EMPLOYMENT TRIBUNALS

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BETWEEN

Claimant	**AND**	**Respondent**
JS		Accenture (UK) Limited

Heard at: London Central (by video) **On**: 13 September 2022

Before: Employment Judge Stout (sitting alone)

Representations
For the claimant: In person
For the respondent: Ms L Bell

JUDGMENT ON THE RESPONDENT'S STRIKE-OUT APPLICATION

(1) The judgment of the Tribunal is that the Claimant's claim is struck out under Rules 37(1)(b), (c), (d) and (e).

(2) The final hearing commencing 31 October 2022 is vacated.

REASONS

Notice of this judgment

1. This judgment is sent to the Claimant's mother and the Respondent. It is not sent direct to the Claimant. I understand that although the Claimant's mother is not the Claimant's representative, it is the Claimant's wish that all communications regarding the case be sent to her mother. I trust that the Claimant's mother will share the content of this judgment with the Claimant at an appropriate time, in consultation with the Claimant's treating medical practitioners.

Preliminary observations

2. The Respondent's strike-out application was heard at a remote electronic hearing under Rule 46 on 13 September 2022. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. There were no connectivity issues. The participants were told that it is an offence to record the proceedings.

3. At the end of the hearing, in the circumstances described in more detail below, I announced my decision to strike out the Claimant's claim, but indicated that reasons would be reserved. I had prepared those reasons, and was about to send them for promulgation on 20 September 2022 when the administration forwarded me an email that the Claimant's mother had sent on 14 September 2022, which it seemed to me justice required I should take into account and give the parties an opportunity to make further submissions before promulgating judgment.

4. Ultimately, following further submissions and orders by me as detailed below, I have concluded that strike-out remains the appropriate course in this case. What follows in these written reasons is therefore, first, the judgment that I had drafted as at 20 September 2022, and then a coda dealing with events and submissions following the hearing and setting out the reasons why I remain of the view that strike-out is the appropriate course.

The issues for the hearing on 13 September 2022

5. This final hearing in this case is listed for 10 days commencing 31 October 2022. The matters listed for consideration at this hearing are:

    a. The Respondent's applications of 15 August [1895] and 3 September 2022 [1910A] to strike out the Claimant's claims in whole or in part;
    b. The Claimant's application to amend her claim dated 23 May 2022 [1797], resurrected by the Claimant's mother (MAS) by email of 5 August 2022 [1891];

c. Whether the Claimant is disabled within the meaning of s 6 of the EA 2010, or stands a reasonable prospect of establishing the same at trial so that the claim should not be struck out now.

6. I dealt first with the Respondent's strike-out application. As that succeeded, the other matters were not dealt with.

This hearing: the Claimant's capacity and fairness of proceeding

7. At this hearing, the Claimant represented herself. In view of the history of this matter (which includes that I had appointed a litigation friend to act on the Claimant's behalf between July and September 2021 as I was satisfied that at that time she lacked capacity to litigate), I asked her questions at the start to make sure that she was well enough to participate in the hearing and had capacity to do so on this occasion. In response, she told me that she is currently in hospital in a psychiatric institution at The Priory, Southgate. She had been there for just over a week. Prior to that she was at home from June 2022. After the last hearing on 5 May 2022 (which she also attended from a psychiatric institution, albeit on that occasion with representation by a barrister, Mr O'Callaghan), she was in hospital for about a month. She confirmed that she felt she was well enough to participate in the hearing. She told me that she was accessing the hearing from a private room, but that her psychiatrist would be checking on her every 15 minutes.

8. The Claimant said that she had not appointed a representative since the last hearing, but her mother (MAS) has been communicating with the Respondent and the Tribunal on her behalf and the Claimant said that she wishes that to continue. I noted that on the Tribunal's electronic record, the Claimant's mother is still listed as her representative, but that is incorrect as by email of 5 May 2022 at 8.00 [1695] her mother had notified that she was no longer representing the Claimant and the Claimant would henceforth be representing herself.

9. In answer to my questions, the Claimant confirmed that she wished at this hearing to pursue her application to amend her claim to include the items on the List of Issues that were italicized in the List produced following the last Preliminary Hearing on 5 May 2022.

10. I sought to establish whether the Claimant had had notice of the Respondent's strike-out applications. The Claimant at the start of the hearing confirmed that she was aware that the Respondent was applying to strike-out, and said that she had been provided by her mother with notes regarding what her mother thought the hearing would be about. However, she explained that she had not been able to read/access her emails because reading emails from the Respondent often 'triggers' a deterioration in her mental health and causes her too much distress. She did not have a copy of the Respondent's skeleton argument, or the letters making the strike-out applications, or the bundle. Her position was that her inability to deal with her emails was a long-standing issue of which the Respondent was aware and she was able to refer by date to emails where her

mother had notified the Respondent of her difficulties with reading emails. I observe at this point that although there are several emails from the Claimant's mother dealing with the topic of the Claimant not reading emails, there has been no unambiguous notice to the Respondent (or the Tribunal) that the Claimant has not (even with support) been reading or accessing her emails at all since the last hearing as now appears may have been the case. I deal with this correspondence further below when setting out the background to the strike-out application.

11. As the Claimant did not have any of the relevant documents, I sought to establish whether she had had appropriate notice of this hearing and, specifically, of the Respondent's strike-out applications. The Respondent's strike-out application of 15 August 2022 was sent by email to both the Claimant and her mother. The Claimant's mother acknowledged that by email of 16 August 2022 and asked for an opportunity to respond to the application [1900A]. The Tribunal's notice that the strike-out application would be considered at this hearing was sent to the Claimant's mother and the Respondent (only) on 17 August 2022 ([1272]).

12. Although the Claimant's mother has not been the Claimant's appointed representative since 5 May 2022, I was satisfied that she was the person to whom the Claimant in August 2022 wished correspondence to be sent. Indeed, since the Claimant was not (she told me) reading her own emails at that point, the only way that notice of this hearing could have been sent to her was via her mother, which is what the Tribunal did. If this does not fall within 'the letter' of Rule 86(2), I am satisfied that it would in the circumstances be appropriate to vary the requirements of Rule 86(2) using the power in Rule 6, as the Claimant had in fact attended the hearing and stated that she was aware of the strike-out application, albeit that she had not read the documents because of the arrangements between her mother and herself and the steps she herself is taking to protect herself from engagement with the detail of this case because of her mental health.

13. In the light of my questions, I was at the start of the hearing satisfied that the Claimant had had the requisite notice both of the Respondent's application and that it would be considered at this hearing, since both the Respondent's letter and the Tribunal's notice that the strike-out application would be dealt with at this hearing had been sent to the Claimant's mother, who although not the Claimant's representative was the person that the Claimant had wished to communicate with the Tribunal on her behalf. The fact that the Claimant's mother had failed to pass on the letter or notice did not mean that notice had not been given. That was in principle (subject to the question of capacity) a failure in the arrangements that the Claimant ought to have made to ensure she received such correspondence and/or (it appeared) possibly a deliberate choice by the Claimant not to have her mother pass on such documents because of the potential for such documents 'triggering' her condition.

14. Nonetheless, despite being satisfied that the requisite notice had been given, I recognised that it was still necessary for me to be satisfied that it was fair to continue in the circumstances, given that the Claimant was in a psychiatric institution and did not have the relevant documents.

15. I inferred from the information the Claimant had provided about the 15 minute checks by her psychiatrist that the Claimant is currently regarded by her psychiatrist as very unwell and as posing a risk of harm to herself. This evidently gave me cause for concern about the Claimant's health and safety, but I considered that if she was in an institution with a psychiatrist checking on her every 15 minutes, she was probably in the safest place possible from the point of view of her mental health to participate in the hearing. In those circumstances, if she wished to proceed, and appeared to me to have capacity to make that decision, it seemed to me that it would be right to proceed (subject, still, to consideration of the position regarding documents). As the EAT observed in *Mukoro v Independent Workers' Union of Great Britain* (UKEAT/0128/19/BA), it is not for the Tribunal to make any decision about the best interests of a party – if they have capacity, that is a matter for them.

16. As to her capacity, as indicated, in July 2021 I had assessed the Claimant to be lacking capacity and appointed a litigation friend for her. I therefore had well in mind the legal principles in ss 1 to 3 of the Mental Capacity Act 2005 (MCA 2005), and the guidance in the *Mental Capacity Act Code of Practice (2007)* and the case law that I had applied on that occasion. The question for me was whether there was good cause for concern that the Claimant lacked capacity and, in particular, whether there was good cause for concern that she was unable to make the decisions that it would be necessary for her to make in this hearing within the definition in s 3 of the MCA 2005, i.e. whether she was unable: (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision; or (d) to communicate her decision. Having spoken to the Claimant for approximately 45 minutes by this time, and heard her explain why she wanted to represent herself and continue with the hearing despite her health, and heard her answer questions in detail about documents and emails even though she did not have access to the bundle, I was satisfied that there was no cause for concern in relation to any of the elements of the capacity test. The Claimant was coherent, well oriented in time and space, she understood the purpose of the hearing, and appeared to me to be on top of the detail of the recent correspondence and prepared to deal with at least the Respondent's strike-out application. I was therefore satisfied at the start of the hearing that, despite the Claimant's ill health, there was no cause for concern on this occasion about her capacity.

17. I remained concern, however, about the fact that the Claimant did not have the relevant documents. Even though this could in some sense be said to be her 'fault' (in the sense that as a party with capacity, who had chosen not to appoint a representative, she ought to have ensured that her mother provided her with everything necessary for the hearing), I understood that the Claimant's state of health had played a major part in the reasons why she did not have the documents (i.e. because the documents are 'triggering' for her and not having the documents is a means of self-protection). I also wished to ensure that she was able to participate effectively in the hearing if I continued to hear the Respondent's strike-out application. I asked the Claimant whether there was any way she could be sent at least the Respondent's skeleton argument today as I thought that document was one the Claimant could probably cope with. She provided an email address, which had been set up by her mother for her to use

specifically for the purposes of today's hearing (the email address took the form Tuesday13September@...) so that she would not have to go into her personal email inbox and encounter there material which might distress her. The Respondent's skeleton argument and letters of 15 August and 3 September were then sent to that email address. The bundle was too large to be emailed, but the Claimant did not want it anyway, and I was satisfied that it was unlikely to help, being over 2000 pages in length and so unwieldy that I myself had had a lot of trouble downloading it and had not therefore pre-read it at all. It also appeared to me that it was unlikely for the purpose of this hearing to be necessary to consider any particular document in detail or any issues of substance, except, if we got to that point, the question of whether the Claimant was disabled, which issue I anticipated the Claimant would be able to deal with as it would not require her to confront any of the substantive liability issues in the case (by which I mean the events in her employment with the Respondent that form the subject of the underlying claim and which are triggers for her).

18. We took a short break at 11.20am during which the Claimant sought to access the documents that had been sent. On resuming the hearing, the Claimant said that she was unable to read the documents that had been emailed to her because it would upset her too much. She confirmed, however, that she wanted to proceed with the hearing, and did not want a postponement. We agreed to proceed with Ms Bell going step by step through her skeleton argument and Ms Bell and I reading out parts of documents as needed to enable the Claimant to follow the points being made. I made clear that the Claimant should ask questions if she was unclear about what was being said at any point, and decided to proceed and 'keep under review' whether it was fair to proceed in this way.

19. For the rest of the morning, I was satisfied that it was fair to proceed in that way because the Claimant demonstrated that she was able to follow Ms Bell's arguments well and to make all the points that could be made on her behalf. The Claimant asked sensible, coherent questions when she did not know what Ms Bell was referring to, and clarification was provided either by me or Ms Bell. The Claimant was able to provide a detailed response on a number of matters. For example, she intervened to state that, contrary to Ms Bell's submission, she had provided the further information ordered at paragraphs 38 and 39 of the Case Management Order of 5 May 2022 by email of 8 July 2022. This email was not in the Respondent's bundle, but was located by me on the Tribunal's electronic system. It turned out that the email had not been correctly addressed to the Respondent's solicitor and thus had not been received by the Respondent. The Claimant was also able to speak in detail about what had happened about obtaining her medical records and explained how her GP had failed properly to comply with her subject access request, so that it was only more recently that her full GP records (748) pages had been obtained. The Respondent had not even realised that there were 748 pages of GP records available, but the Claimant was able to direct me to where this had been referred to in correspondence from her mother (a letter of 6 September 2022 appending what purports to be the Claimant's Disability Statement) and to explain that the full records had deliberately not been sent to the Respondent because there had not been time to redact the GP records. She was also able to identify by date and subject matter a number of her mother's other emails that she wished me to review, and these

were then located in the bundle and the substance of them read out by me to the Claimant.

20. In proceeding thus, we made slow but steady progress. Shortly before the lunch adjournment, I asked Ms Bell to outline what the Respondent was saying about breach of other orders and in summary terms about the whole of the strike-out application so that the Claimant could reflect over the break. The Claimant made a note, checking that she had understood correctly by asking further questions. We then took a break from 1.10pm to 2pm.

21. After the lunch adjournment, the Claimant confirmed again that she was well enough to continue. I asked if her psychiatrist had been round to check on her, at which point she said (contrary to what I had understood at the outset of the hearing), that it was not her psychiatrist who was checking on her, but a nurse. She said her psychiatrist does not know she is doing this hearing and would advise against it. (The Claimant's actual words were: *"my psychiatrist would kill me if he knew I was doing this"*.)

22. We then had a discussion as to whether to proceed with the hearing given that the Claimant knew her psychiatrist would advise against her participation. The Claimant was clear that she wished to continue. After discussion, I decided that as I was satisfied at present that the Claimant had capacity to conduct this litigation and to represent herself, it was a matter for her whether she took the advice of her medical practitioners, and also a matter for her as to what was in her best interests. In order to proceed, I considered I had only to be satisfied that it was possible to have a fair hearing and, for the reasons already set out above, I was so satisfied.

23. We then proceeded for another 40 minutes, during which Ms Bell made slightly more detailed submissions on the points she had outlined before lunch, and the Claimant responded to each so that I was satisfied that I had the Claimant's response in relation to each of the orders that the Respondent said had been breached, that I understood why the litigation since the last hearing had been conducted in the way it had been by her, and I understood also that she was very keen to progress the case and wished to do so despite her psychiatrist's advice.

24. However, at 2.40pm we reached the point of discussing specifically whether there could be a fair trial starting on 31 October, given where we had got to, at which point the Claimant became very upset and said she could not continue with the hearing. While crying, the Claimant said that she was not prepared for today and was told by her mother that she had only to come to discuss her disability. The Claimant said that she was 'not strong enough' to do it. I indicated to the Claimant how sorry I was about her difficulties, and that it was of course absolutely fine for her to leave the hearing, as it was clear that she was too unwell to continue. Given the stage in proceedings, and the approaching trial, however, I asked the Claimant whether she wanted before she left to say anything about what should happen now, including whether the preliminary hearing should continue in her absence or be postponed for a week or two or whether I should require her to produce medical evidence that she was fit to continue with the proceedings or to a full hearing. The Claimant said a number of things in response to this, but the

only thing I heard clearly was that she did not want the hearing to be postponed. She then left the video screen and a psychiatric nurse spoke to the screen briefly. She asked whether we knew that the Claimant was in a psychiatric institution (thus indicating that the institution staff had in fact despite the 15 minute checks been unaware that the Claimant was participating in a hearing). I confirmed that we did know where the Claimant was, but that it was absolutely fine for the Claimant to leave and that I hoped she would take good care of the Claimant, which she said she would before signing out.

25. Following the Claimant's departure, I heard no further submissions of any substance from the Respondent. Although the hearing had ended abruptly, I had in fact heard submissions from both parties on the substance of the Respondent's strike-out application before the Claimant became too unwell to continue. Despite the Claimant's assertions at the end that she had not come to the hearing prepared to deal with the strike-out application, what she had said at the start of the hearing, and her participation during the hearing, made it clear to me that (despite the difficulties with the documents) she had come to the hearing ready to respond to that application, that the notes her mother had provided to her in preparation for the hearing had covered everything that was relevant to the strike-out application and not just the issue of disability, and the Claimant had in my judgment responded to the application very competently, to the extent of pointing out matters in documents that the Respondent had not noticed or had not received.

26. In short, I was satisfied as required by Rule 37 that the Claimant had had a reasonable opportunity to make representations in response to the Respondent's strike-out application. I appreciate that both parties might have wanted to say more about the application, but in my judgment both had said enough for me to be able fairly to make a decision on the application.

27. I did consider whether to adjourn the hearing for a week or two, but decided against that as I did not see that the position was likely to change in a week or two. The final hearing is only 6 weeks away and the parties need urgently to know whether that is going ahead or not. Although the Claimant has provided no medical evidence at all since the last hearing on 5 May 2022, she is clearly very unwell and was attending this hearing against the advice of her treating medical practitioners. In the circumstances, I considered that I did not need medical evidence to know that the position was unlikely to change significantly in the next few weeks and the strike-out application needs to be determined prior to the final hearing so that the parties know where they stand. I decided therefore that an adjournment of this hearing was not in accordance with the overriding objective of avoiding delay or saving expense, and nor was it required in the interests of justice because the hearing had in substance completed prior to the Claimant becoming so unwell that she could not continue. For the reasons I set out further below, I also did not consider medical evidence was required in order to inform my decision on the strike-out application.

28. I accordingly announced my judgment orally at the hearing and indicated that reserved written reasons would be provided.

Background to the strike-out application

29. The Claimant commenced employment with the Respondent on 18 September 2017 as a Technology Consulting Analyst. The claim form in these proceedings was filed on 4 April 2020. Her Details of Claim set out a comprehensible narrative, but it was very difficult to identify what legal claims she sought to bring. The Claimant was when she commenced the claim on sick leave from her employment with the Respondent and that remains the position.

30. According to the Respondent's Grounds of Resistance, the Claimant had a number of periods of sick leave prior to bringing this claim, including between 23 November and 31 December 2017 (tiredness and dizzy spells), between 1 November 2018 and 18 January 2019 (pernicious anaemia), between 18 November 2019 and 2 March 2020 (stress-related symptoms). On 3 March 2020 the Claimant raised a grievance, the contents of which were largely repeated in her claim form.

31. The claim was served on the Respondent on 10 August 2020 and given standard directions to take it to a final 8-day hearing between 27 April and 6 May 2021.

32. The first case management hearing was postponed because of the Claimant's ill health on 17 December 2020. That application was made by the Claimant's sister. The Claimant was too unwell to attend the postponed hearing on 27 January 2021. Medical evidence had been provided indicating that the Claimant was suffering from clinical depression of moderate severity and generalised and phobic anxiety.

33. That hearing went ahead on 27 January 2021 with the Claimant represented by a CAB advisor (Ms Sullivan) who had managed to obtain instructions from the Claimant on the basis of which she prepared a draft list of issues. It was agreed that Ms Sullivan would supply a complete list in the format proposed by the Respondent within 7 days. Ms Sullivan said that the Claimant was very disabled by her conditions at that time and would need regular breaks in the hearing, especially when giving evidence. With the parties consent at that hearing, I also listed the matter for judicial mediation.

34. The Claimant did not comply with the orders arising from that hearing, however, because she was too unwell. She did attend the mediation on 3 March 2021 for a short period, but the mediation was not successful.

35. A further preliminary hearing was listed for 25 March 2021, but medical evidence from Dr Zoha (the Claimant's psychiatrist) confirmed that the Claimant was not fit to attend and the hearing was vacated. Given the Claimant's ill health and lack of clarity regarding the claims, the final merits hearing was vacated and converted to a preliminary hearing. I gave directions requiring medical and other evidence as to the Claimant's capacity and fitness to participate in the proceedings.

36. The Claimant did not comply with those orders either. The Respondent made a strike-out application on 21 April on grounds of breach of orders and failure actively to pursue the claim. By email of 22 April 2021, the Claimant's family informed the Tribunal and the Respondent (with supporting medical evidence) that the Claimant was in a psychiatric institution and not fit to attend the hearing. They sought a stay of proceedings on her behalf. I was concerned as to whether the Claimant had capacity to conduct the litigation, and about the basis on which her family was purporting to conduct the litigation on her behalf. I vacated the 27 April 2021 hearing [1194], and issued provisional views on the issue of capacity and next steps inviting the parties' submissions in writing.

37. In those submissions, the Claimant's family's position was that the Claimant's condition may improve in six months' time. Dr Oliver Foster (Consultant Neurologist) considered that the Claimant's condition may *"respond to treatment in the coming weeks"*.

38. Having received those submissions, by order of 16 June 2021, I listed a preliminary hearing for 15 July 2021 to determine the capacity issue and what further directions should be given. Given the difficulties there had been previously with medical evidence produced by the Claimant or her family being late or vague, I issued detailed orders as to what the medical evidence needed to deal with, and also made a witness order against Dr Zoha and the Claimant's sister, NS.

39. At a hearing on 15 July 2021, at which the Claimant was again not present as she was too unwell, I determined the Claimant lacked capacity to conduct the litigation and her sister (NS) was appointed as litigation friend. A Law Centre representative was present at the hearing assisting the Claimant's mother and sister, but she was not representing the Claimant, nor able to continue assisting the family. I listed an Open Preliminary Hearing for 28 September 2021 to consider among other things whether the case should be struck out under rule 37 if there was insufficient prospect of the claim being heard in a reasonable time. I provided guidance to NS as to how she should approach her role of litigation friend, and the requirement to conduct proceedings on the Claimant's behalf but in her best interests. I gave orders for the production of further medical evidence by 7 September.

40. At a hearing on 28 September 2021, the Respondent was applying to strike out the claim for breaches of orders and failure actively to pursue the case. NS attended as litigation friend, but the Claimant then joined the hearing too. I recorded the following in the case management order:

> [NS] indicated that the Claimant's health had in fact improved significantly and the Claimant had read the bundle for this hearing and was assisting her with making submissions. The Claimant then came on screen to speak to the Tribunal. She said that she is feeling a bit better, and she is shocked to see what has happened on this litigation while she has been 'out of it'. She said that she had been overwhelmed and had broken down. She apologised to the Respondent and the Tribunal that she had not been able to deal with the litigation. She thanked everyone for their help. She wants the Respondent to know that although she feels she should litigate her claim, she does not want the Respondent to waste money or time or resources. She explained that although she had read the bundle, she had done so without looking at the ET1 or the substantive issues

> that are 'triggers' for her. She feels that she needs therapy before she can dive into the issues. She agreed that as she was feeling better and able to give instructions to her sister, it was right that NS should now be simply her 'representative' rather than 'litigation friend'.

41. There was medical evidence from the Claimant's GP in a letter dated 25 August 2021, the content of which I recorded in the case management order as follows:

> Dr Gidley's view is that although the Claimant can conduct litigation to an extent, it would currently be detrimental to her health to attempt to prepare a witness statement. She states that "it is difficult to comment on time frames but potentially six months or spring 2022 as mentioned would be more realistic". The way this is phrased indicates that this is a timeframe that has been suggested to the GP, possibly by the Claimant, but nonetheless the doctor has adopted it as her view. Dr Gidley's view is that because the Claimant wishes to continue with proceedings, dismissing them would not provide the appropriate resolution for her.

42. There was other evidence about the Claimant's condition that I recorded as follows:

> The letters of 7 and 23 September from MAS indicate that the Claimant remains very unwell, her condition is unstable, efforts by her to speak to the Claimant about the claim were not successful and distressed the Claimant, and on 22 occasions she was not well enough to speak to the GP. However, the letter of 23 September indicates that therapy commenced last week in the community and that there is an intention to provide intensive in-patient therapy to the Claimant at the Nightingale Hospital as Dr Zoha recommended when a bed becomes available. At this hearing, NS clarified (and I accept, notwithstanding the lack of documentary evidence) that the Claimant is due to receive three types of therapy (CBT, psychotherapy and trauma-based therapy) and will receive 28 days in-patient treatment. NS indicated that the Claimant would have completed two of the therapies by January 2022 and felt she would be ready to engage with the claim again then, although she will still be receiving therapy into February 2022.

43. I concluded as follows:

> 6. Although the medical evidence is not as detailed as it could be, it seems to me that, taking Dr Zoha's and Dr Gidley's evidence together with the current medical treatment plan, that there is a reasonable prospect that the Claimant will be well enough to engage with the substance of this claim by spring 2022. The fact that she has been able to attend today, and cope well with doing so, provides some further support for the positive prognosis of the treating professionals.
>
> 7. Against that, I must consider the prejudice to the Respondent of further delay. The course of the proceedings to date has undoubtedly prejudiced the Respondent in terms of the amount of work and time that has been put in to reach this point, but the Respondent has not been able to point to any specific prejudice that will be suffered from a further delay. Memories may fade, there may be issues with documents or witnesses, but there are no specific issues raised at this point. Although the claim does involve consideration of events going back to 2017, the claim itself is only 18-months' old. Many other cases take much longer to get to hearing, for a variety of reasons. A stay, or period in which 'nothing happens' on the case, will not in itself cost the Respondent anything. In my judgment that is the right course in this case. Based on her current prognosis by March of next year the Claimant will be in a position in terms of her health to conduct this litigation on an equal footing with the Respondent and the delay will

> not mean that is not possible for there to be a fair trial of this matter. The Respondent's application for strike-out is therefore dismissed.

44. I stayed the proceedings until 28 February 2022, listed a further case management hearing for 30 March 2022 (with directions for the parties to make progress on a draft list of issues by that date) and listed the case for a final merits hearing over 10 days commencing on 31 October 2022. As the Claimant had clearly regained capacity, NS was removed as litigation friend, and appointed in the alternative as the Claimant's representative.

45. On 13 December 2021, the Claimant (using her own email address) wrote to the Respondent and consented for *"any member of the [S] family from the [redact] email address and this email address ([the Claimant's email address) to deal with any matters pertaining to me…"*. The Claimant did not write in the same terms to the Tribunal and therefore NS remained the Claimant's appointed representative so far as the Tribunal was concerned.

46. Following the 'stay' there was a preliminary hearing on 30 March 2022 at which it was intended that the List of Issues should be finalised, but that was not possible as a result of the Claimant's failure to comply with the orders in advance of that hearing [1239]. Ms Millin of counsel appeared on behalf of the Claimant. On enquiry, it appeared that Ms Millin had personally had no contact with the Claimant, but had spoken with another sister (SS) who had informed her that the Claimant was unwell and was in hospital. In that case management order I observed that I had *"very significant concerns about the way this litigation is being conducted by the Claimant/ her family"* (para 6), and set out that:

> 7. It is therefore very important that going forward, if the Claimant has capacity, she either:
> a. conducts the litigation herself (which means personally authoring all correspondence and attending all hearings), or
> b. appoints a single representative within the meaning of s.6 of the ETA 1996.
>
> 8. If the Claimant decides to appoint a representative, she must personally notify the Tribunal as to the identity of that representative and their contact details and she must personally give instructions to that representative for the remainder of the litigation. The representative cannot act otherwise than on the Claimant's instructions.
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> 9. The Claimant's family cannot conduct this litigation for her. If the Claimant continues to permit her family to do so, the claim is likely to be struck out for unreasonable conduct and/or failure actively to pursue the claim.

47. I made further case management directions and listed the matter for another preliminary hearing on 5 May 2022 to consider striking out the claim for non-compliance with orders and/or unreasonable conduct and/or because it had not been actively pursued by Claimant, and with a view to finalising the list of issues in the light of further information from the Claimant [1245]. In this order I also gave orders requiring medical evidence, including evidence as to the Claimant's capacity by 21 April 2022. Because of my concerns about whether the Claimant was in fact conducting the litigation, I ordered her to attend the hearing on 5 May

2022, whether or not she had a properly appointed representative. If she was not well enough to attend, I ordered her to provide medical evidence to that effect. I ordered the Claimant by 7 April 2022 personally to write to the Tribunal to identify which individual person she wished to represent her in these proceedings.

48. Later than stipulated by the case management order, by email dated 8 April 2022 from the Claimant's email address, the Tribunal was notified that Claimant wished her mother MAS, to act as her appointed representative, but with assistance from family members as English is not the Claimant's mother's first language. By email of 14 April 2022 sent from SS's email address a further letter was sent purporting to be from MAS, stating that the Claimant remained very unwell and unable to conduct litigation on her own.

49. By email of 14 April 2022, MAS wrote:

> the truth is that [Jemilat] is not stable enough to represent herself fully at all times. This is partially inherent to her trauma, other reasons include factors such as her medication being finetuned, experiencing psychotic breaks, and the effects of her being overwhelmed and unable to control etc. This is disruptive and the Claimant has always worried that this will be annoying for others in attendance if she was to turn up to a hearing while these symptoms had begun or showed signs of being at the surface.
>
> Physically, she struggles with the physical effects of stress.
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> Similarly, it is impossible for her to open, read and respond to correspondence on her own which will definitely lead to missed deadlines such as the 7th of April 2022 where she thought she could cope and ultimately missed the deadline to place herself as her own representative - **causing me to send an email assuming the position**. [emphasis added]
>
> We therefore rely on periods of dissociation and emotional numbness when she is more 'normal' and stable to have her take part. The problem is that this state cannot be predicted in advance and does not hold up well for extended periods of time nor under pressure - regardless of the nature of the pressure.
>
> Somatoform means that even if she seems to be okay, she can suffer physical symptoms when exposed to stress (such as panic attacks or severe pains for instance) that mean she is no longer able to join - as has been the case before when she believed that she would be fine to take part in the call.
>
> As she spends a bulk of her time with me, I hope she can hold on and join if I am present also.
>
> **Current Situation:**
>
> The Claimant did not feel safe going into hospital and was therefore provided with home check up. She was trying her best to work on the assignment (asking to borrow books etc.) but her concentration continues to be quite bad and she needs to read over and over again to make sense of, retain and use the information. Her diagnosis of severe depression in particular makes simple daily tasks difficult and I can see how this can come across as not wanting to be compliant. Last time we were meant to make a submission in March 2022, she simply couldn't finish the work on time, despite working in the library until closing time and then moving to another one that closed at midnight. Thankfully, there were very few people there at the time. Not only was this hard because of the fatigue, anxiety, agoraphobia and the fact that she is confronting events that trigger trauma and cause distress. What others can do in hours in a few weeks takes her longer - even at her personal best and with the support made available.

> She is ashamed of this and has asked that no further time be sought. However, the anti-depressants have been changed to venlafaxine in the first week of April (because Escitalopam did not alleviate the depression). This (with a simultaneous use of Olanzapine) is causing significant problems - nausea, worsened headaches etc. with worsened concentration, extreme drowziness, fatigue and suicidal thoughts. As this is taken twice a day, even when I return home the next morning it is time for another dose, so she is struggling at present.
>
> Prior to this, we were still managing to work through and it was easier to convince her that providing the names will not get people into trouble (so we now have the names). However, she has been experiencing covid symptoms (as confirmed homerton clinician and ambulance's assessment today (the 13th of April 2022)) - and while she did not explicitly say she cannot continue, we have not managed to make any further progress on the orders.
>
> **Medical Evidence:**
>
> **We are concerned that if we go ahead with requesting a medical note now, her doctor would no-doubt say she is in no state to attend hearings**. We therefore do not know if we should wait until she stabilizes from the medication (estimated 2-4 weeks from date it was initially administered) and, what are explained and expected, by medical professionals to be covid symptoms improve. Any guidance on this would be greatly appreciated. [emphasis added]

50. By order of 25 April 2022, I noted the appointment of the Claimant's mother, MAS, as her representative [1246], and queried whether an interpreter would therefore be required for the hearing on 5 May 2022 in light of MAS's language difficulties. I made clear that the orders in relation to medical evidence must be complied with. In this order of 25 April 2022 I had overlooked that the Claimant's mother had said that she had actually sent the letter of 8 April 2022 appointing herself as the Claimant's representative.

51. A letter from the Claimant's GP dated 25 April 2022 (1136) notes that the Claimant *"has been suffering from a mental health condition (possibly Psychotic Depression / PTSD but I am awaiting a recent letter from her Psychiatrist) and she is currently under the Home Treatment Team. I understand she has a court case coming up and would like to make you aware that this is causing significant additional stress and that she may not be able to attend Court or indeed provide written documentation and she may need an extension. I have asked her to request a letter from her Psychiatrist too, when she sees him next 17th May 2022."*

52. By letter of 28 April 2022, the Respondent set out a further application to strike out the claim.

53. By email dated 5 May 2022 at 8:00am (shortly before the preliminary hearing was due to start), MAS wrote to the Tribunal stating that the Claimant would be representing herself going forward and she was no longer representing her [1695]. As I have already noted, the Tribunal failed to note this change and so MAS remained on the Tribunal's electronic system as the Claimant's representative.

54. At the preliminary hearing on 5 May 2022 the Claimant was represented by counsel, Mr O'Callaghan. The Claimant also joined the hearing. It transpired that

she had recently been admitted as an in-patient at a psychiatric institution, but the Claimant's counsel was satisfied that she was able to give him proper instructions, and I was satisfied on questioning her that she had capacity to give instructions and, indeed, for most of the hearing, she participated actively in the hearing, answering questions from the Tribunal and giving instructions to her counsel [1248]. She was unable to continue when she got to a point that was particularly 'triggering' for her, but asked that her counsel continue in her absence.

55. At that hearing, we were able largely to finalise the List of Issues. Two versions were produced, one which identified claims that were already in the proceedings, and one with italics to indicate claims of which the Claimant had purported to give *"further particulars"* but which would have to be the subject of an application to amend. I gave further directions intended to ensure the parties were ready for trial on 31 October 2022. The list of issues now included claims for direct disability discrimination, indirect disability discrimination, failure to make reasonable adjustments, disability harassment, sexual harassment, sex discrimination, unlawful deduction from wages, discrimination arising from disability and victimisation. There are 68 separate allegations of discrimination, with some limited overlap between allegations. The allegations span the period from November 2017 until April 2020. 14 individuals are accused of wrongdoing.

56. At the hearing on 5 May 2022, it was not intended that there should be a further preliminary hearing prior to trial. I noted (paragraph 11) that the Claimant *"had realised she needed to take control of the litigation herself and not let her family try to deal with it for her"*. I welcomed this, warning the Claimant again (as I had on 30 March 2022) that *"from the history of this matter, the Claimant without a legal representative was in danger of/possibly had conducted the proceedings unreasonably"* (paragraph 12).

57. As to the Respondent's application to strike out, I accepted that there had been a failure to comply with a number of Tribunal orders, but I decided that it was *"not in the interests of justice or in accordance with the over-riding objective to strike out the entire claim because (in short) where the Claimant had in the draft List of Issues set out coherent claims, with names and dates as ordered on 30 March 2020 there was no reason why there could not be a fair trial at the end of October in respect of those matters and strike out would therefore be disproportionate"* (para 20) [1253]. I did, however, strike out the matters in the draft list of issues which were too vague to go forward to a full-hearing, and I worked with the parties to identify into which category each allegation in the 37-page document produced by the Claimant fell.

58. The case management orders that remained to be complied with following the 5 May 2022 hearing ("the May CMOs") were, in summary, as follows:

    a. R to submit Amended Grounds of Resistance by 26 May 2022;
    b. R to produce a Summary List of Issues by 2 June 2022;
    c. C to provide full details of parts of her claim (i.e. missing dates and the 'somethings arising from' for the purpose of her disability discrimination

claims) by no later than 21 July 2022 (this was amended by application after the hearing [1780]);
d. C to send medical evidence relevant to her impairments by 9 June 2022;
e. R to confirm whether it accepted C was a disabled person by 30 June 2022;
f. C to provide a schedule of loss by 7 July 2022;
g. Exchange of documents relevant to List of Issues by 21 July 2022;
h. Parties to agree bundle for final hearing by 1 August 2022;
i. Witness statement exchange by 19 September 2022.

59. After the hearing Mr O'Callaghan confirmed to the Respondent that MAS was no longer representing the Claimant and that the Claimant was conducting the litigation herself [1779]. Unfortunately, Mr O'Callaghan stopped representing the Claimant on 16 May 2022, having had no contact from her or anyone connected to her [1775].

60. On 23 May 2022, MAS sent an email purportedly on the Claimant's behalf, requesting among other things, that she be given permission to amend her claim [1797]. The email also confirmed that the Claimant was unwell and remained in hospital. By email dated 26 May 2022, the Respondent confirmed it did not object to the application to amend the List of Issues pertaining to disability only [1807].

61. In accordance with the May CMOs, the Respondent filed and served its Amended Grounds of Resistance on 26 May 2022 [1809], providing this in clean and "PDF redline version" to enable comparison with the original document.

62. One of the Claimant's claims is that use of "red line" by the Respondent constituted indirect disability discrimination as she found it distressing, and its use by the Respondent's solicitors she found distressing too, although I observe that it is a standard practice, and I can see from the bundle that the Respondent's solicitors had used red line earlier in the month when corresponding with Mr O'Callaghan about the List of Issues without objection ([1691]).

63. Also on 26 May, the Claimant attended at the Respondent's offices without notice requesting to view her laptop. It was not possible to give access that day, but the parties have been in correspondence since regarding the laptop. This incident caused the Claimant distress.

64. On 27 May 2022, taking the view that MAS's letter concerning the amendment application was ambiguous, I ordered the Claimant to confirm by 3 June 2022 that the only amendment she wished to make was to the list of medical conditions relied upon for the purposes of disability [1265, 1828].

65. In accordance with the May CMOs, the Respondent filed and served a Summary List of Issues on 1 June 2022 [1830].

66. On 3 June 2022, MAS wrote to the Tribunal purportedly on the Claimant's behalf [1831] giving a reply to the order concerning the amendment application that remained ambiguous. She did, however, confirm that the Claimant would supply the further details of claim ordered in the May CMOs by 22 July 2022. Under the

heading *"Representation"* at the end of the email, she wrote *"I am only this time to not miss the deadline and cause any more trouble because she could not answer herself. I apologise for any mistake in my English"*. I observe that this suggested that MAS was acting without the Claimant's authority or, even, knowledge.

67. On 8 June 2022 the Respondent confirmed to the Tribunal that it did not object to the Claimant's application to amend which it understood was limited to section 2.1 of the List of Issues pertaining to the conditions relied on as disabilities only [1834].

68. In purported compliance with the May CMOs, on 9 June 2022 MAS sent a link to some of the Claimant's medical records and a document that was stated to set out *"a summary of key issues from the 164 page hospital record"* [1839]. MAS added: *"She is still struggling because of red email from Respondent but I will make sure she open and read all emails she has miss since that time"*.

69. On 13 June 2022, MAS wrote to the Tribunal to say that the Respondent's understanding of the remit of the Claimant's application to amend was incorrect and that the Claimant had wished to apply to amend to include in the List of Issues all the matters that were in italics in the List of Issues produced on 5 May 2022 [1840]. However, at the end of the email, MAS wrote:

> "In this case, the Claimant has been advised by myself to suspend her application to incorporate the italicized items into the List of Issues and instead proceed with the application to consolidate the list of medical conditions only and seek counsel's input on how to proceed instead to avoid further applications to amend the list of issues going forward".

70. The Respondent replied to MAS on 13 June 2022 [1853] and expressed its concern that she was now again purporting to represent the Claimant without the formal authority of the Claimant. The Respondent also explained in this email that in order to be given access to a laptop configured as per her previous laptop she needed to consent to her password being reset by the Respondent's IT team. The Respondent asked the Claimant to confirm whether she was conducting the litigation herself or appointing her mother as her representative.

71. In reply of 15 June 2022 [1852] MAS wrote: *"[The Claimant] was recently hospitalised. I will need to support the Claimant until she is well enough to take this up again by herself in order to avoid any further postponements or delays. I have told her to decide and put this in writing and I am sure she will do so as soon as she is able".* Despite this, there was still no communication from the Claimant one way or the other to say whether she wished her mother to represent her.

72. By order dated 22 June 2022 [1267] I indicated that my understanding in the light of MAS's letter of 13 June 2022 was that the Claimant's application to amend was limited to paragraph 2.1 of the List of Issues and not the other italicised text. I approved that amendment by consent.

73. By email dated 27 June 2022 [1857] MAS wrote to the Respondent (but not the Tribunal): *"While I have not been appointed as [the Claimant's] representative, I need to communicate on her behalf as she has been unable to do this herself".* MAS stated that the Claimant was still not well enough to open her emails and had not *"been stable"* since visiting the Respondent's offices on 26 May and receiving the redline email. MAS sought to vary the dates for compliance with the next four CMOs by 12 days.

74. By email of 29 June 2022 ([1858]), MAS sent an email to the Respondent notifying it that changes had been made to the *"summary document"* which is the document including extracts from the Claimant's medical records. This time the document was stated to include: *"Extracts from Occupational Health reports"* which it was said *"Should give a small indication of what the Respondent knew of [the Claimant's…] state and impact of her health* (sic)*"*

75. The Respondent replied on 30 June 2022 [1859] expressing its continuing concern that the Claimant was not conducting the litigation herself and remained too unwell to do so. In an attempt to remain flexible, the Respondent agreed to the extensions that MAS requested, save for the date that was relevant to the Respondent only.

76. On 30 June 2022 [1862] the Respondent wrote to the Tribunal, to request a preliminary hearing in order to determine the issue of disability and case management directions in readiness for it. The Respondent asserted that although MAS had disclosed some medical evidence on 9 June in purported compliance with the May CMO's, *"the Claimant has failed to provide medical evidence from her GP, treating consultants or private practitioners that evidence a diagnosis of any of the alleged impairments at any of the dates relevant to the claim. The Claimant is also yet to provide evidence as to the impact of the alleged impairments on her ability to carry out normal day-to-day activities."*

77. In further correspondence of the same date, the Respondent [1869] set out its concerns about the Claimant's ongoing conduct of the claim, and MAS's correspondence despite not being appointed as the Claimant's representative or apparently receiving instructions from the Claimant.

78. The Claimant's mother responded to the Respondent's application for a preliminary hearing on disability by letter to the Tribunal of 6 July 2022 [1873]. She did not in this letter clarify the position as to representation or identify on what basis she was corresponding. In this letter, MAS explained that difficulties had been encountered in obtaining the Claimant's GP records, her GP having not complied with a subject access request, but provided only an 11-page summary. She accepted that the 164-page Hospital Record *"that was eventually provided to the Respondent"* was *"not the complete record"*, but submitted that it contained relevant information (which was set out). It stated that the Claimant that following receipt of the redline email from the Respondent, the Claimant had had *"a psychotic break and was no longer able to open her emails".* The letter continued, *"We now know that during this time, several (although, not all) responses to requests for medical records had been sent to the Claimant but we were unable to access them and make them available to the Respondent.*

Attempts to access her records directly from the organisations was not possible without her written consent. …" The letter continued in a way that suggested that the Claimant had then accessed (or MAS had accessed) her emails. MAS stated: *"Once they [i.e. the medical records] were retrieved, they were read, redacted and inserted into the medical summary to make it easy to identify relevant information easily and provided to the Respondent. The Respondent was then made aware of these updates …".* MAS suggested that the update to the medical summary provided on 29 June had included all the relevant medical documentation, but that the Respondent had chosen to ignore this and instead apply for a preliminary hearing on the issue of disability. MAS stated that although the *"summary document"* appeared in large part to contain generic information about various medical conditions, it in fact related specifically to the Claimant.

79. On 8 July 2022, MAS sent to the Tribunal a document *"Final LoI – 22-6-22 (Known Dates Inserted)"* in purported compliance with the May CMOs requiring provision of further details of the claim. The Claimant drew my attention to this at the hearing. The Respondent did not receive this because MAS mis-typed the Respondent's solicitor's email address. The first time the Respondent saw this document was therefore at this hearing. Had the Claimant been reading her emails, this issue might have emerged earlier because the Respondent raised the fact that this document was missing in its strike-out application of 3 September 2022, but of course that email was sent only to the Claimant and not MAS and so was not read by the Claimant. MAS could have done something about it of course, but did not.

80. On 11 July 2022, in response to this correspondence, the Tribunal wrote to the parties to confirm that an Open Preliminary Hearing would be convened on 13 September 2022 to determine the issue of disability [1269]. In readiness for that hearing, I ordered the Claimant to *"provide a signed witness statement dealing with the question of disability (which may take the form of a statement confirming the truth of material set out in the Medical Symptoms and Summary document if that is appropriate) 14 days before the hearing"* (i.e. by 31 August 2022).

81. By email of 19 July 2022, MAS filed and served the Claimant's Schedule of Loss document in compliance with the May CMOs (with the 12-day extension agreed between the parties) [1880].

82. The Respondent and MAS corresponded further at the end of July 2022 [1881-1883] and agreed proposed extensions to the May CMOs as follows:

    a. By 23 August 2022, the parties to send each other copies of all documents relevant to the list of issues for the final hearing including remedy;
    b. By 3 September 2022, the parties to agree documents that are going to be used at the hearing. R to prepare the bundle and send electronic and hard copy to C.
    c. By 3 October 2022, the parties to exchange witness statements.

83. In my absence, REJ Wade approved the agreed extensions by order of 3 August 2022 [1271].

84. In a letter to the Tribunal of 5 August 2022 ([1891]), MAS requested *"reinstatement"* of the Claimant's application to amend the List of Issues to include the italicized items from the 5 May 2022 hearing. MAS stated that she had *"wrongfully asked to suspend said application"* in her letter of 13 June 2022. She continued, *"I had no right or authority to withdraw the Claimant's application because not only I am not the Claimant's representative, but the Claimant had not actually agreed to this. This error was only identified recently and I assured the Claimant that I would make an attempt to rectify my mistake"*. This letter makes reference to 'the most recent letter from Queensbridge Group Practice' (i.e. the Claimant's GP). So far as I am aware, that is a reference to the letter of 25 April 2022 quoted above.

85. By letter of 15 August 2022, the Respondent wrote to the Tribunal, copying in both the Claimant's personal email address and MAS, objecting to the Claimant's resurrected application to amend and applying for the Claimant's claims to be struck out on the grounds that have been pursued at today's hearing [1895].

86. MAS acknowledged that application on 16 August 2022 and requested the opportunity to submit a response [1900A].

87. The Tribunal's notice that the strike-out application would be considered at this hearing was sent to MAS and the Respondent on 17 August 2022 ([1272]).

88. On 23 August 2022, in accordance with the May CMOs (as varied), the Respondent provided disclosure to the Claimant of documents for the final hearing. The covering letter also sought the Claimant's input in relation to the bundle for this hearing and the bundle for the final hearing. This email was not sent to MAS given her confirmation of 5 August 2022 that she was not acting as the Claimant's representative. The Claimant did not respond to this email as she was (she explained at this hearing) still not reading her emails at this point.

89. The Respondent did, however, copy MAS into its email of the same date to the Tribunal in which it notified the Tribunal and MAS that it had sent a letter to the Claimant regarding disclosure which it had not copied to MAS.

90. By email of 25 August 2022 ([1905]) MAS wrote: *"The Claimant has not expressed any desire to formally appoint me as her representative. The matter of representation is being confused with the matter of communication. I am communicating with the Respondent on the Claimant's behalf. … I would like to remind the Respondent that the Claimant had begun checking her email with appropriate support and supervision while admitted to the psychiatric ward – she struggled but only ceased again when the Respondent continued its trademark of sending her triggering emails. She is wading through a great deal in an effort to keep going with our support. I cannot take away her trauma responses but I can do my best to help her navigate her triggers. Stepping in to communicate on her behalf has only been in the interest of the overriding objective and avoiding any further delays…"* MAS then suggested that the Claimant had asked that messages sent while she was in hospital were sent through her, but I have not seen any such correspondence. Indeed, I have not seen any correspondence in which any notification was given to the Respondent of the dates that the Claimant

has most recently been in hospital. The letter continued: *"The Claimant picks herself up but does not manage to hold up for very long and asked for help in an attempt to ensure that her fluctuations do not interfere with proceedings. … I am not the Claimant's representative and as such, the only request made of me is to ensure that emails are picked up and the required support is sought to have them read and responded to in as timely a manner as possible. I politely ask that the Respondent sends the evidence to this email address because the Claimant's difficulty with emails is a longstanding issue that the Respondent has been aware of …"*. MAS made clear that *"we are prepared to send the Claimant's evidence and would be keen to work with the Respondent".*

91. In the absence of confirmation from the Claimant that MAS was her appointed representative, however, the Respondent did not consider it appropriate to correspond further with MAS regarding disclosure.

92. By email of 30 August 2022 ([1908]) the Respondent wrote to the Claimant personally indicating that it had now had the opportunity to conduct a full review of the medical evidence that MAS had provided on 9 June and 29 June 2022 and found that there had only been disclosure of heavily redacted copies of:

    a. An 11-page summary of the Claimant's GP records dated 12 May 2022;
    b. 14 pages of the 40-page report containing the Claimant's GP records dated 17 July 2017;
    c. 32 pages of the 164-page report containing her hospital records dated 26 May 2022.

93. The Respondent acknowledged that the May CMO had permitted the Claimant to disclose only *"the parts of her GP and other medical records … that are relevant …"* and that the Claimant *"may blank out anything that is clearly not relevant"*, but asserted that relevant information had been withheld. The Claimant was asked by 5 September 2022 to provide the missing documents and/or explain the basis for the redactions and documents that had been withheld. The Claimant did not reply to this as she was still not reading her emails.

94. By letter of 3 September 2022, sent to the Tribunal and the Claimant personally, the Respondent made a further application to strike out parts of the Claimant's claims in the event that the Tribunal did not accede to its application of 15 August 2022 to strike out the whole of the Claimant's claim ([1910A]).

95. By emails of 4 September 2022 to the Claimant the Respondent indicated it would be providing her with an electronic copy of the final hearing bundle and asked her to confirm the address to which she would wish the hard copy to be sent. The following day, the Respondent indicated that it would not provide the bundle yet because it needed the Claimant's input to see if the bundle could be reduced if possible. The Claimant did not reply to these emails for the same reasons.

96. By email of 6 September 2022, MAS sent to the tribunal a further revised version of the medical summary of issues document stating in the covering email *"Please see the statement signed off by the Claimant"*. The document attached was not however signed by the Claimant and (as with previous versions) shows little sign

of input from the Claimant, containing as it does either apparently generic information about her medical conditions, or text that refers to the Claimant in the third person interspersed with legal submissions. There are a number of quotes from documents, to which links are provided embedded in the document. These link to the redacted 11-page and 40-page GP records and 164 pages of hospital records previously provided, still with most of the 40 and 164 pages missing. The document also includes without explanation reference to a new set of 748 pages of GP notes, to which no links are provided. The Claimant explained at this hearing that the 748 pages had been obtained otherwise than from her original GP and that they had not been disclosed because there had not been time to carry out any redactions. There was no indication either on the correspondence or in the statement as to when the 748 pages had been received or why they had not been disclosed. That only became apparent to the Respondent when the Claimant explained the position at this hearing.

The legal principles

97. Rule 37 provides:

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

98. I must first be satisfied that one of the grounds for strike-out in Rule 37(1) is engaged. If so, I have a discretion whether or not to strike out, which must be exercised in accordance with the overriding objective in rule 2, which provides as follows:-

> **2. Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.

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

99. The Respondent in its Skeleton Argument has referred to a number of authorities concerning the exercise of the power to strike-out, and I have had regard to these, in particular *Bolch v Chipman* [2004] IRLR 140, *Weir Valves and Control (UK) Ltd v Armitage* [2004] ICR 371, *Peixoto v British Telecommunication plc* (UKEAT/0222/07), *Riley v The Crown Prosecution Service* [2013] IRLR 966, *Osonnaya v South West Essex Primary Care Trust* (UKEAT/0629/1). From those authorities, I take in particular the following principles:-

    a. The power to strike-out is a draconian measure of last resort (*Peixoto* at [44], quoting from *Blockbuster Entertainment Limited v James* [2006] IRLR 630 at [5], [20] and [21]; *Osonnaya* at [32]);
    b. Regardless of the specific ground for strike out relied on, the Tribunal must normally consider whether a fair trial is possible (*Bolch v Chipman* at [55]; *Weir Valves* at [14], ;
    c. The only possible exception is where there has been 'wilful, deliberate or contumelious disobedience' of an order (*Bolch v Chipman* at [55]; *Weir Valves* at [16])
    d. Proportionality is essential. If the consequences of breach of an order or unreasonable conduct may be addressed by some less draconian sanction, they should be: *Weir Valves* at [14]-[15];
    e. The relevant considerations include the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused (*Weir Valves* at [17]);
    f. If a refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination: *Blockbuster Entertainment Limited* at [21] quoted in *Peixoto* at [44];
    g. Both parties to the litigation are entitled by Article 6 of the ECHR to a fair trial within a reasonable time (*Riley* at [27]);
    h. The Tribunal must take account of the fact that other litigants are waiting to have their cases heard (*Riley* at [27], quoting *Andreou v The Lord Chancellors Department*);
    i. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out is an available option (*Riley* at [28]).

100. I add the following regarding the decision of the EAT in *Osonnaya*, which the Respondent referred to in support of the proposition that a Tribunal may err in law if it strikes out a claim for reasons connected with the ill health of the claimant without obtaining medical evidence as to whether the claimant's health would enable the case to be concluded within a reasonable time. It is correct that this is one of the grounds on which Langstaff J reversed the Tribunal's decision (see [39]), along with Langstaff's opinion that the judge had 'overstated' the position when holding that 'no end to the case' could be seen ([37]) and his disagreement

with the trial judge's assessment of the significance of the prejudice to the respondent ([38]). However, in my judgment, it would be wrong to regard Langstaff J's judgment in that case as setting out any binding legal principle. That is for two reasons: first, because Langstaff J appears to have approached the appeal on the basis that it was for him to decide whether the judge's decision to strike out was right and fair, rather than applying a *Wednesbury* approach as, less than 12 months' later, the Court of Appeal in *O'Cathail v Transport for London* [2013] ICR 614 decided was the correct approach in such cases: see the discussion of this legal development at [1]-[4] of *Riley*. Secondly, because *Osonnaya* was a case on wholly exceptional facts. In that case, a pre-hearing review, initially listed for half a day, had still not been concluded 133 hearing days later. The claimant was not at fault in any way for this. The principal reason was her serious illness (sarcoidosis), and its consequent effects on the timetable. At a time when the claimant's case had closed and a central witness for the respondent was under cross-examination, with two other witnesses still to be called, the Judge of his own motion decided to consider whether he should strike out the claim on the basis that it was no longer possible to have a fair hearing. He saw no end to the case, and identified prejudice in the continuing cost to the Respondent and the possible absence of a witness in Tanzania. Langstaff J in the EAT disagreed for the reasons I have already identified, reversed the strike-out decision and remitted the case to be continued in the Tribunal.

101. I have also had regard to the decision of Choudhury P in *Emuekoro v Cromo Vigilant (Scotland) Ltd and ors* [2022] ICR 327, which was concerned with the exercise of the power to strike out a response for unreasonable conduct under Rule 37(1)(b) where a fair trial was not possible within the 5-day trial window because, by the first day of the hearing, the Respondent had failed to comply with the case management orders necessary to enable a trial to take place. I raised the essential principles in this case with the parties at the start of the hearing, in particular that a key question for me in relation to the Respondent's strike-out application would be whether a fair trial was still possible within the current trial window. The relevant passages from Choudhury P's judgment are as follows:

> 18 In my judgment, Ms Hunts submissions are to be preferred. There is nothing in any of the authorities providing support for Mr Kohanzads 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] 2 BCLC 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 conned 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.

20 Mr Kohanzad's reliance on rule 37(1)(e) does not assist him; that is a specific provision, it seems to me, where the tribunal considers that it is no longer possible to have a fair hearing in respect of a claim, or part of a claim, that may arise because of undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons. However, that provision does not circumscribe the kinds of circumstances in which a tribunal may conclude that a fair trial is not possible in the context of an application made under rule 37(1)(b) or (c), where the issue is unreasonable conduct on the part of a party or failure to comply with the tribunals orders or the Rules.

21 In this case, the tribunal was entitled, in my judgment, to accept the parties joint position that a fair trial was not possible at any point in the ve-day trial window. That was su–cient to trigger the power to strike out. Whether or not the power is exercised will depend on the proportionality of taking that step.

…

26 If there are several possible responses to unreasonable conduct, and one of those responses is less drastic than the others in achieving the end for which the strike-out power exists, then that would probably be the only proportionate response and the others would not. There may be cases, which are likely to be rare, in which two or more possible responses are equal in terms of their efficacy in achieving the desired aim and equal in terms of any adverse consequences. However, in most cases there is likely to be only one proportionate response which would be the least drastic of the options available.

27 In the present case, I see no error in the tribunal's approach to proportionality. It correctly directed itself that strike-out is a severe sanction to be used with restraint (see para 10 of the judgment). It then concluded that it was necessary in the interests of justice to strike out in this case, but at para 11 of the judgment it specifically found that an adjournment would have entailed unacceptable prejudice to the claimants. This was because of the delay since losing their jobs almost two years prior to the hearing and the fact that the claimants considerable losses continued to grow substantially from week to week. Striking out was, therefore, considered to be the least drastic course to take in this case, given that the alternative, suggested by Mr Kohanzad, would necessarily entail unacceptable prejudice.

28 It was a highly relevant factor, as confirmed by the Court of Appeal in Blockbuster, that the strike-out application was being considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in that hearing window. In other words, there were no options, such as giving the respondents more time within the trial window to produce its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the respondents), then that leaves only the strike-out. The tribunal did not err in considering the prejudice to the respondents; indeed, it was bound to take that into account in reaching its decision.

My decision

102. I consider first whether the jurisdiction to strike out has arisen.

103. So far as concerns Rule 37(1)(c), non-compliance with orders, the following orders have been breached. My observations on the nature of the breach in each case are as follows. In setting out these observations, I do not state at every relevant point 'this happened because of the Claimant's mental health condition'

– it goes without saying that this is undoubtedly a very large part of the reason why there have been breaches of orders. Nonetheless:-

a. The Claimant failed to provide to the Respondent the full particulars of her claim by 21 July 2022 as required by paragraphs 38 and 39 of the May CMOs. However, this breach was the result of an error with the Respondent's email address of a type similar to that committed by the Respondent at one over the summer. The document was sent to the Tribunal on 8 July 2022. The Respondent does not appear to have complained about not receiving this document until its strike-out application of 3 September 2022, which was sent only to the Claimant and therefore not read by her as she is not reading her emails (albeit that there had been no clear intimation to the Respondent that was the position at that point in time). Had the Claimant been reading her emails, no doubt the fact that she had sent the document (via MAS) on 8 July 2022 would have come to light before this hearing. As it is, the Respondent has only just received the document and therefore did not have an opportunity to review it prior to the hearing.

b. The Claimant failed to send to the Respondent by 9 June 2022 (as required by paragraph 42 of the May CMOs) *"copies of the parts of her GP and other medical records (including treating consultants and private practitioners) that are relevant to whether she has the impairments on which she relies, including all GP and other medical records for the whole of the period of her employment to date. She may blank out anything that is clearly not relevant"*. MAS on the Claimant's behalf sent only some documents as at the 9 June 2022, then some more on 29 June. MAS's letters of 29 June and 6 July (referred to above) acknowledge that that order was not complied with in full. At this hearing, the Claimant further accepted that 748 pages of GP medical records have still not been sent to the Respondent because of redaction concerns. I note the Claimant's explanation for this as being in part attributable to a failure by the GP to comply with a subject access request, but there is also reference in MAS's letter of 9 July to some of the issues with documents being because the Claimant was not accessing her email address, to which documents or consent requests were sent. It is unclear precisely when the 748 pages were obtained. The first reference to them is in the document attached to MAS's email of 6 September 2022, but as MAS's email does not even acknowledge that these 748 pages are new documents (and this point was therefore missed by the Respondent until the Claimant raised it at this hearing), it is not possible for me to tell when the 748 pages first came into the Claimant's possession. In any event, given that the Claimant both at the start and end of this hearing accepted that she was aware that one of the purposes of this hearing was to determine the issue of disability, this failure was very serious as it would have made it impossible to determine that issue fairly at this hearing. And that is even before one considers the issue of whether the Claimant has redacted from those medical records that have been sent to the Respondent more than she should have done (although I observe that from a cursory glance, it seems highly likely that there has been significant over-redaction).

c. The Claimant failed to provide a signed witness statement for the determination of the issue of disability, or any statement of truth to accompany the Summary Document as my order of 11 July 2022 required her to do by 31 August 2022. Instead, an email from MAS of 6 September 2022 asserted that the attached summary document had been 'approved' by the Claimant. I acknowledge that this is not in itself a serious breach, but it is a breach that is symptomatic of the general difficulty in this case which is that the absence of signature (coupled with the nature of the content of the document, which is written in note form, in the third person and contains some generic text) means it is not obvious how much of it is the Claimant's own evidence.

d. The Claimant failed to send the Respondent copies of all documents relevant to the List of Issues, including remedy by 23 August 2022 (which was the varied date for the order at paragraph 18 of the May CMOs agreed by the parties / partly approved by the Tribunal). The Respondent sent its documents to the Claimant on that date, but the Claimant did not send any documents to the Respondent. When the Respondent notified the Claimant's mother that it had sent the evidence to the Claimant, MAS's position was that she was 'prepared' to send evidence to the Respondent if the Respondent was willing to co-operate with exchange, but she did not actually send any documentation on the Claimant's behalf. As the order provided simply for the parties to send each other their documents, rather than exchange, she should have just sent the documents. Coupled with the failure by the Claimant to make arrangements to access the Respondent's documents, the failure on the part of the Claimant to send her documents to the Respondent means that with only 6 weeks to go until the start of trial, disclosure has not taken place.

104. In view of the above breaches, the jurisdiction to strike out under rule 37(1)(c) has arisen.

105. I next consider whether jurisdiction to strike out has also arisen under rule 37(1)(b) (unreasonable conduct). In my judgment, it has. First, because the above breaches of orders constitute unreasonable conduct. That is particularly case with the failure to provide copies of the 748 pages of GP evidence, without which no fair determination of the issue of disability could be made and thus the original purpose for which this hearing was listed could not have been dealt with. The failure to provide disclosure for the final hearing is also serious.

106. Secondly, there has throughout the period from 5 May 2022 been unreasonable conduct as regards the whole handling of the proceedings by the Claimant. My CMOs of both 30 March 2022 and 5 May 2022 warned the Claimant that her family could not conduct this litigation for her. I warned her that without a representative she was in danger of conducting this litigation unreasonably. Despite that, she was very clear both at the hearing on 5 May and at this hearing that she wished to represent herself, and her determination not to authorise her mother to represent her appears through the various references in her mother's correspondence to the fact that she is <u>not</u> the Claimant's appointed

representative. The result has been an unsatisfactory state of affairs in which the Claimant's mother has continued to purport to act on her behalf despite not being authorised as a representative. The handling of the amendment application (which generated a lot of correspondence and Tribunal orders) was unreasonable because it transpired that her mother had been acting without authority in withdrawing that application, which was then reinstated very late in the day. This incident casts doubt on all of MAS's correspondence since the last hearing: was it sent on the instruction of the Claimant or not? It is unclear. I accept that there is (as MAS submits) a difference between communication and representation. The difficulty is that the Claimant and MAS do not seem to understand what that difference is. A communication arrangement would be simply a 'postbox' arrangement. The person assisting with communication would have no substantive input into the content of letters, and no option not to pass on to the Claimant something received. A representative, on the other hand, acts on instructions to represent the individual's interests. That is what the Claimant's mother has in substance been doing since 5 May, but she has been doing so without the Claimant's authority. If the Claimant wished to use her mother as a 'postbox' for communications with the Respondent and Tribunal, as a person with capacity, it is the responsibility of the Claimant to ensure both that her family are only communicating what she has told them to communicate and that the system of communication works and that everything sent to her family is passed on to her. That has not happened. The Claimant did not have the documents she should have had for this hearing as a result, thus further jeopardising the progress of this case.

107. Thirdly, there is the issue of the Claimant not accessing her emails. I fully appreciate that this is because of the Claimant's trauma response when she sees emails from the Respondent, but as a person with capacity given that she had not definitively informed either the Respondent or the Tribunal that they were not to send emails to her personal email address because she was not reading them, she needed to make alternative arrangements for someone else to access her emails so that communications could still get through. Given that the Claimant's personal email address is a Hotmail account, and therefore web-based, this should not have been difficult.

108. Fourthly, it is in my judgment also unreasonable for the Claimant to have failed to keep the Respondent and the Tribunal appraised of her current medical condition, in particular the dates of her entering and leaving and entering again the psychiatric institution. These have all been voluntary admissions and, given that communications from MAS supposedly on the Claimant's behalf have continued throughout this period, there is no reason why this basic information could not have been conveyed. Had it been, the issue of how (and, indeed, whether) to continue communications with the Claimant while she was in a psychiatric institution could have been properly addressed. As it is, I note from the Respondent's email of 4 September 2022 (1926) that the Respondent had some awareness that the Claimant 'may' be hospitalized (and the Respondent's Skeleton Argument at paragraph 64 indicates that it did know prior to this hearing), but it should not be a guessing game.

109. Fifthly, it was apparent from what happened at the hearing that by continuing to conduct these proceedings, she is not following the advice of her psychiatrist. No doubt, that is why no medical evidence has been submitted by the Claimant and no adjournment sought. In this respect, I note that MAS in her email of 14 April 2022 admitted that medical evidence had not been obtained despite what was at that stage an order to do so because the medical evidence would have stated that the Claimant was unfit to participate in hearings. The Claimant's failure to follow the advice of her psychiatrist or (indeed), it would appear, to be honest with those currently responsible for her care about what she is doing on this case is of course extremely concerning from the point of view of the Claimant's health and welfare, and no one could fail to be moved by concern about her (a sentiment that Ms Bell for the Respondent also expressed at the hearing). However, it is not for me to make a judgment about the Claimant's best interests. As a person with capacity, she is entitled to reject the advice of her medical practitioner. What I do take into account is that her failure to heed the advice of those responsible for her care and/or to be honest with them about what she is doing on this case, has contributed to the Claimant's unreasonable conduct of these proceedings because she has been trying to deal with them when she is too ill to do so, and the result is the breaches of orders and unreasonable conduct I have identified above. In so finding, I must emphasise that I am certainly not saying (here, or at any point in this judgment) that the Claimant is 'at fault' in being ill, and I recognise that the efforts she has made with her family to progress the case have been, for someone who is as ill as she is, monumental. Nonetheless, the result has still amounted, objectively, to unreasonable conduct of the proceedings.

110. I should also add this with regard to the issue of unreasonable conduct: although the Claimant has in hearings before me since September 2021 appeared to be a person with capacity to conduct litigation, and although the steps she has taken (with MAS's support) since the May hearing, indicate that she has intermittently since that hearing had capacity to conduct litigation, I must acknowledge that emails such as that from MAS of 14 April 2022 do suggest that there have been periods when the Claimant has probably not had the capacity to conduct litigation. This is on the basis that there have apparently been times when the Claimant has been unable to communicate even with her mother about the case. I take this fully into account but it seems to me that even if there have been periods when the Claimant ought to have had a litigation friend appointed to conduct the proceedings for her, the result would have been no different because, as I know from when I appointed her sister as litigation friend in July 2021, the only possible candidates for litigation friend are members of her family, and they have since March 2022 effectively stepped into that role whenever it has been needed. It has not helped.

111. I next consider whether the jurisdiction to strike out under rule 37(1)(d) has arisen (not actively pursued). The Respondent relies on this ground and on one view it does so entirely properly. It is the case that the Claimant herself has not sent a single communication to the Tribunal or the Respondent since the hearing on 5 May 2022. However, it would in my judgment be wrong to hold that this ground applies in circumstances where, as I have indicated, it is clear that the Claimant has in fact been making what are for her in her current state of health monumental efforts to progress the case. She went personally to the Respondent's offices to

view her laptop. Via her mother, she completed the missing details from the List of Issues, submitted a Schedule of Loss, sent the Respondent some medical evidence and (probably) prepared a statement of sorts on the issue of disability.

112. Finally, I consider whether the jurisdiction to strike out under rule 37(1)(e) (fair trial not possible) has arisen, which question is of course of crucial importance to the way I should exercise my discretion in the light of the two other grounds for strike-out already engaged.

113. I am afraid to say that I have come to the conclusion that a fair trial starting on 31 October 2022 is not possible. Even if the Claimant were well, I am doubtful whether the problems that have arisen could be resolved before that date. The following steps would be required:

    a. A further case management hearing to resolve the question of whether the Claimant is entitled to redact the parts of her medical records that she has done. Given that there are nigh on 1,000 pages of medical evidence to be considered, that would itself have to be a full day hearing. The documents (with any permitted redactions) would then need to be disclosed to the Respondent.
    b. The issue of disability would then require a further open preliminary hearing, of quite possibly 2 days now that I can see the volume of medical evidence that needs to be considered. Although I am aware that earlier in the case management of this matter I expressed surprise that disability might be in dispute, having now see the Claimant's 'summary' statement, I can see that there are real issues that need to be resolved, given that the disability discrimination claims begin with events of 2017 which appear to coincide with the beginning of the Claimant's medical difficulties. There would therefore be a real issue as to whether her conditions at that time were likely to last 12 months. Further, with such a multiplicity of medical conditions relied on, there are also real issues that need to be unpicked as to which conditions were known to the Respondent, what adjustments were required for them and what things 'arose from' them for the purposes of the s 15 claim. Had all this material been disclosed on 9 June in accordance with the order, so that the Claimant was ready for this hearing, it could have been resolved. As it is, I cannot see that all this can be fitted in before 31 October, given the other cases already listed before the Tribunal between now and then.
    c. Disclosure would need to take place. That ought to be straightforward if, as appears, the Claimant is in fact ready to provide her documents as MAS's correspondence indicates, but disclosure only 6 weeks before trial is likely to make preparation for trial very difficult.
    d. The parties would need to prepare a bundle and produce witness statements and then prepare to question each others witnesses at the hearing. 6 weeks is not a lot of time to complete these stages, particularly given the work that still needs to be done on the medical evidence and the disability issue.

114. However, completion of those steps outlined above is made even more difficult by the Claimant's state of health. I appreciate that I do not have up-to-date

medical evidence for the Claimant and, despite my observation about *Osonnaya* not laying down any legal principle that it is an error of law to proceed without medical evidence, I am conscious that it is normally important to have up to date medical evidence in order to make any assessment of the likely impact of an individual's medical condition on their ability to prepare for a hearing. However, in this case, my case management of the proceedings over the last 18 months means that I am much better placed than a judge would normally be to gauge the Claimant's state of health and what is likely to happen regarding her health over the next 6 weeks, which is a very short time indeed. I also, of course, have the information that she provided to me at this hearing, specifically that since the 5 May 2022 hearing she has spent at least 5 weeks in a psychiatric institution, that her most recent course of in-patient treatment commenced about a week before this hearing, that her mental health condition is currently so severe that she is on a schedule of 15-minute checks which as already noted I infer indicates that she is currently regarded as a risk of harm to herself. I know that her treating psychiatrist would have advised against her participating in the hearing. I also know from her own descriptions of her condition and difficulties that she has for a long time been unable to engage with documents that deal with the substance of her claim. Finally, I know from the history of this matter that the Claimant has been more or less this ill since starting these proceedings. Possibly, she was more ill between April 2020 and September 2021, but her mental health has remained very poor since September 2021, and this is despite the six-month stay in proceedings that I allowed on the basis of medical evidence that it was anticipated that with treatment she would be well enough to participate in proceedings from March 2022. Given that history, I would not expect any significant change in her health in the next 6 weeks. Indeed, even if a medical opinion to the contrary was given, I would be unlikely to accept it, given the history of this matter which has shown that the medical practitioners have been wrong about prognosis previously.

115. In all the circumstances, accordingly, I do not consider that there can be a fair trial of this matter commencing on 31 October 2022 and the strike-out power under rule 37(1)(e) is therefore also engaged.

116. Finally, I have to consider whether or not it is proportionate in the circumstances to strike the claim out. Following *Emuekoro*, given my conclusion that there cannot be a fair trial within the current trial window, this means considering whether postponement would be in the interests of justice and in accordance with the over-riding objective.

117. I take as my starting point that postponement would give rise to significant prejudice to the Claimant, and that the alternative course of striking out her claim is the most draconian sanction I can impose and will deny the Claimant access to justice. As she told me at the hearing, she did not want this hearing postponed and I am sure that she does not want the final hearing postponed, given the efforts that she has made, despite her ill health, to prepare for it. Given her current state of health, I am conscious that a decision to strike out the claim will be devastating for the Claimant. However, I cannot base my decision on what would be in the Claimant's best interests, and nor is the Employment Tribunal responsible for meeting her healthcare needs. In my judgment, in this case, the

prejudice to the Claimant of striking out her claim is outweighed by the prejudice to the Respondent and by the need to proceed in the way that best serves the over-riding objective for the following reasons:-

118. First, both parties are entitled to a fair trial within a reasonable time. The final hearing of this case has already been postponed once. If postponed now, the earliest that the Tribunal could relist the matter would be July 2023, which would represent a delay of a further nine months and mean that the claim would have been 'in the system' for over three years. Although some cases, for various reasons, take longer to come to hearing, three years for a case at London Central is a relatively long time. However, there is no magic number. What is 'a reasonable time' is case-specific. In this case, in my judgment postponement to July 2023 would be a very substantial delay given that the events in respect of which claims of discrimination are made date back to 2017. These are claims that all have a three-month primary limitation period, reflecting Parliament's judgment as to the importance of swift resolution of disputes that arise in the employment context. Even if the Claimant at final hearing succeeds in showing she has been discriminated against, a substantial portion of the claims may still be found to have been brought out of time. Although the Claimant's claim is brought against a large corporate respondent, all of the Claimant's claims are claims that depend on her demonstrating that the 14 named individuals have personally discriminated against her. Only then will the Respondent be liable (cf *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33] per Underhill LJ). Three years is a long time for so many individuals to have such claims, and the prospect of a 10-day hearing, 'hanging over their heads'. Moreover, memories do not improve with time and that affects fairness for both parties. These factors combine to mean that there would be significant prejudice to the Respondent if the final hearing were postponed for a second time, and also render the delay that would be involved unreasonable in my judgment, giving rise to a substantial risk that postponement would breach the rights of the parties under Article 6 of the ECHR.

119. Secondly, given the history of this matter (in which on each of the Respondent's three previous strike-out applications, I have held that the jurisdiction to strike out for breach of orders / unreasonable conduct has arisen), coupled with the Claimant's current state of health, I have no confidence that the proceedings will not continue to be conducted unreasonably by the Claimant. That conduct and/or the Claimant's state of health has meant that the Respondent has already been significantly prejudiced. The case has already had nine preliminary hearings listed. Although not all have been effective, in relation to even the ineffective ones there was a substantial amount of correspondence and, for that in April 2021, full legal submissions were required for consideration on the papers. The Claimant's non-compliance with orders has also meant more work for the Respondent in chasing and querying matters. The correspondence and Tribunal orders take up approximately 1,000 pages of the bundle for this hearing. All this sounds in costs for the Respondent that are highly unlikely to be recoverable from the Claimant. There has already been significant prejudice to the Respondent and postponing the final hearing would mean further prejudice.

120. Thirdly, the foregoing factors also mean that this case has taken up already much more than its 'fair' share of Tribunal time, at public expense. To the extent that is reasonable, it is of course appropriate that a case such as this should take up more time in order to ensure that disabled individuals such as the Claimant are not denied access to justice. However, given the backlog in Tribunal claims, and limited judicial resources, it is important that a disproportionate amount of time is not taken up dealing with the claim of one individual, especially where (as here) that claim has no wider public importance. There is a limit, and in my judgment that limit has been reached.

121. As will be clear from the above, in my judgment postponement of the final hearing until July 2023 (the earliest date it could be accommodated by the Tribunal) would not be in accordance with the overriding objective and would involve a substantial risk of breach of the parties' rights under Article 6 of the ECHR. I reach that conclusion without taking any account at all of the prognosis for the Claimant's state of health. In other words, even if there was medical evidence that the Claimant was likely to be fully recovered by July 2023, it would still not in my judgment be appropriate in this case to postpone the final hearing rather than striking the claim out now. It is because that is my view that I have not considered it necessary to order the Claimant to produce medical evidence before concluding my consideration of the Respondent's strike-out application. However, I add this, as it has factored into my thinking: even if there was before me an opinion from the Claimant's psychiatrist that by July 2023 she would be completely well, I would be bound to have to take into account the chance that that opinion was wrong, as the medical opinion that was before me in September 2021 proved to be. Given the history of this matter, and the Claimant's current state of health, there must be a chance that she will not be well even by July 2023. That is an additional factor that makes postponement unreasonable in my judgment, as there is a possibility that all the additional prejudice that would be entailed in postponement that I have identified above, would still be for nought as the Claimant would still be unwell in 9 months' time.

122. For all these reasons, and with deep regret, I have concluded that the only appropriate course is to strike out the Claimant's claim in its entirety. I recognise that this will be very distressing for the Claimant and, given her current state of health, I trust that her mother, to whom this decision will be sent in accordance with the Claimant's wishes, will liaise with the Claimant's psychiatrist to ensure that the decision is conveyed to her in a time and manner that will best safeguard the Claimant's welfare.

Rule 50

123. Under Rule 50(1), the Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person, including by way of an order anonymising the identity of specified parties or any other person (Rule 50(3)(b)).

124. There are numerous authorities on the approach I must take to the question of what order to make where privacy rights potentially conflict with the principle of open justice, including in recent years *BBC v Roden* [2015] ICR 985, *Fallows and ors v News Group Newspapers Ltd* [2016] ICR 801, *Khuja v Times Newspaper Ltd* [2017] UKSC 49, [2019] AC 161, *Ameyaw v Pricewaterhousecoopers Services Ltd* [2019] ICR 976, *TYU v ILA Spa Ltd* (EA-2019-000983-VO), *Frewer v Google UK Ltd* [2022] EAT 34 and *Millicom Services UK Ltd v Clifford* [2022] EAT 74. I intend no disrespect to the EAT and the higher courts by seeking to distil the principles from those cases as follows:-

    a. I must first consider whether or not the individual's Convention rights are engaged. Otherwise I must consider carefully what the interests of justice warranting a privacy order are;

    b. I must give full weight to the principle of open justice and the Article 10 right to freedom of expression, which require that justice is done, and is seen to be done, in open court, that judgments and the reasons for them are delivered in public and that the press (and wider public) are able to understand the proceedings, scrutinize them and freely report on them;

    c. I must remember that the names of individuals are important to open justice and press freedom, that an individual who commences legal proceedings can ordinarily be assumed to have accepted the incidence of publicity that is involved, that the public is to be taken to understand the difference between an allegation and a finding, and that potential embarrassment and damage to reputation or commercial interests will not ordinarily justify departure from the open justice principle;

    d. I must focus intensely on the comparative importance of the specific rights being claimed in the individual case and identify the specific nature of the private rights on the one hand and the public interests on the other. I must judge what is in the public interest objectively;

    e. I must consider the potential justifications for interfering with each of those rights and interests; and,

    f. I must decide where the overall balance is to be struck in the particular case. In some cases, that balance may change during the course of the proceedings, in particular where the balance lies at the stage of deciding a preliminary issue may be different to where it lies at a full hearing and the balance may change again once judgment has been given. For this reason any Rule 50 order made may be time-limited and subject to review.

125. In this case, the question of an order under Rule 50 was not raised at the hearing, which was conducted in an 'open' video hearing room. However, no members of the public attended so the hearing for practical purposes took place in private. At the end of the hearing, I announced my decision orally, indicating that written reasons would be reserved.

126. In writing up the judgment, I have decided of my own motion that it is appropriate to make a permanent anonymity order in respect of the Claimant in this case (and her family members as that is necessary to secure anonymity of the Claimant). This is for the following reasons:-

    a. I am satisfied that the Claimant's Article 8 rights are engaged because throughout this judgment I refer to the Claimant's mental health and to her periods of in-patient treatment in a psychiatric institution. These are matters that are intensely private to the Claimant. Further, I am satisfied, having seen the Claimant during the hearing today, that she is currently a highly vulnerable individual and, although I have been provided with no documentary medical evidence, it was clear from the way the Claimant's participation in the hearing ceased (with her being very upset and requiring attention from a psychiatric nurse) that the publication of this judgment in a way that identifies her would be very likely to exacerbate her distress. I can also take judicial notice of the likely impact of the publication of this judgment (in a way that identifies her) having a potential lasting impact on her personal life as it would reveal to the world details of her mental health condition that I am aware (from her concern to ensure that her medical records were redacted before even disclosure to the Respondent) she would not wish to be revealed. Although the Claimant has made no application herself, I am satisfied that the potential impact on her of not anonymising this judgment would be very significant.

    b. Although the principle of open justice is a very important one, this is a case that has not reached a full hearing and in which there has been no substantive determination of any matter. That lessens the public interest in open justice in my judgment.

    c. Although names are important in particular to the Article 10 right to freedom of expression, that public interest must also carry less weight where there has in fact been no press or public interest in the case and thus there appears to be no realistic prospect of anyone wishing to report on the case, particularly given that it is not now going to reach a full hearing.

    d. The public interest in open justice can very largely be safeguarded by the publication of these reasons.

    e. The strength of the Claimant's Article 8 rights in this case, and likely interference with those rights if anonymity is not granted, outweighs in my judgment the public interest in open justice and freedom of expression.

127. For all these reasons, it is appropriate that the Claimant and members of her family are anonymised. To make that order effective it is necessary also to apply it retrospectively to the judgment on the Open Preliminary Hearing of 28 September 2021. I have made arrangements to do that.

Coda

128. As indicated at the start of this judgment, the above reasons had been prepared before I was forwarded the Claimant's mother's email of 14 September 2022 in which she wrote:

> The Claimant has asked that I send an email on her behalf* to apologise for not being able to continue yesterday. She attempted to rejoin and her nurse helped her email the clerk when she was unable to get in.
>
> The Claimant politely asks that the events of yesterday afternoon are not taken as an indication that she is unwell to attend court and keep the trial dates.
>
> If permitted, she has explained that she would be grateful for the opportunity to:
>
> - rectify any issues the Tribunal has identified in her response to the orders within 2 working days of these being confirmed in writing.
> - send in her medical evidence (she said that this was ones of the options given yesterday),
> - make her submissions on paper (or in a hearing, whichever the Tribunal will prefer) and
> - request reasonable adjustments for the pre-trial process as the problems of her struggling to send emails by herself, for example stem from disabilities that have been detailed in her medical summary explained here. As a result of Severe Depression, Pernicious Anaemia and Complex Post Traumatic Stress Disorder in particular, there is no way that the Claimant would have been able to cope with answering emails and following through on the CMOs on her own.
>
> It is humbly requested that the Claimant is granted an opportunity to retain the trial dates with adjustments in place to accommodate her disabilities as this is a strong case that is based on a solid foundation of evidence. It would be unfortunate (and even detrimental) to allow the Claimant's ill-health and need for help to complete the case to eclipse that fact.

129. I then ordered as follows on 20 September 2022:-

> The Claimant's mother's email of 14 September has only today (20 September) been forwarded to me. As such it has (only just) arrived before the judgment striking out the Claimant's claim (announced orally at the hearing) has been promulgated. This is therefore a situation in which the Tribunal's little used power to 'recall' a judgment potentially operates. As I understand it, the principles applicable in such cases are essentially the same as the power to reconsider under Rules 70-73 where a judgment has been promulgated. The question is whether it is in the interests of justice to do so.
>
> Both parties must file submissions /evidence (via the Claimant's mother in the case of the Claimant) as follows:
>
> 1. By **11am, Friday, 23 September 2022** the Claimant must provide a letter from the Claimant's treating psychiatrist dealing with:

a. her current state of health, diagnosis, prognosis, whether she is well enough to continue with this claim, including by:
   i. conducting correspondence with the Respondent,
   ii. reading the Respondent's disclosure documents relevant to the liability issues (sent to her by email on 23 August),
   iii. preparing a witness statement detailing the evidence she wishes to rely on in relation to the claim,
   iv. reading the Respondent's witness statements, and
   v. participating in a 10-day trial commencing 31 October during which she will need to answer questions put to her by the Respondent's counsel and the Tribunal and she or a representative will need to question the Respondent's witnesses and put her case.
b. If the Claimant would be able to manage those things only with assistance, the psychiatrist must identify what assistance or adjustments would be required;
c. If the Claimant would not be able to manage those things even without adjustment or assistance, the psychiatrist must say so.

2. By the same date, the Claimant must personally address each of the matters that the psychiatrist is to address as per paragraph 1 above. By "personally" I mean that the Claimant must either write or verbally approve every word of the email that her mother sends on her behalf, and the email must state how it has been approved by the Claimant.

3. By **4pm, Monday, 26 September 2022** the Respondent must file submissions addressing any aspect of the current situation that it wishes to address, including whether the judgment should be recalled or promulgated or reconsidered. The Respondent must in those submissions also set out the minimum steps that would be required for the parties to be ready for trial by 31 October 2022.

130. There was then further correspondence from both parties, including a request from the Claimant's mother querying whether the Claimant should withdraw the claim. I do not detail all the correspondence. The correspondence from the Claimant's mother included submissions in response to my order and a PDF of a letter purporting to be from the Claimant's treating psychiatrist and dated 22 September 2022.

131. On 29 September 2022 I ordered as follows:-

Employment Judge Stout has seen the further correspondence from the Claimant's mother in emails dated 27-29 September 2022. She has not yet seen the Respondent's submissions, and administrative staff have so far been unable to locate these. She orders as follows:-

1. The Respondent must re-send its most recent submissions.
2. The Claimant's quotation from the Respondent's submissions suggest that the Respondent may not be aware of the authorities of Dr N Malik v Cenkos Securities PLC UKEAT/0100/17 and UKEAT 0101/17 and CK Heating Ltd v Doro [2010] ICR 1449. If those authorities have not been addressed in the Respondent's submissions, the Respondent may submit an addendum.
3. The letter purporting to be from the Psychiatrist provided by the Claimant is not acceptable. The Claimant has admitted that she failed to inform her Psychiatrist about the last hearing. I am not satisfied that this letter is genuine as: it is not on headed notepaper; the name of the Psychiatrist has been redacted; the signature is indecipherable; and the typeface used appears to be the same as in the other submissions prepared by the Claimant's mother. Unless the Claimant is able to provide evidence that this letter is genuine by 4pm, 4 October 2022, the submission of this document is likely to constitute further unreasonable conduct and a further breach of orders and may by itself provide grounds for strike-out of this claim. The full name, address, telephone

> and email contact details of the Psychiatrist must be provided so that the Tribunal may issue him or her with a witness order or third-party disclosure order if need be.

132. I subsequently was sent the Respondent's submissions. I intend no disrespect to Ms Bell when I summarise those submissions as being to the effect that I should maintain the decision I made at the hearing. I note also that the Respondent disinstructed Ms Bell on the basis of my oral judgment at the hearing and that she is now otherwise engaged for the period when this final hearing was due to take place. Given her lengthy involvement in this matter, I acknowledge that amounts to a significant prejudice to the Respondent.

133. I also received further correspondence was from the Claimant's mother. Nothing, however, has been sent in response to paragraph 3 of my Order of 29 September 2022. In the circumstances, I am driven to the conclusion that the purported letter from the psychiatrist of 22 September 2022 was not genuine but was created by the Claimant and/or a member of her family with a view to deceiving the Tribunal as to the state of the Claimant's health and her prognosis. I recognise that it will have been created out of desperation by the Claimant to maintain these proceedings on which she has invested so much time an energy. However, production of a fake letter with a view to misleading the Tribunal is very serious unreasonable conduct. It adds to the justification for strike-out of this claim.

134. I have, however, nonetheless given careful consideration to the Claimant's mother's arguments about the need to make reasonable adjustments for the Claimant given her disabilities. That is a duty I have had well in mind throughout, and the whole of these proceedings have been conducted in a way that in my judgment adjusts for the Claimant's mental health difficulties. However, there is a limit to the adjustments that can be made; the overriding requirement must be compliance with Article 6 and the right of both parties to a fair trial within a reasonable time. Given events since the hearing on 13 September 2022, it is now absolutely clear that there could not be a fair trial of this matter starting on 31 October (3 weeks' time) and for the reasons I have set out above I do not consider it is appropriate for this case to be further postponed. What has happened since the hearing regarding the Claimant's medical evidence (or, rather, lack of medical evidence) makes that even more clear.

135. As I have said, I recognise that this judgment will be devastating for the Claimant, but I very much hope that the Claimant's family and everyone responsible for her care will continue to provide her with the support that she requires and that she will in time regain her mental health and move on with her life. I thank the Respondent, and in particular Ms Bell and the other members of the Respondent's legal team for the commendable way in which they have conducted this difficult litigation.

136. The claim is struck out in its entirety and the final hearing is vacated.

_____

Employment Judge Stout

7 October 2022

Sent to the parties on:

10/10/2022

For the Tribunal: