Case Number: 1302550/2016
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss R Gupta		**Santander UK Plc**

ORDER OF THE EMPLOYMENT TRIBUNAL
ON A PRELIMINARY HEARING
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 31 October 2022

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **In Person**
For the Respondent: **Mr T Gillie (Counsel)**

ORDER

1 The respondent's application for the strike-out of the claim is refused.
2. The claimant's application for the strike-out of the response is refused.
3 The case is listed for a Closed Preliminary Hearing (by telephone) before Employment Judge Gaskell on 22 December 2022 at 10am with a time allocation of 2 hours.

REASONS

Introduction & Chronology

1 The claimant in this case is Miss Rita Kumari Gupta who was employed by the respondent, Santander UK Plc, as a Personal Banker, from 11 February 2008 until 12 June 2016 when she resigned. The claim form was presented more than six years ago on 7 October 2016. The claimant claims that she was unfairly (constructively) dismissed; that she suffered disability discrimination; and that she is owed notice pay and other unspecified payments. The strands of disability discrimination which are claimed are harassment and a failure to make reasonable adjustments. The claimant gave approximately four weeks' notice of the termination of her employment clearly she was contractually entitled to a longer period (a minimum of eight weeks); it is her case that it was only under duress but she gave a shorter period. She claims the difference between the notice period which she gave and that which she was contractually entitled. It is

the claimant's case that she was disabled by reason of stress, anxiety and depression and that she became disabled in the summer of 2015.

2 The respondent accepts that from February 2016 the claimant was a disabled person and that it had actual or constructive knowledge of that fact. The respondent denies harassment and maintains that all appropriate adjustments were made.

3 On 16 January 2017, there was a Closed Preliminary Hearing before Employment Judge Broughton. Judge Broughton listed the case for final hearing with a time allocation of six days commencing on 22 May 2017. Judge Broughton made Case Management Orders for the proper preparation of the case for that hearing and he defined a list of issues.

4 For the sake of completeness, I should record that, in October 2016 (after the termination of her employment and around the time of the presentation of her claim form), the claimant was diagnosed with Cancer. By reason of the Cancer diagnosis, of course the claimant as a disabled person. But this element of her disability is unrelated to her claim.

5 On 12 May 2017, in response to an application made by the claimant, Employment Judge Dean postponed the final hearing listed for 22 May 2017 and ordered that the claim be stayed for a period of two months. The final hearing was relisted to commence on 11 December 2017. In August 2017, a further preliminary hearing was listed for 26 October 2017.

6 Pursuant to the Case Management Orders made by Employment Judge Broughton and agreed extensions thereto, the respondent was ready to exchange witness statements with the claimant in September 2017 (the final hearing was scheduled for December 2017). However, the claimant indicated that she was not prepared to exchange and she gave various reasons for this including her health issues. Today, she has explained to me that the principal reason was that she could not finalise her witness statement because she was unhappy with the bundle which had been prepared by the respondent which she says has a significant number of documents missing. On 25 September 2017, the claimant wrote to the tribunal requesting an extension of time for the exchange of witness statements. She did refer in this letter to dissatisfaction with the bundle but gave no specifics details. The claimant did not suggest a new date for exchange. It appears that the claimant did not receive a response to this application, doubtless the issues raised would have been addressed at the forthcoming preliminary hearing listed for 26 October 2017.

7 On 13 October 2017, in the light of her ongoing ill-health, the claimant sought a postponement of both the preliminary hearing listed for 26 October

2017 and the final hearing listed for 11 December 2017. On 19 October 2017, these applications were granted by Employment Judge Dimbylow and the claimant was ordered within seven days to inform the respondent and the tribunal as to when she expected to be fit to attend a preliminary hearing.

8 On 5 January 2018, on the application of the claimant, Employment Judge Cocks stayed the proceedings until 1 June 2018.

9 On 4 August 2018, the claimant applied on medical grounds for a further stay of proceedings until April 2019. The respondent did not oppose that application. In fact, the requested stay was never granted. On 13 September 2018, on the direction of Employment Judge Woffenden, the tribunal wrote to the claimant expressing concern as to the length of the stay sought and requesting up-to-date medical evidence in support of the application. The claimant did not respond.

10 Nothing further happened in the case until 11 February 2019 when the claimant emailed the respondent requesting electronic copies of the trial bundles. It appears that Mr Jon Taylor, the solicitor with conduct of the case on behalf of the respondent, was under the mistaken impression that the case was in fact stayed until April 2019. When the claimant emailed him on 11 February 2019, he responded explaining to the claimant the relevant steps which she should take if she wished for the stay to be lifted. He confirmed that the respondent would consent to the case being listed for a preliminary hearing.

11 On 21 February 2019, the claimant wrote to the tribunal indicating that she was in a position to attend a preliminary hearing. And on 29 March 2019 (having heard nothing further from the tribunal or from the respondent), the claimant made an application for specific disclosure.

12 For reasons which are not apparent to me, it was not until 12 September 2019 that the tribunal responded to the claimant's correspondence. On that day, the tribunal requested the respondent's comments on the claimant's letters of 21 February 2019 and 29 March 2019. On 18 September 2019, Mr Taylor responded: he objected to the application for specific disclosure and he suggested that the most expeditious course of action would be for the matter now to be listed for a preliminary hearing to deal with outstanding case management issues.

13 On 31 December 2019, the claimant again wrote to the tribunal: she was seeking to pursue the application for specific disclosure; and also stating that she was ready for the case to proceed and she requested a hearing date.

14 Nothing further happened throughout 2020. On 17 June 2021, the tribunal office wrote to the claimant asking her to resend her email of 31 December 2019 which she did the same day. On 21 June 2021 the respondent made its application to strike out the claims. The application is made pursuant to Rule 37(1)(d) & (e) on the Employment Tribunals Rules of Procedure 2013 on the grounds that it has not been actively pursued and that a fair hearing is no longer possible. On 6 December 2021, the tribunal responded listing the application for hearing on 25 May 2022.

15 By May 2022, the claimant had received a response from the tribunal with regard to the application for specific disclosure. The respondent's position was that the documents sought were no longer available. (The respondent also believes the documents are irrelevant.) Accordingly, Employment Judge Broughton concluded that he could not make an order for the disclosure of documents which did not exist. In response to this, on 22 May 2022, the claimant made an application to strike-out the response to the claims. Although the claimant has not been specific, I assume that her application is made pursuant to Rule 37(1)(c) - as an order for full disclosure of relevant documents was made by Employment Judge Broughton on 16 January 2017.

16 Both applications came on for hearing before me on 25 May 2022. In support of the application the respondent had lodged a hearing bundle accompanied by a witness statement of Mr Robin Parkinson and a skeleton argument prepared by Mr Gillie. The claimant had attempted to respond to the application by the submission of numerous haphazard documents many of which appeared to be irrelevant to the issues to be considered today (as opposed to the wider issues of her claim) and they were not in paginated form and properly indexed. The claimant had not provided a witness statement or a skeleton argument. I therefore postponed the hearing until 17 August 2022 and gave directions for the claimant to file a properly paginated bundle of documents and a witness statement in response to the respondent's application and the support of her own.

17 In the event, the hearing could not go ahead on 17 August 2022 for lack of judicial resource. It was therefore relisted for today.

The Law

18 **The Employment Tribunals Rules of Procedure 2013**

Rule 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.

Rule 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:

(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).

19 ***Birkett v James*** **[1978] AC 297 (HL)**

The House of Lords set out the circumstances in which a Tribunal can exercise its discretion to strike out a claim for want of prosecution, either:

(a) There must have been delay that is intentional or contumelious (i.e. disrespectful or abusive to the court); or
(b) There has been inordinate and inexcusable delay, which:

    (i) gives rise to a substantial risk that a fair hearing is impossible,
    (ii) or which is likely to cause serious prejudice to the respondent.

The inevitable prejudice flowing from a delay is not sufficient. The respondent must show some additional prejudice to the elapse of time itself, however, the additional prejudice need not be great but must be more than minimal.

20 ***Evans v Commissioner of Police*** **[1993] ICR 151 (CA)**
In most cases the nature of the prejudice will usually be obvious. It may be, as has been said in the cases, that it is necessary to investigate the facts before memories have faded.

21 ***Elliott v The Joseph Whitworth Centre Limited*** **UKEAT/0030/13 (EAT)**

The fact that witnesses or documents have gone missing is a relevant prejudicial factor.

22 ***Emuemukoro v Croma Vigilant (Scotland) Limited*** **[2022] ICR 327 (EAT)**

Whether a fair trial is no longer possible is a question to be answered taking into account all relevant facts in each case. Nevertheless, the question is not whether a fair trial is rendered impossible in an absolute sense but, rather, whether it is so taking into account the factors set out in the overriding objective, including undue expenditure of time and money, the demands of other litigants and the finite resources of the Tribunal.

23 ***Rolls Royce Plc -v- Riddle*** **[2008] IRLR 873 (EAT)**

Cases of failure to pursue a claim actively will fall into one of two categories: (i) where there has been "intentional and contumelious" default by the claimant; and (ii) where there has been inordinate and inexcusable delay such as to give rise to a substantial risk that a fair trial would not be possible or there would be serious prejudice to the respondent.

24 ***Catalyst Investment Group Limited -v- Lewinsohn***
[2002] EWHC 522 (ChD)

Following an agreed stay in the proceedings lasting more than 10 years, the High Court was unable to conclude that the defendant had made out any case that the claimant's case should be struck out for want of prosecution under either limb of CPR 3.4(2)(b) or (c) - the provisions of Rule 37 mirror those provisions of the CPR.

The Evidence

25 The respondent called evidence from two witnesses: Mr Robin Parkinson - Head of Employee Relations, and Mr Jon Taylor - the Solicitor currently with conduct of the claim on behalf of the respondent.

26 Mr Parkinson provided evidence of the above chronology and of the fact that the respondent's witnesses would be called upon to give evidence in some cases of events taking place six or seven years ago. He also told the tribunal of three witnesses who no longer worked for the respondent and in respect of whom he had no knowledge as to whether the contact details held by the respondent was still up-to-date.

27 Mr Taylor provided evidence of difficulties he has encountered in progressing the claim with the claimant even with regard to the preparation for the hearing on 25 May 2022 and today. He told me of the readiness with which the claimant accuses the respondent's representatives of malpractice and in some cases of her insistence on including documents within the bundle which are not actually relevant to the issues between the parties for example medical documents relating to the period during which the respondent concedes that the claimant was disabled.

28 The claimant gave evidence on her own account. Her witness statement was partly factual and was partly a skeleton argument responding to the application to strike-out. The claimant does not accept that significant prejudice has been occasioned and in particular for example she was able to offer some help with regard to maintaining contact with the respondent's witnesses. In some cases the claimant went beyond that which was permissible by suggesting substitute witnesses - I explained that the identification of the respondent's witnesses was entirely a matter for the respondent. The claimant also explained the unfairness of holding her responsible for some of the periods of delay: pointing out that in some cases she had waited many months for a response to her correspondence from the tribunal.

29 Regarding her own application to strike out the response, the claimant relies upon which she says is sharp practice on the respondent's part with regard to the constitution of the trial bundle; the fact as the claimant has it that the respondent has not assisted her in her efforts to redact a document which has been disclosed, but which includes confidential customer information; and she has not persuaded by the respondent's assertion that documents which she has sought by way of an application for specific disclosure cannot be located. (These documents relate to the dismissal of the claimant's former manager for falsifying documents. The respondent's case is that the documents concerned were unrelated to the claimant and are irrelevant in any event.)

30 For today's hearing, the claimant also provided a witness statement from her brother, Mr Rajesh Gupta. This statement was limited to the events leading to the postponement of the adjourned hearing date 17 August 2022 until today's date. This statement also contains what appear to me to be quite unfounded allegations of professional wrongdoing against the respondent's legal team. In

the event Mr Gillie had no questions for Mr Gupta who was not therefore called to give oral evidence but I have read his witness statement.

31 I was provided with a hearing bundle specifically prepared for today's hearing. It was prepared by the respondent and runs to some 291 pages. The bundle appears to me to be a bundle which has been compiled by experienced professionals and contains all of the documents I was likely to need. However, pursuant to the Case Management Order I made on 25 May 2022, the claimant also provided a bundle running to some 68 pages. It is of significance that none of the documents in the claimant's bundle were referred to during the course of today's hearing; and just three pages from that bundle were referred to in Mr Taylor's witness statement. Perhaps this experience might persuade the claimant that the respondent's solicitors with their wealth of experience of such matters and recognising their duty to the tribunal can perhaps be relied upon to recognise those documents which need to be in a particular bundle and those which are superfluous.

The Respondent's Case

32 The respondent does not suggest that delays in this case have been intentional or contumelious. Accordingly, the circumstances identified in (a) in the case of ***Birkett*** do not arise in this case. Rather, it is the respondent's contention that the claimant has not pursued the case conscientiously with the result that there has been inordinate and inexcusable delay such that there is significant prejudice to the respondent and a fair trial is no longer possible.

33 Mr Gillie has identified four periods of delay:

(a) 7 October 2016 – 1 June 2018 (1 year 7 months).
(b) 1 June 2018 – 30 April 2019 (c.11 months).
(c) 1 May 2019 – 16 June 2021 (2 years 1 month).
(d) 17 June 2021 – 9 May 2022 (c.11 months).

34 Regarding periods (a) and (b), the respondent does not regard the claimant as having been culpable for those periods of delay. The first was largely covered by a stay ordered by the tribunal - accountable by reference to the claimant's ill health. The second period was also accountable by reference to the claimant's ill health. The claimant requested a stay and the respondent consented to this although no stay was actually granted. The respondent does not argue that substantial prejudice has arisen by reason of these two periods of delay.

35 Regarding period (c), the respondent argues that during this two-year period the claimant's only pursuit of her claim was to send an email to the Tribunal on 31 December 2019 saying that she wished to proceed with her claim. She did not make any further attempts to prosecute the claim until 17 June 2021. The respondent submits that this two-year delay is inexcusable. The claimant failed to exchange her witness statements during this long period and did not even declare herself ready to do so.

36 The respondent argues that period (d) represents another inexcusable delay. The tribunal emailed the claimant on 17 June 2021 asking her to resend her email of 31 December 2019 (sent 6 months previously). The claimant resent that email the same day. On 21 June 2021 the respondent applied to strike out the case. On 6 December 2021, over 6 months later, the application was listed for. The claimant submitted a revised schedule of loss on 9 May 2022. No steps were taken during this time by the claimant to exchange her witness statements. The period is characterised by two delays on the part of the Tribunal each amounting to half a year. The respondent submits that such periods of delay are incompatible with both the overriding objective and the claim's case management directions.

37 It is the respondent's case that periods (c) and (d) of the identified delay give rise to significant prejudice to the respondent in terms of the degradation of witnesses' memory and the potential loss of witnesses who are no longer in its employment and with whom it may have difficulty now making contact. Further, the respondent is concerned that even if it is able to make contact with the witnesses, and even if their memories are intact, the fact that the witnesses is no longer in the respondent's employment, will at the very least make the witness less enthusiastic in giving evidence.

38 In such circumstances, for the following reasons, the respondent submits that a fair trial is not now possible:

(a) The would have to track down its missing witnesses.
(b) On tracking them down, the respondent would need to reproof all three core witnesses.
(c) The respondent would then have to amend, alter or withdraw their witness statements to reflect changing recollections.
(d) The respondent would have to review the bundles and may have to organise and pay for witness training.
(e) It may well be necessary to review and amend the documentation in the bundle upon taking instructions from witnesses with poor recollections of events.
(f) The parties would then have to finalise and exchange witness statements.

(g) A hearing would have to be listed for 6 days at some point in the future. Given the state of the lists, the case is unlikely to be heard for at least another 9 months, that is, not before 2023.
(h) In the interim, the respondent may well have to apply for, and obtain, witness orders to compel attendance of people (who left its employment many years ago) to give evidence on its behalf.
(i) In 2023, the parties' witnesses would be required to give evidence about things that happened some 7 years previously and the tribunal would need to embark on the very difficult task of assessing which set of impaired recollections were most reliable as a basis for making findings of fact.
(j) All this relies on the claimant being ready and available for a hearing which, given the history of this case, is at best uncertain.

39 Accordingly, the respondent argues that the time has come for the claim to be struck-out.

The Claimant's Case

40 As stated earlier, the claimant largely presented her argument as part of her evidence - it is summarised at Paragraphs 28 and 29 above. Significantly, the claimant's submission before me today is that a fair hearing is possible.

41 The claimant told me that she was ready to proceed swiftly to a final hearing. To rectify what she says are the defects in the existing trial bundle, she will produce a supplementary bundle running to a maximum of 50 documents. She can have this ready along with her witness statement within two weeks.

Discussion & Conclusions

42 I remind myself that to strike-out a claim is a draconian measure to which resort should be had only in the most extreme and obvious cases. Having carefully considered all of the documentation in this case, and the evidence and arguments presented by the parties, I am not persuaded that it is appropriate to strike this case out. However, it is essential that the case is brought on for final hearing as soon as it can be accommodated and that the parties fully cooperate both with each other and with the tribunal in achieving this.

43 I am not persuaded that periods of delay (c) and (d) identified by Mr Gillie are entirely inexcusable. The tribunal is aware that the claimant has been combating serious ill-health for a number of years this will have had a profound effect on her energy levels and her ability to be proactive. Further, during these periods there were lengthy delays on the part of the tribunal: significantly, on 31 December 2019, the claimant wrote to the tribunal indicating her wish to proceed

with her claim (and only a few weeks earlier respondent had indicated that it would agree to the case being listed for further preliminary hearing), and yet she heard nothing in response from the tribunal until 17 June 2021. There is an argument that the claimant should have chased and pestered, but it is also a matter of record that during most of 2020 the service provided by the tribunal office was very unsatisfactory because of staffing levels during the pandemic. So far as (d) is concerned, the tribunal wrote to the claimant on 17 June 2021 and she responded immediately. Within a few days, the respondent made its application to strike-out: it is difficult to see what action the claimant could then have taken to advance the claim to a full hearing in the face of such an application. The respondent clearly would have resisted the case being listed for final hearing pending the hearing of the application.

44 I am not persuaded on the evidence placed before me that the respondent will have significant difficulties in contacting its witnesses and I expect the respondent to know the claimant's offer of assistance in this regard

45 Neither am I persuaded that witness recollections will be unduly impacted. The witnesses here are professional managers who made witness statements ready for exchange as long ago as 2017. Much of what they have spoken about in those witness statements will have been contemporaneously documented. I do not accept that it is now necessary for those witnesses to be fully re-proofed. And indeed, the Case Management Orders I have made below are made on the basis that the 2017 witness statements will still form the evidence-in-chief.

46 Of course, between now and the final hearing, those representing the respondent will wish to speak to the witnesses (the notion of witness *training* is somewhat alarming), and to the extent that a witness wishes to change any part of the witness statement that is something which could be dealt with in supplementary witness statements to be exchanged before the final hearing.

47 In the circumstances, and for the reasons I have set out, the application by the respondent for the strike-out of the claim is refused.

48 With regard to the claimant's application to strike-out the response, the simple fact is that if documents no longer exist they cannot be disclosed. The claimant has provided no evidence upon which the tribunal could be satisfied that the documents exist and are being supressed. Neither am I persuaded that the documents are even relevant. If it remains the claimant's case that those documents are relevant, then she can cross-examine the respondent's witnesses at the final hearing with regard to them. If the panel hearing the case concludes that these are documents which they would have expected to have been preserved and disclosed this will be a factor weighing on the balance against the credibility of the respondent.

49 However, there is no basis upon which to strike-out the response. The claimant's application for such a strike-out is also refused.

THE WAY FORWARD

50 Having refused strike-out the claim or the response, I have given careful thought to how the case should now be managed so as to bring about a final hearing with a minimum of further delay.

51 The respondent indicated to me that the bundle had been prepared as long ago as 2017. And that the respondent was ready at that time to exchange witness statements. There appears to me to be no reason why those statements would necessarily need to be amended as the facts occurring prior to that date cannot have changed.

52 The claimant indicated that she could not finalise her witness statement without some amendments to the bundle. I am not going to order the respondent to make changes to the bundle, but I will permit the claimant to file a supplemental bundle limited to 50 documents. The claimant indicated to me that this could be ready within two weeks and that she could then finalise her witness statement.

53 I have therefore made Case Management Orders requiring the claimant to serve on the respondent a supplementary bundle by no later than 2 December 2022.

54 The party should then exchange witness statements on 16 December 2022.

55 The general state of readiness for hearing can then be considered at the Close Preliminary Hearing (by telephone) which I have listed for 22 December 2022 at 10am. There is no need for any further bundle to be prepared in readiness for that hearing and I do not require site of the claimant supplementary bundle or the witness statements. The parties should be ready at that hearing to engage with the listing of a final hearing and any further Case Management Orders which may then be required - including the filing of updated supplementary witness statements.

56 The claimant must understand that whilst I have declined to strike-out the case at this stage, any further delay in advancing this case to a final hearing must be avoided. Of course, the claimant's health is an important consideration but so is the quality of justice which will be available to the respondent's witnesses who are facing very serious allegations of discrimination which have

been hanging over them for many years. It is the claimant who has chosen to bring this claim; is therefore incumbent upon her to be proactive in its progress. If the claimant's health deteriorates further she must arrange either for professional representation or for friends or family to stand in and take over the conduct of the case on her behalf. I intend insofar as it is possible to reserve the case management of this case to myself - and I make it clear that further delay cannot be tolerated and may result in the tribunal acting of its own initiative to strike-out the claim and bring it to an end.

57 Finally, claimant should be aware that unfounded allegations of professional wrongdoing against solicitors and barristers representing the respondent are likely to rebound badly on her own credibility. I have seen nothing in this case which suggests that there has been any wrongdoing: to the contrary, the respondent's representatives have behaved professionally in keeping with their primary duty to represent their client. Those representatives have no duty to the claimant save that they do have a duty to the tribunal which involves not taking advantage of the claimant. On the evidence before me there is no basis to suggest that they have attempted to do so.

CASE MANAGEMENT ORDERS

58 The claimant has permission from the tribunal to serve on the respondent a supplementary bundle of documents limited to 50 additional documents which have been omitted from the main bundle prepared by the respondent. The supplementary bundle shall be indexed and paginated and shall be available to the respondent in electronic format by no later than 4pm on **2 December 2022**.

59 The parties shall simultaneously exchange witness statements by no later than 4pm on **16 December 2022**.

60 The case is listed for a Closed Preliminary Hearing (by telephone) before Employment Judge Gaskell on **22 December 2022** at 10am with a time allocation of two hours.

Employment Judge Gaskell
17 November 2022