EMPLOYMENT TRIBUNALS

Claimant: Miss AB

Respondent: Public Health Wales NHS Trust

Heard at: On video **On:** 29 March 2022

Before: Employment Judge S Moore

Representation
Claimant: In person, accompanied by her father
Respondent: Ms J Williams, Counsel

JUDGMENT

The whole claim is struck out as it is no longer possible to have a fair hearing.

REASONS

Background and Introduction

1. I conducted a preliminary hearing on the above date which had been listed to consider whether the Claimant's claims should be struck out under Rule 37 (1) (e) on the basis it was no longer possible to have a fair hearing in respect of the claim. The decision was reserved and the Claimant requested it be delivered in writing.

Reasonable adjustments

2. I asked the parties if anyone attending required reasonable adjustments for the hearing today. It was agreed that regular breaks would be required for the claimant and also that additional time would be permitted for the Claimant to consider documents and submissions by the respondent, enabling breaks to be taken before responses were required.

3. I also had regard to the guidance in the Equal Treatment Bench Book in particular, Chapter 4 (making adjustments for case preparation).

Issues arising prior and during the hearing

5. This hearing had been listed on direction of Judge Jenkins in his email dated 15 December 2021. In that email Judge Jenkins postponed the final hearing due to start on 5 January 2022 as the Claimant was not well enough to attend. Judge Jenkins set out his concerns (reiterating Judge Brace's concerns in her summary of the preliminary hearing on 9 November 2021) that it may not be possible for there to be a fair hearing of the claims and there should be consideration whether the claim should be struck out on this basis. The notice of hearing was issued on 17 January 2022 also explained the hearing was to consider strike out and listed the hearing for 3 February 2022. On 26 January 2022 the Respondent sent the Claimant a bundle and witness statement for the Preliminary Hearing due to take place on 3 February 2022.

6. The Claimant contacted the Tribunal on 24 January 2022. As a reasonable adjustment due to the Claimant's disability and issues with written documents, Tribunal staff made a telephone note of the discussion so that the Claimant would not have to send an email. The Claimant had asked if the preliminary hearing could be extended to 3 days and also enquired how she should provide evidence for the hearing. The Claimant also requested that the hearing be listed towards the end of February 2022.

7. Unfortunately the hearing listed on 3 February 2022 had to be postponed as the notice of hearing was not compliant with Rule 54. It was relisted for 29 March 2022.

8. Judge Harfield sent an email to the Claimant copied to the Respondent on 24 January 2022. Judge Harfield explained what the hearing would consider and how the Claimant might prepare. She directed the parties to send any documents they wished to rely upon 7 days before the hearing, copied to each other. She also explained in some detail that the Tribunal would be deciding whether there can be a fair hearing of this case and the steps the claimant should take to prepare.

9. On 28 February 2022 Judge Sharp directed that the Respondent should prepare and upload a bundle ahead of the Preliminary Hearing on 29 March 2022.

10. The Respondent re sent the bundle and witness statement to the Claimant on 17 March 2022.

11. On 22 March 2022 the Claimant's father contacted the Respondent's solicitor by email to advise that the Claimant was unable to access her emails. He asked the Respondent to email a link to his email account (for the document upload centre) so that the Claimant could upload her preliminary hearing bundle to the Respondent which she then required the Respondent to upload to the ET system. The problem was that the Claimant's father is not on record as acting for the Claimant and therefore the Respondent's solicitor contacted the Claimant on 23 March 2022 to ask her to provide permission to send the documents to her father's email address. The Claimant did not reply to this email. I asked the Claimant

why she had not replied and she explained it was because she got very anxious about speaking to the Respondent's representatives.

12. On 23 March 2022 a further verbal referral was made after a telephone call from the Claimant. That referral indicated that the Claimant was concerned about the contents of the Respondent's bundle and wanted her own link to upload her own documents. It was explained to the Claimant that she should send any evidence on which she wishes to rely to the Respondent and it will upload them, albeit on a disputed basis if necessary.

13. At 9.34am on the morning of the hearing the Claimant emailed the Tribunal and the Respondent a 12 page list of documents citing documents she said showed the role the Respondent had played in delaying the final hearing. The Claimant had not sent the documents referenced on the list to the Respondent for uploading. There were approximately 30 emails from the Respondent's solicitors on the list, which the Claimant said she would need to discuss verbally with the Tribunal. The Claimant sought permission to upload all of the documents referenced in this list after the hearing. This would have inevitably meant postponing the hearing today to allow both the Respondent and the Tribunal to consider those uploaded documents and then the Claimant to address the Tribunal verbally as she had indicated in her document.

14. Bearing in mind the Claimant informed me there was a significant amount of documents she wished me to consider and would need sending to the Tribunal and the Respondent, I asked the Claimant to tell me how long she would need to be in a position to send those documents. The Claimant told me one week.

15. I was mindful that as at 15 December 2021 (when Judge Jenkins stayed the order to send her disclosure) the Claimant had been unable to complete disclosure due to her disability, having first been directed to send her list of documents by 25 September 2020, with copies to have been provided in time for a bundle to be completed by 23 October 2020. Whilst the Claimant has now produced a list of documents, she advised Judge Brace November 2021 that she had over 3000 pages of disclosure and at that time had not felt able to even open the Respondent's disclosure (she has done so now).

16. Without attaching any fault to her inability to have completed disclosure, I concluded that there was no prospect that she would be able to upload the documents she wanted to refer to in respect of this application within one week or indeed at any time in the foreseeable future. This meant if I postponed this hearing listed to decide whether there could still be a fair trial, on the basis that the Claimant needed further time to produce documents, we would be back in the same position at the next hearing and the delay would have been futile.

17. I also took into account that the Claimant had been aware this hearing would be listed since Judge Jenkins gave directions on 15 December 2021. The hearing was then listed in a notice of hearing dated 17 January 2022. This was then postponed and re-listed until after the end of

February 2022 on advice from the Claimant's GP. The Claimant had been sent documents by the Respondent and had not accessed them. Her explanation to me today was that she had had problems with her email but these issues had only arisen latterly and did not explain why she had not accessed the bundle and statement which had been sent to her on 26 January 2022 and 17 March 2022. The Claimant had not complied with Judge Harfield's order to submit documents 7 days before the hearing.

18. I took into account the Claimant's OCD and depression and how that affects her ability to prepare and take part in these proceedings. I balanced this with the prejudice to the Respondent as well the impact on Tribunal resources of abandoning this preliminary hearing. I had regard to the overriding objective and all of the above factors when I refused the Claimant's application to upload documents after this hearing and to re-list a further hearing to enable her to make verbal submissions.

19. The Claimant told me that she had not read any of the Respondent's bundle or the witness statement at the start of the hearing as by the time her email account issues had been resolved she had not had time to review them. The Claimant had informed Tribunal staff on 23 March 2022 that she was concerned at the content of the Respondent's bundle which indicates to me she had at least been able to look at some of the bundle.

20. As the Claimant had not read the witness statement and said she was unable to access any documents even if they were emailed again (due to her email problems), I allowed a 40 minute break to enable the Claimant to view the witness statement which would be shared on the screen with the clerk remaining with the Claimant to scroll down as and when required. The statement was three pages long and I gave the Claimant 40 minutes to read the statement and prepare questions. The Claimant confirmed to me after the break she had had enough time and had prepared a number of relevant questions for the witness to the extent I was satisfied that this approach was a reasonable one to have taken in all the circumstances.

Findings of fact

Background and timeline of the claims and Tribunal proceedings

Presentation of first claim – 28 March 2018

21. The Claimant's first claim was presented on 28 March 2018. At that time the Claimant was still employed by the Respondent. The Claimant has two mental health conditions, OCD and depression. The main debilitating feature of her OCD is that she has a fear of writing (words on paper and computer) and the fear of contamination. The Claimant went on long-term sick from July 2015 and never went back to work. She raised a grievance in June 2016 alleging discrimination due to her disability. The grievance appeal outcome was on 16 November 2017. The first claim advanced claims of discrimination arising from disability, failure to make reasonable adjustments, direct disability discrimination, unauthorised deduction from wages in connection with holiday pay and a victimisation claim in respect of the alleged failure to pay holiday pay.

First preliminary hearing – 17 August 2018 - postponed

22. The tribunal listed a preliminary hearing for case management on 17 August 2018. On 14 August 2018 the Claimant applied for a postponement of the preliminary hearing. In support of her application the Claimant provided a letter from her consultant psychiatrist dated 8 August 2018. The psychiatrist confirmed that the Claimant's mental health was suffering as a result of the upcoming hearing and was finding the stress of preparing her defence for the hearing very distressing and as a result was unprepared. The consultant requested an adjournment of the hearing to a later date until the Claimant completed a therapeutic treatment with a psychotherapist. The treatment was due to be completed in approximately 10 weeks time. With regards to prognosis the consultant psychiatrist stated she would have a better understanding of this once the therapy was completed.

23. The Claimant's GP had also written a letter in support of the application to postpone the preliminary hearing. The Claimant's GP's confirmed she was in 'no fit state' to comply suffering with low mood anxiety and OCD which she had done so for many years. The GP explained she has tremendous trouble with writing things down which is a big issue for her. He referenced that over the last three months she had attended a course to help with distress management which she feels was improving slightly however she was still getting regular thoughts of self-harm and suicidal ideation.

24. I also had sight of a letter from another consultant psychiatrist dated 15 July 2016. This consultant psychiatrist confirmed that the Claimant has a long-standing diagnosis of obsessive-compulsive disorder which has had a significant impact in her everyday life and career. The two main long-standing patterns of her OCD and alleged perfectionist traits, involve germ phobia and increased anxiety in providing written reports. It went on to say that 'her fear of producing written reports is related with her low self-esteem and a fear of failure and subsequent criticism. Her perfectionist attitude tries to compensate but as a result it will take significantly increased amount of time to complete a report, thus increasing her anxiety and self-loathing'. The consultant psychiatrist stated that the Claimant had engaged extensively in psychological therapies, was also under medication but still experiences distress difficult to control and is affected by events and stresses that can exacerbate her symptomatology.

25. The Tribunal postponed this hearing.

Presentation of second claim – 17 September 2018

26. A further claim was presented on the 17 September 2018. By this time the Claimant had resigned with her effective date of termination being 10 May 2018.

Second preliminary hearing – 29 November 2018 - proceeded

27. This eventually took place on 29 November 2018 before Employment Judge Sharp. The order set out that the Claimant informed Judge Sharp that she was unable to seek assistance with written tasks even from family and friends as the trigger for her symptoms was her perfectionism and that oral

evidence or assistance was unlikely to make matters any easier. Judge Sharp explained that although the Tribunal could be flexible and creative in finding solutions, the matter had to be progressed. Judge Sharp set a generous deadline for the receipt of the impact statement which she ordered. It was suggested to the Claimant that if she was struggling to complete the impact statement in writing she could ask an extension of time or to give the evidence orally. The Claimant was directed to serve her medical records on the Respondent by 13 December 2018. The Claimant was given six months to provide further and better particulars of her claims by 31 May 2019. This was a longer timeframe than would usually be permitted in these cases.

Order to provide further and better particulars by 31 May 2019 – extended to 12 July 2019 and then 31 October 2019 – order not complied with and then only partially on 12 November 2019

28. On 31 May 2019 the Claimant informed the Respondent's solicitors that she would not be able to comply with the order for further and better particulars directed by Judge Sharp. The Claimant indicated she would be requesting an extension of time but had been unable to write the email requesting the extension of time as it required a lot of writing. Subsequently on 4 June 2019, the Claimant wrote indicating she would need an extension of time.

29. The Claimant GP's wrote to the Tribunal in a letter dated 23 May 2019. The GP was clearly very concerned for the Claimant's mental well being, advising that she had become a lot worse over the previous few months and referred to the situation "escalating to a significant degree". I set out the following relevant extracts:

"[Miss AB] has a real significant fear of writing which has caused a lot of distress with regards to her tribunal. I understand that her date is due within the next three weeks to submit paperwork and I write to request a delay to able [Miss AB] more time to put her paperwork together.
[1]….
It is very difficult to put a timeframe on for [Miss AB], however I wonder whether you would consider an extension of three months for her to put her paperwork together albeit slowly."

30. The tribunal granted an extension of time for the Claimant to provide her further and better particulars to 12 July 2019. The Claimant did not comply.

31. On 7 August 2019, the Claimant sought a further extension of three more months to provide her further and better particulars. This was duly granted time extended to 31 October 2019. When granting these applications both Judge Harfield and Judge Sharp referenced the interests of justice requiring the case to be progressed. The Claimant did not comply with this order.

Third preliminary hearing – 12 November 2019 - proceeded

32. At a preliminary hearing on 12 November 2019, outside the extension of time date, the Claimant presented a document in purported compliance of the order to provide further and better particulars. In fact the Claimant's

[1] I have not set out all of the letter as it contains some sensitive information which is not necessary to relay here.

document sought to advance 11 new allegations of harassment and a number of new factual matters not previously raised. The Respondent's representative had had very limited time to consider that document. The Respondent was therefore permitted six weeks to file an amended response and confirm whether they objected to the application to amend and also to set out what they consider to be new allegations not previously pleaded. As a reasonable adjustment I treated the document handed in by the Claimant as an application to amend her claim. The Claimant informed me that there may be further amendments to come as she had not been to write everything down she wanted to raise. My order records I explained to the Claimant that there had to be a point at which the Respondent would know the claims they are facing and a hearing could be listed to determine her case. I explained the overriding objective to the Claimant which meant that I had to balance the effect of the Claimant's condition and her ability to progress the case against the delay and how that might prejudice the Respondent. As a further reasonable adjustment I allowed the Claimant to make oral submissions to support her in amendment application and agreed to record these in my order. I then agreed to list a further preliminary hearing to consider the application to amend using the Claimant's oral submissions recorded in my order.

33. I listed a further preliminary hearing to take place on the 2 and 3 March 2020 to consider the application to amend amongst other matters. It should be noted by this time although the Claimant had released her medical records to one particular solicitor at the Respondent's representative, she was currently refusing to consent for them to be released to anybody else other than this one solicitor which meant that the Respondent had not been able to take meaningful instructions in relation to the medical records and conceding disability.

34. I also decided to list the claim for the full merits hearing given the delays in listing at that time and this was set down for 10 days starting on 14 August 2020. I had a detailed discussion with the Claimant regarding reasonable adjustments for the final hearing given her difficulty in preparing written documents. The Claimant wanted to try and produce a written statement. As a reasonable adjustment alternative plans were built in to allow the Claimant to give oral evidence in chief with a note being taken as evidence at the hearing. Accordingly the final hearing was listed in a staggered manner so that if the Claimant was unable to produce a written statement she had permission to give oral evidence over two days as evidence in chief on the 17th and 18th of August 2020. So as to not prejudice the Respondent they were directed to prepare but not exchange the witness statements until the morning of the hearing where they could be handed to the Claimant and the Tribunal. The hearing would then be paused until 7 September 2020 to enable the Claimant to read the Respondent's witness statement and the Respondent to prepare the cross-examination having had the Claimant's oral evidence in chief.

35. Directions were made for disclosure by list to take place no later than 29 June 2020 with copies being provided as requested and a final hearing bundle to be agreed by 13 July 2020.

<u>Fourth Preliminary Hearing – 2 and 3 March 2021 - postponed</u>

36. On 25 February 2020 the Claimant made an application for the above hearing to be postponed for 6 weeks as she had been unable to complete the written work required for that hearing. Some of this arose in consequence of the Claimant's refusal to allow anyone except one solicitor to access her medical records. The Claimant's GP wrote a letter in support of this application dated 26 February 2020 and certified that the Claimant was medically unfit to attend the preliminary hearing, required an extension of six weeks, citing that she had a review with the local psychiatrist on 4 March 2020.

37. The Tribunal consented to the postponement and it was relisted on 4 May 2020.

Fifth preliminary hearing - 4 May 2020 – proceeded

38. By way of reminder, this had been listed to consider the Claimant's amendment application and refusal to allow access to medical records. On 9 January 2020 the Respondent had filed an amended response addressing what they considered to be new claims and objecting to the amendment. It should be borne in mind that the full merits hearing was due to start on 17 August 2020. At that stage, there had been no decision on the amendment application and neither party was going to be ready for the hearing as they had been unable to prepare until they knew the outcome of the amendment application. In addition the Respondent anticipated they would experience difficulty in obtaining instructions to draft witness statements due to the Covid- 19 pandemic in a short timeframe given the amendment had been unable to be decided. For these reasons I postponed the hearing that was due to start on 14th of August 2020. This was my decision and it arose as the Claimant had not complied with the orders made on 12 November 2019.

39. No decision was made on the amendment application as the Claimant wanted further time to respond to the Respondent's amended response (filed on 9 January 2020) and add any further submissions in support of her application to amend her claim. I directed the Claimant to submit further submissions on before 15 June 2020 regarding her amendment application. I adjusted the usual time I would expect party to make further submissions to 6 weeks after seeking the Claimant's views as to how long she would need to prepare this document. A further preliminary hearing was ordered to be listed after 1 August 2020, by which time it was envisaged a decision would have been made on the amendment and a final discussion could be held to clarify the claims that would be progressing and re-list the final hearing.

15 June 2020 – date for Claimant to provide final comments on her application to amend – Claimant sought further extension

40. On 11 June 2020 the Claimant made an application for more time to comply with the above order and this was granted within extension being given to 1 July 2020. The Claimant did not comply with this order despite the extension of time.

Sixth preliminary hearing – 14 August 2020 – commenced then postponed

41. The Claimant sought a postponement of the above hearing on the morning of the hearing on the grounds of her mental health. This was refused as the Claimant had not provided any medical evidence in support of the application. The Claimant attended but was visibly distressed. I therefore decided to postpone the hearing, but informed the parties I would decide the amendment application on the papers and make some orders to progress the final hearing. I also informed the Claimant that I would be ordering her to provide medical evidence as to her fitness to proceed with the claim and take part in the hearings. I explained that the tribunal has a duty to make reasonable adjustments for the Claimant but this must be balanced with the need to ensure fairness to the Respondent and those alleged to have discriminated against the Claimant as well as the right to have a fair trial within a reasonable period of time. Subsequently a letter from the Claimant's GP was provided which stated she was not well enough to attend the hearing.

Order dated 14 August 2020

42. I then considered the amendment application in chambers on 14 August 2020. The application was refused and reasons were provided in an order dated 14 August 2020. The same order re listed the final hearing to start on 27 January 2021 for ten days, with the same sitting pattern as set out above to accommodate the reasonable adjustments and possibility of needing to hear the Claimant's evidence orally. I acknowledged when listing this hearing that it had been made without availability from the parties and therefore permission was given for parties to postpone the hearing within 14 days of the order.

43. The Claimant was directed to provide a medical report for letter from her GP addressing questions as to the Claimant's nature and prognosis of her conditions, the prognosis and prospect of the Claimant being fit to attend the relisted hearing on the above dates and comply with the orders above and if the Claimant was not fit to attend that relisted hearing a prognosis of when she will be in a position to be well enough to take part in the proceedings.

44. As the Tribunal's previous orders in respect of disclosure and the bundle had not been complied with by the Claimant, time was extended again so that disclosure was to take place on before 25 September 2020 with the bundle being agreed by 23 October 2020.

45. On 24th of August 2020 the Respondent applied for the hearing that had been listed due to start on 27 January 2021 to be postponed and relisted after October 2021 or later. The reasons were twofold. Firstly Counsel was unavailable to attend on two of the final hearing dates. Secondly one of the Respondent's key witnesses was on maternity leave from 19 September 2020 to 18 September 2021 and would be unable to attend a hearing earlier due to childcare reasons. The Claimant wrote a long letter setting out her objections to this application.

46. On 21st of September 2020 Claimant made an application to postpone exchanging the list of documents by seven weeks to 13 November 2020. The Claimant's GP had written a further letter dated 19 September 2020 in support of this application. The Claimant's GP stated that the Claimant was

suffering from significant problems affecting her mental health. He repeated the diagnosis of OCD, depression and also cited complex post-traumatic stress disorder. The GP commented that he understood the Claimant had been asked to assemble information for the employment tribunal. Due to her mental health problems he stated that this would take the Claimant a considerable amount of time to accomplish. He stated he supported her request for the deadline of submission of the information requested be delayed by seven weeks to give her sufficient time to complete the task.

47. On 27 September 2020 the Claimant applied for a postponement of the final hearing that was listed due to start on 27 January 2021. Accompanying that email was the medical information the Claimant had been directed to provide in the order dated 14 August 2020. The Claimant sought permission for the final hearing to be postponed until May 2021 on the basis that she had been deemed not fit to attend. The Claimant stated both she and her care team were confident she would be able to attend a final hearing in May 2021.

48. The medical evidence that accompanied the Claimant's application to postpone the hearing in January 2021 was set out in a further letter from the Claimant's GP dated 27 September 2020 which stated as follows:

"[Miss AB] has completed several courses of therapy. These have been of limited benefit. She has been referred for a different type of therapy known as psychodynamic psychotherapy. It is hoped this will be more beneficial for [Miss AB].

It is hoped that, with the use of medication psychotherapy, there will be improvement in [Miss AB's] mental health. This is likely to be a gradual process over months and years.

The process of going through the employment tribunal has been difficult for [Miss AB], but I think that it will be beneficial for [Miss AB] to complete the process.

Her mental health problems have made it difficult for her to put together the list of documents that has been requested. I believe that [Miss AB] can accomplish this if she is given extra time.

Allowing [Miss AB] to give oral evidence to the tribunal instead of a full written statement is helpful to her as preparing a written statement of the necessary length in detail is unlikely to have been possible for her. However it remains a very challenging task for [Miss AB].

Because of the difficulties her mental health problems caused [Miss AB] in preparing for the tribunal, she will not be ready for the final hearing by January 2021. There is a significant danger that any extra pressure to prepare will lead to a worsening in [Miss AB's] mental health. A postponement to May 2021 should give [Miss AB] the amount of time necessary for her to prepare in a way that is achievable for her.

I believe that [Miss AB] is well enough to prepare for and attend the tribunal if it can be arranged for May 2021."

49. None of the above correspondence was referred to a Judge until 23 October 2020. On 11 November 2020 Judge Brace directed that the final hearing would be postponed and agreed to extend the date for exchanging the list of documents to 13 November 2020.

List of documents – compliance due by 13 November 2020 (having been already extended by seven weeks)

50. Later on 11 November 2020 the Claimant submitted a detailed email to the tribunal over 6 pages long attaching a significant number of documents that had to be sent across five separate emails. In that email the Claimant applied to amend her claim to include an additional disability, for a strike out of the Respondent's response, alleging that the Respondent was consciously misleading the tribunal, had made false statements and sought a further extension of time to exchange the list of documents.

51. Judge Jenkins suspended compliance with the case management orders on 17 December 2020 pending a further preliminary hearing listed on 4 January 2021.

Seventh preliminary hearing- 4 January 2021-proceeded

52. This hearing was conducted by Judge Jenkins. Judge Jenkins listed a further preliminary hearing to be held on 18 May 2021 to consider whether to strike out the response, whether to allow the Claimant to amend her claim to add in the condition of complex post-traumatic stress disorder as a disability, and whether to make any amendments to the listing of the final hearing and case management orders. He also listed the final hearing to start on 5 January 2022.

53. Judge Jenkins extended the date again for the parties to exchange the list of documents. The new date for compliance was 18 June 2021. This time an order was made that copies of documents must be requested by 2 July 2021 and the copies must be sent to the other party by 9 July 2021.

Eighth preliminary hearing - 18th of May 2021-proceeded

54. At this preliminary hearing Judge Jenkins refused the Claimant's application to strike out the Respondent's response and her application to amend her claim to add the condition of complex PTSD as a disability. The Claimant had applied to vary the case management directions set out above and the Respondent did not object. Judge Jenkins agreed to further vary the order for disclosure so that lists would be exchanged on 2 July 2021, copies must be requested by 16 July 2021 and the copies must be sent by 23 July 2021.

55. On 28 June 2021 the Claimant wrote to the Respondent's representative to request a further delay in exchanging the list of documents to Monday, 12 July 2021 as she had been unwell after recent Covid vaccination. This was agreed between the parties without seeking permission from the Tribunal to vary the dates. The parties finally exchanged lists of documents on 11 August 2021. The Claimant's list runs to 88 pages. On 23 August 2021 the Respondents representative emailed the Claimant proposing some amended directions in order to get the case preparations back on track referring to the previous orders of the tribunal. She proposed that they should request copies of documents on or before 1 September 2021, provide copies of documents to each other by 8 September 2021, and the Respondent would then provide a paginated bundle on before 6 October 2021. The Claimant replied on 30 August 2021. She requested further time for the request of copy documents to take place instead on 6 September

2021 and that they provide each other with copy documents one week after that new date on 13 September 2021.

56. On 7 and 10 September 2021 the Claimant submitted some very lengthy emails to the Tribunal containing a number of applications. In summary these were:

a) An application that the Respondent be required to provide the Claimant with an electronic copy of her 2016 SAR no later than 13 September 2021;
b) An application for specific disclosure of alleged missing documents (said to be approximately one hundred);
c) An application that the Claimant compiles the bundle instead of the respondent, with the Respondent bearing the cost, or permission to file separate bundles.

57. On 14 September 2021 the Respondent wrote to the tribunal objecting to these applications.

58. On 16 September 2021 the Claimant emailed the tribunal to request a reasonable adjustment that should be able to respond to the Respondent's email of 14 September 2021 via telephone call with the Respondent and the tribunal. The Claimant requested a further extension of time to exchange copies of documents as she felt she was unable to do so on 20 September 2021.

59. On 24 October 2021 the Claimant's GP sent a letter as follows (relevant sections only set out, not full text of letter):

"Despite taking medication and undergoing regular counselling [Miss AB] continues to suffer significant symptoms.

The process of going through the employment tribunal has been very difficult for [Miss AB]. She does not feel strong enough to proceed with the tribunal at present and request a delay in the proceedings.

[Miss AB] has been working on preparing the bundle of evidence. I understand that she is expected to work with her ex-employers in preparation of the bundle. [Miss AB] feels she is unable to do this is the thought of communicating with their representatives to prepare the bundle worsens her mental health problems. [Miss AB] has become aware that she feels worse when she hears from their team.

[Miss AB] requests that she is allowed to complete her own bundle of evidence. I support this request as such a decision would avoid an increase in the pressures she is already struggling to deal with."

Ninth preliminary hearing – 9 November 2021 – proceeded

60. In consequence of the above correspondence, the tribunal listed a preliminary hearing to determine specific disclosure application. At that stage, the case remained listed for the final hearing due to start in January 2022. The parties had exchanged list of documents but not completed disclosure as copy documents had not been provided by the Claimant, again in breach of orders. The Claimant indicated to Judge Brace that she had not been very well and as a result been unable to provide copies of her evidence to the Respondent and there were some 3000 pages of documents in her disclosure list alone. The Claimant requested one further

week to provide the documentation and relied on the letter from her GP that I have set out above, although it should be noted this was not provided until after that hearing. The Claimant told Judge Brace that she believed the Respondent had removed evidence from disclosure which supported her case and not provided her with soft files she had requested and it was not possible for her to have a fair hearing.

61. The Respondent's representative informed Judge Brace that the Respondent had on two occasions via a document portal provided the Claimant electronic and soft copies of their disclosure documents which the Claimant had not opened. In addition, on three occasions they had tried to deliver by courier hardcopies of the documents. The Claimant confirmed to Judge Brace that she had not opened the document portals as she had struggled with suicidal thoughts and accessing the documents would be dangerous to her health. In regard to the hard copies the courier had attempted to deliver three times, the Claimant explained she had not been well and been unable to touch anything or answer the door for fear of contamination. Further she did not feel able to touch hardcopy documents in any event. The Claimant agreed she had not communicated these issues to the Respondent as it caused her a lot of distress to write to the Respondent. The Claimant sought further time to provide her copy documents to the Respondent but was concerned the final merits hearing should be postponed.

62. Judge Brace discussed whether the Claimant's GP would be aware that if separate bundles were permitted, this would result in the Claimant having to address two files of documents and not one agreed file including duplicate documentation which Judge Brace considered could increase and not avoid the pressure the Claimant was finding in dealing with the disclosure exercise.

63. The Claimant also confirmed to Judge Brace she had not made any contact with witnesses she wished to call. Judge Brace recorded that the claim was not in a position to be considered by Tribunal at the final hearing listed to start in January 2022 due to the non-compliance with disclosure orders which would inevitably delay the final bundle and preparation of witness statements. Judge Brace decided that consideration must be given to the question of whether it was possible to have a fair hearing of the claim and in order for that to happen it was appropriate to obtain medical evidence on the impact of the Claimant's conditions on her ability to participate in proceedings and if there is a material impact how long that was likely to last. The Claimant agreed to get a medical report ideally from a consulting psychiatrist in order to discuss at further a preliminary hearing to be listed on 16 December 2021 whether it was possible to have a fair trial.

64. Judge Brace directed that the Claimant must send the Respondent copies of her documents by 23 November 2021.

65. On 18 November 2021 the Claimant applied for a further extension of time to send copy documents to the Respondent from 23 November 2021 to 7 December 2021. The Claimant stated, "I sincerely apologise that I overestimated what I could achieve in 2 weeks with my severe mental health problems". The Claimant stated in this application that it would be a "further

and final two-week extension". The application was granted. The Claimant failed to comply with this order.

66. On 7 December 2021 the Claimant applied for a postponement of the preliminary hearing listed for 16 December 2021 and the final hearing due to start on 5 January 2022, extend the date for disclosure to 7 January 2022, extend the date for the list of issues to 7 March 2022 and strike out the Respondent's response. This was effectively set out in a letter from the Claimant's GP dated 6 December 2021 which stated as follows (relevant extracts only set out, not full text of letter):

"[Miss AB's] medical conditions have had a significant impact on her ability to take part in the tribunal. It is very difficult [Miss AB] to estimate how long any task will take her. It is difficult for her to be sure that she can meet a deadline. She has to work at the rate that feels comfortable. [Miss AB] believes that if she does everything perfectly then it will prevent bad things from happening to her. If she has to struggle to meet a deadline it will cause her severe distress because she is faced with the prospect of submitting something which is not perfect, and this means that bad things will happen to her. This distress will, in itself prevent [Miss AB] from being able to function.

[Miss AB] does not feel able to interact with the respondent. This is why she feels that separate bundles will be better even though she realises it will mean more work for her than if both parties have been able to work together. [Miss AB] request that she is allowed to submit her own bundle of evidence for the final hearing.

[Miss AB] has a severe fear of making a mistake. She fears that bad things will happen as a consequence. This affects ability to complete tasks, particularly written work. It will therefore, be extremely difficult for her to decide which relevant evidence should take priority over other relevant evidence if she is restricted in the number of pages that she can include in her bundle of evidence for the final hearing. [Miss AB] requests that she is able to include all of the evidence she considers necessary in her bundle of evidence for the final hearing and that she does not have a page limit.

[Miss AB] has previously been granted an extension to submit her evidence until 7 December 2021. Since then she has downloaded and started to work through the respondent's evidence. She is finding this task very upsetting. This has had an adverse effect on her own mental health and directly impacted her ability to finish compiling her own bundle of evidence. As a result,[Miss AB] need more time to complete this task. Therefore she request a further one-month extension, until 7 January 2022 to allow her to submit her evidence.

[Miss AB] has been ordered to submit a draft list of issues by 14 December 2021. [Miss AB] is not well enough to work on the list of issues at present. [Miss AB] is not able to cope with more than one task at a time. She is not able to work on the list of issues alongside compiling her evidence. Because of her significant fear of doing the wrong thing she will need a large period of time to accomplish this task. It would be helpful if she can provide this information verbally, if she finds that she is not able to put this in writing. Whilst [Miss AB] can accomplish this task with more time, she will not be able to work alongside the respondent to agree a draft list of issues because of the distress this would cause her. Therefore [Miss AB] wishes to request an extension until 7 March 2022 to submit her draft list of issues, or to discuss the draft list of issues at a preliminary hearing.

[Miss AB] is due to attend a preliminary hearing on 16 December 2021. She is not well enough to attend a preliminary hearing on this date, but I would expect she will be well enough to attend a preliminary hearing if given more time.

[Miss AB] feels it is important that she can explain to the judge why specific disclosure is essential for a fair final hearing, but this will take some time to prepare and she may not be up to explain all of this in writing. In this case it would help if she could provide this information verbally at the preliminary hearing. Because this issue is causing her a lot of distress it would help if the employment tribunal could deal with this issue before

the draft list of issues, and if the information could be submitted/discussed around one month after the submission of her evidence i.e. around the beginning of every 2022 so that she only has one task to deal with at a time and that she has sufficient time to prepare fairly.

It will not be possible for there to be a fair final hearing in January 2022. Therefore [Miss A] needs to request a delay of hearing 2 May 2022. This will allow her time to complete the task above and will also allow her adequate time to prepare for her verbal witness statement which will reduce her distress. It would be detrimental to have to have this delayed and unresolved for any further length of time.

[Miss AB's] severe mental health problems and the associated symptoms are not going to improve in the foreseeable future and so will be beneficial if any adjustments that can help to reduce the level of distress that she experiences are made in order to enable her to participate in the final hearing.

- **It would help with the final hearing could be heard on alternate days i.e. 1 day of the hearing and then one day off.**
- **It would help of [Miss AB] could take breaks when needed.**
- **It would help of [Miss AB] could record the final hearing, so that she has a record to refer to.**

It is very important to [Miss AB] that she sees this case through to its completion. This is because of the devastating effect the respondent's actions have had, and will continue to have on her life. If the measures detailed in this letter can be accepted then the chance of [Miss AB] completing the case will be increase significantly. I would expect this to have a significant effect on [Miss AB's] mental health"

67. On 14 December 2021, the Respondent submitted a detailed objection to the Claimant's applications and submitted an application to strike out the Claimant's claims pursuant to Rule 37 (1) (e) of the Employment Tribunal Rules of Procedure. Attached to the application was a witness statement from Witness A who had been the Claimant's line manager and against whom much of the discrimination allegations are made. This stated as follows:

"**To Whom It May Concern,**
The claimant xx worked with me between 2013 and 2015, if the employment tribunal scheduled for January 2022 does not go ahead, it will be over 7 years since allegations made about me supposedly took place. Any further delays in time not only impacts on my ability to recall events from so long ago, but is also extremely detrimental to my emotional/mental health and wellbeing.

I naively thought that when none of the claims made by [Miss AB] were upheld by the PHW grievance or appeal hearings, that the annihilation of my good character and standing would cease. The knowledge that the case was not resolved and was going to employment tribunal resulted in me taking a 6 month period of sickness absence from work in 2017[2] due to stress and anxiety, of which this case was a major contributing factor.

In the intervening years between the PHW hearings, and the forthcoming employment tribunal I have had to provide my unavailability to the court at least 5 times. During this time both of my parents suffered serious health problems, and both sadly died. For about 12 months I travelled between my home in Cardiff and Morriston hospital several

[2] The Claimant pointed out that this date must be incorrect as she did not commence proceedings until 2018. I do not find this to be relevant to the issues I must consider as in any event, there were ongoing grievances against Witness A initiated by Miss AB in 2017 and it may have bene the case that an Employment Tribunal was referenced as part of these grievances.

times a week to visit my father on the renal unit until his death, and then the Coronary Care Unit to visit my mother; all of the time with the worry of an impending tribunal date and how I could meet my family commitments! In April 2020, I received a letter from the Chief Medical Officer for Wales advising me that as a vulnerable person I should be shielding. The impact of all of these factors has had a huge impact on my mental health and wellbeing.

In September 2020, I reached a milestone working for the NHS for 45 years (maximum pension) and indeed by now should I should be planning my retirement, but the tribunal is still hanging over me and it is as if my whole life has been put on hold! How much longer am I to be punished for something that I did not do/ or was not responsible for? Whilst I understand that the tribunal has to make adjustment for the claimant, I would ask you to take consider the impact this is having on my mental health and wellbeing."

68. On 15 December 2021 the tribunal wrote to the parties following a referral of the Claimant's applications dated 7 December 2021 and the Respondent's email of 14 December 2021 to Judge Jenkins. He directed that in light of the letter from Dr Davies that the Claimant was not well enough to attend either the final hearing or the preliminary hearing both would be postponed. Judge Jenkins expressed his concern (which had also been expressed by Judge Brace) that it may not be possible for there to be a fair hearing bearing in mind it was nearly 4 years since the claim was issued. Judge Jenkins directed there be a one-day hearing to consider whether the claim should be struck out on the basis that it was no longer possible to have a fair hearing. He directed this should not be held until February 2022 at the earliest as this was the timeframe the GP had indicated the Claimant may be able to participate in the hearing. Judge Jenkins directed that all current case management orders and directions would be stayed.

Evidence of Karen Fitzgibbon

69. This is the witness I have referred to in paragraphs 19 and 20 above. Ms Fitzgibbon is the Head of Workforce Planning and People Analytics and has been involved in this litigation since the outset. She is responsible for providing annual updates on the legal costs so the Respondent's annual budget can make appropriate provisions. Whilst not directly relevant to the issue of strike out under 27 (e), I accepted her evidence that the repeated postponements, delays and cost in responding to the Claimant's numerous applications for extensions and postponements have been significant.

70. I also accepted her evidence about the impact on the ten witnesses that will be needed to give evidence at any final hearing. Some have moved onto new employers and have had to repeatedly seek leave for the three postponed final hearings which have then been postponed.

71. The Claimant challenged this witness on her reference to epidemiologists (plural) as the Claimant believes only one epidemiologist is being called as a witness. Ms Fitzgibbon did not know how many epidemiologists were impacted.

72. It was put to this witness that two of the postponements were delays at the Respondent's request. Ms Fiztgibbon said this was not to her recollection. (The Respondent had requested a delay in the hearing of one year due to

a witness being on maternity leave. The Claimant objected and then some weeks later applied for a postponement due to her ill health).

The Law

73. Rule 2 of the Employment Tribunal Rules of Procedures 2013 sets out the following:

(2) Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.
A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the

74. Employment Tribunals must deal with cases fairly and justly. This applies to all cases not just the Claimant's case. The impact on other cases must be considered when exercising any power given under the rules.

75. Rule 37 of Sch 1 of the Employment Tribunal Constitution (Rules and Procedure) Regulations 2013 provides:

"Striking out
37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in r 21 above."

76. In **Abegaze v. Shrewsbury College of Arts & Technology [2010] IRLR 238** the Court of Appeal considered a strike out under the former provisions in the 2004 Rules (under 18 (7) (b) where it is no longer possible to have a fair hearing). The relevant sections are as follows (per Lord Justice Elias):

Paragraph 17:

"The strike out for failing actively to pursue the case raises some different considerations. In Evans v Metropolitan Police Commissioner [1992] IRLR 570 the Court of Appeal held that the general approach should be akin to that which the House of Lords in Birkett v James [1978] AC 297 considered was appropriate when looking at the question whether at common law a case should be struck out for want of prosecution. (The position in civil actions has altered since the advent of the Civil Procedure Rules). That requires that there should either be intentional or contumelious default, or inordinate and inexcusable delay such that there is a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents. "

77. In this case, one of the reasons the Tribunal Judge was found to have erred was that he had concluded one of the witnesses would not be able to give evidence after such a long period. That witness had already provided a witness statement. At paragraphs 41 and 42 Lord Justice Elias held:

"I agree with that criticism. In this case the evidence fell into two categories. First, there was evidence about what Mr Moseley's practice had been in taking up references. Second, there was the question about what he had said in the conversation with Mr Spalding.

In my judgment, it is highly likely that he could recall what his practice was; there may be greater problems with his recall of particular conversations, but it is by no means self-evident that he could not recall the conversation since it was conducted specifically with this litigation in mind. More importantly, he had not been asked whether he could or not. Furthermore, the difficulty would be shared by Mr Spalding, the other party to the conversation. A tribunal would have to make allowance for the lapse of time when assessing that evidence."

78. The Tribunal must engage on a proper analysis of why a fair trial is no longer possible and ensure there is a factual basis for such a conclusion.

79. In **Blockbuster v James [2006] IRLR 630** the Court of Appeal held as follows (regards proportionality) :

"It is not only by reason of the Convention right to a fair hearing vouchsafed by art 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings *[1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can*

be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

80. I was referred to the following authorities by Counsel for the Respondent.

Peixoto v British Telecommunications Plc UKEAT/0222/07/CEA

81. In this "truly extraordinary case", the Employment Appeal Tribunal upheld the Tribunal's decision (on 10 January 2007) to strike out the claim on the basis it was no longer possible to have a fair trial. The Claimant had been dismissed on 27 November 2003 and off work since 12 January 2001. The matters which gave rise to her claim related to her dismissal following a period of ill health absence, and the way in which she was treated and adjustments said not to have been reasonably made on account of her disability during 2002. In particular, she made criticisms of two line managers. The Claimant's disability was chronic fatigue syndrome (CFS) which creates difficulties in concentration and application. The Claimant presented evidence from her treating practitioner, Dr Mirza, indicating steps which would need to be taken for the conduct of any hearing of the Claimant's case. They included slotting a six day case into a ten day window with intervening days off, with the Claimant taking breaks throughout the trial and for long periods of what was described as aggressive rest, following the preparation of each of the steps in her case, such as the witness evidence and the documentation. the Claim Form was presented on 26 February 2004.

82. In **Riley v Crown Prosecution Service [2013] IRLR 966** it was held that the Tribunal had not erred in striking out a claim on the basis a fair trial was no longer possible. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the European Convention on Human Rights emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. It would be wrong to expect tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a tribunal.

83. The Employment Appeal Tribunal recently considered the power to strike out under Rule 37 in **Emuemukoro v Croma Vigilant (Scotland) Ltd and another UKEAT/0014/20/**

84. In this case the Tribunal had struck out the response on the first day of a five day hearing on the basis that the Respondent's failures to comply with the case management orders meant it was impossible for the trial to proceed within the five day window. Choudhury J reviewed the authorities and rejected the proposition that the power to strike out can only be triggered where a fair trial is rendered impossible in an absolute sense. (This case was about a strike out under Rule 37 (1) (b)). The factors relevant to a fair trial (set out by the Court of Appeal in **Arrow Nominees)** include the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court.

85. The Claimant referred to the case of **Royal Bank of Scotland v AB UKEAT/0266/18** which she said had a similar timespan to her claim (2008 – 2014). This was an appeal regarding remedy and did not contain and relevant authority regarding the power to strike out if a fair hearing is no longer possible. In that claim, whilst the Claimant had been employed between 2008 and 2014, the period between her dismissal in May 2014 and the case reaching a final hearing was relatively short (the judgment was dated 12 February 2016).

Submissions

86. At the point of submissions the Claimant requested permission to upload some "very very big documents". They were documents not submissions. I had already refused this request earlier in the proceedings and I refused the request again for the same reasons I have set out above at paragraphs 16-18. The Claimant submitted that at no time had she known or been given a strike out warning. She was three quarters the way through uploading her disclosure to send to the Respondent at the point Judge Jenkins stayed the order. She acknowledged that due to her medical records the Tribunal might be concerned about her ability to complete the case but she would do the case even if she was unwell. Her parents have been helping her. She referenced the Equal Treatment Bench Book which she stated supported allowing two bundles and that could be a reasonable adjustment. If she was under a strike out warning she would work with the Respondent. When she is unwell this ties in with having to do written work. The Claimant said the Tribunal had been very accommodating. The effect on the Claimant's life would be devastating if she is not permitted to continue. She requested one further opportunity and said she will get disclosure done. The problem is that everything is in her head and she needs to get the case to someone else and she will need to tell someone else where things are located (referencing documents). The case was going ahead until December 2021 and it was still possible to have a fair hearing then. The witness recall cannot have changed in only a few further months. There would be no further costs to the Respondent if the Claimant could submit her own bundle. The Respondent had also been responsible for delays and postponements.

87. The Respondent's submissions followed a chronology of events which I do not set out here as they are referenced above in my findings. The Respondent submitted that the Tribunal did not have to conclude a fair trial was impossible **(Emuemukoro).** The Tribunal needed to consider if there as another way of dealing with the case other than strike out (proportionality). When the chronology is considered since 2018 it is overwhelmingly clear that a fair trial can no longer take place. The medical

position is undoubtedly the basis for the delay. Apart from the difficulty with the witness on maternity leave, the delays have been due to the Claimant's ill health and inability to engage with the Tribunal process. There was nothing clear from the GP to suggest the Claimant will be fit at any stage, and it is not just about attending the hearing itself but the necessary preparation beforehand. There is no evidence to support why the Claimant would be ready by May 2022. The Claimant has been indulged significantly by the Tribunal to date.

Conclusions

88. I first of all consider the medical evidence before me. I noted that the first report in 2016 refers to long standing diagnosis of OCD which manifests itself in increased anxiety in writing reports. As at that date the Claimant had engaged extensively in therapies and was under medication but still experienced distress difficult to control (see paragraphs 24 above). In August 2018 the Claimant had attended a course for the previous three months and was due to embark on a 10 week therapeutic treatment.

89. In May 2019 the Claimant's GP expressed serious concerns about the Claimant's well being describing it as "becoming a lot worse" and advised it was very difficult to put a timeframe on when she would be able to comply with the order to provide further particulars but suggested a further three months. The Claimant did not comply until 12 November 2019 and then only partially. The Claimant had been given over a year to comply with this order (see paragraph 29).

90. On 26 February 2020 the Claimant's GP supported a six week extension of time for the Claimant to comply with orders in respect of the amendment application. The Claimant was not able to ever comply with that order despite granting the GP's suggested extension of time and a decision had to be made on her amendment application as it stood on 14 August 2020. Furthermore, an adjustment had been made to permit the amendment application to be made orally and recorded by the Judge in the order so the Claimant would not have to put the application in writing.

91. On 19 September 2020 the GP supported an application to extend time for the Claimant to provide her list of documents by a further seven weeks to 13 November 2020. This was not provided until 11 August 2021.

92. On 27 September 2020 the GP wrote a lengthy letter in support of her application to postpone the hearing listed to start on 27 January 2021. The GP said that a postponement until May 2021 should give the Claimant the necessary time to prepare in a way that was achievable and she would be well enough to prepare and attend the tribunal if it was arranged for May 2021.

93. On 24 October 2021 the GP reported that despite taking medication and undergoing regular counselling the Claimant was still suffering "significant symptoms". This was 6 months after the GP had considered the Claimant would be well enough to have prepared and attended a final hearing. At this stage the Claimant had not been well enough to provide copy documents to the Respondent let alone begin to agree a bundle or prepare a witness statement. The GP also reported that the Claimant was unable to work with

the Respondent's representatives and this worsened her mental health problems. He requested she be able to prepare her own bundle.

94. On 7 December 2021, the last medical evidence before me, the Claimant's GP wrote a lengthy letter that I have set out above at paragraph 66. This requested a number of further extensions of time and requested a delay of the final hearing until May 2022. Significantly, the GP stated that the Claimant's mental health problems and associated symptoms "are not going to improve in the foreseeable future". If the measures detailed in the letter were accepted then the chance of her completing the case will "increase significantly". These measures were:

a) That the Claimant be permitted to prepare her own bundle with no page limit;

b) The Claimant should be asked to comply with one task at a time;

c) The Claimant should be permitted to address the Tribunal on specific disclosure verbally (which would require a further preliminary hearing before any final merits hearing; this relates to the Claimant's ongoing allegations that the respondent has falsified / withheld documents);

d) List the final hearing with alternate hearing dates (one day on one day off);

e) Regular breaks;

f) Record the final hearing.

95. I should note that there would have been no issue with regular breaks. Whether to permit recording of the final hearing would require a further preliminary hearing.

96. I have carefully considered the medical evidence before me and have reached the following conclusions. Whilst not seeking to criticise the GP in any way, the GP has repeatedly informed the Tribunal that the Claimant will be in a position to comply with orders if extensions are granted, but the Claimant has still been unable to comply even with further lengthy and multiple extensions of time. The best example of this is the advice that the Claimant would be ready for a final hearing by May 2021, which proved not to be possible and now further advice the Claimant would be ready by May 2022, but only if the above measures were accepted and even then, the chances of completion are described as increasing significantly not that the Claimant <u>will</u> be ready for a hearing.

97. I am also of the view that the suggested measure that the Claimant completes her own bundle, with no page limit and that this could be done by May 2022 (noting the date of this advice to be December 2021 so a 5-6 month timeframe) is wholly unrealistic. The Claimant has, up to 15 December 2021 when the order was stayed, still been unable to provide the Respondent with copies of her documents which run to an 88 page list and over 3000 documents still requiring collation, scanning and emailing to the Respondent. It took the Claimant 1 year and nine months to produce her list of documents, breaching the order and requiring extensions of time on 8

occasions. This is just one example of orders not complied with. I am unable to see any circumstances in the foreseeable future whereby the Claimant would be in a position to have compiled her own bundle even if I apply the timeframe suggested by the GP that is a period of 5-6 months, when she has been unable to do so since the order was first due to be complied with by 13 July 2020.

98. I have further taken into account the impact of permitting the Claimant to produce a separate unlimited page bundle on the parties and the Tribunal. This would mean the parties and the Tribunal having to work with two bundles throughout the hearing. Whilst the Tribunal is sometimes able to work in this way this is normally in less complex cases with far fewer documents. I also consider what would happen when the Claimant needed to be asked a question about a document in the Respondent's bundle. She would still have to consider the document as part of a fair hearing. At this preliminary hearing we were required to adjourn for 40 minutes so that the Claimant could read a 3 page witness statement on the screen as she had not accessed or read any of the documents for this hearing. This would be untenable at the final hearing. In my judgment permitting the Claimant to produce her own unlimited bundle would not be a reasonable adjustment in this case as it would not ameliorate the impact of the Claimant's impairments. It does not fix the issue of how she would be able to deal with the Respondent's bundle. It would be simply unworkable in a multi day hearing with multiple claims. The amount of duplication between two bundles would significantly increase costs to the parties and the Tribunal and would lead to delay and hugely impact on the finite resources to hear this claim and other claims in respect of hearing time.

99. I do not accept that the Claimant producing her own bundle would have no cost to the Respondent. They would be required to prepare the case by reviewing two bundles, and it must follow that this would increase costs.

100. I was not reassured by the Claimant's attempt to reassure me that up to the point where the order for copy documents to be provided was stayed (15 December 2021) that she had made significant progress in getting the documents ready to disclose to the Respondent. The Claimant told me she was about three quarters of the way through and wanted to show me the progress by showing me her laptop, over the video platform. I declined as this would not have enabled me to actually assess progress made in uploading 3000 documents by viewing a lap top screen over a video hearing.

101. I have taken into account the advice that the Claimant can only complete one task at a time. Even if we dispense with a list of issues, there still remains disclosure, bundles and witness statements to be prepared before a hearing can start. Even if the Claimant does not prepare a written statement she will still need to read the Respondent's statements. The Claimant is unable to interact with the Respondent's representatives and doing so makes her feel worse. She was unable to telephone them and give them permission for them to send her father information for this hearing. The Claimant was unable to open the electronic bundle or touch the paper copy bundle for the last two preliminary hearings. In my judgment it is unrealistic to conclude the Claimant could take any of the required steps to prepare for a hearing within a reasonable further timeframe. The Claimant

became very unwell after reading the Respondent's disclosure, leading to a postponement of the hearing for a third time. She will still have to contend with reading the witness statements, and if she does so after giving her evidence this may also result in a deterioration in her health requiring a postponement of the hearing part way through evidence.

102. All of the medical evidence leads me to conclude that there is no realistic prospect of the Claimant being in a position to comply with orders to ensure the claims will be ready for a final hearing at any point in the foreseeable future. There is no evidence that the prognosis of the Claimant's mental health is going to improve in the foreseeable future. The medical evidence shows that since 2016 the Claimant has experienced the same difficulties as she is experiencing now. If I was to re set the timetable and relist the hearing, it would be in the hope that the Claimant would be able to comply rather than on any realistic prognosis. In such circumstances striking out must be an option **(Riley).**

Impact of delay on the Respondent

103. As of the date of writing this decision, the Respondent still has not seen the Claimant's disclosure which is over 4 years after the first claim was lodged. Even if copy documents are provided within say the next three months (and for reasons I set out above I think the chances of this are low to zero), the Respondent then has to consider 3000 pages and take instructions from witnesses on documents that may go back as far as 2013.

104. I have taken into account the impact on the Respondent, who has no doubt incurred significant legal costs as well as operational costs from the ongoing delays and non compliance with orders. I have also had regard to the impact of the delay on Witness A who is alleged to have discriminated against the Claimant. From the pleaded claim the alleged acts of discrimination were that Witness A asked the Claimant to write reports and refused her redeployment. The Claimant had already been redeployed from a previous role as it was exacerbating her conditions. These allegations have never been heard and determined and for the reasons I have set out above there is no prospect of this happening in the foreseeable future. This has significantly impacted on Witness A's mental health and well being (as set out in paragraph 67 above). I do not have any evidence before me whether Witness A has already provided a witness statement. I note the Tribunal would have to make allowances for the lapse of time when assessing the evidence. However in this case, if the claims ever got to a hearing, this witness would have to give evidence on events that happened between 2013 and 2015, as far back as between 9 and 7 years ago as at today's date. Whilst there will be contemporaneous documents that may assist with memory recall, I have borne in mind that the Respondent and the witnesses still have not seen the Claimant's disclosure.

105. If I acceded to the proposal for relisting the hearing on alternate days this would effectively bind the respondent to costs of a 20 day hearing as Counsel would need to be retained for the 20 day period.

Impact on Tribunal resources and other cases

106. There have to date been ten preliminary hearings. If the claim is permitted to proceed there would be at least two further preliminary hearings required. In light of the Claimant's concerns over specific disclosure, I anticipate a two day hearing would have to be listed to deal with this issue alone. Further case management would be required to re-set the case management orders.

107. There have been three ten day hearings postponed. That amounts to 30 days of Tribunal time that will inevitably have impacted on the ability to hear other Claimant's claims.

108. All of the above factors lead me to conclude that it is no longer possible to have a fair hearing. I go on to consider whether striking out the claim is proportionate and whether any lesser sanction could bring about a different outcome.

Reasonable adjustments

109. The following reasonable adjustments have been implemented to date:

110. The Claimant has been given significant extra time to comply with orders and multiple extensions of time. The Claimant has repeatedly failed to comply with Tribunal orders and not been sanctioned. The Claimant has been permitted to make verbal requests to staff who then record what the Claimant wants to raise with the Judge. The Claimant's applications have been allowed verbally and recorded by the Judge in orders so the Claimant does not have to make written applications. The Claimant was going to be permitted to give all of her evidence orally and not have to produce a written statement with an adjournment in between to enable the Claimant to have time to review the Respondent's witness statements before having to cross examine. Regular and frequent breaks are built into hearings.

111. Despite all of these adjustments, there is no realistic prospect of a final hearing in the foreseeable future. I have considered on whether any further steps could be taken as an alternative to strike out. The Claimant urged me to give one final deadline and stated she would comply. However if I look back over the history of the case, the Claimant has given such assurances before and been unbale to do so, as her health deteriorates (see paragraph 65 for one such example where the Claimant sought a "further and final" extension of time and then was unable to comply). In my judgment an "Unless Order" would be futile and in light of the medical advice I would be concerned about the impact of such an order on the Claimant's health. This is indeed a "chicken and egg" situation. The advice is that completing this case will benefit the Claimant's mental health but also that having to deal with the case is also significantly impacting her mental health. In light of the medical advice before me (see in particular paragraph 67 which confirms that if she has to struggle to meet a deadline it will cause her severe distress and it is difficult for her to be sure she can meet a deadline) I do not consider that an Unless Order would enable the claims to be progressed.

112. I am unable to agree with the Claimant's submission that she had not understood she was facing a strike out. This was plainly set out in the orders

of Judge Brace, Judge Jenkins and Judge Harfield's communications before the preliminary hearing as well as the notice of hearing itself. Even when faced with the knowledge that this hearing was listed to consider strike out, the Claimant was unable to review any of the documents provided to her in advance of the hearing.

113. I am also unable to agree with a suggestion that if a fair hearing was possible as late as December 2021 it should still be so now. This is not an accurate representation of the position. A fair hearing was not possible in December 2021 as the Claimant had not complied with the orders to disclose her documents and accordingly, there was no possibility the hearing listed to start on 5 January 2022 could have proceeded. There was no agreed bundle. Even if the Respondent's witnesses had managed to draft outline witness statements, they would have had to be revisited once disclosure had been received.

114. I have given this matter very careful consideration and the decision to strike out the Claimant's claim on this basis has weighed heavily upon me. I acknowledge how important seeing this claim through is to the Claimant. However I must also consider the impact of the delay on the Respondent and their witnesses and weigh that balance of prejudice. If I thought there was any prospect of a hearing reaching the final stage in the foreseeable future I would not be striking out this claim, but I do not see any such prospects. Throughout the claim, the Tribunal has sought to make reasonable adjustments and implement the overriding objective with the objective of hearing the Claimant's claims at a final hearing but to no avail. This is not the fault of the Claimant and no blame is attributed to her for the delays and failures but this claim has now reached a point where no lesser sanction is open to the Tribunal. For these reasons, I conclude it is proportionate to strike out the claim.

Employment Judge S Moore

Date: 8 April 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON 13 April 2022

FOR THE TRIBUNAL OFFICE Mr N Roche