EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106965/2019

Held in Chambers on 13, 14 and 15 December 2022

Employment Judge S MacLean

"D"	**Claimant**
Greater Glasgow Health Board	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

1. The claimant's application for strike out of the response is refused.

2. The respondent's application for strike out of the claim as it is no longer possible to have a fair hearing is granted and the claim is therefore struck out in its entirety.

REASONS

Introduction

1. This preliminary hearing was listed to consider the application by the claimant to strike out the response under rule 37(1)(b) and 37(1)(e) of schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the ET Rules); and the respondent's application to strike out the claim under rule 37(1)(e) of the ET Rules.

2. The parties agreed that I was to consider the applications based on written submissions.

Background and facts

The claim

3. On 17 May 2019 David Scott of Legal Spark, sent a claim form to the Employment Tribunal on behalf of the claimant. The claims are of unfair dismissal, disability discrimination, race discrimination; detriments as a result of making protected disclosures and breach of contract/unlawful deduction of wages and holiday pay. The allegations span the entirety of the claimant's employment with the respondent from 28 August 2015 until its termination on 15 April 2019. Many of the allegations relate to a period before the claimant was absent due to ill health in October 2016.

4. The claim form stated that the claimant had a disability and asked for the Tribunal to allow for "the adjustments suggested in the Equal Treatment Bench Book for people with mental health illness".

5. The claim was accepted and sent to the respondent. A preliminary hearing for case management was arranged for 12 July 2019.

The response

6. David James, solicitor for the respondent, requested an extension of time to present the response given that the statement of claim covered various incidents and allegations back to 2015 and extended to 35 pages. Time was needed to collate the relevant information and documentation for a number of parties. The claimant opposed the application on the basis that it would have a disproportionate and negative effect on her ability to prepare for the preliminary hearing. The respondent noted the claimant's position and advising that there would be no objection to postponing the preliminary hearing.

7. Employment Judge Whitcombe extended the time for presenting the response until 4 July 2019. The case management preliminary hearing was postponed and relisted for 26 July 2019.

8. The response was sent to the Tribunal on 4 July 2019. A number of preliminary issues were raised including disability status at the relevant time, time bar of some allegations and need for further specification.

Case management preliminary hearings scheduled for July 2019

9. The time for the claimant to complete her agenda for the case management preliminary hearing was extended to 18 July 2019.

10. On 16 July 2019, Mr Scott requested that the proceedings be sisted for a period no less than three weeks as the claimant's health condition had worsened "especially so on receipt of the respondent's ET3". The stress and overall impact of preparing and future proceedings had led to PTSD flares and an increase of her mediation. The application was supported by a letter from the claimant's GP.

11. Employment Judge Sangster advised there was no requirement at this stage for the case to be sisted; the claimant's attendance was not required at the case management preliminary hearing listed although it may be appropriate to discuss sisting the case at that hearing.

12. On 18 July 2019, Mr Scott asked for the decision to be reconsidered explaining that while the claimant's attendance was not necessary for the case management preliminary hearing, the impact that the claimant's health had on her ability to provide instructions in relation to the completion of the agenda had been affected. Mr James advised that the claimant's application for reconsideration was not opposed and it was also suggested that alternatively, the preliminary hearing could be conducted by telephone.

13. On 19 July 2019, Employment Judge Whitcombe postponed the preliminary hearing listed on 26 July 2019 and advised that it would be reconvened by way of a telephone conference call. An update on the claimant's health and ability to provide instructions was requested by 2 August 2019.

Update on claimant's health and requested adjustments

14. On 2 August 2019 Mr Scott provided an update on the claimant's health and attached a letter from the claimant's GP dated 26 July 2019 which provided details of the claimant's physical and mental impairments.

15. The claimant's GP helpfully summarised that the claimant's health, "is affected severely by trying to work through these proceedings, in large part triggering her PTSD. The anxiety involved is in trying to fit around short notice deadlines and changes are also making her PTSD, depression and chronic fatigue worse. The claimant would therefore benefit from reasonable adjustments to be put in place to allow her to engage with this process in a fair, supportive and appropriate way for her health conditions. Realistically she needs time to absorb any new information and to act on it, which can take several weeks. In addition, because of her current deterioration in health, resulting from all these changes and concerns recently, she will need a minimum of two to three weeks to recover mentally and physically before restarting the process with adequate time intervals between each step of similar duration to allow her to focus and provide information without causing further significant deterioration to her health. Any deadlines also need to be set in advance without changing to allow for planning in advance. Working with predictable schedules can also benefit from extra time as these procedures can be mentally exhausting; for example, a 10-15 minute break would materially be useful to allow her to rest and ensure that she is able to fully engage with the process in a meaningful way. In addition, it is also important for her to have a therapist present during all her Tribunal sessions in order to provide the necessary support if the need for such intervention arrives."

16. On 9 August 2019 Laura Ewart, representing the respondent confirmed that the respondent had no objection to the claimant being given the time specified to rest prior to matters progressing.

Proposed case management preliminary hearing on 25 September 2019

17. On 16 August 2019 the parties were advised that a case management preliminary hearing would be listed in four weeks' time. A notice of hearing was issued on 29 August 2019 for a case management preliminary hearing on 25 September 2019. The parties agreed to this being conducted by telephone. Mr James provided the respodnent's completed agenda form on 18 September 2019.

18. On 23 September 2019 Mr Scott requested a postponement of the case management preliminary hearing. Reference was made to the adjustments that had been requested. The claimant's therapist was unavailable until the week commencing 7 October 2019; only the standard time of one hour had been allocated and the listing of the hearing under standard procedure without reasonable adjustments had a negative impact on the claimant's health. Consequently, the claimant was prevented from instructing Mr Scott. The tribunal administration was invited to contact Mr Scott to assess the availability of the claimant's therapist before listing.

19. The respondent opposed the application because it was the third preliminary hearing arranged for case management. It was not a substantive hearing and was being conducted by telephone. There were preliminary issues which may mean that any final hearing could be well over a year after the claim was received by the Tribunal.

20. Mr Scott advised on 24 September 2019 that he was no longer acting for the claimant. The claimant wrote to the Tribunal opposing the respondent's objection. She explained why she was struggling to come to terms with her "legal representative's behaviour" and was not able to attend the preliminary hearing under her current state of mental and physical distress. She asked that the hearing be postponed until 25 October 2019. In the circumstances Mr James withdrew the objection.

21. The preliminary hearing for case management was postponed and relisted for 8 November 2019 being a date suitable for all parties. The parties completed agendas.

First case management preliminary hearing (8 November 2019 CMPH)

22. The claims were noted. The claims for breach of contract/unlawful deductions from wages and holiday pay were withdrawn and dismissed. The claimant maintained that she was a disabled person as a result of the following physical and mental impairments: post-traumatic stress disorder (PTSD); clinical depression; anxiety; and irritable bowel syndrome (IBS).

23. The respondent did not accept at this stage that the claimant was a disabled person at the relevant time or that they had knowledge of this. While the respondent sought a preliminary hearing about whether some of the claims were presented in time, Employment Judge Sangster, having regard to the overriding objective decided that it would be reserved for the final hearing. It was proposed that the final hearing should not take place before 1 May 2020 and would determine all issues between the parties including disability status if that remained in dispute. Employment Judge Sangster noted that the claimant intended to give evidence. Mr James had not yet determined how many witnesses he would call for the respondent. It was agreed that date listing stencils would be sent to the parties to enable suitable dates for the final hearing to be identified.

24. There was also discussion about the adjustments proposed by Mr Scott. The timetable for preparation for the final hearing was set taking account of the claimant's request for at least three weeks between deadlines where she requires to take action. It was also confirmed that the claimant's therapist could be present/accessible during any hearings although the claimant be responsible for ensuring the presence of her therapist. It was noted that written witness statements should be utilised as this would assist the claimant in preparing for the hearing and reduce the time she would require to give evidence.

25. There was clarification of the request for a break of ten minutes after every thirty minutes during any hearing and the request for the hearings to be held by telephone. While procedural hearings could be held by telephone Employment Judge Sangster enquired whether the claimant was also

suggesting that any final hearing should be conducted by telephone. If so, then this would require careful consideration as to whether it could be accommodated as a reasonable adjustment particularly if the claimant was intending to represent herself at the final hearing and there would therefore require to cross-examine the respondent's witnesses.

26. The reasonable adjustment proposed by the claimant's GP regarding extra time was different from that proposed by the claimant. The claimant's proposal (frequent breaks after every thirty minutes) would have a dramatic impact on the length of proceedings. The claimant undertook to consider the matters and discuss these with her consultant psychiatrist and produce a report from her consultant psychiatrist detailing the adjustments that they suggested may be required to enable her to give evidence at the final hearing and why these are suggested by reference to the substantial disadvantage suffered by the claimant as a result of her medical conditions. These proposed adjustments would then be considered by the Tribunal at a further preliminary hearing held by telephone, if necessary. It was proposed that in order to enable the matter to be considered well in advance of any final hearing, the claimant should provide a report to the Tribunal before 31 January 2020.

27. There was discussion about possible mediation and both parties wished further time to consider this.

Applications for extension of time

28. On 22 November 2019, Mr James requested an extension of time to complete the date listing stencil because of the potential number of witnesses and the need to contact them to ascertain and coordinate availability. Mr James understood that the claimant was the only witness giving evidence in support of her case. The claimant did not object; she had been very ill after the case management preliminary hearing. Both parties were granted an extension of time.

29. On 25 November 2019, the claimant applied for variation of the timescales set out in the orders following the 8 November 2019 CMPH. The claimant

said that this was the first occasion that she had felt able to write the application. The claimant said that she had felt very subdued and was slow to react during the 8 November 2019 CMPH. She was no longer legally represented and therefore the previous reasonable adjustments were no longer valid as the responsibility for preparing the case fell on her. She wanted time to be allowed to fully discuss all these changes with her consultant psychiatrist and/or GP so that she could submit reasonable adjustments that would reflect what she can or cannot do and as a litigant in person with mental health disabilities. The Tribunal was invited to consider the claimant's mental health disabilities which were very limiting, her lack of experience and the fact that she did not anticipate appearing as a litigant in person. She considered it would be helpful to have a full assessment with the consultant psychiatrist in order to determine if the new timeframes would give her sufficient time to prepare and engage in a final hearing.

30. While Mr James did not object in principle to the extension of the deadlines and supported a degree of flexibility, there was concern that the deadlines set at the 8 November 2019 CMPH were relatively cautious and now the claimant had requested that the deadlines be extended by at least two months. The case was originally intended to be listed in May to July 2020 and now it was likely that any final hearing would not take place until at least September 2020. If the claimant's application was accepted in its entirety as it would cause "substantial prejudice to the respondent". The longer the case is delayed, the more difficult it would be for the respondent to be able to mount a defence. Many of the incidents that form the subject matter of the claim were alleged to have taken place in 2015/16. A number of individuals involved in the case are no longer employed by the respondent. A significant portion of the remaining individuals have had no contact or involvement with the claimant since 2016/17 and their recollection may be "concomitantly affected." Mr James suggested a revised alternative deadline which he considered struck a balance between the claimant's desire for additional time to comply with the Tribunal's orders and prejudice to the respondent from any prolonged delay. It was also confirmed that there was no objection for the claimant submitting further proposed reasonable adjustments to the Tribunal.

31. The claimant commented on the revised proposal by email sent on 26 November 2019 in which she expressed concerns that if these revisals were accepted, she would go through pain, indignity and humiliation of applying for further extensions down the line. She was being very open and honest about what she could and could not do because of her disability.

32. Employment Judge Whitcombe directed that the case should be listed for an urgent preliminary hearing to consider: adjustments for the claimant's conditions; variations of directions; and listing of hearings. In the meantime, he asked the claimant to do her conscientious best to comply with directions as soon as possible as it should not be assumed that the extensions of time would be granted.

Mediation and/or case management

33. From late November 2019, the parties indicated that they wished to explore judicial mediation. The offer of judicial mediation was made to the parties. There followed an exchange of correspondence about whether mediation should take place before or after the case management preliminary hearing. Mr James considered that the mediation should run parallel to the proceedings to avoid delay and ensure that there was a degree of clarity about the deadlines to which the parties were working.

34. On 5 December 2019, Mr James completed a date listing stencil which was copied to the claimant. It included details of the ten witnesses that the respondent proposed to call to give evidence including the witness who was estimated to give evidence of one hour as she provided support to the claimant. The respondent estimated that it would take seven days to hear its case.

35. On 6 December 2019, the claimant completed a date listing stencil. The claimant did not copy the list to Mr James. The list of witnesses extended to 16 individuals, none of whom were listed on the respondent's list of witnesses. The claimant said that some of the witnesses were not responding and other had not been approached. She estimated it would take 10 days to hear her case.

36. On 10 December 2019, the claimant disagreed that the proposed case management preliminary hearing should take place first as soon as possible and run parallel with the judicial mediation. The claimant said that due to her disability she would be unable to attend to both processes at the same time and could lead to confusion with the regard to orders running in parallel with judicial mediation. The claimant provided medical reports from her consultant psychiatrist who had reviewed the claimant on 6 December 2019 and from the claimant's GP.

37. The claimant's consultant psychiatrist commented that the claimant had found difficulty coping with the volume and rapidity to process the orders issued at the 8 November 2019 CMPH. The claimant found the proceedings stressful. The claimant's consultant psychiatrist suggested that rather than having two simultaneous processes (judicial mediation/review and her preliminary hearing), the claimant attend to one of the processes at any given time to reduce the burden of stress for example by allowing the judicial mediation to take place first and then to address the preliminary hearing). It was also confirmed by a report from the claimant's GP that the claimant would not be medically fit to continue with both the mediation and the preparation of the final hearing in parallel. The claimant's GP therefore wondered whether it would be possible to "sist the Tribunal process until after judicial mediation takes place".

38. On 17 December 2019, Employment Judge Eccles advised that it would not be possible to list the case for judicial mediation before February 2020 at the earliest. She therefore considered that there may be merit in holding a further preliminary hearing to consider case management by telephone conference call in January 2020.

39. On 24 December 2019, Employment Judge Robison advised the case would be listed for a preliminary hearing to consider case management in January 2020 and that a separate preliminary hearing would be fixed to discuss arrangements for any mediation.

40. On 6 January 2020, the claimant asked for a reconsideration of the decision to hold a preliminary hearing in relation to the litigation in January 2020. The claimant explained her difficulty in engaging with the main ligation process and processes related to the judicial mediation at the same time even if they were spaced by two to three weeks. She provided a further letter from the claimant's GP on 30 December 2019 which expressed the claimant's GP's "disappointment that [the claimant] has told me that this is planned to be done within a space of a month, with both preliminary hearings one after the other."

41. On 10 January 2020, a letter was sent to the parties advising that the Vice President had decided to make judicial mediation available in the case. A judicial mediation arrangement telephone call would be arranged between 20 January 2020 and 31 January 2020. There would also be discussion as to whether or not a case management preliminary hearing for the main case was appropriate at that stage. A telephone preliminary hearing was listed for 29 January 2020.

42. On 15 January 2020, Mr James applied for an unless order requiring the claimant to comply with certain earlier orders by 12 March 2020. He explained:

"The preliminary hearing is, among other matters, for the purpose of fixing a date for judicial mediation and making appropriate arrangements for the conduct of the judicial mediation. The claim is partly one of disability discrimination. Disability status remains in dispute. In order to make any offer at a judicial mediation the respondent requires, in advance, to consider its position and comply with governance arrangements regulating the use of public funds. In order to do so, the respondent requires to make an assessment of the merits of the case. Disability status is core to any claim of disability discrimination, and so without medical records, the respondent will be unable to accurately assess the claim.

Further, the claimant has not provided a schedule of loss. In order to comply with its governance arrangements, the respondent requires to know what its

potential liability might be. Without this information, the audit requirements to which the respondent is subject cannot be fulfilled.

In light of this, I submit that, if the respondent does not receive the information identified in parts 1, 2 and 4 of the Tribunal orders of 12 November 2019 in advance of any judicial mediation, the respondent will be unable to meaningfully participate in judicial mediation.

The issues identified above are not solely limited to a judicial mediation. If the case is to proceed to a full hearing, the respondent requires fair notice of the case against it. Disability status is at the heart of a claim of disability discrimination. If disability status remains unclear at the final hearing, the respondent will be unable to accurately respond to the questions concerning such matters as its knowledge of disability. I submit that, if these orders are left unaddressed, the respondent will be irreversibly prejudiced in its defence.

The claimant has been afforded the opportunity to provide the information identified in the order. The deadline for her to provide the information parts 1 and 2 of the order was 29 November 2019. The deadline for her to provide the information on part 4 of the order was 20 December 2019. At the time of writing, she has still not provided this information."

43. On 28 January 2020, the claimant wrote to the Tribunal providing a letter from the claimant's GP as well as reasonable adjustments that she required for the preliminary hearing being held on 29 January 2020 and also the mediation to be held in March/April 2020.

44. The claimant's GP's letter dated 27 January 2020 stated in discussion with the claimant they had agreed a list of adjustments that the claimant needed. The claimant's GP also expressed concerns about "one of the claimant's main witnesses was approached at an early stage by her former employer and in a manner, which has left [the claimant] frightened as to how the process may proceed in terms of fairness and in terms of further harassment from her previous employer which is already the reason behind the Tribunal."

45. The cover letter from the claimant dated 28 January 2020, stated, "first written on 29 November 2019" was not copied to Mr James because it contained "sensitive and personal information". The claimant referred to "a key witness in her case, the witness, who witnessed Dr Iqbal's detrimental and harassing behaviour towards me numerous times as we worked in an open plan office". The claimant said that she asked the witness to be "my witness" and she agreed on 22 November 2019. The claimant said that on 26 November 2019, the witness had called her distressed and during this telephone call, the witness told the claimant that she did not really witness anything and that she no longer "wanted to be dragged into this". She also refused to appear as a witness. The claimant was traumatised by the telephone call. She was very concerned that the witness had been intimidated into not appearing as her witness. That trauma was further exacerbated when on 6 December 2019, Mr James submitted a list of witnesses for the respondent although the Tribunal had directed the parties to not need to share the list of witnesses with each other at that stage. Mr James "ignored that directive and deliberately copied the claimant so that she could see the list of witnesses." The claimant had a minor breakdown when she saw the witness's name on the respondent's list. The claimant felt further distressed when she realised that Mr James had left out the list of witnesses the assistant psychologists that the claimant named as comparators in her direct discrimination claim.

46. The claimant also expressed concerns about the behaviour of Mr James and Ms Ewart when they were in direct contact Mr Scott. The claimant believed that Mr Scott's changes in behaviour frustrating her case and causing distress (withholding vital information from the respondent and the Tribunal, going on annual leave at a critical time without telling her and deliberately ignoring her instructions) started after Mr Scott spoke directly to Mr James which made the claimant question Mr James' influences over Mr Scott.

47. The claimant indicated that she felt that judicial mediation should take precedence over all other processes and that if the case proceeded to a final hearing, a preliminary hearing was vital to discuss the issues regarding witnesses and the respondent's interaction with witnesses. The claimant said,

"given the concerns I have regarding the interaction of the respondent and their legal representatives, first with my solicitors and now with witnesses, I believe that a fair trial may not be possible."

Second case management preliminary hearing (29 January 2020 CMPH)

48. The case management preliminary hearing on 29 January 2020 was conducted by Employment Judge Eccles who sought to comply with the claimant's request for reasonable adjustments which included allowing breaks during the hearing. The claimant was supported by her friend "E". Mr James represented the respondent.

49. The respondent's position was that there was insufficient information to undertake an assessment of the prospects as required by the Scottish government and without that assessment of the prospects, the respondent does not have authority to resolve the claim at a judicial mediation. The respondent did not dispute that they had in its possession information about the claimant's medical records, including fit notes and occupational health and referrals and reports. It was suggested that the respondent copy this information to the Tribunal and identified what further information was required in order to assess the prospects with a view to participating in judicial mediation. It was also felt that assistance for preparation for judicial mediation if the claimant provided a notice of the remedy sought and the amount of any compensation. It was confirmed that an employment judge would contact parties to discuss further procedure in relation to arranging a judicial mediation. Compliance of the orders issued on 8 November 2019 were suspended pending the outcome of the arrangements of judicial mediation. Mr James did not insist on the application for unless orders.

50. The claimant raised concerns about the respondent's contact with the witness. The clamant said that this prevented her from providing a disability impact statement as she could no longer trust the respondent. Mr James noted the claimant's position and offered to investigate the claimant's concerns as appropriate.

Correspondence regarding the witness

51. On 5 February 2020, having investigated the claimant's allegations in relation to the witness having been contacted by the respondent Mr James wrote to the Tribunal by email, copied to the claimant advising that:

"As the witness was named in the claimant's ET1 and is an employee of the respondent, she was identified as being a potential witness and a request was made for the respondent's representative to interview her. Further to this, the respondent's HR department contacted the witness by telephone. I understand that, in the course of this telephone call and as a standard practice, the employee of the respondent who contacted the witness explained who she was representing and the purpose of the call, outlining that the witness had been named in an employment tribunal claim submitted by the claimant and that the respondent's representative therefore wished to discuss the witness's involvement in the case with her. I understand that the witness agreed that this would be acceptable, and it was agreed that an email would be sent following up on this so that the witness could provide her availability. A follow up email was sent, and the witness confirmed her availability for an interview by return.

The witness was therefore included on a preliminary list of witnesses outlined on the respondent's completed date listing stencil, which was lodged with the tribunal on 5 December 2019. However, to date, she has not been interviewed by the respondent's representative.

The respondent denies that it has acted in any way inappropriately. The respondent and its representative [are] entitled to approach individuals and make requests for interviews. In particular, the respondent denies the allegation by the claimant during the course of the preliminary hearing of 29 January that it approached the witness pretending to be doing so on behalf of the claimant.

Accordingly, the respondent disputes that there are any barriers to the claimant submitting information regarding her disability to the tribunal. The respondent's representatives are legally qualified, and so are regulated

persons subject to the rules governing their conduct. Information submitted by the claimant as part of the tribunal process will be used solely for the purposes of conducting the litigation."

52. The claimant advised that on 21 February 2020 that she was distressed by the email sent by Mr James. She was also stressed by the pressure to reply to email and comply with orders. This was supported by a letter form the claimant's GP requesting if it would be possible to give the claimant a "complete break for the next two weeks from any correspondence or actions required for the process."

53. The parties were advised that there was no requirement to reply or comply with any orders until 16 March 2020 when Employment Judge Eccles would review the information provided and contact the parties regarding further procedure.

Application for strike out of the response and the reply

54. On 16 March 2020, the claimant responded to the emails and in particular the email sent on 5 February 2020. The claimant explained that she had "struggled to address these emails while working to comply with the orders" made during the 29 January 2020 CMPH. The claimant said that emails have "added further stress and have acted to exacerbate my mental health at a time when I was already under extreme pressure (having to assess my past and future loss as well as having to assess the frailty of my future which was very humiliating and painful process as I had to review very sensitive information as well as putting a lot of energy into collecting information in order to comply with the tribunal's order."

55. The claimant requested further information in relation to the explanation about contacting the witness. The claimant also objected to the respondent's request for further information in relation to her disability. The claimant said that she would like to bring new claims of intimidation, harassment, disability discrimination and whistleblowing against the respondent due to the manner in which they had treated her throughout the legal procedure since May 2019 but mostly about how they approached a key witness in the process. The

claimant therefore asked the Tribunal to strike out the respondent's claim in whole or in part due to the unreasonable manner in which the respondent and their legal representatives have been engaging with the process and had been vexatious and unreasonable leaving her as a witness feeling harassed and intimidated.

56. Mr James responded on 20 March 2020. The respondent's position was that witnesses do not appear on behalf of parties; they give evidence under oath and affirmation even when giving evidence by written statement and so are sworn to tell the truth. Regardless of who called the witness it would not change the evidence she would give. Mr James also advised that the respondent had complied with the order relating to medical information and reiterated that all medical evidence relevant to the claimant's health held by the respondent with exception of the notes held by the respondent's occupational health service had been produced. The claimant's consent was required before these notes could be disclosed. In relation to mediation, the respondent's position remained that further medical evidence was required before instructions could be taken and only after doing so would the representative be properly able to assess the prospects of the case to enable the respondent to meaningfully participate in any judicial mediation. With regard to the claimant's wish to expand her case, the respondent did not consider that it was a formal application to amend as she did not state the terms of the proposed amendment although it was appreciated that the claimant could bring an amendment at any time. As regards strikeout, it was denied that the respondent's conduct in the course of litigation was in any way scandalous or vexatious. It was denied that the respondent had acted in any way inappropriately.

Consequences of national restrictions on 23 March 2020

57. On 1 April 2020 the Tribunal wrote to the claimant about participating in a telephone discussion to discuss how best to proceed with the case during the COVID-19 pandemic. Employment Judge Eccles proposed that if the claimant did not feel able to participate in a telephone hearing the case be sisted for two months.

58. On 15 April 2020, the claimant provided a detailed response to the respondent's email. The claimant advised: "the employment judge has also asked me to confirm if I am able to take part in a telephone hearing with the respondent to discuss how best to proceed with the case during the COVID-19 pandemic or if I would like the case to be sisted for a period of two months. I am very ill at the moment and either option would be difficult to manage. However, on balance, I believe that finding a resolution to this case as soon as possible is more than keeping with the overriding objective and therefore I would like to take part in a telephone hearing."

59. The claimant also provided a further letter from the claimant's GP dated 1 April 2020 in which she explained the deterioration in the claimant's health since November 2019 which seemed to be steadily getting worse by the frequent correspondence from the respondent. The claimant felt violated by having to give access to medical records only for them to be mishandled. The claimant could not cope with signing a mandate as she no longer trusts the respondent or its legal representatives because of their "negligent manner in which they have handled all the information that she has provided then in the past".

60. Mr James explained by email sent on 27 April 2020 that his understanding was that the claimant had not given consent to her occupational health records being shared with her managers during her sick absence. Therefore, they were not accessed by management and do not form part of the claimant's personnel file. In any event any such consent would not allow the managers to share the records with Mr James as he was not an employee of the respondent and the consent was to allow him access for use in the Employment Tribunal proceedings.

Third case management preliminary hearing (22 June 2020 CMPH)

61. Employment Judge Eccles conducted this preliminary hearing by telephone. Mr James represented the respondent. "E" supported the claimant. Breaks were provided during the hearing.

62. Both parties accepted that the occupational reports were relevant to the claimant's medical condition. The claimant considered that these were already available to the respondent and should not be required to sign the mandate. The claimant would provide additional medical information and would notify the Tribunal by 29 June 2020 if she required more time to obtain this information. There was also discussion about the claimant requesting information from the respondent.

63. The claimant's concerns about the manner in which the respondent was conducting the response to the claim was discussed: the frequency with which the respondent wrote to the Tribunal; the contact made by the respondent with the witness; and the contact between Mr Scott and Mr James. The claimant did not accept the respondent's explanation for contacting the witness and had applied for strikeout. Employment Judge Eccles did not consider it appropriate to list the case for a hearing on strikeout of the response at that stage, in part because the Tribunal was aware that the claimant requires an opportunity to obtain information and because the Tribunal was unable to list hearings to take place in the timings suggested by the claimant to consider the issue of alleged witness intimidation. The respondent reserved the right to seek expenses against the claimant should an application for strikeout be refused by the Tribunal.

64. The claimant mentioned that she may wish to amend her claim but had been unable to draft an application. Accordingly, no decision was made.

Applications for extension of time

65. On 29 June 2020, the claimant requested an extension of time to provide the medical information until 8 July 2020. The claimant explained that after the 22 June 2020 CMPH she was "very unwell" as her "PTSD had flared up".

66. The claimant wrote on 8 July 2020 stating, "Given the significant amount of medical documents, and the fact that reviewing this is very likely to flare up my PTSD, as well as judging by the way I have been feeling due to recent events associated with this legal process which have exacerbated my PTSD, I would require at least three months to submit this evidence. I cannot predict

how my illness will affect me during this process. There is a possibility that I can become further incapacitated and that this may mean that I have to ask the tribunal for a further extension to this time. As a reasonable adjustment, I would like to ask the tribunal for flexibility in this regard i.e. the time to be extended if I am slowed down by flares of my PTSD."

67. Mr James emailed on 9 July 2020 advising that the respondent did not oppose the claimant having sufficient time to complete the task. There was no wish to erect undue barriers to the claimant progressing her case. However, the claim was lodge on 17 May 2019. The claimant had been ordered originally to produce the medical information by 29 November 2019. Disability status remained unresolved. Mr James asked that the Tribunal to fix deadlines so that parties had a timescale to work towards.

68. On 17 July 2020, the parties were advised that in the circumstances, Employment Judge Eccles considered it appropriate to allow the claimant until 2 October 2020 to obtain the additional information.

69. On 1 September 2020, the claimant emailed the Tribunal about Mr James' email of 9 July 2020. The claimant indicated that the respondent in asking the Tribunal to fix deadlines was more likely to exacerbate her anxiety and delay progress rather than not having a deadline and keeping things a little bit more flexible. The claimant said that due to the respondent's unreasonable and inflexible requests, she was seeking an extension until 30 October 2020. If the extension was not possible then she wished to withdraw from judicial mediation and proceed with litigation.

70. On 7 September 2020, Mr James advised that the respondent had no objection to the proposed extension. He reiterated that there was no opposition in principle to the claimant having sufficient time to provide information. However, it was noted that the claim was lodged on 17 May 2019 and despite having been before the Tribunal for more than a year, disability status remained unresolved.

71. The claimant's application was granted.

Disability status

72. On 30 October 2020, the claimant complied with the order and produced medical information.

73. On 16 November 2020 Mr James confirmed that the respondent admitted that the claimant was a disabled person by reason of depression, anxiety and PTSD from 17 February 2017 and that the respondent knew or ought to have known that the claimant was a disabled person due to these conditions from that date.

74. On 23 November 2020 the claimant's confirmed that based on the respondent's concession she was willing to engaged with mediation. She set out the reasonable adjustment which included the judicial mediation taking place as soon as possible (December/January) by email. This was supported by a letter from the claimant's GP dated 20 November 2020 as it would put the claimant under less stress as she could respond in her own time.

Judicial mediation

75. As is standard procedure the case papers contain no information about the judicial mediation. From subsequent references in the parties' correspondence it took place remotely in January 2021 by cloud video platform. It was conducted by Employment Judge Doherty who had no previous involvement in the case.

Further procedure

76. In April 2021, Employment Judge Eccles wrote to the parties asking how they wished to proceed and if it would assist if the case was listed for a preliminary hearing.

77. Mr James requested by email sent on 7 May 2021 a case management preliminary hearing to discuss listing the case for a final hearing.

78. On 7 May 2021, the claimant advised that she had been very ill since January 2021 and that only recently had recovered from a flare in her PTSD which had affected in turn her IBS and skin. She would like to consult her doctor in

relation to the Tribunal's question. The doctor was currently on annual leave and therefore the claimant requested until 17 May 2021 to reply.

79. On 17 May 2021, the claimant wrote to the Tribunal seeking a preliminary hearing to address longstanding issues in relation to what she described as the respondent's obstruction of justice (inappropriate communication with the claimant's solicitor; intimidation of the witness; ongoing harassment and victimisation of the claimant; and providing false information to the Tribunal about constructive knowledge of disability) and her "extension of claim" and her belief that "due to the respondent's vexatious and scandalous conduct throughout this entire legal process, a fair trial could no longer take place."

80. The claimant requested a preliminary hearing by written submissions as she felt that she was at a substantial disadvantage with telephone hearings particularly the 22 June 2020 CMPH and the judicial mediation in January 2021. She considered that it was "distressing and humiliating" that the Tribunal had "simply ignored my request for judicial mediation to take place by written statements, twice." She also felt that during the telephone 22 June 2020, CMPH that the hearing was "happening to her and she did not fully participate in it".

81. The claimant enclosed a letter dated 14 May 2021 from the claimant's GP supporting the claimant's request to proceed with a preliminary hearing in writing. The letter continued, "She has struggled since the initial hearing and then subsequent mediation which was not unexpectedly a failure. The claimant's health condition means that she struggles to understand and follow events and conversations in a timeous way by telephone or even face to face, so she finds it difficult to reply and can find herself talked into situations she is unaware they are taking place."

82. On 17 May 2021, "E" wrote to the Tribunal in his capacity as "the claimant's friend" advising that he wished to withdraw from the process as he believed his presence possibly created a false impression that the claimant is fully supported through preliminary hearings which was not the case. "E" said that his support was limited to asking for meetings to stop if he noticed that the

claimant was distressed. Beyond that, he had no ability to support the claimant as he had no legal background. "E" further commented that he believed that face to face or telephone hearings placed the claimant at a substantial disadvantage in the proceedings thus far.

83. On 21 May 2021, Mr James suggested that matter be discussed at a case management preliminary hearing. The respondent objected to any hearings, particularly dealing with substantive matters, taking place by written submissions as it would not be in accordance with the overriding objective.

84. On 26 May 2021, Employment Judge Eccles wrote to the respondent with a copy to the claimant requesting the respondent's comment on whether it would be agreed as an alternative to the preliminary hearing held via telephone or video that the Tribunal asked the parties to answer questions in writing in relation to case management and to progress the claim.

85. On 28 May 2021, Mr James objected to any preliminary hearing taking place in writing. The understanding was that the claimant had requested a hearing on two issues: striking out of the response due to the respondent's alleged vexatious and scandalous conduct and "extension" which was understood to mean amendment (of the claim). In relation to the first issue, the claimant made a number of allegations about the conduct of both Mr James and the respondent. Any preliminary hearing on strike out on the basis of this alleged conduct would have to hear witness evidence as to what was or was not done. The Tribunal would then have to make findings as to what happened in order to determine if the respondent's conduct was vexatious or scandalous and if so, whether a fair hearing can still take place. In particular, the claimant would have to give evidence on what she alleges happened. The basic principles of fairness dictate that the respondent would then be able to cross examine the claimant on her account. If it is being alleged that the respondent had acted inappropriately, the respondent is entitled to challenge those allegations and is entitled to put its case forward. None of this would in any way be possible by written submissions alone. Holding such a hearing by written submissions is not compatible with ensuring that the parties are on equal footing and would not enable the Tribunal to deal with the case fairly or justly.

The claimant's proposal was at odds with the overriding objective. As regards the amendment issue, the claimant had not set the precise terms of any amendment which was indeed what was sought. If any preliminary hearing was to consider the amendment of the claim, the claimant requires to set out the precise terms of such amendment in advance so that proper instructions could be taken.

86. As regards case management being progressed by written questions, Mr James was in agreement. He asked for his concerns about the progress of the case to be noted that if the claimant was wholly unable to participate in oral hearings. At some stage there would be a final hearing which cannot be conducted solely in writing. The respondent will be entitled to cross examine the claimant. There are upwards of ten witnesses and allegations spanning years.

Format of any final hearing

87. On 10 June 2021, the parties were advised that Employment Judge Eccles was of the view that reasonable steps should be taken to bring the claim to a final hearing. She noted the claimant's concerns about her health in relation to Tribunal proceedings and had regard to the Equal Treatment Bench Book when considering how best to proceed with the claim. The parties were asked to identify any outstanding preliminary issues and whether they required a separate hearing or to be determined as part of a final hearing. Employment Judge Eccles was also considering whether witnesses could give their evidence in chief by way of witness statements and further the claimant could also provide written answers to questions in cross examination. As regards cross-examination of the respondent's witness, Employment Judge Eccles was considering whether this could be done by her or asking the witnesses questions prepared by the claimant. Comments were sought.

88. Employment Judge Eccles also requested comments on whether the final hearing should take place in person or remotely by Cloud Video Platform. There was also the possibility that the final hearing could be hybrid with some or all witnesses participating remotely. She also indicated that if parties had

been able to identify any steps that might be taken to facilitate a final hearing, they should do so and any suggestions made by the claimant's general practitioner would be taken into consideration.

89. On 23 June 2021, Mr James wrote to the Tribunal advising that there were a number of outstanding preliminary issues. The respondent had conceded disability from 17 February 2017 onwards. It was anticipated that elements of her disability status may be in dispute. Expert medical evidence may be needed to resolve the issue. Separately, there was an issue about how much of the claim was time barred but at a previous preliminary hearing, it had been determined that the time bar argument should be decided at the final hearing.

90. As regards the procedure at the final hearing, Mr James accepted that the Tribunal can, in appropriate circumstances, take evidence from witnesses without that witness having to give oral evidence. However, even in cases of disability discrimination, the Tribunal's role is neither inquisitorial nor proactive rather it is to adjudicate disputes of issues of fact and law between the parties. The overriding objective includes ensuring parties are on an equal footing. Mr James submitted that any procedure must be fair to both parties to enable the Tribunal to come to determination on disputes of fact and law. It was considered that the Employment Judge's proposal permitted a fundamental unfairness. The claimant would have the opportunity of taking time to consider and prepare her answers to cross examination with full access to the evidence of the respondent's witnesses and therefore be able to present her case and her position in the best possible light. The respondent's witnesses by contrast would be subject to normal cross examination, would not have time or opportunity to consider their answers in light of other evidence and would inevitably be at a disadvantage. The respondent would be in an inherently unfavourable position.

91. This unfairness could be alleviated by the claimant answering questions in normal oral cross examination. It could alternatively be alleviated by allowing the respondent's witnesses to view the proposed cross examinations questions in advance and have access to witness statements of all the other witnesses when preparing for questioning. The former option appeared to

have been precluded by the Employment Judge's proposal and the latter option would mean that witnesses would effectively be delivering pre-prepared written statements to the Tribunal such that any cross examination would be a rote exercise. In such circumstances, the final hearing would effectively be decided purely on the basis of written submissions. A more efficient and fair way of proceeding, with less expense and the same result as the latter option, would simply be for all parties to submit written witness statements, view the witness statements of the other witnesses and submit any necessary supplementary witness statements and then submit written answers to the written cross examination questions.

92. This was not a case where conduct is admitted and the only question for the Tribunal is a subjective motivation for that conduct. The parties are in dispute about whether many alleged events even took place let alone why any events took place. The Tribunal will be confronted with the assertion that certain events took place and countervailing assertions that they did not. In such circumstances, and in the absence of oral evidence, the Tribunal could not make any findings of fact at all and could not be able to resolve the dispute between the parties.

93. The respondent submitted that the Employment Judge's proposal would place the respondent at a fundamental and insurmountable disadvantage; that the only way to alleviate the disadvantage would be for the case to be decided either expressly de facto on the basis of purely written evidence; that in such circumstances, the Tribunal would be unable to resolve the substantial disputes of fact and law between the parties; and that accordingly measures should be explored to enable the claimant to participate in the final hearing. The input of the claimant's treating practitioners as to what measures could be put in place would be enormously appreciated.

94. The respondent's position was that a final hearing could take place in some hybrid format. The claimant would find it easier to attend proceedings and answer questions by video link and there would be no objection in principle.

95. On 25 June 2021, the claimant authorised "E" to communicate with the Tribunal to advise that on receipt of the respondent's email, the claimant has suffered a relapse in her PTSD and IBS. The claimant had suffered a panic attack which resulted in her becoming distressed and shocked by the content of the email which she described as "harassing" and "traumatising". The claimant had been in touch with the claimant's GP and the Suicide Helpline. The claimant's GP recommended an extension until 14 July 2021 as a reasonable adjustment to allow the claimant to recover and submit her response to the Tribunal with regard to further proceedings. The application for the extension was granted.

96. On 14 July 2021, having been authorised by the claimant to communicate with the Tribunal, "E" advised that the claimant remained unwell. The claimant was seeking legal advice although she was reluctant to do so given the unresolved trauma brought on by "what transpired between the respondent and David Scott. The claimant's GP recommended an extension until 31 July to allow the claimant to obtain legal advice.

97. The claimant's GP's letter of 14 July 2021 stated that the claimant was "still no better and struggling with IBS/PTSD symptoms, persistent pain and frequent panic attacks following recent email correspondence from the respondent."

98. An extension of time was granted until 31 July 2021.

99. On 29 July 2021, the claimant authorised "E" to communicate with the Tribunal. He sent an email on 31 July 2021 to advise that the claimant remained unwell after suffering a relapse on receipt of the respondent's email on 24 June 2021. This had been the worst PTSD/IBS flareup she had suffered, exacerbating the problem and making the recovery difficult. Some progress had been made as the claimant had contacted a legal firm. The claimant's GP requested a further extension until 31 August 2021 to allow her time to recover and submit her response. The letter was not copied to the respondent. The Tribunal sent a copy to the respondent and asked for comments.

100. On 11 August 2021, the claimant sent an email to the Tribunal office. The claimant advised that she would find it impossible to attend a hybrid hearing due to her disability and she considered that would create a great deal of confusion and that it would be absolutely impossible for her to be able to take part on an equal footing.

101. The claimant reminded the Tribunal of the shock and distress following the respondent's approach to the witness and that she had never recovered, as a result, she found herself always taking decisions from a place of fear, stress, anxiety and intimidation. She considered that the overriding objective was not being met as she was not given an opportunity to engage with the process on an equal footing. She therefore requested a reasonable adjustment, a preliminary hearing by video link, to exhaust all issues that she raised in her letter of 17 May 2021. In particular, the opportunity to cross examine the witness under oath with regard to the manner in which she had been approached. The claimant said that she genuinely believed that the witness had been intimidated. If this was found to be the case, it would cast a great shadow of doubt of how the witnesses would have been approached by the respondent. The claimant found it difficult to engage with any witnesses for fear that they had been interfered with in the same way as the witness had been. If found that the witness's knowledge had been tampered with, the case was no longer suitable for witness evidence. The claimant said that having such a hearing before a final hearing was in keeping with the overriding objective as it would remove her anxiety around witness intimidation; allow her to engage with the witnesses, all of which worked for the NHS and be proportionate to the complexity of the issues.

102. The claimant reiterated that the respondent's behaviour had been scandalously vexatious throughout the entire case and that it needed to be addressed because she currently felt intimidated by the respondent and her solicitor.

103. Mr James responded on 11 August 2021 to the claimant's proposed approach which she had suggested would be a reasonable adjustment. He summarised that the duty to make a reasonable adjustment is not unlimited. Among other

requirements, in order for there to be a failure to make reasonable adjustments, the proposed adjustment must be reasonable. The respondent argued that the claimant's approach for further procedure would not be reasonable. Having a separate preliminary hearing on strike out was not in accordance with the overriding objective. The claim had been before the Tribunal for two years and some of the allegations concerned events six years ago. It would not be proportionate to the complexity of the issues to divert the case to months of additional procedure. Separately if the claimant was unable to attend a hybrid final hearing, it would be difficult, if not impossible, for a fair hearing to take place.

104. On 13 August 2021, the Tribunal wrote to the parties advising that Employment Judge Eccles had decided that a preliminary hearing in September/October 2021 should be arranged to discuss suitable arrangements for a final hearing. Employment Judge Eccles was not persuaded from the information available that there should be a preliminary hearing to question the witness before a final hearing. The claimant's concerns about the witness's evidence and how this should be addressed would be discussed at the preliminary hearing along with reasonable adjustment for the final hearing. The parties were asked about the possible type of hearing for the preliminary hearing, in person or hybrid.

105. On 14 August 2021, Hazel Craik, head of employment at the Central Legal Office, (CLO) wrote to the Tribunal and the claimant advising that Mr James was leaving CLO at the end of August 2021 and that she would be taking over responsibility for the case. Ms Craik advised of her availability.

106. On 20 August 2021, the claimant wrote advising that the news was very short notice and quite shocking given Mr James' implications and the actions within the case for more than two years. The claimant asked for time until the end of August to consider her position in light of these new changes. The claimant stated, "I have never fully recovered after Mr James' (his actions are CLO's actions as he was their employee, and the employer is responsible for the employee's actions in the course of their employment) email of 23 June 2021. Now this shocking and distressing change of events has had another severe

impact on my condition, and I will need more time to think on how to respond to the Employment Tribunal's request in light of these new changes due to the anxiety arising from the PTSD and clinical depression."

107. While waiting for a reply, the claimant sent a further email on 26 August 2021attaching a letter of support from the claimant's GP confirming that Ms Craik's email caused a further setback and requesting as soon as possible confirmation of an extension to 30 September 2021. The claimant asked the Tribunal to take into account the numerous flareups caused by the respondent, especially since January 2021 (she had a severe nervous breakdown when she realised she was drawn into mediation under false pretence by the respondent as neither her schedule of loss nor the medical evidence were taken into account, both of which were directly requested by the respondent as a condition to attend. It was a violation of her human rights and dignity); and the further deterioration of her health since 24 June 2021.

108. Employment Judge Eccles asked for Ms Craik's comments on the claimant's request. The email was sent on 27 August 2021 and copied to the claimant. Ms Craig confirmed that she had no objection to the request but trusted that it would be possible to find a mutually suitable date in October and provided availability. Ms Craig also observed that, "whilst noting the claimant's perception of Mr James' conduct, this is not a perception shared by me or by the CLO. The fact that Mr James will no longer be an employer of CLO after 31 August, will not of course be a barrier to the tribunal considering any application or submissions made by the claimant in relation to the respondent's conduct of this case."

109. The Tribunal wrote to the parties advising the claimant's request for an extension to 30 September 2021 was granted and that availability to attend a preliminary hearing in October and November was requested by 30 September 2021.

110. On 30 September 2021, the claimant wrote to the Tribunal commenting that while Employment Judge Eccles had noted on 11 August 2021 that the claimant may be able to take part in a preliminary hearing by video-link, at

that time she made that statement, the claimant was recovering from all the distress and shock Mr James "vexatious and scandalous" particularly the email sent on 23 June 2021. Now that she had been given time to rest longer, as well as being given time to reflect on this and discuss it at length with her doctors, "it has become obvious that attending a preliminary hearing to discuss 'the witness's evidence and how this should be addressed' either by video-link or in person will certainly lead to another flareup in my PTSD." The claimant also advised that the trauma and scars caused by the 22 June 2020 CMPH where she arrived to refuse judicial mediation but found herself "forced to accept to take part by the manner in which the hearing unfolded at the events around 2019 are too traumatic for her to talk about without breaking down" and she could provide written submissions if given a chance. The claimant reminded the Tribunal and the respondent that she had experienced the shock and traumatic change in attitude of the witness on 26 November 2019 and the claimant said that it was clear from her communication with the witness that she had been intimidated by the respondent which in turn had intimidated the claimant as a witness. The claimant referred to the letters submitted by her doctor and what Employment Judge Eccles had witnessed herself at the last two preliminary hearings before becoming tearful and the shock of what she experienced in November 2019 would affect her to the point where she would be unable to discuss the matter coherently due to anxiety and fear arising in consequence of the PTSD. The claimant requested the Tribunal to allow her to submit the answers with regard to (a) her concerns about the witness's evidence and how that should be addressed and (b) reasonable adjustments for the final hearing (which will have to be carefully considered and discussed with doctors) by written submissions. If the Tribunal agreed, these would be submitted by 4 November 2021.

111. On 29 September 2021, the claimant's GP wrote a letter referring to the claimant remaining concerned about the issues surrounding the 22 June 2020 CMPH as well as considering the worries and the fact that she can no longer count on "E"'s support as he himself found these hearings stressful. The claimant's GP did not believe that the video conference would be appropriate "in addition due to her PTSD, she is unlikely to cope with a trip to Glasgow for

a face-to-face hearing. Therefore, from a medical point of view, I would recommend that she be allowed to attend a preliminary hearing by written submissions as being asked to present information at this hearing via any other methods which would place her at a disadvantage compared with other people who do not have her protected characteristics due to anxiety, fear, poor decision making under pressure all arising in consequence of her PTSD and to some extent her depression."

112. On 4 October 2021, Employment Judge Eccles asked the respondent for comments on the claimant's concerns around the respondent's evidence and reasonable adjustments for the final hearing.

113. On 10 October 2021, in Ms Craik's absence on annual leave, Ms Henderson wrote to the Tribunal advising that the respondent was concerned as to how a fair hearing on the substantive issues can be conducted if the claimant feels unable to attend even a preliminary hearing either in person or via CVP to discuss matters of procedure. That said, the respondent did not object to the claimant's request to set out her position on the preliminary issues in writing by 4 November 2021 rather than attend a preliminary hearing to discuss them. The respondent requested 14 days to consider the claimant's position following receipt of the written submissions.

114. On 13 October 2021, Employment Judge Eccles wrote to the parties advising that she had decided to grant the claimant's request to provide the Tribunal with submissions in writing about further procedure. Employment Judge Eccles requested the claimant include in her written submissions any proposals she wished to make regarding the conduct of a final hearing including how parties give evidence (including concerns that the claimant has around the witnesses' evidence); whether the hearing should be in person, remote or hybrid, and confirmation of whether the claimant is able to say when she will be able to participate in a hearing. It would also assist the Tribunal if the claimant was able to identify any reasonable adjustments that could be made in preparation for and during the hearing.

The claimant's response on further procedure (4 November correspondence)

115. On 4 November 2021, the claimant wrote to the Tribunal with her 12-page response about further proceedings. Also attached to the response were six appendices and a letter from the claimant's GP.

116. The claimant advised that the Tribunal's correspondence of 13 October 2021 had caused her a lot of anxiety and stress because she required to think about reasonable adjustments within the confines of pre-established options (in person, remote or hybrid) regardless of the fact that such options were placing her at a disadvantage as a disabled person. She felt that she was once again backed into a corner and forced to attend a final hearing when she is prevented to do so by severe anxiety arising in consequence of her PTSD.

117. The claimant considered that the options did not take into consideration her concerns that due to **"**the respondent's vexatious and scandalous behaviour, a final hearing could no longer take place". The claimant said that this made her feel intimidated and even more fearful about attending the final hearing because of fear of potential bias within the Tribunal. The claimant asked the Tribunal to provide information including the conscious and unconscious bias training within the Employment Tribunal. The claimant indicated that due to the respondent's approach to the witness and their interference with her solicitor, the respondent's "vexatious and scandalous behaviour throughout this case", she was struggling daily and even more so than before. The claimant said that due to all the intimidation that she had been subject to by the respondent, "I fear that a final hearing can no longer take place". The claimant expressed concern that the Tribunal "constantly refuses to hear my concerns and is constantly forcing me to live in anxiety and fear when this is contrary to what the ETBB and the Equality Act 2010 advise." The claimant expressed concerns that she was being forced to attend a final hearing when as main witness, she felt intimidated by the respondent, "which is placing me at a detriment not only because it is causing me constant stress and anxiety but also because I am unable to participate in the final hearing, on an equal footing, due to all the constant and debilitating symptoms."

118. The claimant went on to comment on the reasonable adjustments that could be made by the Tribunal in preparation for the hearing. The claimant advised that the reasonable adjustments that she required to help reduce reduce/remove her anxiety and allow her to fully engage in achieving justice in preparation for the final hearing are:

(a) Witness declarations. Requested a preliminary hearing to look into witness intimidation. The claimant set out in appendix 1 all the questions that she wished the witness to answer; she required the respondent to answer all questions set out in appendix 2; and Mr James to answer all questions set out in appendix 3. The claimant also required a witness declaration and disclosure from Mr James regarding his involvement with Mr Scott (appendix 4). The claimant sought a strike out on responses to new claims as the Tribunal allow her to provide a timeline of events which would undeniably demonstrate the respondent's behaviour throughout the case had been vexatious and scandalous.

(b) Allow her to lodge new claims against the respondent of victimisation and instructions and pressure and new whistleblowing claims. The claimant asked the Tribunal to order the respondent to disclose why they lied about the knowledge of disability for so long. It was requested that the Tribunal refer the matter to the police for a public police investigation as the respondent's behaviour amounted to a breach of the peace and for the respondent to answer the questions as set out in appendix 5.

(c) The claimant sought the disclosure of documents and set out a disclosure document which she wished the respondent to answer and provide all evidence asked of them in appendix 6. The claimant requested reasonable adjustments during communication. The claimant explained that she found the respondent's emails harassing, discriminatory, vexatious and scandalous and wanted them to stop. The claimant sought an order for Ms Craik to provide a statement with a timeline of events since May 2019 to date where she should state for

each and every single email or letter that Mr James has sent to the Tribunal with written information including who decided to send it, names and addresses of all the solicitors involved in the case apart from Mr James and how many occasions others were involved in reviewing Mr James' instructions and how much autonomy other solicitors had in all the decisions taken in the case. The claimant also asked for the Tribunal as a reasonable adjustment to put in place a vetting system that will review all the respondent's emails before sending them to her. The claimant said she could no longer withstand the respondent's behaviour and if its emails and comments are not backed up by evidence in order to establish facts and move this case forward in a non-discriminatory and polite manner and backed up by clear evidence, they should not be allowed.

Respondent's comments on 4 November correspondence (17 November application)

119. On 17 November 2021, Ms Craik wrote to the Tribunal having received the claimant's email and six appendices. She noted that the claimant had summarised what she required to happen before any final hearing can take place. This included a preliminary hearing to strike out the response to the claim on the basis of the alleged misconduct of the respondent, Ms Craik and other CLO solicitors. In preparation for this, the claimant sought production of written declarations by the witness, Mr James and for the respondent to assign someone to answer questions about her allegations of breach of the peace and witness interference. A request was also made that the witness, witness for the respondent, answers a significant number of questions, most of which did not appear directly relevant to the preliminary issue and some of which constituted witness evidence. Further, the claimant wished Ms Craik to answer a number of questions about the way in which litigation has been conducted, most of which is privileged or in respect of which no court order would be granted. She sought voluntary disclosure of documentation listed over 165 pages. Lastly, she wished the Tribunal to report the respondent to the police for breach of the peace.

120. Ms Craik noted that the Tribunal had already declined to order such a preliminary hearing take place. She argued that even if the Tribunal was persuaded that such a hearing should be fixed, it was not clear how it would be conducted in light of the claimant's clear position, supported by medical evidence (that participating in person, by telephone or video link is detrimental to her health). It would not be fair to have such a hearing take place by way of written submissions or declarations. Mr James set out the reasons for that in detail in his email to the Tribunal dated 28 May 2021.

121. Alternatively, the claimant wished to submit new claims against the respondent or produce a timeline of events to show that the respondent's behaviour has been vexatious and scandalous. If the Tribunal were to agree to either of these options, it would not advance the case in any way or address the fundamental difficulty that the claimant is not fit to take part in any proceedings conducted other than by way of exchange of written submissions.

122. Ms Craik argued that the parties are at an impasse. She said that in a letter from the claimant's GP dated 2 November 2021, it makes clear that unless all the questions that the claimant has raised as appendices to her submission are answered, the claimant will be unable to take part in the final hearing. There is no suggestion in the medical evidence that has been presented, or from the claimant, that her position will change over time. The reasons provided by Mr James is that it would not be an appropriate way to determine the issue of alleged vexatious conduct for the respondent and for the witnesses simply to answer a series of questions posed by the claimant. The Tribunal has already declined to list a preliminary hearing on the alleged issue. However, if the Tribunal is persuaded that it should list a preliminary hearing, it is the position of the respondent that this would require to be conducted in person. The medical evidence indicates that the claimant would not be able to attend such a hearing in person.

123. As the Tribunal has not agreed to convene a preliminary hearing to strike out the response to the claim on the basis of the alleged misconduct of the respondent, subject to any change of position by the Tribunal on the matter,

that the case should progress to a final hearing. As explained by Mr James on 28 May 2021, such a hearing would also require to be in person. The fundamental issue remains that the medical evidence indicates that the claimant will not attend a final hearing in person, either now, or at any point in the future. It is an unfortunate situation but if the claimant is unable to take part in a final hearing, it therefore appears that as a fair hearing in this case will not be possible under rule 37(1)(e), the Tribunal should consider strike out of the claim.

124. In light of the claimant's comments, the email was not copied to the claimant.

Tribunal's engagement with the claimant

125. On 29 November 2021, on Employment Judge Eccles' direction, the Tribunal wrote to the claimant to advise that Ms Craik had responded to the correspondence. In light of the requests that the Tribunal vet all emails arriving from the respondent, Ms Craik had not copied a response to the claimant. The letter continued:

"Judge Eccles does not consider the content of the respondent's correspondence dated 17 November to be offensive, discriminatory, vexatious or scandalous and considers it to be in accordance with the overriding objective that you are permitted to see all correspondence between the Tribunal and the respondent. If you agree with the above Judge Eccles asks whether you wish the Tribunal to send a copy of the correspondence to your doctor as she would be better placed than the Tribunal to assess how you may react to it and whether it is in the best interests of your health."

126. On 29 November 2021, the claimant advised that she contacted the Tribunal on two separate occasions by telephone and was told that the respondent had not made any response to her submission between 4 and 18 November 2021. The email had therefore come as a shock to her. The claimant had lived under severe anxiety as a result. She wanted to see Ms Craik's submission that day. The claimant had an appointment with her doctor at 3pm and it would be appropriate to read it in her presence in case of assistance.

127. The Tribunal responded seeking clarification as to whether or not the email should be sent directly to the claimant's GP to allow her to read it in advance of the consultation. The claimant replied that she would like to receive the correspondence herself, print it out and consider it with the claimant's GP at the consultation. The claimant sent a further email:

"I omitted to mention that as, Judge Eccles, has given due regard to the ETBB and has guaranteed in her email that she genuinely believes that Ms Craik's email response is not going to cause me distress and shock, as her response is respectful, grounded in facts and in accordance with the overriding objective then I believe the judge and I do not feel anxious about receiving Ms Craik's response. I trust the word of Judge Eccles."

128. At 16:30 on 29 November 2021, the claimant advised:

"I am severely aggrieved shocked and distressed by Ms Craik's submission which I could not fully consider due to the trauma, pain, discrimination and harm it has caused. My doctor could not have shielded me from this harm. I fully trusted Judge Eccles' word that Ms Craik's email would not cause me shock and distress and went to read it with peace of mind, which made the shock of what the email contained even more severe, shocking, traumatic and distressing. I was unable to read through it as the pain and trauma was all too severe.

I am asking as a reasonable adjustment that the Tribunal give me time to fully consider this email and also recover as I cannot cope with any communication at this stage.

129. Attached to the email was a letter from the claimant's GP advising that she had spoken to the claimant that afternoon having received the email. The claimant's GP advised that the claimant was currently in "too much shock and stress to be able to fully reasonably consider this further at the present time." The claimant's GP advised that:

"I do not feel that it would have made any difference for you to send this to me first, she is naturally quite upset about the contents, and while I am able to

support her, this would have still caused distress. The claimant is also disappointed to be told that this information should not cause her distress, when it has and would.

I trust that you will allow time for the claimant to respond, as a minimum of two weeks, with no further correspondence during this time. Her physical and mental health are suffering as a result of the stresses, and she needs time to try and recover."

130. As the claimant's email had been copied to the respondent, Ms Craik replied on 30 November 2021 explaining that she had not copied the claimant into the email. Ms Craik commented that it has taken several months to deal with every piece of case management and the claimant's health was being seriously adversely impacted each time she receives an email, even when the content is being considered by the Tribunal and judged appropriately. The respondent's position remained that the Tribunal should consider strike out of the claim. The claimant was not able to progress correspondence about the litigation without it damaging her health. There is nothing to suggest that the claimant will ever be sufficiently fit to be able to attend a preliminary hearing or a final hearing in person. A fair trial is therefore not possible.

The claimant's emails of 23 December 2021

131. On 23 December 2021, the claimant wrote to Ms Craik and copied the Tribunal advising that the 17 November application amounted to intimidation and threats to her disability status. The claimant said that the respondent was asking the Tribunal to strike out her claim because she needed reasonable adjustments. There was no legal argument in asking the Tribunal to strike out the case because she is disabled. This was disability discrimination and disability hate crime. The claimant advised if Ms Craik persistent in making derogatory comments on behalf of the respondent, she would bring a personal injury case against the respondent under the Protection from Harassment Act 1997. The claimant also advised she had taken advice from the police and she intended to follow through with a complaint.

132. Ms Craik the email noting the comments. She did not agree that she or the respondent had discriminated against the claimant. Ms Craik further advised any action or complaint raised would be defended/responded to.

133. On 23 December 2021, the claimant wrote to the Tribunal office applying for an Unless Order against the respondent following their non-compliance with the order of 18 November 2021. The claimant requested that the correspondence be dealt with by a judge other than Employment Judge Eccles. The email stated:

"My health has worsened significantly in the last year, because of the biased manner in which the legal case has been conducted and I would like to make a public statement that if my health deteriorates further, if I die or become otherwise unable to take part in this case (due to a lack of capacity and/or finances) I hold not only the respondent and the CLO responsible but also Judge Eccles who has led me to struggle in mental anguish for the third Christmas in a row. While the respondent, CLO and Judge Eccles have the power of decision over their lives, they have left me completely imprisoned in mental anguish and despair for close to three years, which is unreasonable behaviour that one should not encounter in a progressive democratic and inclusive country."

134. The claimant advised that it was not in the interests of justice for the respondent to write to her directly as their emails were designed for the sole purpose to cause her harm. As a reasonable adjustment, she requested the Tribunal to vet the respondent's emails and explain to her how these emails are grounded in law and why the Tribunal feels that they are not discriminatory, vexatious, scandalous or otherwise offensive.

The respondent's position

135. On 31 December 2021, Ms Craik wrote to the Tribunal that it was not accepted that the respondent failed to comply with the Tribunal's directions. The respondent provided its proposals in relation to the further conduct of the proceeding by 18 November 2021. This had been done albeit that the claimant disagreed with what was written in the respondent's response on 17

November 2021. No order had been made which has not been complied with. It was also not accepted that the respondent's correspondence with the claimant was for the sole purpose of causing her harm. The respondent was making every endeavour to try and deal sensitively with the case albeit this was not recognised, or accepted by the claimant. It was not accepted that the case had been conducted by the respondent and its representatives in a discriminatory or unreasonable manner.

136. In light of the claimant's intimation that correspondence from the respondent causes her severe and life threatening harm and her requests that she not be copied into correspondence between the respondent and the Tribunal as an adjustment for her disability, the email was not copied to the claimant.

Judicial complaint and ongoing case management

137. On 14 January 2022, the Tribunal wrote to the claimant advising that correspondence had been referred to Employment Judge Eccles as she had been allocated to case manage the claim. The President had instructed Employment Judge Eccles to continue managing the claim while consideration was given to the complaint.

138. The claimant was asked if she was well enough to deal with correspondence her email including an application for an unless order and strike out of the response. To properly consider these, it would be necessary for the Tribunal to consider any comments or objections from the respondent. Employment Judge Eccles felt that the claimant should be given an opportunity to see the correspondence from the respondent if the claimant was able to fully participate in the proceedings. Employment Judge Eccles did not consider it appropriate that the Tribunal vet correspondence for the claimant and provide an explanation as to how emails are grounded in law. Employment Judge Eccles had previously suggested that correspondence from the respondent could be copied to the claimant's GP as she would be better placed than the Tribunal to assess how it might affect the claimant's health. It was unclear from the correspondence whether this was something the claimant would consider as a reasonable adjustment.

139. On 31 January 2022, the claimant confirmed that she was unwell with the latest correspondence from the Tribunal and that it had left her distressed, confused and caused further trauma, psychological torment and decline in her mental health. Consequently, she asked for an extension with time until 17 February 2022 before replying. There was no objection from the respondent to this request.

140. The claimant responded on 17 February 2022 advising that she continued to remain unwell as the Tribunal was handling her case in a biased manner. The claimant had tried to address the correspondence but every time she attempted to do so, she was overwhelmed with memories and flashback of all the damage caused to her by Employment Judge Eccles' "personal racial hatred of her as Eastern European and biased approach to her case" leading to flares in her PTSD/IBS and depression every time. The claimant said that she had lost her faith and trust in Employment Judge Eccles and the very thought that she continued to oversee the case was creating difficulties mentally and physically. The letter was acknowledged and the claimant was asked whether she was applying for a sist of the proceedings.

Respondent's application for strike out of the claim

141. Ms Craik responded by email on 21 February 2022 referring to her 17 November application. She considered that there appeared no way that the case could progress in a meaningful way at present far less to a hearing and there was no timescale on which the situation was going to change. The claimant professed to have lost confidence in the ET system and did not feel a fair trial is possible. Accordingly, the Tribunal was invited to consider strikeout of the claim under rule 37(1)(e) of the ET Rules. Once again, because of the claimant's previous intimation, the email was not copied to the claimant.

Correspondence with the President of Employment Tribunal (Scotland)

142. In early 2022, the claimant was involved in correspondence with the then President of the Employment Tribunals (Scotland) Judge Shona Simon. On 10 March 2022, Judge Simon wrote to Ms Craik (copied to the claimant)

attaching an excerpt of a letter to the claimant which Judge Simon dealt with the matter which was relevant to the ongoing conduct to the proceedings. Judge Simon proposed to the claimant that a report might be funded by HMCTS designed to identify whether the claimant is fit to continue with the proceedings and, if not, whether she might be fit in the future. It was confirmed to the claimant that HMCTS would fund such a report. Ms Craik was advised that once the claimant indicated whether she was prepared to consent to an examination and the subsequent report being produced to the Tribunal.

143. On 23 March 2022, the claimant wrote to the Tribunal advising that the request had made her distressed, anxious and suicidal. The claimant explained that the only reason why she felt unwell and unable to engage with the legal process was due "not to my disability but disability discrimination on part of the Tribunal. Namely the refusal to afford reasonable adjustments and discrimination arising in consequence of my disability that the Tribunal is subjecting me to i.e. the Tribunal's refusal to apply the overriding objective through the prism of supporting legislation as they blatantly refuse to apply all the legislation that applies to minorities and disabled people." The claimant advised that she would be in a position to reply to the Tribunal by 11 April 2022.

144. The claimant sent a reply on 11 April 2022 explaining that the submission which extended to 20 pages had left her physically and mentally exhausted. She explained that she needed two weeks to recover from the trauma as she could not currently cope with more correspondence.

145. On 21 April 2022, Judge Simon wrote to the claimant dealing with the issues raised by her. Judge Simon noted that the claimant refused to give consent to be examined by an independent psychiatrist in connection with the proceedings.

(a) The claimant did not wish the proceedings to be sisted because "being given time off from this case will not help me recover".

(b) The claimant also said "taking time off is likely to make my PTSD worse."

(c) The claimant believes that a "fair trial can no longer be possible."

(d) The claimant believed that the only way to unblock the situation and "move this situation forward" is for the Tribunal to "accept responsibility for the difficult situation they created by maintaining racist and discriminatory procedures" and "to provide a judicial decision to this case under rule 60 as soon as possible."

146. In relation to the request for a judicial decision under rule 60, Judge Simon noted that the claimant appeared to be asking the Tribunal to come to a final determination by considering all written documents in private. Judge Simon explained that the type of decisions that fall within the scope of rule 60 are generally case management decisions. If the parties agreed in writing upon the terms of any order or judgment that a Tribunal make, if it thinks fit, it would then make that decision by consent and communicate it in writing to the parties using the power of rule 60. However, rule 60 does not in itself give a Tribunal power to decide it will make a final determination of a claim without a hearing. The principal rule of justice is an important one. Rule 60 is not designed to allow the principle of open justice to be severed. A final hearing will normally be in public. At a final hearing, decisions are made about whether the claim should be upheld or dismissed.

147. The claimant's position was that she wanted the matter dealt with "as soon as possible" while at the same time saying she has "lost faith, trust and confidence in the employment tribunal." She made it clear that she did not seek to sist the proceedings and indeed suggested any delay will damage her health. She was not willing to participate in the process of obtaining a psychiatric report. She was unwilling to receive correspondence from the respondent without it "being vetted". She was now saying it is not possible to have a fair hearing and that what she requires to "unblock" the situation and "move matters forward" was for the Tribunal to accept "responsibility for the difficult situation they created by maintaining racist and discriminatory

procedures which place a barrier to justice for all claimants with my protected characteristic and address instead a deep seated racial and disability discriminatory practice."

148. Judge Simon decided that the next step to be taken in the proceedings is for the Tribunal to consider the respondent's application that the claim should be struck out on the basis that it was no longer possible to have a fair hearing. In terms of the ET Rules, a claim may not be struck out unless a party in question is given a reasonable opportunity to make representations either in writing or if requested by the party at a hearing. Another judge was appointed to make this decision.

149. The claimant was invited by 13 May 2022 to notify the Tribunal in writing whether she wished to attend a hearing in connection with whether the claim should be struck out under rule 37(1)(e) or whether she wished to proceed by way of written submissions only. If the claimant wished to attend the hearing in person, it could be organised to take place in Dundee to minimise the travelling involved for her. Alternatively, it could take by video. The respondent was invited to comment.

150. In May 2022, the Tribunal was advised that the claimant had authorised "E" to communicate with the Tribunal on her behalf. "E" clarified that he was not acting as a representative but assisting the claimant as she was unable to communicate with the Tribunal herself. The Tribunal was provided with a letter from the claimant's GP dated 25 April 2022 in which she asked that the claimant be given time to respond to Judge Simon's letters.

151. On 17 May 2022, "E" requested an extension be granted until 10 June 2022 as the claimant remained in a fragile condition as a direct result of Judge Simon's letters. The extension was granted.

152. Further extensions of time were granted to the claimant following upon a family bereavement and ongoing correspondence with the then acting President of Employment Tribunal (Scotland) Judge Susan Walker.

Applications for strike out

153. I was allocated this case for case management. I had sight of some correspondence between the claimant/"E" and the President in so far as it related directly to the management of the case rather than complaints which are dealt with separately. From that correspondence I noted Judge Walker had confirmed that while Judge Simon had referred to the application made by the respondent it was clear that there were outstanding applications by both parties.

154. On 15 July 2022, in the absence of any response from the parties seeking a hearing, I directed I would consider matters on the paper. Given the passage of time I asked the parties confirm that the applications were still insisted upon and if so they were content to rely on the written submissions already provided or if they wishes to make further written submissions.

155. "E" confirmed that the claimant insisted on her applications made on 23 December 2021 but also wanted me to consider the earlier applications and submissions. The claimant also wanted to make additional submission by 31 October 2022. This time was needed because, "Judge Simon's unlawful conduct" had left the claimant severely ill and she was prescribed new medication which had significant side effects.

156. Ms Craik confirmed that the respondent insisted upon its application for strike out of the claim. Ms Craik considered that the correspondence from the claimant and "E" illustrated the difficulty set out in the 17 November application. The claimant had described often and at length the tremendous negative impact on her physical and mental health that dealing with the correspondence about the case has upon her. This included an attempt on her own life (email of 25 February 2022). There was no suggestion that the claimant will at any time in the short term or even long term be able to participate in this case in a way which provides the respondent, including witnesses individually accused of acting in discriminatory fashion a fair trial. The adjustments proposed by her are not reasonable and would not allow a fair trial to take place. In addition, the claimant now sees the Tribunal service,

in its attempt to assist her, as being as culpable as the respondent in perpetuating acts of discrimination against her and it seems unlikely that she will ever accept that any trial however conducted will deliver justice for her.

157. Ms Craik said that this case has not been without personal cost given the content of the claimant's emails. Those have included threatening of reporting the respondent but also reporting Ms Craik to the police for commission of a disability hate crime, something that was found entirely without justification but also upsetting.

158. As regards the claimant's applications for strike out of the response, Ms Craik said that the respondent submitted the response and grounds of resistance in July 2019. This has been accepted and discloses a defence to the claim. The respondent had throughout the litigation to date conducted itself in a reasonable and professional manner and on an examination of the history of the case, there are no grounds upon which the claimant's application could be upheld. The application should be dismissed.

159. On 30 October 2022, "E" wrote to the Tribunal and Ms Craik attaching a letter dated 28 October from the claimant's GP advising that the claimant's health was deteriorating. She was struggling to submit her "evidence" and requesting an extension of time until the end of November 2022. "E" explained that the Tribunal's directives left her feeling "threatened, anxious and intimidate, experiencing fear, confusion and panic attacks". She considered that the directives were in response to concerns that she had raised about bias and institutional racism. The claimant was concerned why I was only interested in addressing the strike out applications of 17 November 2021 and 23 December 2021 while ignoring the request of 4 November 2021.

160. On 8 November 2022 I directed the Tribunal to write to the parties explaining that the application dated 23 December 2021 refers to the concerns and applications raised in the email of 4 November 2021 and that I needed to consider the applications and comments in the email of 4 November 2021 when considering the application in the emails of 17 November 2021 and 23 December 2021. They were in my view all linked. I also advised that I would

consider the written submissions in chambers in early December 2022 and the claimant's application for an extension of time until 2 December 2022 was granted.

161. On 30 November 2022 "E" wrote to the Tribunal advising that from my refusal to provide clarification it appeared that I had already made my decision without further submissions from the claimant. My conduct had led the claimant to consider suicide. "E" considered that having clearly outlined her reasons for the claim against the respondent all of which was in my possession it was unreasonable to request that she should attempt the submission again without clarification regarding the strike outs.

162. "E" commenting that the claimant felt "terrified" of the Tribunal and admitted that she has no trust or confidence to submit additional information to us. "E" requested that in order to prevent further harm, the Tribunal "set a new precedent and recuse themselves from the process as it was clear that whilst judges can be replaced, the racist and discriminatory attitude towards minorities is sadly maintained." It was requested that the case should be referred to "an independent tribunal of Miss D's choosing." "E" commented that, "due to the fact that Miss D has been so deeply traumatised by Judge Eccles, Judge Doherty, Judge Simon, Judge Walker and Judge MacLean's conduct to the extent where she is experiencing severe symptoms arising in consequence of her disability every time she is reminded of the Glasgow tribunal and considering the fact that as a service user she no longer holds confident in the tribunal."

163. Enclosed with "E"'s letter was a letter from the claimant's GP dated 29 November 2022. The claimant's GP advised that the claimant was having withdrawal thoughts of suicide and needing urgent mental health help. This was due to the stress she was experiencing in "trying to deal with the tribunal and the requests for information". The claimant's GP understood from the claimant that the Tribunal was needing further information to decide regarding striking out of the case whether by the respondent or by herself. The doctor further commented that, "the whole tribunal process for her has caused a flare up of PTSD, anxiety and depression and her physical symptoms of IBS and I

am unable to see a way around this for her in the current situation. At the moment, she is unable to provide the information requested due to her ongoing health condition. I am unsure whether she will be able to provide this in the future, this will depend on whether it is possible to rebuild her confidence in having a fair hearing. Realistically, I think the only way to achieve this is for her to be moved from one tribunal to a different tribunal she can have faith and independence of."

164. Unknown to me due to an administrative error a standard email providing guidance for in person hearings was sent to the claimant and Ms Craik on 5 December 2022 at 14:30. Ms Craik replied at 14:44 wondering if this had been sent in error. Her reply was copied to "E". The Tribunal emailed Ms Craik and "E" apologising and advising that it had been sent in error.

165. "E" wrote to the Tribunal on 8 December 2022 advising that the claimant had suffered another severe breakdown as a direct result of the Tribunal's negligent actions i.e. receiving copies the email exchange between the Tribunal and Ms Craik. "E" said that the claimant was very unwell and should be given and opportunity to recover and respond as the email exchange between the Tribunal and Ms Craik was concerning, and in parts misleading. "E" advised, "I will write to you in due course. Please do not write to Miss D or to me in the meantime as Miss D is too unwell."

The law

166. Rule 2 of schedule 1 of the ET Rules sets out the following:

"(2) Overriding objective

The overriding objective of these rules is to enable employment tribunals to deal with the case as fairly and justly. Dealing with the case fairly and justly includes, so far as practicable –

(a) ensuring 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 unnecessarily formality and seeking flexibility in the proceedings;

(d) avoiding delays 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 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 cooperate generally with each other and with the Tribunal."

167. Rule 37 of schedule 1 of the ET Rules provides:

"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 prospects 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 and 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 the response (or the part to be struck out). "

Deliberations

168. When this case was referred to me for case management it had been identified that there outstanding applications by the parties for strike out of the response and/or the claim.

169. From my preliminary review of the case papers the respondent's application (17 November 2021 email) was in reply to the claimant's 4 November 2021 correspondence which she said in her email of 23 December 2021 had not been addressed.

170. I noted that around March 2020 the claimant asked the Tribunal to strike out the response in whole or in part due to the "unreasonable manner in which the respondent and their representative were engaging with the process" which the claimant said had been vexatious and unreasonable leaving her feeling harassed and intimidated. This related to the respondent contacting the witness and the manner that the claimant had been treated since raising the proceedings. This application was discussed at the 22 June 2020 CMPH. Employment Judge Eccles did not consider it appropriate to list a preliminary hearing on strike out of the response at that stage.

171. The claimant made a further application for strike out of the response around May 2021. This application related to Mr James' inappropriate communication with Mr Scott; intimidation of the witness in November 2020; ongoing harassment and victimisation of the claimant; and providing false information to the Tribunal about constructive knowledge of disability (mental and physical which has been long lasting and for which the claimant had been taking medication). The claimant's position was that due the respondent's vexatious and scandalous conduct throughout the proceedings a fair trial could no longer take place. The claimant reiterated this position around 11 August 2021. Employment Judge Eccles decided to discuss arrangements for a final hearing; she was not persuaded that there should be a preliminary hearing to question the witness before a final hearing.

172. These concerns and others were raised by the claimant in the 4 November 2021 correspondence and her email sent on 23 December 2021. My view

was that each of the claimant's applications referred to issues that had been mentioned in previous applications. It was therefore necessary to consider them in the round. The respondent's application for strike out of the claim was also prompted by and in response to the 4 November 2021 correspondence.

173. I appreciated that parties had already set out their respective positions at length. However, given that they wished me to make a decision of the applications based on written submissions without a hearing I considered it fair and reasonable to ask if they wished to make any supplementary submissions before I made a decision. This was not a direction to do so or to resubmit what was already before me. I would have proceeded with the information available if that had been what the parties asked.

174. My understanding from the submissions before me was that the claimant's position was that the response should be stuck out because the manner in which the proceedings have been conducted by or on behalf of the respondent has been scandalous, unreasonable or vexatious (rule 37(1)(b)) and that a fair trial is no longer possible (rule 37(1)(e)).

175. The respondent objected to that application. Its position was that the response and grounds of resistance were sent to the Tribunal in July 2019. They disclose a defence to the claim. The respondent argued that it had conducted itself in a reasonable and professional manner. There were no grounds upon which the claimant's application for strike out could be upheld. Also the Tribunal had previously declined to order that a preliminary hearing on strike out of the response take place. It would not be fair to have such a hearing take place by way of written submissions or declarations. It would not be an appropriate way to determine the issue of alleged vexatious conduct for the respondent and for the witnesses simply to answer a series of questions posed by the claimant.

176. The respondent did however seek strike out of the claim because the contents of the 4 November 2021 correspondence and the medical evidence. The respondent said that indicated that the claimant will not attend a final hearing

in person, either now, or at any point in the future. If the claimant was unable to take part in a final hearing, it therefore appeared that a fair hearing in this case will not be possible under rule 37(1)(e), and the Tribunal should consider strike out of the claim. I did not understand the respondent to argue that the claimant has acted in a manner that was scandalous, unreasonable or vexatious. The respondent in my view accepted the claimant's GP's medical advice. The respondent acknowledged the challenges that the claimant faces in dealing with the conduct of these proceedings but that the adjustments proposed by her would not allow a fair hearing to take place.

177. The claimant's position was that the respondent's application amounted to intimidation and threats to her disability status. The respondent was asking for her claim to be stuck out because she needed reasonable adjustments.

178. I referred to the ET Rules. Tribunals must deal with cases fairly and justly. This applies to all cases not just the claimant's case. The impact on other cases must be considered when exercising any power given under the ET Rules

179. Dealing first with rule 37(1)(b) I noted that in this context scandalous means misuse of legal process to vilifying others or giving gratuitous insult to the tribunal during the course of that process. A "vexatious" claim is one that is not pursued with the expectation of success but to harass the other side or some improper motive. To strike out a defence on the ground of unreasonable conduct, that conduct must be deliberate and persistent disregard of require procedural steps or has made a fair trial impossible.

180. The claimant believes that Mr James had inappropriate communication with Mr Scott; there was intimidation of the witness in November 2020; there is ongoing harassment and victimisation of the claimant; and the respondent provided false information to the Tribunal about constructive knowledge of disability.

181. As has been previously discussed during the management of this case while there is no doubt about the claimant's genuine belief about the alleged conduct of the respondent and Mr James, the assertions are disputed. In

such circumstances I would have expected to hear witness evidence so that I could make findings as to what had happened.

182. I do not consider that an assertion from the claimant (no matter how genuine) is sufficient for me to make any findings about the conduct of the respondent and Mr James. For the reasons that Mr James articulated in his email of 28 May 2021 it is challenging to deal with the claimant's application for strike out on the basis of written submissions alone. However, I endeavoured to do so.

183. My observation from the correspondence with or copied to the Tribunal was that Mr James and Mr Scott were courteous and professional in their dealing with each other and the Tribunal. They were cooperating about progressing the case as required by rule 2 of the ET Rules. There was no reference to telephone discussions between them. That is not unusual as increasingly the communication between representatives is by email.

184. In relation to the contact with the witness, it is undisputed that the respondent made telephone contact. What was disputed is the purpose and what was discussed. Again, my observation is that parties would normally discuss proposed witnesses at the case management preliminary hearing as this would inform the length and timing of any hearing being fixed. At the 8 November 2019 CMPH it was noted that the claimant would be giving evidence on her own behalf. There is no reference to her calling other witnesses. Mr James had not determined who would be called for the respondent. It was agreed that date listing stencils would be sent to the parties for completion. There is no reference in the preliminary hearing note that the date listing stencils should not be copied to the other party.

185. Date listing stencils are primarily used in cases where no case management preliminary hearing takes place. The parties are encouraged to agree hearing dates but that does not always happen. The standard cover letter explains that the information is to assess the length of the hearing to be fixed and the provision of the names of witnesses allows the Employment Judge to assess the degree of overlap there may be in the witnesses being called to give evidence. The letter also states that the other party in the case will not be

sent a copy of your competed form. While the Tribunal does not send copies to the other parties that does not in my view mean that the parties are precluded from do so particularly having regard to the overriding objective and the requirement for parties to cooperate.

186. Turning to the claimant's allegation about providing false information to the Tribunal about the respondent's constructive knowledge of her disabilities.

187. I noted that in the grounds of resistance attached to the response form, the respondent reserved the question of whether or not the claimant suffered from a disability within the meaning of the Equality Act 2010. It is not unusual for respondents to adopt this position especially when there is uncertainty about which impairments a claimant may be relying on as disabilities and from what date. This issue can often be clarified as the case progresses and medical information is released. From the case papers the respondent provided evidence that it held relating to the claimant's heath with the exception of notes held by occupational health (as the claimant's consent was required for their release). The claimant complied with the order to produce for medical information on 30 October 2020. Mr James confirmed on 16 November 2020 that the respondent conceded that the claimant was a disabled person by reason of depression, anxiety and PTSD (mental impairments) from 17 February 2017 and that the respondent knew or ought to have known that the claimant was a disabled person due to these conditions from that date. Some of the allegations predate 17 February 2017 and the claimant also relied on a physical impairment (IBS) as a disability.

188. Without hearing evidence, I found it difficult to find that the respondent lied. The onus is on the claimant to establish that she was a disabled person at the relevant time. The respondent was initially in possession of some but not all medical evidence. When this was made available a partial concession was made.

189. I then turned to the allegations about how the proceedings were conducted. The claimant has explained throughout the proceedings how the conduct of the solicitors from the CLO has impact her health causing PTSD flares and

requiring increased medication. This first occurred when the response form was sent to her in July 2019.

190. The claimant was also distressed when Mr James emailed on 5 February 2020 providing (as he had undertaken to do at the 29 January 2020 CMPH) an update about the telephone contact with the witness and the requests for medical information. I have made observations on these issues above.

191. The claimant's health has deteriorated throughout the proceedings. The claimant's GP's reports explain how the frequent correspondence from the respondent's representatives impacted the claimant. While I do not doubt this be so, the correspondence was often in response to matters raised by Employment Judges on which the parties' comments were being sought. If a party writes to the Tribunal, rule 92 of the ET Rules requires that it be copied to the other party.

192. Mr James' email of 23 June 2021 regarding the procedure, in particular the proposed adjustments for the claimant at the final hearing, caused a relapse in the claimant's PTSD and IBS. The email was in response to a request for comments by Employment Judge Eccles.

193. The claimant was shocked when she and the Tribunal were advised in August 2021 that Mr James was leaving the CLO and Ms Craik was taking over responsibility of the case. I did not doubt that the claimant was shocked. However, parties require to inform the Tribunal and the other party when there is a change of representation so that records can be updated. There was no evidence that Mr James' departure was related to the case. The CLO continued to represent the respondent and there was no delay cause by Ms Craik assuming responsibility for the conduct of the case. Ms Craik was the representative except when she was on annual leave when her colleague, Ms Henderson provided comments on the claimant's concerns around the respondent's evidence and reasonable adjustments for the final hearing as requested by Employment Judge Eccles.

194. From the case papers there was significant written communication about how to progress the case to a final hearing and to deal with what adjustments could

reasonably be put in place. Understandably the communication was in writing because the claimant was unable to participate at a case management preliminary hearing in person or remotely by telephone/cloud video platform. The claimant set out what adjustments she needed. Her position was supported by the claimant's GP.

195. It was in my view reasonable and appropriate for the respondent to have an opportunity to comment on the adjustments that were proposed by the claimant and for these comments to be considered by the Employment Judge. While the claimant disagreed with comments and found them distressing the comments were not in my view made gratuitously nor were they a misuse of process. Any decisions on adjustments to the procedure at the final hearing had to be fair to both sides and adhere to the principles of natural justice.

196. The following reasonable adjustments had been implemented up to November 2022.

(a) Case management preliminary hearings were conducted by telephone. This was not standard practice for unrepresented parties before COVID-19.

(b) At hearings there were frequent breaks.

(c) The claimant has been given significant extra time to comply with orders and multiple extensions of times.

(d) The claimant's therapist could be present and attend hearings. "E" was present at private hearings as a support. He was not representing the claimant but the Tribunal and the respondent wrote to him rather than the claimant when so authorised by the claimant to do.

(e) The judicial mediation and preparation for the final hearing did not run in parallel.

(f) Witness statements for evidence on chief were to be utilised at the final hearing.

197. On the basis of the papers before me I considered that the respondent and its representatives had acted appropriately. I was not satisfied that the response should be stuck out in terms of rule 37(b).

198. I then turned to consider the respondent's application for strike of the claim which was in response to the 4 November 2021 correspondence in which the claimant set out the matters that had to be addressed failing which she was unable to proceed to a final hearing. The claimant's GP's letter dated 2 November 2021, made clear that unless all the questions that the claimant had raised as appendices to her submission were answered, she will be unable to take part in the final hearing.

199. The respondent's position in the 17 November application was that, supported by medical evidence, the claimant was unable to take part in any proceedings conducted other than by way of written submissions. For the reasons that the respondent had previously set out this was not fair. This was not a case where the conduct is admitted. There is significant factual dispute and the final hearing should be in public.

200. As claimant also sought the Tribunal to put in place a vetting system to review the respondent's emails before sending them to her the respondent stopped copying correspondence with the Tribunal to the claimant. However, Employment Judge Eccles' view that Ms Craik's email of 17 November 2021 was not offensive, discriminatory, vexatious or scandalous did not prevent the claimant being severely aggrieved shocked and distressed on receiving it from the Tribunal. The claimant's GP also advised that it would have made no difference to the effect on the claimant had the correspondence been sent to her first.

201. The claimant's position was that the respondent was seeking to strike out her claim because she needed reasonable adjustments. That was not my reading of the 17 November application. As mentioned above the respondent had not opposed many of the adjustments proposed by the claimant. However, the proposed adjustments in the 4 November 2021 correspondence were in the respondent's view not reasonable as a fair hearing would not be possible.

The Tribunal must remain impartial and adhere to the principles of natural justice.

202. I turned to consider whether a fair trial was possible and if not whether strike out of the claim was proportionate.

203. I have already mentioned the adjustments that have been put in place. I turned to consider the steps that had been taken to consider further adjustments so that for a final hearing could take place.

204. The use of witness statements for evidence in chief had been agreed. There were disputed facts extending back to 2015. The indication was that potentially 26 witnesses will give evidence. The medical advice was that the claimant can only complete one task at a time. Even if we dispense with the list of issues, there remains preparation of the productions and witness statements.

205. Consideration had already been given to how the claimant could be cross-examined and how she could cross-examine the respondent's witnesses and re-examine her own witnesses. It would be necessary to explore this further given the number of witnesses involved; the timescale given that the claimant can only complete one task at a time; and is unable to interact with Ms Craik.

206. Even if it was possible to conduct the final hearing on the basis of written statements/answers, about which I had considerable doubt the medical evidence leads me to conclude that there is no realistic prospect of the claimant being in a position to be ready for a final hearing at any point in the foreseeable future. There is no evidence that the prognosis of the claimant's mental health is going to improve in the foreseeable future. The medical evidence shows that since raising the proceedings the claimant's health has deteriorated. The most recent letter from the claimant's GP advises that "the whole tribunal process for her has caused a flare up of PTSD, anxiety and depression and her physical symptoms of IBS. The claimant is not in a position to provide the information requested due to her ongoing health condition and the claimant's GP is unsure whether she will be able to provide

this in the future. The claimant's GP proposes that she be moved to a different tribunal that claimant can have faith and independence of."

207. My understanding is that the claimant not only has a lack of trust in the respondent and its representatives but also a lack of trust in the tribunal system, which she considers institutionally racist, and the judges who have considered aspects of her case so far.

208. I have taken into account the impact on the respondent, who has no doubt incurred expense from ongoing delays. I have also had regard to the impact of the delay on witnesses who have been alleged to have discriminated against the claimant. The allegations have never been heard and determined and for the reasons I have set out, there is no prospect of this happening in the foreseeable future. If the claim ever got to a final hearing, the witnesses would have to give evidence about the events that happened since 2015. I doubt that the witnesses have provided witness statements yet. There may be contemporaneous documents that witnesses may use to recall. In my view the Tribunal would have to make allowances for the lapse of time when assessing the evidence.

209. All of the above factors lead me to conclude that it is no longer possible to achieve a fair hearing.

210. I have given this matter very careful consideration and the decision to strike out the claimant's claim on this basis has weighed heavily upon me. I acknowledge the importance to the claimant of seeing this claim through. However, I must also consider the impact of the delay on the respondent, the witnesses and weigh that balance of prejudice.

211. If I thought there was any prospect of a hearing reaching the final stage in the foreseeable future, I would not be striking out this claim but I do not see such prospects. Throughout the claim, the Tribunal has sought to make reasonable adjustments and implement the overriding objective, bringing the claimant's claims to a final hearing but to no avail. This is not the fault of the claimant and no blame is attributed to her for the delays and failures. The process

continues to take its toll on her health. This claim has now reached the point where no lesser sanction is open for the Tribunal.

212. For these reasons, I reluctantly conclude that it is proportionate to strike out the claim.

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Employment Judge: **S MacLean**
Date of Judgment: **17 February 2023**
Entered in register: **5 April 2023**
10 **and copied to parties**