EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Harutunian**

Respondent: **(1) GlaxoSmithKline Service Unlimited**
(2) Mr J Ball

Heard at: **London South Employment Tribunal**

On: **06.03.2023**

Before: **Employment Judge Dyal sitting with Non Legal Members Ms Louise Gledhill and Mr Thomas Harrington-Roberts**

Representation:

Claimant: **Mr Maini-Thompson, Counsel (Day 1 – 3 and some of Day 4), In-person (remainder)**

Respondent: **Ms Bell, Counsel**

NOTE ON PRIVACY ORDERS (RULE 50): Privacy orders have been made under separate cover. Pursuant to those orders redactions are made from the public version of this document.

JUDGMENT

1. The complaints of victimisation within the meaning of s.27 Equality Act 2010 are struck-out pursuant to rule 37(1)(b) and/or (e).

CASE MANAGEMENT ORDERS

1. The remaining days of this listing,14 – 17 March 2023, are vacated.
2. The remainder of the Final Hearing is postponed to 13 – 17 and 20 – 24 November 2023
3. By not later than 31 May 2023, the Claimant must write to the Respondents and the tribunal giving an update on the investigations into the [redacted] that she reported including:

a. What clinicians (if any) she has consulted;
b. What investigations (if any) have been undertaken;
c. What diagnosis if any has been given;
d. What prognosis if any has been given;
e. Whether she is fit to proceed with the final hearing in November 2023 and if not when she will be fit;
f. If she says she is not fit, enclosing medical evidence specifically addressing whether she is fit for the final hearing and if not when she will be fit.

4. On a day of her choice between 11 and 18 October 2023, the Claimant shall write to the tribunal giving a further update on her fitness for the final hearing. She must:
   a. State whether she is fit to proceed with the final hearing in November 2023 and if not when she will be fit.
   b. If she says she is not fit, enclose medical evidence specifically addressing whether she is fit for the final hearing and if not when she will be.

REASONS

Introduction

1. The matter came before the final hearing with a 10 day listing. In the event nearly 6 days were spent dealing with preliminary issues, reading-in and ultimately postponing.

2. In the course of those 6 days the tribunal made a number of important decisions and a number of important things happened. A proper understanding of what happened and why is only possible if we set matters out chronologically.

Background

Litigation history

3. A brief history is as follows:

   3.1. The claim was presented on 2 April 2020;
   3.2. There was a Preliminary Hearing (PH) for case management on 23 February 2021 before the former President, Employment Judge Doyle. By this stage the Claimant had served detailed further particulars of claim. The case was listed for a 10 day hearing in December 2021;
   3.3. On 15 November 2021, there was a Preliminary Hearing before Employment Judge Khalid. By this stage the Claimant had served amended further particulars of claim. The 10 day trial in December 2021 was vacated on the basis that the case would not be trial ready. There had not yet been disclosure of medical evidence, there had not been general disclosure and

there were no witness statements. A 3 day open PH was listed for 15 – 17 December 2021 to determine disability status and produce a list of issues. This trial in March 2023 was listed.

3.4. In the event, the open PH took two days. Employment Judge Martin ruled in the Claimant's favour on the disability status issue. A list of issues that is, on the whole, very helpful was agreed.

3.5. In an email of 18 January 2022, the Claimant noted that Ms Bell had sought further particulars of the protected acts at the Open PH. The Claimant gave about a page of information although she did not mention there the matter she relied upon at trial as her protected act (see below).

3.6. On 7 October 2022, there was an attempt at a PH for case management. The parties were given the incorrect start time among other problems so the hearing was rescheduled.

3.7. By this time case preparation disputes between the parties (which lace essentially the whole chronology) were escalating. The Claimant applied to strike-out the response. The case came before Employment Judge Andrews on 15 December 2022. She refused that application and gave case management orders in respect of case preparation (we say more about these orders below). Of a rule 50 application the Claimant made, Employment Judge Andrews indicated that the case did not appear suitable for a rule 50 order but told the Claimant to make the application in writing if she wanted to persist with it.

3.8. By an email of 29 December 2022, the Claimant among other things applied for a rule 50 order. On this matter the application said only this *"the claimant would like to request Privacy and Restriction of Publicity, due to her disability as evidence is of a personal nature and the victimisation that has been imposed and endured as a result. She would like to be able to share these in confidence, so that Employment Tribunal Judge can hear independently and impartial and decision made accordingly and measures put in place by the first Respondent so that what has happened to the Claimant will not happen to anyone else working for the Respondents. This also includes her witness statements and sharing any part of these beyond the identified individuals."*

3.9. Disputes between the parties in relation to case preparation (especially disclosure, bundles and witness statements) continued.

3.10. On 28 February 2023, Employment Judge Webster wrote to the parties giving guidance in relation to the bundle and dealing with the rule 50 application of 29 December 2022. She refused the application and pointed out that the Claimant had not been specific as to why such an order be made beyond asserting that the information was personal. She explained the presumption in favour of open justice and told the Claimant that she could address the tribunal at the outset of trial if she wanted to pursue that order.

Documents

4. The following documents were before the tribunal. We indicate in parentheses on what day of the hearing they were put before us.

4.1. Main hearing bundle running to 1578 pages (day 1);

4.2. Claimant's 'provisional' schedule of loss and mitigation bundle (day 1);

4.3. Respondent's opening note and appendices (day 1);

4.4. Main witness statement bundle (day 1):
  4.4.1. Claimant's witness statement as exchanged;
  4.4.2. James Ball;
  4.4.3. Donna Wilson;
  4.4.4. Jason Lord;
  4.4.5. Roz Austin.
4.5. Agreed chronology and cast list (day 1);
4.6. Two documents disclosed by the First Respondent relating to the Claimant's 17 August 2018 speak up call (day 2). These documents were then included in the Claimant's bundle;
4.7. Further statements (day 3):
  4.7.1. Updated version of the Claimant's witness statement with minor changes and cross-referencing added ('Claimant's final statement');
  4.7.2. Claimant's disability impact statement, used at earlier PH;
  4.7.3. Mr Bell's witness statement in response to disability impact statement, used at earlier PH;
  4.7.4. Claimant's response to Mr Bell's response to her disability impact statement, used at earlier PH.
4.8. Claimant's bundle running to 33 pages (day 3)
4.9. Dr Cheung, letter of 24 January 2023 (day 4)
4.10. Claimant's further medical evidence, referral document, two emails from GP (day 6)
4.11. Correspondence handed up by the Claimant (day 6).

Representation of the Claimant and presence of the Claimant

5. The Claimant was represented by counsel, Mr Maini-Thompson, on day 1 to 3 and for part of day 4. We are told that he was instructed through the direct public access scheme. Counsel was sacked on day 4 as described below. It is important to emphasis that nothing we say here is intended expressly or impliedly as a criticism of counsel.

6. The Claimant was present for all parts of the hearing save between 14.00 and 15.03 on day 2. The circumstances of this are described below.

Day 1 (06.03.22)

7. At the outset of the hearing both counsel confirmed that the issues for determination remained as set out in the agreed list of issues.

8. The following preliminary issues were identified and discussed in the morning:

  8.1. Claimant's witness statement and claimant's documents: the Claimant had, that morning, served a different draft of her witness statement and had served a large bundle of documents. She had been in receipt of the main hearing bundle since 27 January 2023 and witness statements had been exchanged in the weeks before the hearing.
  8.2. The Respondents' strike-out application in respect of the victimisation claim. In essence, they submitted that the Claimant had failed to identify the

protected acts with sufficient clarity for the Respondent to understand them and prepare. This was despite a tribunal order and several requests for information from the Respondents.

9. As set out in more detail below the tribunal indicated that it would commence its reading and deal with these matters substantively on day 2 when it better understood the case having done some reading in. In preparation for that, however, we:

    9.1. gave the Claimant until 2pm on day 1 to state what the protected act(s) were relied upon since Mr Maini-Thompson indicated that he needed to take instructions;
    9.2. asked the Claimant to cross-reference her witness statement to documents since in its existing form it referred to documents without identifying them;
    9.3. asked the parties to identify which documents in the Claimant's bundle were in the main bundle, which were not and of those whether there was any dispute about admissibility.

10. At 2pm the tribunal heard from the parties.

11. Mr Maini-Thompson identified the protected act with precision, and made clear that now only a single protected act was relied upon, namely:

> "*In or around 17 August 2018, the Claimant made a telephone call to speak up channel and during that telephone call, she made a complaint that James Ball, during a meeting on 11.07.18 had failed to take into account the impact of disability on the Claimant's ability to prepare for a meeting scheduled for the Long Term Ill-Health process, and in particular how given her nerve impingement she would not be able to prepare in the timeframe*."

12. The Respondents indicated that the strike-out application was pursued. This was the first they had heard of this putative protected act and were prejudiced by its late identification. The application was deferred until day 2 at 2pm.

13. In relation to the protected act issue, we asked:

    13.1. The Respondents to review their disclosure searches overnight in light of the protected act now being identified with precision by the Claimant's counsel;
    13.2. The Claimant to be ready to point the tribunal to any part of the pleadings or documents where she contended that she had previously foreshadowed what was now relied upon as the protected act.

14. Mr Maini-Thompson also indicated that the Claimant wished to make a rule 50 application. This was also deferred until day 2 at 2pm.

15. Little progress had been made in relation to the Claimant's bundle and witness statement. It was unclear why not.

16. In relation to the Claimant's bundle, we were concerned that no progress had been made. We could not let it protract indefinitely: after the initial work had been done it would then be necessary for us to rule on any admissibility dispute and read any key additional documents. We therefore initially made the following orders. By 12pm on day 2:

    16.1. The Claimant must add to her witness statement any cross-references to documents in the trial bundle that she wished to add;
    16.2. If the Claimant sought to refer to any further documents, i.e., documents not in trial bundle she must:
        16.2.1. Provide a table to identify what each of those documents were. The table must indicate whether the document was previously disclosed to Respondent or not;
        16.2.2. Provide a paginated supplementary bundle containing those additional documents in electronic form and 4 hard copies.

17. Mr Maini-Thompson submitted that it would be impossible to get hard copies within that timeframe so (although noting that there are local copy-shops) we removed the requirement for hard copies to be provided on day 2 and deferred it to day 3 save for Ms Bell's copy which was needed by the end of day 2.

Day 2 (07.03.2023)

18. The tribunal spent the morning of day 2 reading. We heard from the parties at 2pm. At 2pm, Mr Maini-Thompson reported that the Claimant was running late but that he had instructions to proceed in her absence. We therefore did so. She later entered the tribunal room at 15.03. We set out in more detail below – when dealing with her application for reconsideration that was made on day 6 - what the Claimant missed and what she was present for.

19. The issues in relation to the Claimant's witness statement and the Claimant's additional documents resolved. This was essentially through the Respondents taking a helpful and very pragmatic approach. A further draft of the Claimant's witness statement was handed up. It included cross-referencing that both sides had contributed to and a few other changes compared to the version of the statement that had been exchanged. A small bundle of Claimant's documents was produced and the Respondents agreed to it being admitted.

20. We heard the Respondents' strike-out application and the Claimant's rule 50 application (these are described further below). This took most of the afternoon and we deferred judgment to the morning of day 3.

Day 3 (08.03.2023)

21. Unfortunately, Ms Bell was ill. However, Mr Griffiths (solicitor) attended to take our ruling on the applications. We set those out immediately below. We used the rest of day 3 for reading.

Claimant's Rule 50 application

22. Mr Maini-Thompson made the application under rule 50. He submitted that the Claimant did not wish to give evidence in the presence of Mr Ball. He said that the Claimant had been undergoing various "medical distresses" in the last few months and was under clinical investigation. She felt highly pressured by the need to give evidence in open court and wanted any adjustments possible to make it as pressure free as possible. In particular, the adjustment she sought was for Mr Ball not to be present in the room when she gave her evidence. (The Respondents were taken by surprise by the content of this application which had not been foreshadowed).

23. Asked whether the Clamant was seeking any privacy order, such as a private hearing or anonymisation, Mr Maini-Thompson indicated that the Claimant would like maximal privacy orders but his instructions were to focus on keeping Mr Ball out of the room when she gave evidence. Asked whether the Claimant relied on medical evidence in support of the application Mr Maini-Thompson referred the tribunal to the medical information in the Claimant's mitigation bundle. This comprised:

    23.1. Some information about nerve root impingement;
    23.2. A physiotherapy report of 23 November 2021;
    23.3. A fit note from 2017;
    23.4. A letter from an Extended Phyisotherapist to Neurosurgery relating to an assessment of the Claimant in relation to her ongoing physical pain;
    23.5. A letter notifying the Claimant of a gastroenterology appointment in February 2023;
    23.6. A letter notifying the Claimant of an outpatient appointment in urology in May 2023;
    23.7. A letter notifying the Claimant of an outpatient appointment in endocrinology in July 2023.

24. As to Mr Ball not being present in the room, Ms Bell indicated that it was not accepted that there was any basis in anything Mr Ball had done or would do for there to be any objective reason for concern about him being in the room. Further, he is a named Respondent and thus a party to the proceedings and he had a right to a fair trial. This required nothing less than him being able to see the Claimant's evidence and to be able to give his counsel instructions in real time when she cross-examined the Claimant.

25. The tribunal looked for a practical solution to this problem with the following in mind:

25.1. The tribunal is keen for all witnesses to be as comfortable as possible when giving their evidence and to the extent possible to relieve the pressure of doing so;
25.2. The threshold for making adjustments and giving witnesses special measures should rightly be set low at least where the adjustment can be made without any significant impact on the fairness of the proceedings for other parties;
25.3. Making special measures for the Claimant's evidence would not in any way impugn Mr Ball and would not reflect negatively in any sense on him;
25.4. Mr Ball's right to a fair trial indeed meant being able to see and hear the Claimant's evidence and being able to give his counsel instructions in real time during the course of that.

26. The best solution, which we canvassed with the parties and which they approved, was for the Claimant to give her evidence by video-link from a different room in the tribunal. That way she would not be in the same room as Mr Ball. However, everyone including Mr Ball would be able to see and hear her evidence. Mr Ball would be able to give his counsel instructions as required in real time. Further, the tribunal staff could manage the video-link technology, relieving the Claimant of any additional burden related to that.

27. The tribunal plainly has power to make these adjustments. We agreed to make them albeit under rule 41, rather than rule 50.

28. We rejected the Claimant's wider application for privacy orders and gave the following reasons.

29. We began by reminding ourselves of the terms of rule 50. We further reminded ourselves of the following convention rights:

> **Art 8**
>
> **Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Art 10

Freedom of Expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

30. The principle of open justice of great importance. It was explained thus by Simler J (as she was) in ***Fallows v News Group Newspapers Ltd*** **[2016] ICR 801***:*

> *58 The importance of the common law principle of open justice was emphasised and explained in Global Torch Ltd v Apex Global Management Ltd [2013] 1 WLR 2993, paras 13—14. Reference was made by Maurice Kay LJ to R v Legal Aid Board, Ex p Kaim Todner [1999] QB 966, 977 and Lord Woolf MR's holding that the object of securing that justice is administered impartially, fairly and in a way that maintains public confidence is put in jeopardy if secrecy is ordered. Lord Woolf MR identified the ends served by open justice as follows:*
>
> *It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely… Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it.*

31. In ***BBC v Rolden*** [2015] IRLR 267 Simler J said this:

> "The default position in the public interest is that judgments of tribunals should be published in full, including the names of the parties. That principle promotes confidence in the administration of justice and the rule of law. The reporting of court proceedings in full without restriction is a particularly important aspect of the principle and withholding a party's name is an obvious derogation from it, requiring cogent justification for its restriction. … The mere publication of embarrassing or damaging material is not a good reason for restricting the reporting of a judgment, as the authorities make clear."

32. The proper approach for a tribunal to take was considered at [41] and [48]-[50] of ***Fallows*** from which the following principles can be drawn:

    32.1. The power to grant Restricted Reporting Orders is not limited to the circumstances set out in ss. 11-12 of the ETA 1996 [although s.12 is relevant here as this is a case in which there will be some disability related evidence of a personal nature]. The Tribunal has a power to make an order in any case where it is necessary to do so to protect Convention rights or the administration of justice, and such orders may extend after judgment is given, and so may permanently restrict reporting information about the proceedings ([41]).

    32.2. The burden of establishing any derogation from the principle of open justice falls on the applicant and must be established by clear and cogent evidence ([48](i)].

    32.3. Where the Tribunal is satisfied that Article 8 is engaged on the facts of a particular case, it must conduct a balancing exercise, weighing the strength of that right against the correspondence rights of the press and public to impart and receive information about the proceedings [49].

33. Even if we assume that Article 8 is engaged by the fact that the evidence will include information about the Claimant's health, there is no basis for interfering with the principle of open justice.

34. Aside from the Claimant's strong preference for the hearing to be as private as possible and the fact that there will be reference to personal information in the proceedings, no specific reason was given as to why any sort of privacy order should be made. We accept that the Claimant is under some medical investigations for weight loss and we accept that this and her disability, which relates to nerve impingement in the hand, is personal information. However, there is an absence of clear and cogent evidence to establish any need for any derogation from open justice.

35. In this regard, in our view, matters have not moved on since the last occasion when Employment Judge Webster refused the application on the basis that there was insufficient grounds to derogate from the principle of open justice.

Victimisation strike-out application

36. One of the heads of claim is victimisation within the meaning s.27 Equality Act 2010.

37. The form ET1 refers briefly to 'victimisation' but does not identify or at least, not clearly, the protected act(s) relied upon. The Claimant's Further and Better Particulars (as amended) says this about the protected acts:

6.1 The 2nd Respondents subjected the Claimant to detriment when she raised a "speak up" in August 2018. A "speak up" is a means of raising a complaint within the Respondent's organisation, which HR later changed to a grievance.

6.2 [The Claimant's "speak up" was with reference to the Claimant's concerns about the failure of the 2nd Respondent to follow compliance policies and the implications for GDPR and/or other regulations relating to the EqA 2010 and Data Protection.]

6.3 The grievance raised by the Claimant concerned the 2nd Respondents conduct, recording factually and fundamentally incorrect data about Claimant and failure to follow the correct processes in relation to her disability. The Claimant, in particular, made reference to the LTIH brief handover session which took place on the 11th July 2018 where the 2nd Respondent first informed the Claimant that an LTIH had been initiated. During which the Claimant pointed out to the 2nd Respondent that he had not been following the right processes which involved making reasonable adjustments in line with OH recommendations. The Claimant also mentioned to the 2nd Respondent that he was ignoring workable solutions to issues raised by him.

38. The List of Issues, agreed at the PH of 15 – 16 December 2021, says only this in relation to the protected acts:

26. C alleges that she did a protected act in the course of her Speak Up of August 2018 and complaint of 2 April 2019

39. The difficulty is that the Speak Ups (there were two) and the later grievance each triggered processes which each involved numerous people, numerous events, numerous conversations and a various pieces of correspondence. It is unclear from the information given prior to Day 1 of the trial, where and what within all of that the protected act(s) was/were said to be.

40. Thus, in her case management orders at the Preliminary Hearing on 16 December 2022, Employment Judge Andrews ordered the Respondents to send a "*revised request for further particulars of the protected acts relied upon in the claim form"* by 20 December 2022. She further ordered that by 30 December 2022 the Claimant "*shall reply to the request for further particulars setting out specifically and shortly what she says were the protected acts, when and how they were made and to whom."*

41. The Respondent made a request for particulars of the protected act on 20 December 2022. It is commendable for its clarity and simplicity:

1. Paragraph 26 of the List of Issues appended to Order dated 16 December 2021, sets out that "C alleges she did a protected act in the course of her Speak Up of August 2018 and complaint of 2 April 2019". In respect of that protected act, please set out:
    a. The date of the alleged protected act.
    b. The words you used (either spoken or written) that amount to a protected act. If the alleged words were spoken, please set out who you spoke to and where you were when they were spoken. If the alleged words were written, please provide a copy of the communication.

42. The Claimant responded by email on 29 December 2022. The email included a lot of text on the general topic of protected acts but it did not provide the information EJ Andrews had ordered nor that the Respondent had reasonably requested. It unfortunately did not actually assist in identifying what the protected act(s) was/were. It said this:

> *What protected acts; making complaints, informing of non-compliances, doing anything else in connection. Some specific and short responses have already been shared in the Claimant's Further and Better Particulars of Claim – Amended, please see attached for more details.*
>
> *When; this has been on going due to James Ball (Second Respondent's) course of conducts and discrimination of the Claimant's disability and victimisation which kept on getting worse, over time, up until and even beyond her dismissal on 4 December 2019, therefore including First Respondents. James Ball and First Respondents were made aware of these protected acts during the above-mentioned time by the Claimant. Some specific and short responses have already been shared in the Claimant's Further and Better Particulars of Claim –Amended, please see attached for more details. For example August 2018, January 2019, April 2019, November 2019, December 2019, January 2020.*
>
> *How; Claimant informed James Ball at their face to face meetings, she raised two Speak Ups in August 2018, escalated to have these Speak Ups reopened in January 2019 and one of this was changed to Grievance, escalated to have the Grievance reopened in April 2019, raised appeals in December 2019 and January 2020. Subsequently, Claimant having tried ACAS reconciliation, but as neither the Respondents nor their legal representatives engaged, she submitted her Claim to Employment Tribunal on 2 April 2020, so that she would not be out of time.*
>
> *To Whom; James Ball, Management, Human Resources, Investigators, ACAS, Employment Tribunal*
>
> *The details and evidence of the above have already been referenced in the Claimant's Further and Better Particulars of the Claim – Amended and/or provided to Respondents and their legal representatives. Some of these have already been included in the draft Bundles that the Respondents legal representative has sent. However, there are some which the Claimant has shared with the Respondents legal representative, but these have not yet been included to date, to the Claimant's knowledge. Furthermore, there are evidence which Claimant has requested the disclosure of since February 2022, but these have not yet been provided, as per the Respondents' legal*

representatives responses in the table titled - Disclosure and Inclusion of Documents Request Different Format – Updated 5 Nov 2022.

43. The Respondent wrote to the Claimant on 5, 13, 20 and 23 January 2023 politely asked on each occasion for the Claimant to provide the further information requested. There was no response.

44. As stated above, on day 1 at 2pm, Mr Maini-Thompson said there was only one protected act relied upon and it was as follows;

> "*In or around 17 August 2018, the Claimant made a telephone call to speak up channel and during that telephone call, she made a complaint that James Ball, during a meeting on 11.07.18 had failed to take into account the impact of disability on the Claimant's ability to prepare for a meeting scheduled for the Long Term Ill-Health process, and in particular how given her nerve impingement she would not be able to prepare in the timeframe*."

45. The Claimant's own note of the telephone conversation is at p411 of the bundle. It does not record the matter that is now relied upon as the putative protected act. Mr Maini-Thompson accepted that this was the case and on instructions said it was because at the time the Claimant made the note she did not have this point at the front of her mind.

46. In her witness statement the Claimant refers to the speak up call but does not give any evidence specifically setting out the part of the 17 August 2018 telephone conversation that is now relied upon as the (only) protected act. She said this in her statement:

> 54. In August 2018, I raised two "Speak Ups" with reference to my concerns about the failure of JB to follow the LTIH processes and policy, failing to implement reasonable adjustments and non compliance to policies; internal and external regulations, laws for GDPR, Data Protection, Equality Act. I saw a noticeable deterioration in the way JB treated me after I raised these "Speak Ups". I made clear that I would like to be safeguarded. **[Page 166; 599-601; 411; 640; 602d-e; 499 of Joint Bundle]**
>
> 55. My Speak Ups were closed. They were reopened. The one being investigated by HR I was told to raise it as Grievance in regard to JB's conduct. Specifically, I complained about JB recording and sharing factually and fundamentally incorrect information about me, my health and my work with Respondents and his failure to follow the correct processes in relation to my disability. In particular, I made reference to commencement of the Disability/Long Term Ill Health in workplace proceedings [LTIH] on 11 July 2018, the entry point into the process and failure to make reasonable adjustments.

47. Paragraph 55 comes quite close to referring to the subject matter that is relied upon as the protected act (although it does not actually set out the particular complaint made). However, paragraph 55 is not about what the Claimant said in the telephone call of 17 August 2018 (which is when the protected act is said to have been done). It is about the grievance process many months later.

48. Ms Bell submitted that the Claimant's conduct had been deliberately unreasonable, that a fair trial of the victimisation claim was not possible and that striking out the victimisation complaints was proportionate.

49. In the course of making the application the Respondent handed up two documents:

    49.1. One appeared to be the contemporaneous note of the Speak Up call produced by the person the Claimant spoke to. The Respondent thinks this document was previously disclosed to the Claimant but is not certain. The Claimant is uncertain.
    49.2. A further 'back-end' document with log details about the call, like the timing of it and who the call handler was and who it was passed to. This had not previously been disclosed.

50. In our view these documents are essentially consistent with the Claimant's record of the conversation at p411. What they do not do is record, even in note form, the passage of conversation the Claimant now relies upon as the putative protected act.

51. During Mr Maini-Thompson's submissions, Judge Dyal read back his note of what Mr Maini-Thompson had said the protected act was on Day 1 and asked him to confirm that it had been accurately captured. He confirmed that it had.

52. In his submissions, Mr Maini-Thompson said that the Claimant had told one of the Respondent's employees, Ms Denman that she had raised a speak-up, and had done this in around September or October 2018. However, that conversation (assuming it happened, and there is no dispute the Claimant raised the Speak Up) predated the litigation by some years. Further, Mr Maini-Thompson did not go so far as to say that the Claimant had told Ms Denman that the conversation included the information that is now relied upon as the protected act. (We note that Ms Denman was not one of the Respondents' witnesses nor was there any reason to anticipate she would be needed.)

53. Mr Maini-Thompson rightly emphasised that the Claimant had been acting as a litigant in person and that managing the litigation had been very challenging for her. He also emphasised that she had always been clear that the protect act was done in the August 2018 Speak Up.

54. We struck-out the victimisation claims and gave the following reasons for doing so.

Law on striking-out

55. By rule 37 the tribunal has a power to strike-out all or part of a claim. We referred ourselves to the whole rule and note the particular relevance of rule 37(1)(b), (c) and (e).

56. In ***Blockbuster v James*** [2006] IRLR 630, Sedley LJ, summarised the applicable legal principles:

> *This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC 167 and of the EAT in De Keyser v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal.*

57. Also of importance is what Sedley LJ said at [19]:

> *…it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.*

Discussion and conclusion

58. In this case we are satisfied that the Claimant did breach Employment Judge Andrews' order and acted unreasonably in failing to answer the simple questions the Respondents posed in the request for further information about the protected act(s) and which was then followed up some four times.

59. In reaching this view we take into account the fact that the Claimant is and has been a litigant in person, that she was dealing with a large piece of litigation at its 'business end' and that providing further information was not the only issue she needed to manage. There were ongoing disputes about the disclosure, the bundle and the exchange of witness statements. She is also dealing with some health concerns that are under investigation (per the medical evidence in the mitigation bundle).

60. We also take into account the fact the Claimant did provide some response to the Employment Judge Andrew's order made by her email of 29 December 2022 (so

it is not the case she ignored it altogether) and had provided some information about protected acts in the list of issues and in her pleadings.

61. There is no doubt that the Claimant is a highly intelligent person and, even making all due allowances for the matters we have canvassed, she was very capable of providing the information that she was ordered to and which the Respondent requested. There was no legal technicality to what needed to provide, it was simple factual information. The way in which the Respondent expressed the request was simple and easy to follow. In our view the Claimant could and should have answered the request and her failure to do so was unreasonable.

62. Further and in any event, and whether the conduct was unreasonable or not, it has made a fair trial of the victimisation claim impossible:

    62.1. An issue in the case is whether or not the Claimant did a protected act. Doing a protected act is an essential element of a victimisation complaint.
    62.2. The Respondents made every reasonable effort in advance of trial to try and discover critical details about the protected act(s) that would enable them to have a fair opportunity of defending the claim.
    62.3. The Claimant stated those details for the first time on day 1 of the trial.
    62.4. The sole matter relied upon as a protected act is something she says she said in a telephone conversation in August 2018. The matter she relies upon is not recorded in either her note of the conversation nor the note of the person that she spoke to.
    62.5. The Speak Up line was administered by a third party in Canada. The conversation was four and a half years ago. The person the Claimant spoke to, one Ms Brink, is not one of the Respondents witnesses and they have not at any time proofed her. There was no dispute that the Claimant had raised a speak-up call on 17 August 2018. The disputed detail about this telephone call crystalised only at trial: whether the Claimant actually said to Ms Brink what she now says she did and relies on as her protected act. Thus we do not think the Respondents could be fairly criticised for not proofing Ms Brink when preparing this case.
    62.6. Ms Brink was employed by a third party and is a person unknown to the Respondents. She is not available to them at zero notice or for this trial.
    62.7. This case is going stale. It was presented in 2020 and it relates in part to yet more historical events that date back to 2017.
    62.8. The trial has already been postponed once before in December 2021.
    62.9. It would be wholly wrong to postpone the trial in order to make inquiries of Ms Brink.
        62.9.1. The fairness of a trial includes fairness to the Respondents and they are entitled to have the case heard and determined.
        62.9.2. Further, we must also have regard to other tribunal users. The tribunal's resources are a scarce and precious. We currently have levels of delay at historically high levels in getting cases heard.

62.9.3. This matter has been listed for 10 days, a great deal of tribunal time. We have spent two days reading into the case as well as dealing with preliminary issues and are ready to proceed.

62.10. There are a great deal of other issues beyond victimisation which we can deal with at this hearing.

62.11. There is not in any event any request from the Claimant's side to postpone.

63. We also consider that it would be proportionate to strike-out the victimisation case:

63.1. The Claimant's default was significant and repeated;

63.2. A fair trial is not possible of the victimisation claim. There is only one putative protected act, and for the reasons given there cannot be a fair trial now of whether the Claimant in fact did or did not do that protected act;

63.3. For the reasons already given postponing the case on this account would be quite wrong and would be disproportionate.

63.4. The Claimant has a large number of other complaints before the tribunal which we can and will decide on their merits.

63.5. In the circumstances of this case, there is no lesser sanction than striking-out that we can apply and nonetheless have a fair trial of the victimisation claim.

64. We remind ourselves that it takes something exceptional to strike-out a complaint on essentially procedural grounds once it has reached trial. However, what we have outlined above is exceptional and leaves no viable alternative to striking out the victimisation claim.

65. We also note that we have had regard to the fact that the First Respondent made late disclosure of one or possibly two documents. If those documents had supported the Claimant's account of the passage of conversation that she relies on as her protected act that would have significantly altered the analysis. However, they do not and the analysis as we have set out above applies.

66. We finally note we do not think it would not be right for the *tribunal* to identify other possible protected acts in the extensive materials before it (and undoubtedly there are other possible protected acts in the material) and proceed with the victimisation claim on the basis of those. That would involve the tribunal pleading and/or formulating the Claimant's case for her and doing so in a manner that was different to the way she, through counsel, wished to state her case. That would be to enter the arena.

Day 4 (09.03.2023)

Claimant's application to give an additional oral statement

67. On day 4, just before the Claimant's evidence was due to begin, Mr Maini-Thompson applied on instructions for the Claimant to be given permission to make an additional oral statement.

68. During the course of him making the application Judge Dyal asked what the gist of the proposed oral statement was. Mr Maini-Thompson said that he was unable to say, other than that it would go beyond what was in the Claimant's written witness statement.

69. The Respondent objected. It had a longstanding concern (foreshadowed in its opening note) that the Claimant would seek to continually move the goalposts including by augmenting her witness evidence.

70. The tribunal refused the application:

    70.1. The Claimant had served an 18 page witness statement in the case shortly before trial and an amended version of it on day 3.
    70.2. She had given no indication of what the additional statement was that she wanted to make - not even the gist of it. Counsel could only say it went beyond what was in her existing witness statement.
    70.3. By not telling the tribunal even the gist of the proposed evidence we could not make any deeper assessment of whether or not the proposed additional evidence was relevant or whether it whether it would be prejudicial to allow the Claimant to adduce it.
    70.4. In all the circumstances, it would not be fair to the Respondent to simply give the Claimant *carte blanche* to give further evidence with no foresight at all of even the gist of it.

Sacking of counsel

71. After this ruling the Claimant's evidence was due to begin. The clerk took her down to the corridor to room 3 to give evidence by videolink but unfortunately the camera malfunctioned in that room so she returned while the system was rebooted. When she returned she had whispered conversation with Mr Maini-Thompson. Mr Maini-Thompson got up and then left the room.

72. It was unclear to the tribunal what had happened, whether perhaps he had withdrawn, been sacked or left for other reasons. Judge Dyal tried to understand the position from the Claimant. She insisted that she needed to say something and that it was not a statement. Judge Dyal asked the Claimant if Mr Maini-Thompson had been sacked. The Claimant said she wanted him to keep acting for her but she had been told that she could speak if he is here. Judge Dyal told the Claimant that she could not make an additional oral witness statement whether Mr Maini-Thompson was here or not. More generally, that if he was representing her then he spoke on her behalf, with her instructions, except when she was giving evidence which she was about to do for the next day or two. Judge Dyal asked again if the Claimant had sacked Mr Maini-Thompson and she

said she had not and wanted him to be there. She said he is very ethical and by the book, that he had been very helpful and that she could not do it without him.

73. Judge Dyal told the Claimant that she should go and speak to Mr Maini-Thompson if she wanted him to act for her as had left the room. He suggested a break for that to happen. The Claimant said that she needed to say something because it would affect how the proceedings have gone and will go and that it was not a statement. Judge Dyal told the Claimant that if what she had to say was about what adjustments were needed for her to take part in the hearing or matters of that sort then she could tell us, although if she was represented Mr Maini-Thompson could make the representations. We then took a break for the Claimant to speak to Mr Maini-Thompson. Ms Bell offered to speak to the Claimant or as the case may be her counsel about what it was that she wanted to say and it may be that it was uncontroversial.

74. We broke at about 11.38 am. At around 12.10 the tribunal's clerk passed on the message that Mr Maini-Thompson requested a further 30 mins. We agreed to that. At around 12.38pm the hearing resumed. Mr Maini-Thompson explained that he had been sacked, that even if the Claimant wished to re-instruct him he would be obliged to reject the instructions (having taken advice from the Bar Council ethics line and senior colleagues) and that he believed it in the interests of justice to adjourn (whether for a short or long period) for the Claimant to obtain further representation. He said that his assessment was that the case was not suitable for public access instructions (which had been the basis of his instruction).

75. The Claimant then wanted to address the tribunal about some medical issues that she said would affect the hearing. She did not want the Respondents' witnesses or Mr Ball in the room. Ms Bell did not object to the Respondent's witnesses being asked to leave, but did object to Mr Ball being asked to leave. It was his trial too and he needed to know what was being said. During the adjournment Ms Bell had offered to speak to the Claimant / Mr Maini-Thompson about what the Claimant wanted to say but, on the Claimant's account, there had not been time.

76. The tribunal wanted to hear from the Claimant about medical issues that she considered would affect the hearing not least so that we could decide how to manage them. The tribunal asked the Respondents' witnesses to leave (as the appearance was that the Claimant was about to disclose something very personal) but did not ask Mr Ball to leave. As a party to the proceedings, we agreed with Ms Bell that he needed to be able to hear what the Claimant had to say.

77. The Claimant then addressed the tribunal. She was very distressed when doing so. A summary is as follows:

77.1. She had been experiencing medical problems of three kinds:
77.1.1. The nerve entrapment issues that cause musculoskeletal pain;
77.1.2. Unexplained weight-loss which is being investigated as a matter or urgency;
77.1.3. [redacted]problems including the following:

[redacted]

78. Judge Dyal, said to the Claimant that the tribunal needed to know what her preferences were as regards the trial. He outlined what appeared to him to be the main three options:

78.1. To carry on with the trial with the Claimant now representing herself – this could involve a short adjournment but the idea would be to complete the trial in the existing listing;
78.2. Adjourn the trial for a short period with view to the Claimant instructing alternative lawyers to act during this trial listing. Admittedly, the chances of this coming to pass were limited given the nature of the case and the stage the proceedings were at;
78.3. Adjourn the trial to another listing.

Application to adjourn

79. The Claimant's preference, and application, was to postpone the trial.

80. The Respondents opposed the application:

80.1. They did not accept without some medical evidence that the Claimant was suffering from the [redacted]problems she says she is. It would be sensible to have a short adjournment to allow the Claimant to get or attempt to get medical evidence;

80.2. The Claimant had sacked Mr Maini-Thompsons in order to try and get around the tribunal's ruling that she could not give an additional oral statement. Her lack of legal representation had to be seen in that context. She was no prejudiced by the lack of legal representation.

Law

81. The tribunal's powers of postponement are set out in rule 30A.

82. The circumstances here are such that rule 30A(2)(c) applies and the hearing can only be adjourned if there are exceptional circumstances. This is a 'serious hurdle' that is intended to discourage late adjournments (***Morton v Eastleigh CAB*** [2020] EWCA Civ 386. When applying rule 30A the tribunal should seek to give effect to the overriding objective.

83. In ***Ameyaw v PwC Services Ltd***, Mathew Gullick QC sitting as a DJHC said at [53] *"…the definition of "exceptional circumstances" is not closed and that it is a question for the judgment of the Employment Tribunal in the individual case…."*

84. The *Presidential Guidance – Seeking a Postponement of a Hearing* gives basic guidance about applications to postpone. It suggests that applications to postpone on medical grounds should be supported by medical evidence and that the evidence should comment on the applicant's fitness to participate in tribunal proceedings.

85. In ***Teinaz v London Borough of Wandsworth*** [2002] IRLR 721, the following guidance was given:

> *"20. … I would make some general observations on adjournments. Every tribunal or court has a discretion to grant an adjournment, and the exercise of such a discretion, going as it does to the management of a case, is one with which an appellate body is slow to interfere and can only interfere on limited grounds, as has repeatedly been recognised. But one recognised ground for interference is where the tribunal or court exercising the discretion takes into account some matter which it ought not to have taken into account: see, for example,* Bastick v James Lane Ltd *[1979] ICR 778 at 782 in the judgment of Arnold J giving the judgment of the EAT (approved as it was in* Carter v Credit Change Ltd *1980 1 All ER 252 at p 257 per Lord Justice Stephenson, with whom Cumming-Bruce and Bridge LJJ agreed). The appellate body, in concluding whether the exercise of discretion is thus vitiated, inevitably has to make a judgment on whether that matter should have been taken into account. That is not to usurp the function of the lower tribunal or court: that is a necessary part of the function of the reviewing body. Were it otherwise, no appellate body could find that a discretion was wrongly exercised through the tribunal or court taking into account a consideration which it should not have taken into account or, by the like token, through failing to take into account a matter which it should have taken into account. Although an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice. Where the consequences of the refusal of an*

adjournment are severe, such as where it will lead to the dismissal of the proceedings, the tribunal or court must be particularly careful not to cause an injustice to the litigant seeking an adjournment. …"

21. A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. That litigant's right to a fair trial under Article 6 of the European Convention on Human Rights demands nothing less. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.

86. In ***O'Cathail v Transport for London*** [2013] IRLR 310 Mummery LJ said this at [45]:

"Overall fairness to both parties is always the overriding objective. The assessment of fairness must be made in the round. It is not necessarily pre-determined by the situation of one of the parties, such as the potentially absent claimant who is denied an adjournment."

87. His Lordship went on at [47]:

"*Finally, Article 6 of the Convention does not compel the ET to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds, if it would mean that the hearing would take place in the party's absence. There are two sides to a trial, which should be as fair as possible to both sides. The ET has to balance the adverse consequences of proceeding with the hearing in the absence of one party against the right of the other party to have a trial within reasonable time and the public interest in prompt and efficient adjudication of cases in the ET."*

88. In ***Khan and another v BP Plc***, UKEAT/0017/21/JOJ, the Claimant's counsel was taken ill shortly before a three week trial. The ET erred in law in refusing an application to postpone. The circumstances were such that it was agreed between the parties that counsel's illness was genuine. The circumstances were also such that instructing an alternative representative was impossible in the circumstances. Choudhry P said this:

"There is undoubted prejudice caused to a party losing representation at such a late stage and it would not be consistent with the overriding objective and the need to ensure that parties are on a level playing field for the case to proceed in these circumstances."

80. In ***Phelan v Richardson Rogers*** [2021] I.C.R. 1164, HHJ Auerbach said this:

75. First, where the application is to postpone a trial or other hearing, the outcome of which may dispose of the claim, or some other material substantive issue in the case, the applicant's article 6 and common law rights to a fair trial will be engaged. Because of the serious consequences of

refusing a postponement, it should, in such cases "usually" be granted. If what sits on the other side of the scales is simply the inconvenience and cost to the other party of the matter going off, then any tribunal properly carrying out the balancing exercise would be bound to grant the application, and a decision not to do so is liable to be overturned, applying Wednesbury principles. That is the point of Peter Gibson LJ's dictum in Teinaz . Because of what is at stake for the applicant in such cases, a failure properly and fairly to appraise the medical evidence with due care will also vitiate the exercise of the discretion, as was found to have occurred in both Teinaz and Solanki .

76. However, as the foregoing authorities also plainly establish, the potential impact on the other party's fair trial rights, and the wider public interest, do also fall to be placed in the scales on the other side, and, if sufficiently weighty in the given case, may be properly found to tip the balance against the grant of the application. That is the point of Mummery LJ's observations in O'Cathail , especially at para 47, and Longmore LJ's closing observation in Riley .

77. In most cases, such as those involving a sudden accident or short-term illness, the balance will clearly and obviously point in favour of granting the application, and it may, indeed, not be opposed. With many illnesses or injuries, the likely timescale for recovery can also be stated, and assessed, with some confidence; and the decision for the tribunal is, again, unlikely to be a difficult or controversial one. But cases concerning mental ill-health, by way of prolonged or recurring stress, anxiety, and/or depression (often associated with the litigation or its subject matter, itself), perhaps tend to dominate the authorities, because they often involve (or are said to involve) features that potentially have weightier implications for the other party's rights to a fair trial within a reasonable timescale, and/or wider public interest considerations.

78. There is one other aspect worth noting. In principle, the question of whether to postpone a trial on grounds of medical unfitness, and that of what adjustments may be necessary to enable fair participation in litigation or a trial, arise from different scenarios. But in practice there may sometimes be features of both present, or the situation may otherwise require some careful scrutiny, to enable the tribunal to see clearly what is truly at issue.

Tribunal's initial decision

89. Our initial response to the application was to adjourn proceedings on day 4 (a Thursday) in order for the Claimant to seek to secure medical evidence and/or fresh legal representation.

90. The tribunal drafted the following to assist the Claimant in making a focussed request for medical evidence (and gave her both a hard and soft copy):

"The Claimant has reported to the tribunal [redacted]

Is the Claimant currently fit to participate in employment tribunal proceedings:

A) as a litigant in person (e.g. she would need to answer questions posed to her by the other side's barrister, to cross-examine the other side's witnesses, to navigate a bundle of documents and make a closing statement)?
B) if legal represented (she would need to be able to answer questions posed to her by the other side's barrister and give her representative instructions about the case so he/she can cross examine the other side's witness and generally represent her)?

If not, are you able to say when she is likely to be?"

Day 5 (10.03.2023)

91. The tribunal was in chambers; the parties were not in attendance in order to allow time for the Claimant to obtain medical evidence and/or instruct new lawyers.

Day 6 (11.03.2023)

Application to postpone resumed

92. The Claimant pursued the application to postpone. She had attempted to instruct fresh lawyers but without success. The timescales involved were prohibitive. The Claimant had contacted her GP with the following results.

93. Firstly, she had been referred for an urgent [redacted] appointment to commence investigations into the [redacted] problems she reported.

94. Secondly, the Claimant handed up an email from her GP. It stated "*I am not able to give an opinion on your suitability to attend court I'm afraid. I am not an expert in* [redacted] *or legal requirements for court appearances so will not be able to answer the questions you sent in."*

95. Thirdly, the Claimant forwarded an email from her GP that stated:

Dear Mrs Harutunian,

thanks for the email. The referral letter is your data so you can do with it as you wish.

I would probably sign you off for 2 weeks to start with and see how that affected your issues.

96. The Claimant also reported to us that she had had a car accident on the way to the tribunal. She said she had not slept for a long time and that she had been nodding off on the journey which was a long one. She said that she had had a number of near misses.

97. The Claimant submitted that she needed to be legally represented in order to have a fair hearing. She referred to Mr Maini-Thompson's submission that this was the case. She also referred to his submission that the case was not suitable for direct public access. She also suggested that she had not been present for the Respondent's strike-out application and that the tribunal had proceeded with it in her absence. We deal with this matter more fully below.

98. The Respondents opposed the application. Ms Bell submitted that it was a balancing exercise and that the balance favoured continuing.

Discussion and conclusion

99. In this case there are really two strands to the Claimant's application to postpone, although they are inter-related.

100. The first is that she prepared for the trial on the basis that she would be represented by Counsel. On day 4 of the hearing, counsel was sacked. He effectively indicated that in any event if he had not been sacked he would have had to withdraw. He reached that conclusion after taking advice from the Bar Council ethics line and from senior colleagues. He would therefore not accept reinstructions if the Claimant changed her mind and sought instruct him.

101. This is a heavy case. The issues are complicated factually. The bundle is over 1500 pages long. The Respondent's witness evidence is over a 110 pages long. The Claimant is not a lawyer nor is she an advocate. She had not prepared any cross-examination as she was expecting counsel to do it. It seemed to us that the Claimant was significantly prejudiced by losing counsel mid-trial.

102. It would be one thing if she had planned to present her own case at the hearing and prepared on that basis but it is quite another to prepare on the basis of being represented by counsel and then no longer to have counsel.

103. The Respondents submit in effect that this factor is tempered by the Claimant choosing to sack counsel and doing so in order to get round him seeking to respect the tribunal's ruling that the Claimant could not give an additional oral witness statement.

104. The problem with that submission is that in reality we are in no position to fully understand the reason(s) why counsel was sacked nor whether the Claimant behaved unreasonably / strategically in that regard. That is because we have not

been privy to most of the conversations between the Claimant and her counsel which rightly took place privately under privilege. We really do not know anything like the full story of what passed between them nor would it be proper for us to try to get to the bottom of that.

105. Beyond that, in so far as we do have any visibility of why counsel was sacked, it seems to have been at least in part because the Claimant wanted to report particular health issues to the tribunal and her understanding was that she needed to sack counsel in order to do that. If at the time the Claimant applied to make an additional oral witness statement we had we known that what the Claimant wanted to do was report some health issues - we would simply have asked counsel to tell us what the health issues were. However, as above, when the application was made for the Claimant to give an additional oral statement we asked what the gist of it was and counsel was unable to say save that it went beyond her witness statement. (There are various possible reasons why he was unable to say and we do not know which is the applicable one.) Whether the Claimant's understanding - that she needed to sack counsel in order for the tribunal to come to know the health issues she wanted to report – was reasonable or not is impossible for us to assess. It would depend largely on privileged conversations between the Claimant and counsel.

106. All in all, the circumstances are such that we could not fairly conclude that the Claimant culpably brought upon herself the prejudice she would experience if suddenly required to self-represent for the remainder of trial. This prejudice thus weighs heavily in the balance.

107. For the avoidance of doubt, nothing we say here is a criticism of Mr Maini-Thompson even impliedly. He was bound by, among other things, his instructions and we have no clear idea of what they were.

108. The second strand is the health strand. The Claimant reports significant [redacted]problems. Taken at their highest they could represent a significant barrier to participation in the trial particularly if self-representing.

109. It must be said that the Claimant is partly to blame for this matter arising in the unmanaged way that it has. It seems that she has been experiencing symptoms for some months (according to the [redacted]referral). Yet she did not do anything to manage the situation in advance of trial. For instance, no application to postpone was made to allow investigations to be carried out.

110. The evidence that we do have is equivocal. The most recent email from the GP suggests the GP would sign the Claimant off of work for two weeks. That is not the same as saying in terms she is unfit for tribunal proceedings (something the GP declined to express an opinion on directly) but is certainly 'trending in that direction'. That is especially so given that the Claimant does not have a job and her current work is, more than anything, pursuing the tribunal proceedings.

Realistically, the tribunal proceedings in this case would be a lot more demanding than day to day work.

111. There is, overall, a reasonable basis (the Claimant's self-reporting and such medical evidence as there is) to conclude that the Claimant may be unfit to proceed. The evidence is imperfect but the timing and nature of the reported ill-health are such that there is no option of deferring the decision to get better evidence.

112. The possible unfitness for trial also weighs heavily in the balance.

113. There can be no doubt that the above two factors we have analysed each amount to an 'exceptional' reason within the meaning of rule 30A and all the more clearly do so when put together.

114. Still, there is another side to this which we must weigh in the balance. The Respondents have a right to a fair trial and that includes one that takes place in a reasonable timeframe. This is a case that has been postponed once before and is already getting old and stale. A great deal of time and cost had no doubt been expended in preparing for this hearing.

115. Having made inquiries of listing, the case can come back before the tribunal as soon as September 2023 (in the event we have postponed to November 2023 to take account of the Respondents' availability). That is a significant delay and one we take very seriously.

116. However, it is clear to us that the factors in favour of postponement do outweigh the factors in favour of continuing and thus whilst regretting the delay and cost, on balance we must postpone.

Application for reconsideration of strike-out

117. The Claimant applied for the tribunal to reconsider its strike-out of the victimisation claim. The basis of the application was that the Claimant said she had not been able to participate in the application because she had been absent. She said that she had asked her counsel to delay the start of the hearing until 2.30pm on day 2 so that she could attend but that she was told (by him) it would start at 2pm and there was no scope for a later start. She suggested that when she arrived on day 2 the application had finished and all she heard was Judge Dyal saying that he would not summarise what had happened but that her counsel would explain it to her later.

118. The Claimant said that if she had been present at the application she could have pointed to relevant documents. She referred to her email of 29 December 2022 (and would have handed it up save that Judge Dyal indicated the tribunal already had it, and indeed had referred to it in terms in it's reasons).

119. The Claimant handed up a further five documents all correspondence:

119.1. 18 January 2022 email to tribunal;
119.2. 4 July 2022, email to tribunal;
119.3. 1 June 2022, email to Mr Griffiths
119.4. 27 June 2022, email to Mr Griffiths
119.5. 21 July 2022, email to Mr Griffiths;

120. The Claimant submitted that she had provided information about her protected acts and that the Respondent was culpable for delays in disclosure. She suggested that the difficultly arose because there had been a Speak Up and a grievance process and it was necessary to pick-out documents from that process and she had not been present during the strike-out application. She also suggested that Mr Maini-Thompson had not been instructed long enough to know the case well enough to do this.

121. It was evident that one of the things the Claimant was doing was moving the goalposts. Whereas her then counsel had identified with clarity and precision that there was a single protected act and what it was, the Clamant was reverting to a more generalised, non-specific statement of her protected acts. She was trying to present them as having occurred during the course of the Speak Up and grievance process without actually saying specifically what the protected acts were. Notably none of the documents the Claimant referred to in this application took matters materially further as regards specifically identifying a protected act.

122. The application was refused with the following reasons.

Discussion and conclusion

123. The application has no reasonable prospect of success and is refused pursuant to rule 71(1).

124. The Respondents set out the essential basis of the application to strike-out the victimisation claim in counsel's opening note. On day 1, as set out above, there was a discussion of the victimisation claim and the protected act relied upon was identified with particularity by the Claimant's counsel in her presence. The Respondents immediately made their position clear, that this was the first they had heard of this protected act and that the strike-out application would be pursued. This was also in the Claimant's presence. The tribunal made clear that if it would be the Claimant's case that she had previously raised the protected act now relied upon whether in pleadings or otherwise, then she should come ready to point to that on day 2.

125. It was agreed that the application to strike-out would be heard at 2pm on day 2.

126. We do not know what was said privately between the Claimant and her counsel about proceeding on the afternoon of day 2. However, what we do know is what the Claimant's counsel told us: that the Claimant was running late but that he had instructions to proceed in her absence.

127. The Claimant's recollection of the events of the afternoon of day 2 is materially wrong in places. What in fact happened is this.

128. Just after 14.00 the rule 50 application was heard first (we heard from both sides). Ms Bell then started making the application to strike-out at 14.43. She was still speaking when the Claimant arrived at 15.03. Upon the Claimant's arrival Judge Dyal welcomed her to the room and said he would not summarise what had been said that afternoon but words to the effect that her counsel no doubt could afterwards. Ms Bell continued with her submissions in the Claimant's presence. After the Claimant arrived Ms Bell made the following particular submission in relation to the protected act: that the tribunal would have the account of one person of a two person conversation and the Respondents would not be able to challenge that evidence which was not even in the Claimant's witness statement. Ms Bell then made submissions on why it was proportionate to strike out.

129. At that point Mr Maini-Thompson asked for a break to take instructions which the tribunal agreed to. He asked for 5 minutes but in fact we broke from 15.11 to 15.20. We did not rush the parties to return we simply resumed when they did. On returning, Mr Maini-Thompson made submissions in response to the strike-out application in the Claimant's presence.

130. Counsel's response included addressing the issue of whether the Claimant had or had not previously specified the protected act that is now relied upon (and we note that on day 1 we had asked him to come prepared to deal with this). Mr Maini-Thompson acknowledged that the Claimant's note at p411 did not cover the matter and on her instructions explained why it did not. Essentially, she said, it was not on her mind that day. He said, again on the Claimant's instructions, that she had raised the speak-up with Ms Denman in September or October 2018. However, he did not go so far as to say that the specific point now relied upon as the protected act was raised with Ms Denman.

131. With that background in mind, there is no basis for reconsidering the striking out of the victimisation claim:

131.1. There was no application to delay the start of the hearing on day 2. The tribunal was entitled to proceed to hear the application to strike-out in the Claimant's absence in light of her counsel volunteering that he had instructions to proceed in the Claimant's absence. Further there was no request to delay the start of the hearing.

131.2. The Claimant was properly represented by counsel throughout the application.
131.3. In any event, the essence of the application to strike-out was very simple and it was foreshadowed clearly on day 1.
131.4. The Claimant was present for the latter part of Ms Bell's submissions on day 2, which included the kernel of her application, namely that the Claimant was taking a new point that turned on an oral conversation that the Respondents did not have prior notice of or a fair opportunity to deal with;
131.5. A break was taken before the Claimant's counsel responded to the application, in order for him to take instructions from the Claimant (this was at his request);
131.6. The Claimant was also present for her counsel's response. He dealt with the factual (and all other) aspects of the application and was obviously relaying her instructions when he did so.
131.7. Even now the Claimant has not said anything or produced any document that alters the analysis.

132. The application for reconsideration has no reasonable prospect of success and is refused.

Renewed rule 50 application

133. The Claimant made a renewed application for a rule 50 order just before 1pm on day 6. Her focus was on the medical information that she had provided in the course of the hearing particularly the information about having [redacted] problems. Judge Dyal asked the Claimant to explain why she said it would be harmful to her interests for this information to be referred to openly. The tribunal gave the Claimant until 2pm to think about that matter.

134. At 2pm the Claimant wanted to defer addressing the matter to a later unspecified time. However, the tribunal were not content to leave the matter hanging. The Claimant then addressed the tribunal at some length and she did so ably and cogently. In essence:

134.1. She is a very private person;
134.2. She has had to say very private information in front of strangers;
134.3. She wants the medical information to remain outside of the public domain;
134.4. She is concerned that the information could be held against her. The [redacted]issues are under investigation and she does not even know what they are yet.
134.5. If the [redacted]issues went on the internet and could be searched for, they could lead to stigmatisation (our word to capture the essence of the Claimant's submission.)

135. The Respondent was neutral.

Discussion and conclusion

136. It seemed to us that in one respect matters had moved on since the Claimant's previous rule 50 application. The Claimant has disclosed [redacted] issues that are, taken at face value, [redacted]

137. It is currently unclear what is causing the [redacted] issues that are reported. As yet there is no diagnosis and there is no prognosis. [redacted] The matter is under investigation.

138. Most importantly, the nature of the [redacted] is such that they are, in our view, especially personal and have significant scope for being stigmatising.

139. We are satisfied that the Claimant's article 8 rights are engaged.

140. In our view there is a sufficient basis for a derogation from the principle of open justice but *only* a very small one. Anything more would not strike the right balance between article 8 and open justice/article 10.

140.1. The existence of the [redacted] can be protected from widespread publicity by redacting references to them in any document that goes on the Register or forms part of the public record and by making an order restricting the reporting of them.

140.2. This would not make them wholly private since they would still be referred to in the proceedings which are open to members of the public to attend if they so wish (though they have not to date). If members of the public did learn of the [redacted] issues the order restricting publication would apply and would restrict further publicity.

140.3. If this approach is taken the derogations from open justice would be reasonably effective in protecting against widespread publicity of the [redacted] issues but at very little cost to open justice.

140.4. The [redacted] issues are not a feature of the substantive claim. As at today, it seems their relevance is limited to the conduct of the litigation rather than the underlying claim. Thus the imposition on open justice is more minor than it would be if the [redacted] ssues were features of the substantive claim.

143. In our view it would not strike the correct balance between the Claimant's article 8 rights and open justice/article 10 to make any heavier privacy order, for instance for the names of the parties to be anonymised or for the proceedings to be held in private. Such measures would be major derogations from the principle of open justice which cannot be justified by the limited harm to the Claimant's article 8 rights identified.

144. Finally, we make clear that the [redacted] issues are of a completely different kind and order to the other medical problems that the Claimant has reported. Those are nothing like as personal and do not have the same potential for

stigmatisation. In relation to them we see no reason to take any different view than that expressed on day 3.

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Employment Judge Dyal

_____

Date 14.03.2023

SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS