Case No: 1601790/20

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Egan**

Respondent: **Hywel Dda University Local Health Board**

Heard at: **Cardiff** **On:** **5 May 2023**

Before: **Employment Judge C Sharp (sitting alone)**

Representation:

Claimant: In person
Respondent: Mr J Walters (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's application for the Judge to be recused is refused;

2. The Claimant's application that the strike out application in respect of his claim be heard by a full panel is refused;

3. The Claimant's claims of detriment due to the making of a public interest disclosure are struck out on the basis that the Claimant failed to comply with the Tribunal's directions issued on 22 September 2022, 15 November 2022 or 29 December 2022 and has failed to actively pursue his claims.

REASONS

Recusal

1. At the start of the Preliminary Hearing today, the Claimant renewed his written application for me to recuse myself from dealing with the case today. He set out in a letter to the Employment Tribunal his arguments as to why he submitted that I am subject to apparent bias. The Claimant has helpfully referred to the leading case of Porter v McGill [2001] UKHL 67 which confirms that the test whether a reasonable well-informed observer, having

considered the facts, would consider there was a real possibility that I was biased.

2. In summary, the Claimant has said both orally today and in writing is that he does not think that I should have dealt with the strike out application against the Respondent made in November 2022. He submitted that I have demonstrated a closed mind to what he says on several issues and have descended into the arena at times. The Claimant is also unhappy about my refusal to interfere with the Judgment of Employment Judge Duncan made in May 2022. The Claimant has said that I am perpetuating a false narrative that he sought a reconsideration of the decision of Judge Duncan, and in dealing with the Claimant's strike out application in December 2022, I defended the reputation of the Respondent and its representatives. The Claimant added that I should not have dealt with his correspondence sent to Regional Employment Judge Davies, focusing on the correspondence received at the beginning of 2023 when the Claimant said he had asked for reasons for what the Regional Employment Judge had done and received an answer from me.

3. The submissions of Mr Walters on behalf of the Respondent were brief. The Respondent's position was that I had not done anything wrong or inappropriate, and I should not recuse myself. Mr Walters commented adversely on the Claimant's submissions.

4. I declined to recuse myself from the proceedings today. The Claimant's strike out application I dealt with in December 2022 was a collateral attack on the Judgment of Judge Duncan as it challenged its validity repeatedly as a reason for the Response to be struck out (other reasons were also given). As I have explained to the Claimant more than once from the outset of my dealings with this matter, no Judge at this level can overturn the Judgment of another Judge; we can potentially look at orders when there has been a change of material circumstances, but that is all. The only way forward in respect of a Judgment which a party cannot accept is either to seek a reconsideration from the original Judge or appeal to the Employment Appeal Tribunal. Any Employment Judge would have said the same thing to the Claimant; this is not evidence of a closed mind. The same argument applies to Judge Duncan's refusal of the Claimant's reconsideration application; while Judge Duncan says that it happened, I am bound by that finding unless either Judge Duncan changes his position or the Employment Appeal Tribunal (or more senior court) says otherwise.

5. In relation to this legal reality, the Claimant's response is that I should not have dealt with his application in my Judgment of 5 December 2022. However, his application made in November was to strike out the Response; it was not an application for a reconsideration (something which the Claimant has denied ever doing). Addressing correspondence to the Regional Employment Judge does not change the well-established legal principle that the parties cannot pick the Judge who is dealing with the case. Applications made in writing will ultimately be dealt with by whichever Judge ends up with the file on their desk. In this case, that Judge was me.

6. In terms of the allegation that I have descended into the arena, the Claimant has not been specific other than to refer to my Judgment of 5 December 2022. I consider a reasonable reading of my Judgment is that I have

endeavoured to be even-handed, as the Claimant in correspondence has commented. Allowances were expressly made for the fact that the Claimant is a litigant in person and may not fully appreciate all of the legal principles in play. The Claimant has expressed the view that in some way the Employment Judges in Wales are trying to stop him from gaining justice; nothing could be further from the truth. The judges involved to date have made decisions and given reasons for them; I have done the same. No-one has attempted to interfere with my judicial independence.

7. In addition, I do not accept that in my Judgment of December 2022 I inappropriately defended the reputation of either the Respondent or their representatives. What I did was make it plain to a litigant in person that what he was asserting was extremely serious, but the claim was about the public interest disclosures he allegedly made and whether he suffered detriments as a result. I explained to him that it was best to focus on the claim, not the representatives – "*play the ball, not the player*" is another way to put it.

8. Lastly, in relation to the correspondence point raised by the Claimant, I can address this quite simply. Complaints are not dealt with by an Employment Judge; that is a matter for the Regional Employment Judge. However, it is the administration who receives correspondence, and they process emails and letters that come in and send them to whom they believe is the right person.

9. The email sent by the Claimant in January 2023 to the Tribunal asked for written reasons (with the words "*written reasons*" underlined). The administration noted that the last decision in the proceedings was mine (refusal to consider the Claimant's reconsideration application in respect of my Judgment in December 2022), and asked me if I had anything to add in respect of that decision. I confirmed in an email that the reasons I had already given to the Claimant spoke for themselves. That is not evidence of me interfering with the complaints process; nor is it evidence of the Regional Employment Judge acting inappropriately. It was literally the administration saying "*Judge, have you got anything you want to add to what you have just said*?" and the Judge saying "*No, I have said everything I wish to say*".

10. When I consider the nature of the issues raised by the Claimant in seeking my recusal, they are unfounded and I am not persuaded that a reasonable well-informed observer who is aware of the facts, including the principle of judicial independence, would consider there is any real possibility of bias. I will deal with today's application.

Full Panel request

11. The Claimant's application that today's hearing is conducted by a full panel was refused. The Regional Employment Judge, after considering the Claimant's previous correspondence on this issue, made a decision that today's hearing would be conducted by a Judge sitting alone as shown in the Notice of Hearing. Listing is a judicial function. I can only vary, revoke or amend an Order of a Judge (including the Regional Employment Judge) if there has been a change of material circumstances. I am not persuaded that making a number of appeals on different topics to the Employment Appeal Tribunal meets that requirement.

12. However, in case I am wrong, I have considered Rule 55 of the Employment Tribunal Rules of Procedure (as amended) and whether it would be desirable for today's hearing to be conducted by a full panel. The Claimant went through a number of authorities saying that a full panel was the appropriate option, but they were all before the 2013 Rules came into force; the focus of the cases he cited were mainly on whether judges sitting alone should determine employment status. That topic was not what today's hearing was determining. I noted that one of the cases relied upon by the Claimant, Birmingham City Council v Barker and others [2009] UKEAT 0447-09-2910 was an equal pay case where the Judge, contrary to the usual practice in such cases and the expectations of the parties, decided to hear the matter sitting alone. The cases cited by the Claimant were in my view distinguishable as the Rules have changed since, as has current practice. Current accepted judicial practice now is that employment status is a Judge sit alone matter. The practice of judges sitting alone has increased significantly in the last 20 or so years. In any event, I am not determining employment status today, nor dealing with an equal pay claim.

13. I am not persuaded that the strike out application contains matters of fact or law that makes it desirable for a full panel to sit. It is unchallenged that the Claimant has not complied with case management orders more than once. The law is well-settled in this area. To appoint a full panel, there would need to be a postponement; additional costs would be incurred by both the Tribunal and the Respondent. The Claimant said that he felt non-legal members might assist his argument, but in my experience it is rare that the panel is not unanimous. Non-legal members do not commonly deal with case management outside of final hearings. Non-legal members are an extremely valuable resource, given their substantial industrial experience; their strength lies in findings of fact and considerations about reasonableness. Case management is conducted by judges sitting alone. I am the Judge who issued the strike out warning and have had the benefit of dealing with the case since September 2022.

Strike out application against the Claimant

Background to strike out application

14. A summary of how the Claimant came to be facing a potential strike out of his claims today was before the Tribunal through the witness statement of Ms Sammie-Jay Morris, the Respondent's representative conducting the Employment Tribunal litigation. The details were also familiar to me as the Judge who had dealt with the matter several times since September 2022.

15. On 17 and 18 May 2022, there was a preliminary hearing before Employment Judge G Duncan sitting alone, where he determined several preliminary matters, including the employment status of the Claimant. The Claimant vehemently disagreed (and continues to disagree) with that decision. In response to the Claimant's correspondence on this topic, Judge Duncan treated it as an application to reconsider his decision, which was unsuccessful. The Claimant disputes that he sought reconsideration of the Duncan Judgment.

16. On 22 September 2022, Judge Duncan was listed to conduct a case management hearing to prepare the Claimant's complaint to the Tribunal

for a final hearing. Unfortunately, Judge Duncan was not well and I stepped in at short notice and conducted the hearing. During that hearing, I acknowledged that the Claimant remained unhappy about the Duncan Judgment, and told him that the only route to challenge it was to appeal to the Employment Appeal Tribunal as only Judge Duncan or the Appeal Tribunal could reverse a judgment. I explained that I had to conduct that day's preliminary hearing as if Judge Duncan's Judgment was correct, and would make the necessary directions for a final hearing on that basis. I refused to consider re-opening Judge Duncan's Judgment.

17. The Claimant took a full part in the September hearing, and case management directions were issued. They included:

    a. The Claimant to confirm within 7 days of the order being sent out if the record of alleged detriments contained within the order is correct, and/or if he wished to amend his claim;
    b. The Respondent to make any application for strike out of the Claimant's unlawful deductions of wages claims by 29 September 2022 on the basis it has no reasonable prospect of success as a result of the previous Judgment of Judge Duncan;
    c. The Claimant to reply within 7 days of any such application from the Respondent should he object and if he seeks a hearing;
    d. The Claimant to submit a schedule of loss by 17 October 2021;
    e. The parties to complete disclosure by 7 November 2022 (and consequential orders about the hearing bundle index, and the hearing bundle);
    f. The parties exchange witness statements by 23 January 2023.

18. The final hearing was, and remains, listed for eight days, starting on 12 June 2023. A "*catch-up*" preliminary hearing to check all is ready for the final hearing is listed for 30 May 2023.

19. The Claimant did not comment on the list of issues within the September Order, or make an amendment application, despite a reminder from Employment Judge R Harfield to do so. I later confirmed by email that this failure meant the claim would proceed without the "*Subject to Amendment*" elements in the list of issues I prepared in the September 2022 hearing. The Claimant's claim for unpaid wages was struck out on 5 December 2022, after a warning was sent and did not receive a response.

20. It is undisputed that the Claimant as of 5 May 2023 has not complied with the directions made on 22 September 2023 regarding a schedule of loss, disclosure or witness statements. The Respondent's representatives wrote several times to the Claimant and the Tribunal, highlighting the failure of the Claimant to comply. The Respondent sent its disclosure to the Claimant on 7 November 2022, though the Claimant said that he did not open the email until during the hearing today.

21. The Claimant before today's hearing did not tell the Respondent's representatives or the Tribunal that he could not comply or had health issues; instead, on 7 November 2022 he made an application to strike out the Response, with evidence that the Claimant said was new and not available at the Duncan Tribunal in May 2022. This was the fourth attempt by the Claimant to strike out the Response.

22. On 15 November 2022, I wrote to the parties and warned the Claimant that failure to comply with case management orders could lead to sanctions, an unless order or a strike out warning against him and ordered the Claimant to provide his Schedule of Loss within the next seven days. I said:

"In relation to the Respondent's other points, I do not consider it appropriate to consider whether the Claimant is failing to actively pursue his claims. He is clearly dissatisfied with the Duncan judgment, and is focusing his efforts on that. If he fails to comply with directions as a result, that is a matter for him to resolve and can lead to sanctions against him. The Claimant's failure to provide a Schedule of Loss is unhelpful to his case. I direct that the Claimant provides his Schedule of Loss to the Respondent and to the Tribunal within the next seven days of the date of this email; while I am conscious the Claimant seeks a judgment that the Response is struck out, nothing prevents him from complying with this relatively simple order from the Tribunal. Failure to do so may result in the Tribunal issuing a formal strike out warning or an unless order against the Claimant."

23. The Claimant failed to comply and did not respond to emails from the Respondent's representatives asking for the disclosure of his evidence. Instead, he sent correspondence to the Tribunal on other matters, including a response to the Respondent's application for costs arising from the Claimant's strike out application.

24. On 5 December 2022, I determined the Claimant's application on paper (as the Respondent did not seek a hearing) and refused it; I also refused the Respondent's application for costs. The reasons for the Judgment are set out within it. However, it is pertinent to note that within the Judgment, as Ms Morris at paragraph 21 of her witness statement, I "*opined that the Claimant's conduct was closer to abusive rather than unreasonable or vexatious, both in terms of the wasted resource in having to deal with the matter and in terms of the serious allegations levied by the Claimant without evidence. EJ Sharp cautioned the Claimant to "find some objectivity". EJ Sharp reminded the parties to focus on the case management orders in front of them and to channel their efforts into preparing the matter for a final hearing. The Claimant was again warned that if he continued with his line of conduct, he may find himself in breach of rule 76 or may even have his claims struck out*." I agree that this summary is fair.

25. I also said in paragraph 26 of the Judgment: "*I do not though consider that the Claimant's intention is to abuse the process of the Tribunal or be vexatious. I consider that it is more likely than not that he genuinely believes his claim is so strong that it is unfair to expect him to attend a final hearing and go through the Tribunal process. This is the view I have formed from his correspondence to the Tribunal."*

26. The Claimant has argued in today's hearing that I should not have dealt with his application. His position, which I did not accept when dealing with the issue of my recusal, was that I "*descended into the arena*" and the application should have been considered by Judge Duncan. I explained that as it was not an application to reconsider Judge Duncan's Judgment of May 2022, but rather to strike out the Response, it was an application that any Employment Judge could consider. I did not consider that I had acted as

the Claimant alleged; I noted that in the application for reconsideration of my December 2022 judgment, the Claimant said "*While recognising that EJ Sharp has attempted to effect a kindness through equanimity and giving quasi-counsel/direction, as best an EJ May [sic] do whilst remaining impartial…".* This is not consistent with what the Claimant says now about this Judgment.

27. The Claimant sought a reconsideration of my Judgment refusing his application to strike out the Response. He failed though to comply with the Rules and copy it to the Respondent's representatives; it was not considered and the Claimant was given reasons for that refusal.

28. The Respondent's representatives wrote to the Claimant and the Tribunal and sought new case management orders to ensure the necessary preparation for the final hearing was undertaken. I granted that application and reminded the Claimant that he had to comply. The directions made were:

    a. Claimant to provide schedule of loss: 4 January 2023
    b. Claimant to complete disclosure by list and copy document: 25 January 2023
    c. Parties to agree index of documents: 15 February 2023
    d. Respondent to send bundle to Claimant: 22 February 2023
    e. Exchange of witness statements: 5 April 2023.

29. Again, the Claimant failed to comply with the first or second direction, despite chasing by the Respondent's representatives. The Respondent's representatives on 2 February 2023 emailed the Claimant and asked if there was some difficulty preventing him from complying; it was explained to him that his failure to engage was affecting the Respondent and the general case preparation. There was no answer. On 9 February 2023, the Respondent's representatives emailed the Tribunal, explaining that the Claimant was failing to comply or respond, seeking an Unless Order or a variation to case management directions. The Claimant did not comment.

30. On 14 February 2023, I issued a strike out warning against the Claimant on the basis that he was failing to comply with the Tribunal's directions issued on 22 September 2022, 15 November 2022 or 29 December 2022 and/or on the basis that his claims were not being actively pursued. The warning was lengthy, reminded the Claimant of what I had said in November and December 2022 that he had to comply and not let his unhappiness about other matters prevent his compliance. I added:

    "In the view of Judge Sharp, an Unless Order is only likely to led to secondary disputes. The timeline above shows a persistent refusal by the Claimant to comply with case management orders, with the over-riding objective (parties are required to co-operate with each other and the Tribunal), or actively pursue his case. As the recent case of Smith v Tesco Stores Ltd [2023] EAT 11 makes clear:

        "4. The longer case management goes on, the greater the risk that a litigant in person will become embattled and fail to engage properly with the employment tribunal. Good case management requires that the parties work with the employment tribunal and each other in a

constructive manner. Even litigants in person must focus on their core claims and engage in clarifying the issues. It is not the fault of a litigant in person that she or he is not a lawyer, but neither is it the fault of the other party or the employment tribunal. While the employment tribunal should take reasonable steps to assist litigants in person, this must not be at the expense of fairness to the other parties to the claim, and to litigants in other proceedings who seek a fair determination of their disputes, having regard to the limited resources of the employment tribunal.

5. Regrettably, those who are confused by, or disagree with, proper case management decisions that are fair to both parties, sometimes jump to the conclusion that the employment judge is biased and that the employment tribunal and its staff are adversaries to be challenged and attacked. If such a mistaken view results in a withdrawal from the required co-operation with the employment tribunal and the other party, necessary to advance the overriding objective, it puts a fair trial at risk."

The Claimant by repeatedly failing to engage with his claim and comply with the directions made to enable his claim to be determined at the final hearing, despite the patience shown and the warnings given by the Tribunal, is now required to respond to this strike-out warning. Regardless of his views about the Duncan Judgment, or any other matter dealt with by the Tribunal, he is required to comply with case management orders, and it appears that he has failed to do so on more than one occasion without explanation."

31. My hope was that the Claimant would realise that the time had come to comply with the Tribunal's directions, rectify his omissions and tell the Tribunal that he had done so. This was not to be; the Claimant has continued to fail to comply but sought a hearing where the strike out of his claims would be considered on the basis outlined in the warning. This has led to today's hearing.

Law

32. There are two limbs to the strike out application before the Tribunal and different legal principles apply. However, for both limbs, the first question will be factual - has the Claimant failed to comply with Tribunal orders/failed to actively pursue his claims?

33. For the limb dealing specifically with non-compliance with orders, the Tribunal must consider the over-riding objective. As the case of Weir Valves (UK) Ltd v Armitage [2004] ICR 371 EAT makes clear, the magnitude of the non-compliance, the degree of fault by the non-complying party, and the unfairness or prejudice caused to the other side must also be considered. Other matters to be taken into account include if the claim is not struck out, is it possible to have a fair hearing? Is a lesser sanction possible that would address the concerns and issues caused by the non-compliance? Lastly but importantly, is it proportionate to strike out the claims?

34. For the limb dealing with whether there has been a failure by the Claimant to actively pursue his claims, the legal principles are different. The cases of Evans and another v The Commissioner of Police of the Metropolis 1993

ICR 151 and Birkett v James 1978 AC 297 tell tribunals to consider if there has been either:

a. delay that is intentional or contumelious (disrespectful or abusive to the tribunal); or
b. inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

35. The Tribunal took the view that a key question to be determined today will be whether the Claimant will now comply with the Tribunal's orders.

What happened at today's hearing/the Claimant's submissions

36. I outlined to the Claimant the relevant legal principles and that there were two issues to consider (failure to comply; failure to actively pursue). This happened from approximately 10.51am onwards (having dealt with the earlier applications with the Claimant's full participation). The Claimant made detailed legal arguments, both orally and in writing on all the issues to be considered today. I invited him to tell me about what had been happening in terms of his compliance with tribunal orders, and to give his submissions about whether his claims should be struck out, and if not, what I should do instead. The Claimant said he would like an open dialogue, which I was content to do as it would more likely to allow him to focus on the issues. I did not consider it necessary to take formal oral evidence from the Claimant (or Ms Morris), to which neither party objected.

37. The Claimant was articulate, but struggled to focus on the key points, as he wanted to focus on his unhappiness with the Duncan Tribunal or the actions of the Respondent. This was similar to what happened in the hearing before me in September 2022 and is not uncommon when hearing litigants in person. The Claimant freely admitted that he had not complied with the Tribunal Orders, and that he was "*fixated*" or "*obsessed*" with correcting the mistakes he perceived to have been made by the Tribunal and others. I explained that I had anticipated back in November 2022 this view might have been the difficulty the Claimant faced, which was why I had told him then to focus on the claims; the Claimant acknowledged that. The Claimant said that he was not wilfully breaching the Tribunal orders, but he accepted that he had deliberately done so as he was unhappy about what had occurred to date.

38. I asked the Claimant about what was likely to happen if I did not strike out his claims i.e. would he promptly comply? The Claimant was very open and explained that he was not 100% confident of success, but he would like to try. He understood that it was a "*gamble*" and if he failed again, his claims would be struck out and the Respondent would seek a costs order. That said, the Claimant later told me that he probably did not have the assets to satisfy a large costs order immediately. During this section of the hearing, the Claimant was calm, asked questions (which I answered to the extent that I could as an impartial judge), and was easily able to be heard. About the 11.19am mark, it was clear to me that the Claimant had reverted to struggling to focus on talking about the key points, and wanted to talk about his dismissal; for example, he asked for affidavits about it from Ms Morris. He was at this point becoming upset, and I adjourned the hearing.

39. I had suggested a ten-minute break and a breath of fresh air, but the clerk informed me during the break that the Claimant needed a little longer, which I was content to agree. On the Claimant's return at about 11.38am, he seemed upset but wanted to proceed. At this point, the Claimant was difficult to hear and understand at times. He said that the non-compliance was all his own fault, but it was not wilful. He asked me to look at a redacted letter of 24 November 2022 in his hearing bundle. It was a detailed assessment letter from a consultant psychiatrist.

40. I have borne in mind that this is a public judgment and no Rule 50 or similar Order has been made. I have not considered it appropriate to make such an Order in all the circumstances, but I have used discretion and not set out fully the medical evidence before me in order to appropriately preserve the Claimant's privacy. However, there is one sensitive matter I must set out fully or what happened during the hearing next will not make sense.

41. The letter of 24 November 2022 explained that as of September and October 2022, the Claimant was suffering from suicidal ideation and had a mental health history which he was not willing to discuss with the psychiatrist; the Claimant pointed out that this was when he had attended the September hearing and was required to comply with case management orders. He told me that he had now consulted a barrister, who would help him deal with the case in the future.

42. There was much of concern in the psychiatrist's letter but it was evident that the Claimant's desire for justice was a key component of the issues he faces. The letter confirmed that at the times the Claimant was examined, he had capacity under the Mental Health Act in the view of the psychiatrist. I asked the Claimant if he was in a similar place in terms of his mental health as set out in the letter today; his answer was affirmative. The Claimant proceeded to detail his suicidal ideation and plans for his death in such a way that I found it convincing, and not intended (as the Claimant later explained) to be an attempt to persuade me not to strike out his claims.

43. This development posed more immediate issues in my view. I asked the Claimant if he was considering suicide or hurting himself now, and if so, I would be content to immediately adjourn the hearing so he could attend an immediate place of safety, such as A & E. I explained that the duty to deliver justice did not trump the need to keep the Claimant safe. The Claimant said that while he did want to kill himself as he was not going to get justice in this world and had not worked for over two months, he wanted today's application considered. From his perspective, coming back another day was not helpful and would not provide him with the clarity he sought. I considered it right to be guided by the Claimant's view as he had capacity, but I bore in mind the need for a fair hearing.

44. Given that the Claimant had provided a substantial bundle, written to the Tribunal and made oral submissions for over half an hour, I considered it likely that he had said what he wanted to say that was relevant to the strike out application. I appreciated that having the application hanging over his head was unlikely to assist the Claimant's health issues. The Claimant also had a note taker with him. I therefore asked if it was sensible for Mr Walters, who appeared on behalf the Respondent, to deliver his submissions and

see where we were, particularly as the Claimant appeared to be able to fully take part in the hearing until he discussed his health issues, which distressed him. This met with the approval of the parties, but I took the precaution of observing the Claimant to gauge his state. Throughout the Respondent's Counsel's submissions, the Claimant appeared to be listening and at the end told he that he had zoned out for a bit, but heard much of them. He still wanted to proceed.

45. I asked the Claimant if he wanted to speak again, and he spoke for some time. I offered him breaks which were declined, and allowed him to check a point on his mobile phone. The Claimant answered points made by Mr Walters and repeated his earlier submissions; he did not require so much in terms of re-focusing as before. The Claimant was clear that his non-compliance was not wilful and it was in the interests of justice that the claim proceeded. Towards the end, it was evident to me that the Claimant was repeating the same points and I brought his submissions to an end. I reiterated to the Claimant that if he was considering suicide, he should go to a place of safety. I also undertook to attempt to deliver my reserved judgment (as I did not consider it appropriate to keep the parties whilst I deliberated and then deliver oral judgment given the Claimant's health) by the end of next week if possible.

46. As part of my deliberations in determining the strike out application, I have carefully considered whether the hearing today was fairly conducted, given what happened regarding the Claimant. If it was not fairly conducted, then my decision will have no effect (and would not be in accordance with the standards expected of the judiciary by society and themselves). I am satisfied that it was fairly conducted for the following reasons:

    a. The Claimant set out his position in writing before the hearing, and coherently set out his position orally, except when during the section when he was discussing his health issues (which is understandable);
    b. The Claimant was able to respond to the Respondent's submissions;
    c. The Claimant has capacity in the view of a psychiatrist;
    d. The Claimant's conduct before me today was similar to the September 2022 hearing – he struggled initially not to speak over me, but then settled and was able to speak about the key issues when given standard prompts. The only difference was his distress regarding his health. He was lucid.
    e. The Claimant was offered breaks and one was imposed by me. The offer to adjourn to enable him to seek urgent medical support was refused, and the basis for the refusal was logical and reasonable. The Claimant did engage in the hearing after this point.

The Respondent's submissions

47. Mr Walters on behalf of the Respondent was succinct. He noted that there was no dispute that the Claimant had failed to comply with case management orders repeatedly, or that he had failed to respond to the Respondent's representative's communications on the issue, or that before today he had failed to explain why. Mr Walters pointed out that the first the Claimant had ever said about his health issues or the alleged assistance of a barrister was at today's hearing, and there was no suggestion that he had not complied due to lack of capacity, either in the sense of the Mental Health

Act or in terms of being able to do so. Mr Walters highlighted the numerous emails, complaints and appeals that the Claimant had sent regarding these proceedings since September 2022; it was evident that the Claimant had chosen to do other things, rather than comply. Mr Walters also noted that the Claimant on his own account had been in work until about two months ago, which meant he was capable of complying. Mr Walters submitted that the Claimant had wilfully failed to comply, despite the warnings to the contrary from me.

48. Mr Walters observed that the Claimant still had not complied. He explained that the Respondent and its representatives were in a very difficult, if not impossible, position due to the Claimant's non-compliance. Witnesses, who had been subjected to serious professional allegations by the Claimant, had not been able to finalise their statements and had these proceedings handing over them. The Respondent's representatives could not advise the Respondent about key matters. Ms Morris' witness statement set out in detail the impact, and should be considered.

49. The issue of lesser sanctions was addressed. Converting the final hearing into liability only would mean the Schedule of Loss was of less importance, but this would incur significant additional costs for the Respondent in dealing with a remedy hearing, which would be sought from the Claimant. Mr Walters said a final hearing would be a waste of time and resources proceeding in the absence of any evidence from the Claimant, even though he would be able to cross-examine witnesses as the Claimant would not be able to give evidence on the disclosures or challenge the facts put forward by the Respondent in the absence of his own evidence.

50. Mr Walters submitted that there was no prospect that the Claimant would now comply; the history of the case did not support an optimistic view. The Claimant today was plainly of the same view as before and could not get past his fixation in changing the decisions made to date. Mr Walters concluded by saying a strike out of the claims was proportionate, given the intentional failure to comply with case management orders and his disruptive unreasonable conduct which had caused prejudice to the Respondent and its ability to prepare for an eight-day final hearing commencing in June 2023. The Tribunal resources for the final hearing had already been committed.

51. Ms Morris' witness statement set out the prejudice faced by the Respondent due to the Claimant's non-compliance. She said:

"38. The Claimant first issued his claim on 19 August 2020. Despite that, the Respondent is still awaiting sight of a schedule of loss, some two and a half years later. Without sight of a schedule of loss, the Respondent is unable to properly appraise itself of the value of the claim and make an informed decision regarding case management, costs risk or indeed whether any method of alternative dispute resolution may be appropriate or have reasonable prospects.

39. As a public sector body, this affects the Respondent's ability to accurately costs forecast (i.e. to set aside a "pot" of money to cover off the "worst case scenario").

40. The Claimant has had sight of the Respondent's disclosure documents for approximately 6 months, however the Respondent has not had sight of the Claimant's documents. This means the Claimant has access to the full cohort of relevant documentation and is in a stronger position to prepare his witness evidence. The Respondent, who is required to call considerably more witnesses in order to respond to the allegations against it, is unable to properly prepare and finalise their witness evidence without a final and agreed hearing bundle. This means that the parties are not on an equal footing.

41. Even if the Claimant were to provide his documents, there is now limited time to comply with all outstanding directions. There are 16 working days between the hearing of 5 May 2023 and the pre-hearing preliminary hearing on 30 May 2023, in which the Claimant would ordinarily need to provide a schedule of loss, provide his disclosure, that disclosure to be reviewed and sorted into a joint index, that index to be agreed and a final bundle sent out, and both parties to prepare and exchange witness statements with reference to that bundle. This either risks prejudicing the current hearing listing and the matter being delayed for some several months, or means that the parties may not be able to defend their position to the best of their ability as a result of the limited time frame available, potentially to such an extent that a fair hearing is no longer able to take place.

42. Should the Claimant's claim not be struck out, it is possible that for the reasons set out above, the current hearing listing would be adjourned and re-listed in order to provide the parties time to comply with all of the outstanding directions to prepare the matter for a final hearing. Should the hearing be postponed, this is likely to have a serious knock-on effect on the witnesses. The events complained of by the Claimant occurred more than 3 years ago, during the onset of a Global Pandemic. Those involved were front line workers responding to the first wave of the COVID-19 Pandemic, which was a fraught time for all, but conceivably more so for those on the front-line. Postponing the hearing is not only likely to affect the recollection of all involved, but would mean those witnesses are under the burden of these proceedings "hanging over them" for a further amount of time. The Claimant has made serious allegations about a number of the Respondent witnesses within his claims, his applications and including referrals to the professional regulator of those witnesses.

43. If the Claimant's claims are not struck out, there is a real possibility that the Claimant will continue with his existing line of behaviour, including the making of serious and unsubstantiated allegations against those witnesses. The impact to those witnesses personally may well affect their evidence to the point that a fair trial is no longer possible. A number of those witnesses have expressed considerable anxiety and concern. It is clearly noted within EJ Duncan's Judgment that the Claimant spent considerable time making repeated allegations of serious professional misconduct against the Respondent witnesses and the Claimant's correspondence to date does not suggest the Claimant intends to depart from that line of questioning.

44. Finally, the Claimant's failure to engage with The Directions, and the making of repeated applications under which there are little prospects of

success have caused the Respondent to incur substantial and entirely unnecessary costs, borne out of the public purse.

45. Those costs have been incurred from repeatedly having to chase the Claimant to request his compliance, the updates and advice to the Respondent regarding the Claimant's non-compliance and the taking of instructions in that regard. In the Respondent having to apply for and manage the repeated variation of case management directions, to reviewing, advising on and responding to his lengthy and unwarranted applications and including the preparation for, and attendance at this hearing, including counsel's fees. A separate costs schedule has been provided.

46. The Claimant has not at any point since the preliminary hearing of September 2022, indicated that he will focus his mind to The Directions at hand and as such, if his claims are not struck out, it is entirely possible that this line of behaviour will continue and those costs will continue to accrue."

Conclusions

52. The Tribunal makes the following findings:

a. The Claimant failed to comply with the Tribunal's orders of 22 September 2022, 15 November 2022 or 29 December 2022 by failing to send to the Tribunal and the Respondent a Schedule of Loss, by failing to disclose evidence to the Respondent and by failing to provide any witness statements. By doing so, the Claimant has repeatedly breached case management orders and failed to actively pursue his case.

b. The Claimant has still failed to comply with any order made to enable the case to be progressed.

c. The Claimant on his own account failed to comply because he could or would not accept the previous decisions of the Tribunal. While he strongly denies his non-compliance was wilful, the Tribunal finds that the Claimant was told in clear terms by Judge Sharp to focus on preparing for the case and not allow his unhappiness with previous decisions to distract him from this task (email of 15 November 2022, Judgment of 5 December 2022 and email of 14 February 2023.). The Claimant has said that he was "*fixated*" on the decisions which with he disagreed and wanted to rectify that first. The Tribunal accepts that this was the Claimant's position. In practical terms, the Claimant could physically comply as throughout the conduct of the proceedings, he has made repeated applications and complaints to the Tribunal, appealed several times to the Employment Appeal Tribunal, worked until about two and a half months ago, and made contact with third parties such as the police.

d. The Tribunal noted the evidence before it regarding the Claimant's mental health in September and October 2022. This was important as while an individual might be physically capable of doing something, mental health may be a barrier which should be considered by this Tribunal (though this was not argued by the Claimant, he did point out that he saw professionals about this around the time of the September case management hearing). The medical evidence showed that the

Claimant was mentally capable under the Mental Health Act in the opinion of a consultant psychiatrist who had spent a significant time examining the Claimant on two occasions in September and October 2022. The psychiatrist was of the view that the Claimant was suffering from a common mental health condition as well as suicidal ideation; there is nothing in the letter making any findings about the Claimant's ability to conduct litigation or that his "*fixation*" with the previous decisions of the Tribunal was impairing his ability to comply with case management orders.

e. The Claimant was unable to guarantee that he would now comply with case management orders. He made reference to a barrister assisting him prior to today's hearing and who he expected to continue to assist him. However, the Claimant had as of today's hearing still not complied with the case management orders, and there was no explanation why not if a barrister was still assisting. The history of this matter meant that the Tribunal was not confident the Claimant would now comply.

f. Given the submissions of the parties and the evidence before the Tribunal, the Tribunal concluded that the Claimant had deliberately and intentionally failed to comply wholly with all the case management orders made by it, despite repeated warnings.

g. The Claimant's conduct in so doing had been disrespectful to the Tribunal as its orders had been intentionally ignored.

h. The Respondent as a result of the Claimant's complete and continuing failure to comply with case management orders had been prejudiced. Legal costs had been incurred attempting to get the Claimant to comply and try to progress the case. The Respondent is unable to receive full legal advice without the Claimant's evidence on liability and remedy, or consider alternative dispute resolution. In particular, the Claimant's evidence about his reasonable belief (essential for a public interest disclosure claim) was unknown to the Respondent, while the Claimant had had the benefit of receiving the Respondent's disclosure several months ago. The Respondent has been unable to finalise its statements and realistically cannot be ready to commence a eight-day hearing on 12 June 2023, even if the Claimant complied instantly with all the outstanding matters.

i. There cannot be a fair hearing as a result of the Claimant's non-compliance if the hearing commences on 12 June 2023.

j. If the final hearing is adjourned, more costs will be incurred by the Respondent. The Claimant told the Tribunal today that he is not working and is at risk of homelessness. If so, he is unlikely to be able to pay the Respondent's consequential costs if ordered to do so. In addition, delay will result. Eight days of Tribunal time is a substantial allocation of resources; other parties have waited longer as the eight days allotted to this case was not available to them. Future cases will be delayed if the hearing is relisted, and the impact of delay on memories is well-established. Delay is the enemy of justice and it has been caused wholly by the Claimant's deliberate non-compliance. The Tribunal does not consider the impact of delay on the Respondent's witnesses themselves

as being a factor prejudicing the Respondent, but it acknowledges that it is inevitable that given the allegations against them, the Respondent's witnesses will feel increased anxiety due to any delay.

k. Lesser sanctions available to the Tribunal are limited. Adjourning the final hearing conflicts with the over-riding objective as it will increase costs and expense and require more Tribunal resources. The effect on the wider system is outlined above. Allowing the hearing to proceed in the absence of any evidence from the Claimant is in the circumstances likely to be a meritless exercise – the Claimant cannot succeed without evidence of his reasonable beliefs and his ability to cross-examine will be significantly impaired. Splitting the final hearing into separate liability and remedy hearings does not address the core of the Claimant's failure – he has not adduced any evidence as of today, but asks the Tribunal to let him gamble and have a final chance. The gamble in reality would be taken by the Tribunal, its users and the Respondent.

l. The strike out of any claim is draconian. The Claimant fairly pointed out that this case is about the safety of the public during the Covid pandemic in the Welsh NHS. This is undoubtedly a matter of great public importance. However, the Claimant could have complied with the case management orders to enable this weighty matter to be considered; it was his decision to refuse to do so.

53. Stepping back, and carrying out a balancing exercise, the Tribunal has concluded that the proportionate response is to strike out the Claimant's claim and vacate the final hearing on the basis of both strike out limbs. The Claimant has knowingly and intentionally failed to comply with case management orders in any meaningful way, despite warnings, and has shown his disrespect to the Tribunal in doing so. It is not possible to have a fair hearing within the listed hearing window. The Tribunal has no basis on which it could find that the Claimant is likely to ever comply, given his approach to date. The Respondent has suffered prejudice and would continue to do so if either the final hearing proceeded as listed or if it was postponed to a later date. Other tribunal users would also be adversely affected by a postponement. No lesser sanction will address the situation in which the Claimant has placed himself, the Respondent and the Tribunal.

Employment Judge C Sharp
Dated: 10 May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....12 May 2023.....

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FOR EMPLOYMENT TRIBUNALS