EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105485/2022

Preliminary Hearing held in Glasgow on 26 January 2023 and conducted remotely by Cloud Video Platform (CVP) video conferencing

Employment Judge Ian McPherson

Mrs Elaine Black	**Claimant** **Not present and** **Not represented**
Dr Adnan Malik t/a Cumbrae Medical Practice	**Respondent** **Represented by:** **Mr Ben Thornber - Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal:

(1) The Tribunal notes and records that, having heard from the respondent's representative at this Preliminary Hearing, the claimant not being present, nor represented, despite Notice of in person Preliminary Hearing having been issued to her representative, on 23 December 2022, and this Hearing having thereafter been converted to a remote Hearing by CVP, on 23 January 2023, on the respondent's unopposed application, with amended Notice of Hearing issued to both parties, and an email from the claimant's representative sent on 25 January 2023 at 20:26 to the respondent's representative, and forwarded by him to the Tribunal, the claimant's representative having failed to comply with **Rule 92 of the Employment Tribunals Rules of Procedure 2013**, the Tribunal, in exercise of its powers under **Rule 47 of the Employment Tribunals Rules of Procedure 2013,** decided to proceed with the listed Preliminary Hearing in the absence of the claimant and her representative, they having given written consent to proceed without them

attending, and having considered the information available to the Tribunal about the reasons for the claimant's failure to appear or be represented, and it being in the interests of justice to proceed, the respondent's representative (accompanied by the respondent's practice manager) being present, ready and able to proceed, as also the Tribunal assembled for that purpose, and any further delay would be contrary to the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunals Rules of Procedure 2013,** to deal with the case fairly and justly, including avoiding unnecessary further delay, and the saving of expense.

(2) Further, the Tribunal also notes and records that, on the application of the respondent's representative made orally at this Hearing, in relation to the Tribunal's request for clarification of the proper identity and designation of the respondent, identified in the ET1 claim form, and ET3 response, as "***Cumbrae Medical Practice",*** being a trading style name only, the Tribunal made an order, in terms of **Rule 34 of the Employment Tribunals Rules of Procedure 2013,** ordering that the identity of the respondent GP practice be amended, and the Tribunal's casefile updated, to properly name and designate the respondent as "***Dr Adnan Malik, trading as the Cumbrae Medical Practice"***, as it appears that there are issues between him, as the sole practitioner of that GP practice, and the claimant, as complained of by the claimant in her ET1 claim form, and her additional information, as presented to the Tribunal, in subsequent correspondence.

(3) Having thereafter heard oral submissions from the respondent's representative, and having referred to the documents in the Bundle provided to the Tribunal, and all of the available information held in the Tribunal's casefile, as previously received from both parties, the Tribunal gave oral Judgment dismissing the claimant's claim**,** in terms of **Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013,** on the primary basis that it has no reasonable prospects of success, the Tribunal having no jurisdiction to determine the matter complained of by the claimant, being the respondent's alleged provision of an untrue reference about the claimant to another GP practice ; and also, further and alternatively, the Tribunal struck

out the claim on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable in terms of **Rule 37(1)(b)**; non-compliance with previous orders of the Tribunal in terms of **Rule 37(1)(c)**; and that the claim has not been actively pursued by the claimant in terms of **Rule 37(1)(d)**.

REASONS

Introduction

1. This case called before me, on the morning of Thursday, 26 January 2023, for a public Preliminary Hearing on (1) timebar, and (2) prospects of success, further to Notices of Preliminary Hearing previously issued to both parties by the Tribunal, initially on 23 December 2022, and again, by amended Notice, on 23 January 2023, when converting this Hearing to a remote Hearing conducted by CVP videoconferencing.

Claim and Response

2. Following ACAS early conciliation, between 9 and 10 October 2022, the claimant presented her ET1 claim form to the Employment Tribunal on 10 October 2022. She stated that, having been a medical administrator employed by the respondent (then identified as Laura Tempini) and her employment having terminated on 21 December 2021, she wished to bring a claim before the Tribunal to deal with an "***untrue reference"***, which she stated was a type of claim which the Employment Tribunal can deal with.

3. In her ET1 claim form, at section 8.1, the claimant did not indicate that she was unfairly dismissed, nor that she was unlawfully discriminated against on the grounds of any particular protected characteristic, contrary to the **Equality Act 2010**, nor that she was owed any monies by the respondent.

4. At section 9.1, the claimant did indicate that, if her claim was successful before the Tribunal, then she sought an award of compensation against the respondent. Further, at section 9.2, she stated (sic) : "***At my age 60 its getting harder getting a decent job. I want compensation of wages for 7 years up until my pension age".***

5. In providing details and the background to her ET1 claim form, at section 8.2, the claimant had stated (sic): ***"Applied for a job, job was offered then with drawn due to a reference been given to new employer but old employer denying any reference was ever given said one was requested but they declined, new employer states reference was given and they didn't not think I was capable of doing the job (even though I have worked for NHS for 30 years) and to ask old employer for copy which they deny was ever given. Asked for copy reference but new employer has declined . ACAS won't help. I was referred to ICO who after 13 weeks waiting time refused to help also. As it's Health Board job in NHS they also refused any help, so I have lost out in full time employment because of this. I have emails stating all details."*** Further, at section 15 (additional information), the claimant stated (sic) : "***This problem has caused me nothing but stress and anxiety I want to get to the bottom of this and end it ASAP."***

6. When the claimants' ET1 claim form was presented on 10 October 2022, it was rejected by a Legal Officer at the Tribunal, who decided that the claim should be rejected, under **Rule 12 of the Employment Tribunal Rules of Procedure 2013**, because the claimant had provided an ACAS early conciliation number, but the name of the respondent on the claim form (**Laura Tempini**) was different to that on the early conciliation certificate (being **Cumbrae medical practice**).

7. By letter of 13 October 2022, the ET1 claim form was returned to the claimant, stating it had been rejected, but that she could apply to the Tribunal for the Legal Officer's decision to be considered afresh by an Employment Judge within 14 days.

8. Thereafter, by handwritten letter dated 17 October 2022, and received at the Glasgow ET office on 21 October 2022, the claimant returned her ET1 claim form, changing the respondent's name to that on the early conciliation certificate.

9. In those circumstances, following reference to Employment Judge Doherty, on 26 October 2022, she reconsidered the Legal Officer's decision to reject

the claim, without a Hearing, and she decided that the claim could be accepted, and it was treated as presented as at 21 October 2022, the date of receipt of the claimant's letter of 17 October 2022, rather than as at the date of initial presentation of the ET1 claim form on 10 October 2022.

10. The respondent was then required to respond to the claim, by Notice of Claim issued by the Tribunal on 26 October 2022, for reply by an ET3 response form, on or before 23 November 2022.

11. As the claim appeared to have been presented outwith the period within which claims should normally be brought, being three months from termination of employment, the claimant was also sent another letter by the Tribunal stating that, although her claim had been registered, the Tribunal would have to decide, as a preliminary issue, whether the claim should be allowed to proceed, and once the respondent's response had been received, the file would be referred to an Employment Judge for initial consideration, and the Tribunal would write to the claimant further after that had taken place.

12. Thereafter, on 16 November 2022, the Glasgow Tribunal office received by post from the respondent's then representative, Miss Laura Tempini, practice manager, an ET3 response form defending the claim, and setting forth the respondent's position, and basis for defending the claim, at section 6.1 of the ET3 response. They stated, as part of their defence, that no reference had been provided by them for the claimant at any point in time, and that they had responded to her Subject Access Request, on 30 May 2022, to advise that they had not provided a reference to any prospective employer.

13. Following Initial Consideration by Employment Judge McManus, on 18 November 2022, with a view to confirming whether there were arguable complaints and defences within the jurisdiction of the Employment Tribunal, Employment Judge McManus required the claimant to provide further information by 28 November 2022. In particular, the claimant was advised that she should provide information on what legal basis she sought recourse from the Employment Tribunal, and she should state the legal basis of her claim,

and the grounds on which she says that the Employment Tribunal has jurisdiction to hear her claim.

Additional Information from the Claimant

14. In reply, by e-mail to the Glasgow ET, on 22 November 2022, a response was provided by the claimant's representative, her daughter, Lauren Black, stating that the reason for the claimant's case is as follows (sic), so far as material for present purposes:

"The reason for my case is I have been given an untrue and detrimental reference which has now lead me to losing out on a full time Job. The background to my Claim is someone at Cumbrae medical practice has given a false reference about myself via a telephone conversation and is now denying it. The practice manager in Largs informed me that after initially offering me the position they had received a bad reference from my previous employer via telephone and this influenced her decision in retracting the job offer.

Please see letters from Kirsten McKellar marked letter 1 & 2.

This has been ongoing for months and after many attempts to try and reconcile with Cumbrae medical practice I feel I have no other option but to take it further with yourself.

I can confirm 100% that the bad reference has come from Cumbrae medical practice as I have retained a copy from the only other referee involved which states my competence and great work ethic. This reference can be obtained for yourself if you wish but at present I would like to keep the other referee anonymous as she is occasionally works in Cumbrae medical practice and I don't wish for her work life to be made difficult.

As explained before it has taken me many months to get answers I have enquired via –

3 subject access requests

ACAS

ICO `

Referred back to ACAS before getting to yourself

My first Case was taken out against Cumbrae Medical practice on the 26th of May 2022 which is within my 3 month time period – Ref number: R165090/2022

My understanding when leaving Cumbrae medical practice was we were on good terms as I received a nice reply from my previous practice manager wishing me well in the future. This is why I am unsure how it has been made out I am unfit to carry out my Job as I have been doing for the past 30 years.

As per Laura Tempinis Reply I Left Cumbrae medical practice due unforeseen circumstances. During a very hectic house move I fully intended to travel to Cumbrae from Largs but unfortunately there was problems with the house we purchased … I had sent Dr Malik and Laura Tempini many emails regarding the on-going situation – these can be seen on request. I could not get to Cumbrae due to Calmac ferries not sailing most days over the winter due to adverse weather conditions so I resigned which was accepted. Copies of my resignation are attached and the reply can be obtained from Cumbrae medical Practice.

At the time of moving I had an accident in which I banged my head and severely bruised my forehead and eyes. I attended Cumbrae medical practice (as a patient) …. I now feel I'm stuck with what jobs I can apply for as all jobs will look to get a reference from you last previous employer, which I now obviously cant supply as Cumbrae medical practice are acting in Malice.

My Fear is I still have 7 years left until retirement age and I am not going to be able to get another job doing what I enjoy and have been doing for the last 30 years due of all this.

In saying this I give permission for all regarding paperwork, notes and evidence to be accessed by yourself if needed. Please find attached all copies of paper work backing up my claim and providing evidence in this case.

What I am looking for from this is compensation for losing out on a Full time NHS position/NHS Pension contribution also I feel my health has been impacted by this causing me unnecessary stress and anxiety. I feel I Can't even join my Local GP practice now as it was the place I was offered the job before it was retracted where all staff were informed I was taking up the position before all this arose. I feel my name has been tarnished through no fault of my own.

Thank you again for taking the time to read over my case it is greatly appreciated and if you require any more information please feel free to contact me."

15. Following referral to the duty Judge, Employment Judge Whitcombe, the Tribunal wrote to the claimant, on 24 November 2022, explaining the situation, and what was required of her, and seeking her response within 14 days. The Tribunal's letter was in the following terms:

"I refer to the above proceedings. Employment Judge Whitcombe has directed that I write as follows: There are two fundamental issues which you must address. First, your claim appears to have been presented outside the usual time limits applicable to claims falling within the jurisdiction of the Employment Tribunal. When do you say that the unlawful act occurred? Second, and just as importantly, it is unclear that the legal basis of your claim is one falling within the jurisdiction of the Employment Tribunal. Employment Tribunals can only hear claims of types which Parliament has given them the power to hear. Claims for false or negligent references do not obviously fall within the Tribunal's jurisdiction, unless (for example) the allegation is that the making of a reference in those terms amounted to discrimination in breach of a provision of the Equality Act 2010, or some other type of claim that

Employment Tribunals have been given the power to hear. Are you saying that the respondent is in breach of an Act of Parliament or a Statutory Instrument? If so, which one and which parts? Otherwise, on what basis do you say that the Tribunal has the power to deal with your claim? An Employment Judge is considering an order striking out your claim on the basis that it has no reasonable prospect of success. Please reply giving written reasons why your claim has reasonable prospects of success and is of a type that an Employment Tribunal can deal with, or else you may request a hearing for the purpose of giving that explanation. Please reply within 14 days."

16. Following a reply from the claimant, via her representative, Lauren Black, on 5 December 2022, the case file was referred to Employment Judge Doherty. The claimant's representative's reply of 5 December 2022 was in the following terms:

"I am writing in reply to your email sent 24/11/22 Firstly my claim has not been presented outside usual time limits as I have already appealed, I refer you back to my initial email which states the case was initiated of the 26/5/22. The reason it has taken so long to get to yourself was with subject access, Acas x2 ICO which took 13 weeks to reply before I was then passed on to judge Docherty who had agreed to hear my case. I am unsure why it has now been passed to another Judge after Judge Docherty had already assessed and agreed I had a case? This was all explained in previous letter? I'm in no way qualified or competent to begin stating laws to a judge and I'm honestly struggling to navigate my way through the Legal definitions in your previous email. I feel I have been unlawfully represented by Cumbrae medical practice in which they supplied a defamatory and untrue reference to my potential new employer without a single piece of evidence to back up their claims. I feel all legal representatives, ACAS etc which are supposed to be there to support and assist me with any legal matters have been no help whatsoever and I'm left to try and pursue this case with no legal representation. Cumbrae practice have denied giving a reference even

though the letters you have received is proof and states one was given in confidence by telephone I can only presume it was misleading, discriminatory and inaccurate as I am not able to resolve this issue Via Acas they advised me to make a claim to an employment tribunal which I have and am still getting nowhere? Cumbrae have denied any reference was given so why call the new manager instead of replying by email if no reference given? It was given in confidence knowing I will never know what was said about me they in this have cost me this job. When an employer gives a reference you are supposed to have duty of care to an ex-employee I believe this reference was negligent and careless through this I have received a financial loss and suffered stress and anxiety due to all this. I had an almost impeccable record minus a few sick days, no verbal or written warnings and until this and I feel I am now suffering for something which is completely out of my control. I am unsure how a judge can strike out my claim when I have been told by everyone to deal with yourself ICO, ACAS and now yourself are saying you cannot help me? So who can? I have wasted nearly 6 months of my life on this and the stress and Anxiety it is really effecting my mental health. I want my name cleared as I'm now going to be a patient at Largs Practice. Attending the doctors can be anxious enough without this unnecessary stress added to it as well. To summarise I feel Cumbrae medical practice have broken the law by lying giving a false reference with no evidence to back it and then denying it I have suffered financial loss, stress and anxiety. The cost of living is as high as it's ever been in this country and they have caused me economic loss. From what I understand it is in bad practice to give a bad reference never mind a false and untrue reference I have confirmed this with the GOV website and helpline. I would appreciate if my case could be discussed with Judge Docherty as per my initial claim as he is aware on the ins and outs and difficulties I have faced with this case. If you decide this case is out with your due restriction can you advise who can help me as I have been advised by ACAS and ICO that it is only yourself that can help now?"

17. Following instructions from Employment Judge Doherty, the Tribunal wrote to the claimant's representative, on 7 December 2022, in the following terms:

"Employment Judge L Doherty has directed that I write as follows:

- ***The claimant is advised that it is not uncommon for several Employment Judge's to deal with a single claim before it moves to hearing.***

- ***The two points addressed in the Tribunal's correspondence of 24 November 2022 will have to be considered by the Employment Tribunal. At this stage, the claimant should advise the Tribunal of the basis upon which she considered that the Employment Tribunal is able to deal with her claim about failure to supply a reference.***

- ***The claimant is advised that the Tribunal is an independent judicial body and cannot offer advice to either party. The claimant is advised that free legal advice can be obtained in various places (for instance, the Citizens Advice Bureau or the Law Clinic).***

- ***The Tribunal will grant a further two week extension to the claimant to allow time to seek independent advice and respond. Please reply to the Tribunal by no later than 22 December 2022."***

18. Thereafter, by further response, by e-mail from Lauren Black, on 20 December 2022, the case file was again referred to Employment Judge Doherty. Ms Black's email stated (sic) that:

"***In respond to tribunal letter dated 7th of December, I am writing to inform the tribunal about my current situation as per your suggesting I have connected citizens advice and have been advise to contact subject access again to be provided with a copy of the reference that was allegedly not given, they have advised I can get a copy of the paper references request sent and Cumbrae medical practice must reply with the reference correspondence of them refusing to give said reference, also they have advised myself that the tribunal can call for Kirsten the***

recipient of the phone call reference to be contacted and asked for a brief of what was said? Is this something you can assist with? Citizens advice have advised they feel there are grounds for a case to be taken out against negligence and discrimination. I have also contacted ACAS again and have been advise they are still waiting for Cumbrae medical practice to respond to reconciliation but they seem to be dragging their feet and have not given them an answer. At this point I am unsure on what the next step is in this case as we can't do anything until Cumbrae contact yourself or ACAS back could you advise me on what the next step of the process is? Will the date be extended until their response?"

19. Thereafter, on 22 December 2022, Employment Judge Doherty gave instructions that the case should be listed for 1/2 day open Preliminary Hearing to consider (1) time bar; and (2) prospects of success. Notice of that in person Preliminary Hearing to take place on Thursday, 26 January 2023 at 10:00am, with three hours set aside for this Preliminary Hearing, was issued to both parties by the Tribunal on 23 December 2022.

20. On 9 January 2023, the Tribunal received a further e-mail from the claimant's representative, Lauren Black, along with various attachments. In that e-mail of 9 January 2023, so far as material for present purposes, it was stated on the claimant' behalf, as follows:

"…my case is regards to an untrue and detrimental reference which has cost me financial loss, stress and anxiety. The main point to my case is it is not unfair dismissal as the incident happened after I left the practice – My case is in regards to my previous employer lying to a new employer about my work ethic / history ensuring I lost out in a new job opportunity. The above documentation proves the length my previous employer has went to, to ensure that job was not given to myself and the two attached letter signed from Kirsten are written proof of Cumbrae medical practice false statements. I wish for this case to be revised before 26th on January so I know where I stand before attending this preliminary hearing."

Conversion of in person Preliminary Hearing to be held remotely on CVP

21. On 9 January 2023, the respondent's practice manager, Laura Tempini, emailed the Glasgow ET, stating that she would be very grateful if this Preliminary Hearing could be conducted remotely, she explaining that Doctor Malik is the only GP in a single handed practice on the Isle of Cumbrae, and that his absence as general practitioner for that length of time would be detrimental for the practice.

22. Following receipt and consideration by Employment Judge Doherty, on 12 January 2023, she instructed that the claimant was asked to provide comments regarding the respondent's then representative, Ms Tempini's application to convert the Hearing to a video hearing via CVP, and to reply by 19 January 2023, and she was also reminded that jurisdiction would be discussed at this Preliminary Hearing on 26 January 2023.

23. Further, on 13 January 2023, Mr Ben Thornber, consultant with Thornber HR Law, Dunfermline, emailed the Glasgow ET to confirm that it would be preferable if this Preliminary Hearing were held on CVP, and noting that the claimant had not then responded to the Tribunal's letter of 12 January 2023, requesting her comments concerning the respondent's application to convert this Hearing to CVP, and in addition the respondent was not aware that the claimant had responded to the Tribunal's letter of 18 November 2022, asking her to provide that information by 19 January 2023.

24. By letter from the Tribunal, dated 18 January 2023, the claimant was advised that following reference to a Legal Officer, the Hearing listed for 26 January 2023 would consider the prospects of success, as well as the time bar issue.

25. On 23 January 2023, Employment Judge McManus, as the duty Judge, in response to correspondence received from the claimant (being the e-mail of 9 January 2023) agreed to the respondent's representative's request that this Preliminary Hearing be converted to take place via video link on CVP, and an amended Notice of Hearing, giving details for joining the video hearing, was issued separately to both parties, under separate cover.

26. That amended Notice of Preliminary Hearing confirmed that the Tribunal, at this Hearing, would determine the following issues: (1) timebar; and (2) prospects of success. The Tribunal's letter of 23 January 2023 further informed the claimant that:

"***As set out in previous correspondence, the issues to be determined at this Preliminary Hearing are:***

- ***Time Bar***
- ***Prospects of Success.***

Both of these issues relate to the Employment Tribunal's jurisdiction to hear the claimant's complaint.

There are two separate jurisdiction matters which the Employment Judge at the Preliminary Hearing will require to make a determination on. These are:-

(1) Whether the Employment Tribunal has jurisdiction to hear the type of complaint which the claimant seeks to bring

(2) Whether the claim has been brought to the Tribunal within any applicable statutory time period

Both of these jurisdictional issues have an impact on the prospects of success of the claimant's claim. The matter can only proceed to a Final Hearing if the Tribunal has jurisdiction to hear a claim of the type sought to be brought by the claimant. If the outcome of the Preliminary Hearing is that the Employment Tribunal does not have jurisdiction to hear the type of claim which the claimant seeks to bring, then the claim will be dismissed.

As set out in letter to the claimant from the Tribunal of 24 November 2022 (copy attached), it is important that the claimant provides information as to why she says that the Employment Tribunal has jurisdiction to hear this claim, i.e. why the Employment Tribunal is the correct place to pursue a claim in respect of an allegedly false reference.

On the information which has been provided by the claimant to date, there is no indication of what she alleges to be the reason for the alleged reference to have been given. That alleged reason will be important to the Tribunal's determination of whether this claim can be pursued in the Employment Tribunal.

If the nature of the claim is found to be one which the Employment Tribunal has jurisdiction to her, the alleged reason for the allegedly false reference having been given will also be important in the application of discretion the Employment Judge may have to applicable time limits for such a claim to be brought to the Employment Tribunal.

It would be helpful if, by 26 January 2023, the claimant could provide her position on the legal basis of her claim, as set out in email from the respondent's representative of 13 January 2023."

27. By e-mail to the Tribunal from the claimant, sent on 25 January 2023, at 10:54am, the claimant stated that she was writing to confirm her representative and herself were unable to attend this Preliminary Hearing, explaining that (sic):

"…this is due to personal circumstances my father has passed away and I have the duty of sorting out the arrangements, my daughter (representative) cannot attend as she has been taken into hospital to be induced this week and will not be fit for attendance. As this case has been going on for so long I am keen for it still to go ahead, is this something that can be done without my attendance? You have all relevant documents and my personal statements to back up my claim, I can be kept up to date via e-mail but cannot say for certain I will be able to reply back in a timely manner."

28. That e-mail of 25 January 2023 was treated by the duty Judge, Employment Judge McManus, as an application for postponement of this Preliminary Hearing, and the respondent's representative was asked for comments, by reply.

29. By email sent at 14:49 on 25 January 2023, and copied to Elaine Black, the claimant, Mr Thornber stated that it appeared that the claimant was not asking for a postponement but she was stating that the Hearing could go ahead without her or her representative in attendance. Further, he added, it appeared from the claimant's comments that she would have nothing further to add in addition to what she had already put in writing, were she to attend. On that basis, Mr Thornber stated that the respondent's position was that this Hearing should proceed as listed as they were keen for the matter to be dealt with.

30. Thereafter, the case file having been referred to myself, a further e-mail was sent by the Tribunal to both parties, at 16:16 on 25 January 2023, stating that I had instructed the case would proceed by CVP, and if the claimant, or claimant's representative, did not attend, then the Tribunal would consider whether or not to proceed in the claimant's absence, under **Rule 47**, or to deal with the matter in her absence, after having heard from the respondent's representative.

31. The claimant's representative was asked to reply, before 26 January 2023, to the Tribunal's letter of 23 January 2023, issued on instructions from Employment Judge McManus, as no reply appeared to have been received thus far, and it was stated that the claimant or the claimant's representative should reply, as ordered, and any failure to do so would be taken into account by the Tribunal, if the claimant / her representative did not appear at this Preliminary Hearing.

Respondent's Bundle for use by the Tribunal

32. Following the Tribunal's e-mail to both parties, the respondent's representative, Mr Thornber, by e-mail of 25 January 2023, at 16:32, forwarded a small bundle of documents to assist the Tribunal at this Preliminary Hearing, and those documents included those disclosed by the claimant on 9 January 2023.

33. Specifically, the Bundle provided for my perusal and use at this Preliminary Hearing, and to which Mr Thornber referred me to the relevant pages, included the ET documents (indexed as documents 1 to 15), and other documents (nos. 6 to 22) being the claimant's resignation email of 21 December 2021 to Laura Tempini, citing "***due to personal reasons***", and expressly resigning in breach of her terms of employment "***due to unforeseen circumstances***"; the respondent's email reply of 22 December 2021 from Ms Tempini, accepting the claimant's resignation with effect from 21 December 2021; email request for reference from Kirsten McKellar, practice business manager at Largs Medical Group to Laura Tempini of 18 May 2022, advising claimant had successfully applied for the position of medical receptionist / admin at Largs; letter of 24 May 2022 from Ms McKellar, Largs Medical Group to the claimant, withdrawing the offer of employment made to the claimant on 18 May 2022, subject to satisfactory references, on the basis that Ms McKellar had been unable to successfully ascertain that the claimant would be able to fulfil the requirements of the role; the claimant's SAR request for a copy of the reference sent to Ms McKellar, and response by Ms Tempini of 30 May 2022, stating that she was unable to reply to the SAR request as she had not supplied a reference about the claimant to Ms McKellar ; letter from Largs Medical Group to claimant of 14 June 2022, stating that Ms McKellar had received information verbally from an unidentified member of Cumbrae medical practice on 23 May 2022 ; and letter from ACAS to the claimant of 16 September 2022 about references from employers not being misleading, inaccurate or discriminatory.

Claimant's written consent to proceed with the Hearing on her absence

34. By e-mail from the claimant, sent on 25 January 2023, at 20:26, from Lauren Black, her daughter / representative, it was stated that, in regard to Mr Thornber's last e-mail, the Tribunal should treat this e-mail ***"as written consent to proceed with the case tomorrow, without us attending. This is not what we wanted but under the circumstances it is the best we can do as we wish for this matter to be dealt with. I have had a look at your attachments and would ask if you please point out the main problem***

with this case is that Cumbrae medical practice are claiming they did not give any reference at any point but Kirsten from Largs medical practice has confirmed twice that she had received a telephone call which was taken as a reference. Cumbrae medical practice are still denying this. Kirsten can be contacted tomorrow for evidence if needed."

35. Mr Thornber forwarded that e-mail from the claimant's representative to the Glasgow ET, at 20: 56 on at the evening of 25 January 2023, and it was brought to my attention prior to the start of this Preliminary Hearing the following morning. I read it, and the contents of his small Bundle, extending to 22 pages, prior to the start of this Hearing.

Preliminary Hearing before this Tribunal

36. When this Preliminary Hearing started, at 10:00am, on the morning of Thursday, 26 January 2023, Mr Thornber was in attendance to represent the respondent, accompanied by Miss Laura Tempini, the respondent's practice manager, to instruct him. There was no attendance by or representation for the claimant.

37. In light of the previous evening's e-mail from Lauren Black, on 25 January 2023, at 20:26, I decided that it was not necessary for the Tribunal clerk to contact the claimant, or her representative, to ascertain the reason for their non-attendance, as, like Mr Thornber, I regarded Laura Black's e-mail as giving the claimant's written consent for the matter to proceed at this Preliminary Hearing and in their absence.

38. In those circumstances, the case proceeded in the absence of the claimant and her representative, and I considered that that was appropriate in terms of **Rule 47 of the Employment Tribunal Rules of Procedure 2013**. I clarified with Mr Thornber the proper identity and designation of the respondent, it being only a trading style for the Cumbrae medical practice. After he sought clarification from Ms Tempini, I made an order, in terms of **Rule 34**, to substitute Dr Adnan Malik, trading as the Cumbrae medical practice, as the

appropriate respondent in these Tribunal proceedings, he being the sole GP practitioner in thar GP practice.

39. Thereafter, I heard oral submissions from the respondent's representative, Mr Thornber. While he had provided a small Bundle of documents for the Tribunal's use, there was no written skeleton argument provided to me, as often happens with this type of Preliminary Hearing, where a respondent is professionally represented. I make that comment as an observation, and not as a criticism of Mr Thornber, as there had been no earlier judicial order or direction that he should provide such a written skeleton submission.

40. I also observe that Mr Thornber's oral submissions to me were devoid of any reference to applicable case law authority from the higher Tribunals and Courts on the relevant law about how to approach a time-bar / Strike Out application. Again, I make that comment as an observation, and not as a criticism of Mr Thornber, as there had been no earlier judicial order or direction that he should provide any list of statutory provisions, or relevant case law, on which he intended to rely, or make reference to, as often happens with this type of Preliminary Hearing where a respondent is professionally represented.

Relevant Law

41. I have given myself a self-direction on the relevant law.

42. The power to strike out a claim has been described by the Court of Appeal as a '***draconic power not to be readily exercised'*** (**James v Blockbuster Entertainment Ltd [2006] EWCA Civ 684**, Lord Justice Sedley, para 5). It is described as such because it can stop the claimant from proceeding with their claim without having their case considered and evidence reviewed fully at a full hearing. Hence, the power should be used sparingly.

43. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances. It considered the wording of the then ET Rules of Procedure, but the current **Rule 37** is similarly worded.

44. In **Reilly**, as per paragraph 30 of the Opinion of the Court, delivered by the Lord Justice Clerk, it is recorded that:

"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (Balls v Downham Market High School and College [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (ED & F Mann Liquid Products Ltd v Patel (2003) CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (ED & F Mann Liquid Products Ltd v Patel, supra; Ezsias v North Glamorgan NHS Trust, supra). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (Ezsias v North Glamorgan NHS Trust, supra, Maurice Kay LJ, at para 29).

45. As Lady Wise held, in the Employment Appeal Tribunal judgment in **Hasan v Tesco Stores Ltd [2016] UKEAT 0098/16**, there is a 2-stage test to a Strike Out application under **Rule 37.** The first stage is to consider whether any of the five stated grounds (a)-(e) have been established. Thereafter, a Judge has to consider whether or not to exercise the discretion in favour of striking out. Support for that approach is found in the earlier EAT judgment of **HM Prison Service v Dolby [2003] IRLR 694,** where Mr Recorder Bower' QC's judgment described a Deposit Order as the "***yellow card***" option, with Strike Out being described by counsel as the "***red card***."

46. Consequently, there is a very high threshold to strike out a claim for no reasonable prospects of success. In **Balls v Downham Market High School & College [2011] IRLR 217,** at paragraph 6, Lady Smith, the EAT judge, set

out the procedure that must be followed when considering striking out a claim on the basis of no reasonable prospects of success:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

47. It has been further highlighted in **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**, where there are facts in dispute, it would only be "very exceptionally" that a case should be struck out without the evidence being tested.

48. When considering whether a claim can be struck out on the grounds that the case has no reasonable prospects of success, I have also reminded myself that the Tribunal should consider the case of **Cox v Adecco [2021] ICR 1307.** It was stated by His Honour Judge James Tayler, the EAT circuit judge, at paragraph 30, as follows:

"***There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up***

one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success."

49. Employment Tribunals, being creatures of statute, have a narrowly defined (but nonetheless very extensive in range) jurisdiction which covers most of the employment rights established by modern employment legislation.

50. It has a myriad of statutory claims that it has the power to hear, and there are certain circumstances in which they may hear certain types of claim under general contract law, as defined contractual claims under **Section 3 of the Employment Tribunals Act 1996,** and the associated **Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994,** but these contractual claims (which are themselves the subject of defined exclusions) must arise or be outstanding on the termination of an employee's employment.

51. However, it should always be borne in mind that, even where a Tribunal is competent to hear a particular claim, it may be prevented from doing so for a number of reasons, e.g. claims presented outside the statutory time limit laid down by statute law ("time-bar"); or where a claimant does not have the necessary period of continuous employment to bring a particular claim ("qualifying service") ; or the matter is otherwise one of the Tribunal's jurisdiction.

52. As questions of jurisdiction are fundamental to the right of an Employment Tribunal to consider the substantive merits of any particular case, they must be dealt with by the Tribunal, usually at a Preliminary Hearing, whether or not the parties raise them and even if the parties are willing to waive them, as parties cannot by agreement or conduct confer upon a Tribunal a jurisdiction which it does not otherwise have.

53. I refer to other applicable case law authority, where I consider it appropriate to do so, in my **Discussion and Deliberation** section below, later in these Reasons.

54. Meantime, for present purposes, I need only refer to the terms of **Rule 37(1) and (2) of the Employment Tribunal Rules of Procedure 2013,** as follows:

Striking out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

Discussion and Deliberation

55. Having carefully considered the claimant's written representations, as per her ET1 claim form, and subsequent e-mails with the Tribunal, as detailed, so far as material, earlier in these Reasons, also Mr Thornberry's oral submissions at this Preliminary Hearing, along with my own obligations under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, being the Tribunal's overriding objective to deal with the case fairly and justly, I considered that, in terms of **Rule 37(2),** the claimant had been given a reasonable opportunity

before this Preliminary Hearing to make her own representations opposing the respondent's application for Strike Out of her claim.

56. She decided not to appear, or be represented, at this Preliminary Hearing, and so she deprived herself of the opportunity to make any oral representations in reply to Mr Thornber, or to reply to any questions of clarification that I might have asked of her to address points arising for the Tribunal's consideration of her case against the respondents. The email of 25 January 2023 did not seek a postponement of the listed Hearing.

57. On the basis of the circumstances referred to in that email, sent on the eve of this listed Hearing, namely the death of her father (date unspecified), and her daughter's impending maternity hospital appointment for induction (no details provided vouching such an appointment), and no explanation as to why such matters were not brought to the Tribunal's attention at an earlier date, after issue of the Notice of Hearing on 23 December 2022, I would not have considered them to be "***exceptional circumstances***", in terms of **Rule 30A of the Employment Tribunals Rules of Procedure 2013**, justifying postponement of the Hearing on less than 7 days' notice, had there been an application for postponement.

58. Having heard Mr Thornber's oral submissions, and the claimant not being present, nor represented, to reply to them, I thanked him for them, and proceeded to give an oral Judgment there and then, on the primary basis that I was satisfied that the claimant's claim has no reasonable prospects of success, in terms of **Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013,** the Tribunal having no jurisdiction to determine the matter complained of by the claimant, being the respondents' alleged provision of an untrue reference about the claimant to another GP practice, namely the Largs medical practice.

59. As such, I dismissed the claim. I regarded Mr Thornber's oral submissions on jurisdiction to be well-founded. Put simply, the Employment Tribunal being a creature of statute, it only has the specific jurisdictions conferred upon it by Parliament through legislation, primary and secondary.

60. From the claimant's ET1 claim form, where she refers to an "***untrue reference***", and her email of 5 December 2022 to this Tribunal, it is clear that her complaint against the respondent relates not to termination of her employment with the respondent (where she resigned on 21 December 2021 for unspecified personal reasons, as per her email to Ms Tempini) but a concern that there has been a "***defamatory and untrue reference***, or a "***negligent and careless reference"*** about her from the respondent to the Largs medical practice, sometime between 18 and 24 May 2022.

61. In writing up this Judgment, while I hold that her recourse to legal process about that alleged reference (for the respondent denies having given a written reference, and there is a suggestion that somebody (unspecified) at Cumbrae may have given a telephone reference to Largs) is not within the statutory jurisdiction of the Employment Tribunal, the claimant may have a claim to pursue in the civil courts, namely the local Sheriff Court, but she should seek out independent legal advice from a solicitor in that regard. The Tribunal is an independent judicial body, and it cannot give legal advice to either party, which should seek its own legal advice from wherever it can source it.

62. Having given oral Judgment dismissing her claim, for lack of jurisdiction, I then stated that, further and alternatively, I would also strike out the claim, on various other grounds, under **Rule 37**, having considered Mr Thornber's submissions on them too to be well-founded, but as the claimant was not in attendance, nor represented, I would set out my detailed reasons for doing so in a full written Judgment & Reasons to be issued to both parties as soon as possible after close of this Preliminary Hearing.

63. The claimant emailed the Tribunal on 31 January 2023 to enquire as to the outcome of this Preliminary Hearing. On my instructions, an email was sent to her, by the Tribunal administration, on 3 February 2023, stating that her claim had been dismissed by the Tribunal, as per my oral Judgment, and that this written Judgment & Reasons was in preparation, and it would be issued to both parties, as soon as possible, after it was completed and faired by our typing section.

64. In the following paragraphs of this section of my Reasons, I now deal in turn with each of Mr Thornber's submissions, and my private deliberation thereon, giving my reasons for dismissing the claimant's entire claim against the respondent.

No Reasonable Prospects of Success - Rule 37(1)(a)

65. In his oral submissions for the respondent, Mr Thornber stated that the claimant's claim was not within the Tribunal's jurisdiction, but, if it was, then this Tribunal would need to consider whether it has prospects of success, including considering whether it was time-barred and, if so, whether any extension of time should be granted to the claimant.

66. He later invited me to simply dismiss the claim, on the basis that the Tribunal has no jurisdiction to deal with it and submitted that he did not need to further address me on reasonable prospects of success, or timebar. However, I invited him to address me on all matters listed in the Notice of Hearing.

67. Mr Thornber highlighted that the claimant had been ordered to clarify the issues, and the legal basis of her claim, by the Tribunal on 18 November 2022, and again on 23 January 2023, and while she had replied, on 5 December 2022, and 9 January 2023, he submitted that she had not shown that her complaint about the alleged reference from the respondent was within this Tribunal's jurisdiction, nor detailed the legal basis of her claim, by reference to any statutory provisions being relied upon, or at all.

68. Further, Mr Thornber stated that her complaint about the alleged reference being in some way "***quasi-negligent***", as he described it, it was a matter for the Sheriff Court, not the Glasgow ET, and there was no stated allegation by the claimant that the respondent had in some way unlawfully victimised her contrary to **Section 27 of the Equality Act 2010**, by subjecting her to a detriment, because she had done, or they believed she had done, or might do, some "***protected act***".

69. Mr Thornber submitted that the claim brought is not one of unfair dismissal, as is clear from the claimant's email of 9 January 2023, which refers to ***"my previous employer*** (is) ***lying to a new employer."*** Indeed, on her ET1 claim form, I note that the claimant did not tick the box, at section 8.1, to indicate that she was unfairly dismissed (including constructive dismissal).

70. The respondent's representative focussed on "***no reasonable prospect of success***" and not "***scandalous***" or ***"vexatious***", in terms of **Rule 37(1)(a).** He referred me to the email exchange produced at page 20 of the Bundle. On 27 May 2022, the claimant had emailed Dr Malik and copied on Ms Tempini, with a subject access request, asking the respondent to supply the personal data that had been sent in a reference to Kirsten McKellar (practice manager at Largs) concerning the claimant.

71. Ms Tempini's email reply of 30 May 2022, copied to Dr Malik, advised the claimant that: "***I am unable to reply to your Subject Access Request as I have not supplied a reference about you to Kirsten McKellar."*** On the information available to me at this Hearing, Mr Thornber (at page 18 of his Bundle) had provided the email of 18 May 2022 from Ms McKellar at Largs to Ms Tempini at Cumbrae seeking a reference about the claimant, answering 7 set questions.

72. At page 19 of the Bundle, I was provided with a copy of Ms McKellar's letter of 24 May 2022 to the claimant. It withdrew the offer of employment from Largs to the claimant given on 18 May 2022. Finally, at page 21 of the Bundle, I was provided with a copy of Ms McKellar's subsequent letter of 14 June 2022 to the claimant. It refers to : "***I contacted Cumbrae Medical Practice via email on 18/05/22 requesting a reference . I was then contacted by a member of Cumbrae Medical Practice via telephone on 23rd May and received information verbally….Whilst Dr Malik is stating they declined to give a reference, this is inaccurate as whilst I did not receive a written reference, I did have a verbal conversation which has impacted my decision making."***

73. Mr Thornber referred me to the ACAS early conciliation certificate, produced at page 1 of the Bundle, showing that the claimant had notified ACAS on 9 October 2022, and ACAS had issued her with a certificate on 10 October 2022, the same day that the claimant had presented her ET1 claim form to the Tribunal. He commented that no conciliation had been attempted by the claimant though ACAS, although the claimant's email from ACAS, on 6 September 2022 (as produced at page 22 of the Bundle) showed she was in contact with them at that earlier stage about the matter of references.

74. This, he submitted, all had to be viewed in context of the ET1 complaining about matters post-employment with the respondent (which employment relationship had ended on 21 December 2021, when the claimant resigned), and her offer of a job with another GP practice at Largs, made on 18 May 2022, subject to satisfactory references, having been withdrawn by Largs on 23 May 2022. Mr Thornber submitted that there was no reason why the claimant could not have submitted her Tribunal claim at that earlier stage. Her ET1 claim form seeking 7 years' wages as compensation was, he further submitted, indicative of her mindset, and he felt indicates that the claim has been brought vexatiously.

75. Mr Thornber submitted, in terms of **Rule 37(1)(a),** that the claim has no reasonable prospects of success as it is outwith the Tribunal's jurisdiction, and, even if it were within the jurisdiction, it cannot have reasonable prospects of success when it is not clear what is the legal basis of the claim.

76. I decided that Mr Thornber's primary submission on lack of jurisdiction for this Tribunal was well-founded, and so I gave oral Judgment to that effect, as now confirmed in this written Judgment & Reasons. As the subject matter of the claim, related to the alleged (but disputed) untrue reference, is not within the Tribunal's jurisdiction, on the basis of the claim as pled in the ET claim form, it is as plain as a pikestaff that the case cannot be said to have reasonable prospects of success.

Unreasonable conduct of the proceedings by the claimant in terms of Rule 37(1)(b)

77. In his oral submissions for the respondent, Mr Thornber stated that it was unreasonable conduct for the claimant not to attend, or be represented, at this Hearing, and the email of 25 January 2023 was very late notice of that situation.

78. He focussed on "***unreasonable conduct***", and not "***scandalous***" or ***"vexatious***", in terms of **Rule 37(1)(b).**

79. I decided that his submission was well-founded, as regards her unreasonable conduct of the proceedings, not just her failure to attend or be represented, and so I have granted Judgment to that effect, as now confirmed in this written Judgment & Reasons.

80. My view is also impacted by the fact that I do not consider the claimant to have fully participated in the Tribunal process, as a party is required to do, to assist the Tribunal in furthering the overriding objective, in terms of **Rule 2**, and to co-operate generally with the Tribunal and the other party.

81. I have considered whether the claimant acted vexatiously or unreasonably in bringing the proceedings. In **ET Marler Ltd v Robertson 1974 ICR 72**, the then National Industrial Relations Court defined vexatiousness as the bringing of a claim for reasons of spite, to harass an employer or for some other improper motive. In **Attorney General v Barker 2000 1 FLR 759, QBD (DivCt)** the court said that whatever the intention of proceedings may be, if the effect was to subject the (in that case) defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the court process this can amount to vexatious conduct.

82. I have considered whether the claimant's conduct could be considered vexatious in applying either of those definitions. It is my view that the claimant's conduct in this case does not meet the criteria to be defined as

vexatious. It do not find that the claim was brought out of spite or with the intention to harass, but it was misguided.

83. In this regard, I think it is also appropriate to refer to the well-known passage from Sir Hugh Griffiths, President of the NIRC, in **Marler**, that:-"***Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms".***

Claimant's non-compliance with previous orders of the Tribunal in terms of Rule 37(1)(c)

84. In his oral submissions for the respondent, Mr Thornber stated that the claimant had failed to comply with Tribunal orders. At paragraph 15 (additional information), her ET1 claim form the claimant had stated that : "***This problem has caused me nothing but stress and anxiety I want to get to the bottom of this and end it ASAP."***

85. However, Mr Thornber submitted that the claimant had not clarified the legal basis of her claim, and so she had not been actively pursuing it. Her non-attendance today was also relevant, he further submitted, as she had stated that she wanted it dealt with in her absence.

86. The claimant has given written consent to the case proceeding in her absence, and on the basis of the documentation to hand. She had suggested that Ms McKellar ***"can be contacted tomorrow for evidence if needed."***

87. While the claimant is a lay person***,*** and she and her daughter / representative may well, and understandably so, be unfamiliar with the Tribunal's practices and procedures, it is the obligation of a party to call witnesses on their own behalf. The Tribunal is an adversarial process, not inquisitorial, and it is not for the Tribunal to contact Ms McKellar, as Lauren Black's mail of 25 January 2023 suggested.

88. I decided that Mr Thornber's submission that the claimant had failed to comply with earlier Tribunal orders was well-founded, in the sense that while she did correspond with the Tribunal, her emails were not material compliance, as the

legal basis of her claim against the respondent remains unspecified by her, and so I have granted Judgment to that effect, as now confirmed in this written Judgment & Reasons.

89. It is the claimant's case, and she needs to clearly state what it is. It is not for the Tribunal, any more than the respondent, to second guess what they think might be the legal basis of a claimant's case. As the claimant was neither present, nor represented, at this listed Hearing, I could not, to use HHJ Tayler's language in **Cox**, engage in " ***rolling up one's sleeves and identifying, in reasonable detail, the claims and issues."***

90. In his oral submissions to me, Mr Thornber felt it could be a victimisation claim, but he only focused on **Section 27 of the Equality Act 2010**, which deals with victimisation, when it is within judicial knowledge that post-employment discrimination, where discrimination arises after the ending of an employment relationship, can be covered under **Section 108 of the Equality Act 2010.**

91. **Section 108(1) and (2)** provide that a person must not discriminate against or harass another if the discrimination or harassment arises out of or is closely connected to a relationship which used to exist between them, and conduct of a description constituting the discrimination or harassment would, if it occurred during the relationship, contravene the **Equality Act 2010**.

92. However, **Section 108(7)** clearly stipulates that "***conduct is not a contravention of this section in so far as it also amounts to victimisation of B by A***". Victimisation is thus specifically excluded from the scope of **Section 108**.

93. It is for the claimant to have laid out her stall and put all her cards on the table before this Preliminary Hearing. In this regard, I refer to the Judgment of the Employment Appeal Tribunal in **Chandhok –v- Tirkey [2015] IRLR 195,** and in particular at paragraphs 16 to 18 of Mr Justice Langstaff's Judgment in **Chandhok**, where the then learned EAT President referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows: -

"16… The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to

argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

The claim has not been actively pursued by the claimant in terms of Rule 37(1)(d)

94. In his oral submissions for the respondent, Mr Thornber briefly stated that the claim has not been actively pursued, and this argument tied into his earlier submissions about her unreasonable conduct, and non-compliance with Orders.

95. I decided that his submission was well-founded, and so I have granted Judgment to that effect, as now confirmed in this written Judgment & Reasons.

Time-Bar

96. As the claimant was not here to explain her position, I was not able to clarify her position about her claim being time-barred and, if so, whether any extension of time should be granted to her. As I have dismissed her claim as being outwith the Tribunal's jurisdiction, and on various other grounds for Strike Out, as detailed above, I need say not much more.

97. What I will say, however, is that without knowing the legal basis of her claim, where the claimant has not specified that, despite being ordered to do so by two other Judges at an earlier stage, the Tribunal cannot identify whether to approach time bar on the basis of a possible head of claim under the **Employment Rights Act 1996**, where arguments of reasonable practicability may arise, or a possible claim under the **Equality Act 2010**, where if it is time-barred, the Tribunal requires to consider whether it is just and equitable to grant an extension of time to bring a late claim.

98. On the information available to the Tribunal, the start of the time limit for a complaint about the alleged untrue reference runs from 23 May 2022 when the claimant's offer of a job at the Largs Medical Practice was withdrawn by Ms McKellar there. That being so, the statutory period of three months to bring a Tribunal claim would have expired on 22 August 2022. The claimant did not notify ACAS until 9 October 2022. The 3-month period had thus already expired.

99. No clear and cogent information has been provided by the claimant to explain why she did not present her ET1 earlier than she did. On the information available to the Tribunal, she raised matters with the respondent, by subject access request, as also with the Largs medical practice, and then with the Information Commissioners' Office, and ACAS. From all that activity, there is nothing to suggest that the claimant was under any impediment preventing her from raising a Tribunal claim against the respondent at a far earlier stage.

100. The Tribunal is always mindful of the need to assist those representing themselves, acknowledging the need to ensure the parties are on an equal footing. However, it is the claimant who brings the claim and makes the allegations, and it is the claimant who must take responsibility for managing the case and treating it with the seriousness and importance that any legal proceedings deserve. Giving assistance to lay party litigant does not mean doing the claimant's job for them.

101. The Tribunal's Orders and directions are not aspirational, and they must be complied with. Judge Doherty signposted the claimant, as far back as 7 December 2022, to where she might be able to access free legal advice, and granted her an extension of time to do so.

102. Not having had the benefit of hearing directly from the claimant, as she chose not to attend this Hearing, and indeed she consented to it proceeding in her absence, I cannot say one way or the other that there has been wilful and deliberate flouting of the Tribunal's earlier Orders made by Judges Whitcombe and McManus, or merely a lack of diligence on the part of the claimant, and / or her daughter, as her representative.

103. The claimant presented a fairly short claim form which, in my view, cried out for further information as to the legal basis of her claim, but despite earlier Orders / Directions by the Tribunal, clear and unequivocal in their terms, the claimant in effect has done nothing to explain what is a legal basis to her claim that lies within the jurisdiction of the Employment Tribunal.

104. In these circumstances, and the claimant having failed to attend this Hearing, and having regard to the Tribunal's overriding objective, I decided it was appropriate and proportionate to Strike Out her claim, rather than take a lesser course of action.

105. Making an Unless Order, for example, under **Rule 38**, to allow her further time to provide a legal basis for her claim, was not a middle course that I felt was just, as it would simply prolong the proceedings, and entail the respondent potentially being put to incurring further time and cost in preparing for another Hearing at a later stage.

106. The Employment Tribunal's resources have to be shared with all users, many of whom are not professionally represented, and the Tribunal is well used to dealing with unrepresented claimants, or claimants represented by another lay person. That said, when most claimants and / or their lay representatives are ordered to provide information in support of what they say, they do so. The prejudice to the claimant in having her claim struck out at this stage, having had the opportunity to prevent that happening by the provision of information, is, in reality, very little.

107. It is likely that the conduct of the case would continue to be similarly non-compliant, and in those circumstances, she would be at risk of strike out again in the future. The prejudice to her of strike out now is far less than it would be for a party who has routinely demonstrated being able to progress a claim in accordance with directions, as most do. In the meantime, the respondent has had serious allegations hanging over his GP practice, and he had had to secure professional representation via Mr Thornber, and so incur costs.

108. I am reminded of the comments of Her Honour Judge Kathrine Tucker in the unreported case of **Mr W Khan v London Borough of Barnet** [**2018] UKEAT/0002/18,** in which, at paragraph 31, she states: "***Being a litigant in person does not mean that a litigant is exempt from compliance with procedures or from engaging in the litigation process to pursue a claim."***

109. Similarly, the circumstances of this case also remind me of the more well known, familiar and often cited Employment Appeal Tribunal judgment in **Rolls Royce plc v Riddle [2008] IRLR 873** and the comments of Lady Smith, then an EAT judge, at paragraph 20 of that report, where she stated: ***"….it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and / or its procedures. In that event a question plainly arises as to whether, given such conduct,***

it is just to allow the claimant to continue to have access to the tribunal for his claim. …"

110. In closing, I am also reminded of the judicial guidance, per Mr Justice Langstaff, then President of the Employment Appeal Tribunal, in **Harris v Academies Enterprise Trust & Ors [2015] IRLR 208**, at paragraph 40 of his judgment, that : "…***Rules are there to be observed, orders are there to be observed, and breaches are not mere trivial matters; they should result in careful consideration whenever they occur…".***

111. Yes, strike out of a claim is a Draconian step. However, in my view, where the claim brought is not within the Tribunal's statutory jurisdiction, it is not proportionate for further Tribunal resources, both administrative and judicial, to be taken up in dealing with this case. Accordingly, the claim is struck out.

Employment Judge: **Ian McPherson**
Date of Judgment: **10 February 2023**
Entered in register: **14 February 2023**
and copied to parties