundle which the Claimant had been provided with, she had only complained about the bundles in very generic terms and at no point before 17th January 2022 did she provide any specific examples of the sort that she showed us on that day. That would have been a very easy thing to do as we have already observed above. We accept that the Respondent was effectively working blind in trying to understand what the Claimant's complaints about the bundle actually were. That included providing better copies of documents which they identified might be ones that the Claimant was complaining about in terms of legibility. Had the Claimant pointed out what the precise issues were rather than seeking to go behind Orders of the Tribunal and use what she referred to as her "supplemental bundles", the matter could and we accept would have been rectified long before it was. There were at least two Preliminary hearings before Employment Judge Clark and Employment Judge Butler where that could have happened. The Claimant did not participate in that latter hearing save for submitting written representations but again only referring generically to complaints about the bundle.

80. Instead, the Claimant did the opposite of what she had been Ordered to do and sent the lengthy supplemental bundles of her own to which she had cross referenced her witness statement. She made a token gesture – on a generous interpretation – of purported compliance in the way that we have already described above with reference to a footnote on her witness statement. We have attempted to provide a solution and time for the Claimant to comply once again with the Orders previously made but she has still failed to do so. It appears to us that that is wilful non-compliance.

81. We should say that whilst the Claimant contends that a significant number of pages in the bundle were affected by the issues that she identified on 17th January, we have not been able to drill down as to how many pages were actually affected because the Claimant did not comply with Orders which we made on 31st January 2022 to identify them.

82. Moreover, the Claimant was told by the Respondent's solicitors in August 2021 that the quality might be affected by having to send the bundle electronically in 19 attachments. Whilst the Claimant's written submissions indicate that she would not have considered that a hardcopy bundle would be any different to the electronic copy, having complained about legibility and been specifically warned that an electronic copy would be likely to be of lesser quality, it is extremely difficult to fathom why the Claimant did not take the Respondent up on their offer to send a hardcopy to her. That appears to stem only from a reluctance to tell the Respondent what address they needed to send a hardcopy bundle to and we have already made observations about that above.

83. The Claimant has also had in her possession for some time the hardcopy bundles which she collected from the Tribunal at her suggestion so as amend her witness statement.

84. However, we still remain in a position where the Claimant has not complied with the Orders made by three Employment Judges and this Tribunal to cross reference her witness statement to the hearing bundles. That is despite her having been in possession of all of the documents for some considerable time and having had a hardcopy of the bundle since she collected it from the hearing centre. Given all that has gone before, we have no confidence that the Claimant will ever comply with the Orders made in this regard and we have already made plain that we are not prepared to start the evidence unless and until she has done so. Equally, the Claimant has failed or refused to comply with Orders to agree or amend the list of issues and there remains no definitive list in place even at this stage of the proceedings. There is considerable force in the submissions of Ms. Niaz-Dickinson that the Claimant simply places barriers in the way to the smooth running of the hearing.

85. We are satisfied that in continually failing or refusing to comply with Orders made the Claimant has acted unreasonably. That position derailed the commencement of the hearing and as we lack confidence that she will comply at all even if given further opportunity to do so, which places the Tribunal in the position of either not commencing the evidence at all or being forced by the back door to go behind the Orders of previous Judges and allow the Claimant to use her "supplemental bundles". We have already made plain how the

latter is an entirely unsatisfactory state of affairs. We have considered the less draconian sanction of the imposition of an Unless Order but given the Claimant's purported compliance with the Orders made previously by simply noting as a foot note that the documents that she was referring to may be found also in the Respondent's bundle, that is likely to lead only to satellite argument as to compliance/non-compliance.

86. We should also observe in the context of unreasonable conduct that we have considerable concerns about the representations that were made about the Claimant's inability to attend the hearing on 20th January 2022. The clear indication was that the Claimant had been admitted to A&E on that day and it was for that reason that we postponed the hearing on that date. In fact, that was not the case and the Claimant did not attend until the following day when she was already in receipt of our Order to provide medical evidence as to her admission. That is of concern as the content of the initial email was misleading at best and we also have to take into account that we have had no explanation for the myriad of errors in the original admission documentation provided by the Claimant.

87. We are satisfied that that position and, more importantly, repeated non-compliance with Orders made amounts to unreasonable conduct on the Claimant's part. However, it is not enough to find that the Claimant has acted unreasonably. We must also consider whether a fair hearing can still take place.

88. In considering that question we have to bear in mind that we are currently on day 21 of 40 and, other than reading in, nothing at all has been achieved. We are therefore over half way through the existing listing and we have not been able to consider even Preliminary matters such as the list of issues, which the Claimant has made plain she does not intend to engage with despite the comments of Employment Judge Clark, or what other adjustments she may be seeking during the hearing itself.

89. This is not in our view a case such as **Osonnaya v South West Essex Primary Care Trust EAT 0629/11** where evidence has begun and the progress made is simply slow. We have not even got past preliminary matters on day 21 of 40. In short, we have not even made it out of the starting blocks despite being over half way through the race.

90. As we have already observed above in determining whether to further adjourn the hearing, there would be a significant delay in being able to relist this hearing which would be the inevitable result if we continued to await the Claimant amending her witness statement and attending the hearing. That delay, as we have already said, would be at least 16 months. It is notable that in response to an application by the Respondent to adjourn the Preliminary hearing in December 2020, that the Claimant contended that any further delay would cause further deterioration to her health. That is not the only time that the Claimant had made such a reference.

91. The Claimant has not worked since the termination of her employment with the Respondent and has, until recently, continued to submit Statements of Fitness for Work ("Fit Notes"). She has made it plain that these proceedings

cause her stress and indeed, she says that she is currently incapacitated because of the work that the Tribunal asked her to undertake to place page references within her witness statement. We accept the submission of Ms. Niaz-Dickinson that that was a relatively straightforward matter which would have only required the Claimant to compare the index from the hearing bundle and the supplemental bundles which she had previously prepared and alter the page references within her statement. Whilst we accept that we are of course not medically qualified, it is difficult to see if that task caused stress so as to incapacitate the Claimant for almost three weeks, and seemingly she appears to suggest for the remainder of the hearing time, how her stress levels will not be impacted so as to incapacitate her during cross examination both of her and by her of the Respondent's witnesses. That is of course a far more stressful situation.

92. The list of issues alone runs to some 37 pages and the scott schedule setting out the complaints advanced is voluminous to say the very least. The case has considerable complexity as a result of the number of complaints, the time period that they span and the issues involved and there are a number of witnesses on behalf of the Respondent who the Claimant will have to cross examine. This is a far from straightforward case and we take note that even the more straightforward of claims can impact the participants stress levels. That is particularly for litigants in person suffering from mental health difficulties. We raise these matters because, as we shall come to, it is difficult to see if the matter was relisted (which practically speaking it would now have to be notwithstanding what we have said about a further adjournment) how things would be any different on the next occasion.

93. Moreover, the Claimant has made it plain during the hearing on 17th January 2022 that if she suffers a migraine then the aftereffects are such that she requires at least four days to recover. On this occasion, she has spent 18 days thus far on her account incapacitated by the effects of a migraine. The Claimant cannot access trauma treatment until after these proceedings have concluded and it is difficult to envisage that the Tribunal will find that matters have improved in the interim so that the hearing is able to be conducted effectively and in a further 40 day allocation. We accept the submission of the Respondents that the Tribunal will be highly likely to find itself in exactly the same position again in June or October 2023. Whilst we accept that we are not medically qualified, the Claimant has not complied with the requirement to provide medical evidence of her incapacity to attend a hearing and the prognosis as to when she will be able to do so. The best evidence that we have is exactly what has happened during the hearing thus far.

94. We also need to consider the impact on the Respondents in this case. It is a claim in which the Claimant has made some very serious allegations of discrimination, including against a number of individual Respondents. They are entitled to have some finality in these proceedings and not have allegations hanging over them for a further sixteen months at the very least with no certainty even then of any resolution.

95. There is also the cost to the Respondent to consider. The overriding objective requires us to deal with cases without delay where possible and save expense. Leaving aside the time and cost of the attendance of a significant

number of witnesses at a further 40 day hearing, we understand that if this matter was to be relisted the legal costs to the Respondent would be in the region of £120,000.00. Whilst the Respondent is not of insignificant means, that does not mean that they should have to incur what is a huge amount of additional costs in circumstances where there can be no certainty at all that matters would be any different on the next occasion and where the Claimant has to date placed barriers in the way of a fair and effective hearing.

96. Moreover, we accept that it is not only the impact of a fair hearing on the Claimant and Respondent that we need to consider but also the resources of the Tribunal and the impact that relisting the claim for a further 40 days of hearing time will have on other users of that service.

97. Listing a case for a hearing for eight weeks occupying both an Employment Judge and non-legal members has an obvious and significant impact on the ability of other cases to be heard during that timeframe. Cases are already being listed well into 2023 and a hearing of this length will push back hearing dates of soon to be issued cases even further. Within a 40 day period of time we might envisage that somewhere approaching 20 to 30 plus cases might be able to be successfully determined.

98. That impedes access to justice for others in the system who are seeking to advance their claims and the position of having to adjourn the hearing at short notice on a number of occasions already has impacted the ability of the Judge and members to hear other cases within the list. We also need to observe here that given the effects of the pandemic there is already a significant backlog of cases waiting to be heard and they should not have to wait longer than they need to given that delay is a barrier to effective justice. As was observed in **Andreou** some years ago there was even then a notorious burden on the Employment Tribunal system but that has never been more the case than now given the huge backlog created by the pandemic.

99. The consideration of the needs of other users is all the more a factor when, for the reasons that we have already given, we are far from convinced that we would be able to have an effective hearing on another occasion if the matter was relisted for a further considerable period of time.

100. There is also expense to the public which needs to be considered. This claim has been the subject of a significant number of Preliminary hearings and the file itself is voluminous. A further 40 day hearing will result in significant additional cost to the public purse and as we have already indicated, it is far from certain that there could be any effective hearing of this matter in the future. Indeed, we are on day 21 already and next to nothing has been achieved. Again, the best evidence that we have is precisely what has happened thus far and the Claimant's previous representations to which we have referred above as to the effects of delays in the proceedings on her health.

101. We take into account the fact that Article 6 of the European Convention on Human Rights lays down the right to a fair trial, including the right to have a trial within a reasonable time. In our view that cannot be achieved by relisting this matter for a further 40 days of hearing time over 16 months from now to determine complaints which in some cases occurred well over a decade ago

and where we simply cannot be certain that anything further will be able to be achieved on that occasion. We would observe that such a listing would result in the claim not being heard until over four years after the presentation of the first Claim Form and over three years after the second. Moreover, as we have already said some of the complaints are about events over a decade ago and it is plain from the witness statements that we have read that recollections have already faded. A further delay of at least 16 months will only affect the cogency of the evidence even more so. The effect of all that would not be to have a fair trial and certainly not one within a reasonable time frame.

102. We can only conclude taking all of those matters into account that regrettably there is no longer any prospect of a fair hearing taking place and the only course that we can take is to strike out the claims. This is not a decision that we have taken lightly given the important public interest in discrimination (and equally whistleblowing) claims being substantively determined but we cannot determine that there is any lesser course that would achieve a just result for both parties and for other users of the Tribunal system.

103. We should observe that had we not struck out the claim then we would have dismissed it under Rule 47 of the Regulations on the basis of the Claimant's non-attendance in circumstances where there is a lack of medical evidence to confirm that she is unfit to do so. We had considered whether as an alternative to dismissal under Rule 47 whether to proceed with the hearing in the absence of the Claimant, but we do not believe that it is appropriate to do so. The burden of proof falls on the Claimant in respect of the vast majority of the complaints that she advances and there are also significant jurisdictional issues given that some of the complaints go back well over a decade. Having read the Claimant's witness statement there is no realistic prospect of those complaints being made out without her giving evidence. We do not consider that it is appropriate to put the Respondents and the significant number of witnesses that they intend to call to the time and expense of attending to give evidence in those circumstances.

104. For all of those reasons, we have struck out the claims under Rule 37 and had we not done so then we would have dismissed it in the Claimant's absence under Rule 47 of the Regulations.

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Employment Judge Heap
Date: 8th March 2022