EMPLOYMENT TRIBUNALS

Claimant: Dr P Vashishtha

Respondent: 1. Health Education England
8. St Helen's and Knowsley Teaching Hospital NHS Trust
11. Dr Sajid Zaib
12. Dr A Chakraborty

RECORD OF A PRELIMINARY HEARING

Heard at: Watford Employment Tribunal (in public; by video)

On: 3 February 2023

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: Mr M Sutton KC
For the first cohort of respondents, now R1 & 8: Dr E Morgan KC,
For the second cohort, now R11-12: Mr J Cook, Counsel

RESERVED JUDGMENT

1. All of the complaints against all of the respondents are struck out.

REASONS

Introduction

1. This hearing was listed by me for the reasons stated in the letter from the Tribunal to the parties dated 26 October 2022. The background was that a 35 day hearing had been due to commence Monday 31 October 2022. At a preliminary hearing on 27 September 2022, I had refused an application from the Claimant for postponement. There had then been further correspondence as discussed in more detail below.

The Hearing and The Evidence

2. The hearing took place entirely remotely by video. There were no significant technical issues.

3. I heard oral witness evidence from the Claimant and Professor Mamelok, each of whom had produced a written statement.

4. I had a bundle of around 2869 pages. I had skeleton arguments from each of the 3 representatives. I had an authorities bundle to which there was one addition during the course of the hearing.

5. The Claimant has had some relevant assistance from Ms Norris, a solicitor, working for Lawyers For Doctors Ltd who was the Claimant's representative at the 27 September 2022 hearing before me (as well as some earlier preliminary hearings), and who corresponded with the Tribunal and the Respondents in relation to these applications. The Claimant stated in the hearing, and I accept, that he is aware of everything that was written by Lawyers For Doctors Ltd and that it was all done with his knowledge/approval. This is subject to the fact that while he was in India between October and December 2022, some of the letters sent by Lawyers For Doctors Ltd were sent before he had seen a draft version, due to the urgency.

The Law

6. The respondents' position is that my decision should be to strike out on under Rule 37.

> 37.— Striking out
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

7. Strike out is a "Draconic power, not to be too readily exercised." (Blockbuster Entertainment v James [*2006] IRLR 630*).

8. In terms of the manner of proceedings, the case law which I have to consider includes, for example, De Keyser Limited v Wilson [2001] IRLR 324. At paragraph 55 of Bolch v Chipman [2004] IRLR 140, a four step process is recommended.

(1) There must be a conclusion by the Tribunal not simply that a party has

behaved unreasonably but that the proceedings have been conducted by or on his behalf unreasonably.

…

There can no doubt be a finding in relation to conduct outside the court room and outside the ambit of legal correspondence which could be found to be a method of conducting the proceedings. For example, it may well be, on appropriate facts, that a Tribunal might find that if there were a threat that unless proceedings were withdrawn some course or other could be taken, that that would amount to a scandalous method of conducting those proceedings. But as we have indicated, there was no such finding here.

…. If there is such to be a finding in respect of [what is now Rule 37(1)(b)] in this or any case, there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious such conduct.

This proposition is supported by the recent decision of the Court of Appeal, to which our attention has been drawn by Miss Genn, in *Bennett v Southwark London Borough Council [2002] ICR 881* , where the conclusion was that conduct in the Tribunal by an advocate, by way of aberrant and offensive behaviour, was not, in those circumstances, relevant conduct within Order 15 (2) (d).

(2) Assuming there be a finding that the proceedings have been conducted scandalously, unreasonably or vexatiously, that is not the final question so far as leading on to an order that the Notice of Appearance must be struck out.

The helpful and influential decision of the *Employment Appeal Tribunal, per Lindsay P, in De Keyser Ltd v Wilson [2001] IRLR 324* is directly in point. De Keyser makes it plain that there can be circumstances in which a finding can lead straight to a debarring order. Such an example, and we note paragraph 25 of Lindsay P's judgment, is "wilful, deliberate or contumelious disobedience" of the Order of a court.

But in ordinary circumstances it is plain from Lindsay P's judgment that what is required before there can be a strike out of a Notice of Appearance or indeed an Originating Application is a conclusion as to whether a fair trial is or is not still possible.

That decision is not only a decision binding on Employment Tribunals and persuasive before this Tribunal, but it follows well-established authority — in the *High Court in the persuasive decision of Logicrose Ltd v Southend United Football Club Ltd by Millett J (as he then was), reported in The Times 5 March 1998* , and in the *Court of Appeal in Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167* ; both of which authorities were recited by Lindsay P in the course of his judgment in De Keyser.

An enquiry must be held by the tribunal, having made its finding as to the conduct in question, absent the exceptional case as to whether a fair trial is still possible. In Logicrose it was held that such a fair trial was still possible. In Arrow Nominees it was held that it was not.

The reason for the need for that question to be asked, save in the exceptional circumstance to which we and Lindsay P have referred, is that

a striking out order is not (or at any rate not simply) regarded as a punishment. We quote from Millett J's judgment as reported in The Times:

> "The deliberate and successful suppression of a material document was a serious abuse of the process of the court and might well merit the exclusion of the offender from all further participation in the trial. The reason was that it made the fair trial of the action impossible to achieve and judgment in favour of the offender unsafe.
>
> But if the threat of such exclusion produced the missing document then the object of Order 24, rule 16 was achieved. In his Lordship's judgment an action ought to be dismissed or the defence struck out only in the most exceptional circumstances once the missing document had been produced and then only, if, despite its production, there remained a real risk that justice could not be done.
>
> That might be the case if it was no longer possible to remedy the consequences of the document's suppression despite its production. It would not be right to drive a litigant from the judgment seat, without a determination of the issues, as a punishment for his conduct, however deplorable, unless there was a real risk that the conduct would render further proceedings unsatisfactory."

One has only to set those words of Millett J against the words of the Tribunal in paragraph 8 in this case "… it is appropriate that he should forfeit the privilege of conducting a defence within the Tribunal" to see that in our judgment the Tribunal in this case did not approach the question correctly in law.

Employment tribunals must have the power to manage cases, and to make orders that unless their orders be complied with applications will be debarred or dismissed, and if there are breaches of those orders then of course, pursuant to what Lindsay P himself made clear in De Keyser, there will have been, absent a proper excuse, wilful disobedience of a court order, which can lead to a strike out.

There will plainly be circumstances, perhaps such as we indicated earlier by way of illustration, in which conduct of proceedings, for example by way of a threat, even if it results in some kind of promise of good behaviour, or something of that kind, by a respondent, can still have such lingering effect that the Tribunal is of the view that there can no longer be a fair trial. That can certainly be the case in the example given by Millett J where documents have been fabricated, if, for example, no tribunal hearing the case can be satisfied that there are no further documents to be produced or that the present documents may not also have been fabricated, because confidence has been entirely lost in the good faith and honesty of one party or the other. But there must be, and certainly should have been in this case, in our judgment, a conclusion as to whether or not a fair trial can and could be held.

(3) Once there has been a conclusion, if there has been, that the proceedings have been conducted in breach of [what is now Rule 37(1)(b)], and that a fair trial is not possible, there still remains the question as to what remedy the tribunal considers appropriate, which is proportionate to its conclusion. It is also possible, of course, that there can be a remedy, even

> in the absence of a conclusion that a fair trial is no longer possible, which amounts to some kind of punishment, but which, if it does not drive the defendant from the judgment seat (in the words of Millett J) may still be an appropriate penalty to impose, provided that it does not lead to a debarring from the case in its entirety, but some lesser penalty.
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> (4) But even if the question of a fair trial is found against such a party, the question still arises as to consequence. That is clear because the remedy, under [what is now Rule 37(1)(b)] , is or can be the striking out of the Notice of Appearance. The effect of a Notice of Appearance being struck out is of course that there is no Notice of Appearance served. The consequence of there being no Notice of Appearance by a Respondent is set out in [what is now Rule 21] ..
>
> We are satisfied that any tribunal making an order, in the circumstances in which this Tribunal made its order, must ask the question as to what the appropriate consequence is. As a result of [what is now Rule 21(3)] a respondent who has not entered an appearance is not entitled to take any part in the proceedings. But that does not prevent the tribunal, pursuant to its case management powers under Rule 4 or its powers to regulate its own procedure under Rule 15, to make appropriate and proportionate orders.
>
> An option in such a case as this would have been for the Tribunal to debar the Respondent from taking any further part in liability but not necessarily to debar the Respondent but rather to permit him to take part and at the very least probe the case for the Applicant on the question of compensation.
>
> This Tribunal did not ask itself any such questions.

9. In other words, as well as making clear that it is important to make findings of fact about the conduct, and precisely analyse the effects of the (allegedly) unreasonable conduct on the proceedings, it is crucial to bear in mind that the sanction of strike out does not exist so that the Tribunal can show disapproval of the conduct. A thought process that the conduct is so unreasonable that the party must be punished by having their claim struck out (or being debarred from participating in the case of a respondent) is impermissible. Instead, if there is found to have been unreasonable conduct of the proceedings, the focus must be on what effects that conduct has had on the proceedings. Generally speaking, where a fair trial is still possible, despite the unreasonableness, strike out is inappropriate; this general principle is subject to the fact that, as per De Keyser, there can be some circumstances which lead straight to a debarring order (including "wilful, deliberate or contumelious disobedience" of the order of a court or tribunal).

10. If the analysis shows that a party has acted scandalously with the intention of preventing a fair trial from ever taking place, then that in itself is a significant issue and may potentially in itself be a ground for striking out a claim. However, if the party has not acted with that intention, and if the effect of their conduct has not been to prevent a fair hearing, then (if any sanction is needed at all) it may be a appropriate to apply a sanction short of a strike out. A strike out is a draconian measure and should potentially only be taken as a last resort.

11. In considering whether a strike out should be made for non-compliance with any orders of the tribunal then the factors are listed in Weir Valves and Controls (UK) Ltd

v Armitage [2004] ICR 371. They include: 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; whether striking out or some lesser remedy would be an appropriate response to the disobedience.

12. Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, [2006] IRLR 630 contained an example of where, on the facts, the Tribunal did decide that the claimant had deliberately flouted the orders of the tribunal and that strike out was appropriate. The Employment Appeal Tribunal overturned that decision (and the Court of Appeal agreed with EAT) on the basis that the Tribunal had not correctly analysed the extent of the claimant's failures to comply with its orders, or the effects that the conduct would be likely to have on whether a fair hearing was possible. Amongst other things, there had been no (or insufficient) analysis of whether, in fact, even though the Claimant had brought new documents and a revised statement on the first day of the hearing, it might have been possible to simply proceed with the hearing within the listed (six day) hearing slot.

13. The Court of Appeal also pointed out the importance of the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (which is set out in Schedule 1 of Human Rights Act 1998) and by common law and the need to take that into account when considering strike out:

> 20. It is common ground that ... striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more structured approach to it than is apparent in the determination before us.
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> 21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact if it is a fact that the tribunal is ready to try the claims; or as the case may be that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences.

14. Arrow Nominees Inc v Blackledge [2001] BCC 591 was one of the cases referred to in Bolch (though it was not employment tribunal litigation). In that case, the Court of Appeal, in discussing the factors relevant to whether a fair trial remains possible, said:

> …[A] fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court.

15. This was a comment discussed by the EAT in Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327, where it was said:

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

16. On the facts of that case, on the first day of a five-day hearing to consider the Claimant's claims of unfair dismissal, wrongful dismissal and holiday pay, the Employment Tribunal struck out the Respondents' Response for failing to comply with the Tribunal's orders. Those failures meant (in the tribunal's judgment) that it was impossible for the trial to proceed within that listing slot and the tribunal decided that, rather than postpone, strike out was proportionate and appropriate. The EAT judgment noted, amongst other things:

    16.1. That, in Blockbuster, it had been stated strike out might be appropriate where EITHER "the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps", OR that the unreasonable conduct "has made a fair trial impossible" and that these were alternative conditions. Both did not need to be satisfied in order for strike out to be potentially justified.

    16.2. The respondent had sought to appeal on the ground that "the Tribunal ought to have considered whether a fair trial was no longer possible at all and not just whether it would be possible within the trial listing", but that ground had not made it through the sift.

16.3. The decision that "a fair trial was not possible at any point in the five-day trial window … was sufficient to trigger the power to strike-out. Whether or not the power is exercised will depend on the proportionality of taking that step".

16.4. Strike out under Rule 37(1)(e) potentially does require a decision that a fair trial will not be possible on any future occasion (within the foreseeable future). However, it is wrong to seek to import all of the requirements for strike out under Rule 37(1)(e) when the application/decision is being based on Rule 37(1)(b).

16.5. It is not inevitable that, if postponement to a future date would enable there to be a fair hearing on that future date then that option (possibly accompanied by an award of costs) must be the response to unreasonable conduct that has prevented a fair hearing taking place on the scheduled date. If such a decision is the proportionate one, then it should be made. However, the other party is free to argue that should a decision would not be proportionate and that – on the contrary – the proportionate decision is to strike out (meaning that, in the case of a claim, the claim would be at an end, or, in the case of a response, that decisions on liability and remedy could be made within the scheduled listing, with zero, or limited, participation by the Respondent, as per Rule 21.)

17. In other words, Croma does not – by any means – suggest that it would necessarily be wrong to postpone a hearing just because the necessity for postponement was brought about by one party's unreasonable conduct. It does, however, make clear that the case law (including De Keyser, Bolch and Blockbuster) does not necessarily entitle the defaulting party to a postponement (even with costs), regardless of the circumstances, provided they can persuade the judge that a fair hearing could take place on the dates of the re-scheduled hearing. Strike out is likely to be the exception rather than the rule, and postponement might often be more proportionate taking into account the "Draconic" nature of the power. However, the effects of postponement on the other parties must be considered. The other parties, as well as the defaulting party, also have a right to a fair trial.

18. Under Rules 37, it is necessary, as with any other decision that a judge must make, to have regard to the overriding objective. I must take into account all relevant factors, and ignore anything which is not relevant. I must make a decision which is in the interests of justice and which is proportionate. I must have proper regard to the Article 6 rights of all the parties.

19. Strike out under Rule 37(1)(d) would require finding that the party was not actively pursuing the claim. Although I note the Respondents' criticisms, I made orders in relation to witness statements, and other matters, at the September hearing. The Claimant sent his statement to the Respondent. He has also made detailed arguments for why the litigation should continue. He believes no further steps by him are required before the final hearing could commence. I am not persuaded that this ground is made out, and need say no more about what the approach to the discretion for strike out on this ground should be.

20. Rule 37(1)(e) provides a free-standing basis for strike out in circumstances where the Tribunal concludes that a fair trial of all or part of a claim is no longer possible.

21. Article 6 ECHR provides that litigants are entitled to a fair trial within a reasonable time. Whether a fair trial remains possible within a reasonable time is factual question for the Tribunal.

22. A fair trial was no longer possible in Peixoto v British Telecommunications plc UKEAT/0222/07. The EAT accepted that the Tribunal had properly considered Article 6 and stated:

> This Tribunal held that it could not find any point in the foreseeable or even the distant future, when a trial might be likely. The requirement of Article 6 is that a trial must take place within a reasonable time. On that basis the Tribunal was correct. If it could not in 2007 see any time in the future when this case arising in 2003 could be tried, then it was correct to form the view that a fair trial was not possible and to strike it out.

23. As the Claimant's skeleton argument for this hearing observes, that case was found to be an extraordinary one.

24. Under Rule 37(1)(e), it is not necessary to prove that a party has breached an order, or failed to actively pursue the matter. It is not necessary to prove that a party is at fault at all. That being said, the grounds in Rule 37(1) are not mutually exclusive. There is nothing to prevent a party arguing for strike out on the basis that there should be strike out on one of the other grounds (for example, because of unreasonable conduct), but that, in the alternative, there should be a decision, as per Rule 37(1)(e) that a fair hearing is not possible.

25. A decision under Rule 37(1)(e) might be made when no hearing is currently listed (perhaps as a result of previous postponement and/or stay decisions). It is probably unlikely that this ground would ever be justified if a hearing has already been listed, and there is no reason to suspect that that hearing could not go ahead. This is because, by implication, the judge who listed that hearing must have been satisfied that there could be a fair hearing on the dates listed. However, once it becomes apparent that a previously scheduled hearing cannot go ahead on the planned dates, then (if raised by the parties, or of its own initiative) it may be possible to consider whether – by the next available dates – a fair hearing can still take place.

26. In Abegaze v Shrewsbury College of Arts & Technology [2009] EWCA Civ 96, [2010] IRLR 236, the Court of Appeal emphasised that the issue of whether there can ever be a fair hearing requires findings of fact by the Tribunal. Furthermore, any such findings must – like any other finding of fact – have a proper evidential basis. Strike out on this ground is not likely to be appropriate where, by use of case management orders, including Unless Orders, the Tribunal a fair hearing could potentially take place.

27. In my written reasons for refusing the postponement application that I heard on 27 September 2022, I stated:

> 49. It is common ground between the parties that Rules 29, 30 and Rules 30A potentially are relevant when there is a postponement application.
>
> **29. Case management orders**

The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order. Subject to rule 30A(2) and (3) the particular powers identified in the following rules do not restrict that general power. A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

30.— Applications for case management orders
(1) An application by a party for a particular case management order may be made either at a hearing or presented in writing to the Tribunal.
(2) Where a party applies in writing, they shall notify the other parties that any objections to the application should be sent to the Tribunal as soon as possible.
(3) The Tribunal may deal with such an application in writing or order that it be dealt with at a preliminary or final hearing.

30A.— Postponements
(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.
(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;
(b) the application was necessitated by an act or omission of another party or the Tribunal;
or
(c) there are exceptional circumstances.
(3) Where a Tribunal has ordered two or more postponements of a hearing in the same proceedings
on the application of the same party and that party makes an application for a further postponement,
the Tribunal may only order a postponement on that application where—
(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;
(b) the application was necessitated by an act or omission of another party or the Tribunal;
or
(c) there are exceptional circumstances.
(4) For the purposes of this rule—
(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;
(b) “exceptional circumstances” may include ill health relating to an existing long term health condition or disability.

50. It is also common ground that neither Rule 30(A)(2) of Rule 30(A)(3) apply. The decision to postpone is one which lies within the general case management powers.

51. It is a decision to be reached by acting judicially taking into account all relevant

factors and ignoring all irrelevant factors. The overriding objective sets out important considerations. Parties have the right to a fair trial, and this is an important human rights consideration as well as a requirement of the rules.

52. I have taken into account the Presidential Guidance on seeking a postponement of a hearing. That is, of course, guidance only. The actual decision to be made is a matter for me.

53. Being referred of course to Teinaz v London Borough of Wandsworth [2002] ICR 1471; Neutral Citation Number: [2002] EWCA Civ 1040, where it was noted:

> 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.

54. In O'Cathail v Transport for London [2012] ICR 614, Neutral Citation Number: [2013] EWCA Civ 21, the Court of Appeal said:

> 42 Thirdly, the ET correctly took the overarching fairness factor into account in assessing the effect of its decision on both sides. The position of the potentially absent claimant is highly relevant in all cases of adjournment refusal, but it is not determinative of every case. The ET expressly stated that this was "a very rare case", in which it was more unfair in general for the matter not to proceed than it would be to adjourn.
>
> 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.
>
> 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.

55. In Ms Y Ameyaw v Price Waterhouse Coopers Services Ltd [2021] UKEAT 2019-000480, the Employment Appeal Tribunal said at paragraph 55 , referring to the appellant's counsel:

> … The tribunal expressly considered whether the proposed adjustment of using the computer and projection equipment provided by the respondent would enable the claimant to participate effectively in the hearing. Indeed [appellant's counsel] accepted - rightly, in my judgment - that it is not a requirement of a fair hearing that a party should be present at all. Many hearings are conducted in the absence - for whatever reason - of one or more of the parties. See O'Cathail v Transport for

London at 47

56. In paragraph 60 of the same decision the EAT said:

> Deciding an application for an adjournment of this sort is not an exercise in seeking perfection; as Lewison LJ stated in Morton at [23], it is often an attempt to find the "least worst solution".

57. I acknowledge, of course, that Ameyaw was looking at slightly different circumstances. In particular, because of Rule 30A, in that case, the party seeking a postponement had to show exceptional circumstances.

58. However, as per the facts of Ameyaw, a postponement might be refused if there is a partial solution for the particular difficulty led the party to apply for the postponement. It might be true that, because of the difficulty the party might not be able to participate in the hearing in exactly the same way that they might otherwise have done had that difficulty not arisen. However, a postponement does not necessarily have to be granted because of that fact. A balancing exercise is required, which takes into account both the disadvantages to any of the parties of granting the postponement, as well as disadvantages to any of the parties of refusing the postponement.

59. Where a litigant is disabled the tribunal is under a duty to make adjustments to ensure effective access to justice and it is helpful to consult the Equal Treatment Bench Book when matters of this nature arise. That is guidance not evidence, but it is very helpful. I have considered the passages in the Equal Treatment Bench Book relating to dyslexia. I am not saying these are the claimant's own impairments, because each individual is different, but these are useful matters for me to be aware of when reaching my decision. Potential difficulties with dyslexia can include, for some people, some or all of the following:

    - a weak short-term memory,
    - a poor working memory,
    - difficulties retaining information without notes and inefficient processing of information in written texts,
    - difficulty distinguishing important information from important details,
    - word finding problems, as with other people of course but hearings can be stressful with people who have dyslexia as a disability,
    - difficulty following the back and forth nature of the court exchanges. Inability, or at least difficulty in finding the correct place in documents quickly,
    - Maintaining concentration and focus.

60. Adjustments for people with dyslexia will often be necessary during the hearing and especially during time that they are being cross examined.

61. As said in Teinaz:

> 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.

62. The other side of that coin is that where flexibility in the hearing arrangements can prevent there being a "denial of justice" to the party seeking the postponement, then it is vital to consider whether there might be a denial of justice to any other party by postponing.

28. I have those rules, cases and principles in mind in considering the matters relevant to this hearing.

29. I would add that, as the extract from Teinaz makes clear, Article 6 is a relevant and important consideration in relation to postponement applications. Furthermore, there is a need for (a) findings of fact and (b) for those findings to be supported by the evidence. One of the reasons for upholding the appeal in Teinaz was that there was no evidence to support the conclusion that the applicant had simply chosen not to attend, as opposed to making a decision which was based on medical advice.

30. The nonavailability of a party's representative might, in some circumstances, require a postponement in the interests of justice. See, for example, Khan v BP plc EA-2021-000261-JOJ. In that case, a party's intended representative had become genuinely unavailable. On the facts, it would not have been practicable for another representative to become sufficiently familiar with the material in time for the party to have a fair hearing within the original hearing slot. Therefore, despite the inconvenience and expense to other parties, a postponement was required.

31. In Phelan v Richardson Rogers Ltd UKEAT/0169/19/JOJ; UKEAT/0170/19/JOJ, the EAT reviewed the relevant authorities (including Teinaz and O'Cathail) in considering an appeal against (i) refusal of a postponement application and (ii) dismissal of claim under Rule 47 (on basis that the claimant had not attended the hearing). A decision under Rule 47 is distinct from and different from a decision under Rule 37. On the facts, the Tribunal's approach had been permissible, and the relevant factors had been considered

32. In Riley v Crown Prosecution Service, A2/2012/1692, the Tribunal refused to grant a postponement of seven months (which was the soonest the 20 day listing could be re-scheduled for) and to make Unless Orders. According to the Court of Appeal:

22. The judge then decided that he had to take a view and reach a conclusion as to whether a fair trial was possible. He set out a series of contentions made by the respondent as to why a fair trial was not achievable in the circumstances of the case. These contentions may be briefly described as:—

i) the mounting costs;
ii) the dimming of recollections of the respondent's witnesses, which the judge thought had some substance;
iii) the worry and stresses of the respondent's witnesses, which, to some extent, the judge thought had merit;
iv) the fact that some witnesses had left the respondent's employment, which the judge did not regard as presenting an insuperable difficulty; and
v) the absence of any definite prognosis of any recovery sufficient to take part in the proceedings in the foreseeable future.

23. He then concluded that, if he took account of (1) the fact that there was no prognosis of when, if ever, Ms Riley would be in a position to be well enough to take part in the proceedings, and (2) the balance of prejudice to either party, a fair trial was not possible.

33. The EAT and Court of Appeal both upheld the decision. The Court of Appeal commented:

27. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department which are as relevant today as they were 11 years ago:—

"The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights , having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. The Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days."

28. It would, in my judgment, be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal. Like Wilkie J I can see no error of law and would dismiss this appeal.

The Facts

34. The procedural history of the matter up to September 2022 is discussed in my written reasons for refusing the postponement request.

35. Following my decision at that hearing, there was an application by the Claimant to the Employment Appeal Tribunal. I have not seen the transcript of the EAT's decision, but it is common ground between the parties that (a) the appeal was dismissed by EAT, as opposed to being withdrawn and (b) it was dismissed (at least partly) on the merits, as opposed to being dismissed (only) because it was moot.

36. The correspondence between the parties reveals some disagreement about precisely what was said at the September hearing by the Claimant's representative, Ms Norris, about the arrangements for the Claimant to have counsel at the 35 day hearing due to commence 31 October 2022. Because of this, when I sent the Notice of Hearing and Case Management Order (page 2221 of the preliminary hearing bundle) I included my own opinion about what was said. Nothing that was said during the hearing changed my opinion, which was/is:

- I do not think that I was misled on 27 September by what the Claimant's side were saying about representation at the hearing. The application made was entirely on the basis that the Claimant could not attend in person and so the hearing therefore should be postponed. The Claimant made no specific representations about how the hearing could or should proceed with his being legally represented; he (through Ms Norris) said that it should not proceed like that, and that he would regard himself as having no choice other than to withdraw if I declined to postpone.
- In objecting to the application to postpone, and making suggestions for how the hearing could proceed, it was suggested on behalf of the respondents, that the Claimant's side had, all along, intended that the hearing would be attended by all of: (i) the Claimant; (ii) the Claimant's solicitor (or representative from the firm); (iii) the Claimant's counsel.
- In responding to the Respondents' objections, Ms Norris stated that it had never been intended that she or anybody from her firm would attend the hearing. I relied on that assurance, and I accepted it. As far as I am aware, the respondents are not challenging that assurance.
- Ms Norris said that the Claimant had been intending to have counsel, but was now considering whether to represent himself. I asked if she was disputing that the Respondents' version of events, which was that at all the preliminary hearings, the discussion had been that the Claimant would have counsel. Ms Norris confirmed she was not disputing that. I asked, in that case, what had changed, and why did she say the Claimant was now unsure as to whether he would have counsel. She said the change was simply the postponement application, and that the Claimant had cancelled counsel (a silk from Old Square, I was told) after the postponement application had been made. (So some time between 15 August and 26 September, by implication).
- I asked if anything else had changed, such as the Claimant's ability to pay, for example. I was told that nothing else had changed (although the Claimant would not be able to pay 2 brief fees: one for a hearing which was postponed, and another one for a hearing in two years time) and that Ms Norris presumed that – in principle – counsel could be reinstructed.
- I was not misled into thinking that she had specifically checked whether anything else had gone into counsel's diary since the cancellation. In context, she was doing no more than replying to confirm that there had been no (other) change of circumstances that would prevent her and the Claimant attempting to rebook counsel.
- Dr Morgan KC asked for the point to be even more directly addressed. I checked with Ms Norris that my understanding was correct. I said I acknowledged that she was saying that the Claimant might withdraw rather than use counsel, but said I thought she had said that, other than the fact that the Claimant had cancelled arrangements with counsel because of the postponement application, there was nothing preventing the Claimant using counsel. Other than stating that she had been surprised to be asked about this, she confirmed that that was the case.
- In the documents and information supplied after the 27 September hearing, it does not seem to be suggested that Ms Norris or the Claimant had got as far as sending a brief to Mr Sutton KC or to anyone else. It also does not seem to

be suggested that there was any attempt to find out which days within the hearing slot Mr Sutton (or anyone else) could do. It is unclear on which specific dates, after my decision given orally on 27 September 2022, attempts were made to book counsel.

37. Based on the evidence presented at both hearings, and in the bundle, my findings of fact about the Claimant's arrangements for counsel are that:

37.1. The Claimant always had the intention to use counsel at the final hearing. He was neither intending to represent himself, nor to use Ms Norris.

37.2. The Claimant had always accurately and fairly made that plain to the opponents and the Tribunal.

37.3. The Claimant, through Ms Norris, made arrangements for Mark Sutton QC (as he then was) of Old Square Chambers to keep the hearing dates free in his diary. In April 2022, enquiries about fees were made. No agreement on fees was reached at that stage. In June, Ms Norris asked if Mr Sutton was still available and said the Claimant wanted to use him if possible, subject to his being able to acquire funding. In July, her firm said that they still wanted to proceed, and asked about paying in tranches. The chambers made a proposed payment schedule on 1 August 2022. Further information about the proposal was supplied on 2 August 2022. On 25 August, the chambers chased for an update about whether the hearings should remain in counsel's diary (and, by implication at least, whether the booking was a firm one, and whether the payment schedule was agreed).

37.4. No reply was sent to that query, until, on 13 September, Ms Norris's associate wrote to say:

> I apologise for the delay In coming back to you regarding instructing Mark Sutton, I write to update you.
>
> We are currently awaiting the Tribunal's response to an urgent postponement application we have had to make. Unfortunately our client has received the devastating news that his mother (who Ilves in India) has been diagnosed with extensive bladder cancer and requires chemotherapy, surgery and reconstruction. Our client is needed in India to look after his elderly father, his mother and to liaise with the doctors to facilitate her care, which has to take place away from her home town due to the facilities available. If the Tribunal refuse the postponement, our client will have no choice but to withdraw his claim.
>
> There is to be a case management hearing which is currently listed on 27 September 2022 for 1 day before EJ Quill via CVP beginning at 10am, and our client is considering instructing senior counsel, preferably Mark Sutton, to represent him at this hearing. I would be grateful if you would provide quotes for senior counsel to include Mark Sutton if he is available.
>
> I look forward to hearing from you. Meanwhile if you have any queries or require any further information, please do not hesitate to contact me.

37.5. The following day, chambers commented on the preliminary hearing, and, re the main hearing, asked if the payment schedule was agreed.

37.6. The reply the following day (15 September) stated:

> Thank you for your email. In respect of the tranches, unfortunately, the main hearing cannot go ahead. If it is not postponed, our client will have no choice but to withdraw as he cannot leave his mother without support.

37.7. Chambers acknowledged to say that they would "remove the hearing" from counsel's diary.

37.8. On 22 September, Ms Norris wrote to chambers stating that the preliminary hearing would be dealing with the postponement application.

38. Thus, to the extent that it is argued that the Claimant never actually arranged counsel and/or the hearing was never placed in counsel's diary, I reject that argument. The correspondence demonstrates that it was. It seems that no brief and no documents were sent to counsel. However, the correspondence included in the hearing bundle reveals no suggestion that chambers was suggesting that Mr Sutton would not be able to do the hearing because of failure to supply papers by 15 September. It is noteworthy that the first payment (25% of brief fee) would have been deemed to have been incurred on 5 September had the schedule been agreed. That date had passed. That was 8 days prior to the 13 September email mentioning the postponement application. However, the correspondence does not imply that chambers had cancelled counsel's availability because of this. On the contrary, the 14 September 2022 email clearly shows that chambers were still willing to proceed so long as Ms Norris's firm confirmed that the Claimant agreed the payment schedule. The Claimant would have become liable to pay 50% of the brief fee (so an additional 25%) a few days later on 19 September. No attempt to negotiate a delayed schedule for incurring the brief fee (because of the pending postponement application, or at all) was made.

39. I was told at the September hearing that counsel had been cancelled because it had been assumed the postponement application was definitely going to be granted. As per the correspondence above, the Claimant's representatives seemed to be aware that the postponement application might be refused. They were certainly aware that there was to be a preliminary hearing on 27 September and that, as of 15 September, no decision to approve the postponement application had been made.

40. As recorded in my written reasons from the September hearing, one of the issues discussed was that the Claimant was overdue with his witness statement. The hearing was a private one, and – therefore – there was no possibility that the claims would be struck out immediately, at that hearing, because of the breach of the orders. To the extent, if at all, that I am asked to decide that I was misled at the hearing (that the firmness of counsel's booking for 31 October was exaggerated) in order to try to refute possible accusations that the Claimant had never intended to proceed with the hearing on 31 October, my finding is that, as of 15 September, counsel was firmly booked subject to the fact that the Claimant had not yet firmly agreed the

arrangements for brief fee, or sent any payment, or any documents, or agreed the payment schedule. Had the Claimant continued to do nothing in terms of fees or papers, then chambers might had to inform the Claimant that the listing would be removed from counsel's diary, but that had not happened by 15 September. Therefore, what Ms Norris told me about the Claimant having made the arrangement, and then cancelled it because of the postponement application was accurate (subject to the point I have made above, namely that the contemporaneous correspondence does not suggest that the Claimant had assumed the application would definitely be granted at the time he cancelled).

41. For completeness:

41.1. I acknowledge the submission that it was reasonable to cancel because not doing so would have incurred fees which the Claimant did not wish to incur given that he was not going to proceed with the hearing if postponement was refused. However, that is a different argument to suggesting he cancelled because he was sure that postponement would be granted.

41.2. I also acknowledge that at the September hearing, Ms Norris disputed the reasonable of the respondents' assertions that they had incurred (part or all) of the brief fees for the 31 October hearing. Her position was that counsel would not usually charge brief fees for postponements in such circumstances (a postponement just under 5 weeks before a 35 day hearing). The contemporaneous correspondence does not necessarily support the suggestion that the Claimant's fee arrangements with his own barrister were such that there would have been no liability in the event of a postponement granted on 27 September.

42. Paragraph 17 to 22 of my reasons following the September hearing described the application for postponement that was made on 15 August (and refused 27 September).

> 17. On 15 August 2022, an application for postponement was made by email, sent by the claimant's representatives and copied to the representatives of the other parties. This application referred to the fact that the claimant had just found out that his mother had been diagnosed with bladder cancer and that condition required urgent radiotherapy, chemotherapy and then later on surgery. It was envisaged that the surgery had been due to take place towards the end of October and the application mentioned that the claimant's father is frail and is 78 years old and would have difficulties providing the support that the claimant's mother needed. It was said the claimant's wife would have difficulties both in terms of being released from work and because of the need to be in the UK to look after their child who is about to start secondary school. The claimant's only sibling is his brother and his brother also would have difficulties in obtaining time off work (for the surgery and recovery period).
>
> 18. As mentioned in that original application and as amplified in later documents, the surgery was to be provided to the claimant's mother around 1,000 km away from the claimant's mother's home. The plan is that during the surgery the claimant will have a bed in the hospital in the same room as his mother. It is that hospital's

practice that it is the responsibility of the family member, (the attendant, as they are called) to undertake certain caring tasks for the patient. Importantly, the claimant's duties as attendant for his mother would include, drawing the attention of clinical staff to any particular urgent matters that required the attention of the clinical staff, as well as providing personal care and support.

19. An important matter that is raised by the claimant's side, and I accept that this is true, is that there is a need for the claimant to be there during the surgery in case his mother requires a blood transfusion. He is the only suitable family member to provide that. I accept that there would be difficulties in obtaining it from non-family members.

20. I have read and fully considered the email the medical evidence supplied in relation to the claimant's mother including the email of 5 September and the letter from Dr Bora dated 24 September.

21. The correspondence sets out the full treatment that the claimant's mother has needed and continues to need. It is not necessary for me to discuss everything in those items fully save to say that the timetable that has been set out is, for one thing, something that is outside the claimant's control. For another thing, I accept that the timetable set out is genuine.

22. The surgery it is said is planned for the last week of October 2022. What I take that to mean is that it will take place sometime between Monday 24 October and Monday 31 October. 31 October, as I have already said, is due to be the first day of the 35 day final hearing.

43. I summarised what I thought that implied in terms of the timings, and stated, at paragraph 25: "On the balance of probabilities, it seems to me that the actual need for the claimant to be nearby for blood transfusion purposes will have ceased no later than some time in the period 7 to 21 November."

44. After the 27 September hearing, the Claimant's representative wrote to the Tribunal suggesting that there had been a change of circumstances. This appears at page 2128 of hearing bundle. It was sent at 21:36 on Friday 21 October 2022. In other words, more than 7 days before the hearing had been due to commence (which was Monday 31 October 2022). As well as stating that the reasons/arguments put forward previously remained applicable, it said:

44.1. The Claimant's chosen counsel was unavailable and the Claimant had been unable to find counsel.

44.2. "The Claimant's mother's surgery has been delayed due to an infection / the effect of her diabetes and it is not yet certain when it will commence."

44.3. The Tribunal had misunderstood the Claimant's family's situation, and a witness statement was supplied to address that.

45. On Monday 24 October 2022, a letter was sent to the parties on my instructions. Bundle page 2133. It asked for further information; stated that cancellation of the hearing dates might lead to strike out rather than arrangement of new dates; asked

if the Claimant was agreeable to paying the Respondents' costs thrown away if I granted the application.

46. On 25 October 2022, solicitors representing some of the Respondents wrote asserting, amongst other things, that if the Claimant's mother's operation had been delayed then, while that was a change of circumstances, it did not mean that there should be a postponement. On the contrary it would mean that the Claimant was available on and soon after 31 October 2022 in order to give his oral evidence in person in the UK. It also made the argument that, for the case management decision(s) made on 27 September to be changed, there would have to be a material change in circumstances. It made clear it intended to take issue with the Claimant's assertions about the alleged non-availability of counsel.

47. On 26 October 2022, the Claimant's representative wrote to the Tribunal and the Respondents (Page 2140 of bundle).

    47.1. It was stated that the Claimant did not agree to pay costs, and disputed that there was any reason to award costs. Amongst other things, it was suggested that the Respondents' respective counsel:

    > must have now prepared the cross examination questions, the final submissions and considered the documents. It must be the case that both counsel can now complete this task or else the brief fee could not be properly chargeable. If the matter was to be re-listed for 2024, counsel will have already prepared submissions, cross-examination questions and familiarised himself with the bundle. All the necessary work would have been undertaken. With experienced and leading counsel, we would estimate that it would take no more than one hour to refamiliarize themselves with their own submissions and cross-examination questions.

    47.2. It added:

    > During the preliminary hearing of 27 September 2022, it was suggested that there should be another brief fee incurred. We are shocked to hear that this is the case and no matter with which the writer has been involved in the past 24 years (for respondents or claimants) has a double brief fee ever been incurred where there was an adjournment.-

48. I infer from those comments that, as far as Ms Norris was concerned, had the Claimant paid Mr Sutton's brief fee (or any part of it) for the 31 October hearing, and if the hearing had then been postponed, it would not have been necessary to pay again (or perhaps not more than one extra hour of time) in relation to Mr Sutton's appearance at a rearranged hearing.

49. Pages 2142 and 2143 of the bundle contain the responses to my questions about when counsel was booked. It is not necessary for me to quote extensively from those passages because I have made findings of fact above about what actually occurred in relation to booking Mr Sutton KC for the 31 October hearing dates. I do note that Ms Norris expressly states that, as far as she is concerned, sending the brief to counsel is never required more than 6 weeks prior to the hearing and usually not more than 3 weeks before. In context, I take the letter to be putting forward the

proposition on the Claimant's behalf that it would not have been necessary for the brief to be sent to counsel any earlier than 3 weeks before the hearing (so around Friday 7 or Monday 10 October 2022). Although not expressly mentioned in the letter, on 27 September I had made an Unless Order for the Claimant to serve his statement on the Respondents by 10 October (the Claimant having asked for a later date). So the earliest the Claimant's counsel could have seen the Claimant's final statement would have been (not much earlier than) 10 October, although a working draft would have presumably been available prior to then. The earliest the Claimant's counsel could have seen the Respondents' statements would have been 26 October 2022, for the reasons stated at the September preliminary hearing.

50. I had also asked to know which dates counsel could and could not do. As had been discussed at the September hearing, and as mentioned in my written reasons after that hearing, the expectation was that the Tribunal would not need to sit and hear evidence on every one of the 35 days. On the contrary, it was anticipated that the panel and the parties would agree a timetable with some days on which there was no attendance required. At the time I posed the question, I regarded it as (a) a reasonable query and (b) one whose purpose was fairly obvious. I still do. The Claimant's representative response was:

> He cannot do any of the dates as he is committed to other hearings. There is no-one else available. We did not ask for dates for part of the period as no counsel would agree to only be present for part of a hearing nor would this do justice to the Claimant. We would also stress that this is not only that the Claimant's chosen counsel is not available but no counsel is available with experience in healthcare matters. .
>
> No counsel could properly serve the Claimant being instructed for the first time for a 35-day hearing less than one week before the hearing is to commence. However as stated above, there is no one available at Old Square chambers to instruct.

51. To the extent that the letter implies:

51.1. That the author believes that I was considering ordering that the hearing would just carry on in the absence of the Claimant's counsel, I do not consider that a reasonable belief. I consider it fairly obvious (given the background circumstances which had been discussed in September and which were mentioned in my written reasons) that I was wondering whether the non-availability was sufficiently limited that we would be able to arrange non-sitting days for the dates on which the Claimant's counsel could not attend.

51.2. That the author believes that it was too late to book counsel for a 35 day hearing less than one week before 31 October, it is important to consider the context.

51.2.1. The reason that the Claimant was not going to receive the Respondent's witness statements until 26 October was that the Claimant had breached the orders for serving his own witness statement, and was not ready even by 27 September. That was a situation entirely of the Claimant's making.

51.2.2. The Claimant had not had only one week (or less) notice of the need to book counsel. Apart from the fact that the hearing dates had been fixed a year

earlier, he had known since 27 September that the postponement application was refused.

51.2.3. The Claimant's representative's own position is that instructing counsel 3 to 6 weeks before a hearing is always sufficient and that (by implication at least) 3 weeks before the hearing would have been long enough in this case.

51.2.4. My orders and reasons from the 27 September hearing set a timetable which made clear that the evidence phase of the hearing would not start prior to the second Monday, 7 November 2022.

52. However, in the circumstances, it is not necessary for me to make any finding about whether Ms Norris did hold the professed beliefs and whether either of them was, therefore, her reason for not asking for details of counsel's non-availability. The Claimant's oral evidence at the hearing frankly stated that, after the 27 September hearing, he had informed Ms Norris that he did not wish to instruct counsel for the 31 October 35 day hearing (or any part of it) and that she should, therefore, make no attempts to do so.

53. I had also asked the question of whether, given that the operation had been delayed (according to the Claimant's 21 October application) that meant that the Claimant could give oral evidence starting 1 November 2022. The 26 October letter made assertions as to why that was not possible. As stated in the 27 September decision, the witness would not have been permitted to give oral evidence by video from India for legal reasons. The letter made assertions as to why his presence in India during the week commencing 31 October was required.

54. The letter included a bundle of documents. That bundle included what is at pages 2156 and 2157 of the hearing bundle, namely an exchange of emails dated 25 October 2022 with Mr Sutton KC's chambers. The relevant portions state:

> ... We have now made a further postponement application to the Employment Tribunal on the basis that the Claimant does not have any counsel available for a 35 day hearing on 31 October 2022.
>
> The Employment Tribunal is asking us to state why Mark Sutton KC was not available for the 35 day hearing. I think you said that he had another hearing put in for October 2022 but can you confirm this so that I can inform the Employment Judge? You also said that you had no availability for anyone else for a 35 day hearing on 31 October 2022 please can you also confirm that this is still the case. The hearing would be conducted largely in the absence of the Claimant.
>
> The Tribunal is aware that it was the Claimant who cancelled Mark Sutton when he knew that the postponement request was being made due to the issues with the Claimant's mother's health

And in the reply:

> I confirm that Mark is not available as he has other bookings in his diary. I also confirm that I couldn't get anyone else available at such short notice.

55. As I have already said, the Claimant's instructions to Ms Norris were that he did not wish to instruct counsel for the 31 October 35 day listing, and that she should not do so. He had adequate funds to do so (as he stated in his oral evidence at this hearing). There was no impediment to his instructing counsel to represent him at a final hearing between 31 October and 16 December 2022; he simply chose not to. This was not because he had made a decision that he no longer wished to use counsel at the final hearing. He would have instructed counsel to represent him had the dates been acceptable to him. However, since 31 October to 16 December 2022 was not acceptable to him, for that reason, and that reason only, he decided not to send counsel to the final hearing. In terms of what I was told on 27 September about his reasons for not considering those dates acceptable, I addressed that in my decision and written reasons for that hearing.

56. I treated the 26 October reply as the Claimant's unequivocal statement that he was definitely not going to attend any part of the hearing either by attending to represent himself or by instructing counsel. I did not know at the time when the Claimant had made the decision that he would neither send counsel nor attend any part of the hearing. I now know that it was before, or immediately after, the 27 September decision. However, on 26 October, it appeared that the 21 October application (and 26 October additional information) was on the basis of a change in circumstances which included (i) a genuine but failed attempt to re-book Mr Sutton KC and (when that proved impossible) (ii) a genuine but failed attempt to arrange alternative counsel. However, in any event, for the reasons stated in the Tribunal's letter of 26 October 2022, it seemed appropriate to vacate the 35 day listing and make a decision to either postpone (that is, fix new dates) or strike out at a later date.

57. On 1 November, solicitors for the second cohort sent a letter which included their version of what had been said on 27 September about the Claimant's arrangements for counsel. It is not necessary to summarise what they said. My own version of the exchange is set out above. The Claimant's representative replied the same day (bundle page 2183) to say:

> We consider that what was said was along the lines of - "We could TRY and re-instruct counsel if the Claimant chose to do so"(our emphasis) but we could never have guaranteed that we could do so, as counsel might not have been available which indeed, turned out to be the case

58. The letter does not state that the Claimant had chosen not to re-instruct counsel.

59. My finding is that this letter clearly implied that the Claimant had indeed chosen to instruct counsel, and had been unable to do so because counsel was not available because of some booking in his diary made later than the cancellation, and prior to an attempt to re-book him. I do agree that on 27 September itself, Ms Norris had been clear that she expected that the Claimant would withdraw from the case rather than seek to re-instruct the barrister who had been cancelled (by implication, Mr Sutton KC, though his name was not mentioned at the September hearing). However, this email seeks to imply that had Mr Sutton KC been available, the Claimant would have instructed him for the 31 October hearing. However, based on the Claimant's oral evidence, that is not the case.

59.1. There was no attempt to re-book counsel and (therefore) no evidence that when the attempt was made it was discovered that something had already gone into counsel's diary.

59.2. There was (therefore) no evidence about whether the attempt to re-book counsel was made promptly on or soon after 27 September, and so no evidence of whether counsel was already unavailable by 27 September.

59.3. There was no attempts made to discuss whether counsel might be able to rearrange his other commitments in order to accept this 35 day hearing (or whether he could keep the other commitments provided the Tribunal could work around them).

60. The printout of the Claimant's travel arrangements (Bundle Page 2375) is dated 10 October 2022. Therefore, by no later than 10 October, the Claimant had planned that his outward journey (UK to India) would be 21 October and the return journey would be 24 December 2022.

61. The Claimant has a clear recollection that he had a discussion with Dr Bora on 6 October 2022 and, based on that discussion, he changed his flight plans on 7 October 2022.

62. In terms of the outward journey, the Claimant decided after he had heard about his mother's cancer diagnosis that he wished to be with his mother for Diwali (around 24 to 26 October). The documents disclosed for the 27 September hearing showed the Claimant's electronic signature accepting terms and conditions for the flight was dated 18 September 2022. The outward journey was already fixed for 21 October but, at that time, the homeward leg was due to be 2 December 2022.

63. The Claimant found out about his mother's diagnosis on or shortly after 5 August, and the application to the Tribunal was made on 15 August.

64. The application was not made (either in the written correspondence prior to the hearing, or at the hearing on 27 September) on the basis that the Claimant wanted/needed to be with his mother for Diwali. It was always made on the basis that the Claimant's mother's procedure would be in late October, and he needed to be in India for that. In saying this, I am not seeking to doubt the sincerity of the Claimant's desire to be with his mother for Diwali, or that he was worried that this might be the last chance to spend Diwali with her. I am simply pointing out that since the application was never made on the basis that the Claimant's desire to be with his mother would be a reason, or part of a reason, that postponement was justified, no decision on that particular argument was made on 27 September.

65. As mentioned in the reasons for the September hearing, one of the documents which the Claimant relied on and which I took into account was Dr Bora's email of 5 September 2022 and letter of 24 September 2022

65.1. It was stated treatment was time critical.

65.2. It was stated that the first stage was 4-6 cycles of treatment over 4-6 weeks beginning in early to mid-September 2022. [I observe, therefore, that 4 weeks starting early September would finish late September/early October, and that 6 weeks starting mid-September would finish late October.]

65.3. It was said “The next stage of treatment will be the surgery planned in the last week of October 2022.” [I observe that that is the timetable that was relied on at the 27 September hearing].

65.4. It was stated “This procedure will require hospital stay of up to 2-3 weeks followed by a period of weakness and frailty requiring much support at home for up to 2-3 months.” [Ditto]

65.5. It was said “You had mentioned that your elder son [the Claimant] has the same blood group as you and I would therefore urge that he is available at the time of your surgery.” [I observe that the letter did not state that the Claimant was required to be present, for blood transfusion purposes, for the first stage of the treatment, the 4-6 cycles of chemotherapy.]

65.6. The correspondence stated - as discussed in detail in the written reasons from the September hearing - the Claimant’s mother should arrange to have someone accompany her throughout the hospital stay connected with the surgery (to act as what I referred to as “attendant” in those earlier reasons).

65.7. It was stated that, for the first stage (the chemotherapy) the Claimant should be accompanied by someone for each of her (4 to 6) hospital trips. That was said to be for purposes such as running errands, etc, and providing support. It was not stated that a suitable blood donor needed to be present.

66. The text of the 24 September 2022 letter matches that of the 5 September email. My finding is that the opening words [“Thank you for your time to consult me regarding your illness”] did not refer to a consultation shortly before 24 September 2022. The text was written on or before 5 September, and was referring to consultation(s) on or before 5 September 2022.

67. The Claimant relies on a letter dated 17 October 2022 at page 2318 of the bundle. It is from Dr Bora. It is in the same format as his 24 September letter (date and reference number handwritten in in the top right; signature handwritten at the bottom) and not the same format as his 5 September email. The Claimant’s opinion is that the information in this letter matches that which was given to him on 6 October 2022 when he spoke to Dr Bora that day.

68. The third paragraph of the letter states:

> Since chemotherapy can cause anaemia, I would strongly advise that you have a family blood donor available throughout the peri operative period. Transfusion can be necessary before surgery for optimisation, in case of blood loss during surgery or in the postoperative period. Given the shortages in blood supply chain in India, please ensure that there is a donor available throughout so that your surgery can go ahead.

69. To the extent that the Claimant or his representative suggest that that paragraph means that the Claimant was required to be present (for blood donation reasons) throughout the "4 to 6 cycles" of chemotherapy, I reject that suggestion. The letter is plainly stating that, after the chemotherapy, there will be an assessment of readiness for surgery. For the surgery to take place as planned, it might be necessary (or recommended) that the patient have a blood transfusion immediately/shortly before the surgical procedure. For that reason, a donor (in this case, the patient's son, the Claimant) should be present. However, the need for the Claimant to be present with his mother for the surgery is not new information. As discussed in the reasons for the 27 September decision, I made my decision on that occasion having accepted that, for the occasion when the Claimant's mother would attend the hospital for surgery, he would attend with her. This paragraph is stating that, during the same time frame in which the surgery is due to take place, then, before the surgery, a blood transfusion might be needed (as opposed to a transfusion only being needed during or after the surgery). This paragraph is not supplying relevant information that I did not have, and consider, on 27 September. Measured against the date for surgery, the timing of, and duration of, the Claimant's need to be present in India, with his mother, is not affected by this paragraph. I already took into account that the Claimant needed to be present earlier than the planned surgery date, as he was (I was told) going to accompany his mother on the 1000km trip to the location where the surgery was due to take place. This paragraph does not say that he is required to be present more than slightly before the surgery date.

70. However, the letter as a whole does contain information that is different to what I was told on 27 September. The first two paragraphs state:

> I am writing to inform you that your treatment schedule has been adjusted to account for the delay in commencement of your chemotherapy. As you are aware, this was necessitated due to issues surrounding ….
>
> You are currently experiencing some chemotherapy induced side effects and will require family support as previously discussed. Given the complexities of treatment and your various medical conditions, there may be further adjustments to the treatment schedule required depending on how you tolerate each part of the treatment

71. The first sentence is self-explanatory. Taken in conjunction with the correspondence of 5 September 2022 (duplicated in the 24 September letter) it means that there was a delay in the commencement period stated there. The chemotherapy did not start "early to mid-September 2022".

72. Although this is information that I was not given on 27 September 2022, my finding is that it was information which the Claimant already had by that date. He was in regular contact with his parents (and, to some extent at least, also in contact with her treating clinicians). It is inconceivable that, as of 27 September, the Claimant mistakenly believed that the chemotherapy had already started, and my finding is that he knew it had not started.

73. At page 2318 of the bundle, there is a letter from Dr Mangal dated 1 November 2022. It states:

> In accordance with Dr Bora's recommendations, I am overseeing the administration of chemotherapy for high grade bladder cancer to Mrs. Vashistha. I confirm that there have been delays in commencement of Mrs. Vashistha's chemotherapy until 29 September 2022 because of …. She is having chemotherapy side effects requiring considerable family support from her son.
>
> It is difficult to exactly predict when her surgery will take place as this will depend on general health, diabetes control, response to chemotherapy and complications. The recommendation is that surgery is performed 2-6 weeks after completion of current chemotherapy cycle. The current cycle is expected to be completed by 5 November 2022.
>
> I have been asked by Mrs. Vashistha's son [the Claimant] to comment on whether I can predict when a blood transfusion is more likely. A blood transfusion could be needed, anytime during or after chemotherapy to address chemotherapy induced anemia prior to surgery, during the operation due to bleeding and anytime in the first month postoperatively. It is therefore, important that the family have a relative with the same blood group present in case there is a need for a blood transfusion during this period

74. This letter states that the chemotherapy began on 29 September 2022. My finding is that, during the 27 September hearing, the Claimant was aware that the chemotherapy had not started. The date for surgery that I was informed of during that 27 September hearing was last week of October. (See paragraphs 17 and 22 and 24 of those reasons). That was based on the information in the 5/24 September schedule produced by Dr Bora. However, by 27 September, the Claimant was already aware that that schedule was delayed. The "4 to 6 cycles" of chemotherapy had not yet commenced. The information that the surgery was estimated to be last week of October was out of date; the Claimant was aware of that as of 27 September, but the application for postponement was made on the basis that the information in Dr Bora's correspondence was accurate, and should be relied on by me to decide that the Claimant had to be in India for a period of time which commenced shortly before the planned 31 October start date for the final hearing.

75. I also take account of the letters from Dr Mangal dated 10 and 18 November 2022 (pages 2320 and 2321 of the bundle).

    75.1. The former states that, because the Claimant's mother has recently had an infection, and is immune-compromised, any attendants "working in and/or exposed to any acute healthcare settings undergo quarantine of 7-10 days prior to caring for you". Even on the assumption that the Claimant is someone in the category "working in and/or exposed to any acute healthcare settings", he did not follow a quarantine process on arrival after he flew out on 21 October. He went to spend Diwali with his mother, and did so.

    75.2. The latter refers to a blood transfusion from the Claimant to his mother. I am invited to find that this proves that transfusion during the chemotherapy cycles was required. I do not do so. The surgery was 21 November, and my finding is that the transfusion was in the peri-operative period, and was for the optimisation purposes, as referred to in Dr Bora's 17 October letter.

76. It is not my finding that the Claimant would have known, with any degree of certainty, by 27 September 2022, that the surgery date would be specifically 21 November. However, I reject his assertions that he did not have any clear information at all until after he arrived in India. Apart from the fact that his brother (an NHS doctor) was present to assist their parents between 1 and 10 September, the 5 September email shows that the Claimant and his brother were able to receive communications directly from the hospital and, on his own account, he spoke to Dr Bora on 6 October.

77. The programme of first chemotherapy cycle on 29 September and final cycle on 3 November, and surgical procedure 8 to 9 weeks after the start of chemotherapy is not particularly different from Dr Bora's initial schedule. The chemotherapy started a few weeks later than initially planned and the surgery (therefore) took place a few weeks later than initially planned. However, there does not seem to have been unanticipated delays between start and finish. (I do note what the Claimant says about 10 November; however, to the extent, if at all, that this caused any slight delay in surgery, I do not consider it something that took it outside the approximate timescale that Dr Bora originally conveyed in his 5 September estimates). Thus, the reason that the surgery did not take place in or around the last week of October was not events that occurred after the chemotherapy started; it was the fact that the chemotherapy did not start until 29 September 2022. I am entirely satisfied that the Claimant knew, on 27 September, that the chemotherapy had not yet commenced by that date. Thus, in terms of the timing of the surgery, I am not persuaded that the Claimant came into possession of new information after 27 September. He knew that the estimate was for the surgery to take place slightly less than two months after the start of the chemotherapy and that is, in fact, what happened.

78. Thus, given the fact that the chemotherapy had not started by 27 September, my finding is that the Claimant knew, as of that date, that the surgery was now likely to take place no earlier than second half of November, and was not scheduled for last week of October.

79. The Claimant was able to return home to the UK on 16 December. That was 25 days after the surgery. My reasons for the 27 September postponement refusal explained why my finding was that, if surgery took place between 24 and 31 October, the Claimant would be able to attend the tribunal by no later than 5 December 2022. The time lag between the end of surgery and the Claimant's return to the UK was no greater than I estimated. Had I known that the surgery was not going to take place until several weeks later than the dates that I was given on 27 September, then I would not have decided that the Claimant would be back, after the surgery, before 5 December. However, the fact that the Claimant was not likely to be back by 5 December, given that the surgery was not going to take place earlier than the second half of November, was information which the Claimant had on 27 September, even if I (and the Respondents) did not.

80. I note what the Claimant says at paragraphs 48 to 50 of his witness statement about his reasons for standing counsel down. The matters at paragraphs 49 and 50 were already addressed in my decisions for refusing the postponement in September. Taken together, the three paragraphs assert that it was reasonable for the Claimant

to cancel his booking for counsel for the 35 day hearing because it was his intention at the time to withdraw if the postponement was refused. Paragraphs 49 and 50 are arguments for why it was reasonable to withdraw if postponement was refused. I was already told, on 27 September 2022, that that was the Claimant's position. [In other words, these were part of the reasons presented for why I should postpone, rather than insist the hearing take place between 31 October and 16 December.]

81. Paragraph 48 contains a further example of the inconsistency (or lack of clarity, at least) about whether I am being asked to decide that it was reasonable to cancel counsel because it was reasonable to seek to avoid a brief fee for the 31 October hearing, or whether it was reasonable to cancel counsel because the Claimant had already made up his mind that the 31 October hearing would not go ahead one way or the other; either it would be postponed, or else he would withdraw. Based on his oral testimony, my finding is that (a) he had already made up his mind that the hearing would not go ahead one way or the other, and that is why he cancelled counsel in mid-September, without awaiting the postponement decision and (b) after my 27 September decision, he did not change his mind. He did not seek to re-book Mr Sutton KC and he did not seek to arrange a different barrister.

82. I accept Professor Mamelok's evidence. She explains that certain relevant individuals have already retired or are shortly due to do so. She gives her opinion about the timescales involved and how that might affect abilities of witnesses to recollect matters. In relation to some matters, witnesses might be able to refer to contemporaneous records to assist their recollection.

83. Although I have not read them, I do take account of the fact that the parties have all finalised their witness statements and sent them to each other. The Claimant complied with the Unless Order. (My understanding is that he might potentially seek permission to update his statement to add page numbers.) The Respondents submitted their statements in accordance with the orders that I have previously made. Witnesses would be able to re-read their statements prior to being cross-examined, and that would potentially be of some assistance in refreshing their memories.

84. The text of Claimant's statement is 515 paragraphs (pages 2649 to 2775 of the bundle) and is accompanied by appendices (tables of additional information produced by and relied on by the Claimant) which bring the document up to around 170 pages.

85. There are around 22 other witnesses apart from the Claimant (more than 250 pages in aggregate). As mentioned by Mr Cook at paragraphs 46 and 47 of his skeleton argument, there has been some stress caused to his respondents and some of the witnesses by the litigation, and further delays would add to that stress.

86. The list of issues covers allegations dating back to 2016. Although some are more recent (referring to 2020, for example), a large number of the allegations relate to 2016, 2017 and 2018. In terms of the time period about which findings of fact will be necessary, that includes events in 2015.

87. It is likely that witnesses' recollections will have already been affected by the lapse of time from the dates of the relevant events to the end of 2022 (when their written statements were prepared, and when the hearing had been scheduled for). Their recollections are likely to fade further prior to late 2024/early 2025. Some witnesses might die, or become incapable of giving evidence on oath, prior to then.

88. The earliest date that the Tribunal could find a 35 day slot, taking account of the Claimant's dates to avoid, was January 2025. During the February hearing, I made further enquiries as to what difference it would make if the Claimant's dates to avoid were ignored, and/or if the listing was split, so the 35 days were not consecutive. In that scenario, dates earlier than January 2025 might have been found. I did not, however, adopt the Claimant' suggestion that with further refinement of the issues, there might be a reduction from the 35 day listing. EJ R Lewis did extensive case management with the parties; as mentioned already, it was not necessarily envisaged that every one of the 35 days would be a sitting day (even after pre-reading was completed and the evidence commenced), but the listing was intended to allow the panel hearing the case some flexibility. It did not seem appropriate to me to reduce that flexibility. In any event, given the number of witnesses, and number of pages of witness evidence, and the large number of different events in the list of issues, the listing duration seems to me to have been appropriate in any event.

89. The 35 day listing only took account of the complaints which were "active". Some other complaints/allegations were stayed, but not withdrawn. The preparation for the hearing of those active complaints was completed in the sense that the hearing bundle had been finalised, and so had the written witness statements. In principle, the Claimant could apply for the stay to be lifted at any stage. It has not been argued that he might try to do that prior to a rearranged hearing (thereby increasing the duration from 35 days to something higher, and thereby requiring further preparation for that hearing to be undertaken). However, it is common ground that had the 31 October 2022 hearing taken place, then, an application to lift the stay could have been made after the decision on the active complaints been given to the parties. The Claimant's application for later hearing dates (so not 31 October to 16 December 2022, but the earliest dates that the Tribunal could offer) was to preserve the status quo. In other words, that the stay would remain in place for the other complaints, with his right to ask for the stay to be lifted preserved until after the decision on the active complaints.

Analysis and Conclusions

90. As stated above, this hearing was listed by be in order to decide between striking out and agreeing that the final hearing should take place in the future (available dates in 2025 having been identified). In accordance with rule 37(2), the Claimant has had adequate opportunity to put forward all the arguments relevant to any decision about potential strike out.

91. It seems to me that one of the prongs of the Claimant's argument is, in effect, that my decision on 27 September was wrong, and that I should have granted postponement for the reasons that were presented to me on the day.

91.1. In terms of allegedly poor connectivity at the hospital, and/or lack of privacy at the hospital, and/or lack of opportunity (whether because of time difference or because of the need to be with his mother) to watch or listen to the proceedings, I took these things into account at the September hearing, and no new relevant information has been supplied. I note that the Claimant suggests the hospital did not provide an internet service as far as he is aware; however, even assuming that he could not access any internet service (either via the hospital's facilities or a privately purchased arrangement) I mentioned in the September reasons that he could potentially dial in (audio only) and, even if he was unable to do that, there would be breaks for him and his representative to confer.

91.2. In terms of his dyslexia, again, the Claimant has not provided new information or evidence that was not already taken into account on 27 September.

91.3. More generally, to the extent that the Claimant believes that a hearing which took place with his counsel present throughout, but the Claimant not attending throughout, would be unfair to him, I am aware that that is his view, and it was the argument put to me on 27 September. I considered it then and addressed it when refusing postponement. My decision was not that there would be no disadvantage whatsoever to the Claimant of proceeding with the hearing from 31 October to 16 December 2022. My decision was that I had to weigh the disadvantage to the Claimant of refusing postponement against the disadvantage to the Respondent of granting it. See paragraph 90 of the reasons, for example.

91.4. The Claimant's arguments at the 3 February hearing have not persuaded me either that the disadvantage to the Claimant (of proceeding on the hypothetical basis that his mother's surgery was scheduled for last week of October) was greater than I perceived it to be on 27 September, or that the disadvantage to the Respondents of a postponement was less than I perceived it to be.

92. In terms of whether the Claimant would, or would not, be represented by counsel at the hearing on 31 October, the short answer to this is that the Claimant made a decision that he would not be represented by counsel if the hearing went ahead on those dates.

92.1. It is my finding, and it is accepted by the Claimant, that he had previously planned all along to have counsel at that hearing. (I reject the Respondents' arguments that the Claimant had failed to book counsel; as stated in the findings of fact, counsel was lined up and was available until the decision to cancel was notified to chambers in mid-September 2022).

92.2. Furthermore, as the Claimant stated in paragraph 48 of his witness statement "If the postponement was granted, I would reinstruct counsel at a later date."

93. It was not the case that the Claimant decided (whether for financial reasons, or any other reasons) that he would act as a litigant in person during the final hearing. He intended to use counsel at the final hearing all along, and never changed his mind about <u>that</u>. What was a new matter which arose in August was the possibility of needing to be in India for some (or all) of the period 31 October to 16 December.

94. My finding is that the Claimant was aware, at the time he made the 15 August postponement request that one possibility was that the request would be refused.

94.1. He was aware that one possibility was that if he continued with the booking for Mr Sutton KC, and the postponement was refused, Mr Sutton KC would be in attendance for the days in the window 31 October to 16 December when the parties were required to attend.

94.2. On the balance of probabilities, he was also aware that if he continued with the booking for Mr Sutton KC, and the postponement was granted, he would incur some sum for brief fee. It seems to me that Ms Norris potentially wants to have it both ways in relation to whether a postponement causes an overall increase in the sums payable to counsel (assuming that, after the postponement is granted, the hearing does eventually take place). She has suggested that it would be unreasonable for the Respondents to be charged more by their own counsel, for example; however, also seems to suggest that it was reasonable for the Claimant to cancel in mid-September to avoid incurring the 25% of brief fee that would have already been incurred by then if he accepted the payment schedule, and the further 25% that would have been incurred prior to 27 September.

94.3. Ms Norris's suggestion was that the only extra fee (that it would be reasonable for the Respondents to be charged) would be for one hour's re-reading. I think that is unrealistic. In the Claimant's favour, although I have no direct evidence on the point, I will assume that had he continued with the booking of Mr Sutton KC for the 31 October hearing, and had that then been postponed, and had he then used Mr Sutton KC for the rearranged final hearing, then the extra aggregate costs may have been significantly greater than one hour's re-reading time. It would ultimately have been a matter of negotiation. It might have been possible to ask him to do no preparation at all until after 27 September, and/or it might have been pointed out that the Claimant's witness statement and the Respondents' witness statements were not available yet any way.

94.4. This is all academic, however. The reason for the Claimant's cancelling Mr Sutton KC in mid-September was not the concern about having to pay an extra amount if the hearing was postponed and re-scheduled. The reason was that, as far as the Claimant was concerned EITHER the hearing would be rearranged, in which case, he would book Mr Sutton (or somebody else) for the new dates OR he would not pay for counsel at all for the 31 October hearing. In the latter case, he would not be acting as litigant in person, or having anyone else represent him at the hearing.

95. For the avoidance of doubt, it is not my decision that there is anything wrong in principle with the Claimant being of the opinion, up to 27 September, that he would withdraw if postponement was refused, but, once the postponement was refused, deciding to continue. However, after the postponement was refused, he did not try to re-book Mr Sutton KC and he did not try to book alternative counsel.

95.1. It is not relevant that, by 25 October, Ms Norris received confirmation that Mr Sutton KC was not available for the entirety of the 31 October to 16 December listing. I have no evidence of when something new was added into his diary; I do

not know if it was before or after 27 September, for example. I have no evidence of the duration of the new commitments, and I cannot say – therefore – whether it might have been possible for the panel and the parties to work around those commitments. I do not even know whether the commitments were only in the week of 31 October, which, as per my reasons of 27 September, did not require the parties attendance in any event.

95.2. It is not relevant that, by 25 October, Ms Norris received confirmation that that set of chambers had no-one else available.

95.3. The reason that neither of these things is relevant is that the Claimant was not intending to book counsel for the 31 October hearing, even if Mr Sutton KC himself was available, or even if an alternative of similar expertise and experience and cost was available.

95.4. The reason that the Claimant was not going to participate in the 31 October to 16 December hearing had nothing to do with counsel's lack of availability (by whatever date enquiries were made about availability). The reason was that the Claimant decided that he would not participate between those dates regardless of whether the postponement request was granted or refused.

96. As discussed above, the approximate timing of the Claimant's mother's surgery, according to what I was told on 27 September, was the last week of October. Based on that timing, for the reasons previously supplied in writing, I concluded that:

96.1. The hearing could commence without the Claimant being physically present in the hearing room, though represented by counsel (and potentially being able to attend remotely for some or all of the Respondents' witnesses' evidence).

96.2. The Claimant would be able to return to UK in time to give evidence in person

96.3. The panel would deal with timetabling issues as and when they arose.

96.4. See paragraph 94 of the reasons.

97. I was presented with a false premise. I have no reason to doubt that Ms Norris presented the application in good faith based on the information supplied to her by the Claimant. However, in fact, it is now clear that:

97.1. The Claimant's reason for flying out on 21 October was that he wanted to be with his mother for Diwali

97.2. The Claimant knew that the surgery was not going to take place in last week of October. He knew that he could either not fly out at all on 21 October, or else fly out on 21 October, return to UK after Diwali, and still be present in the UK by 31 October. He knew that his being present in the UK on 31 October and the days immediately afterwards would not delay his mother's surgery, because that had already been delayed. He knew that there would be 4 to 6 cycles of chemotherapy before the surgery, and that the chemotherapy had not started by 27 September.

97.3. For the reasons stated in the findings of fact, I reject the assertion that the Claimant needed to be present, for blood donation reasons, during the chemotherapy period. He did potentially need to be present before the surgery for blood donation reasons, but only a short time before; he only needed to be present after the clinicians had decided that the chemotherapy had reached a stage that, so long as the patient was strong enough, the surgery could go ahead. Furthermore, and in any event, if it was to be the Claimant's argument that the surgery would be second half of November, but he needed to be in India from (before) 31 October until the surgery, then he could and should have presented that argument on 27 September. Instead, he allowed his representative to present the quite different argument that the surgery was taking place in the last week of October, and he needed to be present in India from 21/22 October onwards. (Reliance was placed on Dr Bora's 5/24 September schedule; according to that schedule, 22 October would have been several weeks after the chemotherapy had started).

98. At page 2130 of the bundle, as part of the 21 October postponement application, it was stated by the Claimant's representative:

> The Claimant's mother's surgery has been delayed due to an infection / the effect of her diabetes and it is not yet certain when it will commence. The Claimant is in India as of today. The Claimant has extended his ticket to India until 24 December 2022 (a copy of which is attached). We attach further medical evidence from the Claimant's mother's doctor in India about the delay to the treatment.

99. I accept the Claimant's evidence that the date on which the Claimant extended his ticket to 24 December was 7 October 2022. However, the remainder of the information in that paragraph was known to the Claimant (though presumably not to Ms Norris) on 27 September.

100. The Claimant chose to make the postponement application (at the hearing on 27 September) on the basis that Dr Bora's schedule was still up to date. He knew that it was not. It was only after the postponement request was refused that he instructed his representative to make the application on the basis that the surgery had been delayed. Although he had all the information about the delay in his possession on 27 September (and although he was present throughout the hearing, including when I delivered oral reasons), he did not instruct the solicitors to make the application on his behalf until after he had already set off for India on 21 October. This was more than two weeks after the conversation with Dr Bora on 6 October.

101. I am satisfied that (as the Claimant says himself in paragraph 5 of his witness statement) knew that he would potentially be the first witness in the case. I am satisfied that he knew, therefore, that he would potentially be giving evidence in the week of 31 October (after preliminaries and pre-reading) and finishing either that week or early the following week. A truthful and transparent account, on 27 September, about the dates of surgery would have required me to decide whether the Claimant could potentially finish his oral evidence in time to fly out to India without causing a delay in his mother's surgery.

102. It is, of course, a hypothetical scenario. I was not given a truthful and transparent account, on 27 September, about the dates of surgery. My decision is, however, that the reason for that is that the Claimant must have concluded that he had had greater chance of the postponement application being granted if I thought that the surgery was firmly scheduled for last week of October, rather than scheduled for some unknown future date, but on the basis that chemotherapy had not yet started. That is, that surgery would be after "4 to 6" cycles of chemotherapy, and that Dr Bora's 5 September schedule had been pushed back by a few weeks.

103. As late as 21 October, according to the application, the Claimant did not know expected surgery date. It therefore seems likely to me that, on 27 September, I would probably have decided that (i) as per the actual decision, the Claimant would be represented by counsel throughout the hearing, and could attend in person for some of it, while in the UK, and may be able to attend remotely for other parts and (ii) the Claimant would be present in the UK for long enough for his oral evidence to be head and (iii) that the parties and panel would adapt to the circumstances, and have the Claimant's evidence start and finish as soon as practicable, freeing him to travel to India without impacting the surgery date.

104. There is, I am sure, a finite possibility that I would have been persuaded to grant a postponement instead. It is hypothetical, because if the true facts – as were known to the Claimant on 27 September – had been revealed to me, then both sides' arguments, and my decision, would have been based on those true facts. However, the reasons that I did not hear the arguments based on the true facts is that the Claimant made a decision to conceal the true facts from me and the Respondents.

    104.1. Had there been an argument about the need to be present in India a long time before surgery date because of the need to be present during the "first stage" of the treatment (the chemotherapy cycles) that argument would have run into the difficulty that the Claimant did not make arrangements to travel a long time before the surgery based on Dr Bora's 5/24 September schedule.

    104.2. Had there been an argument about the need to be present in India a long time before surgery date because of the need to quarantine, then, on 27 September, I would have been assessing that without the knowledge I now have (that after his 22 October arrival, the Claimant did not quarantine). I would also have been deciding it without the 10 November letter (which was written after the Claimant had been with his mother for around 18 days).

    104.3. Neither of these arguments was relevant on 27 September, given that the Claimant's case was that his travel was booked for Friday 21 October departure date/Saturday 22 October arrival date, and surgery planned for week Monday 24 October to Monday 31 October.

105. I do not consider that it was unreasonable for the Claimant to make a postponement application on 15 August.

106. I do think it was unreasonable conduct for the Claimant to allow the application at the hearing on 27 September to be argued on the basis that the surgery would be in last week of October, when he knew that it was not.

107. That unreasonable conduct did not prevent a fair hearing taking place in the window 31 October to 16 December, because I refused the postponement.

108. It was not unreasonable conduct that the Claimant decided not to withdraw following the refusal of postponement.

109. The Claimant knew that the decision was that the hearing could proceed (as per the draft timetable described orally and confirmed in the written reasons) because he would have counsel at the hearing. He had not changed his mind about counsel and decided to be a litigant in person at the final hearing. It was unreasonable that an application sought to imply/argue that he had attempted to instruct counsel for the 31 October to 16 December hearing and had been unable to do so. The truth of the matter is that he decided he did not wish to instruct counsel for those hearing dates (but would have used counsel had I given different dates) and did not attempt to do so.

110. If the Claimant did not instruct counsel (or any other representative) and did not attend himself on 31 October, and if the hearing started on that date, then a decision under Rule 47 would have been required.

111. In and of itself, it is not unreasonable for a party who has had a postponement request refused to make a further attempt. They might, for example, seek to supply further information or evidence in support of the same grounds that were already rejected. They can also (either additionally or alternatively) put forward new grounds, about which a decision has not already been made.

112. Since the Claimant had decided not to instruct counsel, and decided not to attend himself, it was unreasonable to leave it until after 9.30pm on Friday 21 October 2022 to make his new postponement application. The 21 October application was not based on information that the Claimant did not have available on 27 September (give or take the suggestion that Mr Sutton KC was not available for every day of the hearing slot). If the application was to be on the premise (as it was) that the operation was to be delayed, it was unreasonable not to submit it until after the Claimant had already left the country, thereby taking away the option (or making it more difficult) for the judge to decide that he could be present in the UK for the first week or so of the hearing dates, and give his evidence then, and travel later.

113. More importantly than the comments in the last paragraph, however, it was unreasonable and dishonest for the application to be made on the basis that this was a change of circumstances since 27 September. The Claimant already knew on 27 September that the operation was delayed. He chose to withhold that information from the Tribunal and the Respondent until (in effect) Monday 24 October (given the timing of the Friday 21 October email). He chose to present that as newly discovered information, when it was not. [My assumption is that he misled Ms Norris, but that is not the point. Whether he misled her or not, he is responsible for the fact that the

application on 27 September was presented on a false basis and responsible for the fact that information that the surgery would not happen in last week of October was not supplied until after he had already left the UK, and responsible for the fact that it was suggested to be information he only acquired after 27 September, when it was not.]

114. When I sought confirmation/clarification of what the Claimant was asserting in relation to counsel's booking/availability, it was unreasonable to supply (only) the information that was supplied on 26 October. It was incumbent on Ms Norris (who was acting on the Claimant's behalf) and the Claimant to make clear that the Claimant had instructed Ms Norris that he was not interested in counsel's availability because he was not going to participate in the 31 October hearing, either by attending himself or by sending counsel.

115. The Claimant's unreasonable conduct caused the hearing of 31 October to 16 December to be vacated. My decision on 27 September was that a fair hearing could take place in that window (bearing in mind the need for further case management decisions to be made by the panel during the hearing). I am still of the view that a fair hearing could have taken place in that window. (Even if that required the Claimant's evidence to be heard first, rather than in accordance with the timetable I described on 27 September).

116. By his unreasonable conduct, the Claimant prevented the Respondents having a fair hearing between 31 October and 16 December (or, at the worst, commencing in that period and going part heard).

117. As a result of his unreasonable conduct, the hearing could not have been rearranged for dates earlier than late 2024 (or early 2025, taking account of the Claimant's dates to avoid).

118. The purpose of Rule 37(1)(b) is not that parties who behave unreasonably should have their cases struck out simply because the Tribunal disapproves of their conduct. Nor is the power intended to be exercised as a warning to others that they cannot "get away" with that type of behaviour.

119. Blockbuster makes clear that the power to strike out (for any reason, but I am discussing Rule 37(1)(b) specifically at present) must be exercised with restraint. By definition, when there is a strike out, the claim is not dismissed following hearing of evidence, and a decision (based on that evidence) about the merits. A party is losing their right to a trial when strike is exercised. Their human rights must be taken into account when the decision is being made (as, of course, must be the rights to a fair trial that the other parties also have).

120. In Blockbuster, for example, it was wrong to strike out without properly considering whether a fair hearing could still take place. Had a hearing been possible within the same 6 day listing then that would have been relevant. In this case, however, the Claimant's conduct has caused the hearing slot to be lost. There can never now be a hearing in the window 31 October to 16 December 2022 because that is in the past.

It is in the past notwithstanding there had already been a decision by me, on 27 September, that it should and could start within that window.

121. In Croma, and by reference to the factors mentioned in Arrow, it was made clear that it is not enough for a party which is opposing strike out to say that, assuming unlimited time, and resources, and expenditure (used by the tribunal and/or the parties) a fair trial could still take place on some future date, and therefore a sanction short of strike out is proportionate. The amount of time, resources and expenditure that might be required for a (hypothetically) fair hearing are relevant to the decision about the proportionality of strike out.

122. In this case, by his express refusal to attend the hearing centre for even part of the hearing slot (and I acknowledged on 27 September, and do so again, that I accept he would need to be in India for part of the hearing slot, and so could not be in Watford for every day of the hearing) and by his decision not to attempt to instruct counsel [a decision he was honest about in his evidence on 3 February 2023, but which had been obfuscated in the written material produced on his behalf on 21 and 26 October 2022 (and also November 2022)], the Respondents were denied the hearing in the time slot which had been fixed a year in advance and confirmed on 27 September. There had been numerous preliminary hearings intended to keep that fixture, and – after the Claimant failed to supply his witness statement by the date ordered – the respondents had to produce their own witness statements in a short space of time in order to (try to) keep the fixture.

123. If new dates for the hearing are not arranged (and the claims are instead struck out), the Claimant is not only losing the right to a hearing on those future dates. He is also potentially losing the opportunity to be successful on some or all of those claims. He is therefore losing the opportunity to be awarded compensation for injury to feelings, and to compensation for financial losses. He is also potentially losing the opportunity for the Tribunal's reasons and/or any recommendations to be influential on his future training and career opportunities.

124. If the claims are not struck out, and revised hearing dates are fixed, notwithstanding the Claimant's unreasonable conduct preventing the fair hearing between 31 October and 16 December 2022, then the Respondents will be put to extra stress and inconvenience and expense. They will not have the same opportunity for a fair hearing that they would have had in 2022.

125. In the circumstances, it is proportionate to strike out all of the claims. It would not be in the interests of justice for the Respondents to have to wait two more years for a resolution of the claims, even if I were to accompany that by an award of costs in their favour. The arrangements for witness attendance, and counsel, had already been made, and a replacement date in two years time would not rectify the injustice done to the respondents by the loss of the right to a fair hearing in the period 31 October to 16 December. On the contrary, I accept Professor Mamelok's evidence, and the Respondents' submissions, that a hypothetical trial in two more years time risks being very unfair to them if witnesses have died or become available, or if their memories have faded further.

126. As an aside, both sides suggested they had the most to lose by fading recollections. The Claimant said it was up to him to prove his case. The Respondents pointed out that if the burden of proof shifted under s136 of the Equality Act 2010 then it was up to them to prove a defence. However, in my judgment, the issue is not whether it is completely impossible to have a fair trial; the issue is whether – notwithstanding the fact that written statements have now been finalised – the Respondents' rights to a fair hearing have been significantly impacted. They have been. Given that this state of affairs has been caused by the Claimant, the issue is whether it is therefore proportionate to strike out the claims, (or whether the Respondents simply have to live with the fact that the hearing would be less fair). The part of the Rule 37(1)(b) decision that a lesser sanction than strike out might be applicable if a fair trial is possible, is not simply exactly the same as the analysis that would be necessary for Rule 37(1)(e) to apply. In any event, the short answer is that even if it is true that a hearing in two years time would be less fair to the Claimant than a hearing between 31 October 2022 and 16 December 2022, then that does not prove that such a hearing would not be unfair to the Respondent. Any argument that a delay in the hearing makes it more likely for the Respondents' defence to prevail is not a persuasive argument that (therefore) a fair trial is still possible.

127. It is my conclusion, therefore, that strike out is the only appropriate and proportionate decision in the light of the unreasonable conduct (which I have described above) and the consequences of that unreasonable conduct (which I have also described above). It is not proportionate to fix new hearing dates.

128. For the reasons stated above, all of the claims are struck out. That includes those that were due to be heard starting 31 October 2022, and those that had been stayed indefinitely and which (had not been withdrawn but which) would not have been dealt with between 31 October and 16 December 2022 (regardless of whether they would/could have been added to a rearranged future hearing).

129. All parties agreed that I would not make any decision about costs at this stage, and that, if there is to be an application at all, it would be made after the parties have considered this decision and reasons.

Employment Judge Quill

Date: 3 May 2023

RESERVED JUDGMENT &
REASONS SENT TO THE PARTIES
ON 3 May 2023

FOR EMPLOYMENT TRIBUNALS