EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103432/2022

Preliminary Hearing held in Glasgow on 20 January 2023

Employment Judge Ian McPherson

Mr Gary Reid	**Claimant** **In Person**
MML Marine Limited	**Respondents** **Represented by:** **Mr Paman Singh - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved Judgment of the Employment Tribunal, having heard from the claimant in person, and the respondents' solicitor, at this in person, public Preliminary Hearing, and having thereafter considered, in private deliberation in chambers, the respondents' written submissions, as also both parties' oral submissions, is that:

(1) The Tribunal finds that the proceedings have been conducted by the claimant in an unreasonable manner, and, in these circumstances, it is appropriate to Strike Out the claim, in terms of **Rule 37(1)(b) of the Employment Tribunal Rules of Procedure 2013.**

(2) Further, and in any event, the Tribunal finds that there has been non-compliance by the claimant with orders of the Tribunal, and that the claim has not been actively pursued by the claimant, and, in these circumstances, it is appropriate to Strike Out the claim, in terms of **Rules 37(1)(c) and (d) of the Employment Tribunal Rules of Procedure 2013.**

(3) Accordingly, the claimant's entire claim against the respondents is struck out, and dismissed by the Tribunal.

REASONS

Introduction

1. This case called again before me as an Employment Judge sitting alone at the Glasgow Employment Tribunal for a one-day public Preliminary Hearing in person on Friday, 20 January 2023.

2. By Notice of Preliminary Hearing issued by the Tribunal to both parties on 8 November 2022, the Tribunal had previously assigned this further Hearing as a 2 hour in person further Case Management Preliminary Hearing, as set down by me at a telephone conference call Case Management Preliminary Hearing held on 3 November 2022. My written PH Note and Orders were issued to both parties on 7 November 2022.

3. At that Preliminary Hearing, on 3 November 2022, I had made case management orders for the claimant to provide, within 4 weeks, additional information, to clarify the factual and legal issues in dispute in the case, by ordering him to provide further and better particulars of the disability discrimination claim made against the respondents, and to provide a detailed schedule of loss setting out the amount of compensation which he sought from the respondents.

4. I allowed the respondents to reply, within a further 2 weeks, by intimating any further and better particulars on their own behalf, replying to the claimant's additional information, by way of submitting amended grounds of resistance to their ET3 response, together with a Counter Schedule for the respondents.

5. The further Case Management Preliminary Hearing to be held, in person, on 20 January 2023, was assigned to determine further procedure and list the case for a substantive Hearing in March / May 2023. In advance of that further Hearing, I ordered both parties to provide updated PH Agendas by set dates.

6. Subsequent correspondence ensued between both parties, and the Tribunal, in the following period and, on 13 January 2023, the Tribunal wrote to both parties, on my direction, to advise that I had ordered that the in person (private, or closed) Case Management Preliminary Hearing to be held on 20

January 2023 had been converted to an in person open (i.e. public) Preliminary Hearing on Strike Out of the claim, as sought by the respondents' solicitor, Ms Rebeka Page, in her email to the Tribunal of 12 January 2023.

7. At this Preliminary Hearing, the case was listed to consider whether the claim should be struck out under **Rule 37 of the Employment Tribunal Rules of Procedure 2013** on any or all of the 3 alternative grounds intimated by Ms Page.

8. Given the alternative grounds of the respondents' Strike Out application, I set out below, in the following sections of these Reasons, the procedural history of the claim and response to date of this Preliminary Hearing, including the earlier case management of this claim before the Tribunal.

9. Only recently have I managed to complete my private deliberation in chambers, and progress to issue of this my finalised Judgment, and for the resultant delay, I again apologise to both parties, further to the written apology previously issued by the Tribunal, on my behalf.

Claim and Response

10. The claim had been presented to the Tribunal by the claimant on 22 June 2022, following ACAS early conciliation between 23 May and 10 June 2022. The claimant, who remained in the continuing employment of the respondents, complained of discrimination on the grounds of disability, and stated that he was owed "***other payments"***.

11. His ET1 claim form referred to an attached document for further detail, but it was not received by the Tribunal, and his claim form did not state what remedy he sought from the Tribunal.

12. His claim was accepted by the Tribunal administration, on 28 June 2022, and served on the respondents on that date, requiring them to lodge a response by 26 July 2022, and the case was listed for a telephone conference call Case Management Preliminary Hearing to be held on 23 August 2022.

13. On 29 June 2022, the claimant sent the Glasgow ET an email with the content of his formal grievance to the respondents, stating that he had had issues trying to attach that to his ET1 claim form, and so he copied and pasted it into his email.

14. His correspondence was copied to the respondents, by the Tribunal, on 4 July 2022, as the claimant had failed to do so as required by **Rule 92**. He was reminded of the need for **Rule 92** compliance when communication with the Tribunal, and to copy correspondence to the respondents at the same time.

15. The respondents defended by ET3 response lodged on 26 July 2022 by the respondents' solicitor, Mr Parman Singh of WorkNest Law, Glasgow. A detailed ET3 paper apart was provided, and as a preliminary issue, the ET3 raised the claimant's failure to particularise the basis of his discrimination claim.

16. That ET3 response was accepted by the Tribunal, on 27 July 2022, and a copy sent to the claimant and ACAS. At Initial Consideration by Employment Judge Muriel Robison, on 28 July 2022, the case was allowed to proceed to the Preliminary Hearing on 23 August 2022 for case management.

17. On 28 July 2022, a Ms Sarah Fairley from WorkNest Law, emailed the Glasgow ET, with copy to the claimant, seeking further specification from the claimant of his associative disability discrimination claim, and requesting further and better particulars from the claimant.

18. Ms Fairley lodged a respondents' PH Agenda on 16 August 2022, copying it to the claimant. The claimant should have lodged his PH Agenda, as directed on 28 June 2022, by 2 August 2022, but he failed to do so.

Earlier Case Management

19. Employment Judge Young, on 23 August 2022, ordered the claimant to provide certain information about his daughter's illness to allow the respondents to consider whether they could accept that she is a disabled person as defined in **Section 6 of the Equality Act 2010**, and for the claimant

to provide further and better particulars of his claim that he has been discriminated against because of his daughter's disability.

20. The claimant was ordered to do so, within 21 days from the date that Judge Young's PH Note and Orders were issued to parties on 26 August 2022, i.e., by 16 September 2022. The respondents were allowed 21 days to respond, and the further Preliminary Hearing on 3 November 2022 was fixed, with an order that parties would liaise with the intent of providing an agreed Agenda for this Hearing. Judge Young signposted the claimant to where he might access assistance to him as a lay person, and an unrepresented, party litigant.

21. On 16 September 2022, the claimant emailed the Glasgow ET, with copy to Ms Fairley as the respondents' representative, with his response to Judge Young's Orders.

22. He provided medical vouching of his daughter's Acute Lymphoblastic Leukaemia, and further specification of his claim, referring to acts of discrimination and victimisation, under **Sections 26 and 27 of the Equality Act 2010** (harassment and victimisation), but not direct discrimination (**Section 13**) as had been noted by Judge Young as an option.

23. Without quantifying it, the claimant stated that as regards "***other payments",*** as per his ET1 claim form, he wanted a lump sum compensation and full lost earnings dated from 11 March 2022 to date.

24. The respondents did not reply within the 21 days allowed by Judge Young, so their representative, Mr Parman Singh at WorkNest Law, was issued with a reminder by a Legal Officer, and asked on 12 October 2022 to reply within 7 days, and to explain the respondents' failure to comply with Judge Young's Order.

25. Thereafter, on 13 October 2022, a Ms Rebekah Page, solicitor at WorkNest Law, emailed the Glasgow ET, with copy to the claimant, noting that she had taken over from Ms Fairley, who had left the business, and apologising for the administrative error in not replying before. She asked for the Tribunal records

to be updated, and they have been. She attached an amended ET3 response paper apart.

26. Further, Ms Page raised issues about the medical information provided by the claimant, and stated that the respondents were unable to concede disability status at that time in respect of the claimant's daughter, but they hoped to be able to do so before this further Hearing.

27. Ms Page also asked the claimant to confirm that he no longer pursues a claim under **Section 13**, only **Sections 26 and 27**, and, if he does, to clarify the basis of any such direct discrimination claim, and for him to clarify what sums he seeks under "***other payments***."

28. On 17 October 2022, a Legal Officer wrote to both parties, acknowledged Ms Page's email correspondence of 13 October 2022, and sought the claimant's written comments by 24 October 2022. He provided a letter from a Professor at Queen Elizabeth University Hospital, about his daughter, on 20 October 2022, with copy sent to Ms Page.

29. He sought advice from the Tribunal about what **Section 13** means, but the Tribunal cannot provide advice to parties, as an independent judicial body. Unfortunately, it appears that the claimant was not so advised by letter from the Tribunal.

30. On 21 October 2022, Ms Page emailed Glasgow ET, with copy to the claimant, to confirm that the medical records provided by the claimant satisfied the respondents, and they concede that the claimant's daughter was disabled in terms of **Section 6 of the Equality Act 2010** from her diagnosis in August 2021.

31. That correspondence was acknowledged by the Tribunal on 25 October 2022 by letter, which advised parties that the Tribunal looked forward to receiving an agreed Agenda in sufficient time ahead of the Hearing on 3 November 2022, as ordered by Judge Young.

32. Ms Page emailed the Tribunal, with copy to the claimant, that same day, noting that he had failed to provide his comments by the deadline of 24

October 2022, and stating they would be grateful if they could be sent urgently so that the Tribunal and they knew the claimant's position prior to this Hearing.

33. A Legal Officer directed that the claimant be issued with a reminder, and by letter of 26 October 2022 from the Tribunal, he was asked to reply by 12pm on 28 October 2022.

34. On 28 October 2022, Ms Page again emailed Glasgow ET, with copy to the claimant, stating that she had provided the claimant with a draft Agenda and List of Issues (copies of which she enclosed), but the claimant had not responded.

35. When the casefile was referred to me, on 28 October 2022, I instructed that a letter be sent to both parties. Ms Page's correspondence was acknowledged, and the claimant was advised that a reply must be made before the Hearing on 3 November 2022, and that this was due urgently.

36. As the claimant had not completed a PH Agenda in August 2022, it was stated that it would be helpful if he could return a completed claimant's PH Agenda by 3 November 2022, or at least reply to the respondents' updated Agenda and List of Issues sent to him on 28 October 2022.

37. No further correspondence was received from the claimant in advance of the Hearing on 3 November 2022, when the case first called before me. My written PH Note and Orders were issued to both parties on 7 November 2022. As detailed earlier in these Reasons, at paragraphs 3, 4 and 5 above, I made various case management orders.

38. In my written PH Note and Orders sent to both parties on 7 November 2022, in my closing remarks section, at pages 16 to 19, by way of signposting to the claimant, as an unrepresented, party litigant, and further to what Judge Young had previously suggested to the claimant at the earlier Hearing on 23 August 2022, and in his own PH Note, including CAB, Strathclyde University Law Clinic, EHRC and ACAS.

39. On 1 December 2022, the last day of the 4-week period allowed to him, the claimant emailed Glasgow ET, with copy to Ms Page for the respondents, with

his further particulars, and a Schedule of Loss, seeking past loss of earnings in the sum of **£18,548.88**, plus future losses, still to be calculated. He stated that a PH Agenda would be completed and submitted prior to the Tribunal's deadline of Friday, 6 January 2023.

40. Thereafter, on 10 December 2022, Ms Page intimated to Glasgow ET, with copy to the claimant, the respondents' amended ET3 paper apart, and a Counter Schedule, and also provided payslips for the claimant during his period of absence from his continuing employment.

41. The claimant was asked by the Tribunal, on 14 December 2022, for his written comments, within 7 days, and whether, in light of the respondents' amended ET3 response, and Counter Schedule, he wished to withdraw any part of his claim, or provide additional information, and / or amend his Schedule of Loss.

42. The claimant replied, on 19 December 2022, to stat that he did not wish to withdraw any part of his case, and he attached an amended Schedule of Loss, now seeking past loss of earnings in the reduced sum of **£11,118.28**, plus future losses, still to be calculated.

43. He did not complete and return his claimant's PH Agenda by 6 January 2023. He was issued with a reminder from the Tribunal to do so, by no later than 11 January 2023, and to provide an explanation why it was late, and Ms Page was advised that the respondents' completed PH Agenda was still due by no later than 13 January 2023, the date previously set in my PH Note and Orders issued on 7 November 2022.

44. On 11 January 2023, Ms Page emailed Glasgow ET, with copy to the claimant, with the respondents' completed and updated PH Agenda, and a List of Issues.

45. Ms Page emailed the Tribunal again, on 12 January 2023, with copy to the claimant, stating that he had failed to comply with the Tribunal's extended deadline, and seeking Strike Out of the claim on 3 alternative basis.

46. The claimant had not submitted his PH Agenda by the extended deadline of 11 January 2023, so on 13 January 2023, on my instructions, he was emailed

again by the Tribunal clerk, and advised that he must submit his updated PH Agenda, and include in it his comments on the respondents' PH Agenda and its List of Issues, by no later than Monday, 16 January 2023.

47. He was advised that I had converted the in person Case Management Preliminary Hearing into an in person open Preliminary Hearing on Strike Out, given Ms Page's email of 11 January 2023.

48. Thereafter, on 16 January 2023, the claimant emailed Glasgow ET, with copy to Ms Page for the respondents, apologising for the delay, due to difficulty in his personal circumstances, and attaching his PH Agenda "***completed to the best of my ability with my limited knowledge of terminology used and I have included as far as I am aware all of the required information as per Order 1 set out by Judge McPherson. For Order 2 I do not understand the terminology used regarding the conversion of the hearing... I will below add my response to the best of my ability for each of the listed issues supplied by the respondent, some sections I have left blank, as I do not fully understand the issue or what is being asked of me."***

49. In reply to the claimant's email of 16 January 2023, a further email was sent to both parties, on my direction, on 17 January 2023, advising the claimant that he should seek independent advice from CAB or others, as per previous PH Notes, and signposting by the Judge, and that matters could be discussed at the in person Preliminary Hearing on 20 January 2023.

50. On 18 January 2023, the respondents' solicitor, Ms Page, emailed Glasgow ET, with copy to the claimant, enclosing a Respondents' Bundle of all relevant documents for use at this Preliminary Hearing. It comprised 37 separate, indexed documents, extending to 167 pages.

51. Later that same day, a further email was received by Glasgow ET from a Kirstie Smith, trainee solicitor at WorkNest, requesting that the 10:00am start time for this Preliminary Hearing be amended to 11:30am, as Ms Page was to be engaged in a Final Hearing in another case, and Mr Paman Singh, who would be covering for her, was to be engaged in a telephone conference call Case Management PH in another case.

52. I refused that application to change the start time, as the case had been so listed since 3 November 2022, and I did not consider it in the interests of justice to delay the start of this case when Mr Singh's other case, in Dundee ET, was listed after this case was listed, and so I took the view that this case should take priority.

53. I suggested Mr Singh apply to Dundee ET to vary the start time in that case, or move it to another date. I was also concerned that if Ms Page was not available, why this had not been brought to the Tribunal's attention much earlier, and I sought an explanation from the respondents' solicitors.

54. In an email reply from Mr Singh, on 19 January 2023, it was explained that Ms Page had been allocated to cover a case at Leeds ET, due to the departure of a colleague who was scheduled to appear in that other case, and Ms Page had prior knowledge of the background to that her case, being a CVP Final Hearing.

55. He further advised that he was seeking a variation in start time for the Dundee case, and confirmed that he would update Glasgow ET. Later that afternoon, he confirmed that his Dundee case start time had been varied to the afternoon, and so he would be appearing at this Preliminary Hearing for the respondents.

Preliminary Hearing before this Tribunal

56. This Preliminary Hearing was a public Preliminary Hearing, conducted in person. When the case called before me, just before 10:20am, the claimant was in attendance, unrepresented, and unaccompanied. Mr Singh appeared as solicitor for the respondents, accompanied by Ms Kirstie Smith, trainee solicitor, who was shadowing him.

57. There were also present, as observers, Ms Lorna Gall (managing director) and Ms Nicola Carlin (HR adviser) from the respondents, to instruct Mr Singh. As potential witnesses for the respondents, if the case were to progress to a Final Hearing, Mr Singh stated that there would be nothing in his submissions that impacted on them attending this Hearing as observers / instructing client.

58. Mr Singh provided hard copies of the Respondents' Bundle of Documents, previously emailed by Ms Page, extending to 138 pages, as well as a separate Respondents' Bundle of 10 case law Authorities, extending to a further 94 pages.

59. He also provided to me, with copy for the claimant, hard, printed copy of an 11-page typewritten Respondents' Strike Out submissions, extending across 47 separate numbered paragraphs.

60. Before inviting Mr Singh to address the Tribunal, I explained to the claimant that, in terms of the Tribunal's overriding objective, under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, I had to ensure that the case is dealt with fairly and justly, and while I could not represent or advise him, I would seek to ensure, so far as practicable, that he was on an equal footing with the respondents' solicitor, recognising that the claimant was unrepresented, and unfamiliar with the Tribunal's rules, practices and procedures.

61. I also explained to the claimant that Mr Singh, as the respondents' solicitor, was under a professional duty, as an officer of court, to address me on the relevant law, but it was for me to apply the relevant law. While I stated that the claimant could address me on the relevant law, if he wished to do so, in response to Mr Singh's submissions from case law authorities, I had no expectation that the claimant would seek to do so, as that is unusual from most unrepresented, party litigants.

62. In the event, the claimant stated that he was content for me to apply the relevant law, and so he made no submissions on the relevant law, nor in relation to the cases cited to me by Mr Singh. I suggested to the claimant that he might wish to take some notes as Mr Singh made his oral submission to the Tribunal, if he wanted to make comment on any points raised by him, when he came to address the Tribunal in reply.

Respondents' Written Submission

63. Mr Singh's Strike Out Submissions for the respondents, as provided to me and the claimant, just prior to the start of this Preliminary Hearing, were in the terms reproduced and included in the **Appendix to this Judgment**, for ease of reference, and I refer to them for their full terms.

64. As his full written submission is appended to this Judgment, I need not summarise its salient points, because in his oral submissions, Mr Singh took me, and more importantly, the claimant, as an unrepresented, party litigant, carefully though his submissions, paragraph by paragraph, referring me, and the claimant, where appropriate to the case law authorities that he had cited to the Tribunal.

65. In the course of his oral submissions, Mr Singh referred to it being a high bar to strike out a discrimination claim, but in the circumstances of this case, the claimant had failed to respond fully, despite several opportunities offered to him by the Tribunal at earlier stages of the proceedings, so much so that the claimant had already had a "***third bite of the cherry***."

66. Instead of clarifying the legal basis of the claim, Mr Singh submitted that the claimant had "***further muddied the waters***" by asking to bring a new claim of victimisation, and while he accepted that there was a duty on the Tribunal, and the respondents' representative, to try and understand what the claimant's case might be, when his completed PH Agenda was considered, there was "***another moving of the goalposts***" about a claim of failure to make reasonable adjustments.

67. Further, added Mr Singh, the claimant's email of 16 January 2023, enclosing his completed PH Agenda, had referred to recent difficulties in his personal life, in addition to ongoing health concerns and stress. While not unsympathetic to the claimant, the fact is that he had been ordered by the Tribunal to clarify his claim, and explain the basis of his case, but he had given what Mr Singh referred to as "***vague and unspecified allegations about his personal life and health".***

68. Also, submitted Mr Singh, no medical evidence in support had been provided by the claimant, and these issues had not been indicated by him earlier, yet he was still fit for, and attending work with the respondents.

69. Regarding the claimant's reference to his limited knowledge of terminology, Mr Singh stated that was a fact, and not surprising given the claimant is a litigant in person, but that status does not give him *carte blanch* about what to comply with, and when, as regards the Tribunal's orders. Referring to my PH Note & Orders, Mr Singh described it as an *aide memoir* for the claimant, and ***"as comprehensive as it gets, unambiguous, plain English, and multiple links to go and seek assistance."***

70. Against that description, Mr Singh submitted that it seemed to him to be "***wilful intent by the claimant to plough on as he sees fit, regardless of directions given by the Tribunal".*** Further, he added claimant has been given leeway so far, but "***he's making a bit of a mockery of the system***." He submitted that there had already been extensive judicial resource spent on this case, now at a third Preliminary Hearing, and the claimant's conduct of the proceedings is unreasonable.

71. Referring to Ms Fairley's email of 28 July 2022 from WorkNest to the claimant, requesting further specification of his associative disability discrimination claim against the respondents, Mr Singh submitted that it was set out ***"with simple bullet points, and no legal language to befuddle or confuse the claimant".*** We were now about half a year later, and there is no prospect of this case being ready for a Final Hearing, despite considerable judicial resource, and 3 Preliminary Hearings to date.

72. He described the claimant's case as a "***moving target***", and submitted that if the Tribunal decided to give the claimant a "***fourth bite of the cherry***", because it felt Strike Out was too draconian, then the respondents would ask the Tribunal to consider the issue of an award of expenses against the claimant. He acknowledged that this was a new, oral submission, not detailed in his written submissions.

73. Developing that oral submission, Mr Singh stated that there had bn preparation for the second PH, and preparation of this Strike Out Hearing, but it would not be proportionate to look for expenses for attendance at and preparation for the first Case Management PH, as the claimant is a litigant in person. He further stated that he was not trying to be overly aggressive in the respondents' approach.

74. At that stage, I asked Mr Singh about what the respondents were asking the Tribunal to do, if it decided not to Strike Out the claim. I referred to the red card / yellow card analogy from the **HM Prison Service v Dolby** case, about Strike Out under **Rule 37,** which failing Deposit Order in terms of **Rule 39**, or the use of as Unless Order under **Rule 38,** as a "***last chance saloon"*** approach.

75. In reply to my enquiry, Mr Singh stated that they could have applied for a Deposit Order, but decided upon Strike Out, and while failure to comply with an Unless Order would result in automatic dismissal of the claim, if not compiled with by the claimant, there had been 5 months of defaults here by the claimant, and 4 defaults since the Preliminary Hearing in November 2022.

76. Mr Singh described the situation as "***persistent and unwavering***" conduct by the claimant, and while accepting that the claimant had been reactive, to an extent, rather than pro-active, "***he only acts when he believes that his claim is in serious peril , and he uses excuses to try and get off the hook***."

77. Further, he added, while accepting that the claimant is a litigant in person, and that there must be a level playing field between the parties, there is unfairness, and significant prejudice to the respondents, on a costs basis, and it appeared that "***some matters suggested by the claimant are beginning to disappear in the rear-view mirror"***, and there are complaints going back to his grievance in August 2021.

78. Continuing his submission, Mr Singh further stated that there is a "***corrosive effect of time on memory, and the respondents' witnesses ability to remember, and recall events"***, and while those witnesses are still in the respondents' employment, he submitted that it is still a significant prejudice to

the respondents, although he accepted that the passage of time will prey on the claimant too***, "although those who raise claims are more closely connected and more likely to remember what they believe to be the salient facts***."

79. Mr Singh submitted , under reference to the **Essombe** judgment from the EAT cited by him, that orders are there to be obeyed, as a matter of public policy, as otherwise cases cannot be properly case-managed, and fairness achieved between the parties.

80. When I asked him if he was familiar with a Court of Appeal judgment by Sir Ernest Ryder, former Senior President of Tribunals, Mr Singh stated that he was not, and he relied upon the public policy argument. I cite from that judgment by the SPT in **BPP Holdings** later in these Reasons.

81. In advancing his submissions seeking Strike Out of the claim, Mr Singh stated that there has been inordinate and inexcusable delay by the claimant, he cherry picks, and it is only when his claim is at serious risk does the claimant "***conjure up an explanation, and say he does not understand the process***."

82. Further, Mr Singh added, looking at the claimant's PH Agenda, and comments on the respondents' List of Issues, seeking to clarify his claim, in fact, some responses mean this cannot be sensibly responded to by the respondents, thy still do not know what the claim against them really is, and it is doubtful if you can have victimisation by association.

83. In that latter regard, Mr Singh referred to a recent Glasgow ET judgment issued on 23 November 2022 by Employment Judge Hoey involving a Football Club : **Mr R Quitongo v Airdrieonians FC Ltd and Mr P Heatherington: 4113808/2021.**

84. In closing his oral submissions, Mr Singh invited me to consider the judgment of Mr Justice Popplewell in **O'Shea,** at page 603D/E of the cited judgment , and paragraphs 12 and 3 of His Honour Judge McMullen QC's judgment in **Taylor**, cited at paragraph 46 of his written submissions.

85. He submitted that parallels can be drawn with the **Taylor** case and the present case, and that Judge McMullen, at paragraph 9 of his judgment, had referred to Lady Smith's judgment in **Rolls Royce plc v Riddle,** and the earlier EAT judgment in **Peixoto v British Telecommunications**.

86. He further stated that the **Peixoto** judgment resonated with his own submissions in the present case, and that he could not see any date in the immediate future when this case could be listed for a Hearing as a fair trial would not be possible.

87. Mr Singh concluded his oral submissions at 11:24am, when the Tribunal adjourned for a 15-minute comfort break. On resuming in public Hearing, at 11:42am, I provide a short note of extracts from Sir Ernest Ryder's judgment in **BPP Holdings**, and Mr Justice Langstaff's judgment in **Harris**, for the information of both Mr Singh and the claimant. I reproduce them later in these Reasons, in my closing remarks.

88. In reply, Mr Singh stated first that he had another case law authority that he had not included in his Bundle, but which he now wished to refer me to, being His Honour Judge James Tayler in **Cox v Adecco,** at paragraph 28(1) to (9), a copy of which EAT judgment he emailed to the Tribunal, and the Tribunal clerk provided hard copies of the relevant pages to us for reading. I deal with **Cox** more fully later in these Reasons when reviewing the relevant law.

89. Commenting on **BPP Holdings** and **Harris**, as cited by me, Mr Singh stated that the ET is less formal than the Sheriff Court, but the ET1 is still the claimant's legal pleadings, and there is a need for a narrative of the claim, and not a relaxed approach. He submitted that the respondents have done all that they are required to do, and gone above and beyond, but the claimant has not done so, referring to what Judge Tayler says in paragraph 32 of **Cox** about a litigant in person's responsibilities.

90. The claimant should, Mr Singh submitted, have explained his claims clearly, even if he did not know the legal terms, but he has not done so, despite clear PH Notes from Judges Young and McPherson, and the Tribunal's overriding

objective applies to litigants in person as to other parties, and he should do all that he can to help the Tribunal clarify the claim.

Claimant's oral Reply to Respondents' Submissions

91. It then being 11:57am, Mr Singh having concluded his oral submissions to the Tribunal, I asked the claimant to address the Tribunal with his own oral submissions.

92. In opening his oral submissions, the claimant stated that that there had been a lot of reference to "***stuff I don't understand***" about case law, and I sought to re-assure him that applying the relevant law was for me as the Judge, and I recognised that party litigants often find dealing with case law is not for them.

93. Further, the claimant then submitted that he did not accept that his claim should be struck out by the Tribunal. He submitted that he had submitted the required information, and he referred to his note at page 122 of the Bundle, being his email of 16 January 2023 with his written responses to the respondents' List of Issues, and his completed PH Agenda.

94. He accepted that he had not provided a supporting letter from his GP, to paint a clear image of his circumstances, but the claimant stated he could do so if required by the Tribunal, and what he had said in his covering email was not just an excuse.

95. When I asked him to explain his "***personal circumstances"*** to me, the claimant stated that he continues to go to work, and to be employed by the respondents. He further stated that he has not been off sick since he returned to work in September 2022, and since then he has been at work, and not off sick.

96. He added that his personal circumstances were more relevant than his unspecified "***ongoing health concerns***", as referred to in his email to the Tribunal, and that his state of mind with every part of his life are all interlinked, work, home and relationships. He stated further that he had provided the Tribunal with information about his losses sought from the respondents, and

he further stated that he did not know what further information was required from him, adding that he had provided information to the best of his ability.

97. When I referred him to the signposting to external advice and assistance, at paragraphs 56 to 70 of my PH Note from November 2022, the claimant stated that he had not gone and looked out for that advice, or representation, as he has a daughter who was ill, staying with her mother, while he was separated from his partner, as a result of this Tribunal case, and he is the sole carer for his teenage son, and the claimant stating that he is now living with his own parents.

98. He advised that he still owns the property as identified in his ET1 claim form, as his home address, and that his wife and daughter stay there, but he and his son have, since October 2022, stayed with his parents. He provided his new accommodation address, stating that his phone and email details remain as per his ET1. I have instructed the Tribunal clerk to update his address for service to his parents' address.

99. The claimant stated that he had not taken notes as Mr Singh made his oral submission to the Tribunal, as I had suggested to him at the start of this Hearing, if he wanted to make comment on any points raised, and he simply invited me to give him the "***green light***" to continue with his Tribunal case against the respondents.

100. Further, the claimant stated that he did not accept that there was any prejudice to the respondents, by the delay since last November 2022, and he did not think that memories will likely have faded on the part of the respondents' witnesses, or staff, but that there would be prejudice to him if his case was struck out by the Tribunal, as he had provided information, since the case was first raised, but it seemed it was "***never enough for the respondents***".

101. He further stated that his claim had not changed since it was first raised, and he queried why we were now some 6 months down the line, and the respondents are still looking for additional information. He disputed the respondents' submission that his claim was not sensibly set out to let them respond.

102. While Mr Singh had referred to him getting a "***fourth bite of the cherry"***, the claimant stated that any delay was not on his part, as he stated that he had provided a "***clear and coherent statement of his case three times now",*** and he felt that things were "***going round in circles***."

Reply for the Respondents

103. When I had heard the claimant's oral submissions, as detailed above, and it then being 12:17pm, I invited Mr Singh to reply finally on behalf of the respondents.

104. In his further oral submissions, Mr Singh referred to the claimant's email at page 122 of the Bundle, which had highlighted "***health concerns***", but at this Hearing, the claimant had stated it was not really that, but it is all to do with his "***personal circumstances***".

105. As such, Mr Singh stated that the claimant has a "***blaze attitude to these Tribunal proceedings",*** and that the claimant has "***chosen to bring these proceedings forward with limited information",*** yet the claimant is at work, and working for the respondents, and while family relationships may be difficult, he has not taken up the advice links suggested by the Judge in his helpful PH Note.

106. Mr Singh further submitted that child care does not prevent the claimant from looking for advice on a website, and using the "***horse to water***" analogy, you can only go so far with a claimant who, given links to explore, does not seek to use them to help himself.

107. He further submitted that this is "***wilful defiance"*** to comply, and adhere to deadlines, and while the claimant had said he could not see what else he could do, Mr Singh submitted that the claimant does not sew that his claim cannot be sensibly responded to, and that we will "***never get to a point where the claimant is ready for a Final Hearing."***

108. Further, while the claimant had said his claim has not changed, it is clear that it has, when you look at how he has completed the schedules to his PH Agenda, detailing the types of discrimination he says happened to him, and

what sections of that PH Agenda schedule he had and had not completed to set out the factual and legal basis of the claim he seeks to pursue against the respondents .

109. Using the "one step forward, two steps back" phrase, Mr Singh submitted that we were now "***3 steps back***", and further stated that the claimant is "***unwilling to state his case".***

110. Mr Singh's reply concluded at 12:26pm, bringing this Preliminary Hearing to a close. I reserved Judgment to follow in what I then hoped would be the next couple of weeks. Unfortunately, there has been a delay, for which I have apologised to both parties.

Relevant Law : Strike Out

111. While the Tribunal received a detailed written submission from Mr Singh, with some statutory provisions and some case law references cited by him on the respondents' behalf, the Tribunal has nonetheless required to give itself a more fulsome self-direction on the relevant law relating to bringing a claim and Strike Out.

112. As far as the statutory provisions on Strike Out are concerned, for present purposes, I need only refer to the terms of **Rule 2**, and **Rules 37(1) and (2) of the Employment Tribunal Rules of Procedure 2013,** as follows:

Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Striking out

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

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

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

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

(d) that it has not been actively pursued;

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

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

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

> ***"16.. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.***
>
> ***17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be***

restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

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

114. The power to strike out a claim has been described by the Court of Appeal as a '***draconic power not to be readily exercised'*** (**James v Blockbuster Entertainment Ltd [2006] EWCA Civ 684**, Lord Justice Sedley, at paragraph 5) :

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

115. Mr Singh did cite from **Blockbuster,** at his paragraph 26, and his written submissions do refer to earlier judgments from **Bolch**, and **Weir Valves**, at his paragraphs 25 and 33.

116. Strike Out is described as a draconic power because it can stop the claimant from proceeding with their claim without having their case considered and evidence reviewed fully at a full hearing. Hence, the power should be used sparingly. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances.

117. A Tribunal can exercise its power to strike out a claim (or part of a claim) '***at any stage of the proceedings'*** - **Rule 37(1).** However, the power must be exercised in accordance with ***"reason, relevance, principle and justice":***

Williams v Real Care Agency Ltd [2012] UKEATS/0051/11, **[2012] ICR D27,** per Mr Justice Langstaff at paragraph 18.

118. In directing myself to the relevant law, and as I briefly signposted, during this Preliminary Hearing, I have recalled **H M Prison Service v Dolby [2003] IRLR 694,** at paragraph 14 of Mr. Recorder Bower' QC's judgment, with Strike Out being described by counsel as the "***red card***.", and a Deposit Order is the ***"yellow card***" option.

119. While **Dolby** reviewed the options for the Employment Tribunal, under the then 2001 Rules of Procedure, Mr Recorder Bower's judgment, at his paragraphs 14 and 15, is still worthy of consideration today, reading as it does, as follows:

> ***"14. We thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put it, "the yellow card"). Fourthly, they may decide at the end of the case that the application was misconceived, and that the Applicant should pay costs.***
>
> ***15. Clearly the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the Tribunal must adopt a two-stage approach; firstly, to decide whether the application is misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application***

for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point."

120. In the present case, it is important to note and record that the respondents only sought Strike Out of the claim, on 3 alternative grounds under **Rule 37**, and they did not seek, as many respondents do in Strike Out Hearings, to adopt a fallback position if no Strike Out is granted, then to seek, in the alternative, a Deposit Order under **Rule 39.**

121. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13, [2014] IRLR 14**, the then learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

122. However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosures, the circumstances in which a claim will be struck out are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

123. Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success in terms of **Rule 37(1)(a).** In **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391,** as cited by Mr Singh at paragraph 5 of his written submissions, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

124. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126,** the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases,

in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

125. Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezsias** in **Balls v Downham Market High School and College [2011] IRLR 217,** stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

126. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

127. In **Balls,** at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

"…***to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this***

important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached."

128. In the present case, it is important to note and record that the respondents do not seek Strike Out on the basis of no reasonable prospect of success in terms of **Rule 37(1)(a).** Mr Singh's application was for Strike Out under **Rule 37(1)(b)** due to the proceedings being conducted by the claimant in an unreasonable manner; under **Rule 37(1)(c)** for non-compliance with orders of the Tribunal; and under **Rule 37(1)(d)** that the claim has not been actively pursued.

129. I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, as cited by Mr Singh at paragraphs 4 and 28 of his written submissions, an unreported Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to ***"a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

130. Finally, and while not cited by Mr Singh, I have reminded myself of the judicial guidance from the Employment Appeal Tribunal, in the judgment of the then Her Honour Judge Eady QC, now the High Court judge, Mrs Justice Eady, current President of the EAT, in **Mbuisa v Cygnet Healthcare Limited [2019] UKEAT/0119/18**, at paragraphs 19 to 21 as follows:

> ***"19. The ET's power to strike out a claim for having no reasonable prospect of success derives from Rule 37 Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"). The striking out of the claim amounts to the summary determination of the case. It is a draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial. As the learned***

authors of Harvey on Industrial Relations and Employment Law explain (see P1 [633]):

"It has been held that the power to strike out a claim under SI2013/1237 Schedule 1 Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755 at para 30) or specifically cases should not as a general principle be struck out on this ground when the central facts are in dispute (see Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 [2007] IRLR 603 [2017] ICR 1126; Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755; Romanowska v Aspirations Care Limited UKEAT/0015/14 25 June 2014 unreported). The reason for this is that on a striking out application, as opposed to a Hearing on the merits, the Tribunal is in no position to conduct a mini trial with the result that it is only an exceptional case that it would be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence…"

20. ***Such an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see Ukegheson v London Borough of Haringey [2015] ICR 1285 at para 21 per Langstaff J at para 4.***

21. ***Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET***

should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in Hassan - the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

131. When considering whether a claim can be struck out on the grounds that a case has no reasonable prospects of success, I have also reminded myself that the Tribunal should carefully consider the more recent judicial guidance provided in the judgment from the case of **Cox v Adecco [2021] UKEAT/0339/19; [2021] ICR 1307.**

132. It was cited by Mr Singh, in his oral submissions to the Tribunal, as it rightly should have been, as it is an important judgment from His Honour Judge James Tayler in the Employment Appeal Tribunal, and it bears close reading.

133. In addition to the summary of the current state of the law on strike out, Judge Tayler considered that the judgment of the former President, Mr Justice Choudhury, in **Malik v Birmingham City Council [2019] UKEAT/0027/19,** which helpfully summarised the current, and well-settled, state of the law on strike out, and that judgment was important because of the consideration the then President gave to dealing with strike out of claims made by litigants in person.

134. I have specifically taken into account what Judge Tayler stated in that **Cox** judgment, namely at his paragraphs 24 to 26, as follows:

"24. Guidance for considering claims brought by litigants in person is given in the Equal Treatment Bench Book ("ETBB"). In the introduction to Chapter 1 it is noted, in a very well-known passage:

"Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.

The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.

Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.

All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants."

25. ***At para. 26 of Chapter 1 ETBB, consideration is given to the difficulties that litigants in person may face in pleading their cases:***

"Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:

- ***Failing to choose the best cause of action or defence.***
- ***Failing to put the salient points into their statement of case.***
- ***Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any***

> ***legal label at all. Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess." [emphasis added]***

> ***26. I consider that the ETBB provides context to the statement by the President of the EAT in Malik about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:..."***

135. Further, I have also taken into account Judge Tayler's further sage guidance at his paragraphs 27 to 34 in **Cox**, as follows:

> ***"27. Because the material that explains the case may be in documents other than the claim form, whereas the employment tribunal is limited to determining the claims in the claim form (Chapman v Simon [1994] IRLR 124), consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been pleaded, or are apparent from other documents in which the claimant seeks to explain the claim. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: HM Prison Service v Dolby [2003]IRLR 694; Hasan v Tesco Stores Ltd UKEAT/0098/16. Part of the exercise of that discretion may involve consideration of whether an amendment should be permitted should the balance of justice in allowing or refusing the amendment permit if it would result in there being an arguable claim that the claimant should be permitted to advance. In Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18, HHJ Eady QC held at para. 21:***

"Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see Hassan v Tesco Stores Ltd UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in Hassan - the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

28. ***From these cases a number of general propositions emerge, some generally well-understood, some not so much:***

(1) ***No-one gains by truly hopeless cases being pursued to a hearing;***

(2) ***Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;***

(3) ***If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;***

(4) ***The Claimant's case must ordinarily be taken at its highest;***

(5) ***It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;***

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves

difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. ***There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and***

what type of wrongdoing the claimant contends the information tended to show.

31. Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable

steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focussed as possible.

33. I have referred to strike out of claimants' cases, as that is the most common application, but the same points apply to an application to strike out a response, particularly where the respondent is a litigant in person.

34. In many cases an application for a deposit order may be a more proportionate way forward."

Discussion and Deliberation

136. I have carefully considered both parties` written and oral submissions, along with my own obligations under **Rule 2**, being the Tribunal's overriding objective to deal with the case fairly and justly.

137. Having done so, and after careful consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to earlier in these Reasons, I am satisfied that this is one of those cases where it is appropriate to Strike Out the claim in its entirety.

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

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

139. In his submissions for the respondents, Mr Singh focussed on "***unreasonable conduct",*** and not "***scandalous"*** or "***vexatious***", in terms of **Rule 37(1)(b).**

140. I have decided that his submission is well-founded, as regards the claimant's unreasonable conduct of the proceedings, and so I have granted Judgment to that effect.

141. In particular, my decision to grant the respondents' application on this ground under **Rule 37** is influenced by the fact that I do not consider the claimant to have fully participated in the Tribunal process, as a party is required to do, to assist the Tribunal in furthering the overriding objective, in terms of **Rule 2**, and to co-operate generally with the Tribunal and the other party.

142. I have considered whether the claimant acted vexatiously or unreasonably in bringing the proceedings. In **ET Marler Ltd v Robertson 1974 ICR 72**, the then National Industrial Relations Court defined vexatiousness as the bringing of a claim for reasons of spite, to harass an employer or for some other improper motive.

143. In **Attorney General v Barker 2000 1 FLR 759, QBD (DivCt)** the court said that whatever the intention of proceedings may be, if the effect was to subject the (in that case) defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant, and that it involves an abuse of the court process this can amount to vexatious conduct.

144. I have considered whether the claimant's conduct could be considered vexatious in applying either of those definitions. It is my view that the claimant's conduct in this case does not meet the criteria to be defined as scandalous, or vexatious. It do not find that the claim was brought out of spite or with the intention to harass, but it was misguided.

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

146. What I do regard as unreasonable conduct is the claimant's failure to take advice from the various bodies suggested to him by myself, and by Judge

Young before me. As the claimant could have accessed those sources of advice and assistance remotely, at a time convenient to him, via the internet using the links provided, his failure to do so is all the more a missed opportunity for him to have obtained some professional / voluntary agency advice and assistance.

147. Had he done so, he could perhaps have refined his stated case into something clearer and more coherent to give fair and proper notice of the factual and legal basis of his claim against the respondents, and so perhaps avoided the need for this Strike Out Hearing.

148. In his written submissions, at paragraphs 46 and 47, Mr Singh stated that:

> ***"46… It is inconceivable that the case will be ready to progress to a final hearing after today. Instead, the claim will require further particularisation and subsequent amendment to the ET3 before the parties can even consider any prospect of judicial mediation or a substantive hearing.***
>
> ***47. A number of the matters the Claimant complains of took place some 18 months ago. Once the claim has been fully particularised and a final hearing has been set down, it is likely going to be over 2 years since the alleged incidents. It is recognised that memories decay over time and the Respondent's witnesses may no longer be able to recount the alleged incidents. The Respondent submits that there is a substantial risk that the Respondent will suffer a severe prejudice because of recurring delays and excuses from the Claimant."***

149. I endorse Mr Singh's observations, which I consider to be well founded. The current situation is that the claimant's case is, to quote from **Chandhok**, very much a case built on "***shifting sands***". That is neither appropriate, nor reasonable conduct of the proceedings by him.

150. As such, it is appropriate and proportionate to Strike Out this claim. A lesser remedy, e.g. an Unless Order, would not have been sufficient, given the history of this particular litigation.

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

151. Mr Singh referred to **Weir Valves and Controls (UK) Ltd v Armitage,** at paragraph 33 of his written submissions. In **Weir Valves**, at paragraph 17, the EAT Judge, His Honour Judge Richardson, stated that:

"***But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."***

152. It is relevant also to refer to **Barton v Wright Hassall LLP [2018] UKSC 12,** where the Supreme Court held that litigants in person are not entitled to any greater indulgence in complying with court rules than represented parties.

153. That is because a repeated response from the claimant in the present case has been to say that he is self-representing, and he does not understand . It should be noted, however, that in the current case, the claimant has already been given a degree of latitude that a legally represented party would be unlikely to receive.

154. Further, if he truly does not understand, it makes it all the more remarkable that the claimant did not seek to access the sources of advice and assistance clearly signposted to him by the Tribunal.

155. More recently, Lord Carloway, the Lord President of the Court of Session, as Scotland's most senior Judge, in giving the Opinion of the Court, in **Khaliq v Gutowski [2018] CSIH 66,** having quoted from Lord Sumption in **Barton,** referred, at paragraph 36 of his judgment to a recent judgment by Lady Paton, following **Barton**, stating that:

"... the fair balance achieved by the rules of court will inevitably be disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent".

156. In making this observation about the claimant's conduct in the course of these Tribunal proceedings, I do so readily recognising that it is always difficult for an unrepresented, party litigant, to remain truly objective, no matter how much they try to convince themselves that they are being objective.

157. I recognise that they inevitably have an emotional attachment to their own case, and what they see as their complaint against their employer, or former employer as the case may be, and for them perception can become reality, and cause a sense of miscarriage of justice, conspiracy, etc, to flow, regardless of whatever may be the true factual position. Such litigants are a challenge to the Tribunal system.

158. Mr Singh rightly submitted that the claimant had not clarified the factual and legal basis of his claim, and so he had failed to comply with Tribunal orders. While the claimant is a lay person, and he may well, and understandably so, be unfamiliar with the Tribunal's rules, practices and procedures, it is the obligation of a party to actively pursue their case. The Tribunal is an adversarial process, not inquisitorial, and it is not for the Tribunal to set out the claimant's case.

159. I have decided that Mr Singh's submission that the claimant had failed to comply with earlier Tribunal orders is well-founded, in the sense that while he did correspond with the Tribunal, his emails were not material compliance, as the factual and legal basis of his claim against the respondents remains inadequately specified by him, and so I have granted Judgment to that effect, as another ground for Strike Out of the claim.

160. It is the claimant's case, and he needs to clearly state what it is. It is not for the Tribunal, any more than the respondents, to second guess what they think might be the factual and / or legal basis of a claimant's case.

161. I am not satisfied that it would be in the interests of justice to allow the claimant a further opportunity to set out his case. The claimant has had several opportunities to date, but failed to take advantage of them being provided to him. The "***last chance saloon***" was open to him to act proactively, and meaningfully reply to the Tribunal's earlier Orders at, or in advance of this Strike Out Preliminary Hearing.

162. Whether by design, or default, the claimant has clearly failed to do so. It is not appropriate or proportionate to allow him a yet further opportunity, when his track record to date suggests nothing will change. The interests of justice requires justice to be done between the parties but, as per **Hassan**, regard must also be had to the wider administration of justice, and the impact of this case on other users of the Employment Tribunal.

163. It is appropriate and proportionate that, by granting the respondents' Strike Out application, that this case ends, and that it ends now.

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

164. In his submissions for the respondents, Mr Singh stated that the claim has not been actively pursued, and this argument clearly ties into his earlier submissions about the claimant's unreasonable conduct, and non-compliance with Orders.

165. Again, I regard his submission as well-founded, and, again, it is appropriate and proportionate that, by granting the respondents' Strike Out application, that this case ends, and that it ends now.

Disposal and Closing Remarks

166. For the foregoing reasons, the Tribunal finds that the proceedings have been conducted by the claimant in an unreasonable manner, and, in these

circumstances, it is appropriate to Strike Out the claim, in terms of **Rule 37(1)(b) of the Employment Tribunal Rules of Procedure 2013.**

167. Further, and in any event, the Tribunal finds that there has been non-compliance by the claimant with orders of the Tribunal, and that the claim has not been actively pursued by the claimant, and, in these circumstances, it is appropriate to Strike Out the claim, in terms of **Rules 37(1)(c) and (d) of the Employment Tribunal Rules of Procedure 2013.**

168. Accordingly, the claimant's entire claim against the respondents is struck out, and dismissed by the Tribunal.

169. While the claimant did correspond with the Tribunal, his various emails were not material compliance with the Tribunal's earlier case management orders, as the factual and legal basis of the claim against the respondent remains unclear as it has still not been properly specified by him. It is the claimant's case, and he needs to clearly state what it is. It is not for the Tribunal, any more than the respondents, to second guess what they think might be the legal basis of a claimant's case.

170. The Tribunal is always mindful of the need to assist those representing themselves, acknowledging the need to ensure that the parties are on an equal footing. However, it is the claimant who brings the claim and makes the allegations, and it is the claimant who must take responsibility for managing the case and treating it with the seriousness and importance that any legal proceedings deserve.

171. Giving assistance to a lay party litigant does not mean doing the claimant's job for them. The Tribunal's Orders and directions are not aspirational, and they must be complied with. Accordingly, in coming to my decision to grant the respondents' Strike Out application, notwithstanding the claimant's objections, I have looked carefully at the Tribunal's casefile to see what, in fact, has happened since Judge Young and then myself issued our Orders. The answer is short and easily ascertainable. There has been no material compliance with the Tribunal's Orders.

172. The claimant here is in the same position as very many other claimants, yet they manage to communicate effectively with the Tribunal, and comply with its Orders and directions. I wish to note and record that the claimant presented a Tribunal claim form which, in my view, cried out for further information as to the legal basis of his claim, but despite earlier Orders / directions by the Tribunal, clear and unequivocal in their terms, the claimant in effect has done little to explain what is the legal basis to his claim that lies within the jurisdiction of the Employment Tribunal.

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

174. It is likely that the conduct of the case would continue to be similarly non-compliant, and in those circumstances, the claimant would be at risk of Strike Out again in the future. The prejudice to him of Strike Out now is far less than it would be for a party who has routinely demonstrated being able to progress a claim in accordance with directions, as most do.

175. In all the circumstances, I consider that it is appropriate that this claim end now. To do otherwise, in my view, would be inappropriate. The claimant has failed to comply fully with previous Orders, and I have no feeling that making an Unless Order, under **Rule 38**, would change things for the better, given the experience to date. To allow this case to continue is likely to cause both wasted time and resource, and unnecessary anxiety. It would also occupy the limited time and resource of this Tribunal that would otherwise be available to other pro-active and truly engaged litigants.

176. I am reminded of the comments of Her Honour Judge Kathrine Tucker in the unreported case of **Mr W Khan v London Borough of Barnet [2018]**

UKEAT/0002/18, in which, at paragraph 31, she states: "***Being a litigant in person does not mean that a litigant is exempt from compliance with procedures or from engaging in the litigation process to pursue a claim."***

177. Similarly, the circumstances of this case also remind me of the more well known, familiar and often cited Employment Appeal Tribunal judgment in **Rolls Royce plc v Riddle [2008] IRLR 873** and the comments of Lady Smith, then an EAT judge, at paragraph 20 of that report, where she stated:

"….it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and / or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim. …"

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

179. So too I am reminded of the judicial guidance given by the then Senior President of the Tribunals, Sir Ernest Ryder, in **BPP Holdings v Revenue And Customs [2016] EWCA Civ 121**, as follows:-

> ***"37. There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in Mitchell***

and Denton. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.

38. A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party."

180. Yes, strike out of a claim is a Draconian step. However, in my view, given the circumstances of this case, and its procedural history to date of this Preliminary Hearing, it is not appropriate or proportionate for further Tribunal resources, both administrative and judicial, to be taken up in dealing with this case. Accordingly, the claim is struck out.

Employment Judge: **I McPherson**
Date of Judgment: **28 April 2023**
Entered in register: **3 May 2023**
and copied to parties

APPENDIX : This is a full copy of the Respondents' Strike Out Submissions as provided to the Tribunal.

Gary Reid v MML Marine Limited

Respondent's Strike Out Submissions

Introduction

1. *The Employment Tribunal has set down an open preliminary hearing to consider the Respondent's application of 12 January 2023, under Rule 37 of the Employment Tribunal Rules of Procedure 2013, as amended, to strike out the Claimants claim. A copy of this application can be found at pages 118-119 of the bundle.*

2. *The matters that the Respondent wishes to be considered are set out in the contents of the email dated 12 January 2023 and can be set out below:*

> *"The Respondent seeks strike out of the claims on the following alternate basis due to the preceding failures:*
>
> - *under Rule 37(1)(b) due to the proceedings being conducted by the claimant in an unreasonable manner;*
> - *under Rule 37(1)(c) for non-compliance with orders of the Tribunal;*
> - *under Rule 37(1)(d) that it has not been actively pursued."*

The Law

3. *The power to strike out a claim (or part of a claim) is found in the Employment Tribunals Rules of Procedure 2013, as amended, rule 37, the relevant parts of which are set out below.*

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

(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;

(d) that it has not been actively pursued;

(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.'

*4. As per EATs Judgment in **Hasan v Tesco Stores Ltd UKEAT/0098/16**, it is well established that there is a two-part test when considering strike out. The Tribunal must first consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established. Having identified any established grounds, the tribunal must then decide whether to exercise its discretion to strike out.*

*5. The Tribunal is also required to be slow in reaching any decision to strike out claims, particularly where there is an unrepresented party and allegations of discrimination. In **Anyanwu v South Bank Student Union [2001] ICR 391.** Whilst the Tribunal must adopt a conservative approach to striking out claims, the case law does not have a chilling effect on the Tribunal's ability to strike out claims.*

Background

6. Upon receiving the Claimant's ET1, the Respondent noted that he had failed to particularise his claim. The Respondent lodged their ET3 response and then sought further particularisation by way of letter. [Bundle Pages 29-30] The Claimant did not respond to this letter.

7. The parties attended a preliminary hearing on 23 August 2022. The Claimant was provided with a template agenda by the Tribunal on 28 June 2022, and he was required to lodge this 14 days before the hearing but failed to do so.

The Respondent was also required to lodge an agenda 7 days before the hearing and did so on 16 August 2023. [Bundle Pages 31-37]

8. *Following the hearing, the Claimant was given 21 days to provide further particulars of his discrimination claims setting out all dates of events; individuals involved; what had happened; and the statutory basis for claim. [Bundle Pages 38-39 paragraph 3] The Claimant was also required to particularise his "other payments" claim. The Claimant had indicated at the hearing that he was claiming discrimination by association, and he was advised that he could do so on the following basis s13, s26 and s27. [Bundle Page 44 paragraph 7]*

9. *The Claimant provided further and better particulars on 16 September 2022, but he failed to make any reference to a s13 claim and did not particularise his "other payments" claim. [Bundle Pages 46-50] The claims which the Claimant did attempt to particularise did not include a number of details including dates. This was despite the explicit guidance from EJ Young and contained with the preliminary hearing note. [Bundle Pages 38-39 paragraph 3]*

10. *The Respondent's representative wrote to the Tribunal on 13 October 2022, seeking clarity on the Claimant's further and better particulars including the "other payments" claim. [Bundle Page 51] The Tribunal responded on 17 October 2022, giving the Claimant a deadline on 24 October to provide his comments to the Respondent's correspondence. [Bundle Page 56]*

11. *The Claimant failed to respond to the Tribunal, so the Respondent's representative wrote to the Tribunal on 25 October 2022 and sought comments from the Claimant urgently. [Bundle Page 59] The Tribunal noted the failure and wrote to the Claimant on 26 October 2022 extending the deadline to 12pm on 28 October 2022. [Bundle Page 62]*

12. *EJ Young had also directed for a further preliminary hearing to be set down on 3 November 2022 once the claim had been particularised by the Respondent. EJ Young directed the parties to liaise ahead of the hearing and lodge an agreed agenda. [Bundle Page 39 paragraph 5] The Claimant was*

reminded of this requirement in a letter from the Tribunal dated 25 October 2022. [Bundle Page 51]

13. *Despite the Respondent initiating the process by providing the Claimant with a proposed agenda and list of issues, the Claimant did not respond. The Respondent wrote to the Tribunal on 28 October 2022 providing their draft agenda and list of issues, noting that the Claimant had failed to respond to them. [Bundle Pages 64-69]*

14. *The Tribunal wrote to the Claimant advising that he **must** respond before the preliminary hearing on 3 November 2022. [Bundle Page 70] The Claimant did not respond.*

15. *A further preliminary hearing took place on 3 November 2022 with EJ McPherson and a note of this hearing was compiled [Bundle Pages 72-91]. During the hearing, the Claimant asserted that his reason for failing to respond was due to being unable to open Miss Page's document, however he had failed to alert either the Respondent or Tribunal to this. [Bundle Page 83, paragraph 34] The Respondent noted that the FBPs provided did not clarify all of the claims as requested in the case management orders, which was recorded at paragraph 3. [Bundle Page 73]*

16. *Due to the Claimant failing to particularise both the legal and factual basis of his claim, as well as the remedy he seeks, the parties agreed for a further preliminary hearing to take place on 20 January 2023 in person. [Bundle Page 73-73 paragraph 4]*

17. *The Claimant was ordered to provide further and better particulars of all his claims by no later than 1 December 2022. [Bundle Pages 74-75 paragraph 6]. The Claimant responded to this on 1 December 2022 but failed to include any details of his s26 claim in the particulars. [Bundle Page 94-98] As the Claimant had been directed by EJ McPherson to include details of all claims, the Respondent noted that he was no longer relying upon this head of claim and asked for it to be dismissed. [Bundle Page 99]*

18. The Tribunal noted that the Claimant had failed to fully particularise claim again and sought his comments within 7 days. [Bundle Page 105] The Claimant responded to advise he did not intend to withdraw any part of his claim but still failed to provide any further particularisation. [Bundle Page 107] During the course of this email, the Claimant advised that he would comply with the deadline to provide an agenda before the next preliminary hearing.

19. EJ McPherson also ordered for all parties to provide an updated preliminary hearing agenda ahead of the next case management hearing. The Claimant was to provide his agenda before the deadline on 6 January 2023, and the Respondent by 13 January 2023. [Bundle Pages 75-75 paragraph 9].

20. The Claimant failed to provide an agenda by the deadline of 6 January 2023, so the Tribunal wrote to him on 11 January 2023 giving him until 4pm that day to respond with this agenda and provide an explanation why it was late. [Bundle Page 110-111] Again, the Claimant failed to do so. The Respondent wrote to the Tribunal on 11 January 2023, providing a copy of their agenda and updated list of issues, in compliance with case management orders. [Bundle Pages 112-117]

21. The Claimant's continual disregard for orders, and lack of response led to the Respondent to make an application for strike out of the claims on 12 January 2023. [Bundle Pages 119-119]

22. On 13 January 2023, the Claimant was given a final opportunity to respond by no later than 4pm on 16 January 2023 providing his agenda for the preliminary hearing, and to submit comments both the representative's agenda and list of issues. [Bundle Page 120]

23. On the afternoon of 16 January 2023, the Claimant wrote to the Tribunal. The Claimant advised that he had not responded due to his personal life but provided no evidence of this. [Bundle Pages112-125] The Claimant provided an agenda for the hearing, which failed to particularise the heads of claim he is relying upon and commented on the Respondent's list of issues, providing his view on the facts for each question asked of the Tribunal. The Claimant completed the schedules within his agenda relating to disability and the

Respondent wishes to draw the Tribunal's attention to this. The Claimant has completed the boxes in relation to a failure to make reasonable adjustments, which is not a claim complained of as the Claimant himself has no disability. However, he has written "N/A" under the heading of harassment s26 and marked "-" under the heading of victimisation. The Respondent cannot comprehend what the claims in their current format.

24. *The Claimant was again reminded of the signposting from EJ McPherson to seek legal advice by letter of 18 January 2023, but again failed to do so. [Bundle Page 137-138]*

Respondent's position on strike out under 37 (1)(b)

25. *In relation to Rule 37(1)(b) the "unreasonable" manner in which the proceedings have been conducted, the Tribunal must consider whether the acts complained of are truly related to the conduct of the proceedings. The Tribunal should adopt a three stage test when considering strike out under this rule (**Bolch -v- Chipman 2004 IRLR 140, EAT**).*

    a. *Firstly, the Tribunal must ascertain whether a party has acted unreasonably;*

    b. *Secondly, if a party has acted unreasonably, the Tribunal must consider whether a fair trial is still possible; and*

    c. *Thirdly, even if a fair trial is unachievable, the Tribunal should consider the appropriate remedy in the circumstances. For example, the Tribunal may choose to impose a lesser penalty, such as an award for expenses, rather than striking out the claim.*

26. *In **Blockbuster -v- Jones 2006 IRLR 630, CA,** the Court of Appeal held that unreasonable conduct must take the form of deliberate and persistent disregard of required procedural steps or must have made a fair trial impossible.*

27. *It is then necessary for the Tribunal to consider whether striking out is a proportionate response. Consideration needs to be given as to whether there*

is a less drastic means to the end for which the strike-out power exists. The answer must take into account whether the Tribunal is ready to hear the claim, or whether there is still time for orderly preparation to be made. It may be that a straightforward refusal to admit late material or applications will enable the hearing to go ahead, for example.

*28. As per **Hasan**, the Tribunal must apply its discretion when considering whether to strike out claims. In the present case, the Respondent submits that the Tribunal should take into account the stage of the proceedings. This matter has now benefited from extensive judicial resource as well as constant attempts by the Respondent's representatives to clarify the Claimant's claim. Simply put, he has refused to help himself. When considering the exercising of its discretion, the Tribunal is invited to take into account the fact that it has, on more than one occasion, directed further and better particulars, which the Claimant has not provided. After significant judicial intervention and three preliminary hearings, we are still no further down the line in understanding the precise nature of the Claimant's claims.*

29. The Respondent submits that it is not possible to have a fair trial. The claims are still changing and are a moving target. The Claimant should not benefit from four bites of the cherry, causing significant costs to Respondent, both monetary and administrative. Esto, expenses for two additional Preliminary Hearings and preparation.

30. The Respondent submits that there has been a persistent and unwavering course conduct on the part of the Claimant. This amounts to unreasonable conduct. The Claimant has continuously disregarded required procedural steps and has provided no verifiable reasons as to why he has acted in this unreasonable manner. At a previous stage in these proceedings before the Tribunal the Claimant suggested that his disregard for the Orders of the Tribunal was that he could not open Ms. Page's correspondence. Even if generously taking this statement at face value, the Claimant took no steps to help himself by informing Ms. Page of this or seeking clarity from the Tribunal. It was only when he was put under the microscope, so to speak, that he conjured up this explanation. The reason for his most recent spate of failures

is that he was unwell. Notwithstanding the fact that the Claimant has not submitted any fit notes and continues to attend his place of work, he took no steps to inform the Respondent's representatives or the Tribunal of the supposed difficulties he was facing, and, as per his pattern, only provided this explanation after judicial resource was expended and he was ordered to provide a response.

31. Taking this into account, the Respondent submits that it would be proportionate to strike out the response under Rule 37(1)(b). The matter is no further along and there is still significant haze which surrounds the Claimant's claims. At each iteration, the Claimant's claims appear to evolve and are constantly fluid. Simply proceeding on the basis of the pleadings as they current sit would not assist the Tribunal, as the claims still cannot be sensibly understood or responded to.

Respondent's position on strike out under Rule 37(1)(c)

32. In considering whether it is proportionate to strike out a claim under this Rule, the Tribunal should take into account whether strike out would be proportionate to the non-compliance with the prior Orders.

*33. In **Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371** the EAT set out the principles for tribunals to apply when considering whether to strike out a claim on this ground when an Order has been breached.*

34. When an Order has been breached, the Tribunal must be able to apply a sanction in response to willful disobedience of an Order. The guiding consideration is the overriding objective to do justice between the parties. The Tribunal should therefore consider all the circumstances when deciding whether to strike out or whether an alternative remedy would be an appropriate sanction. Relevant factors will include:

d. the magnitude of default;

e. what disruption, unfairness or prejudice has been caused; and

f. whether a fair hearing is still possible.

*35. In **Essombe v Nandos Chickenland Ltd UKEAT/0550/06** the EAT upheld the strike-out of Mr Essombe's claims as he had deliberately refused to comply with the tribunal's order to disclose tape recordings he had made during a disciplinary hearing. The EAT acknowledged that strike out is a draconian order, which should only be deployed in a clear and obvious case, but held that this was such a case. It was a deliberate decision to disobey the tribunal's order which prevented the tribunal from having the best evidence on which to base its findings of fact. Also, as a matter of public policy, orders are there to be obeyed, otherwise cases cannot be properly case-managed and fairness achieved between the parties.*

36. The Respondent submits that in the present case, the Claimant has willfully disregarded all assistance and signposting offered to him and has intentionally failed, a number of times, to comply with Case Management Orders. This has resulted in draining the Tribunal's precious resources and significantly impacted on the Respondent due to the costs associated in defending itself. The Claimant has been provided with several sources of information, the Tribunal was at pains to provide not only sources of information, but detailed links and a breakdown of how to source support. That the Claimant has chosen not to do so and then seeks to rely upon being unrepresented as a veil to hide his non-compliance behind should not be accepted.

37. The Claimant has, at the eleventh hour, indicated that he was unwell. Yet again, these claims are unsubstantiated and arise late in the day. Given the Claimant's previous track record, his explanations should not merely be taken at face value. Further, there is now a portfolio of evidence, from his own actions, that any further leeway afforded to the Claimant will be abused, resulting in further delay and expense, to the Respondent and to the public purse through the strain on the Tribunal.

38. The Claimant makes reference to conducting the case alone as a party litigant. However, both EJ Young and EJ McPherson have provided the Claimant with direction to seek legal advice for free. The Claimant was reminded of the previous direction of EJ Young and provided with a lengthy

note with links to advice services. [Bundle Pages 87-90] Despite this advice, the Claimant has not taken heed and continues to represent himself. Of course, the Claimant is entitled to do so, but still has to comply with Tribunal orders.

39. This case has now been at three case management preliminary hearings, with the third one today being in person, due to no fault of the Respondent. This is not in line with the overriding objective of the Tribunal to save expense; avoid delay; and ensure that the case is dealt with efficiently whilst seeking flexibility in proceedings. If this case continues, the Claimant will need to take a fourth stab at particularising his claim. He appears to have dropped claims of harassment and victimisation in his agenda and has started mentioning a claim of failure to make reasonable adjustments. It is impossible for the Respondent to know what claim is in front of them to defend as this has changed on every occasion.

40. The Claimant has been reminded of the overriding objectives of the Tribunal by EJ McPherson but is continuing to conduct himself unreasonably and willfully failing to comply with orders, in a total disregard of the Employment Tribunal. [Bundle Page 82]

Respondent's position on strike out under R.37(1)(d)

*41. **In Evans and Anor v Commissioner of Police of the Metropolis [1993] ICR 151**, the Court of Appeal set out guidance on the steps a Tribunal must take when considering striking out a claim under Rule 37(1)(d). The Tribunal can strike out a claim where:*

a. there has been delay that is intentional or contumelious (showing disrespect or contempt for the tribunal and/or its procedure), or

b. there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the other party.

42. The Respondent submits that there has been both an intentional and contumelious delay in proceedings that amounts to contempt for the Tribunal.

The Claimant has continuously disregarded the required case management orders and procedural steps of this Tribunal, with no verifiable reasons as to why he has failed to do so. The Claimant alleged at the hearing of 3 November 2022 that he could not open a rtf document submitted by the ET3 but failed to advise either the Tribunal or the Respondent's representative until pressed by EJ McPherson. Despite multiple letters and warnings from the Tribunal, the Claimant did not raise this issue before the Hearing. EJ McPherson made explicit reference to the possibility of strike out for further failures to comply with case management orders within his preliminary hearing note, yet the Claimant has continued to neglect Tribunal procedure.

43. *In **Khan v London Borough of Barnet UKEAT/0002/18**, the EAT upheld the Tribunal's decision to strike out a claim just under five months after it had commenced, on the ground that it was not being actively pursued. The EAT noted the "exceptional circumstances" of the case given the complete lack of engagement with the progress of his claim in any meaningful way and the Appellant's tendency to pick and choose which emails and requests to comply with. Similarly, the Claimant in the present matter has failed to meaningfully progress his claim with his transitional heads of claim between drafts of his pleadings and failures to respond to numerous requests. Between the first and second preliminary hearing, the Claimant was able to provide further particulars and supply medical evidence when requested, but he chose not to advise the Respondent or Tribunal when he purports to have been unable to open a document; when he was required to lodge an agenda; or when he asked for his comments on the Respondent's correspondence during the same period.*

44. *Similarly, in January 2023, the Claimant appeared unable to comply with case management orders to lodge an agenda despite numerous requests. However, once informed of the prospect of strike out, the Claimant was able to respond to the Tribunal. Nonetheless, the order stated that the Claimant should provide his own agenda; comment on the Respondent's agenda; comment on the Respondent's list of issues; and provide reasons for his non-compliance. The Claimant has not moved matters forward in any meaningful*

way. He has failed on some of these requests by failing to comment on the Respondent's agenda and list of issues appropriately, again picking and choosing which aspects to comply with. These recurrent failures have led to the requirement to undertake three case management preliminary hearings which burdens the Respondent with significant costs, through no fault of its own. In fact, the Tribunal has noted that the Respondent's representative has acted fairly in the course of these proceedings. The Respondent should not suffer the burden of further costs for acting in line with the overriding objective and adopting a tolerant approach to this point.

45. *In terms of the second limb of the test, in **O'Shea v Immediate Sound Services Ltd 1986 ICR 598 EAT**, LJ Hoffmann considered that prejudice to the Respondent may not be difficult to show, as it will often be necessary "to investigate the facts before memories have faded, not to allow hurt feelings to fester and to provide as summary a remedy as possible." In the case before this Tribunal, the Claimant has continuously failed to particularise his claim despite numerous attempts. In fact, in each iteration of his further and better particulars, his ET1 and in fact in the agenda produced for today's hearing, he has elected to refer to differing claims. Seven months on from the claim being lodged, and three hearings later, we are no further on with establishing the heads of claim.*

46. *Parallels can be drawn with the case of **Taylor v HP Enterprise Services UK Ltd EAT 1807/10**. In **Taylor**, despite four preliminary hearings, the case was still insufficiently particularised. The Appellant had not obtained legal representation and had been unwell during much of the process. The Tribunal had attempted to make substantial interventions to get the case on the road but to no avail. The EAT upheld the Tribunal's decision to strike out the claim for the Appellant's failure to actively pursue his claim. It was not for the Tribunal or the Respondent to force the process along or to second-guess the nature of the Appellant's claims. In the present case, EJ McPherson set out a helpful and lengthy preliminary hearing note, in plain English, explaining exactly what the Claimant was required to do before the hearing today. In fact, EJ McPherson noted in his Order at para. 43, that the Note of the Hearing*

was intentionally detailed, and was drafted in this manner to assist the Claimant. The Claimant himself agreed that he understood the instructions and EJ McPherson helpfully set out a list of places the Claimant could seek legal advice, yet he has failed on almost all accounts. It is inconceivable that the case will be ready to progress to a final hearing after today. Instead, the claim will require further particularisation and subsequent amendment to the ET3 before the parties can even consider any prospect of judicial mediation or a substantive hearing.

47. A number of the matters the Claimant complains of took place some 18 months ago. Once the claim has been fully particularised and a final hearing has been set down, it is likely going to be over 2 years since the alleged incidents. It is recognised that memories decay over time and the Respondent's witnesses may no longer be able to recount the alleged incidents. The Respondent submits that there is a substantial risk that the Respondent will suffer a severe prejudice because of recurring delays and excuses from the Claimant.