EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Radhika Kumbharati	**v**	**Network Rail Infrastructure Limited**

Heard at: London Central
On: 24 and 15 April 2023

Before: Employment Judge G Hodgson

Representation

For the Claimant: in person
For the Respondent: Mr J Braier, counsel

JUDGMENT

Claim 2 - 2203669/2019

1. All claims of detriment for whistleblowing are struck out and dismissed.

Claim 3 - 2205768/2020

2. The claim of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 is struck out and dismissed.

ORDERS

Claim 1 - 2206741/2018

3. The issue of like work will be decided as a preliminary issue at a public preliminary hearing. The hearing will be listed when the parties have provided further representations in accordance with the directions below.

4. On or before **16:00, 8 June 2023** the parties shall each write to the tribunal marked for the attention of the EJ Hodgson and provide proposed directions in claim 1 on the following:

    a. Proposed directions for hearing the preliminary issues of like work.
    b. Proposed directions for considering the respondent application to amend. The parties should give directions for determination with and without a hearing should give a time estimate for the preliminary hearing, with reasons.

Claim two -2203669/2019

2. **Unless on or before 16:00, 8 June 2023** the claimant makes an application to amend claim two (2203669/2019) that proposes clarification of those alleged protected acts set out as paragraphs 4.1.1, 4.1.2, 4.1.3, 4.1.6 of the respondents draft list of issues prepared to comply with the order of 8 December 2022 t**hose alleged protected acts will be struck out without further order or warning** and the claimant will be permitted to advance as protected acts only those matters identified in the issues in appendix 1 below.

Claim 3 - 2205768/2020

3. No directions are given in relation to claim 3 at present.

REASONS

Introduction

1. On 8 December 2022, in a case management hearing, I listed a public preliminary hearing to consider the following:
    a. Case management directions, including any directions for trial
    b. At the tribunal's discretion, consideration of any applications made by the parties.

2. There are three claims, which are currently listed to be heard together. These claims have a long and difficult history. Parts of the claims have been dismissed – some have been struck out directly, and some have been struck out because of failure to pay deposit.

3. At the last hearing, there remained fundamental difficulties. The allegations remained unclear and they were not in a fit state for trial. The difficulties were set out in my case management order of 8 December 2022.

4. For the reasons given at that case management hearing, it was evident that further clarification of the claims was needed, and I gave the following orders.

3.3 On or before 16:00, 2 February 2023, the respondent should file and serve a draft list of issues covering all three claims following the guidance set out above.

3.4 On or before 16:00, 16 February 2023, the claimant should file her response to the draft list of issues, confirming whether it is agreed, if it is not agreed, she should file her [own] list of issues. The claimant should follow the guidance set out above.

3.5 On or before 16:00, 23 February 2023, both sides should confirm whether, having regard to the positions on the issues, the time estimate for the hearing [is] appropriate.

3.6 On or before 16:00, 23 February 23, both sides must file any applications. Each application should state the exact order required and should set out the relevant circumstances in support of the application.

3.7 The respondent shall produce a PDF bundle of documents for the next hearing. It must be supplied to the claimant and the tribunal at least seven days before the next hearing.

5. I noted that there had been previous substantial attempts to particularise the claim and the claimant had been required to serve further and better particulars and to apply to amend. It was clear that all attempts at clarification had been largely ineffective. I noted the following:

2.8 It is apparent the parties have made attempts to clarify matters. The tribunal has sought to assist. I understand there have been approximately ten hearings. Unfortunately, there remains considerable dispute and no definitive list of issues has been supplied by either party or agreed by the tribunal.

2.9 I noted that it is common for a tribunal to request some form of Scott Schedule, or to allow the filing of further particulars. Sometimes, that can lead to a claim being clarified, frequently by the addition of facts which, may technically require amendment, but which are accepted by respondent without formal amendment.

2.10 However, the provision of further particulars can sometimes be counter-productive, particularly when there is a failure to clarify existing claims or if new claims are introduced, whether intentionally or inadvertently. If a claim is to be clarified by the addition of facts, or existing claims are to be put in a new basis, or there is to be a new claim on new facts sought, formal amendment is needed. In this case, no amendments have been allowed. It is unfortunate that in this case the provision of further and better particulars has caused confusion and [has] not led to the clarification of existing claims.

2.11 I have confirmed that the further and better particulars will not be considered as part of the claim. It will be necessary to identify those claims which have been pleaded. In doing so the parties must only consider the original claims as filed. The parties must take into account only the claim forms as originally submitted.

2.12 It has been agreed that the respondent will file its list of issues identifying the heads of claim, the specific allegations, and the factual basis for each allegation. Only those claims and allegations which are contained in the original claim forms may be included. There is no need to set out at length the legal questions which the tribunal may wish to answer.

> **The issues should focus on the factual matters relied on by the claimant in support of her claim. For example, for [the] direct discrimination claim, it will be necessary to identify the specific factual circumstances and allegations said to amount to detriments. For the victimisation claim, as well as identifying the detrimental treatment, the protected acts must be identified, including the specific action taken in relation to the Equality Act 2010. If the claimant has not pleaded any protected acts, the respondent should say so.**
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> **2.13 For the whistleblowing claims, each protected disclosure must be identified. The specific information, if it is set out at all in the claim forms, must be identified. If no information is identified, the respondent should say so. Similarly, for each protected disclosure, having regard to the claim forms, the respondent should identify what is said to be the relevant failure, and why it is alleged the disclosure was made in the public interest. If those matters are not dealt with by the claimant, the respondent should say so. The detrimental treatment should be identified.**
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> **2.14 A similar approach should be taken to the harassment claim.**
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> **2.15 In identifying the detriments, it will be necessary to identify the circumstances, to include a description of the action alleged or the words used. If the act complained of is in a document, it will be necessary to identify the document and the specific part of it said to be detrimental. It should also identify who is responsible and when the detrimental treatment took place.**
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> **2.16 The claimant should have an opportunity to respond to the respondent's list of issues. If the respondent has identified any areas which have not been dealt with by the claimant, the claimant should either identify where the matter is dealt with in the claim form and provide the relevant information, or she should consider applying to amend. I have noted that if a case is not pleaded adequately or at all, it may not be appropriate to allow that claim to continue either because it cannot be answered or because it has no prospects of success. I have noted the claimant has already had a number of opportunities to clarify her claims.**
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> **2.17 I have directed that the respondent should file any response and [that] both parties must file any applications. Thereafter the matter will be set down for a two-day public preliminary hearing. The primary purpose will be to identify the issues and to give case management directions, including directions for trial. However, if there are any applications, whether for strike out or amendment or otherwise, the tribunal may consider those applications at its discretion.**

6. At the hearing on 24 April 2023, I considered whether, my directions had been complied with. I identified the applications and determined which applications I would deal with.

The parties' compliance with directions

7. The respondent served a list of issues. The claimant responded with extensive comments annotated to the list. Thereafter, on 23 February 2023, the respondent sought to incorporate some of the observations of the claimant in a final list. I considered those documents at the hearing. The parties were directed to identify the information and allegations contained in the claim forms, as all attempts at further particularisation had

been unhelpful. The respondent has sought to comply with my order. The claimant has failed to comply. For example, in her response to the draft list of issues para. 6.2, she refers to "Further details provided in the PID's schedule, claimant's witness statement and claimant bundle provided for preliminary hearing 12 March 2021."

The applications

8. Identifying the applications made by the parties was not straightforward.

9. The claimant identified applications made on 23 February 2023 and 29 March 2023. She also referred to various observations and subsequent emails. She stated the application of 23 February 2023 superseded that of 14 February 2023.

10. The claimant's applications were unclear, and I took a purposive approach allowing her to clarify her intention at the hearing. I set out my understanding of the applications below.

11. The claimant's application of 14 February 2023: this application was "to take action against the respondent for… non-compliances and irregularities under Rule six." Amongst other matters, she alleged that the "respondent has also tried to remove my harassment claim."

12. The claimant's application of 23 February 2023: this application was for the tribunal "to take action against the respondent… for non-compliances and irregularities under Rule six." This included an allegation that the "respondent has been given several opportunities to provide the final list of issues." It alleged that the respondent had inappropriately sought to remove claims on relevant issues. It referred to the respondent's response to the list of issues, sent on 14 February 2023.

13. The claimant's application of 29 March 2023: this is a lengthy application. The claimant stated, the "[c]laimant respectfully requests to take action against the respondent for their actions and set out a full hearing instead of wasting their time again with another preliminary hearing." The remainder of the application is a lengthy narrative from the perspective of the claimant. It asserts that the respondent's actions have been blameworthy and have caused confusion. It states that the respondent's approach to the issues has been inappropriate and has wasted time. It sets out a long list of alleged non-compliance and irregularities. It specifically alleges the respondent has misled the tribunal by the way it is conducted the case.

14. At the hearing, I sought to clarify what action the claimant envisaged should be taken by the tribunal. She clarified that her application was to strike out all three responses on the grounds that the respondent's behaviour and its failure to identify the issues or deal with them appropriately, has made a fair trial impossible. It was her position that the matter should then be listed for a remedy hearing.

15. The respondent identified applications on 23 February 2023, 10 March 2023, and 21 April 2023.

16. The respondent's application 23 February 2023: the respondent sought to strike out, in claim two, the claim for whistleblowing detriment on the grounds that the claimant's conduct had been scandalous, unreasonable, and vexatious, and in any event, it was no longer possible to have a fair hearing of those claims.

17. The respondent's application of 10 March 2023: this is an application for costs. It addresses the points raised by the claimant, to the extent they are understood by the respondent. Costs are sought on the ground that the claimant's conduct of the proceedings is unreasonable, including her responses of 14 February 2023 and 23 February 2023. In summary, it asserts the alleged irregularities raised by the claimant are misconceived, inappropriate, and reveal no prejudice to the claimant; they are, essentially, disruptive, and oppressive and, lead to excessive costs being incurred.

18. The respondent's application of 21 April: this is an application to amend the first claim to plead the defence to the claim for like work. I was not able to consider this application at the hearing, as there was insufficient time. It will need to be resolved. The respondent should renew it, and should ask the claimant to confirm whether she consents. Thereafter I will consider the application to amend; if necessary, I will list it for a further hearing.

Consideration of the applications

19. As noted, multiple applications have been made by the parties. As directed at the hearing on 8 December 2022, which applications will be considered was a matter for my discretion.

20. Whilst there is a lengthy and difficult history, it is not necessary to set out the full history, but I have had regard to the entirety of the history and the correspondence.

21. Claim one was issued on 21 November 2018, claim two was issued on 24 September 2019, claim three was issued on 28 August 2020.

22. There have been numerous case management hearings. I do not need to record the full history. This has led to several claims being struck out. No single claim has been adjudicated, despite the first claim being filed nearly 4 and a half years ago. The fundamental difficulties revolves around the nature of the claims and the lack of clarity. There have been numerous attempts to identify the claims. It is apparent that during those hearings, the claimant has been given extensive guidance on what is necessary and how she should approach the matters. There remain significant difficulties, and it is those difficulties which have, essentially, prevented the

matter from proceeding. This has been compounded by the fact that there are three claims, which are different. I note that they were combined, presumably on the presumption that there was a substantial overlap in facts and issues which justified them being heard together. This occurred before the issues were adequately identified, and before numerous claims were struck out. It follows there has been a significant change in circumstances it may not be appropriate for the claims to be heard together anymore. However, I do not need come to a final conclusion as to whether the claim should now be separated, albeit for the reasons I will come to, I have decided that part of claim one should be decided by way of a preliminary issue.

23. Following the last case management hearing, directions were given to the parties in a further attempt to clarify the issues, as it was clear no progress could be made until this was achieved; the ongoing failure to define the claims adequately was preventing a fair hearing. At the hearing, I determined it was necessary to see if it were possible, finally, to set out, for each claim, the issues. Thereafter, I could consider which applications could, and should, be determined.

24. As for the status of the issues at present, there is core agreement.

25. It is the respondent's position that the list of issues cannot be finalised because there is a serious failure to set out the claims adequately or at all and this prevents the respondent from knowing the case it is to answer and therefore being able to prepare appropriately for a hearing. In effect, there cannot be a fair hearing.

26. It is the claimant's position that there remains difficulty with the issues. She accepts that there can be no fair hearing as the issues stand currently and she seeks to strike out the responses to all claims. It is the claimant's position that the failure to make progress, and the difficulties which exist in identifying the claims, rests entirely at the respondent's door and all difficulties are caused by the respondent's inappropriate conduct and unreasonable approach.

The Law

27. A tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response. The power to strike out a claim is set out in rule 37 Employment Tribunal Rules of Procedure 2013.

> **(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-**
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> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success;**
> > **(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;**

> **(c) for non-compliance with any of these Rules or with an order of the Tribunal;**
> **(d) that it has not been actively pursued;**
> **(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).**
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> **(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing…**

28. Before striking out in any of these situations, the tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

29. In general, the grounds for striking out a pleading under r 37(1)(a) include an abuse of the process of the tribunal. The term "abuse of process" is not narrowly construed, and the circumstances constituting such an abuse are not limited to claims (or defences) that are "sham and not honest and not bona fide." Stuart-Smith LJ observed in **Ashmore v British Coal Corporation** [1990] IRLR 283:

> **A litigant has a right to have his claim litigated, provided it is not frivolous, vexatious or an abuse of the process. What may constitute such conduct must depend on all the circumstances of the case; the categories are not closed and considerations of public policy and the interests of justice may be very material.**

30. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute (see, e.g., **North Glamorgan NHS Trust v Ezsias** [2007] EWCA Civ 330). Only in an exceptional case will it be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence.

31. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In **Anyanwu v South Bank Students' Union** [2001] IRLR 305, HL, a race discrimination case, Lord Steyn stated (at para 24):

> **For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.**

32. This is not a fetter on the tribunal's discretion, but the power to strike out in discrimination cases should be exercised with great caution.

33. A tribunal should not take the view that **Anyanwu** creates some form of public policy that prevents claims being struck out, as is made clear by Lord Hope at paragraph 39 of Anyanwu itself.

> **Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to [sic] taken up by having to hear evidence in cases that are bound to fail.**

34. The Court of Appeal in **Ahir v British Airways Ltd** [2017] EWCA Civ 1392 made it clear there is no general proposition that where there is a potential disputed on facts a claim must proceed. It is necessary to look carefully at the facts and to consider the nature of the dispute.

35. Underhill LJ put it as follows:

> **16 … Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success.'**

36. It can be seen from **Ahir** that it is not enough for a claimant to assert there is a dispute of facts, and that, therefore, the tribunal is compelled to find there is a prospect of success. First, the claim must be clear. Second, the facts alleged and relied on should be clear. Third, resolution of those facts should be capable of demonstrating discrimination whether directly or by way of inference. Fourth, the respondent's explanation should be considered. Fifth, if the explanation is disputed, there should be some plausible explanation for this from the claimant.

37. There is nothing Ahir which conflicts with the general proposition that the claimant's case should be taken at its highest on the pleadings see e.g. **Ukegheson v London Borough of Haringey** 2015 ICR 1285.

38. **Ahir** is particularly important in the context of claims that have been made clear and are properly pleaded. In those case it may be possible to analyse if the claim had no reasonable prospect of success, for example it may be fanciful. The positions may be complicated in claims which are fundamentally unclear. The pleaded case may reveal no basis for bringing a claim. However, there may be an underlying, insufficiently pleaded case that may have a prosect of success. It may be impossible to ascertain the likely prospect of success of the underlying claim. In those

circumstances, it may be inappropriate to strike out before the claimant is given an opportunity to clarify the claim, such that the prospects can be properly considered. Further difficulty arises when the claimant has been given an opportunity to clarify a claim, but fails to do so. It may then be necessary to consider if the claimant's counduct is such that the claim should be struck out.

39. Cases that have been conducted by or on behalf of the claimant or respondent in a way that is scandalous, unreasonable or vexatious may be struck out. Strike out provides a means for dealing with litigants (or their advisers) who conduct their cases in a disruptive and unruly manner or refuse to obey the directions of the employment judge. If the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible, strike out may be appropriate (see **Blockbuster Entertainment Ltd v James** [2006] EWCA Civ 684). Where these conditions are fulfilled, it is necessary for a tribunal to consider whether striking out is a proportionate response to the misconduct. Sedley LJ put is as follows:

> **5. This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response...**

40. Burton J, giving judgment in **Bolch v Chipman** [2004] IRLR 140, EAT, a case concerning allegations of behaviour that was scandalous, unreasonably, or vexatious stated that there are four matters to be addressed (see para 55). First, there must be a conclusion by the tribunal not simply that a party has behaved scandalously, unreasonably, or vexatiously, but that the proceedings have been conducted by or on his behalf in such a manner. Second, even if such conduct is found to exist, the tribunal should normally decide whether a fair trial is still possible. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a strike out order, it must consider the consequences of the debarring order. If the order is to strike out a response, it is open to the tribunal to allow a respondent to be heard on remedy.

41. Claims may also be struck out when not actively pursued. It may be appropriate to have regard to the decision of **Birkett v James** 1978 AC 297. There are two distinct situations. The first is where there has been intentional and contumelious default by the claimant. This may include a serious or repeated failure to comply with an order of the tribunal, or

conduct amounting to an abuse of the process of the tribunal. Although, it would still be necessary to consider discretion. As to the second situation, it must be shown, first, that there has been inordinate and inexcusable delay on the part of the claimant, and, second, that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the respondent. Strike still requires the exercise of discretion: is a fair hearing possible; is strike out proportionate.

42. In **Rolls Royce plc v Riddle** [2008] IRLR 873, EAT, Lady Smith pointed out that it is quite wrong for a claimant "to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and/or its procedures" (para 20).

43. It is important to bear in mind there are two stages. The first stage, may be seen as the threshold stage, and that involves asking whether any of the grounds for striking out are met. The second stage is the exercise of discretion. There must, at least, be consideration of whether there can still be a fair trial, and second, a consideration of whether strike out is proportionate.

44. I should note the importance of a claimant setting out the claim clearly in order to facilitate a fair hearing. It is for the claimant to set out the case in a relevant statement of case. (I have referred to the claim form and any statements of case generally as the pleadings.) It is common, particularly when individuals are not represented, for there to be deficiencies in the initial documentation. Those deficiencies are sometimes addressed by what are generally referred to as further and better particulars. It is important to recognise that, rather than being a necessary part of the pleadings, the use of further and better particulars is a remedial response to a failure of process.

45. It is frequently the case that further and better particulars, when provided, identify new facts. The addition of facts will normally require an amendment, see **Selkent Bus Company Limited v Moore** 1996 ICR 836. However, a tribunal should avoid excessive formality. Where neither party makes specific objection to a new fact, it is included as part of the claim without the need for a formal amendment. However, this reflects a pragmatic approach; it is not a right. Care should be taken to prevent the remedial process of further and better particulars from circumventing the exercise of a tribunal’s discretion to grant amendments.

46. In short, the process of providing further and better particulars may be a pragmatic way of rectifying a deficiency in a pleading.

47. The issues are a distillation of the pleaded case. It is a way of identifying what are the causes of action and what are the specific factual allegations, said to be some form of detrimental treatment, that are to be determined in the action. Care should be taken to ensure the identification of issues

does not circumvent the exercise of a tribunal's discretion to grant amendments.

48. In **Land Rover v Short** UK EAT 496/2010, Langstaff J confirmed that where a dispute arises about the issues, it is for the tribunal to make a ruling. In **Price v Surrey County Council and another**, UK EAT 450/2010, Lord Justice Carnworth confirmed that the tribunal must exercise control over the form of the issues, even if agreed by the parties. In that case, the issues were described as a confused amalgam of factual allegation and major issues. The tribunal should not simply accept the issues provided by the parties, even if the parties agree them between themselves. It is part of the tribunal's role to exercise control over the way in which the issues are presented.

49. The point was re-emphasised by Langstaff P in the case of **Chandhok v Tirkey** EAT 190/14.

> **17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.**
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> **18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an**

> **Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.**

50. In **Smith v Tesco Stores Ltd** [2023] EAT 11, the EAT has recently confirmed the need for a claimant to engage with the process constructively. Strike out was justified in all the circumstances when Mr Smith's repeatedly failed to respond meaningfully to a draft lists of issues and thus disregarded the duty of cooperation.

Claim one

51. It is common ground there is only one claim remaining in claim one, and that is breach of the equality clause under section 66 Equality Act 2010. It is the claimant's case that whilst working on the second phase of the ground investigation project with HS2 as a client, from 17 March 2017, she undertook like work with her comparator Mr Paul Munday, but did not receive the same benefits.

52. The claimant failed to set out in her claim form what matters she relies on when asserting that her work was like work with Mr Munday. The respondent has not sought to strike out this claim.

53. I have noted that the respondent has applied to amend. That application will need to be determined.

54. It appears the respondent's basic position, as agreed by the claimant, is that her pay was a band three level salary and Mr Munday's was a band four level salary. It is the respondent's position that there were material differences in their work and their responsibility. The claimant's pleading does not address any similarities or differences in work. If the respondent is right, and the work was not like work, that will determine the equal pay claim. I consider it appropriate for the issue of like work to be decided as preliminary issue, and I will give instructions in relation to this separately.

55. In due course, if the claimant is successful in establishing like work, it will be necessary to consider the remainder of the claim, and in particular whether there is a material factor defence. Whether that matter should be considered with claims two and three will be for the judge who hears the like work preliminary issue.

Claim two

56. It was agreed that there were claims of direct race discrimination, victimisation, and harassment. In addition, there are allegations of whistleblowing detriment.

57. As for the claims of direct race discrimination, victimisation, and harassment, there was substantial agreement in principle, albeit the claimant disputed the exact wording identifying the detriments. I am

satisfied that the respondent has identified the detriments correctly, and I have recorded them in appendix 1, which sets out the issues in the claims.

58. I have set out in the issues below the claims of direct discrimination, harassment, and victimisation as they appear in the claim form. If the claimant wishes to include any further allegations of detriment she may not do so without amendment. The claimant specifically confirmed that for direct race discrimination, she relies on only detriment one. The claimant specifically confirmed that for victimisation and harassment she relies on both detriment one and detriment two. At various times, the claimant has sought to dispute the exact wording, I am satisfied that the detriments as now drafted reflect the claims as pleaded. It is for the tribunal to exercise control over the form nature of the issues. I note that the issues are simply a summary of the claims are not a replacement for the claim form itself. Ultimately, if a tribunal, at the final hearing, takes the view that the detriments have not been identified adequately, it is open to that tribunal to clarify.

59. For the purpose of victimisation, the claimant alleges that she undertook six protected acts. The protected acts relied on, to the extent the respondent has been able to identify them, are as follows:

> **a. raised concerns about unfair treatment in March and April 2017 to;**
> **b. raised concerns about unfair treatment and harassment in the Grievance hearing in August 2018 and November 2018 and appeal hearing in March and April 2019;**
> **c. raised concerns about unfair treatment with Human Resources on September 2018 by;**
> **d. informed Human Resources about ACAS and Employment Tribunal claim in October 2018;**
> **e. submitted a claim to the Employment Tribunal in November 2018 in which allegations of discrimination were made; and**
> **f. raised concerns about bullying, harassment and ongoing discrimination to Human Resources in December 2018.**

60. It is accepted that raising issues concerning ACAS and submitting a claim in November 2018 are potentially capable of being protected acts. What information was given to human resources, and how, in October 2018 is unclear, but the respondent has not taken issue with this.

61. As for the remainder of the allegations, they all simply refer to raising concerns about treatment. There is a complete failure to set out what those concerns were, how they were raised, with whom, and what information was given.

62. Pleading the nature of the protected act is not complicated or difficult. All that is required is to state what was communicated to whom, how it was communicated, when it was communicated, and what was the specific information. I have regard to section 27 Equality Act 2010. There are broadly four types are protected acts: bringing proceedings; giving evidence or information in connection with proceedings under the act; doing anything for the purpose or in connection with the act; and making

an allegation that another person has contravened the act. In addition, the giving of false evidence or information, or the making a false allegation, is not protected, if the evidence or information is given, or the allegation is made in bad faith.

63. It follows that the respondent, in defending a victimisation claim based on a protected act, has several lines of defence. First, the circumstances said to constitute the act need to be identified, as their circumstances may not fall within one the four categories which could be a protected act. If the protected act is not identified with sufficient accuracy, the respondent is fundamentally denied the opportunity to consider whether the victimisation claimant fails at the first hurdle. In addition, a respondent is entitled to know whether what is relied on is evidence, information, or allegation. It should know with sufficient certainty so that it is able to consider the potential defence, and if necessary, bring evidence on two questions: first, whether the evidence information, or allegation was false, and second, whether the evidence, information, or allegations was made in bad faith.

64. The claimant, in making broad allegations that she raised concerns fails to identify whether what is being referred to is evidence, information, or allegation. There are two consequences. The first is that the pleading itself does not as it stands demonstrate an arguable case that there has been a protected disclosure. This opens the possibility of that allegation been struck out as having no reasonable prospect of success. Of course, it would be inappropriate to do so without giving the claimant an opportunity to make the allegation clear. If the allegation is to be clarified, such clarification may require an amendment.

65. It is clear from the claimant's oral representations that it is not her intention to clarify, but instead she seeks to set out further allegations in her witness statement, or even to approach this in an ad hoc manner at the final hearing. It is clear, therefore, that she is consciously and deliberately, failing to set out the nature of the case.

66. The result is that the respondent does not know, in relation to these four alleged protected acts, which simply refer to raising concerns, what is the case it is to answer. It does not know what is said to be, if anything, the relevant evidence, information, or allegation. This fundamentally denies the respondent an opportunity to respond adequately or at all to the allegations. The respondent has been denied the opportunity to identify whether the alleged events occurred on to bring evidence on that basis. It is denied the opportunity to say whether alleged protected disclosures involved the provision of false evidence, information or allegation whether the allegations were made in bad faith. Without identifying the specifics of the alleged concerns, respondent has been denied the information it need for there to be a fair hearing.

67. I accept that a claimant should be given a reasonable opportunity to clarify her claim. In this case inevitably that would involve the addition of facts, and that must involve amendment. It is inappropriate to allow the claimant further unbridled licence to add to, or supplement, her claim without maintaining the necessary control of amendment.

68. The four protected acts identified which simply refer to raising concerns do not sufficiently identify the allegations. As I have noted, it is arguable that they have no reasonable prospect of success as they stand. The claimant's failure to clarify these protected acts is, in my view unreasonable conduct of these proceedings and the threshold for strike out is met. Further, the lack of clarification, for the reasons given, fundamentally undermines the respondent's right to a fair hearing. I have considered whether they should simply be struck out. In my view the claimant has had more than ample time and ample opportunity to clarify the matters. However, I am prepared to give her one final chance. If she wishes to proceed with those allegations, she must identify the protected acts adequately. As this will involve a addition of facts, she should be obliged to apply to amend. If she does not apply to amend the four allegations to include the relevant detail, they will stand struck out in accordance with the unless order (above). If she does apply, then they should be subject to further scrutiny, and the tribunal should consider them having regard to the normal principles applicable to amendment.

69. The claimant alleges whistleblowing detriment in claim two. She relies on protected disclosures. The respondent has taken these from the relevant schedule to the claim form. The whistleblowing detriment claim has already been subject to a number of strike outs and I will deal with what remains.

70. The second claim is supported by a document set out in a Scott schedule format. That document contains "an Equality Act schedule" and a "public interest disclosure schedule." I am concerned with the second part of the schedule. That is set out in several sections. Some of that schedule has been struck out in previous decisions and I am concerned with the balance.

71. It is the respondent's position that the schedule lacks proper particularisation and in particular there is a failure to particularise the whistleblowing complaints. The respondent's application states:

> **The Claimant's Second Claim was lodged on 24 September 2019. Despite being lodged over three years and four months ago, the Claimant has still not fully particularised her whistleblowing complaints in that she has not:**
>
> - **precisely identified the protected disclosure relied on in each case. The Claimant has not set out the words alleged to have been used;**
> - **in respect of the failure under s43B(1)(a)-(f) the Claimant has not:**
>   - **clearly identified the public interest she relied on in respect of each protected disclosure; and/or**

- **has not adequately set out the basis on which she reasonably believed that the information tended to show a failure; and/or**
- **has not adequately set out whether she relies on a failure that has occurred, is occurring or is likely to occur;**

72. The schedule contains a number of alleged protected disclosures. The protected disclosures relied on for each of the sections is not the same, albeit there is some repetition and overlap. There are numerous alleged detriments identified which attach to various alleged protected disclosures.

73. In its draft list of issues, the respondent sets out those matters said to be protected disclosures as contained within the claimant's schedule. I am satisfied that the respondent has, essentially, used the wording as set out in the claimant's schedule. Although it appeared that the claimant continued to dispute the accuracy of the respondent's issues on this point. It is necessary to set out the various disclosures as they are relevant to each of the sections which remain before the tribunal.

74. Section 1 of the claimant's schedule is dealt with at 6.1.1 – 6.1.7 and the alleged detriments are identified as follows:

> **Case Number: 2206741/2018; 2203669/2019; 2205768/2020**
>
> **6.1.1 raised a Close Call using the contractors system on 30 November 2017 after a site visit regarding the inappropriate personal protection equipment of Bridgeway Contractors while doing GI Works;**
> **6.1.2 challenged the construction manager in a meeting on 12 December 2017 for visibility of close calls raised by all contractors at Euston Site;**
> **6.1.3 raised concerns regarding the safety reporting and close calls for GI works with Anthony Sutton on 10 September 2019;**
> **6.1.4 raised concerns regarding the reporting of close calls for GI works with Neil Soden on 24 September 2018. Neil Soden was the Programme manager and Principal Designer representative for GI works for HS2 project at Euston;**
> **6.1.5 emailed Anthony Blackhall (Construction Manager for Euston works) on 12 December 2017;**
> **6.1.6 emailed Neil Soden (Principal Designer Representative and Programme Manager) on 12 December 2017;**
> **6.1.7 emailed Neil Soden on 24 August 2019 for close calls numbers;**

75. Section 2 of the public interest disclosure schedule has previously been struck out.

76. The relevant protected disclosures from section 3 of the public interest disclosure section are set out at 10.1.1 – 10.1.9 of the draft list of issues as follows:[1]

> **10.1.1 raised concerns about line management, secondment and career progression with Neil O Toole and Neil Soden on 14 March 2017, 29 March 2017 and 20 April 2017;**
> **10.1.2 emailed detailing the issues with line management, missing reporting structure and its effect on health and wellbeing in Appeal letter on 19 November 2018;**

[1] Detriment four of this section was previously struck out

> **10.1.3 raised concerns in the appeal hearing meeting on 14 March 2019;**
> **10.1.4 raised concerns using Network Rail speak out policy on 28 September 2019;**
> **10.1.5 emailed to Neil Soden and Human Resources with concerns regarding fit note acknowledgement on 15 November 2018;**
> **10.1.6 emailed to Stephen Moffat and Human Resources on 19 November 2018 with appeal letter;**
> **10.1.7 raised concerns with Andy Lundberg regarding line management issues on 14 March 2019;**
> **10.1.8 raised concerns using Network Rail's speak out policy on 28 September 2018;**
> **10.1.9 submitted a claim to the Employment Tribunal for Discrimination;**

77. Section 4 of the schedule of public interest disclosures had been struck out previously, as has the first section 5.

78. There was a second section 5 to the schedule of public interest disclosures. Several of the alleged detriments had previously been struck out. The protected disclosures are set out at 14.11 and 14.12 of the draft issues as follows:

> **14.1.1 raised concerns about access to the Claimant's personal information in an appeal letter to Steve Moffat on 19 November 2018; and**
> **14.1.2 raised concerns about access to the Claimant's personal information by unknown managers in an Appeal hearing meeting on 14 March 2019.**

79. The final sections of the schedule of the protected disclosures schedule, sections 6, 7, and 8 have all previously been struck out.

80. It is the respondent's position that the claim for whistleblowing detriment should be struck out. Part of the reason is the failure of the claimant to identify the protected disclosures, and the reason why they are protected, adequately or at all. The respondent's written submissions state the following:

> **10. As will be clear, the R highlighted in its list of issues considerable gaps in C's pleaded claims that rendered the R unable to compile a comprehensive list of issues. Those gaps relating to C's whistleblowing detriment claims under the Second Claim, as identified by the R in the list of issues, are as follows:**
>
> > **10.1. Precise particulars about the protected disclosures relied upon by C, including the words said to have been used by C to make the protected disclosure [paras 6.1, 10.1, 14.1];**
> > **10.2. Identification as to which protected disclosures are relied upon in respect of each specific detriment [paras 6.1, 10.1, 14.1];**
> > **10.3. The basis on which C asserts a belief the information tended to show a failure under s.43B(1)(b) or (d) ERA [paras 7.1, 11.1, 15.1];**
> > **10.4. Whether, in respect of each protected disclosure, C was relying on a failure under s.43B(1)(b) or (d) that had occurred, was occurring or was likely to occur [paras 7.1, 11.1, 15.1];**
> > **10.5. Identification of which asserted public interest C relied upon in respect of each alleged protected disclosure [paras 8.1, 12.1] (the same failure applies to para 16.1 albeit it is not referred to in R's list of issues);**

> **10.6. Sufficiency of identification of detriments [para 13.1]; and**
> **10.7. The date of a works coordination meeting which C says she was not invited to (and relies upon as a detriment) [para 9.1.4].**
>
> **11. The gaps are thus extensive and wide-ranging.**
>
> **12. In C's response to the R's list of issues [R480], the only gaps C sought to fill was to identify in 3 tables which protected disclosures were relied upon in respect of which detriments [see tables at R484, R488, R494]. Even in doing that, there were problems in C's response, namely:**
>
> > **12.1. No protected disclosures were identified in re detriment 4 in the table at [R484-486] nor detriment 12 in the table at [R488-491];**
> > **12.2. She relied on a number of detriments which were already struck out by EJ N Walker, namely detriment 2 in the table at [R484-486], detriment 4 in the table at [R488-491] and detriments 1-2 in the table at [R494-495]; and**
> > **12.3. She relies on some protected disclosures which she does not appear to assert are causative of any detriments, namely disclosures 3 and 7 in the table at [R484-486] and disclosure 4 in the table at [R488-491].**
>
> **13. Apart from the link between detriments and disclosures, C did not seek to cooperate at all with the R in filling the other gaps in the list of issues essential for determining C's Second Claim. On the contrary, her response is monumentally unhelpful, with C repeatedly asserting merely that there were sufficient details provided in the 'PID Part A Schedule' (i.e. the table of particulars by which C presented her claim) and in the bundle and witness statement C produced for the PH on 12.03.21 [see C's responses from R480-496 at paras 6.2, 7.2, 8.2, 9.2, 10.2, 11.2, 12.2, 13.2, 14.2, 15.2, 16.2, 17.2]. C does not make any attempt to elucidate the answers to the gaps or even to identify from where in those extensive documents the answer could be found.**
>
> **14. C has shown a wanton failure to cooperate with the R to ensure that the list of issues was fully set out for this PH. This is the 10th PH in C's claims, and the 9th since C presented the Second Claim. An extraordinary amount of ET resources has been used up on C's claims, such that litigation which commenced 5 years ago still has no listed trial date.**
>
> **15. At every stage, C has obfuscated rather than providing clarity, such that nearly 4 years from presentation of C's Second Claim the R still does not know the case it is required to meet.**
>
> **16. Moreover, C's latest obfuscation and lack of cooperation has occurred in the face of very clear guidance from EJ Hodgson as to what he expected from the list of issues and as to the potential consequences to C if the information was not provided.**
>
> **17. Save to the limited extent set out above, C neither provided the relevant information in responding to the R's list of issues, nor did C apply to amend her claim in order to fill the gaps.**

81. During the hearing, the claimant did not engage with these issues adequately or at all. The claimant failed to acknowledge there were deficiencies in her claim or that further clarification should be given. Instead, the claimant alleged that the respondent's conduct has been inappropriate and the response to each claim to be struck out.

82. In its supplemental submissions, the respondent described the claimant's conduct during the hearing on 24 April 2023 as follows:

> **17. C resisted numerous opportunities to answer questions posed by EJ Hodgson in order to try to identify C's position on the issues in the Second Claim, with C's approach being to repeatedly ignore the EJ's questions and to provide responses wholly unrelated to the question posed.**

83. This to be a fair and reasonable record the claimant's approach.

84. I gave both the parties opportunity to file further submissions following the hearing, which both took advantage of. I considered the claimant's further submissions carefully.

85. At the conclusion of the hearing on 24 April 2023, I reiterated the key matters to be dealt with in each claim, and I confirmed the matters on which it would be helpful to receive submissions.

86. In particular, I highlighted that I would be considering whether the schedule, sufficiently identified the information said to constitute the protected disclosure, and the reason why each was protected. The claimant provided as follows:

> **3. SECOND CLAIM (2203669/2019): As highlighted by the claimant in her submissions on 24 April 2023 and previous submissions on 23 Feb 2023, 29 March 2023 and 1 April 2023, respondent has made third strike out application on 23 Feb 2023. On previous occasions tribunal has converted the March 2020 hearing to strike out on 7 Feb 2020 before the respondent strike out application on 12 Feb 2020. Respondent has now made another strike out application on 23 Feb 2023. On previous occasion, respondent ignored the tribunal orders given in Dec 2020 and submitted the strike out application on 25 January 2021 after 4 pm deadline. To start with respondent have fundamentally not submitted the ET3 response on 24 Dec 2019 which they claim to have submitted. Whether or not tribunal has accepted the response is a different question, but the respondent has provided incorrect information to the tribunal saying that they submitted ET3 response on 24 Dec 2019 in their bundle. Respondent had an opportunity to make a strike out of the allegations at the March 2021 that they seem to request now. Respondent had also an opportunity to appeal the judgements or orders for second claim on previous occasions regarding the strike out, but they did not do so, they have not even made a reconsideration application. Respondent has now wasted tribunals precious time and resources with another hearing and claimant had to sacrifice her personal time during weekends to deal with respondent's vexatious and scandalous conduct. Respondent in their bundle has also misleaded the tribunal to appear that her Equality and PIDA schedule that were part of the claim were not part of the claim but further and better particulars.**
>
> **4. Respondent also tried to remove the claimant harassment claim from second claim. Claimant has detailed her harassment claim in her witness statement for March 2021 hearing and the Judge has identified this claim in her orders. Respondent totally ignored this claim in their submissions in July 2021 and Dec 2022 hearing. Harassment claim was neither reflected in their agenda nor in their list of issues for July 2021 and Dec 2022 hearing. Respondent was given a warning in the case management of July hearing**

> **which says that 'If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.' Claimant says that it is not a minor mistake but a major mistake which in itself is enough for the tribunal to strike off all the respondent's responses. Recent case management for Case Number: 1308232/2019, A v London EV Company Limited) Paragraph 22 says that 'Respondents, particularly if legally represented in accordance with their duties to assist the Tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the Tribunal to identify the documents and key passages of the documents in which the claim appears to be set out, even it may not be explicitly pleaded in a manner that would be expected of a lawyer and take particular care is a litigant in person has applied the wrong legal label to a factual claim that if properly pleaded would be arguable.'**
>
> **5. Also, to note that while going through the respondent bundle at the 24 April hearing, claimant pointed out to the Judge that List of issues (with changes made in blue text) from Page numbers 464 to 479 of the respondent bundle is not a correct reflection of the claimant's actual pleadings and not as per the claimant's response from 480 to 497. A simple example of this is that respondent has not captured the date 21 November 2018 in Section 10.1.9 in Page 488. Looking at the respondent bundle pages, it appears that respondent has not captured all the victimisation issues under Equality Act. Claimant did not have an opportunity to go through each and every line of the respondent's list of issues and it was very difficult to navigate through respondent bundle as they have not captured claimant's responses in their amended list of issues. Claimant is not confident that fair trial is possible with this type of respondent misconduct. It is respondent unreasonable conduct if they makes changes and submit the bundle / amended documents after the hearing / claimant's submissions when they had several opportunities to do so before this.**

87. Whilst these submissions raise a number of issues, they do not address the respondent's submissions that the claim is inadequately pleaded such that the respondent cannot know adequately or at all the claim it is to meet.

88. I set out, in relation to protected acts above, the importance of identifying, accurately, in pleadings those matters relied on. For it to be a protected disclosure, there must be a qualifying disclosure made in the circumstances envisaged by section 43B Employment Rights Act 1996 . There are key elements which must be established. The disclosure must be of information. It follows that information should be set out and identified. It must be made in the public interest. The pleading should be sufficient to identify why it is alleged it was made in the public interest at the time. The disclosure must, in the reasonable belief of the employee, tend to show one or more relevant failing as identified at 43B (1) (a) – (e). It should be possible to identify what is said to be the relevant failure, and the reasonable belief should either be explained or clearly implicit.

89. The requirement for this detail is not unjustified pedantry. It is a necessary part of the identification the claim. Without the information, the respondent

and the tribunal may be left guessing at what is inntended. At best, this is likely to lead to lengthy, disorganised, unclear, and confused proceedings. That in itself may be sufficient to negate the possibility of a fair hearing. A fair hearing is not any hearing. It should be one which uses tribunal resources in an appropriate manner. However, alleged protected disclosures that are inadequately pleaded fundamentally prejudice the respondent. At best it prevents the respondent from being able to engage appropriately, reasonably, and proportionately with proceedings, but more likely, it denies the respondent an opportunity to identify the relevant information, so that it can identify what the claimant says is the relevant information and circumstances of the alleged protected disclosure. This denies the respondent the opportunity to prepare adequately or at all by obtaining the relevant evidence. That seriously and potentially fatally undermines the respondent's right to a fair hearing.

90. Such failure is important in any case. When the allegations of protected disclosures are multiple and diffuse the difficulties are compounded to the point where the claim becomes unmanageable and oppressive. When claims develop that characteristic, then there may be a question of unreasonable conduct, or even vexation.

91. During the course of the hearing the claimant made it plain that she resisted the tribunal's attempts to clarify the issues and asserted she considered her claims to be clear. Instead of accepting guidance and engaging with the process of clarification, she blamed the respondent for failing to set out the issues adequately or at all. The claimant, however, in seeking to resist the guidance went significantly further; she made it plain that she did not wish to be constrained at the final hearing by carefully defined issues. Put simply, the claimant refused to engage with, or cooperate, with the process of clarifying and defining her claims.

92. Nevertheless, it is still necessary to look carefully at the claim form. The tribunal should not be distracted into imagining that the claim exists elsewhere other than in the pleaded claim itself. I considered each of the alleged protected disclosures and in particular considered whether each identifies adequately the information disclosed, the relevant failure relied on, the reasonable belief of the claimant as to why it was made in the public interest, or why it demonstrated a relevant failure.

93. I do not find it necessary or proportionate to, in relation to each alleged protected disclosure to make detailed findings. I also observe there is danger in artificially considering each alleged protected disclosure separately, particularly when the claimant basis her case on the totality of the cumulative effect.

94. I found that the claimant has failed to set out to any sufficient degree of all the information relied on. I will consider several examples by way of illustration. I will use the numbering as set out in the respondent's draft list of issues.

95. In 6.1.2 there is general reference to challenging the construction manager. In 6.1.3 there is reference to raising concerns. In 6.1.4 there is further reference to raising concerns. In 6.1.5 there is simply a reference to an email without any attempt to identify the information. This is similar for 6.1.6 and 6.1.7. There is slightly more information in 6.1.1, but not significantly. That pattern proceeds across the remainder of the protected disclosures relied on with one possible exception which is the submission of the employment tribunal claim for discrimination on 21 November 18 (10.1.9); however, even in relation to that what is said to be the relevant failure, or the public interest, is not identified.

96. I find that the nature and extent of the claimant's whistleblowing detriment section in the second claim remains wholly unclear.

97. The claimant has had numerous opportunities to address the deficiencies. Previous judges have highlighted the difficulty. The problems were addressed once again on 8 December 2022 before me. The claimant had an opportunity to address the deficiencies when responding to the respondent's draft of the issues . The claimant had an opportunity to address the deficiencies at the hearing. Instead, she has made it plain that she will not engage with that process and does not accept any deficiency.

98. The claimant's refusal to engage with the process is in my view deliberate and contumelious obfuscation. There is a deliberate refusal to engage with the process or to accept the need to set out the claims clearly. Instead of agreeing to engage with the process of clarifying her own claims, the claimant has adopted the opposite stance and sought to ensure that the claims remain obscure to maximise, in her view, the arguments that she can raise the final hearing.

99. I am satisfied the claimant understands what is required of her. I take into account that she is a litigant in person, but she has now gained considerable experience of the process and has the benefit of assistance and guidance from more than one judge.

100. I do not accept the claimant's contention that the respondent has acted inappropriately. Respondents are frequently asked to assist in drafting issues. This is a pragmatic approach. Many respondent representatives, as is the case here, no doubt having regard to their overriding duty to the tribunal, seek to engage positively and to assist. The issues are a distillation of the pleaded case. In a reasonably pleaded case, there should be virtually no need for the assistance of either the claimant or the respondent. The judge should be able to draft the issues from pleadings. In this case, it appears the claimant takes the view that the responsibility for pleading and clarifying her claims lies with the respondent or the tribunal. That is a misunderstanding. It is for the claimant to plead her case in a way in which it can be understand an heard fairly.

101. When a case is not set out clearly, it is appropriate for the tribunal to give ample opportunity to claimant to rectify that situation. However, there comes a point when it is apparent that the process has failed and there is no prospect, whatsoever, of the claimant engaging in a way which is constructive. At that point, it is necessary to ask whether the claim can still proceed, in the sense of whether there can be a fair hearing.

102. For the reasons I have given, the whistleblowing detriment claim in the second claim is based on unparticularised alleged protected disclosures. The claimant fails to plead the alleged protected disclosures adequately or at all. In particular there is a failure to set out the information, the relevant failure, the basis for the claimant's reasonably belief as to the likelihood of failure, or to identify the public interest element. One may be marginally clearer than the others, but the case is put on the basis of the cumulative effect of the totality and treating them differently would be arbitrary. Further, for the reasons I have given, the respondent is fundamentally prejudice and unable to prepare for the hearing. I'm satisfied there is no possibility of there being a fair hearing of the claimant's allegation that she suffered detriment for whistleblowing as set out in the second claim. I therefore strike out the section 47B Employment Rights Act 1996 claim.

<u>The third claim</u>

103. During the course of the hearing, as noted above, the respondent applied to strike out the claim of automatic unfair dismissal. This was considered fully at the hearing. I asked for the application and the submissions be clarified by way of supplemental submissions, I gave the claimant an opportunity to file further submissions.

104. Claim three was submitted on 28 August 2020. It contains allegations of unfair dismissal and automatic unfair dismissal, contrary to section 103A Employment Rights Act 1996.

105. The narrative to the claim states "The reason for my dismissal was on the grounds of making several public interest disclosures as detailed in the additional information."

106. The additional information sets out a "timeline of events for automatic unfair dismissal." It identifies nine alleged protected disclosures page 254.

> **Nov 2019: Subsection 1b and 1 d of Section 43B PIDA -Made a qualifying disclosure in accordance with section 43C by raising Health and Safety concerns by email on 28th Nov 201 9 with Union representative & by email on 29th Nov 2019 to Human Resources**
>
> **Jan 2020 : Subsection 1b and 1 d of Section 43B PIDA - Made a qualifying disclosure in accordance with section 43C by raising Health & Safety concerns by email on 8th Jan 2020 with Employee relations advisor & Union Representatives**
>
> **Jan 2020 : Subsection 1b and 1 d of Section 43B PIDA -Made a qualifying disclosure in accordance with section 43C by raising Health & Safety concerns by email on 15th Jan 2020 with HR manager**

> **Jan 2020: Subsection 1b and 1 d of Section 43B PIDA -Made a qualifying disclosure in accordance with section 43C by raising concerns by emails on 15th Jan 2020, 23rd Jan 2020 and 31st Jan 2020 with HRBP and Head of HR regarding a health and safety issue**
>
> **Jan 2020: Subsection 1 b and 1 d of Section 43B PIDA -Made a qualifying disclosure in accordance with section 43C by raising concerns by email on 31st Jan 2020 to line manager on a health & safety issue**
>
> **Feb 2020: Subsection 1b and 1 d of Section 43B PIDA -Made a qualifying disclosure in accordance with section 43C by reporting a health & safety issue via Network Rail internal system on 20th Feb 2020**
>
> **March 2020 : Subsection 1b and 1 d of Section 43B PIDA -Made a qualifying disclosure in accordance with section 43C by formally raising a grievance on 27th March 2020 with Head of HR regarding a health & safety issue**
>
> **June 2020 : Subsection 1 b and 1 d of Section 43B PIDA-Made a qualifying disclosure in accordance with section 43C in the Appeal Hearing held on 9th, 11th and 16th June 2020.**
> **…**
>
> **Made a qualifying disclosure in accordance with section 43C in the in the disciplinary hearing, regarding data protection legal obligation on 21 st Aug 2020**

107. The claimant fails to set out adequately or at all what is said to be the information disclosed. Instead, there are bare assertions of qualified disclosures.

108. The respondent did not initially take this point. As noted, these claims have a long history.

109. Claim three included an application for interim relief which led to an interim relief hearing. Since then, there have been various other hearings at which the claim was considered. In seeking to draft the issues, the respondent took into account the representations made at various hearings in which it appeared the claimant had sought to clarify what amounted to the information for each of those alleged protected disclosures. This approach was contrary to my order of December 2022, which directed the parties to consider only the pleadings. The respondent's approach did, reasonably and fairly, reflect what the respondent understood to be the agreed position between the parties. It was therefore a generous position for the respondent to adopt and one which assisted the claimant. At the hearing, the claimant refused to accept the accuracy of the information as identified in the issues, or to accept that there had been any prior agreement.

110. It is for the claimant to identify her case. It is for the claimant to plead what information is said to constitute the alleged protected disclosure. I made it clear to the claimant it was open to her to accept the respondent had identified the information correctly in the draft issues, in which case it could be incorporated in the issues with the respondent's consent and,

therefore, without the need for formal amendment. The alternative would be to consider the claim form itself. Ultimately, and despite my seeking to clarify the position, the claimant refused to accept that the respondent had set out accurately the alleged information said to constitute the protected disclosures. Therefore, I could not adopt the respondent's draft of the issues, instead it is necessary to consider only the claim form.

111. I have already noted, as set out above, the importance of identifying the information, the relevant failure, and the grounds for the reasonable belief that the information tended to show a relevant failure made in the public interest. It is for the claimant to set that out in the pleadings. I also noted the importance of allowing the claimant every opportunity to clarify a pleading which falls short in one respect or another. I have also considered why that is important and why failure to provide appropriate clarification leads to severe prejudice to the respondent and the inability to have a fair hearing. Those observations are equally relevant here.

112. In its supplemental submissions the respondent says the following:

> **32. The position on the automatically unfair dismissal claim under the Third Claim is similar to that on the s.47B claim under the Second Claim, and the points made there can be largely repeated.**
>
> **33. As identified by EJ Hodgson, C's claim itself did not identify at all the information said to constitute the protected disclosures. The R has done its very best to understand and identify that information and to set it out clearly in its list of issues. The R even added C's preferred text (in blue print) to the asserted disclosures in the List of Issues sent to C on 23.02.23 [R464]. C has had that document for two months, and knew it would be discussed at this PH. Notwithstanding this, C attended the hearing wholly unprepared to engage on whether she accepted that the R's list of issues correctly identified the alleged protected disclosures. As a result, when asked by EJ Hodgson, C refused to accept that any of the protected disclosures were correctly set out in the list of issues, yet was unable to identify any way in which they were not.**
>
> **34. This leaves C in a position in which she has pleaded a claim which lacks any of the relevant and essential information as to the content of the alleged protected disclosures (and no application to amend to add that information), and a refusal by C to engage cooperatively on the list of issues in order to enable the ET to confirm through that means what the disclosures were.**
>
> **35. C's entire approach to this exercise was an obstructive one. In spite of EJ Hodgson's repeated and patient efforts to go through the list of issues with C and to understand any dispute on how the R has characterised what it understands to be the disclosures, C repeatedly refused to answer questions posed. C returned time and time again to the fact that Joseph Mullally is described as 'Human Resources' rather than 'Human Resources Business Partner' [see 475, para 21.1.1] – a wholly insubstantial and irrelevant issue, of no probative value at all.**
>
> **36. C's obstructive approach at the PH – and her failure to engage sensibly with the R's efforts to identify the protected disclosures following C's inadequate pleadings – means that almost three years after C's Third Claim was presented there is not agreement about the protected**

disclosures relied upon in respect of the s.103A claim. It is a disagreement that ought not to be intractable but which C's conduct renders intractable. The ET can have no confidence that C will resile from her obstructive approach and act cooperatively to enable the issues to be settled.

37. For like reasons to those set out at para 29 above in respect of C's Second Claim, the R would urge the ET to strike out C's s.103A claim within the Third Claim.

113. The claimant's written submission on how I should approach the third claim were as follows:

6. THIRD CLAIM (2205768/2020): Claimant has raised the concerns with respondent list of issues starting from 11 December 2020 until the hearing on 24 April 2023. If the respondent is disputing what has been agreed at the 9 Dec 2020 hearing regarding the list of issues, then it is the matter for the respondent to request the transcript of the hearing from the tribunal in relation to this (which they should have done by now). It is clear from claimant's submissions and documents and respondent bundle for Dec 2020 hearing that claimant provided cast list with Job titles and actual emails of the protected acts with clear names of the persons and the appeal hearing meeting notes. These were considered in length at the Dec 2020 hearing and the respondent agreed to make the amendments following the hearing, but respondent continuously ignored what was agreed and provided the same list of issues again and again to number of Judges. (excluding the names or roles or excluding the actual issue or providing the different job titles for same person). It was also agreed at the preliminary hearing followed by email to tribunal in Dec 2020, that full email chain and appeal hearing notes dated 13 July 2020 that the list of issues are referring should be available, but claimant has not seen this in respondent bundle. This vexatious and scandalous conduct of the respondent has made it appear as if the issues for third claim are not protected acts. Also, if the tribunal can see the page 475 in the respondent bundle for the paragraphs 21.1.2. and 21.1.3 that they are referring same person Craig Etherington as Employee relations advisor (in paragraph 21.1.2) and then as Senior HR manager (in paragraph 21.1.3). Tribunal to note that claimant has submitted the eT1 form for third claim within one week of her dismissal as part of Interim relief application.

7. Respondent made changes to the list of issues after the claimant submissions on 14 Feb 2023 and they also agreed at the 24 April hearing that they did not include the correct Job title for Joseph Mullally (he was the HR business partner at Network Rail). Claimant is asking, why did not the respondent provide the correct list on 1 Feb 2023 and wait for claimant's response (in Red text on 14 Feb 2023). Respondent also chose not to include claimant's responses in the amended list. If the respondent is making changes to the list of issues after the claimant has made submissions, then this is not a reasonable conduct, because respondent had the opportunity to make the changes in their first submission of list following the Dec 2020 hearing but they misleaded the tribunal. Claimant is being put to pressure after two and half years in explaining all the issues again and again to a different Judge when there was already a preliminary hearing held in relation to the third claim in Oct 2020, Dec 2020, in July 2021 and in Dec 2022 with three different Judges. This is a severe injustice to the claimant who is a litigant in person compared to represented respondent and claimant feels biased.

8. Tribunal also to note that respondent representative website https://www.eversheds-sutherland.com/global/en/index.page demonstrates

> **that Respondent representative is a specialised employment law solicitor with international client's base, with thousands of legal and business advisers worldwide. So how can the respondent make so many errors in their bundle preparation and not complying with the tribunal order. Respondent is tactfully doing this to mislead the tribunal and claimant. Respondent is also claiming that the witnesses have left the business and the case is historical in their submissions.**

114. I find that these submissions do not engage with the core issue – the claimant's failure to set out the information said to constitute protected disclosures.

115. I have considered whether there should be a further attempt at particularisation. The need for clear particularisation has been made clear at various times during the history of these claims. It was the central theme of the case management discussion on 8 December 2022. The directions given on that day were designed to assist the parties to focus on those matters which need to be addressed, and it was made plain that this was a final opportunity for the claimant to comply. Given the totality of the history, the evidence of the written documentation, the position adopted at the hearing, and the subsequent submissions I am satisfied that the claimant's approach will not change.

116. The claimant has failed to plead, adequately or at all, what is said to be the information constituting protected disclosures in the third claim. In my view there is no prospect of her engaging with that process. The claimant's approach causes severe prejudice for the respondent. The respondent cannot prepare adequately or at all for the hearing. The respondent cannot identify the relevant evidence. Without the adequate pleading, there is no prospect of the hearing being conducted in a way which is fair to both sides.

117. I have concluded the claimant's conduct of the claim in relation to these matters is unreasonable; it is arguably vexatious, but I do not have to finally decide that point. On the pleaded claim, none of the alleged protected disclosures can succeed, as none identifies a disclosure of information. It follows, on the pleaded case there is no reasonable prospect of success. The claimant has been given more than ample opportunity to clarify her claim and has failed to do so . Instead, she has consciously chosen not to engage. Further she has behaved in a way that is it obstructive and her conduct is contumelious. Most importantly, there is no prospect of there being a fair hearing of the automatic unfair dismissal claim. I am satisfied that the claimant has been given sufficient opportunity to engage in a way which may rectify the deficiency in the pleadings. Not only is the claimant failed to do so, but her continuing conduct also demonstrates a conscious frustration of to all attempts to assist here and to make progress. I have considered if a lesser sanction would be appropriate; I find it would not. In the circumstances, I strike out the claim of automatic unfair dismissal.

<u>The claimant's application for strike out</u>

118. I should consider the claimant's application to strike out the responses. As I have noted, it is far from clear that strike out was the intention of the various applications made by the claimant, and I have sought to take a purposive approach at the hearing.

119. In seeking to strike out the three responses, the claimant relies upon the totality of her written submissions. As to the alleged unreasonableness of the respondent's conduct, the further submissions state:

> **9. ALL THE THREE CLAIMS: Claimant also requests the tribunal to look into the 'CLAIMANT OBSERVATIONS ON RESPONDENT BUNDLE' sent on 20 April 2023. Claimant is spending substantial amount of time to deal with respondent non-compliances and chasing them for bundles. The manner in which the respondent has prepared the bundles is scandalous, unreasonable or vexatious, it is no longer possible to have a fair hearing. Claimant and tribunal had to turn to several pages forward and backward at the 24 April 2023 hearing making it difficult to clarify the issues. There was not a single document where the claimant's responses were captured with respondent changes in the respondent bundle. Looking at the respondent list of issues line by line and cross checking them against claimant original list of issues and agreements following the previous preliminary hearings would cause further delay to the full trial date setting and another preliminary hearing.**
>
> **10. Respondent has neither agreed the index or bundle of documents inspite requesting the bundle on 1 April 2023 by the claimant. Also, claimant is struggling to understand why the tribunal is considering the list of issues referring to Watford tribunal / bundle or referring to July 2021 hearing, when the respondent was given an opportunity before the hearing to provide correct versions. Claimant is put in a position that leads to Judge into error for subsequent hearings. Also, almost one hour of tribunal time was wasted on 24 April hearing as Judge did not have access to the respondent bundle. Respondent claims to have uploaded it on 14 April 2023 after 4 pm. Judge had to adjourn and asked the counsel / solicitors to send the bundle of documents. Claimant is not sure which bundle the solicitors have sent to the Judge as claimant or Londoncentralet@hmcts.gsi.gov.uk was again not copied in the email ignoring the rule 92. Also, claimant is struggling to understand why the Judge has considered the bundle that was not copied into claimant and Judge also referred to some previous bundles that they have received which claimant did not have access to at the time of hearing. It is unclear what has respondent sent to the tribunal on the hearing day as the claimant was not copied as they were also referring to some documents that sent over one day before the hearing. Claimant for these reasons feels that hearing was not conducted fairly.**
>
> **11. There is also a fundamental issue with respondent bundle submissions which claimant tried to highlight on 20 April 2023. Respondent has not provided the bundle before 4 pm as requested by the legal officer, they seem to claim that they were waiting for the DUC link. From the tribunal case management order for Dec 2022, it is clear that respondent could have provided the bundle in separate sections instead of waiting for the DUC link. Also, it is not clear when did the respondent request the link (claimant not copied) and when did the tribunal provide the link to the respondent because the claimant has also requested the link on 23 March 2023 and 1 April 2023, but she was not given any link to upload.**

Also, respondent seems to believe that claimant need not be copied in all the emails to the tribunal and vice versa contradicting the Rule 92.

12. In Emuemukoro v Croma Vigilant (Scotland) the ET, faced with a respondent who had failed to comply with bundle and witness statement directions which made a fair trial impossible within the listed five-day trial window, struck out its response at the start of the trial. On appeal, the EAT confirmed that whether a fair trial could have been possible at a later date was immaterial: when considering a strike-out application on the first day of trial it is enough, to trigger consideration of strike out, that a party's unreasonable conduct meant a fair trial was not possible within that trial window. Whether or not the power ought to be exercised then would then depend on proportionality. Even though, full trial dates have not been fixed in this case, the non-compliances and irregularities are almost similar in nature including that respondent tried to remove the actual claims and did not capture all the issues or did not capture them correctly. Respondent has tactfully prepared the bundles to actually delay the full hearing and mislead the tribunal at preliminary hearings. For the conduct to be misleading or deceptive, it is not necessary that the conduct conveys either an express or implied representation, but that conduct is sufficient to lead or likely to lead the judge into error. Recent case management for Case Number: 1308232/2019, (A v London EV Company Limited) Paragraph 25 says that 'Deciding when it is convenient for a party to comply with a Tribunal order is not a choice that a party has; compliance with Tribunal orders, is mandatory and not optional. Clarification of the parties respective cases is an essential step and forms the foundation of trial preparation; it is the list of issues which determines the disclosure and witness evidence which is required for the final hearing.'

13. Respondent claims that all the emails from the Eversheds should be considered as if from respondent representative which claimant disagrees. Respondent should not be disclosing her case details to all the employees at Eversheds, they should disclose it to only relevant people and they should in their communication say that they have sent on the behalf respondent representative (mentioned on the eT3 form). Without this information, claimant is correct in saying that the emails are from unknown people as the communication email does not reflect that they are sent on behalf of the respondent representative. Also, tribunal to note that all the communications to be copied into the tribunal and vice versa under Rule 92 which respondent is continuously ignoring. For October 2020 hearing, two bundles were received from the Eversheds (one day before the hearing) and the respondent did not confirm which bundle to be referred for the hearing, they also sent an email around 5:30 pm on 8 October 2020 saying that they sent two bundles.

14. Respondent conduct for the September 2021 hearing (for which claimant has not received the notice of hearing from tribunal) is undoubtedly unreasonable. There was an email from Alija Shqipran (Shqipran.Alija1@justice.gov.uk) on 3 Sep 2021 to the respondent at 11:28 am and mentions that reply to be sent to Londoncentralet@hmcts.gsi.gov.uk. Respondent totally ignored this and sent the reply to someone unknown and Alija Shqipran. Respondent who is represented did not alert the tribunal about the persons not on the eT1 response form. In their email on 3 Sep 2021 (tribunal London central not copied) respondent themselves says that they were not clear on the purpose of the preliminary hearing.

15. As submitted at the 24 April 2023, claimant feels biased as her application related to the respondent non-compliances and irregularities was set aside until the end of the day even though she has made several

applications related to this since Jan 2021 and preference was given to respondent strike out applications. Claimant has also mentioned that she has raised the concerns regarding the non-compliance and irregularities application that was put to the tribunal before Dec 2022 hearing and she has included that in her agenda at that time. Claimant believes that she has been put to disadvantage by not looking into her concerns at Dec 2022 hearing and delaying it to end of April 2023 hearing. Claimant was asked to pause several times when she raised questions about the fundamental issues with the respondent bundle and her applications. Claimant also feels unfair when she is being put in a position again and again to explain that the Equality and PIDA schedules were prepared as agreed at the hearing in August 2019. Claimant also felt pressurised the way the hearing was conducted to accept or not accept the list of issues as the hard copy of the bundle of 569 pages was delivered to the claimant less than a week and the Judge had not received a copy until the hearing day (hearing was paused while the bundle was requested from respondent). As explained in earlier paragraphs there are no single document of list of issues where claimant's responses were captured and there were several other observations that claimant has detailed out on 20 April 2023. Also, there was no document on what changes have been made to the list of issues since it was issued in December 2020 and amended several times since then by the respondent and why.

Claimant hopes the Judge will consider all the previous submissions including this in the interests of justice and claimant bundle has already been provided to the tribunal on 16 April 2023. For avoidance of doubt respondent has been copied.

120. The respondent's submissions address the proposed strike out of the respondent's responses. The submissions are extensive and I have set out the most important below. Unfortunately, the submissions are lengthy. This reflects the nature of the complaints made by the claimant and the respondent's concern to demonstrate what it considers to be the position. I am also conscious that the claimant has suggested her submissions that, in some manner, no proper consideration has been given to her application to strike out and hence why I consider it appropriate to set out in some detail the submissions on both sides. The following extract from the respondent's submissions will suffice to demonstrate the respondent's position.

35. The R's responses to those allegations in C's table [at C362] are set out, for ease of reference, in the table below:

Row	C's assertion	R's response
5-6	**R's response to C's Second Claim was due on 26.12.19 but R did not submit the ET3 until 02.01.20**	**R emailed its response in time on 24.12.19 [C126], but subsequently realised the Grounds of Resistance were attached but not the ET3. Accordingly on 02.01.20 R submitted the ET3 and applied for an extension of time for its submission [C108]. The ET then accepted the R's response on 31.01.20 [C110].** **Thus the Grounds were presented on time, the only failure was to attach the ET3, and this was remedied swiftly and the R's application**

		was accepted by the ET in accepting the response.
7-10	**R did not provide the disclosure list or trial bundle for the Second Claim on 6 and 20.02.20 respectively as per case orders, providing them on 03.03.20.**	**The notice of claim for the Second Claim set out summary case management orders solely in respect of that claim which included disclosure by 06.02.20 and production of the bundle by 20.02.20 [C102], and a full hearing to commence on 01.06.20. However, by February 2020, (i) EJ Wade had intimated her view that the Second Claim should be consolidated with the First Claim [C98] but had not decided on the point, (ii) C had applied for reconsideration of the unpaid deposit orders made in the First Claim [R130-138], (iii) C had appealed against the deposit orders and that had been rejected on the sift but time continued for C to assert her rights under r.3(10) of the EAT Rules for an oral hearing [R150] (iv) the R had applied to strike out C's Second Claim and for consolidation of the two claims [C132-133] and the PH listed for 04.03.20 had been converted to consider the strike out application, and (v) neither the R nor the ET had ever received a full copy of C's particulars of claim, but merely a copy in which each page was cut to A4 size, meaning much of the text was missing (hence EJ Tayler ordered C at the 04.03.20 PH to provide a full hard copy of the particulars to the ET and R [C136, para 2]. At that PH, the First and Second Claims were consolidated, the full hearing listing was vacated and the claims were stayed pending determination of C's reconsideration application and appeal [C136, paras 1, 3, 5].** **Hence at the dates set out in the case management order, the R and ET lacked the full particulars of claim, it would have been impossible to comply with disclosure duties, and there was no possibility that the full hearing dates were going to remain in place. Moreover, consistently with the R's strike out application large amounts of the claim were struck out and any disclosure and trial bundle in those circumstances would have been redundant and a waste of legal costs.** **There were thus clearly excusable reasons for non-compliance with the timetable, C did not raise the matter at the PH before EJ Tayler, and C suffered no prejudice at all by the R's approach.**
13	**The Notice of Claim in case no. 2205768/2020 ("Third Claim") was sent on 30.09.20 and required any documents 5 days before the interim relief hearing listed for 09.10.20, but R provided theirs on 08.10.20.**	**The Notice of Hearing is at [C152], listing the hearing for 09.10.20 and requiring documents to be sent 3 working days beforehand – 06.10.20 and not 04.10.20 as per C's assertion.**

		The hearing was an interim relief hearing. The ET will be well aware of difficulties for Respondents in compiling documents and statements long before such hearings due to the swiftness in which they are listed. **In this case, the R's difficulty was compounded by the lack of clarity in C's ET1 about the nature of her claim and the disclosures she relied upon [see C's particulars at C146 and C151]. This made it very difficult (and perhaps impossible) for the R to identify the disclosures.** **C did not provide any clarification of her disclosures until 19:59 on 07.10.20 [C155-160] (so C herself sent documents after the stipulated deadline). That enabled the R's solicitors the following morning to more readily identify the documents relied upon for the protected disclosures and to compile a bundle and witness statement, which it sent the following afternoon [C161]. It clearly acted with alacrity in doing so, and cannot sensibly be criticised for this.** **Moreover, the night before the hearing C sent to the ET 3 zip files containing around 140 separate files of multiple pages [see EJ Elliott judgment at R214, paras 13-14]. Accordingly to the extent that there was any unreasonable non-compliance, it was by C and not by the R.** **The R's alacrity in putting together a bundle which identified the asserted protected disclosures enabled the hearing to go ahead and for EJ Elliott to understand the context and to reach a decision on the question of interim relief.** **The R's actions did not prejudice C but rather assisted the ET to properly conduct its hearing.**
16-17	**The agenda for the PH on 09.12.20 was due on 02.12.20 but not sent until 07.12.20**	**The R accepts the agenda was sent in late, but assert that it is the most minor of infractions and caused no prejudice to the hearing.** **Moreover, the ET will be aware the primary purpose of the agenda is to enable to the ET to conduct the hearing, the EJ had the agenda in good time before the hearing, and no prejudice was caused by sending it 2 days beforehand.** **There is no indication from EJ Joffe's Case Management Summary that she had any concern about when the R sent in their agenda [C212].**

18	**The R sent a bundle of documents from 'unknown people' on 07.12.20**	**This is a bizarre allegation. As set out in the R's response to C's r.6 application [C430], the bundle was sent by an Eversheds paralegal with an Eversheds email address, the solicitor with conduct of the case was copied in, and the email set out at the start the relevant case number and *'We act on behalf of the Respondent, Network Rail Infrastructure Limited in the above matter'***
20-21	**Following the 09.12.20 PH, the R sent a list of issues which did not make amendments ordered to be made by the ET as had been agreed at the PH.**	**The PH occurred on 09.12.20 before EJ Joffe. As set out in EJ Joffe's case management summary, the R provided a draft list of issues in the Third Claim and C was given the opportunity to review it and raised points of amendment [C214-215, paras (22)-(23)]. EJ Joffe then ordered the R to send C and the ET the finalised list of issues incorporating the amendments agreed at the hearing [C215, para 1.1].** **R's counsel took a careful note of the amendments proposed by C and agreed at the hearing, and then amended the List of Issues accordingly for the R's solicitors to file. The amended version is at [C205]. The amendments made were to add "David Rogers" to para 3.1.10, the dates to paras 3.1.10.1-8, and the final sentence to para 3.1.11.** **It appears that C believed that she had requested, and it had been agreed, that all names and roles be added to the list of issues. It may be that that was C's intention, albeit it is not what C said at the hearing.** **In any event, after C insisted that the names and roles of the recipients of each disclosure be added to the list of issues [C225-226], the R did so notwithstanding it was not what was agreed at the hearing [email of 18.01.21 at C227, and amended list at C228].** **It is not feasible or a proportionate use of time for the ET more than two years later to resolve whether the C's or R's understanding of what was agreed at the PH on 09.12.20 was correct, but in any event the R agreed to add in the names and roles and there is no possible basis on which this matter can sensibly be the topic of a r.6 sanction.**
26	**R was required by EJ Joffe's order to set out its application to strike out C's claims by 4pm on 25.01.21 and the R failed to do so.**	**The R accepts that the order is as set out by C [see C216, para 2.1].** **The R's email was sent out 1 hour and 5 minutes late – at 17:05 on 25.01.21 [C236]. The hearing on that application was listed more than 6 weeks later on 12.03.21 and C**

		was in no way prejudiced by a 65 minute delay in receiving the application. **C wrote to the ET on 26.01.21 seeking action against the R for the 65 minute delay [C240]. It was wholly disproportionate for C to do so then and all the moreso to raise it as a basis for sanction against R more than two years later on.**
29	**When the R updated the bundle for the 12.03.21 PH it sent C only a soft copy of the update by email and not a hard copy.**	**C does not provide any emails about this in her bundle. Notably C was sent a hard copy bundle on 26.02.21 [see C267] and sent her own bundle by email [C267].** **To the extent that the R sent any additional update to the bundle by email, C provides no evidence that she complained about this or sought a hard copy of it, nor that it in any way prejudiced her. No such issue was raised, to the R's recollection, at the hearing of the PH, nor is there any suggestion that C lacked capacity to print out and to insert any additions that were emailed to her.**
31	**The R was supposed to send the skeleton for the 12.03.20 PH by 16:00 on 09.03.21 but failed to do so.**	**The skeleton was sent at 16:15 on 09.03.21, 15 minutes late. The delay resulted from difficulties the R's solicitors had in getting the email to send.** **In any event, no prejudice is caused by a 15 minute delay and there is no possible cause for sanction for a 15-minute delay 2 years ago in the sending of the R's skeleton.**
36, 38	**The R sent bundles of documents from "unknown people" for the 05.07.21 PH on 03 and 04.07.21**	**Once again, it is absurd for C to suggest non-compliance in raising these allegations.** **The Rs had sent a bundle for the 05.07.21 hearing on 28.06.21 [referred to at C312]. The R subsequently became aware that C had appealed EJ N Walker's judgments of 12.03.21 and updated the bundle accordingly on 03.07.21 [C312]. The following day, the R filed a note I had produced to assist the EJ [C313]. Both were sent by Rachel Snipe, one of the solicitors with conduct of C's claim. She was not unknown to C and has been party to considerable correspondence in this matter.** **In any event, even had she been unknown this would not amount to non-compliance.**
42-43	**For the PH on 08.12.22, R did not provide a list of issues by 24.11.22 as ordered, nor an agenda by 02.12.22 as ordered.**	**It is accepted by the R that the draft list of issues was ordered to be provided by 14 days before the PH [C321, para 1.2] and the agenda 7 days beforehand [C340].** **It is accepted that the R sent both on 02.12.22 [as asserted by C at C367, row 45].** **Both were sent well in advance of the PH and caused no prejudice to C. In any event, at the**

		PH EJ Hodgson ordered the list of issues to be drafted in a different format, which would have been the case whenever the agenda and list of issues had been sent. **There is, once more, no sensible basis for the ET to sanction the R under r.6 in respect of this matter.**
45	**R removed the harassment claim from the list of issues**	**The R had not removed any harassment claim from the list of issues. No harassment claim had been included in the list produced in June 2021 [R274] and accordingly was never removed by the R from its list of issues.** **It is understandable from C's table of particulars why the R had not properly appreciated that C had raised a harassment claim. The Equality Act schedule produced within those particulars has a column headed 'The Provision of the Equality Act relied on' [C68], in which C had only written "Race Discrimination".** **The omission by the R was thus inadvertent. It was certainly not a failure to comply with any order. Once the R appreciated that C had intended to include a harassment claim within the Second Claim, it added it to the draft List of Issues sent on 01.02.23 [see R465-466].** **There is no basis for any r.6 sanction in this regard.**

36. It will be abundantly clear from the above table that a r.6 application based on the matters raised in C's table of non-compliance is wholly misguided. To the extent that there are failures to comply with time limits, they are minimal, C suffered no prejudice, and the R did send each document in good time before the hearing. Moreover, on no occasion was there any need for a follow-up order or an unless order from the Tribunal to get the R to comply.

37. As regards the additional matters raised in C's application of 14.02.23, updated on 23.02.23, and set out at para Error! Reference source not found. **above:**

- **a. The removal of the harassment claim is dealt with under row 45 in the above table;**
- **b. C is misguided in complaining about the removal of remedies from the List of Issues. It was made clear at the last PH and in the Case Management Summary that the List of Issues should not set out the legal questions but should focus on the heads of claims, specific allegations and factual basis of those allegations [C370, para 2.12], which is why the R's draft list of issues is limited to liability. This is not an example of the R not complying with ET directions, but adhering to them.**
- **c. C's complaints about removing names and changing/removing names/roles is misguided, as the R has done nothing of the sort. The R has already dealt with the inclusion of names and roles at rows 20-21 of the above table.**

d. C complains about the R excluding/failing to include issues. To the extent that relates to the harassment claim, it is dealt with above. To the extent it is intended to relate to some other claim, C has not specified it and thus the R cannot answer the allegation.

38. On 29.03.23 C sent a further email making allegations against the R and urging the ET to take action [C439-442]. In large part the matters set out are repetitive of those already dealt with. It appears the only additional points on which C urges action are below (with responses from R):

121. I have no doubts that there have been failings on the part of the respondent. The respondent has not complied with of all deadlines. There have been typographical errors, for example some documents have been labelled as in the Watford employment tribunal. There has been some failure to includes dates.

122. It is not every breach of order which will be seen a significant or which would be prejudicial to a fair hearing. When considering strike out, the tribunal should have regard to all the circumstances, which may include the following: the effect of any breach, and whether the effect will be to cause prejudice; the reason for the breach; how blameworthy is the conduct. Overarching all that is a consideration about whether the possibility of a fair hearing has been undermined.

123. It is common in litigation, in all courts and tribunals, at all levels, for there to be breach of orders, often in the form of minor delays.

124. It is also necessary to consider the overall conduct of the respondent. Here, as I set out above, the respondent has, patiently, sought to identify the issues and to assist the claimant. In setting out the issues in accordance with my order of 8 December 2022, the respondent has acted reasonably, helpfully, and entirely in compliance with its duty to the tribunal to assist in promoting the overriding objective. The conduct of the respondent, and its advisers, is consistent with the overriding objective and is reasonable. Nothing the respondent has done undermines the prospect of a fair hearing. The opposite is true, the respondent's actions have sought to facilitate a fair hearing, despite the claimant's conduct. I reject the claimant's application to strike out any of the responses.

125. It will be necessary to consider, in due course, the application to amend.

126. I find it is appropriate, first, to consider the question of like work. The equal pay claim will be relevant to the remedy in the remaining claims, should the claimant be successful in her claims. I envisage that once the question of like work is resolved, if breach of the equality clause remains live, any material factor defence, can be dealt with at a final hearing. At that hearing, it may be appropriate to deal with the remaining discrimination, victimisation, and harassment claims, as well as the claim of unfair dismissal. However, a final decision on that will be taken in due course.

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Employment Judge Hodgson

Dated: 23 May 2023

Sent to the parties on:

23/05/2023

For the Tribunal Office

Appendix 1

List of issues remaining

Claim one - 2206741/2018

1 It is common ground there is only one claim remaining in claim one, and that is breach of the equality clause under section 66 Equality Act 2010. It is the claimant's case that whilst working on the second phase of the ground investigation project with HS2 as a client, from 17 March 2017, she undertook like work with her comparator Mr Paul Munday, but did not receive the same benefits.

2 The respondent denies like work, and in the alternative raises a material factor defence.

Claim two - 2203669/2019

3 For the purposes of direct race discrimination, the claimant relies on one alleged detriment:

a. Detriment one – by the respondent on a date unspecified failing to hold an interim or holding any conversation meetings to discuss the claimant's performance during the financial year 2018 to 2019 before sending her a pay award letter received on 26 June 2019.

4 For the purposes of victimisation and harassment the claimant relies on detriment one and a further detriment as follows:

a. Detriment two by the respondent failing on a date unspecified to provide the claimant with copies of notes, including witness statements, in advance of the grievance hearing on 26 September 20, 2019 in accordance with the grievance handling policy.

5 For the purpose of harassment, it is the claimant's case that the conduct related to her race.

6 For the purpose of victimisation, the claimant alleges six protected acts. It is agreed that two matters raised, in principle, could be protected acts, being the following:

a. by informing human resources about an approach to ACAS and an employment tribunal claim, in October 2018; and
b. by the claimant submitting a claim to the employment tribunal in November 2018 in which allegations of discrimination were made.

7 In addition, there are alleged protected acts which are materially unclear, and which are not recorded in these issues at present. Each refers to raising concerns, but such concerns are not specified, and may require amendment if they are to be relied on.

8 The claim of detriment for whistleblowing has been struck out for the reasons given.

Claim three - 2205768/2020

9 The claimant alleges she was unfairly dismissed.

10 It is the respondent's case that she was dismissed for a fair reason being either some other substantial reason, or a reason related to conduct. It is the respondent's position that there was a significant material breakdown in the working relationship which entitled the respondent to dismiss the claimant and further or in the alternative that breakdown related to the claimant conduct.

11 The claim of dismissal for whistleblowing, contrary to section 103A Employment Rights Act 1996, has been struck out.