EMPLOYMENT TRIBUNALS

Claimant: Mr PJ Jackson

Respondent: The Chief Constable of Greater Manchester Police

Heard at: Manchester (in public) **On:** 13,14,15 and 16 June 2022
17, 20 and 21 June 2022
(In Chambers)

Before: Employment Judge Holmes
Ms B Hillon
Mrs M Conlon

Representatives
For the claimant: Mr D O'Dempsey, Counsel
For the respondent: Mr S Gorton, Leading Counsel with Mr D Tinkler, Counsel

RESERVED JUDGMENT ON APPLICATION TO STRIKE OUT THE RESPONSE

It is the unanimous judgment of the Tribunal that :

1.The respondent was in breach of the Tribunal's orders for disclosure in not disclosing to the claimant Witness Statements , and emails sending the same from the IPCC to the respondent, that it had received from the IPCC in or about April 2016 in respect of the investigations Operations Poppy, 1, 2 and 3;

2.The respondent acted unreasonably in not disclosing to the claimant the aforesaid Witness Statements and emails;

3.It is still possible to have a fair hearing, striking out would be a disproportionate sanction, and neither the response, nor any part thereof, will be struck out.

4.The Tribunal will consider what steps should now be taken by way of additional documents being added to the bundle, additional witness evidence, recall of the claimant , and any other witnesses, and any other steps as may be proposed by the claimant as necessary for the hearing to continue as a fair hearing.

REASONS

1. The Tribunal , following the postponement of the hearing part heard on 10 March 2022, received, on 13 May 2022 an application by the claimant to strike out the response, or, in the alternative, parts thereof , under rule 37 of the rules of procedure. The application was advanced in some detail, and runs to some 36 pages.

2. The respondent responded on 20 May 2022 by a short email opposing the application. By email of 30 May 2022 the claimant sought a hearing by the full panel, and an order that the respondent make and serve a witness statement in respect of its disclosure. No orders were made, the Employment Judge being unavailable, On 6 June 2022 the respondent wrote to the Tribunal seeking clarification of the basis of the application within rule 37, and proposing sequential exchange of Skeleton arguments. It was silent upon the issue of any witness statement. The claimant replied further by email of 7 June 2022, noting that no witness statement had been provided, and seeking further directions for exchange.

3. The claimant subsequently on 9 June 2022 submitted a Skeleton Argument, with supporting documentation, and the respondent reciprocated on 10 June 2022 in the form of Counsel's Note.

4. The hearing of the application commenced on 13 June 2022. Submissions were completed on 16 June 2022. The Tribunal reserved its decision. Three days of deliberations , and drafting of the judgment were then required, not least because the claimant requested that the Tribunal read all the IPCC witness statements that had been disclosed, to which the application relates. The Tribunal has had before it (on an evolving basis):

The claimant's application document dated 13 May 2022 (36 pages)

The claimant's Skeleton Argument dated 9 June 2022 (21 pages) with attached IPCC Witness Statement Comments (27 pages)

The respondent's Note for Strike out PH on 13 June 2022 dated 10 June 2022 (24 pages)

Bundle: IPCC Witness statements (441 pages) : Strike out application [This bundle has been referred to in the claimant's submissions as "WS…",and the Tribunal will adopt that terminology]

Bundle: Documents (201 pages) : [This bundle has been referred to in the claimant's submissions as "DB…",and the Tribunal will adopt that terminology]

Note on the Correct Test for Strike Out 14 June 2022 – claimant

Respondent's Note for Strike Out - 16 June 2022

Reply to R's analysis purporting to deal with relevance and whether certain IPCC statements ought to have been disclosed – 16 June 2022

The Tribunal also had access , and was referred to, parts of the bundles for the main hearing, but some elements thereof (e.g. the three Operation Poppy Reports) were extracted and available to the Tribunal in a separate bundle. Where reference is made back to the main hearing bundle, and pages will be referenced "MB…".

Background.

5. At the conclusion of the originally listed period of the hearing on 10 March 2022, the Tribunal postponed the hearing, to be resumed for an initial period of two weeks on 13 June 2022, and a further three weeks commencing in July 2022.

6. These claims were first commenced on 25 July 2012, with a second claim form being presented on 12 May 2014. The claims have been extensively case managed, and the final hearing postponed on a number of occasions. After much revision of case management timetables, and extensions of time for steps such as exchange of witness statements, the final hearing, listed for 70 days , finally commenced on 2 November 2021.

7. The Tribunal has been provided with a hearing bundle (some parts of which are for hearings to be held in private) of some 23 ring binders, running to some 8118 or so pages. The claimant has given evidence (being recalled at the end of the March sitting), as have all of his live witnesses, and the respondent has called a large number of its witnesses, but a number remain to be called.

8. By way of summary, the claimant's claims are of protected disclosure detriment, and automatically constructive dismissal by reason of his having made protected disclosures. He relies now, having withdrawn some, upon 19 protected disclosures, and some 24 alleged detriments.

9. All the protected disclosures relied upon were made at the same time, in January 2014, to the IPCC (as it was then, now the IOPC), in three documents referred to as PDR1, PDR2 and PDR3.

10. In its (the Tribunal will treat the respondent as an entity, not a person, as the Chief Constable is sued solely in his capacity as Head of the GMP) responses, consolidated in the Consolidated Grounds of Resistance dated 21 March 2017 , the respondent makes no admissions as to the claimant having made any protected disclosures , the facts of his communication of information to the IPCC being admitted, but no more. It denies any detriment or causation of any protected disclosures that may be proved, denies that the claimant was constructively dismissed, and that, if he was, that this was because he had made any protected disclosures.

11. Orders for disclosure were first made at a preliminary hearing held on 19 October 2017, by Employment Judge Hodgson, sent to the parties on 10 January 2018. At para. 3.3 of Schedule B, Orders and Directions the Tribunal expressly ordered that the parties give disclosure "on the standard civil procedure rules basis". Various other disclosure orders, or variations of previous orders were made, but nothing turns upon the terms of any subsequent orders.

12. There is no issue but that disclosure in these proceedings has been substantial, and highly time consuming. It has, perforce, been somewhat piecemeal. The respondent holding the majority of the documentation , of course, has had the larger task in giving disclosure.

13. At the centre of this application, and what indeed prompted it, are the three investigations carried out by the IPCC into three , but , be it noted, therefore, not all , of the matters which formed part of the claimant's disclosures to the IPCC, and which form part of his case in these proceedings that these disclosures were protected disclosures.

14. The IPCC carried out and concluded three investigations, namely Poppy 1 – which related to the disposal of human tissue in the wake of the Shipman enquiry, Poppy 2 – which related to Operation Nixon, the enquiry relating to and alleged lack of safeguarding in an operation under the direction of Supt. Scally, and Poppy 3 – which related to Operation Oakland, and the alleged failings and misconduct on the part of Supt. Snowball.

15. Those investigations led to three reports being released by the IPCC to the respondent. The reports were released on 6 April 2016 (Poppy 3), 29 April 2016 (Poppy 1) and 23 September 2016 (Poppy 1)

16. The respondent disclosed the existence of these reports, initially, it seems around June 2019, but they were included in the List of Documents that the respondent produced to the claimant's solicitors on 4 October 2019.

17. In the course of its investigations, the IPCC took witness statements from a number of persons, in fact some 70, possibly more. Some made more than one statement. The claimant made a statement, as did several other witnesses on both sides.

18. Those witness statements were not, it is conceded, disclosed with the IPCC reports. They were in fact sent, however, to the respondent on the following dates:

Poppy 1 - 12 May 2016

Poppy 2 – 30 September 2016

Poppy 3 – 15 April 2016

19. That said, four of these witness statements, two each from Joanne Rawlinson, and Martin Bottomley, were disclosed on 4 October 2019.

20. Subsequently , in the course of the hearing, during the cross – examination of the claimant's witness Richard Mortimer, his IPCC witness statement was disclosed by the respondent, and then put to him in cross – examination.

21. In February 2022 the issue of what witness statements had been obtained by the IPCC was further raised. The upshot of this was that the Tribunal made, on the application of both parties, on 10 February 2022, an Order against the IOPC (as it now

is) for production of the witness statements. The wording of this order was subsequently slightly varied.

22. The IOPC duly complied, having initially queried the need for such an order when the respondent was already in possession of this material. On 3 March 2022 the IOPC provided the material to the claimant .

23. The Tribunal , having exhausted the listed hearing dates, postponed the hearing on 10 March 2022. This application was made on 13 May 2022.

The submissions.

24. Both parties have made extensive written submissions, and it is not intended to rehearse them *in extenso* here. The Tribunal will confine itself to the main salient points which it is necessary to consider in order to determine this application. Omission of any matters referred to in either party's written or oral submissions does not mean that the Tribunal has not considered the issue, it means that the Tribunal does not consider it of sufficient weight or merit to have any material bearing upon the Tribunal's decision.

25. By way of summary, in very broad terms, the claimant's contentions are:

a) the respondent in not disclosing the IPCC witness statements and other related material which had been in its possession since 2016, was in breach of the Tribunal's order for disclosure;

b) it had breached these orders deliberately;

c) It had acted unreasonably;

d) There was a real risk that there could not now be a fair trial;

e) The respondent's conduct in relation to disclosure generally had been unreasonable and obstructive, so that the Tribunal should find that its conduct was deliberate, and/or that the Tribunal could no longer have any confidence that it had even now met, or would meet, its disclosure obligations;

f) Striking out the response, or alternatively those parts of it to which the undisclosed material relates, was the proportionate and right thing to do.

26. Similarly, in summary, the respondent contended:

a) The respondent had not breached the Tribunal's orders – the documents in question were not in fact disclosable;

b) The respondent had not acted unreasonably;

c) Alternatively, any breach or unreasonable conduct had not been deliberate;

d) A fair trial (applying the correct test) was still possible;

e) The claimant should bear some responsibility for not raising what should have been an obvious omission from the disclosure much sooner;

f) Lesser steps could be taken to reduce or eliminate any unfairness, and a fair trial was still possible.

The issues in this application.

25. Whilst the parties have not, in terms, set out a List of the Issues which the Tribunal will have to determine in determining this application, the Tribunal considers them to be:

a) Did the respondent , in not disclosing to the claimant the IPCC Witness Statements that had been provided to it, breach the Tribunal's orders for disclosure?

b) If so, was that breach wilful, deliberate or contumelious, so as to entitle the Tribunal to strike out the response or any parts thereof , without considering whether a fair trial remains possible?

c) If not, and the Tribunal has to consider the issue of a fair trial, what is the correct test to be applied – that there is a real risk that a fair trail is no longer possible, or that a fair trial is actually no longer possible?

d) Applying that test, is a fair trial possible?

e) Regardless of whether the respondent breached any Tribunal order, was the respondent's conduct unreasonable, vexatious or disruptive?

f) If so, what test should the Tribunal apply as to whether a fair trial is possible?

g) Applying that test, is a fair trial possible?

h) If none of the grounds under rule 37(1)(b) or (c) are established, should the response or any parts thereof be struck out under rule 37(1)(e)?

i) If the Tribunal considers that striking out is warranted, is it a proportionate and appropriate response, and, if not, what lesser sanctions or measures ought to be applied?

Discussion and findings.

26. Whilst the application has been advanced in the order of the subsections of the rule 37 under which it has been brought, the Tribunal considers it most logical to examine firstly whether the ground under rule 37(1)(c) has been made out, i.e. that the respondent was in breach of a Tribunal rule or order.

Has the respondent breached the Tribunal's orders as to disclosure?

27. In terms of the orders in question, they have been identified, and are not disputed. The first were made on 19 October 2017 by Employment Judge Hodgson.

28. It is correct that these orders, and any subsequent variations , were ordered on a "standard" basis. Unlike the position under the 2001 rules, which linked the power to order disclosure and inspection to the powers of a court under r 31 of the Civil Procedure Rules 1998 (CPR), the 2004 rules instead reverted to the position under previous rules by linking it specifically to the powers of the county court. The 2013 rules replicate the 2004 rules in this regard. The change was not, however, one of substance, as the CPR r 31 governs disclosure and inspection in all courts. Of general importance when applying for, and considering the extent of any order for disclosure and inspection, is the overriding objective, particularly those aspects of the objective that relate to saving expense and proportionality. These are matters which, particularly in complex cases, the parties should have in mind when applying for orders of specific disclosure, and which the Employment Judge or Tribunal should take into account when deciding whether to make such an order and, if so, the extent of it. In order to ensure that disclosure should be no more than is necessary for the effective disposal of the litigation, a step-by-step approach is often to be preferred to ordering wide-ranging disclosure at the initial stage, this being particularly appropriate where the issues have not yet been identified with precision (see ***South Tyneside Council v Anderson, UKEAT/0002/05)***

29. The rules governing disclosure and inspection under the CPR Pt 31 are based on the principles of relevance and then necessity (is disclosure necessary for the fair disposal of the case?) and openness. The essence of the rules is that orders for disclosure are limited to 'standard disclosure' unless the court otherwise directs (CPR 31.5; note that 'disclosure' is defined simply as 'stating that a document exists or has existed' (CPR 31.2). This means that a party is required to disclose only those documents (being documents which are or have been in his control) (a) on which he relies; (b) which adversely affect his own or another party's case, or which support another party's case; and (c) which he is required to disclose by a relevant practice direction (CPR 31.6, 31.8). A document means anything in which information of any description is recorded (CPR 31.4) and extends to electronic documents (CPR PD 31B).

30. Each party must make a reasonable search for documents falling within (b) and (c) above (CPR 31.7). The duty of disclosure continues until the conclusion of the proceedings, and if relevant documents come to a party's notice at any time during the proceedings, he must immediately notify the other parties (CPR 31.11).

31. The procedure for standard disclosure in civil cases under the CPR includes each party serving a list of documents, indicating those in respect of which there is a claim of privilege from inspection and those which are no longer in the party's control (CPR 31.10(1)–(4)). The list must also include a disclosure statement indicating the extent of the search for documents which are required to be disclosed, and certifying that he understands the duty of disclosure and that to the best of his knowledge he has carried out that duty (CPR 31.10(5)–(7)). With regard to the right to inspection, a party has a right to inspect any document that has been disclosed except where it is privileged or is no longer in the control of the other party (CPR 31.3). In addition, there is a right to inspect any document mentioned in a statement of case, witness statement, witness summary, affidavit, and (except, generally, a document referred to

in his instructions) in an expert's report (CPR 31.14, 35.10(4)). However, if a party considers that it would be disproportionate to the issues in the case to permit inspection of documents falling within a certain category or class, he is entitled to refuse to permit inspection provided he has stated in his disclosure statement that inspection will not be permitted on grounds of disproportionality (CPR 31.3(2)). If the disclosure made by a party appears to be inadequate, there are provisions enabling the court to order specific disclosure and inspection of particular documents or classes of documents (CPR 31.12). In deciding whether or not to make an order for specific disclosure, the court will take into account all the circumstances of the case and, in particular, the overriding objective (see CPR 31 PD para 5.4). that full procedure, however, is not adopted in the Employment Tribunal, in that, in particular, there is no requirement for any "disclosure statement" setting out what steps a party has taken, or whether privilege is claimed in respect of any undisclosed materials.

Conclusion on breach.

32. The first question the Tribunal has to determine is whether, in not disclosing the IPCC witness statements and related material that it had, and had held since 2016, the respondent was in breach of the Tribunal's orders for standard disclosure. Whilst it appeared from the response of Andrea Knight, the respondent's solicitor, in her email of 14 March 2022 (referred to below) , that the respondent was accepting that this material was disclosable, and was apologising for "overlooking" it, the stance taken by the respondent in the hearing was to make no such concession. It is right, of course, that a party's view as to whether material was or was not disclosable is not determinative, and the respondent is free to argue to the contrary of any concession that may have been made.

33. The test, as set out in Mr Gorton's Note, citing ***Santander UK plc and others v Bharaj [2021] ICR 580*** in paras. 24-27, is as follows:

"24 As is well known, in Canadian Imperial Bank of Commerce v Beck[2OO9] IRLR740, Wall L J said this at para 22:

"In our judgment, the law on disclosure of documents is very clear, and of universal application. The test is whether or not an order for discovery is 'necessary' for fairly disposing of the proceedings'. Relevance is a factor, but is not, of itself, sufficient to warrant the making of an order. The document must be of such relevance that disclosure is necessary for the fair disposal of the proceedings."

Thus, the Tribunal accepts, the test is not merely whether the material is relevant.

34. Whilst the respondent has argued that this material , though potentially relevant to some of the issues in the claims, its disclosure was not necessary for fairly disposing of the proceedings.

35. The Tribunal does not agree. Disclosure is merely stating that the document is held. The class of documents in question was intricately linked to the IPCC Poppy reports that were disclosed. The Tribunal is quite satisfied that the respondent, in

failing to disclose that it held the Witness Statements received from the IPCC, and had done so since 2016, was in breach of the Tribunal's orders for standard disclosure.

36. The fact that the existence of this material was clearly signposted by the three Poppy reports which were disclosed does not make it any the less disclosable. Indeed, with respect, Mr Gorton's arguments that much of what was included in the undisclosed material was recited in, or summarised in, the Poppy reports rather makes that point. That the same information may be available in two different forms of documents does not make the second form non – disclosable. Nor is this material in any way so far removed from, or tangential to, the Poppy Reports what were disclosed. It was intimately linked to them , although sent from the IPCC by a separate, though not much later, email chain. Put another way, if the Poppy Reports were disclosable (and the respondent has not argued that they were not), why would the Witness Statements referred to in them not also be?

37. Further, the Tribunal does take into account proportionality, and the limits of standard disclosure. Disclosure is not to be confused with inspection. To comply with the disclosure obligation all the respondent had to do was to disclose the existence of these documents, not provide copies of them. That would have been the next stage, and any issues as to the relevance of particular statements, or the proportionality of providing copies thereof, could be raised then.

38. As it was, it transpires that rather than numerous bankers boxes of hard copy documents, all the Witness Statements from the IPCC had been disclosed in electronic form, so provision of copies would not, in fact, have been onerous. The respondent's various explanations do not make any reference to the receipt of this material in electronic format.

Was the breach wilful deliberate or contumelious?

39. The claimant invites the Tribunal to conclude that the respondent acted deliberately in not disclosing this material. He suggests that the Tribunal should so conclude because, primarily, inconsistent explanations have been given as to why this material was not disclosed , and secondly, because of the history of disclosure in these proceedings generally, with reference to specific instances where he says the respondent has deliberately sought to conceal documents from him.

40. Turning to the first, the explanations, the history is as follows. The possibility that there were more Witness Statements which the IPCC had supplied to the respondent than had been disclosed arose in or about early February 2022, during the course of the hearing. Up until that point the respondent had disclosed four witness statements from the IPCC in the Poppy investigations, two each from Joanne Rawlinson and Martin Bottomley. This was around October 2019, when the respondent's List of Documents was served. Thereafter, the existence of the IPCC witness statements from Tom Elliott, and Richard Mortimer emerged during the course of the hearing, and they were cross – examined on these statements.

41. This gave rise to a joint application being made to the Tribunal for a third party disclosure order against the IPOC, as the successor to the IPCC, initially on or about 10 February 2022, with an amended ordered being made on 1 March 2022.

42. In response to these orders the IOPC on 24 February 2022 (according to an email from Mr Cooper to the Tribunal of 7 March 2022, and referred to on page 35 in the table attached to the Application of 13 May 2022) commented to the claimant's solicitors that it seemed incredibly inefficient that it was being required to produce this documentation , when it had previously supplied to the respondent.

43. By email of 25 February 2022 Mr Cooper on behalf of the claimant raised this with the respondent (page DB195) , as follows:

"Dear Mr Kenny

I am writing to you as I understand correspondence should be sent to you in Andrea Knight's absence on leave this week

I refer to the exchanges today with the IPOC and your service of the bundle of witness statements provided to the force by the IPCC in respect of Operation Oakland

We are increasingly concerned as to the manner in which the Respondent has addressed its disclosure obligations in this case. It is now evident that the witness statements taken by the IPCC (as it then was) were provided to the Respondent on the conclusion of each of the three Poppy investigations , and yet none of those statements were disclosed to us until the witness statement of Rick Mortimer was provided whist Mr Mortimer was giving evidence (and then on the basis that this was in the possession of Dominic Scally , but not the force , as he had faced disciplinary action arising from his involvement in Operation Nixon).

We asked in our email to Ms Knight of 16 February 2022 for a full explanation of the process adopted by you in disclosure in this case by close of Business Friday 18th February 2022, but received no response. It is now essential that in light of the above this explanation be provided by no later than close of business Tuesday 2022.

Please also explain why it is only today that we have been served with the witness statements regarding Operation Oakland, and why these had not been identified and served earlier"

44. By email of 4 March 2022 Ms Knight respondent replied (page DB194). In her email she said this:

"In response to your email of the 25th February 2022 requesting an explanation of the process adopted (below) I have made enquires can confirm that the material that is held by the Force in relation to Operation Poppy was reviewed in full as part of the initial disclosure exercise that was carried out. In addition to this approaches were made to individuals who were identified as witnesses and/or were identified as potentially holding material of relevance.

In relation to the material that the Force holds that was provided to PSB by the IPCC in relation to Poppy as referenced by the IOPC, that material is not indexed. The Respondent's position is that given the fact that the IOPC are to supply the statements, it would be disproportionate for the Respondent to review the material for a second time."

45. In reply , Mr Cooper wrote to the Tribunal and the respondent on 7 March 2022 (pages DB199/200) as follows:

"We refer to the production order issued on 1st March 2022 since when the IOPC have provided the parties with copies of the witness statements taken by the IPCC (as it then was) during Operations Poppy 1,2 and 3 , numbering over 100 statements running to about 750 pages .

The IOPC have also provided copy emails showing that these witness statements were provided to the respondent as the Appropriate Authority during 2016. The letters providing the statements and reports to DCC Pilling as Appropriate Authority will need to be introduced into the bundle. The IOPC initially queried the need for an order on the basis that the respondents had the statements in their investigations as they had been provided to the respondent ."

46. After reciting the orders for disclosure that had been made in the proceedings, he continued:

"Though the Respondent's disclosure had been provided in parts , a consolidated list of disclosure was provided by the Respondent on 2 October 2019.

None of these IPCC witness statements have been disclosed by the Respondent in these proceedings (though the IPCC witness statement of Rick Mortimer was as the tribunal may recall disclosed during his witness evidence, on the basis that it had been disclosed to Dominic Scally) .

Though we have still to complete our review of the statements and take full instructions, we consider that a number of the statements are plainly relevant to these proceedings (and to the Claimants preparation for these proceedings) and should have been disclosed by the Respondent as part of standard disclosure.

We had asked for a full explanation from the Respondent of the process adopted by Respondent in disclosure in this case, with particular reference to these IOPC statements

The response as evidenced in the attached exchange fails to provide an explanation as to why none of these statements were disclosed. It does however confirm that the Respondent had the documents in his possession at all material times .

The Claimant seeks an order that the Respondent under rule 29, provides within 7 days a witness statement/affidavit from a duly authorised officer of the Respondent comprising a full and frank explanation as to what steps were taken to identify documents for disclosure in these proceedings, when they took those steps, who they

asked for documents and who made a decision as to what was or was not relevant in respect of documents in the possession custody or control of the Respondent . Insofar as the witness statements taken by the IOPC during Operations Poppy 1,2, 3, the statement should provide a full and frank explanation as to why none of these statements were disclosed during the standard disclosure exercise and why they have not been disclosed since.

Following receipt of that statement the claimant reserves the right to make further applications to include an application to strike out."

47. Ms Knight replied by email to the respondent and the Tribunal on 14 March 2022 (page DB198) , in these terms:

"First of all, I should point out that the detail that I am about to provide is the extent to which I am able to comment on matters and is to the best of my knowledge and recollection. Due to the length of time that this case has been ongoing, a number of individuals have been involved in this case, some of whom are no longer employed by the GMP or who have long since moved to different roles within the organisation.

The position with regard to the IPCC statements has to be understood in the context of the colossal task that the Respondent faced in completing disclosure in this matter. The task of disclosure has been ongoing since the inception of the claim and, from around summer 2018, the disclosure exercise took up the time of two solicitors and a paralegal almost exclusively for a number of years.

In order to give the Tribunal some insight into just how vast the disclosure exercise was in this matter, on Operation Span alone which is only a very narrow aspect of this case, approximately 40 bankers boxes of material were reviewed and the process of disclosure on that particular element of the claim took around 3 - 4 months. Similarly for the Cregan related operations, 50 - 60 bankers boxes of material were reviewed over a period of around 5 - 6 months.

The bundle in this matter contains in excess of 10,000 pages of material, the vast majority of which was given by the Respondent in disclosure.

During the disclosure exercise, we maintained a log of the Respondent's documents. The log recorded matters such as document title and date. It also recorded other details such as the origins of the documents, the rationale for any redactions and the details of whether documents were disclosable within these proceedings. The log of documents is 882 pages.

Following the conclusion of Poppy 1-3, the IPCC provided approximately 30 bankers boxes of material to the Respondent. The Respondent believes (but has been unable within the time available to confirm definitively) that the statements taken by IPCC as part of their investigations were included in that material. The Respondent can confirm, via reference to the log of documents, that a process began whereby a number of the IPCC statements were assessed for relevance and consideration was given as to whether those statements should be disclosed. It is apparent that this process broke down and did not progress further. It would appear that the IPCC

statements were overlooked and were not disclosed. The Respondent apologises unreservedly on behalf of the Chief Constable for this failure.

In relation to the request from Mr Cooper for an explanation of the disclosure process adopted by the Respondent, we are fully aware of our disclosure obligations and, to the best of our knowledge and belief, we have complied with those obligations.

The amount of documentation within this case, most of which was provided by the Respondent, is vast. Providing an explanation of the disclosure process undertaken by the Respondent would require a substantial amount of detail as it would need to outline all of the steps taken over a six year period"

48. In terms of other explanations, Mr O'Dempsey refers to the submissions made by Mr Gorton in para. 48 of his Note of 10 June 2022, where he says:

"Instead, C is attempting to use the fact that R had the entire corpus of statements for its PSB mandated conduct proceedings but did not share those statements with the legal department who in turn did not empty the contents of this into the trial bundle, as evidence of default and misconduct. That is nothing of the sort."

49. The claimant invites the Tribunal to find, on the basis of these inconsistent explanations, in large part, and the respondent's prior history in relation to disclosure in general in these proceedings, in support, that the respondent's failure to disclose this material was deliberate.

50. The Tribunal does not so find. The first and most obvious point is that if the respondent really intended that this material should be kept from the claimant , it would not have disclosed the Poppy Reports. As observed above, the existence of this material was obvious from the Poppy Reports themselves. Whilst a complete list of all the witness statements that were taken across all three Poppy investigations does not form part of each of the Reports:

a) The report into Poppy 1 at Appendix 5 sets out a table of people referred to in the report, and whether they were interviewed. Some 19 people are shown as having been interviewed.

b) The report into Poppy 2 at para. 92 sets out a table of the 14 persons from whom witness statements were obtained, and Appendix 8 sets out a similar table of some 30 "witnesses", and the dates upon which they were interviewed.

c) The report into Poppy 3 does not follow the same format, in that it does not contain the type of Appendix of people referred to that the other two reports do (despite an indication in para. 75 that it would do) , but paragraphs 286 to 307 of the report do show that evidence was obtained by the IPCC from the senior leadership team in Stockport, namely Ch. Supt. Sykes, Supt. Phillips, and Supt. Berry.

51. The Tribunal appreciates that this is not as extensive as the 70 (or so) witnesses who are identified as having given witness statements in the List produced by the claimant for this application, some of whom had made more than one statement

to the IPCC. The Tribunal also notes that in some instances, there is no reference at all in the reports to some witnesses having provided statements, most notably Thomas Elliott, Kieran Murray and Paul Bailey. The Tribunal notes that whilst their statements appear in Section B, under Poppy 1, their statements , which were all taken around the end of November 2014, do not state which Poppy operation they relate to. This may be because they were of general application, and had not been assigned to any particular one of the three Poppy operations.

52. Be that as it may, the fact of the existence, or likely existence , of witness statements made to the IPCC was hidden in plain sight. That was reinforced by the respondent disclosing not only the three Poppy reports, but four witness statements , two each from Joanne Rawlinson and Martin Bottomley, in its List of Documents in October 2019. That too would rather be likely to lead to enquiries as to whether any other witness statements had been taken and disclosed to the respondent by the IPCC. It is significant that these statements were disclosed in connection with Poppy 1. That report contains an Appendix of people referred to , and those who were interviewed, including, of course, these two witnesses. By revealing four of those statements , the respondent was hardly concealing them, and was, if anything, drawing attention to the fact that other witness statements made to the IPCC were likely to be in existence, and in its possession.

53. Further, and not a point in fact advanced by the respondent, but apparent from the main bundle, two documents in File 9, at pages 3095 and 3096/7 clearly show the fact DCC Pilling received Poppy 3 material. The former is an email from DCC Pilling to Laura Shuttleworth and John Egerton on 8 April 2016, to which he attaches the IPCC report into Poppy 3. The latter is then a response from John Egerton to DCC Pilling as to what action he proposes to take in relation to Julian Snowball. Again, this is hardly concealment of this fact, even though DCC Pilling omits any reference to these documents in his witness statement.

54. The Tribunal accordingly takes the point made by the respondent that there would be no point in the respondent deliberately seeking to conceal that it was in possession of this material. It would be apparent to the claimant that it was likely that the respondent held such material, even if the complete details of all those persons whose IPCC witness statements would not be apparent from the Poppy reports . Further, given that the material emanated from, and likely still to be in the possession of, the IPCC, or its successor, it would be material which was not solely in the control of the respondent, and its existence would be easily ascertainable by enquiry with the IPCC.

55. The Tribunal accepts that the explanations given have varied, and , in the light of the information that the statements were received in electronic form, references to the need to go through multiple bankers boxes, which process was then apparently not competed, seem now to be irrelevant . The email from Chris Arkwright, paralegal, of 16 February 2022 (page DB178) , in connection with the disclosure of Rick Mortimer's IPCC witness statement , is instructive . in it he says:

"Dear Mr Cooper,

I understand that the Respondent was only made aware the IPCC statement was potentially in the Respondent's possession on 14 February 2022. As such the Respondent made enquiries to locate it and duly disclosed it to the Claimant at the earliest opportunity.

Regards

Chris Arkwright"

That prompted further correspondence from Mr Cooper on behalf of the claimant as to when the respondent came into possession of this IPCC statement, which led ultimately to Andrea Knight's letter of 4 March 2022, referred to above.

56. It is apparent from this email exchange that there may well have been an element of left hand and right hand disfunction within the respondent's legal department, and possibly beyond it, as , unless it is being suggested that the Paralegal's email to Mr Cooper was dishonest, for which there is no foundation, he appears to have been unaware of the wholesale receipt of the IPCC witness statements in 2016.

57. The Tribunal considers that on these facts , the claimant has fallen well short of establishing that the respondent , in the form of some unidentified person, took a deliberate decision not to disclose this material to the claimant. There is no basis for the Tribunal finding that this was a deliberate , wilful or contumelious breach. That one hand , or more, of the organisation did not know what the other(s) was or were doing is a far more likely explanation, along with a degree of ineptitude, it has to be said, in disclosing some, but not all of, the witness statements that had been received from the IPCC , without making it clear that they were part of a much larger tranche that had been received. The explanations, the Tribunal accepts by Ms Knight are confusing, and , as it now turns out, omit any reference to the fact that this material was received electronically. The explanation in Mr Gorton's submissions, is, with respect , a theory, no more than that. It may be right, it may not be, but whatever the position, however unsatisfactory the respondent's accounts have been, the Tribunal does not consider that this warrants the Tribunal finding that the breach was deliberate.

Other aspects of disclosure relied upon in support of the application by the claimant.

58. Turning to the claimant 's other basis for inviting the Tribunal to conclude that this was not an innocent breach, the claimant relies upon various aspects of disclosure, which he contends should lead the Tribunal to conclude that this breach was deliberate. They are extensive, and are set out in 67 to 75 of the claimant's Skeleton, which cross – refer to paras. 66 to 78 and 79 to 85 of the application document.

59. The Application sets out a table (pages 19 to 20) of disclosure made by the respondent from 6 July 2021 up to 2 December 2021. There then ensue at paras. 67 to 70 submissions as to the late disclosure given in November 2021, at paras. 71 to 78, submissions as to the disclosure, and redactions in, material relating to the

Superintendent family matter, at paras. 79 to 82, submissions as to the disclosure of Rick Mortimer's IPCC statement during the hearing, at para. 83, submissions as to disclosure of only one PPO document in relation to Officer N's evidence, at para. 84 disclosure of Neil Evans' policy books, and , at para. 85 disclosure of an email between DCC Pilling and ACC Ford, disclosed on 26 January 2022.

60. The tenor of these paragraphs is that the respondent has throughout this process been deliberately obstructive, failed to disclose plainly relevant documents that it had, and has , in some instances, unilaterally redacted versions of documents , which were then opened either by the Tribunal, or the respondent agreeing to remove redactions.

61. The respondent's answer to all this is equally set out in tabular form, in an untitled, undated and unpaginated document , which begins, as the claimant's table does, on 6 July 2021 with the disclosure of Neil Evans' daybook notes. This document, in the right hand column sets out the respondent's case on when, and why, these documents were disclosed. In some instances , the respondent has disclosed documents in response to requests from the claimant . Mr Gorton, however, has made it clear that in such instances that was not an implicit admission that such documents were originally disclosable , but were disclosed, to use a Chancery phrase *"de bene esse"* , the respondent choosing not to argue their disclosability, but simply to provide the material to the claimant in order to facilitate and expedite the hearing.

62. Additionally, at the conclusion of this table is an Appendix "Dr West Disclosure Appendix", which runs to some three pages, and is a full account of the respondent's disclosure of material relating to the advice provided by Dr West in connection with the Dale Cregan manhunt.

63. The Tribunal has considered all this material. It would be impossible, and disproportionate, given how long it has taken to determine this application, for the Tribunal to embark upon an issue by issue analysis of whether in each of these instances the respondent deliberately chose or sought to avoid or otherwise evade its disclosure obligations. As the two tables and submissions show, there are two sides to these issues, and all was not necessarily as one side or the other contends. The claimant may well have some valid points in terms of the respondent's failures to provide more timely disclosure, and to make unilateral redactions. Equally, the respondent may be right to complain that the claimant was seeking more than was truly disclosable, or was proportionate to disclose, and that, for example in the case of the disclosure in relation to Dr West, no real use was ultimately made of the material that was disclosed.

64. The only issue relating to disclosure where the Tribunal does consider the claimant has raised serious and legitimate concerns is in relation to the two daybooks of Martin Bottomley. The claimant's case is set out in paras. 55 to 60 of the Application, thus:

"55. Initially R made disclosure of only one daybook for Mr Bottomley, purportedly evidencing his review of Op Leopard and which led to his report which was critical of the C's leadership of that operation and fed into his Organisational Review report. R

did not disclose that daybook completely but only a few pages. Following disclosure C requested of R, "please can you provide the original document for review including the front page of the day book" [p100 DB]. This of course was the right of a litigant, and did not need any further justification. However, on 26 February 2020 Laura Shuttleworth emailed back that the request to the original documents was an 'unusual one' – "could you explain why you and your client would like sight of these so that we can consider your request further?" [p107 DB]. To this C 's solicitor wrote on 26 February 2020 that the request was not an unusual one and the client was entitled to request the original documents within the disclosure process [p107 DB].

56. On 2 March 2020 C's solicitors chased for a reply to their request [p116 DB].

57. On 5 March 2020 C's solicitors reiterated the request to hear back on the request to view the original documents including the Bottomley daybook. (This would take until mid 2021 to resolve.) At this time C's solicitors [P127 DB] wrote to Mr Arkwright, Ms Shuttleworth and Ms Knight stating that the disclosure was being made close to witness statement exchange and in the light of the known forthcoming leave of the solicitor involved. C's solicitors reiterated the request to hear back on the request to view the original documents including the Bottomley daybook. There was also a request for R to state what steps had been taken to find C 's policy books and day books at the time C was signed off sick. The hearing which had been scheduled to commence on 20 April 2020 did not of course occur.

58. The C's unchallenged witness statements (WS1 para 739 ff) deal with what happened in respect of obtaining the full version of the only day book initially disclosed, and a second day book the existence of which was only disclosed in June 2021 (that is well after the hearing was originally due to have commenced). In essence there were two daybooks maintained by Mr Bottomley, one purportedly for Op Leopard, and the other titled Op Grievance both covering much the same period.

59. So, the R :-

a. had not disclosed during standard disclosure the existence of the Op Leopard book

b. Initially only disclosed the inside pages of Op Grievance, and suppressed its title page by covering it over with a piece of paper stapled to it, it seems deliberately to hide the fact that it had been titled "Op Grievance", resisting C's right to see it (despite the fact that it is plainly relevant to the motivation of the R in the treatment of the C in OL). The R's explanation is also dealt with in C's witness statements (WS2 para 160ff). There is no innocent explanation for this suppression of the title page.

60. R engaged in obstructive behaviour in response to requests for disclosure, engaged in lengthy delays and sought to hide relevant material by deliberately stapling over the cover, and evidences that R has not been observing the duty to make proper disclosure."

65. In terms of the respondent's response to this, Mr Gorton deals with this in paras. 55 to 61 of his Note (first Note) thus:

55. C has distilled his allegations regarding Mr Bottomley's day books into two complaints (para 59 of his application). These are: a complaint that R did not disclose Mr Bottomley's 'Op Leopard' day book during standard disclosure, and a complaint that R 'suppressed' the title page of Mr Bottomley's 'Op Grievance' day book.

56. C maintains (at para 7) that R's conduct in relation to Mr Bottomley's day books provides 'clear evidence' of R's 'deliberate attempt to suppress relevant material.'

57. By letter to Slater and Gorton dated 22/6/21, Ms Knight provided a full account of the history in respect of Mr Bottomley's day books.

58. With regard to C's first allegation, Ms Knight explained that Mr Bottomley provided his 'Op Leopard' day book to R's legal services section on 8/6/21, C was notified of the existence of this book on 9/6/21. C was permitted to inspect the day book upon his attendance at Force Head Quarters (FI IQ) on 11/6/21. Ms Knight provided a full explanation for the late disclosure of the day book. She explained that, following discussions with Mr Bottomley and a review of the case file, it was believed that Mr Bottomley had, prior to 8/6/21, provided the day book to legal sendees. Ms Knight explained that the day book had been omitted from standard disclosure in error. Ms Knight confirmed that, as soon as the omission was realised, steps were taken to disclose the day book.

59. With regard to C's second allegation, Ms Knight explained that copies of the relevant sections of Mr Bottomley's 'Op Grievance day book were disclosed to C in February 2020. Ms Knight explained that, when C attended FHQ on 11/6/21 to inspect the daybook, it was presented in the same format as had been disclosed previously. For example, the pages that were not relevant and had not been disclosed were stabled together and the front pages of the daybook, which were not considered to be relevant, were covered. Ms Knight explained that the front pages of the day book were uncovered and shown to C when he explained why he wanted to see them.*

60. R has not objected to the inclusion of Mr Bottomley's day books in the bundle. Mr Bottomley can, of course, be questioned about his day books when he gives evidence.

61. C had advanced no evidence, let alone 'clear evidence', of an attempt by R to conceal evidence in respect of Mr Bottomley's day books.

66. The Tribunal does have (pages DB 145 to 157) Ms Knight's letter of 22 June 2021 in which she provided this explanation. The Tribunal notes that the initial response to the request for inspection, from Laura Shuttleworth, was to question why the claimant was seeking to inspect the originals of the disclosed materials. Subsequently inspection was arranged, but Andrea Knight then sought to draw a distinction between inspection of only what had been disclosed, and questioned whether the front page of a both daybooks actually had been disclosed, and hence whether there was a request for inspection of that page. She then relented, and accepted that the front covers of the daybooks had not been disclosed, but they then were, and then inspection was permitted. It was then that the claimant became aware that the front pages) of the other daybook, on which the legend "Operation Grievance" has been written, when the stapled pages covering that front page were removed.

67. The claimant makes much of this incident, and relies upon the respondent's initial questioning of the claimant's right to inspect original documents as suggestive that the respondent was deliberately seeking to conceal the front page of the second daybook.

68. The Tribunal understands the claimant's concerns, and accepts that this may be evidence of a deliberate attempt at concealment. The Tribunal is not prepared, however, purely on the papers and submissions alone to make such a conclusion of fact. It may well be one to which it ultimately comes, but this is a premature stage at which to do so. The Tribunal therefore does not consider that it can take these matters into consideration when determining whether the non – disclosure of the IPCC material was deliberate, which it has determined it was not, nor in determining whether the Tribunal should now conclude that it cannot have any confidence that the respondent has given full disclosure or will continue to do so. A further factor in that decision is the very different nature of , and the likelihood of different personnel being involved in, the non – disclosure of the IPCC material, and the disclosure of one particular individual's daybooks.

69. Indeed, all these matters are not, however, the actual alleged breaches relied upon in support of this application, but are relied upon in general terms to persuade the Tribunal that the respondent's failure to disclose the IPCC witness statements and allied material was deliberate, or that the Tribunal should now conclude that it cannot have any confidence that the respondent has even now given full disclosure, so as to justify striking out the response. For the reasons given , the Tribunal does not do so.

Was the respondent's conduct unreasonable, vexatious or disruptive within the meaning of rule 37(1)(b)?

70. Whilst breach of Tribunal orders might be considered inevitably to amount to unreasonable conduct, and normally will, there may be exceptional circumstances in which , although a breach has, in strict terms, occurred, it is of a minor or highly technical nature, or had been contributed to by conduct by the other party, so that it may not, in fact, be considered also to amount to unreasonable conduct.

71. We do not consider that to be the case here. Whilst there may be some mitigation for the respondent's breach, and the Tribunal will need to consider its effects, and all of the relevant circumstances, in determining what orders to make, the obligation to give this disclosure was, and remained, upon the respondent. The claimant had given no indication that it would not be required, and had made no agreement to limit disclosure to exclude this material.

72. That said , the Tribunal does not consider that the respondent's conduct was vexatious, but it has been disruptive, as it has disrupted the preparation for the final hearing, and given rise to the need for, firstly, an order against the IOPC , during the course of the final hearing, and this application.

Is a fair trial possible? What is the correct test?

73. Having found that the threshold conditions in rules 37(1)(b) and (c) have been met, the Tribunal's next task is to determine the effect of these breaches. It is common ground that the Tribunal has to go on to consider whether a fair trial is possible, but the claimant submits that the correct test is whether there is a *real risk* that a fair trial is no longer possible, whereas the respondent submits that this is too low a test, the Tribunal has to be satisfied that a fair hearing is no longer possible, not that there is merely a risk that it is not.

74. The Tribunal has been referred to the following authorities by counsel in the course of their submissions:

Bolch v Chipman [2004] IRLR 140

Weir Valves v Armitage [2004] ICR 371

Blockbuster Entertainment Ltd. v James [2006] IRLR 630

Governing Body of St. Albans Girls' School v Neary [2010] IRLR 124

Abegaze v Shrewsbury College of Arts and Technology [2010] IRLR 241

Harris v Academies Enterprise Trust [2015] IRLR 208

Baber v The Royal Bank of Scotland PLC [UKEAT/0301/15 and 0302/15]

Emuemukoro v Croma Vigilant (Scotland) Ltd. [2022] ICR 327

75. The Tribunal cites these cases in this order as this is their chronological order, and one can therefore trace the development of this line of jurisprudence through the decisions of the EAT and Court of Appeal that are referred to.

76. The respondent's position is this. The test to be applied in considering whether to strike out under rule 37 (whether it be under limb (1)(b) or (c)) is, and has always been, whether a fair trial remains possible. That is not the same test as to whether there is a real risk that a fair trial is not possible, the Tribunal must be satisfied that it is more than a risk, it is a reality.

77. In support of that being the test, the respondent relies upon the following. In the course of his judgment in ***Bolch v Chipman [2004] IRLR 140*** Burton P. says this:

"Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the notice of appearance must be struck out. The helpful and influential decision of the Employment Appeal Tribunal, per Lindsay P, in ***De Keyser Ltd v Wilson [2001] IRLR 324*** *is directly in point.* ***De Keyser*** *makes it plain that there can be circumstances in which a finding can lead straight to a debarring order. Such an example,and we note paragraph 25 of Lindsay P's judgment, is 'wilful, deliberate or contumelious disobedience' of the Order of a court. But in ordinary circumstances it is plain from Lindsay P's judgment that what is required before there can be a strike out*

of a notice of appearance or indeed an originating application is a conclusion as to whether a fair trial is or is not still possible. That decision is not only a decision binding on employment tribunals and persuasive before this tribunal, but it follows well established authority – in the High Court in the persuasive decision of ***Logicrose Ltd v Southend United Football Club Ltd*** *by Millett J (as he then was), reported in The Times 5 March 1998, and in the Court of Appeal in* ***Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167****; both of which authorities were recited by Lindsay P in the course of his judgment in* ***De Keyser****."*

78. ***Bolch v Chipman*** and the cases cited by Burton P in his judgment were referred to in the judgment of the EAT in ***Weir Valves v Armitage [2004] ICR 371.*** In the course of his judgment, HHJ Richardson says this:

"13 What are the principles on which the employment tribunal should act in deciding whether to strike out a case such as this, where there has been a breach of a direction?

14 Where the unreasonable conduct which the tribunal is considering involves no breach of a court order, the crucial and decisive question will generally be whether a fair trial of the issues is still possible: ***De Keyser v Wilson [2001] IRLR 324,*** *328 – 329 , paras 24 and 25, applying* ***Logicrose Ltd v Southend United Football Club Ltd*** *The Times 5 March 1998, and* ***Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167. De Keyser Ltd v Wilson*** was recently followed in ***Bolch v Chipman ,*** *para 55….."*

15. Even if a fair trial as a whole is not possible , the question of remedy must still be considered so as to ensure that the effect of a debarral order does not exceed what is proportionate : see ***Bolch v Chipman*** *, para 55(3) and (4)….."*

79. In ***Blockbuster Entertainment v James [2006] IRLR 630*** Sedley L J summarised the law (then in respect of rule 18 of the 2004 rules, but this is immaterial) as follows, at para 5 of his judgment:

"This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in ***Arrow Nominees v Blackledge [2000] 2 BCLC 167*** *and of the EAT in* ***De Keyser v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140*** *and* ***Weir Valves v Armitage [2004] ICR 371****, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."*

80. In ***Abegaze v Shrewsbury College of Arts and Technology [2010] IRLR 241*** Elias LJ in the Court of Appeal , in th course of his judgment said:

"15.The relevant legal principles applicable to this case are not in dispute. In the case of a strike out application brought under para. (c), it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed.

16. These principles can be derived from ***Blockbuster Entertainments Ltd v James [2006] IRLR 630 (CA); Arrow Nominees v Blackledge [2001] 2 BCLC 167 (CA);*** *and* ***Bolch v Chipman [2004] IRLR 140 (EAT).****"*

81. In ***Baber v The Royal Bank of Scotland PLC [UKEAT/0301/15 and 0302/15]*** Simler, P. said this when considering the test for striking out under rule 37:

"*13. Even in a case where the impugned conduct consists of deliberate failures in relation, for example, to disclosure, the fundamental question for any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible : see* ***Bolch v Chipman*** *[2004] IRLR 140 EAT where, having cited* ***De Keyser v Wilson*** *[2001] IRLR 324 EAT and* ***Arrow Nominees Inc v Blackledge*** *[2000] EWCA Civ 200, Burton P set out guidance for Tribunals when determining whether or not to make a strike out order, as follows:*

(i) There must be a finding that the party is in default of some kind, falling within Rule 37(1).

(ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.

(iii) Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.

(iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so.

See also ***James v Blockbuster Entertainment Ltd*** *[2006] IRLR 630 CA to similar effect , where Sedley LJ recognised the draconian nature of the strike out power and that it is not to be readily exercised. He held, even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether the sanction is a proportionate response in the particular circumstances of the case, and the answer to that question must have regard to whether the claim can be tried because time remains in which orderly preparation can take place, or whether a fair trial cannot take place."*

82. More recently, in ***Emuemukoro v Croma Vigilant (Scotland) Ltd. [2022] ICR 327*** the then President Choudhury J summed up the law , at paras. 9 and 10 of his

judgment. He recited and approved the dicta of Sedley LJ in ***Blockbuster Entertainment Ltd v James*** rehearsed above. He went on, however, to consider a contention made on behalf of the appealing respondent employer that the test to be applied was whether a fair trial was possible *at all* , as opposed to whether a fair trial was possible within the allocated trial window. He rejected that contention, with these observations, at paras 18 and 19 (Ms Hunt being counsel for the claimant, and Mr Kohanzad for the appealing respondent :

"*18 In my judgment, Ms Hunt's submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible* at all *and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.*

19 I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in ***Arrow Nominees [2000] 2BCLC 167*** *set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters."*

83. Thus, in all of these authorities , there is no mention of the Tribunal needing to determine whether there was a risk that there could no longer be a fair hearing, rather the Tribunal must determine , one way or the other , whether there actually could be. That was still the approach of Coudhury P. in ***Emuemukoro v Croma Vigilant (Scotland) Ltd*** . Whilst he accepted that the claimant did not have to show in absolute terms that a fair trial could never take place, and it was enough to show that one could not take place within the allocated window. He did not speak of risk, he spoke of determination of whether the inability to have a fair hearing was made out.

84. In support of the claimant's argument, Mr O'Dempsey cites ***Logicrose Ltd v Southend United Football Club Ltd*** *reported in The Times 5 March 1998,* and the Court of Appeal decision in ***Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167.***

Logicrose contains the seeds of the claimant's argument, developed in the judgment of the Court of Appeal in ***Arrow Nominees*****.**

85. Dealing first with ***Logicrose*** (cited in ***Bolch*** page 113 AB), the principle is stated to be

"In his Lordship's judgment an action ought to be dismissed or the defence struck out only in the most exceptional circumstances once the missing document had been produced and then only, if, despite its production, there remained a real risk that justice could not be done. That might be the case if it was no longer possible to remedy the consequences of the document's suppression despite its production. It would not be right to drive a litigant from the judgment seat, without a determination of the issues, as a punishment for his conduct, how- ever deplorable, unless there was a real risk that the conduct would render further proceedings unsatisfactory.'

86. This was cited with approval in ***Arrow Nominess***, in the EWCA (see ***Bolch*** p119 authorities bundle).That test, submits Mr O'Dempsey, was a "real risk" test.

87. That principle has never been narrowed by subsequent cases; Sedley LJ was using a shorthand explicitly back-referring to the detailed principles given in the earlier cases. ***De Keyser*** (EAT) at paragraph 24 also adopts the ***Logicrose*** test. ***Weir Valves*** (EAT) at para 14 (AB p8) explicitly refers to ***Logicrose*** and ***De Keyser***.

88. For the respondent, Mr Gorton submitted that the law is stated shortly, accurately and definitively by Elias LJ in the Court of Appeal in ***Abegaze v Shrewsbury College of Arts and Technology [2010] IRLR 241*** at para 15 which had all the relevant cases referred to it (***Arrow Nominees, Bolch, Blockbuster*** etc).

"In the case of a strike out application brought under r 37(i)(b) it is well established that before a claim can be struck out, it is necessary to establish that the conduct complained of was scandalous, unreasonable or vexatious conduct in the proceedings; that the result of that conduct was that there could not be a fair trial; and that the imposition of the strike out sanction was proportionate. If some lesser sanction is appropriate and consistent with a fair trial, then the strike out should not be employed".

89. The Tribunal takes Mr O'Dempsey's point, that the earlier cases of ***Logicrose*** and ***Arrow Nominees*** do support a lesser test of "real risk", but this has perhaps been lost in subsequent considerations of the test by the EAT and the Court of Appeal. The language of the later authorities is not consistent with the "real risk" approach, and in the Employment Tribunal context (for the other two cases were both Chancery cases under the CPR) the test that has actually been applied has been for some time now that of whether a fair trial remains possible , not whether there was a real risk that it was not.

90. This Tribunal considers itself bound by the orthodoxy that has grown up on the authorities in this field of employment law, whether they be right or wrong , and will apply the test of whether a fair trial remains possible, not whether there is a risk that it does not remain possible.

91. That said, as ***Emuemukoro v Croma Vigilant (Scotland) Ltd*** demonstrates, it is legitimate to examine whether a fair hearing within the allocated trial window remains possible.

Is a fair hearing still possible?

92. The Tribunal having found that the respondent has behaved in a manner which falls within rules 37(1)(b) and (c) , it must now go on to consider whether a fair trial is still possible. It must also do so in order to determine whether the claimant can rely upon rule 37(1)(e), which is in the clear terms that the Tribunal must decide whether it is no longer possible to have a fair hearing, and does not refer to risk.

93. To do so the Tribunal must examine what aspects of the claimant's case he contends have been adversely affected by the respondent's conduct. The claimant's case on these aspects is to be found in paras.18, 20 and 22 of his application of 13 May 2022, and 92 to 101 of Mr O'Dempsey's Skeleton argument.

94. The former reads:

18. The R's failure during standard disclosure and subsequently to disclose has rendered a fair trial impossible because someone in R plainly selectively disclosed statements made to the IPCC (a) during ordinary disclosure (b) at the stage of composing witness statements; (c) after exchange of witness statements and (d) during the C's cross examination. It was obvious that the statements were relevant to the issues in the case relating to:

i. C's reasonable belief (at the least)
ii. in the case of detriment 1.5, (i) obtaining a deposit order in respect of that detriment (as the IPCC statement of Tom Elliott revealed that there would be oral evidence given by Mr Elliot concerning what he was told as to the reason for his suspension which the ET would have to evaluate), and (ii) C's preparation of his case (as Mr Elliott did not have his IPCC statement before him as an aide memoire when his statement was being compiled);
iii. The R's evidence of at least Kay Dennison, Peter Fahy, Simon Barraclough, Julian Flindle on behalf of the R, who had all given evidence to the IPCC;
iv. The C's own witness statement in preparing his statement without sight of what had been said by others to the IPCC
v. The C's witnesses' evidence where they had previously given statements to the IPCC, i.e., Rick Mortimer and Tom Elliott
vi. The state of knowledge of the disclosures made by the C of relevant actors on behalf of the R, including Russ Jackson, Ian Pilling, Peter Fahy and Simon Barraclough
vii. The C's identification of witnesses to call, which for example in light of the content of his statement to the IPCC may have included Paul Bailey.
viii. Support provided to Cs case by documentary evidence in the form of the witness statements provided to the IPCC from persons such as Dave Law, Bob Ashton, Harry Kearney, the relatives of the victims of Harold Shipman.

And at para. 20:

20. Despite R being very conscious of seeking IPCC material from the C, the communication of the Reports to DCC Pilling (during the period C had his 2016 grievance) was not disclosed. This failure to disclose meant that when compiling his witness statement C could not refer to highly material evidence which goes to the motivation of Mr Pilling, and others in failing to ensure that the grievance was dealt with. A fair hearing within the current time allocation will not be possible in respect of the question of constructive dismissal and other elements of the claim.

And para. 22:

22. In the light of R's failure to disclose relevant material it is submitted that a fair trial of the whole is no longer possible:

(a) C has not been able to refer to material whilst being cross examined which would have plainly supported the assertions he makes about the protected disclosures;
(b) The ET has listened to extended cross examination based on partial disclosure of documents, and cannot be expected properly to assess credibility or other aspects of the C's evidence in the light of that lack of proper disclosure at the correct time;
(c) The failure to disclose will clearly have had a material impact on the ability of the C to prepare for the hearing over an extended time period, not least in the preparation of his witness statement.
(d) The failure to disclose goes not only to the case relating to protected disclosures but also the cases concerning the reasons for dismissal and detrimental treatment of the claimant.

95. In the Skeleton argument, the claimant argues as follows:

Impact on R's defence and applications available to C at the appropriate time

93. If the materials from the IPCC witness statements had been available when disclosure was made, C would have applied for a strike out/deposit order in relation to the defence concerning protected disclosures 1.2, 1.3 as having no or little reasonable prospect of success. He would have had this material available to consider when making decisions about which PDs to continue to pursue or drop in order to save tribunal decision making time.

94. Had disclosure been made at the appropriate time the R's position on the IPCC protected disclosures could not seriously have been maintained and this would have resulted in a very large time saving for the parties and the tribunal. R has never argued that it differentiates causally between different PDs. Hence had proper disclosure been made it is highly likely that either the defence would have been amended to accept that protected disclosures had been made or if R had not been willing to do that voluntarily a deposit order (with subsequent withdrawal of the defence on this point) would have been made or the case for R on these points would have been struck out as having no reasonable prospect of success.

Impact on C's preparation of case

Choice of C's witnesses and preparation of witness statements

95. The absence of the materials has made a difference to the way in which C has had to prepare his witness statements; make choices about who to approach to give evidence in the case; and in respect of the content of their witness statements. The non-availability will have affected the points of reference he had in order to answer questions in cross examination.

96. In relation to the witnesses, he might have wanted to call to support his case, C had considered calling Mr Bailey but decided not to do so. It was known that Mr Bailey had brought claims against the R but not that he had provided a statement to the IPCC in relation to the Poppy investigations. Had the contents of his IPCC statement been known C might well have called him. Other potential witnesses that might have been called (or sought) include Mr Kearney (WSB 141), Mr Law (WSB 93 & 107), and Jane Whitham (WSB 336). The tone of these witness statements when read with information that C believed they might be able to give would have given him more confidence to approach them to give evidence on these and other issues (for example Ms Whitham re the allegation of misogyny, ability as an SIO and what happened on OL Whitham as she was part of the team and had worked with the C on previous investigations).

Impact on Trial

C's ability to respond to cross examination or re-examination on PDs and causation of detriments.

97. C submits that in a case of this scale, where evidence of this nature has turned up after the C has given his evidence and has been challenged repeatedly over matters to which the undisclosed materials relate, it is impossible for the tribunal to assess that evidence with any confidence. The failure to disclose the IPCC material is not confined to the statements alone. Moreover, due to the delays that have affected this case (relating to R's concerns over whether national security issues were raised, and the pandemic) C's access to these witness statements clearly may have acted as an aide memoire for him when preparing the case.

98. C had to deal with cross examination relating to the events in 2016 without having reference to the interactions of Mr Pilling with the IPCC at that time (which would of course have made it also clear that R had electronic copies of the IPCC materials including witness statements); the suggestion that nothing relevant was happening during the relevant period of the grievance was something to which C had to reply without access to materials which are capable of showing a motive for his treatment over the grievance and failure to give him the reasons for his removal as OIOC. In reality the materials now disclosed show that there was motive for the R to do nothing about C's grievance.

99. It is no answer to this point to say, "well, you have the material now and the tribunal can evaluate the evidence after this material is put to R's witnesses". This is insufficient for two reasons: (i) evaluation of evidence is well known to be a process influenced by many factors including demeanour in response to questions which in turn can be affected by the witness's ability to reference documents in reply (or in re-examination); (ii) there will be a material lengthening of the cross examination of the R's witnesses to cover the material which will threaten completion within the trial allocation.

100. It is difficult for the tribunal to assess the C's evidence without him being able to refer to these interactions.

Impact on assessing evidence

101. The provision (not by R but by a third party) of the materials comes at a point which makes the evaluation of the C's credibility on these protected disclosures, and the attempt to damage his credibility more generally, impossible to evaluate, as the tribunal has spent several weeks hearing cross examination of the C without his being able to refer to relevant material6; it has seen Mr Mortimer ambushed with his IPCC statement which was used to try to undermine his credibility by reference to inconsistencies between the IPCC statement and his witness statement. Of course, because it was not disclosed, he did not have it as an aide memoire; the same point can be made in relation to Mr Elliott.

96. The respondent makes a number of points. It contends (if the Tribunal is against it on the disclosability of the material) that any impact upon the claimant's case can be remedied by recalling the claimant and any other witnesses to whom the IPCC material can then be put. Secondly, the claimant , or his legal team, must bear some responsibility for this situation, having actual or constructive knowledge of the likely existence of this material since , at the latest October 2019. In terms of any alleged ambush of the claimant's witnesses Elliott and Mortimer, this was not the responsibility of the respondent, but of the claimant, who failed adequately to proof them, or to enquire, if they were unsure, of the respondent or the IPCC, whether they had made witness statements to the IPCC.

Discussion upon whether a fair trial is still possible, and if not, whether that has been caused by the respondent's default.

97. Dealing (not quite in the order set out in the claimant's Skeleton) first with the alleged impact upon the claimant's preparation for the final hearing, and what the effect would have been of earlier disclosure of this material, it is noted that the only witness that the claimant says he would have called is Paul Bailey. It is said that he made a conscious decision not to do so. It is said that the claimant did not know that Paul Bailey had made a witness statement to the IPCC, and that , had the contents of such a statement been known the claimant "may well" have called him.

98. Whilst none of the Poppy reports expressly mention Paul Bailey as having been interviewed or having made a statement, that Paul Bailey may have made a witness statement to the IPCC was something that the Tribunal considers the claimant either

knew , or could easily have found out. The claimant says in his own statement to the IPCC (page MB 1446) that his belief that there was cronyism in the GMP was shared by others including the Black and Asian Police Association , of which Paul Bailey was the Chair.

99. In weighing up whether to call him, the claimant could easily have approached him (he has been represented in his Employment Tribunal claims by the same solicitors) to check if he had made an IPCC statement.

100. The claimant could indeed still seek to call him now. He has, in fact, attended the Tribunal as an observer on a number of days of the hearing, so is clearly available. The effect of the material non -disclosure of his witness statement is thus capable of mitigation, and does not pose a threat to a fair hearing, and certainly not one that is solely of the respondent's making.

101. In respect of any other witnesses, it is noted that Mr O'Dempsey's Skeleton at para. 96 refers to other potential witnesses that might have been called as "including" Harry Kearney, Dave Law and Jane Whitham. With respect, it is not sufficient for a party seeking to establish that a fair hearing is no longer possible to suggest that witnesses who cannot be called "include" certain persons, implying that there are others. If there are, they should be identified. As it is, the claimant was aware that Dave Law was being interviewed by the IPCC because they discussed the ineptitude of the Investigator at taking witness statements. He is expressly referenced as having been interviewed in Appendix 5 of Poppy 1.

102. In terms of what Dave Law's witness statement to the IPCC may have said, his presence at a number of crucial meetings at which the disposal of human tissue was discussed is documented in the Poppy Report, and specifically at paras . 286 to 290, his evidence about what was said in a meeting on 2 February 2011, and his opposition to the proposal to dispose of human tissue without informing family members, is summarised. Thus the claimant was, or should have been, well aware of Dave Law making a witness statement to the IPCC, and what it was likely to say. It is hard to see why he did not approach him to make a statement in these proceedings, which, of course, he may still do.

103. In relation to Harry Kearney, that he was interviewed is also apparent from Appendix 5 to Poppy 1. It is correct that he too expresses views which are critical as to the respondent's actions in connection with this issue. Quite what his evidence would add to that which is already before (and will doubtless now be added to) the Tribunal is unclear, but the claimant could still, if he felt it really necessary , seek to call him.

104. Finally, in relation to Jane Whitham, she made a witness statement in Poppy 2. She is referenced as a person from whom a witness statement was obtained in para. 92 of the report, and in Appendix 8. She made a lengthy statement dealing with her specific involvement in Operation Nixon. The claimant does not say that he wishes to call her in relation to this evidence as such, but that had he seen her (and indeed the others') IPCC witness statements, this "would have given him more confidence to approach" her , and other witnesses on these and other, unrelated, issues.

105. That is, with respect , a very weak and far from compelling basis upon which to suggest that the non -disclosure of this material has prejudiced a fair trial, or had any real influence upon the claimant's preparation of his evidence for this trial. Jane Whitham's witness statement to the IPCC makes no reference to anything other than Operation Nixon, so it is unclear why its disclosure would have led to the claimant approaching her for other evidence outside the scope of Operation Nixon. Again, of course, he can approach her now, and apply for permission to adduce further evidence.

106. In short, save perhaps for Paul Bailey, the claimant has failed to establish any credible basis upon which the Tribunal could be satisfied that the non – disclosure of this material has actually hindered his preparation for trial, in terms of witnesses. Even if it has, some of the responsibility for that must lie at his door, and, in any event, any such damage caused can still be remedied by applications to call additional witnesses.

107. The Tribunal now turns to the next basis upon which it is contended that the non – availability of this material has rendered a fair trial impossible, and that is that the claimant's evidence thus far, without access to this material, has been unfair. The Tribunal acknowledges that if the claimant was unable , in cross – examination , to give full and persuasive answers , particularly in relation to the sources of , and reasonableness of his belief in the disclosures he had made, to the extent that sight of the undisclosed material before completing his witness statements, or even before his cross – examination , his case may have been prejudiced by this default on the part of the respondent.

108. That said, Mr O'Dempsey has cited no specific examples of when this may have occurred, and the Tribunal cannot, without extensive trawling through its notes and the transcripts, recall any such instances. The Tribunal , for these purposes, is prepared to accept that that this may have occurred, and that the claimant may well have been able better to answer some questions in cross – examination had he had access to the undisclosed IPCC material. In particular, there was cross – examination and Tribunal questioning on 24 January 2022 about DCC Pilling, and why the claimant considered that his treatment of him had been by reason of his having made any protected disclosure. That may have been an instance when, had he known that DCC Pilling had received the IPCC reports and witness statements, he may have mentioned that fact. Against that, however, DCC Pilling in his witness statement does say (at para. 19) that he had read the Poppy reports "when they were received by the Force", but he is not specific about when this would have been.

109. The Tribunal does not accept , however, that this makes it impossible for the Tribunal to evaluate the claimant's evidence with any confidence , without his having been able to refer to this material. The submission is that access to these materials may have acted as an aide memoire for the claimant when preparing his case. That is so, but the Tribunal can easily take into account that this material was not available to the claimant in assessing his evidence.

110. The simple and obvious answer to this submission, is that the claimant can now refer to that material. To the extent that his memory can be refreshed by reference to these materials , this can be done by means of a further witness statement, and/or

further re-examination. Any damage to his credibility or risk that his evidence may be seen as a poor account in some respects, can be remedied by reference to this material. To that extent the Tribunal does not accept the submission in para. 99(i) of the claimant's Skeleton, the Tribunal is quite capable of evaluating evidence at various stages, and is generally wary of relying upon "demeanour". If the claimant is now able to respond to questions that were put to him in cross – examination or by the Tribunal by reference to this material, there is still time and opportunity for him to do so.

111. As to proposition (ii) in para. 99, in relation to the lengthening of cross – examination of the respondent's witnesses, the Tribunal will revert to this matter below.

112. In terms of those claimant's witnesses whose evidence has already been taken, Elliott and Mortimer, whilst it was unfortunate that they were cross – examined upon their IPCC statements, the Tribunal agrees that , given the knowledge of the fact that they had each made such statements that the claimant had, or constructively had, any unfairness in relation to their evidence was not caused by the respondent, as much as by the fact that they were not adequately proofed. In any event, no objection was taken to the admission of this undisclosed material at those stages in the hearing.

113. The Tribunal now turns to another proposition made by the claimant as to the effect of the non – disclosure of the IPCC witness statements, and of the email chain that has now been produced by the IOPC which reveals that this material, and therefore probably also the Poppy reports, were sent to DCC Pilling. The claimant's contentions are set out in para. 20 of the Application document of 13 May 2022, and para.98 of his Skeleton.

114. To be frank, and with no criticism of Mr O'Dempsey, from whom the Tribunal should have sought clarification during his oral submissions, the Tribunal had not fully appreciated that the claimant's case is (or appears to be) that until the disclosure from the IOPC he did not know that the Poppy reports and the witness statements had been sent to DCC Pilling, the person to whom his grievance had been allocated. That the claimant would not initially know this from the respondent's disclosure may seem to be rather borne out by the disclosure that was originally given of the communications between the IPCC and the respondent, and the IPCC and the claimant , to be found in File 16. Reference is made to the "Appropriate Authority", but in the Poppy reports that is simply stated to be the GMP, and not any individual.

115. Nothing in the correspondence in File 16 identifies DCC Pilling as the recipient of any of the Poppy materials. There is reference to DCC Hopkins, and it may be that DCC Pilling took over as the person within GMP as the "Appropriate Authority" upon DCC Hopkins becoming Chief Constable. In his witness statement DCC Pilling refers (paras. 15, 16 and 17) to Supt. Anderson and Supt. Egerton as being the respective "Appropriate Authority" in respect of the three Poppy operations. He makes no reference to receipt of the Poppy material in April 2016. That , if correct, may explain why the claimant was unaware until , at the earliest exchange of DCC Pilling's witness statement , and then this later disclosure that DCC Pilling had received the Poppy material, or when.

116. It is not, however, the whole story, as it overlooks, as it seems, with respect, both parties have, two documents in File 9, at pages 3095 and 3096/7. The former is an email from DCC Pilling to Laura Shuttleworth and John Egerton on 8 April 2016, to which he attaches the IPCC report into Poppy 3. The latter is then a response from John Egerton to DCC Pilling as to what action he proposes to take in relation to Julian Snowball.

117. This material is not referenced in DCC Pilling's witness statement, which will doubtless be the subject of cross – examination. It rather undermines the claimant's case, if such it be, that it was not until the recent disclosure of the IPCC witness statements that he knew, or could have known, that DCC Pilling had received any Poppy reports.

118. The question then is what effect has this had upon a fair hearing? The claimant's argument is that had he known that DCC Pilling , the person whom he contends subjected him to the detriment of delaying the conclusion of his grievance, had received the Poppy materials , he could have dealt with this in his witness statement or cross – examination, as showing motive for his treatment. DCC Pilling's evidence, however, does reveal that he had read the Poppy reports, even if he does not state in terms that they were sent to him. The Tribunal finds it hard to accept (what it thought was) the premise of this submission, that the claimant was unaware that DCC Pilling had personally received any Poppy material. But, assuming it is correct, or correct in respect of Poppy 1 and Poppy 2, in terms of the claimant's own witness statements, the inclusion of any reference to these matters would not have been the inclusion of any relevant facts of which the claimant had direct knowledge, and needed to prove. They would be, at best, matters of comment or speculation by him, as to the possible motives that DCC Pilling may have had for his treatment of the claimant. The claimant does now have that material, and it can, and now doubtless will,(for he has yet to give evidence), be put to DCC Pilling. That the claimant was unable to mention it, for what it would be worth, in his own evidence is really of only marginal , if any , relevance. It will be a matter of weight to be given to his evidence whether he knew, and if he did not, why he did not, that DCC Pilling had received this material. There is thus no real prejudice to the claimant's case , on this issue ,arising from this aspect of the late disclosure, and a fair hearing upon it remains possible.

119. Another aspect that the claimant relies upon is a contention that , had this material been available, the claimant's case in respect of PDs 1.2 and 1.3 would have been very strong, so as to entitle him to seek orders of either strike out, or for a deposit, in connection with the respondent's response of denial that these two disclosures were protected disclosures. He submits that it is highly likely that the defence would have been amended to accept that protected disclosures had been made, or that a deposit order would have been made "voluntarily" or by the Tribunal.

120. With respect the Tribunal cannot agree. The respondent has now also had opportunity to review the IPCC material in full, even if it had not done so previously. The Tribunal has, on several occasions, urged the parties to narrow the issues where at all possible. As late as March 2022 the Tribunal repeated its exhortations, especially in respect of some of the protected disclosures relied upon where the basis facts of

what had occurred were not in dispute, and had formed the basis of the IPCC recommendations for further action.

121. The respondent has considered its position, and in a Note of 12 June 2022 has set out its position as to why it still feels unable to make concessions in respect of the claimant's alleged protected disclosures, in general, and PD 1.2 in particular. The respondent may be right or wrong to do so, and the Tribunal will have to determine these issues, but this clearly demonstrates that even with the IPCC material fully considered, the respondent has not had any change of position in respect of concessions that any of the disclosures were protected. There would not, therefore have been any amendment of the response, or a voluntary change of position, nor, the Tribunal considers, would the respondent have agreed to a deposit order. That would have left the claimant with the option of seeking strike out or deposit orders, but the Tribunal is far from satisfied that any such orders would actually have been made.

122. To some extent, however, that is by the by, the question for the Tribunal is whether a fair trial, in the sense of the final hearing, is still possible. To that extent what interlocutory orders may or may not have been made had this disclosure been given when it should have been, apart from being a highly speculative exercise, is not very germane to the issue of the hearing as it now proceeds. Had a deposit order been made (probably the best the claimant could have hoped for) the respondent would have been likely simply to have paid it, and to have pressed on. All this has little bearing, in the Tribunal's view, upon whether a fair hearing remains possible.

A fair hearing within the allocated trial window.

123. As is clear from the recent case of ***Emuemukoro v Croma Vigilant (Scotland) Ltd. [2022] ICR 327*** , the question of whether a fair trial remains possible should not be considered in absolute terms, but should be approached from the point of view of the allocated trial window. That is apparent from para. 18 of the judgment :

" …..that is to say by considering whether a fair trial is possible at all *and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so."*

124. It is right to note that the dicta of Coudhury J. are in the context of an application being made on the first day of the trial, where these considerations will be particularly apposite. The facts of that case , as ever, are instructive. The claimant had been dismissed by the respondent in late December 2017. He presented claims of unfair dismissal, and other allied claims in May 2018, which were listed for a 5 day hearing on 4 November 2019. The respondent failed to comply with case management orders, and so was not ready for the hearing to commence . It conceded that that and fair trial was not possible within the trial window, as its failure to give disclosure impacted upon the claimant's case, as well as its own. If the claims were not struck

out, the only alternative was for the hearing to be postponed, with the prospect of it not being re-listed until late summer 2020. In those circumstances the EAT upheld the Tribunal's decision to strike out the response.

125. It would be wrong to assume that consideration of whether a fair trial can be held within the allocated trial window should only be a factor in applications made at the start of a listed final hearing, but it will be appreciated that the situation is a little different when, as here , the application has been made part way through a hearing.

126. The Tribunal accepts that the late disclosure of this material will have an effect on the length of this hearing, so that it will not conclude within the allocated trial window. That window was 70 days, but that is going to be exceeded, and probably always was. Whilst the claimant seeks to blame the respondent for loss of the initial four weeks, with applications relating to rule 50 matters, and other issues, that is not the same as contending that this non – disclosure has occasioned this delay in completion of the hearing, or extension of the time needed for the hearing.

127. Leaving aside this application, it is unclear just by how much the admission of (hopefully only some of) this further material, with concomitant re-calling of witnesses, calling of further witnesses , and any other consequences , will actually prolong this hearing. The Tribunal would expect it to be a matter of days, not weeks. Had the material been available earlier, the Tribunal would have expected the listing to have been extended accordingly to accommodate it, so the trial window ultimately may have ended up being around the same as it may now end up being.

128. That is, it is appreciated, somewhat speculative, but the claimant has failed to advance anything other than generalisations as to the likely effect upon the length of the hearing, and the Tribunal does not consider this is as significant a factor as it may otherwise have been. The Tribunal considers that there is a significant distinction between cases where the breach complained of has delayed the start of, and necessitating the postponement of by many months, a final hearing and cases where that breach has prolonged the duration of the final hearing. In the latter case, as here, context is everything, and there is a further distinction to be drawn between cases where the breach significantly extends the time needed to complete the hearing, for example by doubling or tripling it. In this case, already listed for 70 days, the proportional extension occasioned by the breach is rather less, in the overall scheme of things.

129. Whilst the effect upon the claimant's mental health has been alluded to (para. 114 of the Skeleton) no medical evidence has been adduced, and nothing has been put before the Tribunal to suggest that there is any risk to the claimant's health, or he will be unfit to participate in, any extended hearing .

130. That is not to say that the extending of the time necessary now to complete the hearing is not to be totally discounted, but it must be examined in the context of the likely length of hearing necessary in any event had the disclosure been given when it should have been, and the overall delay that may now be occasioned in the conclusion of the hearing.

131. This case was listed for 70 days, in one tranche between November 2021 and March 2022. It would not, for various reasons, have been completed within that timeframe, and is already listed for a further 5 weeks. It is now likely that more hearing time will be needed. It is, however, likely that it will be possible to conclude the hearing (if not the deliberations and judgment) before the anniversary of the start of the final hearing on 2 November 2021. Whilst not what the claimant wanted, and doubtless frustrating and upsetting for him, the Tribunal considers that it is still possible for the final hearing to be concluded within a reasonable time, in the context of these particularly complex and extensive claims.

132. The Tribunal's conclusion therefore, in the light of all the above, is that a fair trial remains possible, and the threshold condition for the Tribunal to consider striking out the response , or any part of it, has not been made.

133. The Tribunal would add, for completeness, that if the Tribunal has applied the wrong test, and should have applied the "real risk" test, it would have come to the same conclusion. Whilst there is some risk that there cannot be a fair hearing, the Tribunal considers that this would be a very small, and hence not a real risk.

Proportionality and the sanction of striking out.

134. In these circumstances the Tribunal need go no further. It is clear, however, that even if the Tribunal did consider that a fair trial was no longer possible, it should be slow to impose the accepted Draconian sanction of striking out a claim or a response. As Mr Gorton submitted, citing ***Summers v Fairclough Homes [2012] 1 WLR***, even when the claimant had acted dishonestly and fraudulently to increase the value of his claim, an order striking out the claim was not appropriate. Lord Clarke's dicta on why strike out exists as a theoretical sanction, but is rarely (if ever) a proportionate sanction makes it clear that the draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small. The test in every case must be what is just and proportionate. It seemed to the Supreme Court that it will only lie in the very exceptional case that it will be just and proportionate for the court to strike out an action after a trial.

135. He cited also ***Masood v Zahoor [2010] 1 WLR 746*** and ***Ul-Haq v Shah [2010] 1 WLR*** as examples of cases where the conduct in question had been extreme, but the Court refused to strike out the claims. In the employment context, he cited ***Blockbuster Entertainment Ltd. v James [2006] IRLR 630*** referred to above, where, after a recital of the general principles, Sedley LJ said this:

"19. In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be recanvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial.

The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.

20. It is common ground that, in addition to fulfilling the requirements outlined in paragraph 5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was 'the only proportionate and fair course to take'. This aspect of their determination plays no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.

21. It is not only by reason of the Convention right to a fair hearing vouchsafed by Article 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 Ke Jokai Tea Holdings [19921 1 WI.R 1196, especially at 1202E-II. 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 |w 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 1he existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

136. That is the approach we have taken. Even if we were wrong on the test to be applied, and only a real risk that a fair trial cannot be held need be , and has been, shown, we would still have to consider the proportionality of striking out the response, or any parts of it.

137. In terms of striking out the whole of the response, that would not, on any view, be proportionate. The default in question, which relates to the non – disclosure of the IPCC material held by the respondent, relates, on the claimant's own case, to only some of the claimant's claims. The main focus has been on PD1.2 and 1.3, but Mr O'Dempsey's submissions have sought also to embrace PD1.8, PD2.1, and PD 3.1. In terms of detriments, D1.5, in relation to Tom Elliott is engaged, but he also seeks to bring in D2.18 to 2.22, and the constructive dismissal.

138. Pausing there, PD1.8 does not relate to the non – disclosure of the IPCC material, as far as the Tribunal can see. This relates instead to the alleged non – disclosure of warrants in connection with the Dale Cregan case.

139. Given the limited and discrete failure of disclosure in respect of the IPCC materials, strike out of the whole of the respondent's response was never likely to have been a propionate response, and would have indeed looked like the penalisation of a defaulting party , which the caselaw makes abundantly clear is not the purpose of strike outs.

140. In terms of striking out those parts of the response to which the material defaults do relate, we would not, even if we were wrong on the fair trial issue, consider that a proportionate response. The effects of the defaults are still capable of remedy, their effects upon the claimant's case and his preparation for trial are nothing like as serious as has been contended for, and other sanctions or applications can be put in place to put the claimant into the position, or more or less the position, he should have been in had the disclosure been given when it should have been. That some responsibility for failing to raise defaults that were , or should have been, obvious to the claimant , who has been legally represented throughout, at any time before the commencement of the hearing (or even after it, after the first deployment of any IPCC witness statements in the course of the hearing) is another factor that we take into account in determining the proportionality of the sanction of striking out , in all the circumstances.

141. In approaching this matter, the Tribunal has taken into account a number of factors as to the extent to which it can accept that the respondent's conduct has led to the risk, or rather the likelihood, that there cannot now be a fair hearing. In assessing the seriousness of, and consequences of, the respondent's conduct, however, the Tribunal bears in mind that the overriding objective applies to both parties. Its aim is to get parties to concentrate on constructive and proportionate preparation for the final hearing. Its purpose, when introduced into all civil litigation, was to discourage interlocutory procedural applications, and constant adversarial challenges before the Tribunal to the other side's conduct of the proceedings. In short , its focus was to stop parties engaging in costly and time consuming satellite litigation, and to "get on with it".

142. To that extent we consider that it is germane to consider the conduct of the claimant in these matters. A number of points arise. Firstly, and most obviously, the claimant , himself a former Police officer, is represented by a major firm of lawyers, who have instructed top employment counsel. This application has arisen primarily, because, as we have found, the respondent breached the Tribunal's orders for disclosure, and thereby acted unreasonably , in not disclosing to the claimant the IPCC witness statements that it had received. We have determined above, however, that this was not deliberate or contumelious, but was an error.

143. The claimant , however, seeks to ascribe any difficulties in the conduct of his case that may arise in consequence of that breach solely to the respondent. We do not consider that he can do so.

144. Firstly, as our findings above show, that witness statements had been made to the IPCC, and hence were likely to have been provided to the respondent was apparent from the three Poppy reports themselves. Whilst a consistent approach was not taken in each report, and no specific reference was made to, for example the statements of Paul Bailey, Thomas Elliott and Kieran Murray , there was to most of the others , and the likely existence of such statements was apparent from the disclosed Reports themselves.

145. Secondly, the claimant knew that witness statements were being taken by the IPCC. He had made one, but he was also aware that others would be doing so, as, for example, he told the IPCC whom to contact for this purpose. He had a discussion with Dave Law about how poorly the person taking his statement had carried out this task. In the updates he received from the IPCC in 2015 he was informed that they were taking witness statements from relevant persons (see pages MB 5788, 5790 and 5792).

146. Thirdly, the respondent in any event, in October 2019, disclosed four witness statements (two each from Joanne Rawlinson and Martin Bottomley) which had clearly been made to the IPCC. That there may also be other statements , particularly in Poppy 2 , where Appendix 8 sets out that some 30 witnesses were interviewed, and Poppy 1, where Appendix 5 sets out that 19 witnesses were interviewed, including Dave Law, Joanne Rawlinson and Martin Bottomley, was or should have been immediately obvious from the Reports and that disclosure.

147. The claimant , however, made no enquiry, and did not seek any further disclosure, relying instead, it seems upon the respondent, of which he was already deeply distrustful, to have complied with its disclosure obligations.

148. Further, he prepared witness statements for, and called two witnesses, Tom Elliott, and Mortimer , both of whom had made witness statements for the IPCC investigations. It is appreciated that the former was not expressly referred to in any of the three Poppy reports, but the latter was clearly identified as having been interviewed in Poppy 2.

149. These are all matters that the Tribunal considers are legitimate to take into account in the exercise of its discretion, and in assessing whether a fair trial is still possible, and if not, the extent to which the respondent is to be held responsible for that, and as to the proportionality of making any strike out order in all these circumstances.

Timing issues.

150. The Tribunal did raise with the claimant the issue of when the decision to make this application was made, and whether it should have been made any earlier that it was . It is grateful to the claimant's solicitors for providing by email the information as to the timing of the application, and when it was first mooted, following the disclosure from the IOPC in March 2022. We note what they say, and do not consider that any delay on the part of the claimant in making this application (in that period) is germane to our decision, and has not been taken into account in making it.

The resumed hearing – applications.

151. The Tribunal appreciates that the parties will need time to consider this judgment, and the steps than now need to be taken. It is hoped that the hearing can, after dealing with any applications (but not any costs applications – the Tribunal is , provisionally, not minded to determine any such applications until the conclusion of the whole case) arising from this application, resume with the respondent's witness evidence before the next adjournment until July. More time will be required, of course, after that next session of hearings , and once a revised ELH is available, the Tribunal will look to further list the hearing as soon as possible.

Employment Judge Holmes
DATE : 22 June 2022

ORDER SENT TO THE PARTIES ON
21 July 2022

FOR THE TRIBUNAL OFFICE