EMPLOYMENT TRIBUNALS

Claimant: Mrs M Perrott

Respondents: (1) Imperial College of Science and Technology
(2) Ms A Kelly
(3) Ms M Langton
(4) Professor J Mestel
(5) Ms A Kehoe
(6) Ms N Hirjee
(7) Ms A Gourlay
(8) Professor A Gast
(9) Mr G Jones
(10) Mr T Lawrence
(11) Professor M Burgman
(12) Ms O Fernandez
(13) Professor D Haskard
(14) Mr N Houghton
(15) Professor I Walmsley
(16) Mr T Ovenden
(18) Mr H Brar
(19) Farrer & Co LLP
(20) Ms A Kendle

RECORD OF A PRELIMINARY HEARING

Heard at: (in public; by Cloud Video Platform) **On:** 18, 19, 20 and 21 October 2022

Before: Employment Judge Joffe

Appearances
For the claimant: Mr Perrott, lay representative
For the respondents: Mr N Pourghazi, counsel

JUDGMENT

1. The respondents' responses are not struck out.

2. The claimant's claims in claims numbered 2200345/2022 and 2201863/2022 are struck out save for those set out in the list of issues below.

3. The following respondents are removed from the proceedings:

    a. Ms A Kehoe

    b. Ms N Hirjee

    c. Ms A Gourlay

    d. Professor M Burgman

    e. Mr T Lawrence

    f. Mr T Ovenden

    g. Farrer & Co LLP

    h. Ms A Kendle.

Note: Full reasons are now provided for the judgments and orders. A number of omissions from the case management orders have been corrected and are indicated below by underlining.
Since the hearing, the parties have now settled the claims but the reasons are provided in accordance with the Rules of Procedure.

CASE MANAGEMENT ORDERS

Further open preliminary hearing

1. There will be a further open preliminary hearing on **6 and 7 February 2023** before Employment Judge Joffe to:
    1.1 Consider any remaining strike out and deposit order applications;
    1.2 Consider which respondents should remain in the proceedings;
    1.3 Consider whether the claims should all be heard together;
    1.4 Case manage all claims, including the claimant's fourth and fifth claims, which the respondents have not yet responded to;
    1.5 Consider whether the current listing for the full merits hearing in May 2023 can be retained.

Amendment

2. The claimant's application to amend her first claim was refused <u>save as reflected in the attached appendix</u>.

3. The respondents' application to substitute detailed grounds of resistance in claims 1 to 3 was allowed.

Applications

4. The claimant's application to record these proceedings was refused.

5. The claimant's application for deposit orders against the respondents was refused as was her application that other action be taken against the respondents under rule 6 of the Rules of Procedure.

6. The claimant withdrew her applications for specific disclosure and further information after we had a discussion about general disclosure and the purposes of further information.

7. I allowed the respondents' application to exclude three categories of evidence:

    a. The claimant's grievance from 2005;
    b. The claimant's allegation of unaddressed historic claims of bullying and aggression which she accepted in her second claim form were not connected to any person in the current proceedings;
    c. Allegations of bullying and aggression by Mr M Sanderson and Professor Gast in relation to others (not the claimant), covered in a report by Jane McNeill KC.

8. After the claimant and her representative drafted the lists of her most important claims in claims 2 and 3, we worked through those claims carefully and discussed the wording recorded in the list of issues for claims 2 and 3 below, That wording reflects the claims which have not been struck out, and, save for the incorporation of the further information, the expectation is that those issues will not change. For the avoidance of doubt, the striking out of the remainder of the claim forms in claims 2 and 3 does not prevent the claimant from giving any evidence relevant to the issues which remain which is referred to in those claim forms.

9. These claims have already required an unusual amount of case management. It is intended that the hearing in February will be the last case management hearing and the parties should cooperate with one another to achieve that outcome. As we discussed at the hearing, it is in everyone's interests for these claims to be heard as quickly and efficiently as is practicable. Parties should take a sensible view as to what applications are proportionate and worthwhile.

Further information

10. The claimant must write to the Tribunal and the respondents by 4 pm on 11 **November 2022** with the following information:
    7.1 What key statements made by the claimant Mr Jones is said to have left out of the minutes of meetings;
    7.2 What material inconsistences between oral evidence and written statements the claimant says Mr Jones failed to cross reference;
    7.3 In what other ways the grievance outcome report of Mr Jones and Mr Houghton is said not to be balanced, fair and objective;
    7.4 Which material parts of the claimant's appeal were missed by Professor Mestel when he 'rewrote' her appeal;

7.5 Which delays in the grievance and grievance appeal processes the claimant says were unreasonable;
7.6 What protected disclosures the claimant says she made, setting out the dates of the communications and saying what type of wrongdoing she says her disclosures tended to show, by reference to the categories set out in the list of issues below.[1]

The further information is to be contained in no more than one typed sheet of A4 per item of further information, in a font size no less than 11 and with line spacing at least 1.5 lines.

Strike out applications

11. By 4 pm on **30 November 2022**, the claimant will send to the respondents and the Tribunal her response to the respondents' applications for strike out and deposit orders in claim 1. That document should be no more than 35 pages of A4 in a font no less than 11 and with a line spacing no less than 1.5 lines.

12. By 4 pm on **16 December 2022**, the respondents will send to the claimant and the Tribunal any reply to the claimant's document.

13. By 4 pm on **2 December 2022**, the respondents must send to the claimant and the Tribunal any applications to strike out on the basis of no reasonable prospects and/or deposit orders in respect of claims 2 and 3, the applications to be in the level of detail of a skeleton argument.

14. By 4 pm on **13 January 2023,** the claimant will send to the respondents and the Tribunal her reply to any strike out / deposit order applications in claims 2 and 3.

15. By 4 pm on **6 January 2023**, the respondents will write to the claimant and the Tribunal with any applications they wish to pursue to strike out claims 4 and 5 as being vexatious and/or any applications they wish to pursue to strike out claims 4 and 5 on the basis that they have no reasonable prospect of success or for deposit orders in claims 4 and 5 on the basis of little reasonable prospect of success.

16. By 4 pm on **27 January 2023**, the claimant will write to the Tribunal and the respondent with any skeleton argument she wishes to rely on in respect of any strike out applications in claims 4 and 5.

Lists of claims in claims 4 and 5

17. By 4 pm on **30 November 2022**, the claimant will write to the respondents and the Tribunal setting out no more than ten claims for each of claims 4 and 5 which represent her most important claims in each claim form and indicating whether she is content to substitute those lists for the particulars of claim in claims 4 and 5.

[1] This further information was not discussed at the hearing but is clearly necessary to complete the list of issues.

18. The parties are encouraged to seek to agree lists of issues in claims 4 and 5.

Extension of time for responses in claims 4 and 5

19. By consent the respondents are not required to submit detailed grounds of response in claims 4 and 5 until a date to be determined at the further open preliminary hearing.

Variation of dates

20. The parties may agree to vary a date in any order by up to 14 days without the Tribunal's permission, but not if this would affect the hearing date.

About these orders

21. These orders were made and explained to the parties at this preliminary hearing. They must be complied with even if this written record of the hearing arrives after the date given in an order for doing something.

22. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

23. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Writing to the Tribunal

24. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

25. All judgments and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

26. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/*

27. The Employment Tribunals Rules of Procedure are here:

https://www.gov.uk/government/publications/employment-tribunal-procedure-rules

28. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

CASE SUMMARY

29. The claimant is employed by the first respondent university. Her first claim is about the first respondent moving her from her existing role to another role and related issues. Subsequent claims largely concern the grievances and grievance appeals which have arisen from those initial events.

The Issues

30. The issues the Tribunal will decide are set out below.

1. Disability

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Did she have a physical or mental impairment?
1.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
1.1.5.2 if not, were they likely to recur?

2. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

2.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

2.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

2.2.1 Having a paralegal to takes notes in the grievance appeal hearing.

2.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the presence of the paralegal exacerbated the claimant's anxiety?

2.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

2.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

2.5.1 Recording the hearing;
2.5.2 Providing someone else to take notes of the hearing.

2.6 Was it reasonable for the respondent to have to take those steps?

2.7 Did the respondent fail to take those steps?

3. Victimisation (Equality Act 2010 section 27)

3.1 Did the claimant do a protected act as follows:

3.1.1 Her written assertion to Mr H Brar on 8 January 2021 that she had been indirectly discriminated against due to her sex;
3.1.2 Her claim in a letter to Mr Jones (IO) and Mr Houghton (HR Support) on 24 March 2021 that since she sent her letter to Mr Brar on 8 January 2021 she had been victimised;
3.1.3 Lodging her claim form in her first claim on 29 January 2021.

3.2 Did the respondent do the following things:

3.2.1 Mr Jones failing to conduct a full and proper grievance investigation between 1 March 2021 and 27 August 2021 in that:
3.2.1.1 He asked which witnesses the claimant wanted but did not interview any of them and failed to explain in his report why not;
3.2.1.2 He delayed providing the claimant with minutes of meetings;
3.2.1.3 He left key statements by the claimant which would have assisted her case out of the minutes of meetings;
3.2.1.4 He did not properly investigate allegations of bullying and gaslighting against Mr Ovenden;
3.2.1.5 He did not give the claimant the opportunity to comment on what the respondents' witnesses said but the respondents' witnesses had the opportunity to comment on what the claimant said;
3.2.1.6 He did not cross reference inconsistencies in the oral evidence of witnesses with their written statements,

including evidence about whether the claimant's contract allowed her to be moved in a non voluntary way;

3.2.1.7 He did not interview Ms Duda, investigate the contractual basis of her move or look at the documents which contained the offer of the move and showed the terms on which the move was offered in order to compare the claimant's forcible move with Ms Duda's voluntary move and obtain evidence as to whether Ms Duda's move was subject to review;

3.2.1.8 He did not compare the job descriptions for the role the claimant had at the time as a part time role and the role she was being made to take up on a non-voluntary basis. The claimant says this should have been investigated in order to determine whether the new role was a like for like role as asserted by HR and whether it was truly on same grade as the claimant's role;

3.2.1.9 He did not request the Hays evaluation scoring for the role the claimant was offered.

3.2.2 Mr Jones and Mr Houghton failing to write a balanced, fair and objective grievance outcome report, in that:

3.2.2.1 They paid more heed to the respondents' witnesses evidence as shown by the relative number of quotes from the claimant as compared with quotes from the respondents' witnesses;

3.2.2.2 They used subjective language rather than making findings on the balance of probabilities.

3.2.3 Mr Jones initiating putting the claimant back under the management of Mr Ovenden temporarily on 13 April 2021, despite knowing that Mr Ovenden was the main focus of the claimant's grievance;

3.2.4 Mr Houghton and Mr Jones saying in the report that they had not investigated whether there was indirect sex discrimination because they said it was not properly articulated (which the claimant denies), but:

3.2.4.1 Failing to give the claimant the opportunity to further explain her indirect sex discrimination claim, and

3.2.4.2 Nonetheless finding that there was no indirect sex discrimination.

3.2.5 Mr Houghton and Mr Jones failing to investigate the acts alleged to be victimisation set out in the claimant's letter of 24 March 2021;

3.2.6 Mr Brar, HR Director, instructing the claimant to work on her appeal in her own not the college's paid time. The request to work on the grievance in paid time was made and refused on 7 October 2021;

3.2.7 Mr Brar giving the claimant a substantially shorter extension to work on her appeal than Mr Ovenden received when he worked on his grievance response. The claimant's request for an extension of time and the response to that request were dated 7 October 2021;

3.2.8 Professor Gast and Professor Walmsley not intervening in the claimant's case, despite the claimant advising them on numerous occasions that their senior management were breaching the Equality Act and the grievance and appeal procedures. A request to Professor Gast on 7 May 2021 was declined on 11 May 2021. Requests on 13 and 21 May to Professor Gast were declined on 21 May 2021. A request to Professor Gast on 10 August 2021 was declined on 11 August 2021. A request to Professor Walmsley on 12 December 2021 received no response;

3.2.9 Professor Walmsley failing to have the claimant's grievance against Professor Haskard and Ms Fernandez properly and independently investigated and letting them investigate themselves. The claimant made a request on 14 October 2021 which was refused on 21 October 2021. She asked again on 25 October 2021 and Professor Walmsley did not change his mind on that same date;

3.2.10 On 18 November 2021, in response to the claimant's appeal document, Professor Mestel saying that it would not be reasonable or proportionate to consider every comment in the document in detail and saying he would not do so;

3.2.11 Professor Mestel rewriting the claimant's complaints in a way which missed out parts of her appeal;

3.2.12 On 29 November 2021, Professor Mestel declining to take forward the claimant's grievances against Mr Jones (dated 21 November 2021) and Mr Houghton (dated 23 November 2021) as separate grievances;

3.2.13 Ms Langton requesting Farrer & Co (Ms Kendle) to provide a paralegal, Mr Evans, to act as a notetaker in the claimant's first grievance appeal meeting on 16 December 2021;

3.2.14 Professor Mestel's conduct to the claimant in the claimant's appeal hearing on 16 December 2021:

3.2.14.1 Not letting Mr Perrott read a statement;

3.2.14.2 Repeatedly badgering the claimant by asking her who wrote the statement;

3.2.14.3 Asking repeatedly and aggressively and belittlingly if her representative had input into this opening statement (the badgering lasting 5 – 6 minutes);

3.2.14.4 Shouting at the claimant;

3.2.14.5 Flailing his arms in the air;

3.2.14.6 Not accepting the claimant's answers;

3.2.14.7 When the claimant answered questions, saying that was not an answer;

3.2.14.8 Badgering the claimant to answer his questions repeatedly even when she had already provided an answer;

3.2.14.9 Ignoring what the claimant had said entirely at times;

3.2.14.10 At times constantly interrupting the claimant when she was answering questions;

3.2.15 On 17 January 2022, Mr Brar refusing to take forward the claimant's grievance against Professor Mestel, Ms Langton and Ms Kelly (submitted on 5 January 2022);
3.2.16 Delays in the grievances and grievance appeals;
3.2.17 On 19 January 2022 the respondents declining to address all of the claimant's alleged protected disclosures, as set out in her letters of 21 November 2021 and 3 December 2021;
3.2.18 Ms Langton and Professor Mestel refusing to remove Mr Evans from the appeal hearing.

3.3 By doing so, did it subject the claimant to detriment?

3.4 If so, was it because the claimant did a protected act?

3.5 Was it because the respondents believed the claimant had done, or might do, a protected act?

4. Direct sex and/or race discrimination (Equality Act 2010 section 13)

4.1 Did the respondents do the following things:

4.1.1 The acts or omissions at 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.5, 3.2.6, 3.2.7, 3.2.10, 3.2.11, 3.2.12, 3.2.14?

4.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than:
For 3.2.1: Professor Gast
For 3.2.6: Mr Ovenden
For 3.2.7: Mr Ovenden
For 3.2.14: Mr Jones

4.3 If so, was it because of race and/or sex?
4.4 Did the respondents' treatment amount to a detriment?

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 The acts or omissions at 3.2.13 and 3.2.18.

5.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

5.3 If so, was it because of disability?

5.4 Did the respondents' treatment amount to a detriment?

6. Harassment related to sex and/or race (Equality Act 2010 section 26)

6.1 Did the respondent do the following things:

6.1.1 The acts at 3.2.14 and 3.2.18.

6.2 If so, was that unwanted conduct?

6.3 Did it relate to sex and/or race?

6.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. Remedy for discrimination or victimisation

7.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the claimant?

7.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the claimant be compensated?

7.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

7.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

8. Protected disclosure

8.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

8.1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions: [Claimant to provide further information]

8.1.2 Did she disclose information?
8.1.3 Did she believe the disclosure of information was made in the public interest?
8.1.4 Was that belief reasonable?
8.1.5 Did she believe it tended to show that:
[Claimant to provide further information]

8.1.5.1 a criminal offence had been, was being or was likely to be committed;
8.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
8.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;
8.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;
8.1.5.5 the environment had been, was being or was likely to be damaged;
8.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

8.1.6 Was that belief reasonable?

8.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

9. Detriment (Employment Rights Act 1996 section 48)

9.1 Did the respondent do the following things:

9.1.1 The acts or omissions at 3.2.12, 3.2.13, 3.2.14, 3.2.15, 3.2.17, 3.2.18.

9.2 By doing so, did it subject the claimant to detriment?

9.3 If so, was it done on the ground that she made a protected disclosure?

10. Remedy for Protected Disclosure Detriment

10.1 What financial losses has the detrimental treatment caused the claimant?

10.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

10.3 If not, for what period of loss should the claimant be compensated?

10.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

10.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

10.6 Is it just and equitable to award the claimant other compensation?

10.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

10.8 Did the respondent or the claimant unreasonably fail to comply with it?

10.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

10.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

10.11 Was the protected disclosure made in good faith?

10.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

REASONS

The hearing

1. This was a four day preliminary hearing listed to hear a large number of applications in this case which has a complex procedural history already. The respondents put in a 176 page skeleton argument. Whilst in ordinary circumstances that might seem excessive, it was understandable in the context of these claims. The claimant's skeleton was 82 pages. The bundle ran to thousands of pages although the claimant had included many documents in the claims which were not relevant to the applications I had to consider.

2. I had a day of reading before I saw the parties and I then heard oral submissions on the various applications. We broke at various points, such as when I invited the claimant and her representative to seek to formulate the most important claims in her second and third claim forms.

3. These proceedings had reached a point where they were at real risk of becoming unhearable due to the proliferation of claims and the length and lack of clarity of the particulars of claim. I discussed with the claimant and her representative the importance of taking a proportionate approach so the claims that are important to her can be heard in a reasonable amount of time without unreasonable further delay. My impression is that the claimant and her representative understood the issue and were keen to adopt a cooperative approach to bringing the claims to a hearing.

Brief history of the proceedings

4. The claimant is a senior finance officer employed by the first respondent. Her claims arise from a decision made by the first respondent in late 2020 to move the claimant from one department to another. In relation to that matter, she makes claims in particular of indirect sex discrimination and under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations.2000.

5. The claimant has brought a series of grievances and appeals against grievance outcomes and these are the subject of the bulk of her further claims.

6. The chronology of events is as follows:

    - 8 April 2021: First claim form submitted. The particulars of claim run to six pages;
    - 7 June 2021: Respondents' ET1 and holding response submitted;
    - 22 July 2021: Case management preliminary hearing before Employment Judge Palca. The issues were defined and directions given for a full merits

hearing listed for February 2022. Orders were made for both sides to provide further information;
- 4 August 2021: Employment Judge Palca's further orders in response to claimant's applications for disclosure and further information;
- 7 September 2021: Further preliminary hearing to list a judicial mediation and a further preliminary hearing (for 29 October 2021);
- 18 October 2021: Judicial mediation;
- 28 October 2021: Further preliminary hearing vacated by Tribunal due to lack of judicial resource;
- 19 November 2021: Full merits hearing dates vacated and directions give for an open preliminary hearing (18 – 20 January 2022) to consider matters including claimant's amendment applications and applications for deposit orders, disclosure and further information;
- 23 December 20221: Claimant's application to amend her claim and application to postpone OPH as she will be submitting second claim;
- 7 January 2022: OPH postponed;
- 21 January 2022: New claim submitted. Particulars of claim run to 112 pages;
- 11 March 2022: Second ET3 and holding response submitted;
- 12 April 2022: Claimant submits third ET1;
- 27 April 2022: Case management preliminary hearing in front of Employment Judge Glennie lists OPH, a full merits hearing for May 2023 and a further case management hearing for the OPH (August 2022);
- 1 June 2022: Third ET3 and holding response;
- 28 July 2022: Respondents' application to amend response in form of draft detailed grounds of resistance;
- 8 August 2022: Further case management hearing in front of Employment Judge Glennie: three claims consolidated and further directions given for OPH including directions for sequential provision of skeleton arguments.

7. The applications to be heard at this hearing were as directed by Employment Judge Glennie.

8. I was told during the hearing that the claimant had issued fourth and fifth claims. These were not before me but it clearly made sense to seek to include them in the management of the claimant's proceedings. The details of claim in claim 5 were said to run to 144 pages but I was not provided with these.

Recording

9. The claimant applied to record the hearing. In part this was said to relate to her inability to concentrate, but no medical evidence was produced and the claimant was represented by her husband. The other basis for wishing to record was to 'avoid disputes' about what had occurred in the proceedings. These disputes appeared to have occurred in circumstances where the claimant considered that her notes were fuller and more accurate than those of the Tribunal or the respondents.

10. I had regard to the recent decision of the EAT in Heal v University of Oxford UKEAT/0070/19:

The effect of these provisions in the present context, read with the authorities above and the terms of s.9 of the 1981 Act, may be summarised as follows:
a. Tribunals are under a duty to make reasonable adjustments to alleviate any substantial disadvantage related to disability in a party's ability to participate in proceedings.
b. Where a disability is declared and adjustments to the Tribunal's procedures are requested in the ET1 form, there is no automatic entitlement for those adjustments to be made. Whether or not the adjustments are made will be a matter of case management for the Tribunal to determine having regard to all relevant factors (including, where applicable, any information provided by or requested from a party) and giving effect to the overriding objective.
c. The Tribunal may consider whether to make a case management order setting out reasonable adjustments either on its own initiative or in response to an application made by a party.
d. If an application is made for reasonable adjustments, the Tribunal may deal with such an application in writing, or order that it be dealt with at a preliminary or final hearing: see Rule 30 of the ET Rules.
e. Where the adjustment sought is for permission for a party to record proceedings or parts thereof because of a disability-related inability to take contemporaneous notes or follow proceedings, the Tribunal may take account of the following matters, which are not exhaustive, in determining whether to grant permission:
i. The extent of the inability and any medical or other evidence in support;
ii. Whether the disadvantage in question can be alleviated by other means, such
as assistance from another person, the provision of additional time or additional breaks in proceedings;
iii. The extent to which the recording of proceedings will alleviate the disadvantage in question;
iv. The risk that the recording will be used for prohibited purposes, such as to publish recorded material, or extracts therefrom;
v. The views of the other party or parties involved, and, in particular, whether the knowledge that a recording is being made by one party would worry or distract witnesses;
vi. Whether there should be any specific directions or limitations as to the use to which any recorded material may be put;
vii. The means of recording and whether this is likely to cause unreasonable disruption or delay to proceedings.
f. Where an adjustment is made to permit the recording of proceedings, parties ought to be reminded of the express prohibition under s.9(1)(b) of the 1981 Act on publishing such recording or playing it in the hearing of the public or any section of the public. This prohibition is likely to extend to any upload of the recording (or part thereof) on to any publicly accessible website or social media or any other information sharing platform.
…
The adjustment sought in this case, namely the use of a recording device to record proceedings, gives rise to an additional reason why such an adjustment could not be made automatically or as a matter of routine. The express consent of the Tribunal is required for such an adjustment otherwise there could be a breach of s.9 of the 1981 Act. The Tribunal has a broad discretion to grant such

consent, but in doing so it will generally be relevant to consider whether there is a reasonable need for proceedings to be recorded, or whether the claimed disadvantage would be alleviated by the use of a recording device. The difficulties involved in taking a contemporaneous note of proceedings are likely to be experienced by many self-represented litigants. The taking of such notes is not an everyday skill and even those who do not have any physical or cognitive disability may find it difficult to keep a meaningful or helpful contemporaneous note of proceedings. The Tribunal will therefore be unlikely to accept that a slight limitation on the ability to take notes would lead to the adjustment of permission
being granted for a recording device; a cogent explanation of the precise nature of the difficulty and why other adjustments alone, such as additional breaks or time, would not suffice, could normally be expected before consent is given.
…

Permission to record proceedings is unlikely to be granted on a routine or regular
basis. Each case will have to be determined on its own facts. However, it seems very unlikely that permission would be granted where the applicant fails to demonstrate that, for reasons related to a disability or medical condition:
i. there is a complete or partial inability to take contemporaneous notes; and
ii. such inability will result, in the circumstances of the particular case, in a substantial disadvantage.

[Per Choudhury P]

11. I rejected the application to record the hearing since there was no evidence that between the claimant and her husband there was a complete or partial inability to take contemporaneous notes. The concern was in fact that the Tribunal would not keep an accurate record, which is not a reason for allowing a recording to be made.

Claimant's strike out application on the basis of non compliance with rules or orders / application for orders against the respondents pursuant to rule 6 of the Employment Tribunals Rules or for deposit orders

12. The claimant alleged that the respondents had failed to comply with various orders and that the respondents' response in the first claim should be struck out. There were a number of alleged failures that had been put forward prior to the hearing and further alleged failures raised in the claimant's skeleton argument, although it was not easy to discern exactly which matters of complaint fell within this application.

Strike out for non compliance with an order – Rule 37(1)(c): the law

13. A claim or response may be struck out where there has been 'wilful, deliberate or contumelious disobedience' to a Tribunal order: De Keyser Ltd v Wilson

[2001] IRLR 324. The guiding consideration is the overriding objective and the Tribunal should consider all the circumstances of the case, the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption unfairness or prejudice has been caused, whether a fair hearing is still possible and whether some lesser remedy would be an appropriate response.

14. I considered the alleged breaches of orders which could be discerned:

Delay in complying with order 2.2 of the Employment Judge Palca's 22 July 2021 orders:

15. Employment Judge Palca made orders for both parties to provide further information. The claimant had to specify her comparators for her PTWR claims and the respondents had to provide the objective grounds it relied on. The objective grounds in a PTWR will relate to the comparators chosen so although EJ Palca's orders required the respondents to set out their objective grounds at the same time as the claimant provided particulars of her comparators, the respondents took the view that this had been an error and provided the objective grounds fourteen days after the claimant set out her comparators.

16. There was on the face of it a default in complying with EJ Palca's order and it would have made sense for the respondents to ask for the orders to be reviewed or corrected. However, there was no wilful, deliberate or contumelious disobedience and it would not be in accordance with the overriding objective to strike out the response. There is no real fault on the part pf the respondents, the default was very minor and has caused no disruption, prejudice or unfairness; a fair trial is still possible.

Not providing an updated list of issues before the judicial mediation

17. Employment Judge Palca ordered the parties to provide an updated list of issues to the Tribunal prior to the judicial mediation. The parties were not able to agree a list and the respondents provided an updated draft. There is no breach of an order by the respondents.

Not providing particular of dates of meetings in accordance with EJ Palca's orders

18. The respondents were required by case management orders issued on 4 August 2021 to provide details of dates of particular meetings with as much particularity as possible. The respondents have provided a time frame for some of the discussions and a date for another discussion. It appears that that this was as much particularity as the respondents were able to provide and there is no default.

Not confirming attendance at preliminary hearing on 29 October 2021

19. The complaint here is that the respondents had not confirmed their attendance at the preliminary hearing listed for 29 October 2021 prior to that preliminary hearing being vacated due to lack of judicial resource on 28 October 2021.

20. The explanation provided by the respondents was that, following a judicial mediation on 18 October 2021 and some continued negotiations thereafter, the respondents had begun preparing for the preliminary hearing and intended to send a single email confirming attendance and attaching relevant documents. That email had not been sent prior to the hearing being vacated.

21. There was no wilful, deliberate or contumelious disobedience and it would not be in accordance with the overriding objective to strike out the response. There is no real fault on the part of the respondents, the default was very minor and has caused no disruption, prejudice or unfairness; a fair trial is still possible.

Delaying the open preliminary hearing

22. After the 28 October 2021 hearing was vacated, the Tribunal wrote to the parties requesting dates to avoid from January 2022 onwards. The respondents provided their dates including availability in January 2022 and the Tribunal listed the OPH in January 2022. The claimant applied to postpone the hearing because she intended to submit a second claim and that request was granted by the Tribunal on 7 January 2022.

23. There was no default by the respondents nor indeed any unreasonable behaviour.

Not agreeing the list of issues

24. EJ Palca at the July 2021 hearing had told the claimant that she could draft proposed amendments and apply to amend her claim form. The claimant sought to add a large number of unpleaded issues to the list of issues (the respondents say some 95). The respondents resisted those claims being added to the list of issues as they were not in the claim form and no successful amendment application had been made to add them.

25. The claimant seemed to have formed the view that EJ Palca's orders gave her carte blanche to add issues to the list of issues without making an application to amend. That was an incorrect view and there is neither a breach of an order by the respondents nor anything unreasonable in the respondents' approach to the list of issues.

26. The following are new allegations of breach from the claimant's skeleton argument:

Respondents not explaining basis of application to strike out on the basis of no reasonable prospects

27. There was no breach of order. The grounds for the application had been outlined in the detailed grounds of resistance and then set out in great detail in the skeleton argument provided on 5 October 2022 in accordance with Tribunal orders. The respondents had sought to explain to the claimant in

correspondence how the strike out applications applied to various complaints. I ultimately concluded that the applications could not properly be heard in the time available at this open preliminary hearing but that was not a result of the respondents' presentation of the applications.

Referring to the claimant's schedule of loss in respondents' skeleton argument

28. The claimant had asked for the schedule of loss not to be included in the bundle for the OPH and it had been removed, the respondents said to avoid unnecessary argument although the respondents considered that there was no good basis for the request. The respondents made reference to the contents of the schedule in their skeleton argument. There was no breach of order and to avoid dispute the respondents did not rely on those parts of the skeleton arguments at the hearing before me.

Complaints that amended detailed grounds of resistance did not show amendments

29. The claimant was unhappy that the detailed grounds of resistance (which were two documents) were not in the form of amended drafts of the (three) original grounds of resistance. The claimant when submitting her own proposed amendments had been directed by Employment Judge Palca to provide the amendments as part of her original particulars of claim with the proposed amendments underlined. The respondents explained the difficulty with presenting the amendments in that way but also provided the claimant on 11 August 2022 with three individual drafts showing the changes as compared with each of the three original holding responses.

30. There was no breach of an order because there had been no order that the draft amendments be provided in a particular format but in any event the respondents had cooperated to provide the claimant with the documents in the form she requested.

Redaction of documents disclosed for the OPH

31. There were some complaints by the claimant about redaction. I was not taken to particular examples by the claimant but the respondents said that redaction had occurred in a small number of cases where there was a claim to legal professional privilege. There was no evidence of any breach of an order.

Respondents added page numbers to skeleton after it was initially provided

32. The skeleton argument of the respondents was provided in accordance with Employment Judge Glennie's orders on 5 October 2022. Page references were inserted two days later. There was no breach of an explicit provision of Employments Judge Glennie's orders and no significant disadvantage to the claimant. The claimant herself had updated her skeleton.

Not complying with Employment Judge Glennie's disclosure orders

33. The respondents had written to the Tribunal for clarification of Employment Judge Glennie's orders. I could see no evidence that the disclosure provided was not in accordance with those orders. The claimant was mistakenly of the view that an application to strike out on the grounds of no reasonable prospects of success necessarily required disclosure of all the underlying documents relevant to every complaints sought to be struck out.

Abandoning application to strike out on the basis of the rule in Henderson v Henderson

34. The respondents had abandoned this as a ground for strike out in the skeleton argument. Whilst it might have been useful for the respondents to notify the claimant that they had abandoned this ground at the point when this decision was made (if earlier than the date of drafting of the skeleton) there was no breach of an order.

35. Having carefully considered the claimant's applications, I could see no basis on which to strike out the responses or to take action against the respondents under rule 6. The claimant did not put forward any submissions as to why the responses had little reasonable prospect of success and so there was no basis on which I could make deposit orders against the respondents.

Claimant's application to amend her first claim

Law on amendment

36. In considering an application to amend a claim, a Tribunal will have particular regard to the balance of hardship and injustice in refusing or allowing the amendment, together with any relevant factors. Those include the factors set out in Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT:
The nature of the amendment: The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

    Applicability of time limits: If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

    Timing and manner of the application: Delay in making the application is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery.

37. The merits may be relevant to an amendment application; if a proposed claim is obviously hopeless, that consideration affects the assessment of the injustice caused to a claimant by not being able to pursue it. Nothing is lost in not being able to pursue a claim which cannot succeed: Herry v Dudley MBC and anor EAT 0170/17.

38. Time limits are simply a factor in the exercise of the discretion although they may be an important and potentially decisive one. The fact a time limit has expired will not prevent the tribunal exercising its discretion in favour of allowing an amendment, although it will be an important factor in the scales against allowing the amendment: Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07.

39. The core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The parties must therefore make submissions on the specific practical consequences of allowing or refusing the amendment. If the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence? If permitted, what will be the practical problems in responding? Where the prejudice of allowing an amendment is additional expense, consideration should be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party can meet it: Vaughan v Modality Partnership [2021] ICR 535, EAT.

40. The Tribunal is entitled to have regard to any hardship caused by the nature of the draft amendments. In Barnes v Handf Acceptance [2004] EWC 1095 Fulford J rejected some draft amendments on the basis that the amendments were 'so prolix, detailed and confusing in the way that they are developed that the burden imposed on the respondents and the court in dealing with them would be wholly unreasonable. The lengthy process of unravelling, understanding, answering and adjudicating on them would defeat the overriding objective and would constitute an abuse of the process of the court.'

41. A number of the claimant's amendments were not opposed by the respondents as they were said to be repetition of matters already in the first claim form or elucidation and/or addition to background facts.

42. I allowed these amendments. I have reviewed and corrected my original case management orders which failed to properly record the fact that these amendments had been allowed. They are set out as an appendix to these Reasons.

43. The proposed amendments were set out over some forty pages (inclusive of the original claims). There appeared to be dozens of new claims. There did not appear to be any particular issue with the timing of the claimant's application. For many of the matters there was no problem with time limits, although that was not true of all of the proposed amendments. Many of the claims seemed relatively trivial compared with other claims the claimant was pursuing. The time period covered by the proposed new claims is relatively short and the claims related to responses to the claimant's grievances.

44. The main question for me was whether the new proposed claims could be properly understood and responded to. This went to the issue of hardship to the respondents.

45. The difficulty was that, in the long narrative set out, it was impossible to understand what new substantive claims were being pursued and what the causes of action were ie what legal label was being put on factual claims. Despite the length of the narrative there were clearly missing particulars in relation to some of the claims. Some matters were said to be breaches of 'equality laws and Public Sector Equality Duty'; the former obviously lacks sufficient specificity and the latter does not refer to any claims the claimant has over which the Tribunal has jurisdiction. The claimant had already withdrawn such claims after being told at a previous case management hearing that the Tribunal had no jurisdiction to hear them.

46. It did not seem to me, having dealt with these various applications over the course of four days that the claims in the draft amendment could be adequately defined in less than a further day of Tribunal time.

47. The prejudice to the claimant in not allowing the amendments seemed to me to be minor – the loss of some claims which did not appear to be core claims in her case and which overlapped significantly with claims which she was already pursuing. Many of the claims which I could understand appeared to be of doubtful merit and /or trivial, eg claims about how redaction had been carried out by the respondents.

48. On the other side of the equation there would be significant hardship to the respondents in the further resource and cost to be expended in first clarifying and then responding to the claims. Furthermore, and even bearing in mind that the claimant is a litigant in person assisted by her husband as a lay representative, there is significant resonance with the Barnes case. The burden on the Tribunal of managing the claimant's claims has already been very significant. The claimant is not entitled to a wholly disproportionate share of the Tribunal's resources at the expense of other litigants. Whilst it is very much part of the function of the Tribunal to seek to ensure parties are on an equal footing by working to understand and record at a case management stage the claims a claimant is seeking to bring, a claimant is not entitled to expect that resources will be devoted to that task which are wholly out of scale to the importance and value of the claims in issue.

49. For those reasons, I did not allow the further amendments sought.

Respondents' strike out applications: to strike out claims 2 and 3 on the basis that the claims are vexatious (rule 37(1)(a) and/or that the manner in which they have been conducted has been unreasonable or vexatious (rule 37(1)(b)

Strike out under rule 37(1)(a) or 37(1)(b)

50. Vexatiousness was defined in AG v Barker [2000] 1 FLR 759:

> "Vexatious" is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no

discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the 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 process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.'

51. In French v Brent Walker Ltd EAT 746/86, the EAT said this:

A particular point was taken by Mr Kerr to the effect that even if this conduct could be categorised as unreasonable, it certainly was not vexatious, and he referred us to two authorities of which the more helpful was that of Cartiers Superfoods Limited v Laws [1978] IRLR 315 which indicates that vexatiousness implies the doing of something over and above that which is necessary for the conduct of the litigation, and suggests the existence of some spite or desire to harass the other side to the litigation or the existence of some other improper motive. Mr Brook-Smith does not, indeed could not, dispute the correctness of that definition of vexatiousness, but he asserts, in our view rightly, that where a Tribunal has found that an applicant has put forward a case for which he knows there is no basis, that does amount to an intention to harass the Respondent, because looking at the matter sensibly there can be no other explanation for such conduct than that the hope exists that the proceedings will pressurise the other side into some sort of settlement advantageous to the party bringing them. To act in that way, to use proceedings for that end, does in our view, constitute vexatious conduct and accordingly we conclude that the Tribunal were correct to categorise this as vexatious or unreasonable conduct.

52. The approach in cases of unreasonable conduct is summarised in Blockbuster Entertainment Ltd v James [2006] IRLR 630, CA:

The power of an employment tribunal under rule 18(7) to strike out a claim on the grounds that an applicant has conducted his side of the proceedings unreasonably is a draconic power, not to be too readily exercised. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these two conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. This requires a structured examination. The question is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take account of the fact, if it is a fact, that the tribunal is ready to try the claims, or that there is still time in which orderly preparation can be made.

53. In considering whether conduct is an abuse of process, the Tribunal is entitled to look at both the public and private interests in play: Edey v LB Lambeth [2022] EAT 94:

Next the question of abuse of process needs to be considered. This requires a broader approach considering the conduct of the Claimant along with public and private interests whilst taking account of all the facts. The Ross Judgment refers

to the "scattergun approach" and "deflection tactic(s)" of the Claimant in her method of pursuing claims, this can properly be considered to fall within the definition of conduct. That approach, as adopted by the Claimant, expands substantially the time and expense in defending claims by Respondents (private interest) it also takes up considerable tribunal time which impacts on the resources of the Employment Tribunal service and cases brought by others (public interest).

54. Pleadings may be oppressive for excessive prolixity or other features which make them unmanageable. This may contribute to unreasonable conduct. That was the case in Dunn v Glass Systems UK Ltd [2007] WLUK 300, concerning proceedings in the High Court:

I have read the Particulars of Claim and am satisfied that the complaints made by Mr Grant are justified. I agree with the view that it ought to be possible to plead the claim in comparatively few pages. The sheer length of the pleading makes it oppressive. It takes over a day to read it in detail. If a full defence is to be filed it will no doubt take many days and many hours to respond. In my view any trial based on this document will be unmanageable and excessively long. I also agree with the criticisms that it contains a mass of details which are irrelevant to the cause of action.

There can, for example, be no justification in devoting 18 pages to analysing one e-mail that is not on any view a contractual document. I agree that it was not appropriate for the Particulars of Claim to attempt to deal with points that Mr Dunn assumed would be in the Defence. He should have waited for the Defence. I agree that the Particulars of Claim contains a large amount of evidence. I also agree that it contains a large number of terms that are simply incomprehensible – such as collateral intent, continuing to withhold on basis of presumption, continuing to withhold on basis of presumed fault. Mr Dunn does not appear to understand the meaning or relevance of the word dishonesty. His claim is a claim for fees under a contract and/or damages for breach of contract. It is neither relevant nor appropriate to make allegations of dishonesty simply because Glass Systems are challenging those fees. It could equally be said that Mr Dunn was being dishonest in seeking to claim those fees and costs in this action. However Mr Grant was careful (and in my view correct) to make it clear that he was not making an allegation of dishonesty against Mr Dunn.

…

I must consider whether any remedy less than striking out is appropriate in this case. At no stage has Mr Dunn offered to amend his pleading so as to cure its obvious defects. He has chosen to defend the pleading as it stands. Equally, as Mr Grant points out it would be possible to strike out only part of the pleading. It might for example be possible to strike out only paragraph 33. In the end I have decided that the problems with the Particulars of Claim are so serious that it must be struck out as a whole.

[Per HHJ Behrens]

55. For a Tribunal to strike out under rule 37(1)(b):

    - There must be conduct falling within the rule;
    - If so, consideration should be given as to whether a fair trial is still possible. If a fair trial is still possible, the case should proceed, save in exceptional circumstances;
    - Even if a fair trial is impossible, the Tribunal should consider whether there may be a lesser sanction which should be imposed.

    Bolch v Chipman [2004] IRLR 40.

56. In Emuemukoro v Croma Vigilant [2022] ICR 327, Choudhury P explained that a fair trial need not be impossible in an 'absolute sense:

    That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting atrial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

The second claim

57. The particulars of claim run to 112 pages. The narrative starts with some new background matters, including making allegations against an individual not otherwise involved in the proceedings, dating back to 2005. The claimant refers to a culture of bullying and aggression at Imperial College which she then says is historic and not connected with anyone in her current claims. She adds an allegation dating from 2019.

58. The particulars then carry on with a narration of events relating to the claimant's grievances from 25 August 2021. This appears to be a narrative of every event and item of correspondence in the relevant period. At times in the particulars there is a paragraph saying particular individuals in doing particular acts treated the claimant less favourably and victimised her or that their motivation for treatment generally was 'race and/or sex' but it is not clear in any case exactly which acts or omissions these general allegations relate to and which types of discrimination are alleged.

59. I had regard in particular to the following features of this document:

- The overall length and number of apparent allegations in respect of a short period of time;
- The fact that some allegations appeared to be about matters which were trivial, eg administrative decisions of little moment;
- The fact that it was not possible to understand which matters were matters of background and which were matters which were substantive complaints;
- The impression given by the document that every error or every matter the claimant disagrees with the respondents about is asserted to relate to a protected characteristic or constitute victimisation regardless of whether there is any evidence to support such an inference;
- The fact that it is not clear what causes of action are pursued in relation to the factual complaints, where the latter are identifiable;
- There are references to indirect sex discrimination without identification of a PCP; comparators are not identified if relied on for direct discrimination claims;
- It appears that everyone who has dealt with the claimant's grievances has been named as a respondent.

60. The respondents had counted some 722 separate potential complaints in the second claim and the claimant did not demur from that figure.

61. I concluded that even to manage the second claim so that the matters contained in it could be heard fairly would require a case management hearing lasting several days at considerable cost to the respondents and the Tribunal.

The third claim

62. The particulars of claim in the third claim run to 25 pages but suffer from the same features as the particulars in the second claim.

63. In addition to the issues with the formulation of the claims, there are aspects of the claimant's conduct of the proceedings which have been unreasonable, even allowing leeway for the understanding of a litigant in person. In particular, there has been a persistent inability to discern or distinguish what are minor issues with adherence to orders or rules with no consequences in respect of the claimant's applications to strike out the respondents' responses and a persistence in applying for orders that have already been refused. There are a number of other complaints made by the respondents about the conduct of the proceedings which I do not rehearse here but I make the point again that the claimant should use the concept of proportionality as a touchstone in her approach to these proceedings.

64. So far as the unreasonable conduct was concerned, I concluded that it had the potential to render a fair trial impossible but had not yet done so. I was heartened by what was said on the claimant's behalf at the open preliminary hearing and am optimistic that the claimant's future conduct of the proceedings will be cooperative.

65. Having regard to the private and public interests, the guidance in Barker and difficulties in this case similar to those in Dunn v Glass Systems, I concluded that the claims in their current form were vexatious. A fair trial was not possible of the claims in the form in which they had been presented and they could not

be pruned or managed in a way which was proportionate or fair to other Tribunal users.

66. In order to consider whether there was a lesser sanction which would render a fair trial possible, I asked the claimant to set out her twenty most important claims in claim 2 and claim 3. She took some time to carry out this exercise and after discussion with the parties I recorded the list above which seemed to me to capture the claimant's most significant complaints but also to be in a form which the respondents could respond to and the Tribunal could determine.

67. Contained in the claimant's lists were allegations against Farrer & Co LLP and Ms A Kendle, a solicitor employed by Farrer & Co LLP.

68. These were as follows:

1. Ms Kendle and/or Farrer & Co agreed to placing Mr Evans in the Claimants Appeal Hearing

Law: Victimisation, Disability discrimination, Protected disclosure detriment.

2. Ms Kendle, as Imperial's seconded in-house lawyer, and/or Farrer & Co and/or Imperial College, provided the Tribunal and the Claimant with an incorrect definition of a facilitated conversation compared to Imperial Colleges known protocols
Law: Victimisation

69. Mr Evans is a paralegal employed by Farrer & Co who took notes of an appeal hearing.

70. The second matter concerned the respondents' response to a request for further information. The claimant had asked what the respondents meant by a 'facilitated conversation'. The response, drafted by Ms Kendle, I must presume on the basis of instructions received from the respondents, included the following: 'There are no formal restrictions on what can be discussed during a facilitated conversation, However, as Ms Kehoe explained to the Claimant, the focus should be on looking at how the parties could work together effectively going forward rather than going back over old issues.' The complaint about this formulation as set out in the particulars of claim attached to the third claim form was that Ms Kendle had inserted the word 'old' which did not appear in a letter sent by Ms Kehoe to the claimant on 16 December 2020.

71. What the claimant said about that in the particulars of claim was that:
Hence, Ms Kendle stating 'rather than going back over old issues' is misrepresenting what Ms Kehoe stated in her letter but attributing it to Ms Kehoe. Ms Kendle doing this equates to misleading the Court with the attempt to weaken the Claimant's case and is a detriment to the Claimant. It is also breaching SRA and the Courts overriding objective.

72. Farrer & Co were said to be liable if Ms Kendle's supervising partner was aware of what was written in the further information.

73. The claimant was alleging that Ms Kendle was employed by the first respondent. The respondents set out in their detailed grounds of resistance that Ms Kendle was employed full time by Farrer & Co but was seconded to the first respondent, a client of Farrer & Co, one day a week. The details of the arrangements were details which indicate an ongoing employment relationship between Ms Kendle and Farrer & Co and no such arrangement between Ms Kendle and the first respondent. The claimant was not in a position to challenge the facts pleaded about the arrangement.

74. So far as allegations against Farrer & Co were concerned, it was clear that the allegations concerned actions taken in their capacity as the first respondent's solicitors. It was not suggested that they were the claimant's employer. It was said that they were acting as the first respondent's agents and /or that they and Ms Kendle had aided or instructed discriminatory acts. No facts were put forward to support the submission that they were acting as the first respondent's agents.

75. I had regard to the case of Bird v Sylvester [2008] ICR 208, CA. A claim against a respondent's solicitors was struck out in that case in circumstances where the solicitors had advised the employer to commence disciplinary proceedings against a claimant in part because of her conduct in making a complaint of race discrimination which did not succeed in front of an employment tribunal and wrote letters to the claimant informing her that disciplinary proceedings would be brought. The Court of Appeal upheld the employment tribunal's decision and Laws LJ said this:

    The employment tribunal were plainly impressed by public policy considerations. I have considered whether by force of the public interest in the integrity and effectiveness of the solicitor-client relationship, the court should go so far as to hold that a solicitor acting within the terms of his retainer can never be liable under section 33 . But I doubt whether that is so. Extreme situations may be envisaged in which the solicitor himself actively promotes, perhaps for a malign motive, oppressive actions, and actively carries them along. I would, however, suggest that it is very difficult to see how a solicitor who confines himself to giving objective legal advice in good faith as to the proper protection of his client's interests, and acts strictly upon his client's instructions, could be at risk of an adverse finding under section 33(1) of the Race Relations Act 1976 . Something more than that, as it seems to me, is required if a person is to be shown to have knowingly aided an unlawful act within the meaning of that subsection.

76. I concluded that similar considerations apply to the analogous provisions of the Equality Act 2010. It seemed to me that the claimant had no reasonable prospect of showing that either Ms Kendle or Farrer & Co were liable to her for any kind of discrimination in providing a paralegal to take notes of an appeal hearing or for the wording of the further information, whether on the basis of an allegation that the first respondent was Ms Kendle's employer or on the basis that they were liable under any of sections 110, 111 or 112 of the Equality Act 2010. For that reason I did not allow the claimant to include these revised allegations when substituting her twenty best claims for the claims struck out as being vexatious.

Removal of respondents

76. The narrowing down of claims in claims 2 and 3 had the result of removing allegations against a number of respondents and I accordingly dismissed those respondents from the proceedings

Respondents' application to strike out claims on the basis that they have no reasonable prospects of success and/or for deposit orders on the basis of little reasonable prospect of success

The law on strike out: no reasonable prospects of success

77. Under rule 37 of the Employment Tribunals Rules of Procedure 2013, a claim or response may be struck out on various grounds including that it is scandalous and vexatious or has no reasonable prospects of success: rule 37(1)(a).

78. In heavily fact-sensitive cases, such as those involving whistleblowing or discrimination, the circumstances in which strike out is appropriate are likely to be rare: Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.

79. The test is not whether the claim is likely to fail. It is not a test that 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 a high test: Balls v Downham Market High School and College 2011 IRLR 217, EAT.

80. It is crucial when considering strike out to take the claimant's case at its highest; where there are core issues of fact which turn to any extent on oral evidence, these should not be decided without an oral hearing: Mechkarov v Citibank NA [2016] ICR 1121.

81. Caution should be exercised where a case is badly pleaded and a claimant is unrepresented; the proper course of action may be to allow an amendment: Mbuisa v Cygnet Healthcare Ltd EAT 0119/18.

82. The following helpful summary was given by Linden J in Twist DX Limited v Armes UKEAT/0030/20/JOJ(V):

> *43. The relevant principles relating to the application of this provision for present purposes can be summarised as follows:*
>
> *a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, Tayside Public Transport Company Limited v Reilly [2012] IRLR 755 at paragraph 30.*

b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success": see, for example, paragraph 26 of the Judgment of the Court of Appeal in the Ezsias case (supra).

c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of Ezsias.

d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.

e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, Campbell v Frisbee [2003] ICR 141 CA.

f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see Soo Kim v Yong [2011] EWHC 1781.

g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in Hassan v Tesco Stores Limited UKEAT/0098/16 and Mbuisa v Cygnet Healthcare Limited UKEAT/0109/18), but these principles are applicable where, as here,

the parties are legally represented, albeit less latitude may be given by the court or tribunal.

83. This application concerned in the main claims from claim 1 and also a sample of claims from claims 2 and 3. Numerous claims were identified and very detailed submissions were made in the respondents' skeleton argument. The claimant and her representative did not respond in detail to these applications, which occupied over 60 pages of the respondents' skeleton argument, and there was insufficient time in the listing for me to consider and determine each of the applications, even if I had been satisfied that the claimant had grasped and responded to them.

84. It seemed to me that it was in accordance with the overriding objective to adjourn these applications to a further open preliminary hearing. Some work needs to be done by the respondents in any event to define which applications remain in relation to claims 2 and 3 given the extent of strike out in those claims.

Respondents' application to exclude evidence

85. The Tribunal's powers to exclude evidence were summarised by the EAT in HSBC Holdings Ltd v Gillespie [2011] ICR 192:

- The Tribunal has power to exclude evidence on the basis that it is insufficiently relevant to the pleaded issues;
- Relevance is not an absolute concept. 'The degree of relevance needed for admissibility will vary according to the nature of the evidence and in particular the inconvenience expense, delay or oppression which would attend its reception.'
- It is in accordance with the overriding objective for the Tribunal to exclude evidence which is only of marginal relevance.

86. In the Gillespie case, allegations not considered to be sufficiently relevant to be admissible involved matters occurring years before the acts complained of in the proceedings and involving none or virtually none of the same individuals.

87. In these proceedings, I concluded that the Tribunal deciding the full merits hearing would not be assisted by evidence about the following:

- The claimant's grievance from 2005, ie over 15 years before the matters the subject of the existing proceedings. This was a grievance against a Ms Hooth, who has no involvement with or relationship to the matters the subject of the current proceedings;
- The claimant's allegation that there is a 'culture of bullying and aggression at Imperial College' which remains unaddressed. She refers to three incidents which are not particularised and in respect of which the perpetrators are unnamed. The claimant says in the second particulars of claim that 'these matters are historic and not connected to anyone named in this or previous ET1s';

- Allegations of bullying by Professor Gast and Muir Anderson and Ms J McNeil KC's report about those matters. Mr Anderson has no involvement at all in the matters the subject of the claimant's claims. The findings against Professor Gast have no relationship to the claimant and Ms McNeill made no findings of prohibited conduct under the Equality Act 2010 nor of sex discrimination. The claimant's complaints against Professor Gast relate to Professor Gast not becoming involved in the claimant's grievances. The matters in Ms McNeill's report have no relevance to those allegations. The claimant says that it is relevant that Ms McNeill recorded interviews whereas the claimant was not allowed to record some meetings. However, given that Ms McNeill was an independent barrister conducting an independent investigation of her own design, this did not seem to me to be evidence which was likely to help a Tribunal decide the issues in the claimant's claims.

Respondents' application to amend the grounds of resistance in the form of the detailed grounds of resistance

88. In response to each of the claimant's ET1s in claims 1, 2 and 3, the respondents submitted holding responses within the time limits. They apply to replace these with detailed grounds of resistance in one document. The detailed grounds of resistance provide detailed factual responses to the claims.

89. The reason the respondents say that they initially submitted holding responses was that they wished to avoid prejudicing or pre-empting the outcomes of the claimant's ongoing grievance processes, particularly as the claimant remains an employee of the first respondent.

90. The amendments have been sought at what in fact in the context of these claims is an early stage of the proceedings. There is not yet a finalised list of issues and the claims may or may not be ready for a four week trial at present listed for May 2023.

91. The claimant submitted that some of the respondents could have submitted full responses as they were not involved in the outstanding internal processes. However the additional work and expense involved in submitting partial separate grounds of response for some respondents would not in my conclusion have been justified since it would not have speeded up the proceedings and would have multiplied documents and potentially created confusion.

92. I considered that the timing and manner of the application was unobjectionable.

93. The claimant raised the point that the respondents have now provided a factual response to her claims which includes assertions that the claimant's grievances had at least in part been vexatious and malicious, in circumstances where the claimant faces a disciplinary process about the bringing of grievances. The claimant's point was that the respondents were willing to prejudice the outcome of that process but had said that they could not submit detailed responses earlier to avoid prejudicing the outcome of grievances / grievance appeals.

94. I considered that the respondents were in a difficult position in terms of pleading to the claimant's claims in circumstances where serial grievances and grievance appeals are afoot. There has been no moment when they could have done so without being characterised by the claimant as having delayed and / or been premature given the state of the internal proceedings. They may or may not have chosen the optimum moment to avoid prejudicing internal proceedings of one sort or another but I did not consider that there was any basis on which I could conclude that the explanation for providing holding responses was disingenuous or that the respondents had behaved unreasonably in providing holding responses.

95. The prejudice to the respondents if the amendments are not allowed would be very significant since they would be disabled from defending the claims on their merits. I could see no prejudice to the claimant other than the loss of a windfall in the respondents being unable to defend her claims in detail. The claims would not in any event have been ready for a full merits hearing earlier than the date on which the amended grounds of resistance were provided. The matters at issue have been extensively investigated and documented in the course of the grievance processes and appeals. There is nothing to suggest any evidence will have lost its cogency. The balance of hardship was in favour of allowing the amendments.

Claimant's application to strike out all of the respondents' responses on the basis that they have no reasonable prospects of success, the manner in which the proceedings have been conducted by the respondents has been unreasonable or that it is no longer possible to have a fair trial (Rule 37(1)(a)(b) and (e)) or for deposit orders on the basis that the responses have little reasonable prospect of success

Additional law: Deposit orders

96. A tribunal may make a deposit order where a claim or response has little reasonable prospect of success, pursuant to rule 39 of the Tribunal Rules 2013. The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim fails. Their purpose is not to make it difficult to access justice or to effect a strike out through the back door. Even where a claim has little reasonable prospect, there is a discretion as to whether to make a deposit order, which must be exercised in accordance with the overriding objective: Hemdan v Ishmail and anor [2017] ICR 486, EAT.

97. The claimant did not identify any part of either the holding responses or the detailed response that had no reasonable prospect of success or little reasonable prospect of success or the basis for that contention.

98. Similarly the claimant did not identify ways in which the conduct of the proceedings by the respondents had been scandalous, vexatious or

unreasonable, although it appears that some of the allegations made in support of the strike out applications for breaches of orders above are also relied on as vexatious / unreasonable conduct.

99. In addition the claimant relied on the respondents' correspondence with the Tribunal after the August 2022 hearing in front of EJ Glennie. The claimant's account of her correspondence in September 2022 was that she was seeking to have the case management orders corrected to include applications she felt had been omitted by Employment Judge Glennie. The respondents' correspondence proceeded on the basis that the claimant was seeking to add some applications to the open preliminary hearing. The correspondence between the parties and with the Tribunal in the period between August 2022 and this open preliminary hearing was voluminous and complicated. Ultimately Employment Judge Glennie instructed a letter be sent to the parties on 3 October 2022 in which he made no further amendments to his case management orders but stated:
'The [previously] amended orders include provision for the Tribunal to determine the Claimant's applications to strike out all of the responses on all or any of the relevant grounds under rule 37. This is sufficient to include all or any of the specific grounds relied on by Claimant in her existing application, but do not allow for the addition of further applications.'

100. I could not see, looking at the correspondence as a whole, that the respondents had behaved unreasonably or vexatiously in believing or representing that they believed that the claimant was seeking to add further applications to be considered at the open preliminary hearing.

101. The claimant also made reference in her skeleton argument to other items of correspondence from the respondents which seemed to me to be unobjectionable.

102. I do not repeat what I concluded on the other allegations of breach of orders above. There were some areas in which the respondents' conduct of the proceedings could potentially have been improved; if the decision to abandon the application to strike out some claims on the basis of the principle in *Henderson v Henderson* was made much earlier than the date when the respondents' skeleton was provided, it would have been better to let the claimant know that before she spent time researching the matter. I bear in mind the fact that these proceedings have been unusually onerous for the respondents and that there is little in the conduct which has been brought to my attention which is potentially open to criticism. I do not consider that the conduct of the proceedings by the respondents has been vexatious, scandalous or unreasonable.

103. The claimant submitted that a fair trial was not possible because of the delay in the provision of detailed responses to the claimant's claims. The claimant said that this was on the basis that memories fade. However, the final hearing date has inevitably moved back in time due to the difficulties in outlining the issues in existing claims and the issuing of further claims. The grievance processes mean that many of the matters in dispute have been explored and documented before memories have had the opportunity to fade significantly.

104. I did not conclude that there were grounds to strike out the respondents' responses.

Case Management

105. The hope for the proceedings going forward is that the claimant will be able to refine her claims in her fifth and sixth claim forms so that they are in a form which can be responded to and heard in a proportionate way.

Employment Judge Joffe
05/12/2022

Sent to the parties on:

05/12/2022

For the Tribunal Office:

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