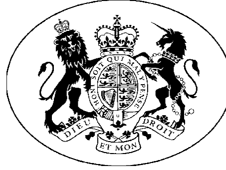

EMPLOYMENT TRIBUNALS

Claimant: **Ms Lowers**

Respondent: **Staffordshire County Council**

Heard at: **Birmingham Employment Tribunal (via CVP)**
On: **5 August 2022**

Before: **Employment Judge Noons**

Representation
Claimant: Ms Anderson, Counsel
Respondent: Mr Peacock

JUDGMENT having been given orally at the hearing and sent to the parties on 15 August 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The hearing of 5 August 2022 was originally scheduled to be an ADR hearing. However, the claimant made an application for the hearing to be converted to an open preliminary hearing to deal with their application to strike out the respondent's grounds of resistance. The hearing was therefore converted to an open preliminary hearing and was conducted via CVP. Both parties had the benefit of representation at the hearing.

Issues for the Tribunal to Decide

2. I have to determine, in accordance with Rule 37 of schedule 1 of the Employment Tribunals (constitution and rules of procedure) 2013, whether to strike out all or part of the response on the grounds that the manner in which the proceedings have been conducted by or on behalf of the respondent has been unreasonable, whether there has been non-compliance with an order of the Tribunal and whether it is no longer possible to have a fair trial. The effect of any strike out of the response is such that it shall be as if no response had been presented as set out in Rule 21.

Background

3. There is very little dispute between the parties are to what has occurred and I had the benefit of a 465 page bundle and a 27 page supplemental bundle of correspondence. Both representatives took me to the relevant pages in the bundles. No witness evidence was put before me and both representatives made lengthy oral submissions. There is a lengthy history of this matter and I set this out in detail below.

4. The claimant's ET1 was received on 28 November 2019. The particulars of claim run to 19 pages. The Respondent was required to submit their response by the 3 January 2020. On the 30 December 2019 the Respondent emailed the Tribunal stating that they would not be in a position to respond by the deadline and seeking an additional 28 days. At this point no request for further particularisation of the claimant's claim was made.

5. The respondent submitted an ET3 and grounds of resistance on 3 January 2020, that is to say within the original time limit for doing so. The grounds of resistance were a bare denial of the claims with no factual detail at all. Employment Judge Miller therefore refused the application for an extension to submit the ET3 and grounds of resistance but ordered that the Respondent

may, no later than the 7 February 2020, provide further and better particulars of its response

6. On the 7 February 2020 the Respondent wrote to the Tribunal requesting an extension for doing so until 21 February 2020 on the basis that "the respondent has been provided with a significant number of documents relating to the claimant which have been reviewed and have resulted in further requests to the relevant department for information. The respondent is awaiting this information." The claimant objected to this extension request. No amended response was submitted on 7 February 2020 nor on 21 February 2020.

7. A telephone preliminary hearing took place on 30 April 2020, (**"First Preliminary Hearing"**). The respondent submitted no documents for the First Preliminary Hearing and had still not submitted particularised grounds of resistance. The claimant did complete a standard agenda form ahead of the first preliminary hearing. There was no suggestion at this stage that there was any need for further particulars from the Claimant.

8. The First Preliminary Hearing had to be adjourned to 15 May 2020 with the respondents being directed to submit their particularised response by 7 May 2020.

9. On the 7 May 2020 the respondent submitted amended grounds of resistance that ran to 54 pages. The grounds of resistance themselves were 18 pages but, in a departure from usual tribunal practice, the respondents appended a number of documents to these grounds of resistance.

10. The adjourned preliminary hearing (**"Second Preliminary Hearing"**) took place on the 15 May 2020. At this hearing, Employment Judge Algazy QC observed that "the respondent had served a lengthy draft response exhibiting substantial evidence but which did not address the specific matters under "Claims" in the claim other than to plead a generic defence which was substantially replicated for the various claims advanced. Difficulties arising from the pandemic were specifically adverted to".

11. The following directions were given at the second preliminary hearing:

    11.1 The respondent was to serve a detailed request for further particulars of the claim by 1 June 2020 with the claimant to serve a response by 29 June 2020.

    11.2 The respondent was to serve any application to amend its response together with a draft of the amended response by 21 July 2020.

    11.3 The claimant was to file an application for costs by 22 July 2020 and a further preliminary hearing was listed for 24 July 2020.

12. On the 1 June 2020 the Respondent submitted a document they referred to as a request for Further and Better Particulars, however it included a request for an Impact Statement, disclosure of documents and what amounted to detailed witness evidence (including requests for the 'gist of all words spoken' in a number of meetings) Given the nature of the request the claimant requested an extension of time to respond and provided a full response 10 July 2020.

13. On the 21 July 2020 the Claimant submitted an application for costs, referring to what they said was the Respondent's ongoing disruptive conduct, failure to comply with directions, and the costs incurred due to multiple preliminary hearings to seek their compliance.

14. On 21 July 2020, purportedly in accordance with the Tribunal's Order made at the Second Preliminary Hearing, the respondent submitted an application to amend it response along with a copy of that response. However, the grounds of resistance submitted with that application were not new but were in fact the ones which had already been submitted by the respondent on 7 May 2020 and which had been subject to criticism by the Employment Judge at the Second Preliminary Hearing.

15. A telephone preliminary hearing took place in front of Employment Judge Perry on 24 July 2020, (**"Third Preliminary Hearing").** At this hearing the Employment Judge was able to identify the complaints. He also noted that the respondent had not complied with the order made at the Second Preliminary Hearing to serve its application to amend its response along with a copy of that response. Employment Judge Perry noted "it has not done so - the response is a repeat of that previously lodged."

16. He also noted "Sadly, little progress has been made". He commented that the respondent "has merely relodged the current response and despite what Employment Judge Algazy QC stated as the requirement to apply to do so, it has not made a substantive application setting out the grounds for doing so to include the reasons why it has not so before. This conduct of the proceedings by the respondent meant that even at the Third Preliminary Hearing the Employment Judge was not able to list the case for final hearing.

17. The respondent was ordered, by 21 August 2020, to serve *"a detailed amended response setting out [the respondent's] position as shall be relied on at trial, to include its [response to the claim under] s44(c) Employment Rights Act 1996"* and "a substantive application to amend its response setting out the grounds for its application".

18. At the Third Preliminary Hearing Employment Judge Perry listed an open preliminary hearing on 30 September 2020 to deal with, amongst other things, the claimant's application for costs and the respondent's application to amend its response.

19. The Respondent applied for an extension of time to the 4 September 2020 to comply with the orders given at the Third Preliminary Hearing. Nothing was received by the claimant by 4 September 2020 and they applied for an Unless Order on 7 September 2020.

20. On the 29 September at 4.45 pm the Respondent submitted an application to amend its grounds of resistance accompanied by a witness statement and an 'amended' grounds of resistance. These amended grounds of resistance did

not have any track changes in them. This submission was over a month after the order should have been complied with and over 3 weeks after the revised date the respondent had requested to comply with the order. It should also be noted that this submission was at the very end of the working day before the preliminary hearing listed for 30 September 2020.

21. At the preliminary hearing on the 30 September 2020, ("**Fourth Preliminary Hearing"**), Employment Judge Coghlin QC set the matter down for final hearing starting on 1 November 2021. He also awarded costs against the respondent on the grounds of their unreasonable conduct to date in the matter. The amount of the costs award was not determined so as to allow the parties to try to agree the amount to be paid failing which Employment Judge Coghlin QC would determine the matters on the papers.

22. At the Fourth Preliminary Hearing the Employment Judge again noted that both the previous Employment Judges had commented on the regrettable lack of progress on the case. In relation to the respondent's application to amend its grounds of resistance Mr Mohammed, the respondent's solicitor, accepted at the Fourth Preliminary Hearing that the "amended" grounds of resistance submitted the day before were in fact the same ones that had already been submitted twice before and which had been found to be insufficient by Employment Judge Perry and Employment Judge Algazy QC. The respondent accepted that they did not advance matters and did not press the application to submit an amended response.

23. The respondent also did not oppose the claimant's application for an Unless Order requiring compliance with the third and fourth bullet points under paragraph 2.3 of the Order of Employment Judge Perry following the Third Preliminary Hearing.

24. Employment Judge Coghlin QC therefore made an Unless Order stating that "The litigation cannot proceed until the respondent's case has been properly pleaded. Too long has passed already without this happening". The

Respondent was therefore given until 4 pm on 14 October 2020 to comply with the Unless Order.

25. Further case management directions were also given at the Fourth Preliminary Hearing to get the case ready for final hearing. For the purposes of this judgment it is relevant to note that the respondent was ordered to liaise with the claimant to agree the bundle of documents and that a copy of the bundle had to be sent to the claimant by 10 February 2021.

26. On the 13 October 2020 the Respondent issued amended grounds of resistance.

27. On the 10 November 2020 the Claimant's amended list of issues was provided to the Respondent. The Respondent had been ordered at the Fourth Preliminary Hearing to respond by the 25 November 2020, agreeing the same or providing an amended draft. To date the respondent has not done so.

28. Following no contact from the respondent for a period of 2 months the claimant applied to the Tribunal for a stay of all directions to the 30 April 2021. That was due to having been advised previously that a relative of the respondent's representative had COVID, although the respondent's representative had been communicating (albeit only in respect of extensions of time) for two months following that notification. The claimant did not want to apply pressure to the respondent's representative when it was unclear as to whether there were possibly personal circumstances which prevented progress on this matter.

29. A further preliminary hearing was listed for 17 May 2021, (**"Fifth Preliminary Hearing"**). The respondent only replied to the claimant on Thursday 13 May 2021, this being the first response to any communications since January 2021.

30. In the end the Fifth Preliminary Hearing took place on two days, 17 May and 8 July 2021 in front of Employment Judge Harding. Employment Judge Harding noted that the respondent had complied with the Unless Order set out at the Fourth Preliminary Hearing.

31. At the Fifth Preliminary Hearing, the hearing for November 2021 was postponed as both parties agreed that the case was not ready for hearing and in fact more than 10 days were needed in any event. The claimant had submitted a 40 page list of issues and Employment Judge Harding pointed out the “need for cases to be kept within proportionate bounds and pointed out that it is often helpful (and proportionate) for the claimant to focus their claims on the issues that lie at the heart of their case”. The claimant’s representative, Ms Anderson, “acknowledged that both a greater degree of clarify and a greater degree of focus was required”.

32. The Claimant was directed to provide a revised list of issue by the 1 September 2021 in a prescribed format, The respondent was directed to “file an amended Response to those allegations by no later than 29 September 2021. This shall include setting out the respondent's position in respect of the following matters;

    32.1 For the section 15 claim, in the event that a tribunal finds that the unfavourable treatment asserted occurred, whether it is accepted that it occurred because of the "something" identified by the claimant and, if it is not, what the respondent asserts was the reason for the treatment. The respondent shall also set out whether it is accepted that the "something" arose in consequence of the claimant's disability. If the respondent relies on justification the respondent shall set out the legitimate aim on which it relies.

    32.2 For the indirect discrimination claim whether it is accepted that the asserted PCP/PCP's were applied, whether or not it is accepted that these caused the group disadvantage identified and the particular

disadvantage to the claimant. If the respondent relies on justification the respondent shall set out the legitimate aim on which it relies.

32.3 For the reasonable adjustments claim the respondent shall set out whether or not it is accepted that each PCP asserted by the claimant was applied to her and whether or not the nature and extent of the substantial disadvantage suffered by the claimant as a result of the application of the PCP is accepted. The respondent shall also set out for each adjustment the date from which it is asserted time began to run for limitation purposes.

32.4 For the harassment claim whether or not it is accepted that the unwanted conduct occurred, and if so whether it is accepted that it was unwanted. Whether it is accepted that the conduct was done with the proscribed purpose or had the proscribed effect (as the case may be), and whether it is accepted that the conduct relates to disability.

32.5 The respondent shall also set out whether it considers that any of the claims in the list of issues requires an application to amend on the part of the claimant. If so it shall identify the type of amendment application that it asserts is being made and whether it agrees or objects to such an application. If it objects the respondent shall set out the grounds for its objections".

33. Employment Judge Harding also made directions for disclosure with each party having to "send to the other all relevant documents which are or have been in that party's control including documents on which that party relies and documents which adversely affect that party's case". This was to be done by 11 November 2021 with a bundle being agreed by 9 December 2021 and the respondent to prepare and send to the claimant a copy of the bundle by 22 January 2022. The matter was set down for a final hearing lasting 16 days starting on 19 September 2022 which is 2 years and 10 months after the claim

form was submitted and was the second time the matter has been listed for a final hearing.

34. The claimant duly filed a revised list of issues. The respondent did nothing. The claimant sent her disclosure documents despite the respondent's failing. The Respondent subsequently provided some documents to the claimant. On 23 March 2022 the respondent's new legal advisers requested a copy of the claimant's disclosure as this had not been given to them by the respondent. This was sent to them.

35. The parties were required to attend a further telephone preliminary hearing (**"Sixth Preliminary Hearing"**) on 7 April 2022 to check compliance with the orders made at the Fifth Preliminary Hearing. On 6 April 2022 at 7.35 pm, that is to say after working hours on the night before the hearing, and it would appear in response to the claimant's application for strike out and costs, the respondent provide new grounds of resistance. This was nearly 7 months after it should have been provided. Again, contrary to standard Tribunal practice, the amended response did not contain any track changes. The grounds of resistance changed the respondent's position on certain matters from the earlier grounds of resistance.

36. The claimant also maintained that the grounds of resistance still did not provide full particularisation, making sweeping assertions such as that the respondent had reduced the Claimant's workload 'on numerous occasions' as a reasonable adjustment and providing a list of other adjustments said to have been made, but with no detail as to when, how or by whom such as was required for the case to progress.

37. At the Sixth Preliminary Hearing Employment Judge Harding noted "Unfortunately there had not been compliance with directions; the respondent had failed to produce amended grounds of resistance, as ordered, disclosure had only partially taken place and consequently there was no agreed bundle and there had been no exchange of statements. I should add that given the

extremely lengthy history of this case this failure to comply with the tribunal orders was wholly unsatisfactory. Matters went awry, it would appear, at least initially because the respondent had failed to lodge an amended response by 29 September 2021, as it had been ordered to do. This remained the case until shortly before this hearing…"

38. The respondent sought clarification in respect of one aspect of the claimant's claim and the clarification was given at the Sixth Preliminary Hearing. The respondent confirmed that it was not in a position to "set out its pleading in respect of the reasonable adjustments claim (which was the only outstanding matter)". The claimant requested some further information from the respondent which their representative confirmed that they were "content to provide the information requested as part and parcel of the amended response, particularly as the information requested may limit the size of the disclosure exercise somewhat".

39. The respondent was ordered again to provide amended grounds of resistance addressing the claimant's reasonable adjustments claims in the format set out in the order following the Fifth Preliminary Hearing and, by consent, the further information requested by the claimant no later than 5 May 2022.

40. By no later than 26 May 2022 the parties were to send each other any outstanding disclosure. The bundle was to be agreed by 9 June 2022 with the respondent sending a copy to the claimant by 16 June 2022. Witness statements were to be exchanged by 14 July 2022.

41. The claimant's representative confirmed in writing on 11 April 2022 the further particulars that they were requesting and which the respondent had agreed to respond to at the Sixth Preliminary Hearing.

42. Amended grounds of resistance were served on 5 May 2022, again the amendments were not marked in track changes. This meant the claimant's

representatives had to conduct their own exercise of identifying all the changes from the version sent to them on 6 April 2022. No explanation has been given to me as to why the various iterations of the grounds of resistance did not contain track changes to help the Tribunal and the claimant identify what changes had been made.

43. Having carried out this exercise the claimant's representative was of the view that the respondent had failed in two regards to provide the answers to the request for further particulars which they had agreed to do at the Sixth Preliminary Hearing. They therefore emailed the respondent's representative on 6 May 2022 clearly setting out where they believed the answers had not been provided.

44. The respondent's representative responded on 13 May 2022 bluntly saying they considered that the respondent had complied sufficiently with the Tribunal's orders and the claimant's request for further particulars. This response did not point out where in the amended grounds of resistance it believed it had answered the requests, clearly it would have been helpful had they done so given there were no track changes in the amended grounds of resistance. The point taken by Mr Peacock before me today on some of the requests is that it will be contained within witness statements but I note that at the Sixth Preliminary Hearing the respondent had agreed to provide answers to the request for further particulars even where is strayed into the realms of evidence.

45. No explanation has been given to me today as to why the respondent changed this position or why the respondent is seeking to go behind an order that was made by consent at the Sixth Preliminary Hearing especially as they agreed that answering the requests would limit disclosure. The claimant maintains that some requests have not been answered and that the respondent is trying to go behind what it had previously agreed to provide and what was ordered at the sixth preliminary hearing.

46. The effect, the claimant says, of not providing this information is that the requests for specific disclosure are very wide, because the issues/timeframes cannot be narrowed without the information requested. The respondent has refused to provide the disclosure requested on the basis it is excessive. This is clearly the point which their representative recognized at the Sixth Preliminary Hearing and therefore why he agreed that the respondent would provide the answers in full. It is not clear on what basis the respondent has changed its mind nor is there an application before me to vary the consent order made on 7 April 2022.

47. The respondent disclosed documents on 25 May 2022 and a bundle was agreed on 9 June 2022 which ran to some 1015 pages. This was in accordance with the directions given at the Sixth Preliminary Hearing.

48. On 26 July 2022 the respondent's representative sent over 1200 pages of additional documents to the claimant. The explanation for this is that their legal representative was at their offices taking witness statements and that during the course of those discussions it became apparent that more documentation existed which had not been disclosed. The respondent's legal advisers quite properly advised the respondent of their ongoing duty of disclosure and the documents were duly sent to the claimant.

49. The explanation given to me today was that the respondent had thought that they had already disclosed all documents. Mr Peacock said that it was only when sat with the respondent's witnesses, who are different people from the respondents in-house legal team who conducted the searches to comply with disclosure, did it become apparent that there were documents which had not been disclosed.

50. No explanation was given to me as to why these documents were not found by the respondent's legal team when they were conducting their searches ahead of disclosure. No evidence was before me today at all as to the extent

of the search made by the respondent's legal department. Disclosure was first ordered for 16 December 2020. I also note that the respondent themselves when making their application to extend time to submit their response commented that they had a lot of documentation and yet the respondent took until less than 2 months before the start of the hearing to provide full disclosure.

51. This late disclosure potentially more than doubles the size of the bundle. Mr Peacock on behalf of the respondent was not able to provide me with full details of what was contained within this late disclosure but did indicate that it contained some appendices to the investigation reports. These are clearly documents central to the claim. Again there was no explanation as to why they had not been disclosed earlier other than an assertion that the respondents (by which Mr Peacock must mean their legal team) thought they had disclosed everything.

52. The case has come before me today for the seventh preliminary hearing to consider the claimant's application to strike out the respondent's response and for their costs. In the event we only dealt with the strike out application as there was not time to deal with the costs application.

Relevant Law

53. Rule 37(1)(b) provides that a claim or response (or part) may be struck out if 'the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent… has been scandalous, unreasonable or vexatious' and at 37(1)(c) "for non-compliance with…an order of the Tribunal".

54. A party may find that his or her claim or defence is struck out on this ground if that party has conducted the case in an 'unreasonable' manner. For a tribunal to strike out for unreasonable conduct of proceedings, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the

striking out must be a proportionate response, *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*.

55. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must consider whether a fair trial is still possible, *De Keyser Ltd v Wilson 2001 IRLR 324, EAT*. in ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.

56. In *Bolch v Chipman 2004 IRLR 140,* the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

    56.1 before making a striking-out order an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings

    56.2 once such a finding has been made, he or she must consider, in accordance with *De Keyser Ltd v Wilson*, whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed

    56.3 even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

57. In *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*. the Court of Appeal noted that the courts and tribunals must be open to the difficult as well as to the compliant so long as they do not conduct their cases unreasonably. In considering whether a case has been conducted unreasonably, a tribunal should bear in mind that the time to deal with persistent or deliberate failures to comply with rules or orders is when they have reached the point of no return. The Court took the view that it was not satisfactory for a tribunal to

simply record that a strike-out is 'the proportionate and fair course to take'. Rather, it should have spelt out why a strike-out was the only proportionate and fair course to take.

58. In *Emuemukoro v Croma Vigilant (Scotland) Ltd and ors 2022 ICR 327, EAT*, the EAT rejected the proposition that the question of whether a fair trial is possible must be determined in absolute terms; that is to say, by considering whether a fair trial is possible at all, 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. The EAT considered that, where a party's unreasonable conduct has resulted in a fair trial not being possible within that the allocated window, the power to strike-out is triggered. Whether the power ought to be exercised depends on whether it is proportionate to do so.

59. Mr Peacock urges me to find that all the respondent's unreasonable conduct of proceedings prior to the costs order at the Fourth Preliminary Hearing in effect fall away as their behaviour is dealt with by the costs order. With respect to Mr Peacock, I do not agree. The respondent's conduct of proceedings prior to the Fourth Preliminary Hearing has been found to have been unreasonable and that is why the costs order was made. I am entitled to take this conduct into account when determining whether or not to strike out the response.

Application of Law

60. As set out above there is a sorry history of this case with repeated non-compliance with orders by the respondent. The respondent has chosen to conduct these proceedings in such a way that there have been wholesale failures to comply with tribunal orders. This includes failures to comply with orders made by consent. There has already been a finding that the respondent's conduct of proceedings prior to 30 September 2020 was unreasonable.

61. The first date for disclosure was 16 December 2020, there is then a further order for disclosure by 11 November 2021 and then by 26 May 2022. Despite this the respondent failed to comply with its disclosure obligations until 26 July 2022.

62. The respondent's solicitors, quite properly having advised the respondents of their disclosure obligations, provided what they believed to be full disclosure on 25 May 2022. This led to a bundle of some 1015 pages in total and then a further 1200 pages are disclosed to the claimant on 26 July 2022. The only explanation as noted above that the respondent gives is that these only became apparent when witnesses were spoken to.

63. I have heard no explanation as to what steps the respondent took when conducting searches ahead of disclosure. It is quite clear that a proper and diligent search cannot have been carried out. The witnesses cannot have been asked if they still had any documents. This is despite clear guidance from the respondent's solicitors as to their disclosure obligations.

64. In this regard the manner in which the proceedings have been conducted by the respondent is unreasonable. It is also a failure to comply with a tribunal order.

65. Further I find the respondent has failed to comply with the consent order made at the hearing on 7 April 2022. The respondent did not provide answers to all of the requests. The respondent's failure to comply with the consent order amounts to unreasonable conduct of the proceedings.

66. I also find that the respondent's failure to provide full grounds of resistance until 5 May 2022 amounts to unreasonable conduct of the proceedings. The usual time limit for submission of grounds of resistance is 28 days. There have been multiple occasions where the respondent has not complied with Tribunal orders in relation to the grounds of resistance. These resulted in the

Unless Order but despite compliance with that order the manner in which the proceedings were conducted by the respondent continued to be unreasonable such that at the Sixth Preliminary hearing the respondent again had to be ordered to provide amended grounds of resistance.

67. There have also been points as set out above where the respondent has failed to engage with the Tribunal process for several months and has only engaged at the last minute just before a scheduled preliminary hearing. I find in relation to this that again the manner in which the respondent has conducted the proceedings has been unreasonable.

68. Overall, I therefore find that there has been deliberate and persistent disregard of the Tribunal's processes and procedures.

69. Having concluded that the manner in which the proceedings have been conducted by the respondent has been unreasonable and that there have been failures to comply with Tribunal Orders I have also concluded that a fair trial is no longer possible in the trial window. The claimant, despite nearly 3 years of trying to progress her case and complying with orders for disclosure, has been ambushed with 1200 pages of disclosure 7 weeks before the start of a 16 day hearing. Ms Anderson on her behalf has submitted that there is not enough time left for the claimant and her legal team to review this disclosure, consider whether there is anything further required and finalise her statements and prepare for the final hearing. I agree with Ms Anderson's submissions.

70. I canvassed with the parties whether sequential exchange of statements could help remedy deficiencies but it is clear that it could not. The claimant says there are still requests for disclosure outstanding because of the respondent's failure to comply with the consent order. Before statements could be exchanges disclosure has to be completed. I therefore conclude that a fair trial is not possible during the current trial window.

71. I also have considered whether a fair trial is possible at all given the unreasonable manner in which the respondent has conducted the

proceedings. The number of preliminary hearings in this case is quite remarkable and I have no confidence were I to postpone the hearing and relist it that the respondent would conduct the proceedings in a reasonable manner such that a final hearing could take place. For example they were told as far back as 15 May 2020 that their response was deficient and yet it took almost 2 years to rectify this.

72. I am also mindful that a postponement and relisting of a 16 day case would delay the hearing for somewhere in the region of 9 months meaning the claimant would have to wait nearly 3 years to have her case determined. This further delay would come with a significant risk of memories fading even further. This is a case which has already had its final hearing postponed once before. I therefore find that a fair trial is no longer possible because of the respondent's unreasonable conduct of these proceedings.

73. Having concluded that a fair trial is no longer possible, I have also to consider whether strike out is a proportionate and fair response to the manner in which the respondent has conducted proceedings and for their failure to comply with Tribunal orders. I appreciate that strike out is a draconian measure and only to be used in the most extreme of cases.

74. In this case strike out is proportionate and fair because the respondent has already had costs awarded against it for it's unreasonable conduct and yet this unreasonable conduct of proceedings has continued and persisted. There has been repeated failures to comply with Tribunal Orders including an Order which was made by consent. It is proportionate and fair because the respondent has had considerable opportunity to change the manner in which they conduct the proceedings and yet they have not done so. The orders made at the Sixth Preliminary Hearing were the last chance to get this case ready for hearing and the respondent has failed to avail itself of this last chance. I conclude that if I were to adjourn the hearing and potentially make an order for costs as an appropriate sanction that the respondent would still conduct the proceedings in an unreasonable manner and fail to comply with

Tribunal Orders. It has shown this in the past and there is no reason to expect this behaviour to change in the future.

75. I have also considered whether partial strike out of part of the response and grounds of resistance would be appropriate and potentially a more proportionate approach, however the respondent's unreasonable conduct of proceedings pervades all areas of the response and I therefore conclude partial strike out is not appropriate.

76. The case must come to hearing and in all the circumstances and given the above and in light of the overriding objective I conclude that a less draconian sanction is not appropriate. For the reasons set out above I conclude that strike out is the proportionate and fair response. In the circumstances I strike out the respondent's grounds of resistance in their entirety.

Employment Judge Noons
5 September 2022