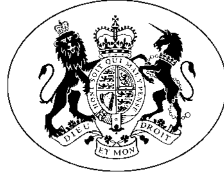

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr. Z. Malik	v	**Birmingham City Council**

Heard at: **Birmingham** **On:** **25 March 2022**

Before: **Employment Judge Wedderspoon**

Members **Ms. Outwin**

Mr.Sharma

Representation:

Claimant: **In Person**

Respondents: **Ms. Hodgetts, Counsel**

ORDER

1. The respondent's application to strike out the claim is refused.
2. The respondent's application for costs against the claimant is well founded.
3. The claimant will pay the costs consequent upon the adjournment of the case from 22 February 2022.
4. The respondent will provide a costs schedule detailing those costs to the claimant and the Tribunal by 1 April 2022.
5. The claimant will provide a response to the schedule to the respondent and the Tribunal by 8 April 2022.
6. By 15 April 2022, the Labour Party, (a third party in these proceedings) is ordered to provide to both parties unredacted documents concerning information about the claimant passed from the Labour party to the respondent and to the Labour Party from the respondent.
7. The Labour party and/or the respondent have leave to make representations in respect of this order by 15 April 2022.

REASONS

1. The claimant brings complaints of race discrimination, victimisation and constructive unfair dismissal.

2. The respondent applied to strike out the claim pursuant to Rule 37 (1)(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the rules') on the ground that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable and vexatious. In summary the respondent's application is based on their contention that the

claimant exaggerated his medical symptoms in order to obtain the postponement of a final hearing.

3. The Tribunal was provided with a bundle of documents of 71 pages. The claimant prepared two written skeleton arguments (one in response to the respondent's argument) and the respondent prepared one written skeleton argument and relied upon six authorities. The parties were given an opportunity to make oral submissions at the hearing.

The Law

4. Pursuant to Rule 37 (1)(b) of the Rules 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 the claim on the grounds that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious. When considering an application, the Tribunal must always take into account the overriding objective in accordance with rule 2.

5. In the case of **De Keyser v Wilson (UKEAT/1438/00)** it was established that when considering a strike out application a tribunal must consider (i)whether such conduct has taken place and (ii)whether a fair trial is possible.

6. In the case of **Bloch v Chipman (UKEAT/1149/02)** it was suggested a four stage approach should be taken by the Tribunal as follows :-

   (a)there must be a conclusion by the Tribunal not simply that a party has behaved unreasonably but that the proceedings have been conducted by him unreasonably;
   (b)Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously an enquiry must be held by the Tribunal absent the exceptional cases as to whether a fair trial is possible;
   (c)once there has been a conclusion that a fair trial is not possible there remains the question as to what remedy the tribunal considers appropriate which is proportionate to its conclusion. It is also possible of course that there can be a remedy even in the absence of a conclusion that a fair trial is no longer possible, of course, which amounts to some kind of punishment but which if it does not drive the defendant from the judgement seat may still be an appropriate penalty to impose, provided that it does not lead to debarring from the case in its entirety but some lesser penalty;
   (d)If the question of a fair trial is found against such a party, the question still arises as to consequene.

7. The Court of Appeal in the case of **Blockbuster Entertainment Limited v James (2006) EWCA CIV 684** emphasised that a strike out order must be a "proportionate measure".

8. In the case of **Bayley v Whitbread Hotel Co Limited t/as Marriott Worsley Park Hotel UKEAT/0046/07** it was considered although a party's behaviour had

been deplorable in failing to disclose a full expert's report (disclosing only edited highlights) the focus should be on injustice and whether there is a risk to a fair disposal of the issues between the parties.

9. In **Sud v Mayor & Burgesses of London Borough of Hounslow (UKEAT/0182/14)** where the tribunal found that the claimant's conduct (a lie about her medical condition and altered the date on a relevant document in order to mislead the tribunal when considering her application for postponement on medical grounds) totally undermined trust in her credibility such that a fair trial was no longer possible. Mr. Justice Laing stated at paragraph 39

   "Her explanation did not alter my view that her conduct has undermined trust in her credibility and that a fair trial of her case – a case in which her veracity in matters pertaining to her health and alleged disability will be of critical importance of a fair trial – is no longer possible."

10. In **Chidzoy v BBC (UKEAT/0097/17)** adopted a four stage test set out in Bloch and stated at paragraph 46 *"..Whilst I agree that the claimant's conduct was very serious I consider the ET was right to exercise caution and not to merely assume that it should strike out the case. Having made primary findings as to what had taken place, the ET appropriately considered what inference it should draw relevant to the question whether a fair trial might still be possible. It resisted the Respondent's suggestion that it should infer that the claimant might have engaged in similar conduct on previous occasions but concluded nevertheless that it could no longer have the necessary trust in the claimant's veracity to enable it to continue to hear her case. That was a conclusion reached given the ET's finding as to the nature of the claimant's conduct, in being party to a discussion about her evidence with Ms. Gliss but was also informed by her failure to herself bring the matter to the ET's attention and by the differing accounts she had given – initially by means of her instructions to her solicitor and then in her own statement. Viewed against the clear instructions it had given to the claimant during the hearing, the ET was entitled to conclude that it could not longer conduct a fair trial of the claimant's case; the loss of trust was irreparable..".*

11. Further in the case of **Emuemakoro v Croma Vigilant (Scotland) Limited UKEAT/0014/20** the EAT held a tribunal was entitled to accept the parties joint position that a fair trial was not possible at any point in the five day window and that was sufficient to trigger the power to strike out. Whether or not the power ought to be exercised would depend on proportionality.

12. The costs regime for the Tribunal is set out in Rule 76. There are limited situations when costs can be successfully applied for including where a part has acted unreasonably in the way proceedings have been conducted. In the EAT case of **Haydar v Pennine NHS Trust (UKEAT/0141/17)** Mrs. Justice Simler, (at paragraph 25) set out a three stage process in deciding whether to award costs. The first stage is to consider whether any matters on Rule 76 (1)(a) to (c) are satisfied which includes whether a party has acted unreasonably in the way the proceedings have been conducted. This trigger if satisfied, is necessary but

not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged does not mean that costs will automatically follow. The second stage the tribunal must consider is whether to exercise its discretion to make an award of costs. This discretion is broad and unfettered. The third stage means if the tribunal decides to exercise its discretion to make an award of costs and involves assessing the amount of costs to be ordered in accordance with Rule 78. An ability to pay a cost award may be considered at both stage 2 exercise of the discretion and at stage 3 when determining the amount of costs that should be paid.

13. Costs are the exception rather than the rule **Lodwick v Southwark London Borough Council (2004) ICR 884.** In the case of **McPherson v BNP Paribas (London Branch) 2004 ICR 1398** it was held that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion but that is not the same as requiring the respondent to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred. In the case of **Barnsley Metropolitan Council v Yerrakalva (2012) IRLR 78** it was held that the Tribunal should consider the whole picture of what has happened in the case and ask whether there had been unreasonable conduct by the claimant in bringing and conducting the case and in so doing identify the conduct, what was unreasonable about it and the effects it had had. In that case the effect of a claimant's conduct in giving differing accounts about her degree of disability was considered unreasonable conduct and it was reasonable for the employers to question her credibility and to incur costs in doing so. The costs awarded need not be precisely calculated to reflect the cost to the respondent caused by the claimant's unreasonable conduct but should broadly reflect what had caused by the erring party.
14. In **Daleside Nursing Home Limited v Mathew (UKEAT/0519/08)** Mr. Justice Wilkie held where at the heart of a claim is an explicit lie alleging racial abuse the employment tribunal was in error in failing to find that the claimant acted unreasonably in bringing or conducting her claim and should have made an order for costs against her. In **Arrowsmith v Nottingham Trent University (2011) EWCA Civ 797** it was held that the case of Daleside does not lay down a point of principle of general application that where a party lies about a central allegation in the case in the case an award of costs must follow; each case will be fact sensitive.
15. In respect of a party's ability to pay, the fact that a party is out of work (no savings or capital assets) does not mean it is inappropriate to make a cost order. The question of affordability does not have to be decided once and for all by reference to the party's means as at the moment the order falls to be made so that if there is a realistic prospect that the claimant might at some point in the future be able to pay a substantial amount, it was legitimate to make a costs order in that amount thereby enabling the respondents to make some recovery when and if that occurred (**Vaughan v London Borough of Newham (2013) IRLR 713).**

<u>The respondent's application</u>

16. The respondent submitted that the claimant exaggerated his medical symptoms including shortness of breath, chest pain and coughing. It relied upon the following matters (a)the claimant obtained medical evidence on 4 February 2022 in order to seek a postponement of the final hearing; the doctor's note

states *"chest infection, shortness of breath"* (see pages 17 to 18); (b)the claimant obtained additional evidence on 7 February 2022; the G.P. note stated *"severe cough and breathlessness with pleuritic chest pain. GP to review after 14 days. I advise that you are not fit for work"* and on 8 February 2022, the G.P. stated *"I am writing to confirm that I have treated Mr. Malik for a lower respiratory tract infection. He continues to have chest pain and shortness of breath. He was seen in the Queen Elizabeth Hospital on 7 February for tests on his heart and lungs. I believe he is not fit to attend a hearing due to his current ill health, either in person or remotely on account of his ongoing cough and shortness of breath. I have arranged to review him after two weeks to reassess his condition. If he is better at that stage I will be able to confirm his fitness to attend a rescheduled hearing."* so to make a renewed application on 9 February 2022 to seek a postponement of the final hearing. The evidence on 8 February 2022 was that the claimant stated he was not fit to attend a hearing either in person or remotely on account of his ongoing cough and shortness of breath. The claimant's email dated 9 February 2022 *"the difficulty I have is that when I speak it triggers my cough, hence I am unable to represent myself, it effects my breathing making me breathless and dizzy* (page 25-30) (d)the claimant obtained the medical certificate for the period of 18 February to 4 March *"still having difficulty with cough and shortness of breath, difficulty talking for extended periods of time. I believe he will be fit to attend a preliminary hearing on 24 February 2022 for 90 minutes as long as his talking time is staggered* (page 40 to 42) the Respondent submits this medical material was obtained by the claimant by exaggerating his medical symptoms to his G.P. in order to resist the relisting of the final hearing in the near future (d)In serving the statement of fitness under cover by email dated Monday 21 February 2022 (page 39) representing it was correct position of the claimant's current health; the respondent state this material was submitted to enable him to resist the relisting of the final hearing (e)At the preliminary hearing on 24 February 2022 maintaining his position to attempt to avoid a relisting in the future.

17. The respondent contrasts the G.P. fit notes with the claimant's conduct which they submit is inconsistent behaviour. The Respondent obtained video evidence of the claimant addressing a council meeting on 22 February. There are two parts to the claimant's address namely the first part lasting 1 minute and 51 seconds where they state he speaks robustly, clearly and confidently using prepared notes; raising his voice to speak above objections; there is no coughing or shortness of breath and the second part lasting 2 minutes and 42 seconds where he speaks robustly, clearly and confidently and using his prepared notes with no coughing or shortness of breath. If there was no adjournment he would have been able to speak for 4 minutes and 33 minutesIt was submitted that the video evidences the claimant speaking clearly and confidently and raising his voice. This the respondent submits is in clear contradiction to the claimant's assertions on 21 February 2022 when he served the fit note on the Tribunal and the claimant representing that the fit note represented the true position on 24 February 2022 when the claimant attended the Tribunal to confirm this was the case. The respondent also submitted that the claimant's performance at the Council meeting on 22 February 2022 is in stark contrast to both the medical evidence dated 18 February and his performance before the Tribunal in the first part of the hearing on 24 February 2022 when he coughed loudly at regular intervals. The respondent submits it was part of a preplanned defection by the claimant from the Labour party to the

Conservative party. His conduct fits with the claimant's general reluctance to relist the final hearing of this case for the sake of his political ambitions. On the last occasion the claimant proposed that the final hearing be listed after August when he returns from Pakistan. He was reluctant to fix the case for any date in April because of Ramadam or in May because of Eid. These dates coincide with campaigning for local elections which the respondent states was the most likely reason for the claimant's reluctance to re-list the case until later in the year. The respondent submitted that Eid is 2 to 3 May not 4-5 as the claimant had suggested the Tribunal and he failed to volunteer to the Tribunal that local elections are on 5 May.

18. The respondent submitted that the claimant has misled and exaggerated his symptoms on Friday 4 February and Monday 7 February to achieve a postponement of the final hearing and to avoid relisting the case in the near future. The respondent submits that the claimant was able to attend a 5 hour council meeting on 22 February 2022 commencing at 2p.m. with prepared notes; having agreed to second an amendment proposed by the opposing political party.
19. The respondent also relied upon "untrue assertions" made by the claimant namely in his email dated 23 February 2022 he stated he "spoke for 3 minutes of which half the time I did not speak" because of the commotion by individuals. That was all my involvement regarding speaking" and further at the preliminary hearing on 24 February 2022 when he stated that he spoke for no more than 1.5 minutes (page 56). During this hearing the claimant coughed in the first part of the hearing and then did not cough at all. The respondent also submitted that the claimant's address was part of a public defection in the opposing political party in circumstances in which he had previously been deselected as a candidate by his former political party for the forthcomimg local elections. In the claimant's interview on 22 February to the Birmingham Mail (pages 44 and 47) it was reported "*Councillor Malik said afterwards that he was upset at losing his chance to stand as a Labour councillor again..He felt that his omission from a selection panel for his ward seat had been unfair and when an appeal failed to decided to act".* Further the respondent relied upon the later Birmingham Mail report dated 6 March (pages 62 and 63) *"Councillor Malik made the switch after the city Labour group decided he would not defend his seat."* The respondent submitted it can be reasonably inferred that there had been discussions with the new political party in advance of the public statement on 22 February 2022 or that from the photograph of the claimant with his new political party in the Birmingham Mail report dated 23 February (page 49 and 51) that the claimant was capable of engaging both in collegiate informal discussions on 22 February 2022 with his new political colleagues and in the exchanges necessary to pose for the photograph.
20. The respondent further submitted that the claimant was evasive to the Tribunal as to whether he would be standing as a candidate for the new political party or not. The respondent referred the Tribunal to the Birmingham Mail report dated 22 February 2022 (pages 44 and 46) "In turn Councillor Malik crossed the floor and was formally welcomed into the new political party who he will represent in the forthcoming local elections" and the tweet from the new political part on 22 February 20200 at 6.07p.m. (before the council meeting has finished) published in the Birmigham Mail report dated 6 March 2022 (p.62 & 64) "We are pleased to welcome the claimant to the new political party on Birmingham City Council and *"he was adamant he will represent the new party in the May's local*

elections." Consistently with the claimant's public defection on 22 February 2022 the claimant was out campaigning on 24 February 2022 (page 59).

21. His conduct of the proceedings is unreasonable scandalous and vexatious. The respondent submitted that the claimant could participate in a hearing. The Tribunal is used to making reasonable adjustments to hearings. The claimant did not want the final hearing to proceed. A fair trial is not possible. The type of claims brought by the claimant and the factual assertions he makes rely heavily upon the credibility of the claimant and the burden rests upon the claimant to establish his prima facie case. The Tribunal will be influenced by the claimant's conduct in the findings in the case. It would not be practicable for a newly constituted panel to consider this case within the trial timescale as there would be a duplication of time, resource and the case is already old. On the particular facts of the case, it would be proportionate response to strike out the claim.
22. Alternatively, the respondent requested that there be a cost order. The effect of the claimant's unreasonable conduct of the proceedings was to effect a postponement of the final hearing which caused costs to be incurred by the respondent and the claimant had the ability to pay.

<u>The claimant's reply</u>

23. The claimant stated he had not misled the Tribunal. He was genuinely unwell. He did not pull the wool over the doctor's eyes. He recalled the Tribunal asking him at the start of the case about his health because he was coughing. He was too unwell to attend a hearing and was admitted to hospital on 7 February 2022. It was impossible for him on that date to further engage in correspondence with the respondent's solicitor or attend a hearing because he was in hospital. He even cancelled a pre-arranged meeting (see text at page 71) because he was too ill to attend. On 18 February 2022 he was seen by his G.P. who referred him to a chest clinic. He did not say to the claimant he could not attend a council meeting. The claimant submitted he did not resist the relisting of the final hearing and when relisted in May 2022 he did not object. At the meeting on 22 February his G.P. had advised he could attend the preliminary hearing on 24 February 2022. As for his defection to another political party, after 1.5 minutes of his speech he was interrupted and his whip was withdrawn by the Labour party and he had no option but to defect to the other party. He said this was consistent with medical advice which said "talking time is staggered." The claimant said he had rested for two weeks and he felt better; this was reflected in his demeanour giving him confidence at the council meeting. It is not evidence he had exaggerated his condition. He said his conduct at the council meeting and having his photograph taken there was not comparable to the engagement at a Tribunal hearing
24. He had previously appealed a decision by the Labour party to remove the whip in December 2020 when he was criticised for failing to tell the party about the Employment Tribunal case. He said his participation in the council meeting was not contrary to the medical advice. Following the medical advice he received in early February 2022 he rested. On 18 February 2022 he was assessed as being able to deal with the preliminary hearing; he had not misled the Tribunal. He referred to a screenshot dated 7 February 2022 which showed him cancelling a meeting on 7 February 2022 because he was too unwell to attend.
25. The claimant also submitted that his case was a complex one. It would not be right or possible or safe to reduce his case to a single issue of credibility of him. The Tribunal needs to take account of all of the evidence. As for credibility he had a number of issues of credibility concerning the respondent's witnesses

and their evidence was unsatisfactory. He listed 13 bullet points about the respondent's unsatisfactory evidence in this case. He submitted that the Tribunal is perfectly capable of determining whether the allegations he makes are credible by hearing his evidence and the respondent's witnesses; a fair trial is still possible.

26. The claimant further stated that there has been nothing about the conduct of the proceedings that could be said to be scandalous or make it impossible for a fair trial to be heard.
27. In respect of his financial situation, he had outgoings of about £1,700 per month; which left him with about £100 in the bank at the end of the month. He had savings of about £1,800 and debt at the same level. His mortgage has £25,00 outstanding and his house has a value of about £125,000. He has equity of £100,000.

Conclusions

Context

28. The recent history of this case is set out in the case management orders. The final hearing of the claimant's case was listed from 1 February 2022 (day 1) until 23 February 2022. In summary, the case had been listed to allow reading time for the Tribunal and a number of non-sitting days.
29. On the commencement of day 1, the claimant applied for a strike out of the respondent's ET3 for breach of an unless order. The Employment Judge enquired if the claimant was fit to proceed bearing in mind he was coughing at the hearing. There was a concern that the claimant may have had COVID and the case was being heard in person. The claimant stated that he was fit to proceed and he had a long-standing cough.
30. The Tribunal refused the claimant's strike out application on 2 February 2022 giving reasons. Following delivering judgment, the Tribunal discussed with the parties about the timetabling of the hearing. The claimant informed the Tribunal he had an appointment to see his G.P. on Thursday of that week (3 February). The claimant was also due to have a meeting on Monday 7 February 2022 so that the Tribunal adjourned the case to read in and rescheduled the start of the hearing for 1 p.m. on 7 February 2022 to accommodate the claimant's pre-arranged meeting. This meant that the claimant's cross examination would end on the afternoon of 10 February 2022.
31. At 5.25 p.m. on Friday 4 February 2022 the claimant provided a sick note from his G.P. dated 4 February 2022 stating that the claimant had a chest infection and was not fit for work. The claimant was unfit between 4 to 18 February 2022 and that the doctor did not need to assess the claimant for fitness to work again. On 7 February 2022 the respondent's solicitor contacted the claimant and stated that the medical evidence provided did not state that the claimant was unfit to participate in the hearing and asked the claimant to clarify whether he was proposing to postpone the hearing and whether he was unable to attend the hearing. The claimant responded apologising and stating that due to a bad cough and asthma he was requesting a postponement. The respondent notified the claimant it would be objecting to an application to postpone. The claimant responded that he was in bed and in bad health. The respondent invited the claimant to log into the hearing remotely. The claimant did not respond; in fact unbeknown to the Tribunal and the respondent, the claimant was taken to hospital on that date.

32. The Tribunal rejected the application to postpone due to the inadequacy of the medical evidence and relisted the case to restart on 10 February. However, the Tribunal gave the claimant an opportunity to provide further medical evidence addressing the issues of (a) his health condition (b) why he is unable to participate in a hearing in person or remotely; (c)the prognosis as to when he will be able to participate in the hearing either in person or remotely (in accordance with **Teinaz v London Borough of Wandsworth (2002) ICR 1471 and Levy (the trustee in bankruptcy of Errod Western Ellis-Carr) v Errol Weston Ellis Carr (2012) EWHC 63).**

33. The claimant provided further medical evidence from his G.P. Dr. M. Rashid dated 8 February 2022. The medical evidence on this date stated "*"I am writing to confirm that I have treated Mr. Malik for a lower respiratory tract infection. He continues to have chest pain and shortness of breath. He was seen in the Queen Elizabeth Hospital on 7 February for tests on his heart and lungs. I believe he is not fit to attend a hearing due to his current ill health, either in person or remotely on account of his ongoing cough and shortness of breath. I have arranged to review him after two weeks to reassess his condition. If he is better at that stage I will be able to confirm his fitness to attend a rescheduled hearing."*

34. The respondent did not object to the application to postpone the hearing. The Tribunal granted the application to postpone the final hearing. A preliminary hearing was fixed for 10 a.m. on 24 February 2022 via CVP with an estimate length of 1.5 hours. The claimant was ordered to provide updated medical evidence to deal with (a)the nature of the claimant's medical condition (b)the prognosis of the condition (c)whether the claimant is able to participate in a hearing (in person or remotely) and (d)if not when the claimant will be able to participate in a hearing (in person or remotely). The parties were also informed they should have details of their availability for the relisting of the final hearing.

35. By fit note dated 18 February 2022 the claimant's G.P. did not sign him fit to participate in a resumed final hearing but instead stated that the claimant would be able to participate in a Preliminary Hearing listed to consider the case further and relist the final hearing. The fit note dated 18 February 2022 (submitted to the Tribunal on 21 February) stated "*"still having difficulty with cough and shortness of breath, difficulty talking for extended periods of time. I believe he will be fit to attend a preliminary hearing on 24 February 2022 for 90 minutes as long as his talking time is staggered.."*

36. At the preliminary hearing on 24 February 2022 the claimant relied upon the medical evidence received. At this hearing the Tribunal sought to re-list the case at the next available date. The claimant sought a re-listing of the case in August after his return from Pakistan. He did not want the case to be re-listed in April due to Ramadan or in April due to Eid. The respondent asserted at the preliminary hearing that the claimant's reluctance for a relisting prior to 5 May was because of the claimant's political ambitions. The claimant had submitted that he was not sure if he would be selected as a candidate for election on 5 May 2022.

37. The Tribunal concluded that the case should be listed as soon as possible taking account of the nature of the claims (discrimination which are fact sensitive) and the fact the allegations were historic. It was able to accommodate the case for a listing from 10 May 2022. The claimant did not object to this listing.
38. The Tribunal concluded that the claimant's submission of a fit note dated 18 February which lasted on 4 March 2022 implicitly suggested that the claimant was unfit to resume the final hearing on any days within the trial window (1 February to 23 February 2022). The fit note provided for limited participation by the claimant at a preliminary hearing listed on 24 February 2022. In summary the Tribunal reasonably concluded on the basis of this medical evidence that that the claimant could not participate in a final hearing until after 4 March 2022 because he was simply too unwell to do so.
39. The right to a fair trial means that a party must be fit and able to participate in a hearing. The Tribunal is used to making reasonable adjustments to the trial process so to include regular breaks provided during the trial day so that a party or witness can participate. In the course of cross examination, there is no need for the person cross examining or answering the questions to talk throughout the day.
40. The Tribunal is not medically qualified and must rely upon medical evidence to guide it as to whether a party is able to participate in the trial process or if a party can do so with reasonable adjustments. The Tribunal is not permitted to look behind the medical advice given by a party save in exceptional circumstances which may include where the medical advice given is so inconsistent with the conduct of a party.
41. In consideration of any case management order, the Tribunal must apply the overriding objective to ensure that parties are on an equal footing and delay is avoided. This is particularly important in the context of discrimination claims because they are fact sensitive and expedition in hearing such a claim is in the interests of justice.
42. On 21 February 2022 the claimant submitted to the Tribunal the G.P. fit note dated 18 February 2022. This fit note indicated that the claimant was able to attend a preliminary hearing for 90 minutes but only where talking was staggered. The medical material represented that the claimant would not be fit to participate in a final hearing prior to 4 March 2022. The Tribunal finds by submitting the note dated 18 February 2022 on 21 February 2022 the claimant represented this was the true position as of 21 February 2022 and he was unfit to participate in a final hearing at this stage and could only participate in a preliminary hearing on 24 February 2022 for 90 minutes. The claimant has accepted today that the events shown in the video dated 22 February 2022 demonstrate an improvement in his health condition. The Council meeting was some 5 hours in length. It is accepted that the claimant did not talk for this period. However, by 22 February 2022 when the claimant participated in a Council meeting, the Tribunal finds the claimant had experienced a significant improvement in his health. The Tribunal notes that the videos of the claimant's speech is in two parts before the council. The claimant can be observed confidently and articulately addressing a large crowded room of people with the use of a microphone. The claimant speaks confidently, robustly and is able to raise his voice and does not cough. (This description of the video was unchallenged by the claimant; he explains it as confidence following

resting).The Tribunal notes that in total the claimant speaks for over 4 minutes in this manner.

43. The Tribunal compares this conduct with the fit notes provided by the claimant's G.P. The Tribunal, taking account that it has no medical expertise, is however able to observe that the conduct of the claimant in the video is in stark contrast to the medical picture presented to it including the fit note dated 18 February 2022. The claimant does not struggle in the video with cough or shortness of breath or talking (in a raised voice). The Tribunal takes account that the fit note dated 18 February suggested that talking had to be "staggered". The Tribunal does not find that the talking of the claimant in the video is in fact staggered. The claimant is able to talk in two parts robustly, raising his voice, for over 4 minutes in total. The only reasonable interpretation of the fit note is that "staggered" means that the claimant could be given breaks to deal with his shortness of breath or his cough or any talking; no shortness of breath or cough is evident from the video. Regrettably, the Tribunal has concluded that the conduct displayed by the claimant on 22 February is inconsistent with the picture painted by the claimant to his doctor on 18 February.
44. The respondent urges the Tribunal to find that the claimant exaggerated his condition to his G.P. on 18 February in order to obtain the fit note and postpone the final hearing. The Tribunal is unable to find that on the balance of probabilities, but does find the conduct of the claimant evidences a significant improvement in the claimant's health by 22 February 2022. The Tribunal is unable to say whether the claimant exaggerated his symptoms on 18 February 2022 when he obtained the medical evidence from his doctor but finds that by 22 February 2022 the claimant well knew he had sufficiently recovered to be able to make a public address in an open forum speaking confidently and assertively in the absence of any coughing or shortness of breath. The Tribunal finds it disingenuous of the claimant to state he was just following medical advice and his G.P, did not say he could not attend a council meeting. By 22 February 2022 by maintaining he could only participate in a short hearing to a limited extent and on 24 February 2022 at the preliminary hearing (when the claimant came to the Tribunal and maintained that he was unable to resume the trial) the claimant did act unreasonably. The Tribunal finds at this point of time the claimant was exaggerating the extent of his poor state of health so that the fit note was no longer accurately represented the situation and he knew it.
45. The Tribunal does remind itself it has no medical expertise but the conduct of the claimant at the council meeting is in clear contradiction to the debility presented in the sick note by 22 February 2022. It appeared to the Tribunal that the claimant could, have engaged in the Tribunal process with such an improvement in his condition. The Tribunal finds on the particular facts of this case that the conduct was inconsistent with the medical picture presented on the sick note such that the claimant did exaggerate his medical symptoms and this amounts to unreasonable conduct of the proceedings.
46. The Tribunal now turns to consider whether a fair trial is still possible. The respondent argues that it no longer is because the claims pursued depend upon the claimant's credibility to establish a prima facie case. It submits that the claimant's credibility has been significantly damaged by the misrepresentation of his health condition such that it is not possible to have a fair trial. The claimant states that the tribunal is able to determine the case when it hears all the evidence.

47. The Tribunal agrees with the claimant. The fact that a witness may exaggerate some parts of a case does not mean that he/she has done so on all matters before the Tribunal so that the Tribunal can never determine an allegation in their favour and a fair trial is not possible.
48. Discrimination claims are fact sensitive. This means that all the material available to the Tribunal must be analysed which includes both documentary evidence and oral evidence. The claimant has particularised a number of aspects in his skeleton argument of the respondent's evidence which he deems to be unsatisfactory and unreliable.
49. On balance, the Tribunal does not consider the claimant's unreasonable conduct in this procedural aspect of the case fundamentally damages his position so that the Tribunal could not determine issues and claims in his favour; the claimant's evidence may well be reliable on other matters based on an analysis of the documentary and oral evidence. The Tribunal determines a fair trial is possible because the Tribunal will consider all the evidence presented to it and weigh it accordingly. The Tribunal is sufficiently experienced to put aside the sick note issue and focus on the facts and evidence of the case.
50. Furthermore, this case has a long history and needs to be determined for the sake of both parties and their witnesses as soon as possible. The Tribunal finds that it is too simplistic to suggest that where there has been some less than candid disclosure of a claimant's medical position in terms of a procedural matter that a person can never be believed. Furthermore, striking out this claim is disproportionate and not in accordance with the overriding objective; in the interests of justice this case should and must be heard.

Costs

51. The Tribunal having determined that the claimant has conducted the proceedings unreasonably (pursuant to Rule 76(1)(a)) by the claimant failing to notify the Tribunal and respondent on 22 February 2022 as to the improvement of his health that the final could have been resumed within part of the trial window listing. It has been adjourned off in full to be determined in May. The Tribunal considers that the claimant would have been able to conduct his case with any reasonable adjustments required to the trial process.
52. The Tribunal considers it would be appropriate to award costs because inevitably the adjournment of the trial for 2 days has caused costs to the respondent to instruct counsel to re-read papers for the postponed hearing to be now later resumed.
53. In regard to the means of the claimant, he does have means; he has equity of about £100,000 in his property and savings of £1,800 and an excess of £100 per month in his account (although he has some debt of £1,800). In the circumstances the Tribunal does award costs and the amount is to be determined on the papers. The respondent will provide a costs schedule detailing those costs to the claimant and the Tribunal by 1 April 2022.
54. The claimant will provide a response to the schedule to the respondent and the Tribunal by 8 April 2022. The respondent will provide a costs schedule detailing those costs to the claimant and the Tribunal by 1 April 2022.
55. The claimant will provide a response to the schedule to the respondent and the Tribunal by 8 April 2022.

Third Party Disclosure

56. The Employment Judge also followed up a matter of third party disclosure raised by the claimant on the previous occasion. The Employment Judge confirmed from her perusal of the file, no documents from the Labour Party had been received by the Tribunal; there were none in the files for this case. The claimant was asked to explain the relevance of the documents which amounts to correspondence to and from the trade union/respondent about him. The claimant asserted that they were relevant; it was political. The claimant was asked how a political reason could be relevant to a claim of discrimination based on race and/or unfair dismissal. The claimant said he believed that the correspondence would show that he was being discriminated against by reason of race. The respondent raised no objections to the application but suggested that there may be a GDPR issue so that the Council as a third party ought to be given an opportunity to make representations. The claimant did not object to this course.

57. In the circumstances by 15 April 2022, the Labour Party, (a third party in these proceedings) is ordered to provide to both parties unredacted documents concerning information about the claimant passed from the Labour party to the respondent and to the Labour Party from the respondent.

58. The Labour party and/or the respondent have leave to make representations in respect of this order by 15 April 2022.

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Employment Judge Wedderspoon

Signed on 05/04/2022

Sent to the parties on: 22/04/2022

For the Tribunal: