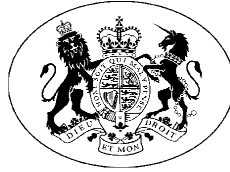

EMPLOYMENT TRIBUNALS

Claimant: Miss A Smith

Respondent: Pennine Care NHS Foundation Trust

Heard at: Manchester (by CVP) **On:** 13 December 2022

Before: Employment Judge Phil Allen (siting alone)

Representation
Claimant: In person
Respondent: Ms L Amartey, counsel

UPON APPLICATION made by the claimant in a document of 9 May 2022 to reconsider the judgment dated 16 March 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

The Judgment of the Tribunal is that:

1. The decision to strike out the claimant's claim, contained in a Judgment dated 16 March 2022 and sent to the parties on 17 March 2022, is confirmed.

REASONS

Introduction

1. The claimant was employed by the respondent from 14 February 2013 until she was dismissed, effective on 22 January 2020. She was latterly a Trainee Assistant Psychological Wellbeing Practitioner. The claimant entered a claim at the Tribunal on 22 May 2020. She alleged: that she suffered detriments and had been automatically unfairly dismissed as a result of having made public interest disclosures; direct disability discrimination; disability related discrimination; breach of the duty make reasonable adjustments; ordinary unfair dismissal; direct sex discrimination; and harassment on grounds of sex. The respondent denied the claims and does not accept that the claimant had a disability as defined by the Equality Act 2010 at the relevant time.

2. A case management hearing was conducted on 9 December 2020 as a result of which various orders were made for the preparation of the case for

hearing. The case was listed for a final hearing to be heard on 9-13 May 2022. On 3 March 2022 the respondent applied for the claim to be struck out on the basis that the claimant had not complied with the case management orders made on 9 December 2020 (as amended).

3. On 8 March 2022 the Tribunal wrote to the claimant and explained that strike out was being considered and that if the claimant objected, she needed to reply by 15 March 2022. It was explained that strike out was being considered for two reasons: because the claimant had not complied with the case management orders made on 9 December 2020; and/or because the claim was not being actively pursued. The claimant did not respond in the time required. I made the decision to strike out the claimant's claim as a result of the two grounds identified. That was recorded in a Judgment made on 16 March 2022 and sent to the parties on 17 March 2022.

4. The claimant sent the Tribunal an appeal document on 9 May 2022. That appeal was treated as an application to reconsider the Judgment made on 16 March.

5. I extended time for the reconsideration application to be made. That was a decision made without the respondent having had a reasonable opportunity to make representations before it was made. The respondent applied to set aside that case management order. It was confirmed that I would consider that application at this hearing under rule 29 of the Employment Tribunal rules of procedure.

6. When the parties were sent a notice that reconsideration was being considered under rule 72, the parties did not believe the issue could be determined without a hearing. As a result, this hearing was arranged as a reconsideration hearing under rule 72(2). The hearing was listed later than would otherwise have been the case, in the light of a document provided by the claimant dated 20 May 2022 which provided advice from a community midwife.

Issues

7. There were two issues being considered at this hearing:

   a. Whether I should revoke the case management decision I made to extend time for the claimant to apply for reconsideration (under rule 29); and

   b. Whether I should confirm, vary or revoke the Judgment I made on 16 March 2022 to strike out the claimant's claim.

Procedure

8. The claimant represented herself at the hearing. Ms Amartey, counsel, represented the respondent.

9. The hearing was conducted by CVP remote video technology. The hearing had been converted to be heard by CVP at the claimant's request.

10. On 10 June 2022 in a letter sent to the parties, I set out the parties' options regarding attendance and representations for the hearing. As the claimant had asked about cross-examination, I explained that if the claimant wished to give

evidence, she needed to prepare a witness statement which set out the relevant evidence and send a copy to the Tribunal and the respondent at least fourteen days before the hearing. I explained in that letter that the that the focus would be on argument, but expressly pointed out that evidence which showed why the claimant had failed to comply with the order of the Tribunal dated 9 December 2020 and/or why she appeared to not be actively pursuing her claim (including not responding to the warning sent on 8 March 2022) was likely to be relevant to the determination to be made. The claimant did not provide a witness statement in advance of the hearing. The respondent's representative highlighted that, in the absence of any evidence, she would be making submissions that the claimant had not shown what was required. The claimant did not make any application to be allowed to give evidence in the absence of a witness statement having been provided.

11. A bundle of documents was prepared in advance of the hearing by the respondent. When I refer to a number in brackets in this Judgment, that is reference to a page number in the bundle prepared for the preliminary hearing. The claimant sent emails to the Tribunal ahead of the hearing. One of those was stated to be a victim impact statement from the claimant. The other provided a report from Dr Mukherjee (Consultant Perinatal Psychiatrist) of 1 December 2022.

12. It was made clear to the claimant that she could take notes during the preliminary hearing, if she wished to do so. The claimant also indicated that she might need to leave the virtual hearing without prior notice for health reasons, and it was confirmed to her that was understood, and she was able to do so at any time if she needed to.

13. The claimant was given the choice of whether she wished to make her submissions first or second. She chose to go second. Ms Amartey made submissions for the respondent. The claimant then made her own submissions. I asked each of them questions. The claimant was offered a break before she made her own submissions, but she chose to make her submissions without a break. However, towards the end of making her submissions, the claimant requested a relatively lengthy break (for reasons she explained in the hearing), and a break was taken at the time and for the length of time the claimant requested. When the hearing resumed, the claimant's submissions were concluded and some brief comments in response were made by Ms Amartey.

14. During her submissions, the claimant referred to a different report from Dr Mukherjee, in addition to the one which had been emailed shortly before the hearing. The claimant was provided with the opportunity to email the additional report to the Tribunal during the hearing, copied to the respondent's representative. The email forwarded by the claimant did not contain the report as an attachment. The claimant then endeavoured to photograph and send a copy of the document which she had, but due to technical issues with her phone she was unable to do so. As a result, I was not able to take into account the additional report referred to as it had not been provided to me before the end of the hearing and at a time when the respondent's representative was able to respond to it.

15. At the end of the hearing I reserved my decision. This document provides my Judgment and the reasons for it.

The relevant facts

16. Following a period of ACAS Early Conciliation, the claimant entered her Tribunal claim on 22 May 2020. At box 1.8 of the claim form the claimant ticked the box to say that she would prefer to be contacted by email. The claimant provided a personal email address in box 1.9. In section 8.1 the claimant ticked boxes to show she was claiming unfair dismissal, disability discrimination and sex discrimination. In box 8.2 the claimant provided some explanation of the details of her claim, but it is fair to say (without any criticism of the claimant who was unrepresented throughout the proceedings) that it was not immediately clear from the content of the claim form what exactly the claimant was alleging and how those allegations fitted with the types of claim which she wished to bring.

17. The bundle provided to me included some further particulars provided by the claimant (28). Those pages provided more detail about the claimant's claims and the basis upon which they were pursued. They included what was described as a witness statement from the respondent's Freedom to Speak up Guardian. The document I had was not dated, but the agenda prepared for the preliminary hearing recorded that the claimant had provided some further information and the claimant's appeal to the Employment Appeal Tribunal stated that she had provided further particulars requested by the respondent on 25 September 2020, from which I conclude that it was provided prior to the preliminary hearing and in September 2020. The respondent's position in the agenda for the preliminary hearing (case management) was that further clarification of the claims was still required, following the further particulars.

18. It is not necessary or appropriate for me to record or address the substantive issues in the claim. The claimant emphasised during the hearing how strongly she felt about the matters she had raised. The respondent's representative highlighted that the factual matters relied upon in the claimant's further particulars, dated back to 2016.

19. A preliminary hearing (case management) was conducted on 9 December 2020 by Employment Judge Whittaker. The claimant attended. A case management summary was sent to the parties following the hearing, albeit it appears that the document was not sent until 12 February 2021. The claimant was ordered to provide some further particulars of her claims. Case management orders were made for the preparation of the case for final hearing. The final hearing was listed to be heard over five days on 9-13 May 2022. The document contained the usual confirmation that the orders made had been explained to the parties at the hearing, and that if anyone affected by the orders wished to, they could apply for the orders to be varied, suspended, or set aside.

20. The claimant was not happy about the conduct of, or the outcome to, the preliminary hearing. She appealed to the Employment Appeal Tribunal. That appeal was ultimately unsuccessful. It was finally determined at a hearing on 26 January 2022 (a rule 3(10) hearing). I do not need to address the grounds of that appeal or the decision made. The respondent's representative submitted that I should consider part of the grounds of appeal when assessing the credibility of the claimant; but I have declined to do so, particularly in the light of the claimant's health issues.

21. I did note that in her correspondence about the outcome of the preliminary hearing (case management) and in her appeal, the claimant was critical that she

had been required to do things whilst she felt that the respondent's response was incomplete, incomprehensible, and contradictory. Amongst other things (70) she said that the order required her to include a lot of information that the claimant said she had already submitted to the courts and the respondent, and she was conscious of being unable to meet the short deadlines for submission of the information.

22. The claimant's appeal did include a list of names, which were described as the respondents against whom the claimant asserted she had claimed (74). That was not a list of people against whom the claimant compared herself when asserting that her treatment was discriminatory, it was a list of people at the respondent who the claimant appeared to be alleging had discriminated against her.

23. The claimant sought more time to comply with the orders made at the preliminary hearing. One of her reasons for doing so was the delay in the orders made at the hearing being sent out in writing. As a result, I varied the dates for compliance with the orders made, and the revised dates were set out in the Tribunal's letter of 18 February 2021 (83).

24. The orders as amended, in summary and as relevant, required the following:

a. The claimant to provide details of each and every occasion when she said she was sexually harassed by Mr Williams, by 23 March 2021;

b. The claimant to identify each occasion when she asserted she made protected disclosures (to Ms Ryder) and what was said, by 23 March 2021;

c. The claimant to identify any other detriments upon which she wished to rely by 23 March 2021, but only if she was relying upon any detriments other than the four which had been identified at the preliminary hearing;

d. The claimant to name the people she was comparing herself to for her direct discrimination claim (her comparators) by 23 March 2021;

e. A schedule of loss to be provided by the claimant by 23 March 2021;

f. The claimant to provide copies of any medical evidence in her possession or control relevant to the issue of whether she had a disability or disabilities at the relevant time by 10 May 2021;

g. The claimant to prepare a disability impact statement by 10 May 2021;

h. The parties to each send the other a list of all the documents in her/its possession or control relevant to the issues in the claim by 14 June 2021; and

i. There were also orders for the respondent to prepare a final hearing bundle by 7 July 2021 and for witness statements to be sent by each of the parties to the other by 2 September 2021, but in practice those

steps were never undertaken because of the non-adherence to the other orders.

25. I will address in my conclusions what the claimant explained at the reconsideration hearing about those orders and whether she had complied with them. What in practice happened was that the claimant did not comply with any of the steps ordered at all at any time after the preliminary hearing (case management). Under the amended case management orders, the case should have been fully prepared for hearing by 2 September 2021, over eight months before the final hearing listed. As at the date of the strike out Judgment on 16 March 2022, none of the steps required to prepare for the hearing had been done by the claimant as ordered at the preliminary hearing (case management).

26. During 2021 the claimant continued to correspond from the email address provided. On 31 December 2021 the respondent's solicitor highlighted to the claimant that she had still to comply with the orders requiring her to clarify her claim. He made reference to the claimant's appeal and highlighted the final hearing date. He provided a list of documents for the respondent and a link to download copies of those documents. The claimant responded on 1 January explaining that she was awaiting the appeal hearing and criticising the respondent's response.

27. On 26 January 2022 the claimant's appeal was dismissed. In an email on 28 January the respondent's solicitor highlighted the outstanding steps required from the claimant and asked the claimant to inform him when she would be taking those steps (126). Further emails were sent on 17 February (127) and 24 February 2022 (129). The claimant having not responded, the respondent's solicitor applied to the Tribunal on 3 March 2022 to strike out the claim on the basis that it was not being actively pursued (128).

28. On 8 March 2022 the claimant was sent a letter from the Tribunal warning her that the Tribunal was considering striking out her claim because: she had not complied with the orders of the Tribunal dated 9 December 2020; and it had not been actively pursued (131). The claimant was explicitly warned that if she wished to object to the proposed strike out, she should give her reasons in writing by 15 March 2022 and should confirm the dates by which she would comply with the case management orders.

29. The claimant did not respond.

30. On 16 March 2022 I made the decision to strike out the claim because: the claimant had not complied with the orders of the Tribunal dated 9 December 2020; and/or it had not been actively pursued. A Judgment was signed on 16 March 2022 and was sent to the parties on 17 March 2022 (133). At the date upon which I made that decision: the claimant had not provided to the Tribunal any of the further particulars ordered to have been provided by 23 March 2021; the respondent had informed the Tribunal that the claimant had not undertaken any other steps in preparation for the hearing as ordered (and the claimant had not contradicted that assertion); a five day hearing was less than two months away; and the claimant had not informed the Tribunal of any reason why she had not or would not comply with the orders made and had not responded to the Tribunal's own correspondence informing her that she needed to object if her claim was not to be struck out.

31. On 24 March 2022 the claimant emailed the respondent's solicitor from a new email address (136). She explained in the email that the phone attached to

the previous email address which she had used, no longer worked. She asked for an adjournment of the hearing on 13 May 2022 due to requiring urgent treatment for her disability. She detailed the recent impact which her mental health had upon her. She attached some photographs and a letter dated 21 March 2022 which recorded that the claimant had an appointment arranged with a Dr Schofield in early April.

32. The respondent's solicitor responded on the same day and informed the claimant that the hearing had already been cancelled as her claim had been struck out. The claimant responded to say she would be appealing the decision. The claimant then emailed the Tribunal (145) explaining what she had been informed, that she would be appealing the decision, and asking for all documentation which had been sent to the previous email address. She said that she had been unable to access her old email address and also medical issues had caused unfortunate and unavoidable disruption. Within the email she also referenced unfair time allowances for the case management documents, and concluded by asserting that it was unfair that the respondent was not required to undertake directions or unfair deadlines.

33. On 28 March the claimant emailed the Tribunal (146) and referred to a conversation with a Tribunal administrator on 24 March in which she had been informed that a letter had been sent to her previous email address. She explained she was not aware of the letter and sought leniency. She requested that all documentation sent to the previous email address from January 2022, was now forwarded to the new email address.

34. The claimant's explanation at the reconsideration hearing was that her phone had burnt out (a photo was provided (185)). Having lost her phone, she was not able to obtain another one for some time due to cost. She said she could not access the email address she had previously used without the destroyed phone. She suffers from acrophobia and therefore leaving the house was/is difficult and she cannot use a computer at a library, nor did she have access to another computer.

35. The respondent's representative asserted that the email of 28 March (146) and the period of emails sought within it, suggested that the claimant had not had access to the relevant email address from January to 28 March 2022. The claimant responded to this by very clearly stating that was not true. She said she had only not had access to the email address for about three weeks. She had sought the emails back to January in order to ensure that she had everything. On that basis, the claimant would have received the emails from the respondent's solicitor in February 2022 explaining the need to undertake the outstanding steps ordered, as they had been sent prior to that timeframe.

36. On 29 March 2022 the claimant provided the Tribunal with some further documents which she asserted were medical evidence of her condition. The documents provided partly reflected those previously sent to the respondent's representative, but also included confirmation that: the claimant was in receipt of personal independence payment; she had met with Ms Buttery, a specialist perinatal mental health nurse at Greater Manchester Mental Health NHS Foundation Trust on 1 March 2022 to complete a specialist perinatal community mental health assessment, the letter detailed that the claimant was struggling with increased anxiety which was impacting upon her ability to leave her home; and that the claimant's Universal Credit work capability assessment decision of 22

October 2021 had been that the claimant had limited capability for work and work-related activity.

37. On 7 April 2022 the Tribunal sent a letter to the claimant (158). That informed the claimant that once she had received the strike out Judgment she should apply within 16 days of it being sent to her for reconsideration of the Judgment. The letter also stated that the application should set out the steps the claimant was taking to comply with the Tribunal's orders and actively pursue the claim. There was no evidence before me that the claimant was re-sent the strike out Judgment and related correspondence at the same time as that letter was sent.

38. On 27 April 2022 the Tribunal emailed the strike out Judgment to the claimant (159). In the same email the claimant was informed that there had been a typographical error in the letter sent on 7 April and she was advised that she had 14 not 16 days to seek reconsideration "*from this email sent today*". Subsequent emails were exchanged in which the claimant sought a copy of the strike-out application made.

39. On 9 May 2022 the claimant sent to the Tribunal a document containing the notice of her appeal from the decision of the Employment Tribunal. The second page included the claimant's grounds (168). The claimant disputed that she had not pursued her claim and referred to her lack of legal representation. The claimant asserted that she had been requested to provide further details and had provided all this evidence within the preliminary hearing bundle, but (she asserted) the respondent had refused to acknowledge that any evidence had been sent by her. The claimant referred to a lack of leniency shown to her and said she remained adamant that the court orders from December 2020 had been complied with. She referred to a delay in providing medical evidence being beyond her control and due to the delay in being assessed by a professional psychiatrist who had confirmed PTSD.

40. In her final paragraph the claimant said the following:

> "*Following the rule (10) hearing on 19 January 2022, the appellant experienced a severe decline in mental health and was referred to an urgent mental health team in February 2022, the appellant was then referred to see a psychiatrist at Bolton NHS in March 2022 whom confirmed the appellant had PTSD and has commenced a plan to start treatment. The appellant then sent documentation on March 24 with the medical evidence (proving PTSD disability) and requesting to delay court proceedings as the appellant was required to undergo urgent mental health treatment. It was then that the appellant was*"

41. I was not provided with any documentation sent by the claimant on 24 March 2022, save for that detailed at paragraph 31 above.

42. I accepted the claimant's email and attached documents as a reconsideration application (albeit that it was also an appeal). I noted that the application was made more than 14 days after the decision had originally been sent to the parties, but it had been sent within the timescale given in the Tribunal's email of 27 April 2022, being the email which re-sent the Judgment to the claimant. I considered it in the interests of justice to extend time for the reconsideration application. I also determined that (having undertaken the sift consideration required by rule 72(1) of the Employment Tribunal rules of procedure) the

application to reconsider should proceed. This was explained in a letter sent to the parties on 12 May 2022 (165). The parties were invited to set out their views on whether the application could be determined without a hearing. The claimant was asked if she would be fit to attend a hearing (and when). The respondent was asked to set out its reasons for asserting the Judgment should not be reconsidered. I also asked the claimant to provide a copy of the rest of the text which followed on from the paragraph I have quoted in paragraph 40 above, but she has never done so.

43. Emails were sent in response by both parties. A hearing was required. The claimant provided a letter from a midwife dated 20 May 2022 (172) which said that asking the claimant to attend court during her pregnancy could jeopardise the health of the claimant and pose a risk to her baby. The reconsideration hearing was accordingly listed for a date after the claimant's pregnancy ended to avert the risks identified. At the reconsideration hearing the respondent challenged the credibility of this report as it was not on Trust headed paper, but I accept it as genuinely being written by the community midwife as the wording used was entirely consistent with what I would expect from a midwife and there was no evidence to the contrary.

44. What would happen at the reconsideration hearing and the claimant's options regarding evidence, were outlined in a letter from the Tribunal of 10 June 2022 (176).

45. The respondent's solicitor sought to challenge the decision made to extend time for the application to reconsider to be made. It was highlighted that the respondent had not been given the opportunity to provide its view before the decision was made. The parties were informed on 7 July 2022 (191) that, at the reconsideration hearing listed, I would also consider the respondent's application that I set aside my earlier case management order in the interests of justice, being in circumstances where the respondent had not had a reasonable opportunity to make representations before it was made.

46. When the respondent set out the grounds upon which it stated the strike out decision should not be reconsidered on 8 August 2022 (193), the respondent provided a detailed timeline of events and also questioned the credibility of the claimant and the explanation which she had given, highlighting that the lack of a phone does not prevent access to icloud emails. In her response (195), the claimant stated she did not have a laptop so would be unable to access any icloud emails. She also said that the icloud account was attached to the mobile phone number of the broken phone, which was disconnected almost five years previously, as the claimant had not paid the monthly bill. I understood the assertion regarding access to the internet requiring an available device to do so. I did not understand the latter part of the claimant's explanation, as the claimant had clearly been using the relevant email address up to some time in or around February 2022.

47. Shortly before the reconsideration hearing, the claimant sent an email which she described as a victim impact statement. In it she asserted that she suffers from PTSD and acrophobia and described the impact those conditions have had upon her. She asserted that she has been persistently pursuing her case since proceedings began in April 2020. She asserted that she had already sent all the documents in her possession to the courts and could not physically send anymore documents. She explained that she had needed to wait for almost two years for an assessment by Dr Mukherjee. She referred to her contention that the respondent

had not complied with orders. She referred to the merits of her claim. She referred to documents attached which had been sent to the respondent before she was made aware that the claim had been struck out, including a report from Dr Mukherjee. Her email concluded with the following:

> "*Bolton NHS have been supporting the appellant and they advised me in February 2022 that I should "take a break from proceedings for a few weeks and apply for an extension, to enable me to seek urgent treatment at the time". I dutifully followed this advice given to me by the mental health nurse and I was then Unfortunately informed 24 March 2022 by the respondent, (in response to medical evidence sent) that my claim had been struck out and approved by a judgment from Manchester ET on 16 March 2022"*

48. The only medical report provided by the claimant from Dr Mukherjee (Consultant Perinatal Psychiatrist) was one dated 1 December 2022. The claimant did not provide any other report from her, nor was it clear when such a report would have been prepared or when it would have been provided to the Tribunal or the respondent. The report provided said the following:

> *"The above-named lady is currently under the Perinatal Community Mental Health Service. We provide assessment and care for women who are pregnant up to 1 year postnatal with moderate-severe mental health difficulties. Miss Smith reports the ongoing work tribunal court case has been having a significant detrimental impact on her mental health, with the current court case triggering symptoms related to past trauma. Until this court case is resolved, Miss Smith is unable to access appropriate therapy which is an important part of her care plan. Miss Smith would like for a conclusion (remedy) to be reached as quickly as possible allowing her to move on with her life. Any support to enable her to attend court related meetings would be appreciated."*

The Law

49. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the Judgment (rule 70). The original decision can be confirmed, varied or revoked. The Court of Appeal in **Ministry of Justice v Burton** [2016] EWCA Civ 714 has emphasised the importance of finality, which militates against the discretion being exercised too readily.

50. The process for reconsideration is set out in rules 71 and 72. Rule 71 requires that an application for reconsideration shall be presented in writing within 14 days of the date on which the written record of the original decision was sent to the parties. Rule 72 provides for the Employment Judge who made the original decision (where that is practicable) to consider any application and if there is no reasonable prospect of the original decision being varied or revoked, he can refuse the application. If he does not refuse the application, the original decision is to be reconsidered at a hearing, unless a hearing is not necessary in the interests of justice.

51. Reconsideration of a strike out Judgment is known as an application for relief from sanctions, with reference to the relevant principles used in the civil

Courts. The touchstone of whether to grant relief from sanctions is whether granting the relief sought would be in the interests of justice.

52. Rule 5 provides that the Tribunal may on its own initiative or on the application of a party, extend any time limit specified in the rules, whether or not it has expired.

53. In her submissions, the respondent's representative relied upon the decision in **TCO in-Well Technologies UK Ltd v Stuart** UKEATS/0016/16, a Judgment in which Lady Wise addressed the two steps present in this case: extension of time for the reconsideration application; and the reconsideration itself. Lady Wise confirmed that the time point must be addressed first and separately. She also confirmed that the Tribunal had the discretion to extend time for an application for reconsideration under rule 5.

54. When extending time under rule 5 I am required to consider the balance of prejudice in exercising the discretion to allow an extension of time, with the prejudice of not doing so. The respondent's representative contended that I had not done so when I made my decision to extend time without first providing the respondent with the opportunity to highlight the prejudice it identified. Lady Wise in **Baisley v South Lanarkshire Council** UKEATS/0002/16 made clear that a failure to address the balance of prejudice was an error of law. As that Judgment spells out, in considering the discretion to extend time, I must balance the relative fairness and unfairness, convenience and inconvenience and consequences to each party of the decision to be made in the exercise of my discretion.

55. The respondent's representative submitted that in exercising my discretion it was important that I took into account the prejudice to the parties. She submitted that the respondent was prejudiced by the exercise of any discretion because of the significant delay in the case being heard. Indeed, she contended that the balance of prejudice weighed heavily against it. She highlighted that the issues to be addressed appeared from the further particulars to date back to 2016 and the case had been further significantly delayed. She submitted that the impact on the recollection of relevant witnesses meant that there was a real risk that a fair trial cannot go ahead as a result of the delay.

56. The respondent's representative emphasised rules 86 and 90 of the Employment Tribunal rules of procedure. Rule 86(1) says documents may be delivered to a party by electronic communications. Rule 86(2) says the document shall be delivered to the address given in the claim form or to a different address as notified by the party in question. Rule 90 says that where a document is delivered in accordance with rule 86 it shall, unless the contrary is proved, be taken to have been received by the addressee on the date of transmission, where it is sent by electronic communication.

57. The respondent's representative in her submissions highlighted what was said in Harveys on Industrial Relations about the rules. The relevant paragraph says that the effect of the deeming provisions is that a party to whom proceedings have been sent as required is deemed to have been properly served and, therefore, that person is not entitled to a review of the decision on the ground that he did not have notice of the proceedings leading to the decision, unless the contrary has been proved. She referred to the three authorities referenced in the relevant passage in Harveys and, in particular, she emphasised **Zietsman v Stubbington** [2002] ICR 249, a decision of the Employment Appeal Tribunal. That

case involved postal service to the last known place of business to which correspondence had been sent. The case was about notice of proceedings, when the party against whom Judgment had been entered sought to review that decision because he said he had not received notice of the hearing. The party had not visited his former premises after relocating, nor had he made arrangements for the post to be forwarded. The Tribunal found the failure to do so was thoroughly irresponsible conduct, to which the ignorance of the proceedings was wholly attributable, and it declined to review the original decision. The Employment Appeal Tribunal upheld that decision and observed that there was no evidence before the Tribunal that the notice of hearing was not delivered in the ordinary course of post; only that the individual did not actually receive it.

58. I accepted the respondent's representative's submissions. I did not accept that the passage highlighted, or the cases referred to, precluded me from exercising the discretion to extend time for the reconsideration application to be made. What was addressed in Harveys was a review application on the basis that a party had not received notice of proceedings or of a hearing. Whilst rule 71 contains a requirement for a reconsideration application to be made within 14 days, and the limited time set down in the rule indicates the importance of such applications being made timeously, I have a general discretion under rule 5 (when applying the overriding objective) to extend time for such a reconsideration application to be made. The issues raised in **Zietsman** and the rules of service were clearly relevant to the exercise of that discretion, but it was not determinative that I should not exercise the discretion where the requirements of service had been met when the Judgment was sent out.

59. Rule 29 of the Employment Tribunal rules of procedure provides that a case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice and, in particular, where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

60. The respondent's representative also placed some reliance upon **O'Cathail v Transport for London** [2013] EWCA Civ 21, a case in which the Court of Appeal upheld a Tribunal's decision to refuse a postponement application where the application had been made with supporting medical evidence.

61. I have also considered and taken into account the matters raised by the claimant in her submissions.

62. All decisions of the Employment Tribunal are subject to the overriding objective set out in rule 2, to deal with cases fairly and justly. That includes, so far as practicable, ensuring that the parties are placed on an equal footing, as well as avoiding delay (so far as is compatible with proper consideration of the issues) and saving expense.

Conclusions – applying the Law to the Facts

63. The first issue to be considered was the respondent's application to set aside my case management order to extend time for the application to reconsider to be considered. I had not sought the respondent's view at the time that I made the decision to extend time, and therefore it was appropriate and in the interests of justice for me to consider whether that decision should be set aside, the respondent's submissions on it having been heard.

64. In making my decision I had focused on two things: the claimant's assertion that she had not received the strike out order at the time it was made; and the time set out in the Tribunal's email of 27 April 2022 for a reconsideration application to be made, with which the claimant had complied.

65. I will not re-produce in full the respondent's representative's submissions on this issue. She was right to highlight the detailed provisions of rules 86 and 90 of the Employment Tribunal rules of procedure. In this case (as is now usual practice), the claimant had provided an email address and had indicated that she would like the Tribunal to correspond with her using that address on the claim form. Under the rules, a document can be delivered to a party using electronic communication. The document is to be delivered to the address provided on the claim form (until an alternative address is notified). If a document is delivered it is to be taken as having been received by the addressee on the day of electronic transmission. That meant that the starting point under the rules was that the strike out Judgment was to be taken as having been received by the claimant on 17 March 2022 (the date it was sent by email to the claimant's previous email address).

66. **Zietsman** is authority for the fact that when someone has moved premises but failed to notify the Tribunal of their new postal address, the posted letter was still delivered on the relevant date, even though the intended recipient did not actually receive it because they were not at that address. I accept the submission that the position is comparable to someone to whom documents are sent to an email address which they are no longer using or accessing. I accept the allied point that the claimant's failure to actually see the Judgment at the time it was sent, was attributable to her own fault in not notifying the Tribunal that she could no longer see emails delivered to the address to which they were being sent. The claimant could and should have informed the Tribunal that she was no longer able to access emails at the relevant address and provided an alternative means of communicating with her, whether her postal address or an alternative email address.

67. Rule 90 does provide that if the contrary is proved (that is it is proved that the letter was not received), the rule does not apply. I did not hear evidence from the claimant as she chose not give evidence or prepare a witness statement, and she was not cross-examined. The respondent's representative was correct in her submission that the contrary could not be proved without evidence having been heard. Even relying upon the documents, I do not find that the claimant proved the contrary. A damaged phone did not mean that emails cannot be accessed. Emails are not linked to a device in the way the claimant asserted. The claimant's explanations, such as they were, were not sufficient to prove that the emails were not received, at least in the sense identified in **Zietsman**.

68. I considered all relevant factors, including the factors that the respondent's representative submitted I should take into account when balancing prejudice. I nonetheless decided that I would not vary, suspend or set aside my case management order. I extended time for the claimant to make her application to reconsider the Judgment. That decision remained unchanged. The importance of determining the reconsideration application made on its own merits and the very significant (potential) prejudice to the claimant if I did not do so, meant that it was the right decision which accorded with the overriding objective for the time for the reconsideration application to be made to be extended, even though the claimant was deemed to have received the Judgment which she was seeking to reconsider on 17 March 2022 and even though the respondent suffered the potentially

significant prejudice identified. For the latter part of the period, I also took into account that the Tribunal had (erroneously) informed the claimant on 7 April 2022 that she would have sixteen days from being re-provided with the Judgment, and that she had fourteen days from the email of 27 April 2022, to apply for reconsideration. I accept that the Tribunal's own letters explained that period of further delay (albeit I accept the respondent's submission that the Tribunal was in error when the statements were made in those letters).

69. Turning to the reconsideration of the Judgment itself, I must consider the interests of justice when deciding whether to vary or revoke the Judgment. As I have highlighted under the section on the law above, the importance of finality mitigates against the discretion being exercised too readily.

70. I had initially determined that it was not the case that the application to reconsider had no prospect of success (at the sift stage when undertaking the initial consideration under rule 72(1)), because of what was said at the end of the appeal document about the claimant's health, quoted in full at paragraph 40 above. If it was the case that the claimant had not pursued her claim or complied with the orders made on 9 December 2020 (as amended), at least following the conclusion of her appeal, because she had experienced a severe decline in her mental health such that she needed to undergo urgent mental health treatment which had meant in practice she was unable to progress her claim, it was entirely possible that the interests of justice would have required that the decision to strike out the claim should be reconsidered and, potentially, revoked.

71. I have no doubt whatsoever that the claimant has significant mental health issues. I have not seen any evidence which proves that she has been diagnosed with PTSD or acrophobia, but there is certainly no evidence which disproves that to be the case. The claimant's mental health challenges are clearly part of the broad explanation for the claimant: not complying with orders; not pursuing her claim; and (possibly) not providing the Tribunal with up- to-date contact information when she had issues with phones and email addresses. However, there was simply no evidence whatsoever before me which showed that the claimant had suffered a particularly significant period of ill health during the relevant period in early 2022 or that there had been any urgent mental health treatment. There was no evidence beyond what was asserted in the document considered as the application to reconsider (quoted at paragraph 40).

72. In her impact statement email, the claimant provided a different account for the non-compliance with Tribunal orders related to her health. In that email, she asserted that she had been advised by medical professionals to take a break from the proceedings in February 2022. No evidence was provided of any such advice having been given to the claimant, nor was it referred to in the claimant's earlier correspondence when addressing the strike out of her claim. If she had informed the Tribunal or the respondent of such advice at the time, that may have been an important factor. It may have been important had the claimant provided any evidence to support it, or to substantiate it, as a reason for her not taking steps in early 2022 to progress the case, but she did not do so.

73. What came out from the claimant's arguments at the reconsideration hearing and the documents provided, were two other explanations for the claimant's non-compliance with case management orders.

74. The first explanation was the issues the claimant had with her phone and accessing her emails. Whilst I do not entirely understand why the destroyed phone rendered an email address inaccessible, nor do I think that the claimant's explanations were necessarily consistent, I have for the purposes of my decision accepted the claimant's own contention that she was unable to access that email account for three weeks in March 2022 (before she provided the respondent with her new email address). That did explain the lack of any response to the Tribunal's letter proposing strike out. It is therefore relevant. It did not explain any non-compliance prior to that short period, nor did it explain the absence of any steps taken to clarify the claim since it was struck out.

75. The primary reason for the claimant's non-compliance became clearer at the reconsideration hearing when the claimant responded to each of the case management orders and explained her assertion at the hearing that she had complied with what was required. In addressing the case management orders the claimant provided the following explanations:

a. For the requirement that the claimant provide details of each and every occasion when she said she was sexually harassed by Mr Williams, she said she had done so in the original document and it was something which had happened every single day;

b. For the requirement that the claimant identify each occasion when she asserted she made protected disclosures (to Ms Ryder), she said she had done that in September 2020, that is in the further particulars she wrote prior to the case management hearing;

c. For the requirement that the claimant identify any other detriments upon which she wished to rely, the claimant said she had already done so;

d. For the requirement that the claimant name the people she was comparing herself to for her direct discrimination claim (her comparators), the claimant asserted that she had already done so in the appeal. Whilst not entirely clear, it appeared that the claimant was referring to the appeal to the Employment Appeal Tribunal which contained a list of names, but not a list of comparators (it was a list of people the claimant asserted should have been respondents);

e. For the requirement that the claimant provide a schedule of loss, she said she had already done that in the claim form;

f. For the requirement that the claimant provide copies of any medical evidence in her possession or control relevant to the issue of whether she had a disability or disabilities at the relevant time, the claimant asserted that she had done so and referred to the bundle of documents which had been provided for the preliminary hearing (case management). She also, understandably, referred to the delay in being seen by a Consultant due to delays in the NHS and following Covid;

g. For the requirement that the claimant prepare a disability impact statement, the claimant asserted that she had already done so, which would appear to be a reference to the further and better particulars she had provided prior to the preliminary hearing; and

h. For the requirement that the claimant send the respondent a list of all the documents in her possession or control relevant to the issues in the claim, the claimant did not understand what was being asked. I am satisfied that she did not do this. I am also satisfied that the respondent had sent its list and had given access to its documents with the email in December 2021.

76. Whilst the claimant's explanations were not entirely clear and were somewhat difficult to genuinely understand, her response to a number of the orders made was to assert that she had provided what was ordered before the preliminary hearing (case management) even took place. It was clear that in some cases the claimant did not understand what was required. However, for most of what was ordered, the primary reason why the claimant had not complied with the orders made was because she did not think she should have had to do what was required – because she believed she had already done all that she should need to in order to progress her case. She believed that what she should have to do, had been done before the preliminary hearing (case management) took place. What was clear was that the claimant had decided not to comply with what was ordered following that hearing, her non-compliance was a conscious decision and not related to health issues or problems with her phone and an email address.

77. The claim was struck out on two grounds: the claim was not being pursued; and the claimant had not complied with the orders made on 9 December 2020. The grounds overlap to an extent; but are different.

78. The claimant had not complied with the case management orders made on 9 December 2020, as amended. All of the above steps should have been undertaken by the claimant by no later than 14 June 2021. Even if the claimant had awaited the outcome of her appeal to the Employment Appeal Tribunal before taking the steps (and the Tribunal had not granted permission for her to do so), they should still have been undertaken in early 2022 when the respondent's representative highlighted to the claimant the need to do so. As at 16 March 2022, the claimant had not complied with the orders made, all of which were between eight and eleven months overdue.

79. I found that the genuine reason why the claimant had not complied with the orders was because she did not wish to or intend to do so, along with (for some of them) a lack of understanding of what was required. The reason she had not complied was not her health (albeit I appreciate her health may have been a contributory factor) and it was not because she had been unable to receive emails for three weeks at the relevant address. At the date when the strike out Judgment was made, the listed five-day hearing was less than two months away. In the absence of any response to the Tribunal's letter proposing strike out, I am satisfied that the decision to strike out for non-compliance with the case management orders was the correct one.

80. I have considered whether I should revoke my decision in the light of all I have heard. As I have explained, the position at the end of the reconsideration hearing appeared very different from what had been identified as the potentially valid grounds for reconsideration identified from the application made. I have particularly taken account of the fact that not only had the claimant not complied with any of the orders made at the time that my Judgment was made, she has also not made any attempt to comply since (save possibly for the order regarding medical evidence with which she may have partially complied by providing some

documents). She has not put forward any proposals for when she will be able and willing to do so. Her insistence that she had complied with the orders, even though in my view she had patently not done so since the orders were made, was a factor to be considered when making my decision. I also took into account: the prejudice identified by the respondent's representative which would result if the strike out of the proceedings was revoked and the case needed to be re-listed (when it would not be heard before 2024); as well as the obvious prejudice to the claimant that she would be unable to pursue her claims and have them determined on the merits if the decision was not revoked.

81. I have decided that the decision to strike out the claims because the claimant had not complied with the case management orders made on 9 December 2020 should not be varied or revoked, in the light of the matters which I have explained and because the claimant had not done so. It is not in the interests of justice to revoke the Judgment made. I have carefully considered the need to ensure that as far as possible the parties are placed on an equal footing, but do not find that the obligation to do so means that the strike-out of the claimant's claims should be revoked where she failed to take any of the steps required and has continued to fail to do so.

82. Having reached that decision, it is not necessary to determine whether I would have revoked the strike out Judgment if it had only been made on the grounds that the claimant had not actively pursued her claim. The claimant had not pursued her claim in the ways ordered and required. She had not complied with any of the case management orders, some of which were just under a year overdue by the date the claim was struck out. She had pursued her appeal and she had previously corresponded with the Tribunal and the respondent. After the end of her appeal, the claimant did not take the steps required to prepare the case for hearing. She did not respond to the respondent's representative's requests for her to take the steps required. She did not respond to the Tribunal's letter. The claim was not being pursued at the date when the claim was struck out and I am satisfied that the decision made at the time was correct.

83. Having heard from the claimant at the reconsideration hearing, I have no doubt that the claimant wishes to pursue her claim. If the claim had been struck out solely on that basis that it had not been actively pursued, and to the extent that it might be possible to separate that reason from the claimant's failure to undertake the steps ordered, it might have been a more finely balanced decision to determine whether it was in the interests of justice to revoke the strike out Judgment. On balance and for the reasons already given, I still would not have revoked the strike out decision. I would add that the claimant's assertion that she was progressing the claim was simply incorrect; she had taken steps up to the preliminary hearing (case management) and she had progressed her appeal, but she did not actively pursue her Tribunal claim in the period from early/mid 2021 to 16 March 2022.

Summary

84. In summary, I have not changed my previous case management decision that the time for receipt of the reconsideration application should be extended. I have reconsidered my Judgment to strike out the claim made on 16 March 2022. I have decided that the decision should be confirmed. It should not be varied or revoked. The claim accordingly remains struck out.

Employment Judge Phil Allen
19 December 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
23 December 2022

FOR THE TRIBUNAL OFFICE

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