



EMPLOYMENT TRIBUNALS

Claimant: Mr C Giles

Respondent: Just Eat.co.uk Limited

HELD: Newcastle Employment Tribunal (by telephone)

ON: 1 March 2023

BEFORE: Employment Judge McCluskey

REPRESENTATION

Claimant: No appearance

Respondent: Mr P Kerfoot, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claim is not struck out.

REASONS

Introduction

1. The claimant was employed by the respondent from around 16 August 2021 until around 7 March 2022.
2. On 20 July 2022 the claimant presented a claim with complaints of unfair dismissal, disability discrimination and sexual orientation discrimination.
3. The complaint of unfair dismissal was dismissed on 7 October 2022, the claimant having failed to provide representations as to why the complaint of

unfair dismissal should not be dismissed, as set out in the order from the Tribunal dated 22 September 2022.

4. The complaint of sexual orientation discrimination was dismissed on 17 October 2022 at a case management preliminary hearing, having been withdrawn by the claimant.
5. An open preliminary hearing was listed for today on the Tribunal's own initiative to determine whether the claimant's remaining claims, namely of disability discrimination, should be struck out as below or if the claims are not struck out to make case management order as appropriate;
 - 5.1. [REDACTED] For non-compliance with the Tribunal's Orders;
 - 5.2. That it has not been actively pursued.

Background

Procedural history

6. On 22 September 2022, the Tribunal wrote to the claimant, ordering him to provide a disability impact statement and any medical evidence he was able to obtain, relevant to whether he had a disability at the relevant time. The claimant was ordered to comply with the Order by 14 October 2022.
7. On 11 October 2022 the claimant sent the respondent a disability impact statement.
8. On 13 October 2022 the claimant sent the respondent two mobile phone screenshots. The screenshots were from an online NHS record for the claimant. One screenshot showed his name, address, date of birth and NHS number. The second showed a prescription for Fluoxetine medication with an end date of 24 March 2022.
9. A telephone case management preliminary hearing took place on 17 October 2022. The claimant appeared in person at the hearing. The respondent was also in attendance. At the hearing the respondent said that it did not admit that the claimant had a disability, or that it knew or ought reasonably to have known that the claimant was disabled, at the relevant time.
10. At the hearing on 17 October 2022 the Tribunal made Orders, including those set out below.
11. A final hearing was listed for 3 days, to commence on 18 April 2023.
12. The claimant was ordered to send a schedule of loss to the respondent and the Tribunal by 4 November 2022.
13. The claimant was ordered to send to the respondent copies of the parts of his GP records and any other medical records, relevant to whether he had a disability at the time of the events the claim is about, by 2 December 2022 (paragraph 15 of Orders of 17 October 2022).

14. The parties were ordered to send each other copies of all documents relevant to the issues listed in the case summary by 16 December 2022 ((paragraph 16 of Orders of 17 October 2022).
15. The parties were ordered to send each other copies of their witness statements by 22 February 2022.
16. On 5 December 2022 the respondent wrote to the Tribunal, copied to the claimant. The respondent said that the claimant provided two attached mobile phone screenshots from his medical record on 13 October 2022 but that no information had been received from the claimant since the hearing on 17 October 2022. The respondent said that it did not believe that the claimant has complied with the Order of 17 October 2022 for relevant GP records and medical information to be provided, by 2 December 2022.
17. On 5 December 2022 the claimant wrote to the Tribunal and the respondent, in reply to the respondent's correspondence of the same date. He said: "*I am still trying to acquire my up-to-date medical record, I have been unable to book an appointment with the gp to discuss this so far. I'm request another month please*".
18. On 7 December 2022 the respondent wrote to the Tribunal, copied to the claimant. The respondent said: "*We object to the Claimant's request for an extension of time in which to provide his medical records. The Claimant has been aware since 16 September 2022 that the Respondent does not accept that he has a disability within the meaning of section 6 of the Equality Act 2010. In light of this, on 22 September 2022, Employment Judge Sweeney ordered the Claimant to provide a disability impact statement and any medical evidence he was able to obtain by 14 October 2022. Employment Judge Rodger further explained the importance of obtaining and providing medical evidence at the Preliminary Hearing of 17 October 2022, when the Claimant was ordered to provide to the Respondent copies of his GP and other medical records relevant to the question of whether he had a disability at the relevant time. This should have been provided to the Respondent by 2 December 2022. It has now been nearly 11 weeks since the Claimant was first ordered to provide his medical evidence and, if the parties are to have any chance of being ready for the substantive hearing listed for 18 April 2022, it is critical that this issue of the Claimant's alleged disability is resolved without further delay...*".
19. On 7 December 2022 the claimant wrote to the Tribunal and the respondent, in reply to the respondent's correspondence of the same date. He said: "*It has been exceptionally difficult to schedule a non-emergency appointment to see my GP given the time of year and how scarce appointments have been this has been compounded. I managed to schedule an appointment for the 16th December and I am hoping to be able to get the report during the appointment or shortly after. Hence my request for an additional month*". xx
20. On 16 December 2022 the respondent wrote to the claimant and said: "*Further to the disclosure order made at the Preliminary Hearing on 17 October 2022, please can you confirm whether you are in a position to exchange documents?*". This was the final date for disclosure of documents by parties in accordance with the Tribunal Orders of 17 October 2022.

21. On 16 December 2022 the claimant wrote to the respondent, in reply to the respondent's correspondence of the same date. He said: "*Further to my prior email, I requested an additional month. I am not currently ready to exchange documents*". The respondent sent the claimant its disclosure documents on 16 December 2022.
22. On 20 December 2022 the claimant wrote to the respondent. He said: "*I saw the doctor, however I have had to request a new medical report, as the one attached states depression and anxiety ended in 2018. Dr Leeks has updated the system however the desk clerks advised the new record could take up to 28 days to produce. I have attached the existing record with end date in 2018 and have previously provided the record of my fluoxetine prescription dated from 2016 up until March 2022. I hope this evidence combined confirms my diagnosis, if not I will need to provide the updated medical record when it is ready to collect.*".
23. On 6 January 2023 the respondent wrote to the Tribunal, copied to the claimant stating that the claimant had not yet provided meaningful information to enable the respondent to assess whether the claimant was disabled for the purposes of section 6 Equality Act 2010.
24. On 6 January 2023 the claimant wrote to the respondent in reply to the respondent's correspondence of the same date. He said: "*I am still awaiting the completion of the medical report, which has likely been delayed by Christmas and new year, I am trying to get an update on it*".
25. On 9 January 2023 the claimant wrote to the respondent. He said: "*Just chased the report up with the GP office and the only update was "It's currently with the team that deals with them, we'll contact you once it's ready." That's all I have to go on*".
26. On 9 January 2023 the respondent wrote to the claimant and said: "*Thank you for the update in relation to your medical evidence. Please can you let me know when you will be in a position to disclose any non-medical documents you may have? These should have been disclosed on 16 December and I am concerned that these delays risk jeopardising our ability to be ready in time for the substantive hearing of this matter in April*".
27. On 10 January 2023 the Tribunal wrote to the parties. The Tribunal agreed to extend the time for the claimant to disclose his medical records and relevant documents (paragraphs 15 and 16 of the Orders of 17 October 2022) until 16 January 2023. The correspondence stated that "*The claimant must, however, ensure that he complies with the orders by this date*".
28. On 17 January 2023 the respondent wrote to the claimant to ask about disclosure of non-medical documents in accordance with paragraph 16 of the case management orders of 17 October 2022. The deadline for providing these documents had been extended by the Tribunal until 16 January 2023. The claimant had not provided any such documents.

29. On 17 January 2023 the claimant wrote to the respondent and said: *“The up-to-date medical report is still not ready, so the previous medical report in conjunction with proof of prescription will need to be used and the best I can do is send the new report when it’s ready. I was told it was 28 days to compile the report however that has been well exceeded and I’m getting brushed off with ‘we’ll contact you when it is ready to collect”*.
30. On 17 January 2023 the respondent wrote to the claimant and said *“...you were also supposed to disclose any non-medical documents you may have by 16 December 2022, with the Tribunal then extending that deadline to 16 January 2023. Given that you have still not provided this information I am going to write to the Tribunal today to ask them to impose a new deadline for compliance (I will suggest 30 January 2023)”*.
31. On 17 January 2023 the respondent wrote to the Tribunal, copied to the claimant and said *“We write further to the letter from the Tribunal of 10 January 2023. In this letter the Tribunal confirmed that Employment Judge Robertson had extended the deadline by which the Claimant ought to have provided copies of his medical evidence from 2 December 2022 to 16 January 2023. And extended the deadline for the Claimant to comply with his wider disclosure obligations from 16 December 2022 to, again, 16 January 2023. The Claimant has complied with neither of those two new deadlines and the Respondent has still not received copies of the Claimant’s medical records or any other documents in relation to this matter”*.
32. In the respondent’s correspondence to the Tribunal on 17 January 2023, copied to the claimant it also said: *“We also request that... the Tribunal make an unless order requiring the Claimant to comply with the orders made at paragraphs 15 and 16 of the case management orders of 17 October 2022 (for disclosure of both his medical records and any other relevant documents) by 30 January 2022 or have his claim dismissed”*.
33. On 19 January 2023 the Tribunal wrote to the claimant and asked for comments on the correspondence dated 17 January 2023 from the respondent to the Tribunal. The claimant was asked to reply by 26 January 2023. The correspondence was sent by email, to the email address provided by the claimant in his claim form and with which the claimant had been corresponding with the Tribunal and the respondent.
34. The claimant did not reply to the correspondence from the Tribunal dated 19 January 2023, either by the deadline of 26 January 2023 or at all.
35. On 15 February 2023 the Tribunal wrote to the parties with a notice of a public hearing by telephone to take place on 1 March 2023 at 9.00am. The notice stated that the purpose of the hearing was to determine whether the claimant’s claims of disability discrimination should be struck out on the following grounds: a) for non-compliance with the Tribunals Orders; b) that it has not been actively pursued; and if the claims are not struck out, to make case management orders as appropriate. The correspondence was sent by email, to the email address provided by the claimant in his claim form and with which the claimant had been corresponding with the Tribunal and the respondent.

36. On 22 February 2023 the claimant wrote to the Tribunal and the respondent. He said *"I have made numerous attempts to acquire an up-to-date medical report and despite my GP advising me he had done this, this has not been the case. I have attached a previous report with my condition in the significant past section and provided the screenshot of my active prescription at the time in dispute. If there is anything else required, please let me know"*.
37. On or around 22 February 2023 the claimant sent the respondent his schedule of loss. The claimant had been ordered to provide this by 4 November 2022.
38. On or around 22 February 2023 the claimant sent the respondent his witness statements.
39. On 28 February 2023 the Tribunal wrote to the parties to advise that the start time of the public hearing by telephone on 1 March 2023 was 10.00am and not 9.00am as stated on the notice sent on 15 February 2023. The correspondence was sent to the claimant by email, to the email address provided by the claimant in his claim form and with which the claimant had been corresponding with the Tribunal and the respondent.

Hearing today

40. On 1 March 2023 I dialled into the public telephone hearing shortly before 9.00am. I waited in the telephone hearing until 9.15am. Neither the claimant nor the respondent was present on the call.
41. I dialled into the public hearing by telephone again shortly before 10.00am. The respondent's representative was present in the telephone hearing. I asked the clerk to check the email address to which the notice of public hearing had been sent on 15 February 2023 and to which the change of start time had been sent on 28 February 2022. The clerk confirmed both notices had been sent to the claimant by email, to the email address provided by the claimant in his claim form and with which the claimant had been corresponding with the Tribunal and the respondent.
42. I waited until 10.15am to ascertain whether the claimant would attend the public hearing by telephone. He did not do so. He did not contact the Tribunal to explain his non-attendance either before the hearing start time of 10.00am or in the period until 10.15am.
43. I determined that the claimant had been given notice of the public hearing by telephone which was to take place today and had been given notice of the change of start time from 9.00am to 10.00am the day before. In any event I had attended the telephone hearing at 9.00am and the claimant was not in attendance at that time.
44. As the claimant had been given notice of the hearing and had provided no explanation for his non-attendance, I determined that the hearing should go ahead today. It started at 10.15am without the claimant in attendance. The respondent made submissions in relation to strike out of the claim.

45. Under Rule 37(1) of the Employment Tribunal Rules of Procedure, a Tribunal may strike out all or part of a claim or response on various grounds including-
- (a).....;
 - (b).....;
 - (c)for non-compliance with ... an order of the Tribunal;
 - (d)that it has not been actively pursued;
 - (e).....
46. Under Rule 37(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.
47. Striking-out orders are neither automatic nor punitive. There must be consideration of whether the sanction of strike-out is a proportionate response in the circumstances of the case, including by reference to whether a fair trial remained possible or whether a lesser sanction was available (*Baber v Royal Bank of Scotland plc EAT 0301/15*)
48. Due to the very severe consequences that flow from a decision to strike out, the power should only be exercised on the clearest grounds and as a matter of last resort (*Otehtubi v Friends in St Helier EAT 0094/16*).

Non-compliance with tribunal order

49. In considering whether to strike out for non-compliance with an order, a Tribunal must have regard to the overriding objective of seeking to deal with cases fairly and justly. This requires a Tribunal to consider all relevant factors, including: the magnitude of the non-compliance; whether the default was the responsibility of the party; what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out or some less punitive response (e.g. further orders including deposit order) would be an appropriate and proportionate response (*Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT*).
50. Where a claim has arrived at the point of a final hearing it would take something very unusual indeed to justify striking out (*Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, Court of Appeal*).

Not actively pursued

51. A claim may be struck out where the failure to progress is either because of intentional and contumelious (disrespectful) default or alternatively has resulted inordinate and inexcusable delay giving rise to a substantial risk to the fairness of the process or serious prejudice to the other party (*Birkett v James 1978 AC 297, HL*).

Submissions

The respondent's submissions were in summary as set out below.

52. The respondent had prepared a hearing bundle for the preliminary hearing today which contained all relevant correspondence between the parties and the Tribunal. A copy of the hearing bundle had been sent yesterday by the

respondent to the claimant's email address and has also been sent to the Tribunal. This served as a reminder to the claimant of the hearing today.

53. The claimant had until 14 October 2022 to produce medical records. On 13 October 2022 he produced two mobile phone screen shots from an NHS app which had medication entries on two dates, one in 2016 and the other in 2018. In the case management orders of 17 October 2022, a deadline of 2 December 2022 was imposed for producing GP medical records and any other relevant medical records. That was then extended by the Tribunal to 16 January 2023. That order has not been complied with.
54. Although it is for the claimant to prove his case, his disability complaint has very little reasonable prospect of success, therefore it is extremely important to have documentation to see if he has a disability within the meaning of section 6 EqA. There is a real issue of prospects in this case which is why the medical records are necessary.
55. The Tribunal may feel that the claimant has done his best to obtain medical records from his GP. However, there is also a separate order for disclosure of non-medical records, with a deadline of 16 January 2023. That order has not been complied with. The respondent wrote to the claimant about that order on 16 December 2022. The claimant replied on 16 December 2022 saying he needed another month and that he wasn't currently ready to exchange documents. The respondent replied on the same day, saying that the extension sought by the claimant was in relation to medical evidence, not other documents. The claimant did not reply to that email and has still not done so. The respondent sent their disclosure documents to the claimant by email on 16 December 2022. The claimant did not reply to that email and has still not done so.
56. The claimant is not actively pursuing his claim. This arises from a lack of meaningful response to the emails sent by the respondent as outlined already. No meaningful medical information has been disclosed and the only excuse for not providing it is "I'm trying". There has been no response at all by claimant in relation to normal disclosure of other documents (non-medical). The respondent doesn't know why. The claimant replied on 22 February 2023 to say that he was trying to get a GP medical report. There has been no correspondence from the claimant since then.
57. There has been no communication from the claimant to the Tribunal about why he is not in attendance today. If the Tribunal notifies the claimant of a hearing to determine strike out of his claim on the ground that it has not been actively pursued, it is incumbent on the claimant to say I am pursuing it, I am still waiting to hear from the GP and explain his position on other disclosure.
58. There are no reasonable prospects of the claimant being successful in his claim. The crux is that there is a 2-week window between 7-20 February 2022 in which the claimant fails to complete any work. He is dismissed due to his nil work output in this period. The claimant says his depression caused him to go into a spiral and he couldn't do any work. What the respondent needs to know to concede disability is the long-term impact. In terms of the medical evidence there is a lacuna. The NHS screenshot of his prescription shows that his

prescription ends just after, on 24 March 2022. This is not consistent with the spiral which he relies upon. The Tribunal cannot rely on the impact statement alone and needs medical evidence to support this.

59. In the alternative if the Tribunal considers that there are little rather than no reasonable prospects the respondent makes an application for a deposit order. A direction could be made for the claimant to provide information as to his financial ability to pay a deposit order.

Conclusions

60. I determined that the claimant had been given notice of the strike out hearing and the change of start time by the Tribunal. He had been given reasonable opportunity to make oral representations at a hearing as to why his remaining complaints, being disability discrimination complaints, should not be struck out. He had not attended the hearing. He had not given any explanation to the Tribunal as to why he could not attend. He had not made a request to make written representations as to why a strike out order of his remaining complaints should not be made. I determined that the hearing should go ahead today in his absence.
61. The notice of the public hearing refers to two grounds upon which the Tribunal is to consider strike out. These are non-compliance with Tribunal orders and the claim not being actively pursued. I will deal with each of these in turn.

Non-compliance with Tribunal order

62. In deciding whether to strike out the claimant's remaining complaints for non-compliance with an order under rule 37(1)(c), I have had regard to the overriding objective set out in rule 2 of the Employment Tribunal Rules of Procedure of seeking to deal with cases fairly and justly. This requires me to consider all relevant factors, including the magnitude of the non-compliance, whether the default was the responsibility of the party or his or her representative, what disruption, unfairness or prejudice has been caused, whether a fair hearing would still be possible, and whether striking out or some lesser remedy would be an appropriate response to the disobedience (*Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT*).
63. I must also consider whether strike out on the grounds of non-compliance is a proportionate response. For a tribunal to strike out a claim for non-compliance with a Tribunal order, it must be satisfied either that the failure to comply involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; In either case, the striking out must be a proportionate response (*Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*).
64. I am also mindful that striking-out orders are neither automatic nor punitive. There must be consideration of whether the sanction of strike-out is a proportionate response in the circumstances of the case, including by reference to whether a fair trial remained possible or whether a lesser sanction was available (*Baber v Royal Bank of Scotland plc EAT 0301/15*).

65. In considering the guidance in Weir Valves I am mindful that the claimant is a litigant in person. He has represented himself throughout the proceedings to date.

Paragraph 15 of Orders of 17 October 2022 - medical documentation

66. I have considered the question of non-compliance with the order for the claimant to send the respondent GP records and other medical records (paragraph 15 of Orders of 17 October 2022).

67. I have considered what disruption has been caused as the claimant has not complied with the order for production of parts of his GP records and any other medical records, relevant to whether he had a disability at the time. This, says the respondent, prevents consideration by the respondent as to whether the claimant was disabled at the relevant time and whether this can be conceded. I agree that there has been disruption for the respondent, which impacts on time and cost and creates uncertainty for the respondent. This disruption continues whilst the order is not complied with. This is not, however, enough.

68. Turning to unfairness and prejudice, on the one hand the delay or potential failure by the claimant to provide all relevant GP records and other medical records causes unfairness and prejudice to the claimant. On the other hand, the claimant has been taking steps to try to obtain documentation from his GP. The claimant told the respondent and the Tribunal on various occasions, most recently on 22 February 2023, that he had made numerous attempts to acquire an up-to-date medical report and despite his GP advising him he had done this, it had not been the case. There will be unfairness and prejudice to the claimant if his claim is struck out for non-compliance of a Tribunal order for provision of medical information, when he has been taking steps to obtain that information and communicated this to the respondent and the Tribunal.

69. I have considered whether a fair hearing would still be possible. I have nothing before me to suggest that a fair hearing would not be possible. The explanation given by the claimant in his emails is that he is waiting for documentation from his GP, not that it will not be provided. The respondent submitted that if the claim was not struck out the final hearing listed for 18 April 2023 should be postponed. I deal with this below when dealing with next steps.

70. I have considered whether there has been a deliberate or persistent disregard of the required procedural steps by the claimant in relation to the medical information to be provided. The claimant had asked his GP to provide medical information. He says that there is a delay in the GP doing so. He has done what he can to comply with the order by sending information from the NHS app about his medication. I cannot say that this is deliberate or persistent disregard of the required procedural steps by the claimant. It is unfortunate that the claimant was not present today. He had however replied to the notice of the public hearing, by his email of 22 February 2023, saying that he is still waiting to hear from his GP.

71. I have considered whether some lesser remedy would be appropriate rather than striking out. I deal with this below when dealing with next steps.

Paragraph 16 of Orders of 17 October 2022 – non-medical documentation

72. I have considered the question of non-compliance with the order for parties to send each other copies of all documents relevant to the issues listed in the case summary by 16 December 2022 ((paragraph 16 of Orders of 17 October 2022).
73. These documents were described to the claimant by the respondent as the non-medical information. The claimant replied to the respondent's email about exchange of these documents by referencing the delay in getting documentation from his GP. The respondent explained that the order related to non-medical information. The claimant did not respond further to the respondent.
74. I have considered whether there has been disruption, unfairness or prejudice. It may be that the claimant does not have copies of such documents relevant to the issues in his possession or control to comply with this order. It is likely that the documents relating to workplace matters will be in the possession of the respondent. In this regard the respondent has sent the claimant its documents in compliance with the order. It would have been helpful if the claimant had replied to the respondent specifically to confirm whether he had any non-medical documentation. As his response related to medical documentation only, it may well be that he does not. Whilst there is a degree of uncertainty on the part of the respondent as to the final position on non-medical documentation, it may well be that the claimant does not have anything to produce. As matters currently stand I do not consider that this causes unfairness or prejudice to the respondent. On the other hand, if the claim was to be struck out when the claimant may not have relevant documents in his possession or control, there would be unfairness and prejudice to the respondent.
75. I have considered whether a fair hearing would still be possible. Again, I have nothing before me to suggest that a fair hearing would not be possible. If there is late disclosure by the claimant of documents which would fall under this order it would be open to the respondent to raise the matter at that time if it considered that a fair hearing would not be possible, or if there was any disruption, unfairness or prejudice at that time.
76. I have also considered whether there has been a deliberate or persistent disregard of the required procedural steps by the claimant in relation to the non-medical information to be provided. The claimant has responded to the email from the respondent asking about disclosure under this order. Albeit his response related to information from his GP he has taken active steps to engage in the procedural steps required of the case. I cannot say that there has been a deliberate or persistent disregard of the requirements of this order.
77. Finally, I have also considered proportionality as I am required to do by *Blockbuster Entertainments Limited*. I have considered that the claimant has engaged with the respondent and the Tribunal in relation to his complaints and the orders, mostly on a reasonably prompt basis following communications about the orders and bearing in mind that he is a litigant in person. I am also mindful that the timeframe for the provision of medical information by the GP is not within the claimant's control and came over the winter period. It is well

known that GPs are under additional work pressures over the winter period. I cannot see that it is proportionate for his claim to be struck out.

Not been actively pursued

78. A tribunal can strike out a claim where there has been delay that is intentional or contumelious (disrespectful or abusive to the court), or there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent (*Birkett v James 1978 AC 297, HL*).

79. Both categories recognise that a claimant's conduct may result in losing the right to continue with a claim. In relation to the first category although striking out a claim because of a claimant's failure to actively pursue it is a draconian measure, it is one that can be ordered where the claimant's default is intentional and shows disrespect for the tribunal and/or its procedures (*Rolls Royce plc v Riddle 2008 IRLR 873, EAT*).

80. I cannot say that the claimant's conduct in not complying with the orders has been intentional or disrespectful or abusive to the Tribunal. He is a litigant in person who has taken steps to comply or to explain his position to the respondent and provide updates. He has been hampered by delays by his GP. It is unfortunate that he has not attended the hearing today to update the Tribunal on compliance with the orders, in particular relating to medical information. That said he responded to the Tribunal and the respondent on 22 February 2023, after notice of the hearing today was given to him, to provide an update that he was still waiting to hear from his GP. I also understand from the bundle provided by the respondent for the hearing today that the claimant has provided a schedule of loss and witness statements to the respondent on or around 22 February 2023.

81. I must also consider the very severe consequences that flow from a decision to strike out, and that the power should only be exercised on the clearest grounds and as a matter of last resort (*Otehtubi v Friends in St Helier EAT 0094/16*). I do not consider that there are clear grounds for strike out given the participation in the proceedings by the claimant which I have set out.

82. For all the reasons set out the claim is not struck out.

Next steps

83. I also considered whether there would be a more appropriate and lesser sanction than the draconian sanction of strike out of the claim. The respondent invited me to consider a deposit order if I was not minded to strike out the claim. The notice of public hearing did not refer to a deposit order as an alternative to strike out.

84. Before any deposit order could be made the Tribunal is required to make reasonable enquiries as to the claimant's ability to pay a deposit. Since the hearing on 1 March 2023 the respondent has made an application for a postponement of the final hearing on 18 April 2023. A telephone case management hearing is to be listed to consider this.

85. If the respondent remains of the view that a deposit order is appropriate on the basis that any specific allegation in the claim has little reasonable prospect of success, it would be open to the respondent to make an application for case management for a deposit order to be considered at the upcoming telephone case management hearing.

Employment Judge McCluskey

Date: 3 April 2023

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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