EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Slaven

Respondent: University Hospital of South Manchester NHS Foundation Trust

Heard at: Manchester **On:** 12 December 2022 and 13 December 2022 (in chambers)

Before: Employment Judge Slater (sitting alone)

Representation
Claimant: Mr S Lewinski, counsel
Respondent: Mr J Boyd, counsel

JUDGMENT

The application to strike out the claim because a fair trial is no longer possible is refused.

REASONS

Issue

1. This was a public preliminary hearing to decide whether to strike out the claim because a fair hearing is no longer possible. This was on the application of the respondent.

Evidence and skeleton arguments

2. The claimant and Mrs Logue, for the respondent, had produced witness statements for this hearing. Mr Boyd did not wish to cross examine the claimant and I did not consider there was anything in her statement which required clarification, so I did not need to hear oral evidence from the claimant. I read and took into account the contents of the claimant's statement. Mr Lewinski had, in his skeleton arguments, challenged the efforts of Mrs Logue to contact a potential witness, Ms Coombes. Mr Lewinski told me he had not expected to cross examine Mrs Logue, but was happy to do so. I considered that we should hear evidence

from her. She was, therefore, cross examined by Mr Lewinski and I make findings of fact about the respondent's efforts to contact witnesses based on Mrs Logue's evidence.

3. I also had an electronic bundle of documents prepared by the claimant and referred to pages in this bundle to which I was taken by reference in the witness statements or otherwise.

4. Both counsel had prepared written skeleton arguments which had been exchanged. I had read these arguments, the witness statements and documents referred to in the statements before starting the hearing.

Background to the application

5. This case has a long history. Employment Judge Ross summarised this in the record of a private preliminary hearing conducted by her on 3 May 2022.

6. The claimant brought an equal pay claim as well as the complaints of unfair dismissal, disability discrimination and failure to pay holiday pay which are the subject of this application ("the non-equal pay complaints").

7. In summary, the claimant's non-equal pay complaints were put on hold (with the exception that disclosure was required in relation to these complaints as well as the equal pay complaints at an early stage) while various stages in the equal pay claim proceeded. This was initially, by agreement, while a like work claim was determined, but then carried on after the like work claim failed and the equal pay claim proceeded as an equal value claim. There have been various reasons for the particularly long time this has taken so far, including having to re-start a stage two equal value hearing after 8 days, when a non-legal member had to withdraw from the case and the respondent, as it was entitled to do, objected to the Tribunal continuing with the case as a panel of two.

8. Prior to the private preliminary hearing on 3 May 2022, neither party had suggested that the non-equal pay complaints should proceed to a final hearing before determination of the equal pay claim. At the private preliminary hearing on 3 May 2022, Employment Judge Ross listed, with the agreement of both parties, two final hearings: one to deal with the equal pay claim (a stage 3 hearing in October 2023); and one to deal with the non-equal pay complaints (20-23 February 2023). Again, with the agreement of the parties, the hearing of the non-equal pay complaints was listed to deal with liability only since, if the complaints succeed, remedy will be affected by whether or not the claim for equal pay succeeds.

9. Employment Judge Ross made case management orders for the preparation of the non-equal pay complaints for the final hearing. These included a further order for disclosure. It appears the judge's attention was not drawn to the fact that an order for disclosure had been made by Employment Judge Russell in December 2012. In accordance with the orders, the final hearing bundle was to have been completed by 19 September 2022 and the witness statements sent to each other by 24 October 2022. Orders were made relating to the disability issue. I have been told at this hearing that the respondent has, since that hearing, conceded that the claimant was disabled at relevant times by reason of a physical impairment affecting both of the claimant's feet.

10. I note that there was no suggestion made at that preliminary hearing that a fair trial of the non-equal pay claims was no longer possible.

11. The respondent made its application which has led to this hearing by letter dated 8 November 2022. I deal with this under the heading "the respondent's application". I note that this application was made about two weeks after witness statements should have been served, in accordance with the orders of Employment Judge Ross. Although the letter did not expressly say that it was an application to strike out the claim, Regional Employment Judge Franey interpreted it as such, and listed this preliminary hearing to decide whether the claim should be struck out because a fair hearing is no longer possible. Mr Boyd agreed that the Regional Employment Judge was correct in his identification of the issue to be decided.

Facts

12. The claimant was employed by the respondent as a Cardiac Investigations Unit Manager from 13 October 1975 until she was dismissed on the grounds of redundancy with effect from 23 September 2011.

13. The claimant presented her claim to the Tribunal on 22 December 2011.

14. The respondent presented a response on 27 January 2012.

15. The claimant provided amended grounds of complaint dated 4 October 2012. The non-equal pay complaints in these grounds are unfair dismissal, direct disability discrimination, failure to make reasonable adjustments and breach of contract/unlawful deduction from wages in relation to failure to pay accrued but untaken holiday entitlement for the holiday year 2009/2010. It appears to me that the other breach of contract/unlawful deduction from wages complaint about a shortfall in the contractual redundancy payment is, in fact, a remedy matter relating to the equal pay claim, and its absence from the list of complaints and issues relating to the non-equal pay claims supports me in that view. Mr Lewinski told me at the end of the hearing that the claimant does not claim direct discrimination, as referred to by Mr Boyd, but discrimination arising from disability. I note that the list of complaints and issues annexed to the record of the preliminary hearing held on 3 May 2022 refers to a complaint of discrimination arising from disability rather than direct discrimination. Since I have not examined the whole history of the case, and the bundle for this hearing does not contain anything which sheds light on this, I do not know when and how the complaint of direct discrimination in relation to dismissal changed to a complaint of discrimination arising from disability. However, I am not aware of the parties disputing that the complaints to be considered at the final hearing are as identified in the list of complaints and issues prepared by Employment Judge Ross.

16. The respondent provided amended grounds of resistance, which are undated in the bundle of documents provided to me. Whilst relatively brief, the grounds of resistance contain a level of detail which suggest to me that they were drafted on the basis of instructions from someone in the respondent organisation with knowledge of relevant events, as I would expect to be the case.

17. At a case management discussion on 14 December 2012, orders were made by Employment Judge Russell which included an order that the parties should exchange lists of documents (relating to all the claimant's complaints) by 4 February 2013 and copies of documents by 11 February 2013.

18. It is agreed that documents relevant to the non-equal pay complaints were disclosed at this early stage so the parties have been in possession of all relevant documents since February 2013.

19. The respondent did not take statements from potential witnesses at an early stage, when memories could be expected to be relatively fresh. I do not know why this was not done.

20. Mrs Logue is employed by the respondent as Head of Workforce Strategy at Wythenshawe, Trafford, Withington and Altrincham (WTWA) Hospitals. Mrs Logue was not employed by the respondent until September 2014, so was not involved in dealing with this case in the early years of proceedings. On the basis of her witness statement and oral evidence, I make the following findings of fact.

21. Three potential witnesses were identified at some stage (unspecified) before Mrs Logue's involvement: Dr Neil Davidson; Ms Judy Coombes and Mr John Silverwood.

22. Dr Davidson sadly passed away in July 2020. No witness statement had been taken from him before he died.

23. Mr Silverwood was HR Director at the time of the redundancy of the claimant. He left the respondent in March 2012 for other employment. He is now retired. Mrs Logue contacted Mr Silverwood, having found him on LinkedIn. Mrs Logue spoke to Mr Silverwood. She provided him with some background to the case and some of the background papers they had. On 19 August 2020, Mr Silverwood informed Mrs Logue that his recollection was very poor due to the 11 year gap and that he could not recall anything.

24. Ms Coombes had left the respondent in July 2015 to work at Tameside Hospital. She signed detailed witness statements in relation to the equal pay proceedings on 21 February 2014 and 17 January 2017. Ms Coombes was significantly unwell in 2019 and could not take part in the equal pay hearing in 2019. I take from this that the respondent, or their representatives, had contact details for Ms Coombes in 2019. There has been no further contact with Ms Coombes from the respondent since then.

25. Mrs Logue found out from the Director of People and OD at Tameside Hospital in August 2022 that Ms Coombes had retired in August 2021.

26. Mrs Logue did not ask anyone at Tameside to forward a letter to Ms Coombes' last known address. Mrs Logue did not send anything to Ms Coombes at the last address the respondent had for Ms Coombes because she did not want to send confidential information to an address they had in 2015. As noted above, the respondent was in touch with Ms Coombes as late as 2019. It is not clear why a letter asking Ms Coombes to get in touch would need to contain confidential information. Mrs Logue did not send anyone to the address they had for Ms

Coombes to see if Ms Coombes was still there. Mrs Logue was also concerned because Ms Coombes had been significantly ill. However, she admitted that she would not know whether Ms Coombes had fully recovered. Mrs Logue did not want to send a letter to an address she did not know whether Ms Coombes was still at. Mrs Logue could not find any contact details for Ms Coombes via the internet or social media.

The respondent's application

27. The respondent wrote to the Tribunal on 8 November 2022, making the application which has led to this hearing. The letter included the following:

> "We write to seek an order that this hearing be cancelled. The grounds of our doing so is that matters to be determined in the hearing relate to events which took place in 2009 to 2011. The Respondent does not have any witnesses to comment on events so long ago. It is respectfully submitted that the passage of time is such, (the parties have concentrated over the course of this litigation on the question of equal value), that the matter is no longer capable of having a fair trial. The equal value process is ongoing, and is listed to be heard at a final stage hearing in October 2023. This application does not impact on that hearing."

28. Attached to the letter was the witness statement of Mrs Logue which has been the respondent's evidence at this hearing.

29. Mr Boyd provided a written skeleton argument for the respondent and made additional oral submissions. Mr Boyd's written skeleton argument can be read, if required. I do not seek to set out all Mr Boyd's arguments, but summarise his principal submissions as follows.

30. Mr Boyd submitted that it was unfortunate yet unavoidable that a fair trial of the non-equal pay claims was now impossible due to the passage of time and the claims should be struck out.

31. Mr Boyd argued that blame is completely irrelevant. If a fair trial is no longer possible, for whatever reason, the claim must be struck out.

The claimant's response to the application

32. Mr Lewinski provided a written skeleton argument for the claimant and made additional oral submissions. Mr Lewinski's skeleton argument can be read if required. I do not seek to set out all Mr Lewinski's arguments but summarise his principal submissions as follows.

33. What is a fair trial must be considered in context. This context includes the respondent's failings in not securing witness evidence at an early stage. Ms Logue had not made sufficient efforts to try to contact Ms Coombes. The respondent should not be able to profit from its own failings.

34. It is not the case that the trial cannot go ahead. A trial can proceed on the basis of documents which were disclosed at an early stage, the claimant's evidence and the evidence of the witnesses that the respondent can call. The fact that the

respondent may have made it more difficult for themselves to defend the claim does not mean that a fair trial is not possible.

35. Proportionality forms part of the consideration of what is a fair trial.

Law

36. Rule 37(1)(e) of the Employment Tribunals Rules of Procedure 2013 provides that a Tribunal may strike out all or part of a claim or response on the grounds 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). No other part of rule 37 is relied upon for the respondent's application.

37. The parties referred me to the following authorities: **Abegaze v Shrewsbury College of Arts & Technology** [2008] UKEAT/0176/07/ZT EAT; **Peixoto v British Telecommunications Plc** [2008] UKEAT/0222/07/CEA; **Abegaze v Shrewsbury College of Arts and Technology** [2009] EWCA Civ 96 CA; and **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327. I was not given the full decision in the case of **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684 CA, but I was referred to relevant passages in this authority, quoted in the other cases.

38. The EAT in **Abegaze**, at paragraph 58 wrote:

> "The legal principles to be applied by an Employment Tribunal when considering an application to strike-out a claim were set out by Sedley LJ in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630 CA at paras 5, 18-21 with whom Wilson and Brooke LJJ agreed:
>
> "5 This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in **Arrow Nominees v Black/edge** [2000] 2 BCLC 167 and of the EAT in **De Keyser v Wilson** [2001] IRLR 324, **Bolch v Chipman** [2004] IRLR 140 and **Weir Valves v Armitage** [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal.
>
> "18 The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him - though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are

> open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.
>
> "19 In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be recanvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.
>
> "20 It is common ground that, in addition to fulfilling the requirements outlined in paragraph 5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was 'the only proportionate and fair course to take'. This aspect of their determination plays no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.
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> "21 It is not only by reason of the Convention right to a fair hearing vouchsafed by Article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see **Re Jokai Tea Holdings** [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact - if it is a fact - that the tribunal is ready to try the claims; or - as the case may be - that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

39. The EAT in **Abegaze v Shrewsbury College of Arts & Technology** also quoted from Arrow Nominees Inc v Blackledge [2001] BCLC 591:

> "The function of the Court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice."

40. The EAT in Peixoto also referred to the legal principles in **Blockbuster** as being the principles to apply, quoting the same paragraphs. However, in paragraph 49, HHJ McMullen QC wrote: "In every case, there must be some question of proportionality. In our judgment that arises when dealing with rule 18(7)(f) at stages prior to the determination that a fair hearing is not possible. It could not be said that once the judgment had been made that a fair trial was impossible, any further steps need to be considered. If the Tribunal reaches that conclusion and yet orders the case to go on for some other reason, it would be allowing itself as a public authority under the Human Rights Act to commit a violation of the Convention Art 6.1." At paragraph 50, HHJ McMullen QC wrote: "The fact that it must conclude that a fair trial is impossible involves consideration of all lesser alternatives, including proportionate measures to see whether the case can be tried."

41. There is an apparent conflict in the authorities about the stage at which proportionality is to be considered. Is this, as the EAT in **Peixoto** suggests, to be considered as part of the assessment as to whether a fair trial is possible. Or is it, as the Court of Appeal authority of **Blockbuster**, suggests, something to be considered even after a decision is made that a fair trial is no longer possible? Counsel were not able to point me to any authorities which have sought to deal with this apparent inconsistency. It may be that the answer lies in the fact that, in **Blockbuster**, the application to strike out was based on unreasonable conduct, made at the start of the final hearing, and the Tribunal was considering whether a fair trial could go ahead in that trial window. The possibility of a fair trial sometime in the future, if the claim was not struck out at that stage, would leave room for the consideration of proportionality after a decision had been taken that a fair trial was not possible within the existing trial window. This was the approach taken by Choudhury J (President) in **Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327.** The situation being considered in **Peixoto** was of a different nature: the conclusion that a fair trial was not possible arose when the claimant, due to ill health, could not proceed with her claim. The Tribunal concluded that there was no prospect at any time in the future when the claimant would be ready to proceed. Since alternatives such as postponing the hearing were not potentially going to make a fair trial possible in the circumstances, there was no scope left to consider proportionality after the decision that a fair trial was no longer possible had been arrived at.

42. If this distinction between the cases is correct, it would seem that proportionality does not come into play after the conclusion that a fair trial is no longer possible where the reasons for a fair trial not being possible mean that there is no feasible alternative for a fair trial in the future if the hearing is postponed. Whether or not I am right in this analysis, I think, in practice, whether proportionality is to be considered only in reaching a conclusion that a fair trial is not possible or also, again, after that conclusion has been reached, is unlikely to make a difference to the conclusion I reach.

Conclusions

43. This is a case where either a fair trial is possible in February 2023, when the final hearing is listed, or it is never going to be possible. There is no suggestion

that more time will put the respondent in a better position to be able to defend the claim. Indeed, given the respondent's argument that the passage of time makes a fair trial impossible, the situation can only get worse.

44. There is no suggestion of any blame being attributed to the claimant for arriving at the situation which has led to the strike out application. As in the **Peixoto** case, it is possible for a blameless claimant to have their claim struck out, if a fair trial is not possible. I need to consider whether a fair trial is possible in this case, even though the claimant bears no blame for the situation.

45. If the claim is struck out, it is the claimant who will suffer the consequences. I do not know whether the claimant will win any or all of her claims if the case goes to hearing, but, if it is struck out at this stage, she loses the possibility of being successful in all or some of her claims. She loses the opportunity to have a determination of her claims by the Tribunal on their merits. On the other hand, if the claim is struck out, the respondent benefits, at the very least, from not having to expend any more time and money in defending the claims and, at most, from not being found to have unlawfully discriminated against the claimant, having failed to pay holiday pay, and from not having to pay any compensation to the claimant which might otherwise have been awarded.

46. As described in **Blockbuster**, the power to strike out a claim is a draconic power, not to be readily exercised.

47. I do not agree with Mr Boyd's submission that it is unavoidable that a fair trial of the claims is now impossible due to the passage of time. The situation was in large part avoidable, had the respondent taken prudent steps to secure witness evidence at an early stage.

48. Mr Boyd submits that it is irrelevant who, if anyone, is to blame for the situation: if a fair trial is no longer possible, the claim must be struck out. I agree with Mr Lewinski's submission that it is relevant to consider failings on the part of the respondent when considering what, in context, is a fair trial.

49. The difficulties the respondent finds itself in are attributable in large part to a failure to take prudent steps to capture its evidence at a stage in proceedings when the memories of witnesses were likely to be relatively fresh. The respondent did not need an order of the Tribunal to exchange witnesses to realise that capturing their witness evidence was something that should be done. They could not have foreseen that Dr Davidson would, sadly, die before the case was concluded. However, they should have realised that the memories of witnesses are likely to fade over time and that, if witnesses can add anything of real substance to the documentary evidence, their evidence is best captured when it is fresh. I have had no explanation as to why this prudent step was not taken. Mr Boyd acknowledged that, if it had been taken, the respondent would be unlikely to be making this application. It is not simply the passage of time since relevant events which makes it difficult for the respondent to provide its best defence; it is the respondent's failure to capture the witness evidence at an appropriate stage.

50. Taking the prudent steps I have referred to would not be something done because the respondent had a duty of care to the claimant to capture that evidence. It would be done because this was something done to protect the

respondent's own position. If the evidence of Dr Davidson and Ms Coombes had been captured, the respondent could have sought to rely on their statements, although the witnesses were not available to give oral evidence. In relation to Ms Coombes, I do not think it is certain she will not be able to give evidence, but I will return to this. In relation to Mr Silverwood, a statement taken at an early stage would have prompted Mr Silverwood's memory about past events even though, as is common with many witnesses, he might not be able to recall with any reliability, anything more than recorded in his statement when being cross examined.

51. The respondent would have been in a better position to defend the claims had they taken these prudent steps. Failure to take those steps is likely to cause them difficulty in defending the claims, although the extent to which it will cause difficulty is unclear. The paucity of witness evidence for the respondent might cause difficulties not only for the respondent but also for the claimant. It is not uncommon that evidence which emerges in cross examination of witnesses for the respondent provides material from which a Tribunal can draw inferences of discrimination when considering whether the claimant satisfies the initial burden of proof on them in a discrimination case, proving facts from which the Tribunal could conclude that there was unlawful discrimination.

52. The failures in relation to securing witness evidence does not preclude the respondent from being able to defend the claims. All relevant documents were disclosed in accordance with the order of Employment Judge Russell made in 2012. Decisions made about the claimant were made in the context of an organisational reorganisation. Documentary evidence is likely to be of particular importance in this type of case.

53. This is not a situation where the respondent has no witness evidence at all. Mr Silverwood has been contacted. Although his recollection on the basis of what he has so far been shown is poor, it is possible that his recollection might be improved by a detailed consideration of all relevant documents. Even if it is not, he might, at the least, be able to provide some explanation of relevant documents.

54. I am not satisfied that the respondent has taken all reasonable steps to try to contact Ms Coombes. Mrs Logue may have had laudable reasons, relating to Ms Coombes having been suffering ill health in 2019, for not wanting to write to her, but, on the information provided to me, I am not satisfied that Mrs Logue could reasonably conclude that Ms Coombes would be unfit, in 2022/2023, to assist the respondent in providing a witness statement and giving evidence at the hearing, if the respondent decided to call her as a witness. No attempt has been made to contact Ms Coombes using the contact details the respondent, or its representatives, must have had for her in 2019, when Ms Coombes was not able to give evidence in the equal pay case, due to ill health. I did not hear any evidence to suggest the respondent had positive information that Ms Coombes had moved, or changed her telephone number or email address, or whatever contact details the respondent or its representatives had for Ms Coombes when last in touch with her. The respondent could have asked Tameside Hospital to forward a letter to Ms Coombes asking her to get in touch with the respondent, but it did not. Any letter would not have needed to contain any confidential information. On the basis of the limited attempts made so far to track down Ms Coombes, I do not consider the respondent can say with confidence that Ms Coombes will not be available as a witness for the hearing in February 2023.

55. It is questionable how much weight, in any event, the Tribunal would be able to put on witness evidence which was not supported by contemporaneous documentary evidence. Judges have, rightly, been cautioned about the reliability of such witness evidence. This is the case even if the witness evidence has been captured at a relatively early stage. It may be that the disadvantage to the respondent of not being able to call all the witnesses they would have liked to call, or of calling witnesses whose memory has faded due to the lengthy time since relevant events, is not as great as suggested for the respondent.

56. The initial burden of proof is on the claimant in relation to the discrimination complaints. If the documentary evidence is thin, as suggested by Mr Boyd, the claimant may not be able to satisfy the initial burden of proof. The claimant may even be disadvantaged, as noted above, by not having respondent witness evidence which potentially could provide material on which the claimant could rely to satisfy this initial burden of proof. The respondent is more likely to be disadvantaged by the paucity of witness evidence for the respondent if the claimant satisfies the initial burden of proof. The respondent may find it more difficult to prove that the relevant treatment was in no material sense because of discrimination than if they had witness evidence relevant to this question. This depends, of course, what that witness evidence would have been. In the case of Dr Davidson, apart from what contemporaneous documents suggest as to his thought processes, we cannot know what that evidence would have been. The availability of a relevant witness does not necessarily mean that the party relying on that witness will be able to put forward witness evidence that persuades a Tribunal that there was no unlawful discrimination.

57. In relation to the complaint of unfair dismissal, the reason for dismissal, redundancy, is not in dispute. It is the fairness of that dismissal which is in issue. Mr Silverwood may be able to give relevant evidence, prompted by a detailed consideration of all the relevant papers. Relevant documents are available.

58. In relation to the holiday pay claim, the claimant will bear the normal burden of proof of proving, on a balance of probabilities, the facts on which she relies for her claim. It is difficult to see how witness evidence from the respondent in relation to holiday pay would strengthen its defence. Presumably any holiday pay calculation was recorded in the documentation which has been disclosed. It would seem unlikely that there will be a factual dispute as to how much has been paid and what that was for. It is more likely that any differences between the parties will be a matter for submissions, relating to the correct application of the holiday pay provisions and the law.

59. I consider that, in all the circumstances, it would be disproportionate to strike out the claim. This would be a most draconian step, depriving the claimant of the opportunity to have her claims determined. The respondent may not be in as strong a position to defend the claims as it would be if it had available all the witness evidence it would wish to have, although even that may be a matter of debate. It is not precluded from defending the claim. It has the relevant documents to rely on and Mr Silverwood as a potential witness, and possibly Ms Coombes, if she can be located with more diligent efforts. Any deficiencies in the witness evidence, other than the availability of Dr Davidson to give evidence, are due to the respondent's failings. Even in relation to Dr Davidson, his evidence would have

been available, to a degree, had the prudent step been taken of taking a witness statement from him at an early stage. I conclude that, in all the circumstances, a fair trial is possible. Doing justice between the parties requires, I conclude, that the trial goes ahead, despite any difficulties the respondent faces because of limitations in relation to its witness evidence. In my view, striking out the claim would be achieve injustice and be disproportionate. Whether or not the claimant goes on to win or lose her claim, she is entitled to have it heard.

60. In accordance with my analysis of the case law, I consider that proportionality is to be considered as part of the assessment of whether a fair trial is possible in the type of situation we are considering, where there is not alternative of delaying proceedings to achieve a fair trial at a later date. However, even if I am wrong in this analysis and proportionality has to be considered again, after the conclusion that a fair trial is not possible, before deciding whether to strike out the claim, I would reach the same conclusion: it is not proportionate to strike out the claim.

61. For these reasons, I refuse the application to strike out the claim. The case will proceed to the final hearing as listed in February 2023. A separate document sets out case management orders.

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Employment Judge Slater

Date: 14 December 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

15 December 2022

FOR THE TRIBUNAL OFFICE