EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104661/2013 and 4104662/2013

Held in Glasgow on 17, 19 and 21 January 2022

Employment Judge: Susan Walker

Ms C McMahon	**Claimant** **Represented by:** **Mr Woolfson, solicitor**
AXA PPP Health Care	**First Respondent** **Represented by:** **Ms Skeoch, solicitor**
AXA UK plc	**Second Respondent** **Represented by:** **Ms Skeoch, solicitor**
AXA ICAS Ltd	**Third Respondent** **Represented by:** **Ms Skeoch, solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(corrected version)

The judgment of the Tribunal is that :

1 The manner in which the proceedings have been conducted by the claimant has not been unreasonable. The application under rule 37(1)(b) is refused in respect of both claims.

2 It is no longer possible to have a fair hearing of case 4104662/13 and case 4104662/13 is struck out under rule 37(1) (e) .

3 It is no longer possible to have a fair hearing against the First and Second Respondents and case 4104661/13 is struck out against the First and Second Respondent under rule 37(1) (e).

4 Case 4104661/13 is **not** struck out against the Third Respondent. The application under rule 37(1)(e) is refused in this respect .

REASONS

Introduction

1 This was a hearing to consider the respondents' application to have both claims struck out under rule 37(1) (e) (that it is no longer possible to have a fair hearing) and/or rule 37(1)(b) (that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable).

2 Although no determination has yet been made by the Tribunal in relation to whether the claimant was disabled at the relevant time for the purposes of the Equality Act, various adjustments were made at her request and without objection from the respondents.

3 It was agreed at a previous case management hearing that the hearing to determine the strike out application would be on non-consecutive afternoons. It was also agreed that the claimant would give evidence in chief by way of a witness statement to be taken as read.

4 On 14 January 2022, the claimant's representative emailed the Tribunal to request some additional adjustments, including the provision of a private space to which the claimant could retire privately if she became upset or distressed. It was confirmed by the Tribunal that the additional adjustments would be made.

5 It is understood that the claimant was content with the adjustments that were made by the Tribunal.

6 Having adopted her witness statement, the claimant was cross-examined on the 17 January 2022. No witnesses were called by the respondent . A joint set of productions was provided for the Tribunal and any case numbers refer to that set. The respondent also provided a chronology which, although not agreed by the claimant, assisted the Tribunal. The Tribunal also had access to correspondence in its own case file.

7 Ms Skeoch provided written submissions for the respondents and supplemented these orally on 19 January 2022. Mr Woolfson provided written submissions for the claimant and supplemented these orally on 21 January 2022. Ms Skeoch was given an opportunity to reply. Both sides referred to relevant authorities.

Findings in fact

8 The following facts are agreed or found to be true:

Background

9 The claimant has presented a number of claims to the Tribunal. For the purpose of this application it is necessary to refer to case numbers 111650/2010 ("Claim 1"); 4104661/2013 ("claim 2") and 4104662/2013 ("claim 3").

10 Claim 1 is a claim of discrimination on grounds of a protected belief and victimisation; claim 2 is a claim of unauthorised deductions from wages and claim 3 is a claim of discrimination on alternative grounds of protected belief and disability .

11 In 2012, the claimant had complained about Judge Gall. Her complaint was referred to the President of Employment Tribunals (Scotland), Judge Simon. At that time, it was 2 years since Claim 1 had been presented to the Tribunal (and before claims 2 and 3 had been presented.) In her reply to the claimant, dismissing the complaint, Judge Simon drew her attention to the terms of the

overriding objective in the then applicable Rules of Procedure and, in particular, the need to ensure that a case is dealt with "expeditiously and fairly". Judge Simon said "*Case law supports the proposition that if a very lengthy time passes between the events giving rise to a claim and the hearing of that claim (whatever the reason for the delay) then it may be necessary for a judicial decision to be taken as to whether it is possible for there to be a fair hearing of the case, in light of the passage of time. This is a matter upon which you may wish to take legal advice."*

Respondent's first strike out application and the decision of Judge Gall

12 In August 2015, the respondents applied for all the claims to be struck out either on the ground that the claim had no reasonable prospect of success or on the ground that the manner in which the proceedings was conducted by the claimant had been unreasonable or on the ground that a fair hearing was not possible. In the alternative, a deposit order was requested.

13 The applications were considered by Employment Judge Gall at a Preliminary Hearing which took place in November 2015 and January 2016,

14 Judge Gall issued his judgment on 1 March 2016. He decided that the claim of discrimination on the protected characteristic of belief in claim 1 and claim 3 should be struck out as having no reasonable prospect of success. However, he concluded the remaining claims should not be struck out on this ground as, in summary, there were factual disputes still to be determined.

15 He also decided that claim 1 should be struck out in its entirety on the alternative ground that the manner in which claim 1 had been conducted by the claimant had been unreasonable. As part of that consideration, he concluded that "*a fair hearing was not possible in respect of claim 1*".

16 Judge Gall's decision on the unreasonable manner of the conduct of proceedings was based on detailed consideration of number of examples of behaviour by the claimant. It included his conclusion that "*the claimant essentially refuses to accept case management decisions which are made but not as she believes they ought to be. She similarly did not accept the*

communication to her that the Rules which would be applied at the PH were the 2013 Rules. It is one thing to conclude that the view taken was not correct. That may well be the view to which Ms McMahon adhered. What she did however was to seek to advance, once more, the proposition that the 2004 Rules applied"

17 Judge Gall refused the application for strike out of claims 2 and 3 on the grounds of unreasonable conduct of the proceedings. He noted that these claims did not have the background of the earlier events which occurred in claim 1 although the claimant's behaviour leading up to the Preliminary Hearing was relevant. He concluded that the claimant's manner of conduct of these proceedings has not been unreasonable "*as things currently stand"* although he commented that her conduct of the proceedings "*has certainly not been ideal"* and he commented that his conclusion did not mean that the conduct of proceedings in claims 2 and 3 was reasonable.

18 Judge Gall refused the applications for strike out of claims 2 and 3 on the ground that a fair hearing was not possible. He noted that claim 3 involved allegations of discrimination going back to 2009 and in relation to the disability discrimination claim, the respondent's had raised a time bar point. He noted that assessment of a fair hearing *"has to involve recognition of the fact that witnesses are to be asked about events said to have occurred at least seven years prior to any hearing".* However, he also noted that claims 2 and 3 had been current for just under 3 years. While that is a "*relatively long time"* for a case to be live before the employment tribunal, he commented that it was not unique. He noted that "*what is of particular significance is the fact that no meaningful progress has been made in bringing the case to a Hearing"* although he recognised that "mediation has accounted for around four months of the life of the cases and that the claimant has been unwell for a period of time". He concluded "*with a degree of hesitation"* that he would not strike out the claims on the basis that a fair hearing was no longer possible *"as matters currently stand"*.

19 Judge Gall's decision meant that claim 2 and claim 3, insofar as it was based on the protected characteristic of disability, could proceed. He directed that a case management Preliminary Hearing should be listed.

Claimant's appeal of Judge Gall's decision

20 The claimant found the decision difficult to accept. She did not believe that her conduct warranted strike out of claim 1 and she disputed some of the facts on which Judge Gall relied, such as the number of appeals.

21 She appealed Judge Gall's decision to the Employment Appeal Tribunal ("the EAT") within the 42 day period under the Employment Appeal Tribunal Rules (the "EAT Rules"). The appeal was rejected by Lady Wise under rule 3(7) of the EAT Rules . Her opinion was that the appeal disclosed no reasonable grounds for bringing an appeal. This decision was sent to the claimant on 22 August 2016. The claimant's attention was drawn to rule 3(10) of the EAT Rules and a copy of rule 3 was enclosed.

22 The claimant understood that applying for a rule 3(10) hearing before a judge was an option available to her. However, she did not understand that this was a step she was required to take. She believed that there was no point in a rule 3(10) hearing as she had nothing to add to what she had set out in her appeal. Having considered the various statutory provisions, EAT Rules and relevant practice directions, she believed that she was entitled to simply request leave to appeal Lady Wise's decision under rule 3(7) to the Court of Session without having a rule 3(10) hearing.

23 The claimant was also suffering from depression at the time and considered that further procedure would damage her mental health.

24 The claimant wrote to the EAT on 29 September 2016 to request leave to appeal to the Court of Session. On 7 October 2018, the EAT Registrar advised her that *"As no application has been made under rule 3(10) to have the matter looked at again by way of a hearing before a judge, the procedures at the Employment Appeal Tribunal have not been exhausted and so no*

action on the application for leave to appeal to the Court of Session can be taken at this time".

25 This led to correspondence between the claimant and the EAT between November 2016 and April 2017. The claimant set out 6 times in detail why she understood that it was permissible for her to request leave to appeal without requesting a rule 3(10) hearing. The EAT Registrar maintained that she had to request a rule 3(10) hearing first.

26 The claimant did not accept that position. She still does not accept that position but she finally requested a rule 3(10) hearing on 6 February 2017. This was received by the EAT on 8 February 2017 and treated as 142 days out of time. The claimant was advised that she would need to seek an extension of time for a late application, giving the reason for the delay.

27 The claimant wrote to the EAT on 19 April 2017, making an application for an extension of time to request a rule 3(10) hearing. She said she was making the application *"under duress".* The claimant still considered this was a step she was not required to take.

28 On 4 July 2017, the Registrar refused that request and this led to the claimant appealing against that decision which was considered at a hearing before Lady Wise on 13 April 2018. At the claimant's request, this hearing was on the papers.

29 Lady Wise did not accept the claimant's submission that she was entitled to proceed straight to an appeal to the Court of Session without a hearing under rule 3(10). She then concluded that even if that had been competent, it would not have been appropriate in the particular case. She noted that the claimant was an "*experienced litigator*" and was aware of the rule 3(10) procedure and could have complied with it timeously. She noted that the claimant's initial application for leave to appeal to the Court of Session was made at least 10 days after the expiry of time to seek a rule 3(10) hearing. She concluded that the reason for the delay was the claimant's desire to appeal directly to the Court of Session and that she had given no good explanation for her failure

to apply timeously for a rule 3(10) hearing. She said there was no suggestion that the claimant's disability prevented her applying timeously. She concluded that the claimant has sought to employ "*very questionable tactics and procedural abuse" .*

30 This judgment was issued on 9 July 2018.

31 On 17 August 2018 , the claimant wrote to the EAT for permission to appeal the decision. By letter dated 18 September 2018, the EAT refused that application. Part of the reason was that they said the Rules did not provide for an appeal where a rule 3 (10) hearing had not taken place.

32 The claimant submitted an application to the Court of Session for leave to appeal on 29 October 2018. Following a hearing in January 2019, the application was rejected and the decision intimated on 10 April 2019.

33 There was then further correspondence between the claimant and the Court of Session and between the claimant and the Supreme Court. By letter of 3 June 2019, the Supreme Court confirmed that they did not have jurisdiction and the decision of the Court of Session of 10 April 2019 could not be appealed. The letter said that the claimant should ask the Court of Session for confirmation that she had exhausted all domestic remedies.

34 The claimant wrote to the Court of Session on 6 June 2019. The Court of Session wrote to the claimant on 7 June 2019 confirming there was no further avenue of appeal with the Court of Session.

35 The claimant understood that she had no further right of appeal in the UK and she applied to the European Court of Human Rights on 8 October 2019.

36 By letter dated 30 January 2020, the Registry of the ECHR advised that the Court had decided that the claimant's application was inadmissible as the domestic remedies had not been exhausted as required as the *claimant "did not appeal against the decision complained of or raise matters before another competent authority".*

Attempts to progress claims 2 & 3

37 A case management hearing was listed for 6 May 2016.

38 On 11 April 2016, the respondent wrote to the claimant seeking written answers to aspects of claim 2 and wrote to the Tribunal with suggested next steps which included listing a Preliminary Hearing to consider the issue of time bar in relation to claim 3.

39 On 16 April 2016, the claimant responded that she would respond as soon as she could.

40 28 April 2016, the Tribunal asked parties for their comments on whether the case management hearing should be postponed in light of the appeal? The respondent replied that it should go ahead, and gave reasons for that position. The claimant questioned why Judge Gall thought it should be postponed before she could comment. Judge Gall decided to postpone the case management hearing and asked the respondents for more detail on the time bar point. This was provided on 19 May 2016. The claimant indicated she would provide the information that had been requested by the respondents in relation to claim 2.

41 Further correspondence between the Tribunal and the parties included the claimant providing what she described as a "*schedule of material facts, applicable law, relevant documents and witnesses for the claimant's unlawful reduction from wages claim".*

42 On 24 August 2016, the Tribunal refused the respondent's application for Preliminary Hearing on time bar and sisted the claims pending the outcome of the EAT proceedings. The Tribunal had not been advised at that point that the appeal outcome had been issued.

43 There was further correspondence between the Tribunal and the parties between August and November 2016.

44 On 20 February 2017, the Tribunal asked the parties for an update on the appeal. On 23 February 2017 the claimant advised she was still waiting for

the decision from the EAT on whether it would grant her leave to appeal to the Court of Session. She stated *"It would not be appropriate in these circumstances …for the sist to be recalled and for any hearing at the ET to proceed at this time."*

45 On 13 July 2017, the claimant wrote to the Tribunal . She set out her position in relation to the EAT's decision and said that she "*wished it to be clear to the Employment Tribunal that I intend to follow up any Court of Session application, that is necessary, to the Supreme Court and thereafter to the European Court of Justice should one of both of those become necessary."* She stated that because of the appeal and her mental health disability, *"it would not be appropriate for any dates to be set for hearings in any of my existing Employment Tribunal claims at this time"* . She said that if dates were set by the ET, even if it was said by the ET that they could subsequently be cancelled if necessary *"it will cause significant further anxiety for me and mat have the serious adverse effect of making the tribunal process a hostile, oppressive, demeaning and humiliating environment for me".*

46 On 2 October 2018, the Tribunal wrote to the parties, noting that appeal to the Court of Session had been refused by the EAT and asking whether parties were now in a position to proceed to a hearing. On 14 October 2018, the claimant wrote to the Tribunal advising she intended to appeal to the Court of session. She repeated that listing any dates in the employment tribunal it would cause significant further anxiety for her and may have the serious adverse effect of making the tribunal process a hostile, oppressive, demeaning and humiliating experience for her. She said "*Please therefore do not set any dates for any such hearing in the Employment Tribunal until I have exhausted any legitimate and lawful domestic and European Court of Justice Commission remedies as may be necessary"*

47 In May, July and October 2018 and April 2019 and January and May 2020, the respondents raised concerns about the lack of progress and the prospect of a fair hearing.

48 Throughout this period, the claims remained sisted. Once the Tribunal became aware that the ECHR proceedings were completed, it wrote to the parties asking for an update.

49 On 25 February 2020, The claimant asked for a hearing in relation to her disability status before the claims could proceed. She stated that the respondents could not be a party to such a hearing which *"would determine how the Tribunal should treat the claimant in respect of her mental health in the proceedings".*

50 On 5 March 2020, the Tribunal asked the claimant to confirm that she was agreeing that the sist could be lifted and if so, a case management hearing would be listed where any reasonable adjustments could be discussed. It was explained that "*Both parties would be included in that discussion as there needs to be consideration of a fair hearing for both parties."*

51 On 17 March 2020 he claimant replied saying that recalling the sist would not be reasonable or in the interests of justice until her disability status *"is properly resolved".* This was refused but the claimant was asked to set out what adjustments she needed.

52 There was correspondence in relation to this matter, with some delay at the Tribunal's end when it did not refer the claimant's correspondence timeously to a Judge for directions.

53 For a period, between March and August 2020, there were no hearings in person in the Employment Tribunal due to the pandemic.

54 On 20 October 2020, Judge Walker wrote to parties and said that it would not be appropriate to make any comment on whether the claimant is a disabled person as this is a live issue in one of the cases. However, Judge Walker said that it would be possible to make most of the adjustments requested without making such an assessment. Directions were given including a case management preliminary hearing to be listed in January or February 2021.

55 The respondent made the applications for strike out that are the subject of this hearing in November 2020.

56 It was not possible to list the case management hearing in January or February 2021. Correspondence about adjustments continued.

57 A case management hearing in person finally took place on 8 October 2021. The claimant was now represented by Mr Woolfson. Judge Walker directed that the respondent's application for strike out would be listed for a hearing as soon as possible and it was agreed that that should be considered before any further case management took place . The preliminary hearing was listed to take place in person, on non-consecutive days in the afternoons. Provisions were put in place for the claimant to have regular breaks and for her to have a private place to go to if she became upset.

Relevant law

EAT Procedure

58 The procedure to be followed at the EAT is set out in the Employment Appeal Tribunal Rules 1993. Rule 3(10) says:-

> "Subject to paragraph (7ZA) where notification has been given under paragraph (7) and within 28 days of the date the notification was sent, an appellant or special advocate expresses dissatisfaction in writing with the reasons given by the judge or Registrar for his opinion, he is entitled to have the matter heard before a judge who shall make a direction as to whether any further action should be taken on the notice of appeal or document under paragraph (5) or (6)."

59 The EAT Practice Direction 2013 , provides in relation to rule 3 (10) hearings, at para 11.5:

> "Reasons will be sent and within 28 days. The appellant may request an oral hearing (known as a "rule 3(10) hearing") before a judge unless the judge determining the sift has ruled that the appeal is wholly without merit."

60 S37 of the Employment Tribunals Act 1996 provides that an appeal on any question of law lies from any decision or order of the Appeal Tribunal to the relevant appeal court with the leave or the Appeal Tribunal or of any relevant appeal court.

Striking out a claim

61 Section 37 of the Employment Tribunals Rules of Procedure 2013 provides the grounds on which a claim may be struck out by the Tribunal. These are:

(a) That it is scandalous or vexatious or has no reasonable prospects of success;

(b) That the manner in which the proceedings have been conducted by or on behalf of the claimant....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 it is no longer possible to have a fair hearing in respect of the claim...

Respondents' submissions

Previous strike out application

62 Judge Gall's observations and findings are of invaluable assistance as they were informed by his intimate knowledge to the proceedings at that time.

63 The Tribunal is being asked to assess the claimant's conduct since 2016 and the question of whether a fair hearing is possible. This is almost 6 years after clear judicial findings on the same issues.

64 Proceedings were raised on 25 June 2013 and relate to allegations going back as far as 2009. No preliminary or substantive issues have been addressed apart from the strike out judgment of Judge Gall.

Fair hearing

65 It is recognised that only in rare cases will the Tribunal strike out a claim on the ground that a fair hearing is not possible (*Abergaze v Shrewsbury College* 2009 EWCA Civ 96). It is necessary for the Tribunal to consider the relevant facts to determine through a clear analytical process whether a fair trial is no longer possible.

66 It is appreciated that length of time is not, in isolation, going to mean that a fair trial is not possible but it is a material factor. These proceedings have been at the ET for over 8½ years – that is an extraordinary length of time, especially when the proceedings are barely further forward than when lodged and arguably, may go backwards before they can go forwards.

67 It is not accepted that lack of progress is due to the respondents. There has not been the usual case management preliminary hearing and it is agreed by the claimant's representative that issues of specification should be dealt with after this application. Claim 2 is, if anything less clear than it was. It has been suggested that amendment may be made to suggest that the claimant is still employed or, that no amendment is needed and the TUPE issue may be dropped. The respondents made an application for a preliminary hearing which was refused and the claim was then sisted.

68 It is acknowledged that the pandemic will have had some impact on the Tribunal's ability to advance the proceeding but the period of delay of 3½ years was entirely due to the claimant as she pursued her appeal to the EAT, the Court of Session, and the ECHR.

69 This is a truly exceptional case and the Tribunal is invited to consider Judge Gall's recognition 7 years ago of the length of time the claimant had been current at that stage,

70 *Abergaze* can be distinguished as in that case there had been a decision on liability but not a decision on remedy. To strike out would have been to deprive a claimant of a remedy where he had succeeded on the merits. This case is different. Not only has there been a lack of progress on substantive issues, there has been no progress son preliminary issues either. There is a great deal of case management still required before any of that can be addressed.

71 In *Taylor v HPO Enterprise Services UK Ltd* 2011 6 WLUK 283, the claim was struck out as a hearing was no longer possible. *Abergaze* was distinguished due to the different stage the proceedings were at.

72 The respondent has made the Tribunal and the claimant aware of its concerns on a number of occasions. The President wrote to the claimant in 2012 warning of the possibility that a fair trial may not be possible. The respondent has sought to resolve the claims, having engaged in judicial mediation. They have no option but to make the application as they see no alternative way forward.

73 The Tribunal is invited to consider the historic difficulties in these proceedings. If the next step is not the claimant's preference she will engage in lengthy and protracted correspondence about it.

74 She has accused Judge Gall of bias and refused to give evidence in relation to the application for a deposit. In all likelihood, the respondent submits, the proceedings, if allowed to proceed will not be straightforward and will be protracted and resource draining. For example, the claimant suggested in October 2021 at the case management hearing that she will assert that she is still employed by one of the respondents. The respondent finds this astonishing not least when the claimant lost an attempt to interdict her employer from terminating her employment in the sheriff court and raised an unfair dismissal claim (struck out for nonattendance at a case management Preliminary Hearing, a decision that was subsequently unsuccessfully appealed to the EAT). Any amendment procedure will add further delay and, if permitted, would require further evidence on why the claimant's employment was terminated

75 In respect of claim 2, the Tribunal is invited to consider document pp298- 308. The respondent asked questions to try and narrow the issues. The document provided by the claimant is entitled “Preliminary draft schedule of main facts”. There is clearly more to come. It is not a straightforward case as suggested and the likelihood of proceeding to a hearing in the near future is wholly unrealistic,

76 In respect of claim 3, the Tribunal is invited to have regard to the document at pp 44-65. The complaints are sprawling in nature, plainly require further specification and contain preliminary issues such as time bar. In cross-examination, the claimant was clear this was a summary document only. Getting to a hearing will not be achieved swiftly or in a straightforward manner.

Prejudice to the respondents

77 It is accepted that the claimant would be prejudiced if her claim were struck out. However, this has to be balanced against the prejudice to the respondents. The claimant says she has emails which support her position but it is inappropriate to ask the Tribunal to assess this without a full hearing. Also a reference to a handful of allegations in the context of a sprawling claim with myriad other allegations does not provide a proper basis to invite the tribunal to make meaningful finding on prejudice. The respondents’ position is that 68 of the 70 allegations are out of time and specifically the allegations based on the emails referred to by the claimant.

78 Reference is made to *Riley v Crown Prosecution Service [*2013] EWCA Civ 951 where, referring to *Andreou v Lord Chancellors Department* [2002] EWCA Civ 1192, the court said: “Article 6 emphasises that every litigant is entitled to a “fair trial within a reasonable time” . That is an entitlement of both parties to litigation

79 Reference is made to *Ossannaya v South West Essex Primary Care Trust* UKEAT/0629/11. *“A hearing within a reasonable time is one in respect of*

which the interest of both parties have to be considered; reasonable is not a criterion that is to be satisfied through the eyes of one party alone."

80 Strike out is not always a sanction for unreasonable conduct it can also be viewed as an aid to justice (para 34 *Osonnaya)*

81 Claim 2 – the quantification is 2 years for unauthorised deductions. The claimant now values her claim at £200000. The respondent submits that it would require amendment to broaden the scope of the claim. It is wholly unsatisfactory for the respondent not to know where they stand, Even at the hearing, the claimant was not willing to advise the Tribunal of the definitive basis of the argument being advanced.

Cogency of evidence

82 Claim 3 will require detailed witness evidence from a substantial number of individuals. Claim 3 comprises 24 pages of 70 allegations of discrimination going back to 2009.

83 Claim 2 relates to alleged deductions in 2011 . A witness will have to recount events from 11 years ago and the case is not, as the claimant suggests in a state when a final hearing could be set down quickly. A suggestion of an ongoing employment relationship would add complexity as would evidence going back to 2007 in relation to the TUPE issue.

84 Witness ability to recount events will be grossly impacted by such a lengthy passage of time. The Tribunal is invited to reject the position that witness recollection will not be affected. Anyone's recollection will be impacted by the passage of such an amount of time especially when the we are not yet clear on the specific basis of the complaints.

85 In cases of discrimination is it open to a Tribunal to draw negative inferences from a respondent's inability to adequately explain why it took the actions it did. There is a real risk to the respondents in circumstances where so much time has passed.

86 P281 contains a list of individuals who the respondents believe will be relevant potential witnesses . Of the 19 on the list, only 3 remain employed. It is accepted this does not prevent them attending as witnesses but it undoubtedly places the respondents in difficulty. This is only an informed guess. It is accepted that further particularisation is required.

87 Unlike *Abergaze*, there has been no liability hearing, no witness statements have been obtained

88 Reference is made to *Merelie v Shrewsbury College of Arts & Technology [2009] .* In that case , the judge was balancing the evidence of the claimant who was obsessed with her case with those who have got on with their lives. This is similar to the present case where the cogency of the respondents' evidence will be more impacted than the claimant's. This is contrary to the principle that parties should be on an equal footing.

89 Judge Gall accepted there was a legitimate concern in 2016 about the cogency of evidence. These legitimate concerns are all the more pressing for the further delay.

Proportionality

90 Is there a less draconian sanction? It is submitted that this is not relevant where a fair trial is not possible.

91 There is no requirement for blameworthy conduct. Even if the Tribunal is not with the respondents on unreasonable conduct, the claims can be struck out on fair hearing grounds alone.

Unreasonable conduct

92 Judge Gall's judgment is referred to in terms for the claimant's conduct to that date. The claimant should have been under warning that her behaviour needed to improve.

93 After the strike out judgement, the claimant continued to have persistent disregard for required procedural steps. Seeking leave to appeal the r3(7)

decision was a deliberate step. The claimant knew of the rule 3(10) process but chose not to use it.

94 Despite being advised of the correct process, the claimant delayed for a considerable period before acting on the advice and requesting a rule 3(10)

95 The claimant displayed a disrespect for judicial decisions that was reminiscent of her earlier behaviour referred to by Judge Gall.

96 The Tribunal can rely on the findings of the upper courts for their interpretation of the law.

97 The claimant was aware that the ECHR would be unable to proceed with any appeal where she had not exhausted her domestic remedies. She had a similar outcome to an appeal presented in relation to claim 1 in 2012/13.

98 The respondents submits that the circumstances fall within the first category of *Blockbuster* as " deliberate and persistent disregard of required procedural steps" and so no consideration of a fair trial is required.

99 Alternatively, for the reasons already given, a fair trial is not possible

Claimant's submissions

Unreasonable conduct

100 The Tribunal's focus should be on conduct since March 2016 as Judge Gall concluded that the conduct of proceedings as at that date had not been unreasonable. If the Tribunal concludes that the claimant's conduct since March 2016 has not been unreasonable, the claimants should not be struck out on grounds of unreasonable conduct.

101 In respect of Rule 3 (10) the claimant considered the relevant provisions and case law and concluded that it was not mandatory to request a 3(10) hearing. She was also concerned about the effect on her mental health and she understood that a fee was payable. Nothing in her conduct is close to being unreasonable.

102 It is not necessary for the Tribunal to reach its own conclusion as to whether as a matter of law it is competent to seek leave to appeal against a rule 3(7) hearing. The issue is whether the claimants conduct has been unreasonable.

103 The respondents rely on Lady Wise's comments. It is respectfully suggested that these may be due to the claimant not having attended the hearing.

104 With regard to the further appeal to the ECHR it is apparent that the claimant had exhausted her domestic remedies and so the alleged conduct, which the respondents say is unreasonable, did not take place,

105 *James v Blockbuster Entertainment Ltd* [2006] EWCA Civ 684 refers to conduct taking the form of "*deliberate and persistent disregard of procedural steps".* Insofar as the application relies on persistent disregard of procedural stapes, the respondents are mistaken that the claimant had not exhausted her domestic remedies Therefore the only aspect of the claimant's conduct to be considered is not initially requesting a rule 3(10) hearing.

106 The claimant is correct that a there is no requirement to request a rule 3(10) and there is nothing in the EAT Rules that says that leave to appeal is conditional on such a right having been exercised.

Is a fair hearing possible?

107 If the claimant had exercised her right under rule 3(10) different outcomes are possible. If the default is not intentional or contumelious (reference to *Birkett v James* [1977] WLR 38) then it is necessary to show that (a) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants…"

108 Although that case, quoted in *Evans v Commissioner of the Metropolis* [1992] WL 895709 , involved a claim not being actively pursued, it is submitted that the principles are relevant here given that the respondents are relying on delay. There was no intentional or contumelious default on the part of the

claimant and the delay has not been inordinate or inexcusable. Both conditions require to be satisfied (see *Evans* per lord Steyn) , Therefore delay alone would not justify strike out.

Cogency of evidence

109 It is acknowledged that memories can fade over time. For the wages claim there would be two witnesses, the claimant and a witness for the respondent. The documents are available and the legal issues will be of the greatest significance. There is little if any issue around the cogency of evidence. The claimant's position will be whether the claimant had a legal entitlement to the wages claimed. The claimant's position will be that there were no required contingent events which she did not meet and the Tribunal will need to consider whether the documents provided to the claimant support that position. The passage of time should have no material impact on the consideration of these issues or the ability of the respondent to defend the claim.

110 The claim of disability discrimination will rely to a large extent on documentary evidence . The claimant is bringing serious issues to the attention of the Tribunal. She has documentary evidence including emails which give a clear insight into how she was being viewed and treated at the time.

111 Even though there is a list of witnesses at p281, this is not the claimant's list of witnesses She intends only to call 2 or 3 in addition to herself. What is more important is who the respondents intends to call. This has not been confirmed. The fact that a number of witnesses are no longer employed should not be a material factor. It is no answer to say that. The claimant has provide a level of detail in her ET1 and accompanying list of allegations that should have enabled the respondents to take preliminary steps with regard to obtaining witness evidence. The respondents have not sought to obtain further information from her in relation to her disability discrimination. Just when a case management hearing was due to be listed in 2015, the respondents asked for all her claims to be struck out.

112 The President's letter has been described as a "warning" but the claimant is unclear why that statement has been attached. It made the claimant aware that the issue of a fair hearing can arise where there has been a lengthy delay. However it was issued prior to claims 2 and 3 being issued and before appeal proceedings so it is not relevant to conduct of these claims.

113 Prejudice to the claimant of the claims being struck out would significantly outweigh prejudice to the respondents . It is also a matter of public interest to have discriminatory treatment addressed.

114 The Tribunal must apply a two-stage test. Firstly whether the grounds in rule 37(1) (b) or (e) have been met and if so, decide whether to exercise discretion to strike out, given the permissive nature of the rule. The claimant submits that the grounds have not been met and, even if they have, strike out is not appropriate. There has been no deliberate and persistent disregard of the required procedural steps (*Blockbuster*) and there has been no intentional and contumelious default or inordinate or inexcusable delay (*Birkett)* .

115 The claimant submits that it is now possible to proceed to a hearing on the merits of claim 2 and this should proceed separately. As for the discrimination claim, reference is made to *Anyanwu v South bank Student Union* [2001] UKHL 14 – such cases should not be struck out for abuse of process except in the most obvious and plainest of cases. Reference to paragraph 24 of the judgment *"Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest"*

116 It is submitted that with appropriate case management there is no reason why the disability discrimination claim cannot be moved towards a hearing most likely with further particulars having been provided by both parties and witnesses identified

Discussion and decision

117 I consider it important to acknowledge before I set out my decision that I accept that the claimant is genuine in her desire to progress the claims and in her belief that she has been poorly treated by the respondents. I also accept that she has acted in good faith in her attempts to appeal Judge Gall's decision and in her various statements to the Tribunal that she was not able to cope with hearings in the present cases while she was pursuing the appeals. It was clear that her mental health presents significant challenges and that giving her evidence in this hearing was a difficult process. I also think it is important to acknowledge the sensitivity shown by Ms Skeoch in her questioning of the claimant during this hearing.

Application under rule 37(1)(b)

118 I will start with the application under rule 37(1)(b) that both claims should be struck out as the manner in which they have been conducted by the claimant has been unreasonable. This is a two-step process. I first have to decide whether the threshold of unreasonable conduct of the proceedings has been met and then whether it is in accordance with the overriding objective to strike out the claim on that ground. Consideration must be given to all the circumstances. In particular, it must be remembered that strike out is a draconian step that should not be taken if there is a more proportionate lesser sanction available. In particular, consideration should be given to whether a fair trial is still possible.

119 I have considered this issue carefully and considered the case law to which I was referred. I am conscious that my focus must be on the manner of conducting the proceedings that are the subject of the application (being claim 2 and what remains of claim 3). I will refer to these as the "Present Proceedings". The appeal to the EAT and the issues around the rule 3(10) hearing were concerned with the claim 1 and the part of claim 3 that has been struck out. I will refer to these as the "Appeal Proceedings". The bulk of the respondent's challenge relates to the manner in which the Appeal

Proceedings were conducted and would not, of itself, competently found an application for strike out of the Present Proceedings.

120 However , if the claimant was acting unreasonably in pursuing those appeals, then, although that would be conduct of the Appeal Proceedings , that could also be potentially relevant to the application before me. The Present Proceedings were sisted at the claimant's insistence while the Appeal Proceedings were concluded. If the reason for the sist was based on unreasonable conduct of Appeal Proceedings, then insisting on the sist may also be unreasonable conduct of the Present Proceedings.

121 I start from 2016. Although he did not ultimately conclude that the manner of conducting the Present Proceedings had been unreasonable, I take into account that there were already significant delays by 2016 and that Judge Gall expressed concerns about the claimant's conduct of these proceedings at that stage.

122 As Judge Gall comments, it is not unreasonable to appeal a decision of any court. That is a right which any litigant has. That is unquestionably correct. However, the manner and number of appeals may be unreasonable.

123 Having heard from Ms McMahon, I do not doubt the sincerity of her belief that she was not required to apply to the EAT for a rule 3(10) hearing following a rejection under rule 3(7) before seeking leave to appeal to the Court of Session. I would go further and say that that belief was not, in itself, unreasonable. The word "may" in the EAT Rules and the Practice Direction could reasonably be interpreted as permissive and not mandatory and I accept that was the claimant's interpretation. However, critically, this was not a belief shared by the Registrar of the EAT, Lady Wise or the Court of Session.

124 It is impossible to know what the outcome of such a rule 3(10) hearing would have been. However, a party conducting proceedings reasonably would have accepted the EAT's direction on that procedural point and applied for a rule 3(10) hearing. It was unreasonable conduct of the Appeal Proceedings to

continue to engage in protracted correspondence arguing the point instead of applying for a rule 3(10) hearing promptly on being advised it was required.

125 The claimant said in evidence that she thought she would have to pay a fee of £1,200 for a rule 3(10) hearing. That would have been a relevant consideration if the claimant had reasonably believed that to be the case. I do not accept that she did believe that. She does not mention it in her correspondence with the EAT.

126 If she did believe that a fee was payable, it was not a reasonable belief. Even under the original fee regime, a separate fee would not have been required for a rule 3(10) hearing. The claimant is clearly capable of reading and absorbing detailed legislation to find that out. A call or letter to the EAT would also have clarified the point. Almost 3 years were taken up with this issue and in the end, of course, no rule 3(10) hearing ever took place.

127 The claimant says that one of the reasons for wishing to bypass a rule 3(10) hearing was that this extra hearing would put additional strain on her mental health. I accept that was part of her motivation but this does not affect my conclusion that to persist with her position that a rule 3(10) hearing was not required before an appeal could be made to the Court of Session was unreasonable conduct of the Appeal Proceedings.

128 I do not consider that the claimant persistently and deliberately disregarded procedural steps as suggested by the respondents. I accept her evidence that she believed that she was correct in her interpretation. Persisting in this belief when judicial authorities told her she was wrong and that she needed to take a different course was not reasonable. It is also a criticism made of the claimant's conduct by Judge Gall. However, I do not consider it was deliberate in the sense envisaged by *Birkett v James.*

129 I turn then to consider whether the manner of conducting the Present Proceedings was unreasonable as a consequence of the unreasonable manner of conducting the Appeal Proceedings. Specifically, whether insisting on the lengthy sist was unreasonable conduct of the Present Proceedings.

130 For the claimant to require that the Present Proceedings remained sisted was not, in itself, unreasonable. Had appeals been proceeding in the normal course, this would have been the usual direction. If her appeal had been successful, it would have been proportionate for the claims to be heard together.

131 It is arguable that claim 2 could have been heard even while the appeal process was ongoing. However, I have accepted that the claimant has been suffering from mental health challenges through this period and the claimant indicated that she was unable to deal with any hearings in the Employment Tribunal at that time due to her mental health. She was not asked by the respondents nor by the Tribunal to provide evidence to support that contention. I do not consider it was unreasonable conduct of the proceedings for the claimant to request that no hearings take place while she was engaged in the appeal process on account of her mental health.

132 It is relevant that , even if the claimant had applied for a rule 3(10) hearing, we do not know what the outcome would have been. If unsuccessful, the claimant may still have applied for leave to appeal to the Court of Session and may have had a hearing there and from there , possibly to the Supreme Court. It is likely that some delay was caused by the claimant's unreasonable conduct in relation to the rule 3(10) hearing but it is not certain how much.

133 Despite the finding that the manner of conducting the Appeal Proceedings was unreasonable, I am not satisfied that the manner of conducting the Present Proceedings was unreasonable and I refuse the respondent's application insofar as it is made under rule 37(1)(b) .

Application under rule 37(1) (e)

134 I therefore turn to the respondents' alternative application under rule 37(1) (e) which is that both claims should be struck out because a fair hearing is no longer possible.

135 I have looked at claims 2 and 3 separately.

Is a fair hearing possible for claim 2?

136 As currently pled, claim 2 is in narrow focus with the issues clearly defined in the ET1 and the ET3. The respondent does not dispute that the claimant was potentially entitled to the benefit of the relevant Scheme.

137 However, the respondents say that claim 2 does not fall within the Tribunal's jurisdiction, as any payment under the Scheme would be made by the insurance company and not by the respondent. They say that therefore the sum claimed is not "wages".

138 Secondly, the respondents say that the claimant did not comply with the requirements of the scheme as she would not submit to a medical examination. The claimant's position is that, under the terms of the Scheme, she was not required to undergo a medical examination and could provide her own evidence.

139 It seems to me that, as currently pled, it is still possible to have a fair hearing of the issues in claim 2 despite the length of time that had passed. The issues are narrow and based on documentary evidence or legal interpretation of the terms of the Scheme. The basis of the claim and the response were clearly articulated at the time.

140 The respondents say that witnesses will require to recall events from 2011. That is true but there appears to be very little, if any , factual dispute that will require oral evidence. As I understand the position, the claimant accepts that she would not agree to a medical examination. The question, is whether she was required to in terms of the Scheme (if in fact, the Tribunal has jurisdiction to hear the claim at all.)

141 There is one additional potential issue of fact. If the claimant is correct that she was entitled to provide her own medical evidence and the respondents do not succeed on their jurisdictional point, then the Tribunal would have to decide whether that medical evidence would have been sufficient to entitle her to the benefit of the Scheme that she seeks. This would be necessary to decide what was "properly payable". However, as a claim of unauthorised

deductions, the onus of proof is on the claimant. If there is a difficulty in proving this matter, the claim will fail and so any prejudice caused by the delay will be to the claimant.

142 I stress I have refused the application for strike out in relation to claim 2 as currently pled . Mr Woolfson and the claimant suggested that the claim is wider in scope than it appears at first viewing. There was a suggestion that the claim can be treated as continuing to the present date without the need for any amendment.

143 I made it clear at the hearing that I do not accept that proposition. A claim for unauthorised deduction from wages is retrospective and not prospective. It is a claim in relation to identified deductions (or a series of deductions) that have been made. Even if the claim is based on a series of deductions, the claim cannot cover deductions that have not yet been made at the time that the claim is presented.

144 I have considered the issue of a fair trial on the basis of the claim as it is currently pled, which is a claim of unauthorised deductions from 28 May 2011 to the date of the claim (being 23 June 2013) with the last alleged deduction on 28 May 2013.

145 It is possible, of course, for the claimant to apply to amend the claim to add alleged deductions to the claim that are said to have been made since the claim was made. If the claimant wishes to amend, such an application should be made promptly and it will be considered on the normal principles, including balance of prejudice to both parties . Such consideration will take account of whether a fair trial is possible of any extended claim.

146 While I have decided that it will be possible to have a fair trial of the substance of claim 2, I am concerned at the claimant's assertion that there was a relevant transfer in terms of TUPE in 2007 from the Third Respondent to the First or Second Respondent. This is denied by the respondents who assert that the Third Respondent was the claimant's employer throughout . They set out what they say occurred, which they say included a change of name and

a share sale. I do not consider it would be possible to have a fair trial of this issue in 2022, some 15 years after the alleged transfer is said to have taken place. From the claim and the response it is clear that this would be a complex matter involving detailed documentary and oral evidence and the Tribunal would have to make detailed findings in fact about every aspect of the transactions. It would also not be proportionate to explore that issue when the Third Respondent accepts that, if the claimant succeeds in her claim, she will be entitled to payment from them. There is no obvious prejudice to the claimant in striking out this element of her claim.

147 I therefore consider that claim 2 should be struck out against the First and Second Respondent under rule 37(1)(e).

Is a fair hearing possible for claim 3?

148 I have carefully considered the various cases cited to me by both representatives.

149 I am conscious that it is unusual to strike out a claim of discrimination and that , as stated in *Anyanwu*, this should only be done "*in the most obvious or plainest of cases" .* However, that does not mean that a claim of discrimination can never be struck out where the circumstances merit it.

150 A claim should not be struck out as a punishment. In this particular case, while I have found that the manner of conducting the Appeal Proceedings has been unreasonable, I have not found that to be deliberate or contumelious. While there has been inordinate delay, I do not consider it is inexcusable. The claimant clearly has a mental health condition which has contributed to her attitude to her own case and to her ability to progress the current cases while she was involved in an appeal process in relation to Judge Gall's decision.

151 In any case, there is no question of seeking to punish the claimant for any delay.

152 When considering whether a claim should be struck out under rule 37, consideration must be given to whether a less draconian sanction would be

appropriate. An important consideration, as noted above, is whether a fair trial is still possible.

153 If the ground of strike out is simply, as under rule 37(1) (e) that a fair trial is not possible, then that conclusion should not be reached unless consideration has first been given to whether additional steps could be taken that would enable a fair trial to take place. If that consideration has taken place and no steps have been identified, then a finding that a fair trial is not possible must lead to strike out. To do otherwise would be unfair to the other party.

154 This is made clear in the case of *Peixoto v British Telecommunications PLC* 2008 WL 1771466 which was considering rule 18(7)(f) of the 2004 rules, the equivalent provision to rule 37(1)(e). Paragraph 49 of the judgment provides "*The assessment of whether a fair trial is impossible obviously invokes consideration of what other matters can be considered. ….. In every case there must be some question of proportionality. In our judgment that arises when dealing with rule 18(7)(f) at stages prior to the determination that a fair hearing is not possible. It could not be said that once the judgment had been made that a fair trial was impossible any further steps need to be considered. If the Tribunal reaches that conclusion and yet orders the case to go on for some reason it would be allowing itself as a public authority under the Human Rights Act to commit a violation of the Convention Art 6.1"*

155 As noted in *Peixoto*, paragraph 55, this is a separate issue from the "backward looking decisions" relating to unreasonable conduct. Essentially the Tribunal, when considering the issue of fair trial, has to look forward and consider whether that will be possible in the foreseeable future.

156 The critical factor which is relied on in the present application is the length of time that has elapsed since the alleged discrimination and the effect that will have on the cogency of evidence and , in particular, the respondent's ability to properly defend the claim.

157 The respondents draw attention to the fact that the claim is at a very early stage and therefore different from some of the cases on which the claimant

relies, such as *Abergaze* where the case was either at a hearing or had already had a liability hearing.

158 It is also relevant , as noted in cases such as *Osonnaya* (paragraph 17) , that Article 6 requires that a trial must take place within a reasonable time and that consideration of what is reasonable must include the interests of both parties. Delay in Employment Tribunal proceedings is not unusual. However, the delay in this case is extraordinary. Even if it were possible to get the claim to a final hearing in the next 6 months, the Tribunal would be considering allegations about incidents which are said to have occurred 12 and 13 years ago.

159 However, delay alone, even extraordinary delay as in this case, is not sufficient grounds to conclude that a fair trial is not possible. It is also important that consideration is given to whether there are steps that could be taken which would mean that it would be possible to have a fair trial for both parties.

160 I have considered the ET1 in claim 3 in detail. The body of the claim form sets out the claim in general terms. It refers to the claimant suffering

"discrimination, about severe personal injury and injury to feelings, constant unjust criticism of my work, being unfairly picked on, being excluded, overbearing supervision, unwanted conduct related to my beliefs , being set up to fail, the abuse and misuse of power by some managers and HR, the turning of my workplace into a hostile, oppressive, demeaning and frightening environment for me and some of my colleagues. When I sought help to resolve these matters, some senior managers and HR personal instead of trying to stop it and prevent further instances of this unlawful discrimination and injury, colluded in it. I was humiliatingly suspended from work after agreeing to mediation and had false allegation made against me by an HR officer with no proper investigation.

I also raised the unlawful discrimination of some of my colleagues by some managers and HR, the adverse effects on their health as well as mine of what

was happening in the course of my employment. That is the lack of dignity, the hostile, demeaning, degrading, humiliating and offensive circumstances at work for some colleagues in breach of stated company policies on diversity, health and well-being, harassment and bullying on unlawful discriminatory grounds."

161 The claimant also again raises the issue of whether there were relevant transfers under TUPE in 2007.

162 The claimant concludes that she has had continuous incapacity to work since September 2010 which she says was a result of the unlawful discrimination, harassment, victimisation and injury to feelings on grounds of her philosophical belief or alternatively because of her disability or alternatively because of her association with disabled colleagues.

163 Attached to the ET1 is a paper apart titled "*Summary schedule of allegations*". This runs to 20 pages. The first 11 pages relate to alleged incidents in 2009, 7 pages relate to alleged incidents in 2010, there is one reference to the alleged failure to make payments under the PHI scheme from "April 11 to date" and an allegation of "*Series of failures to keep me informed of changes in the workplace that would affect me and I would otherwise receive eg policy changes, staff changes, management changes*" which is said to be from "*July 2010 onwards".* There are two pages of undated allegations. The allegations include a number of initials which are explained on the last page as relating to 18 individuals including the claimant. While the respondents refer in their submissions to 70 allegations, there are within each "box" of allegations, several "sub-allegations". I count there to be over 150 allegations.

164 It is not possible in this judgment to set out more than a flavour of the allegations. The first allegation is *"malicious criticism of my work by JW. Malicious criticism of my work repeated to intimidate me, PK, JW"* . This is said to have occurred in January 2009. Many of the allegations are in general terms like that.

165 Some of the allegations are more specific. For example, *"When I made legitimate complaint of unlawful acts, I was said to have a "mental health issue" that impacted my work. PK, JW. Malicious assertions that I "ambushed" staff at work, JW, PK, AC. Abuse of power by JW, forced from toilets, told to go home if "I couldn't cope with being at work" JW Accused of manipulating co sick pay JW".* These incidents were all said to have taken place on 25 February 2009.

166 The claimant suggests that these incidents were so extreme that the witnesses will recall this clearly. I have no doubt that some of the incidents may be recalled by witnesses in some level of detail. However, I am concerned that there are so many allegations, some specific but many in general terms, and almost of all of which are said to have taken place 12 or 13 years ago. The events which are so vivd to the claimant will not have the same importance to the large number of other potential witnesses. This is a case similar to *Mereille* where the judge was balancing the effect of the evidence of a Claimant considered to *"be unreliable and obsessed with her case in comparison with those who have got on with their lives and not been engaged in this matter".*

167 I agree with the respondents that witnesses' recollection of what happened will be inevitably be diminished after 13 years and the respondents will be prejudiced in their attempts to defend the claim as a result. I appreciate that the claimant herself has a very strong recollection of what happened and that she says that she has documents that will support what she says. However , the Tribunal will not simply have to consider whether any factual allegation occurred. It will also have to consider <u>why</u> any incident occurred. As Ms Skeoch submitted, discrimination claims are nuanced. A Tribunal have may draw an inference from a lack of explanation by the respondents where the claimant sets out a prima facie case of discrimination.

168 The claimant herself has suggested various alternative motivations for the treatment she says she was subjected to – it was alternatively because she was disabled, or it was because she was perceived as disabled (this appears

to be a new addition to the ET1) or it was because she was speaking up for others who were disabled. Of course, her primary position as to the motivation of her mangers and others , was that she was treated less favourably because of her protected belief. That still is her position but that part of the claim has, of course, been struck out.

169 The claimant suggests that the respondent should have taken steps to safeguard the evidence by taking statements. As the President pointed out in her letter to the claimant in 2012, there is no obligation on a respondent to do that but, in any event, what would the statements relate to? The majority of the allegations are general in scope and it is accepted for the claimant that further particularisation is required. The sheer number of the allegations makes this suggestion impractical.

170 There will also be preliminary issues of disability status and time bar each of which is fact specific.

171 I have considered whether there are steps that can be taken through case management which will make it possible to have a fair trial. One possibility could be an order that the allegations should be further particularised and the respondent then allowed to amend their response. It might also be possible for the claimant to provide a detailed witness statement of all the allegations and then the respondent could approach witnesses to see whether they are, in fact, able to remember the events in questions.

172 However, I do not think either option is realistic or proportionate. The allegations are numerous and wide-ranging, in many cases generic in nature and largely relate to 2009-2010. It is not clear who the witnesses would be. There appear to be 17 individuals named by the claimant as involved in the events. These include 15 individuals identified by the claimant as having discriminated against her (or harassed or victimised her).There may, of course be other witnesses who were present and who the respondent could have spoken to (and perhaps called as witnesses) had the case come to a hearing closer in time to the events.

173 I consider that the nature of the case is such that it is simply not possible for the respondent to present as detailed a defence now as they may have presented at the time. That is aggravated by the fact that the majority of the individuals have left their employment but it is mainly due to the passage of time.

174 I accept that the claimant has a detailed recollection of all the events and has retained documents to support her position. It is clear that the claimant has been intensely focussed on these events for this period. However such a recollection, even one honestly retained, over 13 years is no guarantee of its reliability. The claimant's memories will, inevitably, focus on and reinforce her own sense of grievance. The reliability of her recollection is likely to reduce each time the memory is recalled and relived.

175 The allegations are clearly important to the claimant and it is important as a matter of public policy that claims of discrimination are ventilated. However, a fair trial must be a fair trial for both parties. Someone accused of discrimination (whether as a party to a claim or as a witness) is entitled to have that charge resolved within a reasonable time and with a reasonable opportunity to fairly defend themselves.

176 I consider it is also relevant that the possibility of a claim being struck out on this ground was flagged to the claimant by the President in 2012 (albeit not in respect of this claim) and that the respondent have repeatedly made clear their concern about the delay and the effect on a fair trial. Neither of these things is conclusive, of course, and I have concluded that it cannot be said that the claimant's conduct necessarily caused the delay. However, I consider it is a relevant factor that the claimant was on notice that at some point, continued delay might lead to her claim being struck out.

177 Having considered all the circumstances, and concluded there are no reasonable steps that could be taken to achieve a fair trial, I consider that a fair trial of claim 3 is not possible and that claim is therefore struck out.

178 For completeness, I should say that if I had decided not to strike out claim 3 in its entirely , I would similarly have struck out the claim against the First and Second Respondents for the reasons given in claim 2.

Further procedure

179 I appreciate this will be disappointing for the claimant. It may be she will appeal my decision . That is, of course, her right. However, it is critical that claim 2 now proceeds to a hearing as soon as possible.

180 I will direct that a case management Preliminary Hearing is listed in person for 2 hours. This hearing will deal with any applications, including applications to amend, which are made at least 7 days before the hearing, and make directions for a final hearing as soon as practical.

Employment Judge: **S Walker**
Date of Judgment: **27 February 2022**
Entered in register: **31 March 2022**
and copied to parties

This is a corrected version of the judgment.

Susan Walker (Employment Judge)