EMPLOYMENT TRIBUNALS

Claimant: Mrs S Mir

Respondent: Omniamed Communications Limited

RECORD OF A HEARING

Heard at: London Central (via Cloud Video Platform)
On: 17, 18 and 19 May 2023

Before: Employment Judge Joffe
Mr T Ashby
Mr P Brione

Appearances
For the claimant: Miss J Andrews, lay representative
For the respondent: Mr H Sheehan, counsel

JUDGMENT

1. The claimant's claims under the above case number are struck out.

REASONS

Claims and issues

1. These dates were listed to continue the full merits hearing, which had commenced in January 2023 but had not been completed for reasons explained in the chronology of the proceedings below.

2. There were a number of applications made by the parties between the previous and resumed hearing dates. It had not been possible to consider those applications at a separate preliminary hearing and the parties had been informed by the Tribunal that the applications would be considered at the outset of the resumed full merits hearing.

3. The applications which had been notified to the Tribunal prior to the resumed hearing were as follows:

    a. The respondent's application to strike out the claimant's claims under rule 37(1)(c) on the basis that the claimant had failed to comply with an order of the Tribunal from the 23 January 2023 case management orders that the claimant should provide medical evidence;
    b. The respondent's application to strike out the claimant's claims under rule 37(1)(c) on the basis that the claimant had failed to comply with an order of the Tribunal from the 23 January 2023 case management orders as to the limited extent to which the claimant could update her witness statement;
    c. The claimant's application that a transcript of a recording she made of a meeting should be admitted in evidence.

4. We indicated to the parties on the morning of the first day of the resumed hearing that we were proposing to spend no more than half a day hearing and deciding the applications so that there would be time to complete the full merits hearing. For the reasons set out below, we did not continue to hear evidence and the time was entirely taken up with the respondent's strike out applications.

5. The time taken up by procedural matters over the course of the two hearings was extended by the parties' failures to cooperate with one another. At times over the course of these hearings, it has seemed to us that the respondent would pursue applications or objections to orders which were open to it but disproportionate and unhelpful. In response, Ms Andrews would herself become uncooperative at times. We understood from what she told us that her own disabilities meant she was suffering from anxiety which affected her responses. We mention these aspects of the hearing not to apportion blame as between the parties but to convey a sense of how unusually challenging both hearings were to manage.

6. The respondent arrived at the hearing with a new application to strike out without giving any notice to the claimant as to the content of that application. We understood that the new basis for the application was something that Mr Sheehan became aware of when preparing for the hearing. He had not had time to prepare a skeleton argument and had prepared a speaking note. He made oral submissions only and no documents were provided to the claimant or the Tribunal save for a bundle of correspondence. We would comment that it would have required little work for the respondent's solicitors to send an email to the claimant's representative, indicating the further basis for strike out being pursued. Advance notice to the claimant would have been in accordance with the overriding objective and might have saved a significant amount of hearing time.

7. In the events that happened, Mr Sheehan added the following grounds to strike out during the course of his oral submissions:

a) Strike out under rule 37(1)(b) of Employment Tribunals Rules of Procedure 2013 in respect of the existing grounds.. Previously the applications had been pursued under rule 37(1)(c) only;
b) Strike out under both sub rules in respect of the production of a transcript.

8. Initially, on being presented with these new grounds, Ms Andrews did not ask for extra time to respond to the new strike out applications. However once the ambit of the applications had become clear, she did ask for further time. After starting her submissions before lunch on 17 May 2023, after the lunch break she said that it would be unfair for her to have to respond to the new applications which had effectively been an ambush. The Tribunal agreed that the claimant had not had a fair opportunity to prepare for the new applications and that if they were to proceed she would require one. Initially Ms Andrews said that weeks would be required but she then told us that a day would be sufficient to prepare a response to the submissions. Our understanding is that Ms Andrew is qualified as a barrister but does not practice as a barrister and runs an organisation called Grace Equality in Employment Limited, t/a Advice Rights. Because of her own disabilities she requires additional time to complete tasks and does not take on many cases. She was representing the claimant on a pro bono basis.

9. Had it not been for Ms Andrews' disabilities, we would have considered half a day would have been ample to have prepared a response to the new applications. Because Ms Andrews herself asked for a full day, we were content that this was a fair amount of time. We could have declined to hear the respondent's new application, but that application was sufficiently bound up with the claimant's application to admit the transcript and caused us sufficient concern about the fairness of the hearing, that we considered that we should hear the application.

10. We recommenced the hearing on 19 May 2023. Ms Andrews sent the Tribunal a skeleton argument and bundle of authorities shortly before the hearing recommenced at 10 am. When we enquired whether these had been sent to the respondent, Ms Andrews objected on the basis that Mr Sheehan had not provided a skeleton and the claimant had been taken by surprise by the contents of the strike out application. I explained that Ms Andrews had been given a day to prepare a response to the new application and that Mr Sheehan would not be able to follow the argument without a copy of the skeleton argument, assuming that Ms Andrews would be referring to the written document but not reading out everything contained in it. I commented that Ms Andrews should reflect on whether she was cooperating with the Tribunal or advancing the claimant's case in taking the stance she did.

11. Ms Andrews became upset and made a statement about how the Tribunal had discriminated against her in relation to her disability and had scoffed at her. Tasks took her longer because of her disabilities and she could not turn work round as quickly as a representative without her disabilities. She had had inadequate sleep because she had had to work so late preparing the response to the application.

12. I attempted to reassure Ms Andrews that it had been our understanding from what she had said to us that a day would be sufficient and that is why we had made that order. We had not ultimately been faced with an application to postpone the hearing for a number of weeks. There had certainly been no intention to discriminate against her in relation to her disability or to make her feel scoffed at. I observe that Ms Andrews' skeleton argument was a highly competent and thoroughly researched document. It was apparent that Ms Andrews was concerned that the Tribunal would hold her conduct against the claimant in some way and I attempted to reassure Ms Andrews and the claimant that that was not the case.

13. Ms Andrews then provided her skeleton argument to the respondent and we took some time to read it.

Reasonable adjustments

14. For health reasons, the claimant required regular breaks, as did both representatives. We aimed to take short breaks every hour but sometimes had longer or ad hoc breaks

<u>The history of the proceedings</u>

15. It is important to understand in some detail the history of the proceedings.

16. The claim form was presented on 2 April 2022. The claim concerns the claimant's employment by the respondent between 22 February 2021 and 2 November 2021. The respondent is a medical communications agency and the claimant worked as a medical editor. The reason given by the respondent for the claimant's dismissal was poor performance.

17. The claimant suffers from an impairment of her right arm. Employment Judge J Burns found at a public preliminary hearing on 1 September 2022 that the claimant had the disability or disabilities of epicondylitis and arc syndrome at the time of her employment.

18. The claimant brings a number of claims. She says that the respondent imposed provisions, criteria or practices ('PCPs'), including as to workload and speed of work which put her at a disadvantage. They failed to make reasonable adjustments and instead extended her probationary period. The respondent is also said to have discriminated due to something arising in consequence of the claimant's disability (her performance issues or perceived performance issues) in extending her probationary period and dismissing her. There are victimisation claims relating to how the claimant was treated when she made a complaint about her dismissal, a breach of contract claim relating to notice pay and claims in relation to an alleged breach of the right to be accompanied to a disciplinary meeting and in respect of holiday pay.

19. A significant issue between the parties is as to whether the respondent had actual or constructive knowledge of the claimant's disability. That issue requires the Tribunal to resolve disputes of fact between the parties as to what the claimant said about her impairments to her manager, Ms Brown, or the HR manager, Ms Jones. There are also fact sensitive issues as to whether the respondent had actual or constructive knowledge that the PCPs were putting the claimant at a disadvantage and whether they were in fact putting the claimant at a disadvantage. There are factual issues as to whether the claimant's disability was causing the performance issues / perceived performance issues and what support the claimant was provided with in relation to performance issues raised with her. There are factual issues about the claimant's request to reduce her working hours and how this was handled.

20. In its grounds of resistance, the respondent said:
The Claimant and Ms Brown had various email exchanges about the injury. The Respondent understood this was a temporary injury and had no cause to believe that this was a substantial or long-term condition. At no point did the Claimant state that her hand injury was or had exacerbated an underlying condition. In particular the Claimant did not mention either orally or in writing epicondylitis, arc syndrome or any other long term condition.

10. The Respondent only became aware of the Claimant's above conditions, as set out in paragraph 7 of her particulars of claim when they read the particulars of claim.
…

14. At no point did the Claimant state that the reason for her poor performance was her temporary hand injury. Neither did she state that her hand injury had exacerbated an underlying condition or indeed that she had an underlying condition.

21. On 22 June 2022, there was a case management preliminary hearing in front of Employment Judge Davidson. The claimant represented herself and Mr Sheehan appeared for the respondent. The full merits hearing was listed for 18, 19 and 20 January 2023 and directions were given which include:

- Disclosure was to take place by 30 September 2022. The order stated: *Documents includes recordings, emails, text messages, social media and other electronic information. This includes all relevant documents in the parties' possession or control even if they do not support their case;*
- The respondent was to prepare and provide a copy of the bundle to the claimant by 14 October 2022;
- Witness statements were to be exchanged by 4 January 2023.

22. There was an open preliminary hearing on 1 September 2022 at which Employment Judge J Burns decided the issue of disability in the claimant's favour. There were issues between the parties about disclosure for that

hearing and the Judge made an order for specific disclosure of a document relating to a display screen equipment assessment.

23. Employment Judge Burns also had reason to raise with the claimant her disclosure obligations:

In the bundle appeared a judgment in the Employment Tribunal in Bury St Edmonds dated 20/6/22 in case number 3307564 2020 in which the Claimant was held not to be disabled. That judgment refers to the period when the Claimant was employed by a previous employer namely Iqvia Ltd which the Claimant told me was from October 2019 to March 2020. In 3307564 2020 she had relied (in her unsuccessful claim to have been disabled), on the same impairments as she relies on in the instant claims. A different period is under examination in the instant claims, and the issue is to be considered afresh. However it is regrettable that the Claimant, contrary to her disclosure obligations in the instant litigation, failed to disclose this relevant document, which instead was found and disclosed by the Respondent's solicitors. There are no written reasons for this previous judgment and when I asked the Claimant, who was present when the oral reasons were given, for a summary, she was unwilling or unable to comply with my request.

24. The correspondence which predates that hearing shows that the parties were significantly in dispute about procedural matters, including disclosure. We are not in a position to form any judgement as to whether either side was substantially at fault in relation to those matters.

25. The claimant was not satisfied with the respondent's compliance with Employment Judge Burns' specific disclosure order and on 15 September 2022, the claimant applied to strike out the response on the basis of what she said was the respondent's scandalous and vexatious conduct in relation to procedural steps for the preliminary hearing and disclosure. How that application was handled by the Tribunal was not clear from the documents we saw.

26. On 30 September 2022 the respondent sent the claimant a disclosure bundle. They wrote:

In accordance with our ongoing duty of disclosure, we're taking instruction to ensure we fulfil our obligations and all relevant documents are disclosed so more documents may follow which we'll disclose as soon as possible.

27. On 7 October 2022, the respondent chased the claimant for her disclosure

We respectfully request that this is provided to myself on behalf of the Respondent by no later than 5pm Monday 10th October 2022. You will be

aware that the hearing bundle is due to be agreed by Friday 14th October and we will be unable to collate / agree this without the Claimant's documents.

In accordance with our ongoing duty of disclosure, we are also finalising a supplemental bundle with further documents provided by our client and will send this to you early next week.

We look forward to receiving your client's disclosure bundle before then so as to assist with the collation of a draft hearing bundle and index.

28. Also on 7 October 2022 the claimant sent the respondent a 'disclosure index'. She said:

This may be revised and further documents will be added in accordance with the ongoing duty of disclosure.

I have received your initial bundle and will be finalising my documents next week.

If documents come to my attention or possession after 14 October, I will be sending these…

29. We observe that it appears that both parties may have used the 'ongoing duty of disclosure' as a pretext for not doing a thorough disclosure exercise at the appropriate time and subsequently disclosing documents in a piecemeal fashion.

30. It appears that documents from the claimant's list were provided in this piecemeal way and on 17 October 2022 the respondent wrote saying that the delay in disclosure was delaying preparation of the bundle and asking the claimant to agree a revised date of 11 November 2022

31. The claimant declined to agree the variation and said she was maintaining her application to strike out. We note that at this point the claimant was apparently engaged in detail with the disclosure process and continued to be critical of the respondent's disclosure.

32. There was extensive further correspondence about disclosure The claimant asked for a number of documents. An extensive supplemental disclosure bundle was sent to the claimant by the respondent on 31 October 2022. The claimant sent some items by way of further disclosure on 10 November 2022.

33. On 28 November 2022, the respondent sent the claimant a draft electronic hearing bundle and asked for an address to send a hard copy. They asked for her comments so that the bundle could be finalised.

34. On 5 December 2022, the claimant wrote to the respondent saying that she had been unwell for the last few weeks and unable to prepare, but that she would be sending some further documents, some of which were in the second list that she had sent to the respondent and some of which 'I am discovering,

identifying and locating'. The claimant had difficulties accessing the electronic bundle but did not provide an address for a hard copy bundle to be delivered to.

35. Ongoing disputes about the hearing bundle led Employment Judge J Burns to order on 16 December 2022 that the respondent should finalise the hearing bundle immediately and provide a copy to the claimant by email and that if the claimant wished to refer to documents which were not in the respondent's bundle she should prepare a supplementary bundle by no later than 24 December 2022.

36. On 20 December 2022, the respondent sent the claimant an electronic bundle and index. On 24 December 2022 the claimant sent the respondent a draft supplementary bundle index. She said that she had been unwell and would get documents over to the respondent in the next few days. She raised concerns about whether her documents had been included in the respondent's bundle. As we understand it, the index provided by the claimant referred for the first time to the following handwritten notes, including*:*

Hand written notes – 26 August 2021

46. Hand written notes – 24 September 2021

47. Hand written notes – 2 November – dismissal meeting

48. Hand written notes – re. Claimant will be dismissed next

37. On 27 December 2022, the claimant wrote to the Tribunal saying she had been unwell and unable to finalise the supplemental bundle by the date ordered.

38. On 30 December 2022, the claimant sent a further index and supplementary bundle to the respondent. She asked the respondent for further documents on 31 December 2022 and on 4 January 2023 the respondent sent the claimant a further section of the bundle including some documents she had previously asked for. On 6 January 2023 the respondent responded further to the claimant's disclosure requests and expressed concern about documents in the claimant's supplementary bundle which had not previously been disclosed, in particular handwritten notes.

39. At the claimant's request the respondent agreed to delay the exchange of witness statements until 9 January 2023.

39. On 9 January 2023, the claimant wrote to the respondent:

Due to your late disclosure of all my payslips, and the list of issues from the Tribunal being incomplete, continuing non-disclosure, the witness statement cannot be finalised. Many other documents in your bundle, especially IM messages and correspondence between management and other employees,

will affect the list of issues to be dealt with. This list needs to be revised. Did you prepare this list?

The list of issues had been prepared in the course of the case management hearing.

40. On 9 January 2023, the respondent wrote to the Tribunal about the claimant not exchanging witness statements and applied for an unless order. The respondent wrote:

The payslips which the Claimant refers to ought to have been in the Claimant's possession already and given that these payslips are not relevant to the issues in this matter the Respondent rejects the contention that this should delay the Claimant's preparation of her witness statement.

Similarly, the Claimant has not explained why the Tribunal's list of issues is not accurate and furthermore we cannot see why there is any cause to change the list of issues in this matter. The list of issues was not originally sent at the same time as the CMOs but at the request of the Respondent it was later sent to both parties on 13 December 2022 at 09:51.

41. The claimant's objections to the unless order attached GP notes which showed that the claimant had attended her GP with ill health issues on 14 December 2022 which caused a referral to the emergency department. She raised concerns about various matters including the disclosure issues which had arisen.

42. On 10 January 2023, Employment Judge J Burns issued an unless order requiring the claimant to serve her final signed and dated witness statement for trial by 4 pm on 12 January 2023.

43; Witness statements were exchanged on 12 January 2023. The claimant's statement was clearly incomplete. Someone who had been assisting her to draft it had left questions for the claimant to fill in. There were references to documents without the inclusion of the relevant page numbers from the bundle.

44. The claimant's statement at paragraph 35 said with reference to the 26 August 2021 meeting with Ms Brown (the meeting at which her probation period was extended): 'I have to prepare transcripts of a recording of this meeting and this will be supplied.'

45. So far as the 2 November 2021 dismissal meeting was concerned, paragraph 69 refers to the claimant's notes in her supplementary bundle. At paragraph 70, the claimant said: 'I have to prepare transcripts of a recording of this meeting and this will be supplied'.

46. Ms Brown's witness statement dealt with her knowledge of disability. She said that she was aware the claimant suffered a hand injury in June 2021 but she said that she did not know the claimant had an underlying condition until she read her claim form. Ms Brown gave very detailed evidence of what she

said were the claimant's performance issues and how she attempted to address these with her. She expressed the view that for most of the issues the claimant's hand injury would not have been a reasonable explanation

47. On 13 January 2023, the claimant wrote to the respondents:

I am unable to deal with your email below as I have already informed you on Monday 9 January about the disclosure you sent on Friday which I saw at the weekend, that I could not get my witness statement done/finalised. To comply with the unless order I had to send you a witness statement, but I reserve my right to add to this as I have stated in it clearly. I am unwell and have been this week, while trying to deal with the unless order. I will not be able to do the hearing next week.

Are you in agreement with a postponement?

48. The account of what occurred next is taken from our case management orders:

The claimant had applied to postpone the hearing in advance at a point when we understood she was acting in person. The background is that she suffers from a disability affecting her arm and shoulder.

On 15 January 2023, the claimant had written to the Tribunal:

I am the Claimant in the above claim and I am representing myself. The final hearing is currently scheduled for 18 to 20 January 2023. Unfortunately I have not been well and am currently unwell, and therefore I have not been in a position to prepare sufficiently for the final hearing or to attend it. I have been in contact with my GP and my GP has confirmed that I am not currently well enough to prepare for the final hearing; my GP has provided written confirmation of this, which is attached. After that appointment, I injured my finger on Friday evening, making my disability more aggravated, which led to today's GP appointment. Please find attached the additional fit note from the doctor, so that the Tribunal and the Respondent are aware of my current position.

In light of the above, I am requesting that the hearing scheduled for 18 to 20 January 2023 be postponed and re-listed at a later date, as stated in my email below of two days ago.

My health situation is outside of my control and therefore I trust that the Tribunal and the Respondent will be prepared to agree to my request. If it is not agreed then I would be severely prejudice particularly as I am a litigant in person. For the avoidance of doubt, someone else has assisted me with the drafting of this email as I am so unwell. I do apologise for the short notice of this, but as I say I have been unwell.

I would also like to draw the Tribunal's attention to the fact that the Respondent has been disclosing documents late. The exchange of witness statements has now taken place although it was difficult for me to do this partly because of my

declining health at the time and also because of the Respondent's late disclosure of certain documents.

I believe that I should be well enough to attend a final hearing from mid-February.

The respondent had objected to the postponement and Employment Judge Adkin had refused the application in a communication which appears to have only reached the parties on 17 January 2023, the day before the hearing was due to start.

The claimant applied again on 17 January 2023, with further medical evidence, saying:

To provide more detail about specific ways in which I will be unable to take part in the hearing is my ability to recall, ability to speak have been affected. I am unable to use the computer, unable to open documents, turn pages, unable to sit for longer than 15-20 minutes. This is all due to the pain in my swollen finger, hand, both arms discomfort and headaches.

Employment Judge Adkin refused that request and said the claimant could renew the application at the hearing.

49. The events of that hearing are recorded in our case management orders and these Reasons should be read in conjunction with those case management orders.

50. On that occasion we heard the evidence of Ms Jones. At one point in cross examination, Ms Andrews suggested that Ms Jones' evidence of the dismissal meeting on November 2021 would be shown to be false by a recording of the meeting.

51. We made the following relevant orders:

Claimant's recording(s)

49. Miss Andrews, whilst cross examining Ms Jones about a meeting, made reference to an audio recording allegedly made by the claimant which had not been disclosed by the claimant. The recording was referred to in a manner which suggested that it would be produced at a later date and Ms Jones' evidence would thereby be shown to be false.

50. If the claimant had documents which advanced her case and on which she intended to rely, they should have been disclosed before exchange of witness statements. We made it clear that it was too late for the claimant to seek to have any such recording or transcript of recording admitted in evidence and that it would be inappropriate to refer to the recording(s) in evidence or submissions. Miss Andrews told the Tribunal that the claimant was not seeking any further disclosure and we proceeded on the basis that the

respondent's bundle and claimant's supplementary bundle contain all the documentary evidence we will be considering.

Witness statements

52. The claimant's witness statement was incomplete in a way which made it difficult for the Tribunal to use. We were conscious that she should not be given the opportunity to amend her evidence in a way which was unfair to the respondent, particularly as Ms Jones had given her evidence. We therefore made an order in the following terms

53. The claimant must send to the respondent and the Tribunal by 4 pm on 24 February 2023 her witness statement revised in the following ways only:

53.1 To include page numbers in the bundle and supplementary bundle where documents are referred to;

53.2 To include dates where these are missing;

53.3 To remove any references to recordings;

53.4 To answer the questions posed in the text at paragraphs 14, 30 and implicitly at paragraph 55. The amendments should be clearly noted whether by way of underlining, tracked changes or otherwise.

54. By 4 pm on 10 March 2023, the respondent will write to the claimant and the Tribunal with any objections to the amendments, FAO EJ Joffe.

55. By 4 pm on 24 March 2023, the claimant will write to the respondent and Tribunal responding to any objections, FAO EJ Joffe.

52. The parties' disputes carried on after the January 2023 hearing. The claimant provided medical evidence on 21 February 2023 in the form of a letter from her GP which answered some but not all of the questions which had been posed:

Mrs Shaukia is registered at the Kingston Health Centre. I received a request from her to answer various questions pertaining to her health for her upcoming employment tribunal. She has been registered at the health centre since February 2019. she has seen various GPs including speaking to myself Dr Kabza (GP).

I have briefly reviewed her medical records. She has a history over the last 2 to 3 years of neck, shoulder and arm issues. She had had normal investigations including an MRI scan and nerve conduction studies. As her symptoms are musculoskeletal in origin they tend to be intermittent and wax and wane with no obvious triggers although they seem to occur more commonly when she is under more stress. Due to this relation to stress it has made it difficult for her to attend the previous tribunal hearings in January 2023, but she was able to listen in with her advocate representing her on the day. When the pain flares she reports finding it difficult particularly to scroll through digital documents as the process exacerbates her symptoms. It is

impossible to predict her prognosis in the future although in view of the above any steps to reduce the stress she experiences around the tribunal hearings would lead to less chance that her symptoms flare.

She has mentioned to me that she plans to attend with an advocate in the future and in addition, provision of a printed hard copy of documents so she can turn physical pages rather than having to scroll this will be beneficial Regular breaks will also help.

53. On 21 February 2023, the respondent made an application to strike out on the basis that the medical evidence did not comply with the orders made:

Order Requested

The Respondent submits an application for strike out of the Claimant's claim, under Rule 37 (1) (c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, on the basis that the Claimant has failed to comply with the Order set out at paragraph 56 of the CMOs, dated 23 January 2023.

The letter from the Claimant's GP, sent by the Claimant's representative earlier today, falls short in answering the questions which were clearly set out by the Tribunal in the CMOs. The Claimant's representative appears to acknowledge in her covering email that the letter from Dr Kazba is deficient in her comment that the Claimant will provide another statement detailing the steps in which she took to comply with the Order.

Despite the promise of an explanation, at present the Claimant has made no efforts to notify the Respondent of her attempts to comply with the Order, nor has she highlighted any difficulties in doing so. Instead, she has simply provided the Tribunal with incomplete medical evidence two days later than the 17 February 2023 deadline.

It is our contention that the case is not being conducted in accordance with the overriding objective. It is neither efficient nor fair for issues to be revisited repeatedly. The way in which the matter has been and continues to be conducted is wasting both the Tribunal's and the Respondent's resources.

In light of this, we respectfully request her claim to be struck out.

54. On 26 February 2023, the claimant served a witness statement with supporting documents evidencing her efforts to get her GP to answer the Tribunal's questions. The claimant also served her revised witness statement at about this time although the covering email was not included in the bundle prepared by the respondent.

55. On 28 February 2023, the respondent made a further strike out application concerned with the claimant's compliance with the order in relation to her witness statement:

Application to strike out

We maintain our position that the Respondent remains deeply concerned the Claimant is conducting this litigation unreasonably and vexatiously given her continued non-compliance with the timing and scope of the Tribunal's CMOs. Providing the amended witness statement within the parameters set out at paragraph 53 is not a complex order and the Claimant has had substantial time to comply with it.

We therefore continue to seek an order striking out the Claimant's claim, under Rule 37 (1) (c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, on the basis that the Claimant has failed to comply with the paragraph 53 of the CMOs by amending her witness statement beyond what was prescribed by the Order as well as not doing what it requested in an attempt to unfairly advance her case. This is not a situation where the Claimant has materially or substantially complied with the Order. On the contrary this is a situation where she has materially failed to comply with it for the reasons we have given. So, the Tribunal is in a position to strike out for non-compliance.

We contend the Tribunal should do so given:

1. The Claimant's continuing non-compliance and over-reach will cause severe prejudice to the Respondent given that one of the Respondent's witnesses has already given oral evidence and both of the Respondent's witness statements have been served on the Claimant;

2. If left untouched there will be a failure to do justice between the parties as the Tribunal clearly ordered simultaneous exchange of statements but the Claimant has taken advantage of her original failure to comply with the exchange of witness statements order to revise her statement in light of the Respondent's statements and evidence to address points she would otherwise not have addressed;

3. The Claimant's consistent failure to comply with the Tribunal's orders. As stated in our letter of 27 February she has also failed to comply with the Tribunal's order at paragraph 56 of the CMOs on the provision of medical evidence. These letters should be read together as forming part of one whole application based on the Claimant's conduct since the hearing last month.

So, this remains more than a procedural objection. The manner in which she has dealt with her witness statement again goes to the heart of respect for the Tribunal's orders and fairness between the parties.

56. On 28 February 2023, the claimant wrote to the respondent in respect of the respondent's objection to the audio recording of the 26 August 2021 meeting, which had by then been raised by the claimant:

I am aware that the Tribunal have stated that the audio recording may not be included, however as I am sure you are aware, Ms Jones complained on a number of occasions of recollection issues due to the passage of time.

You are also aware that the claimant has been allowed to include her notes of the hearing on the 26th August and her witness statement does in fact refer to a transcript of the hearing, between her and Kitty Brown which reference the claimant confirming her disability and its length.

In the circumstances, I have attached a link to the audio recording of that event to enable her to refresh her memory prior to the hearing, such that she will be able to recall its events and assist the Tribunal in its fact-finding mission.

57. On 1 March 2023, the claimant served a further version of her witness statement with more page numbers included. Ms Andrews said that they believed they had complied with the order as to the revised witness statement. She had rectified a failure to send the audio recording previously and said:

The claimant makes an application to include that audio recording. There is no ambush. The matter does not go to the evidence of Ms Jones and the claimant is content that should Ms Brown wish to do so, she can amend her statement which has not yet been entered into evidence. This document is highly relevant to the issue of knowledge and given that there is some time before the hearing, the respondent will not be prejudiced by its disclosure, save for the fact that it tends to verify the claimant's own notes already included in the bundle

Given the alleged issues raised by the respondent and the above, it is submitted that a PH should be set down by a separate Judge to determine the issues

58. On 9 March 2023, the Tribunal wrote to the parties inter alia asking for their dates for an open preliminary hearing on the respondent's strike out applications between 16 March 2023 and the end of April 2023.

59. On 13 March 2023, the claimant wrote again to the respondent again about the recording:

Following on from the video link, I have not heard back from you to confirm you have downloaded it. I would be grateful if you could confirm.

I have now attached the transcript of that recording. I have made it clear that the claimant intends to make an application for this to be included and has no objection if Ms Brown wishes to amend her statement to the matters relating to knowledge as she has not given evidence at this stage

Alternatively, the respondent may now wish to concede knowledge. Clearly, as I have stated, your client is on notice that this evidence exists and Ms Brown now has the opportunity to have her memory refreshed.

60. On 15 March 2023, the respondent confirmed that it had been able to download the recording.

61. On 16 March 2023 there was further correspondence from both parties to the Tribunal about the respondent's strike out applications. The respondent offered only two dates for a preliminary hearing – 14 or 17 April 2023. The claimant objected to the applications and said:

The version of events stated by the respondent is quite at odds with reality and it is submitted that now they have a copy of the audio recording are worried that their witness's credibility is now potentially in tatters.

To be clear, with regards the latter, I have offered to the respondent's representative for the witness to amend her statement such that the Tribunal will only see the updated version and such that there would be no credibility issue on that specific point.

As for the respondents dates of unavailability, they cannot expect a Tribunal to hold a hearing on their whim on 2 specific dates.

If the Tribunal is minded to set down a hearing, then clearly that should also cover the scope of the audio/transcript to be dealt with by a different Judge to one who is currently sitting in the substantive case.

Clearly, for any such PH, the claimant will also rely upon the audio recording of Mrs Jones which demonstrates her unreasonable conduct when giving evidence as to the respondent's unreasonable behaviour.

62. I was not available on either of the dates the respondent said that it could attend a preliminary hearing although there was delay in informing the parties until 20 April 2023 that the applications would have to be heard at the resumed full merits hearing. The parties were invited to but did not request a case management preliminary hearing.

63. In May 2023 there was some correspondence about the contents of a 'preliminary hearing bundle' and about a document the respondent disclosed, which was a publicly available document which related to an issue about the display screen equipment assessment the claimant had undertaken whilst employed by the respondent ('the IHASCO document').

64. On 15 May 2023 the respondent wrote to the Tribunal and the claimant: 'Matters have moved on since our letter of 28 February 2023 which our counsel will make full submissions in respect of on Wednesday morning.' The claimant wrote back saying that counsel should be ordered to provide those submissions in advance.

Law

Rule 37(1)(b)

65. This subrule provides that a claim or response (or part) may be struck out if 'the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent… has been scandalous, unreasonable or vexatious'.

66. In order to strike out for unreasonable conduct, the tribunal must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible; in either case, striking out must be a proportionate response — Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA:
The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true ,merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him – though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.

67. The meaning of 'scandalous' was considered by the Court of Appeal in Bennet v London Borough of Southwark [2002] IRLR 407:
The trinity of epithets 'scandalous, frivolous or vexatious' has a very long history which has not been examined in this appeal, but I am confident that the relevant meaning is not the colloquial one. Without seeking to be prescriptive, the word 'scandalous' in its present context seems to me to embrace two somewhat narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process.

68. In A-G v Barker [2000] 1 FLR 759, the Court of Appeal said about vexatious conduct:
The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process

69. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must generally

consider whether a fair trial is still possible: De Keyser Ltd v Wilson [2001] IRLR 324, EAT. Conduct such as deliberate flouting of a tribunal order, can lead directly to the question of a striking-out order, however in ordinary circumstances, neither a claim nor a defence can be struck out on the basis of a party's conduct unless a conclusion is reached that a fair trial is no longer possible.

70. In Bolch v Chipman 2004 IRLR 140, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:
- before making a striking-out order under what is now rule 37(1)(b), an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings;
- once such a finding has been made, he or she must consider, in accordance with *De Keyser Ltd v Wilson* whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed;
- even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

71. In Emuemukoro v Croma Vigilant (Scotland) Ltd and ors [2022] ICR 327, EAT, Choudhury P said:
I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzadis proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.

It was a highly relevant factor, as confirmed by the Court of Appeal in Blockbuster, that the strike-out application was being considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in that hearing window. In other words, there were no options, such as giving the respondents more time within the trial window to produce

its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the respondents), then that leaves only the strike-out. The tribunal did not err in considering the prejudice to the respondents; indeed, it was bound to take that into account in reaching its decision.

72. The EAT in Bayley v Whitbread Hotel Co Ltd t/a Marriott Worsley Park Hotel and anor EAT 0046/07 emphasised the importance of a tribunal clearly analysing whether a fair trial is possible. That was a case in which the claimant's father, representing him, withheld portions of expert reports on the claimant's dyslexia. This had come to light during the full merits hearing:

20. We are content to assume for present purposes that the Tribunal was entitled to find that Mr. Bayley senior's conduct in producing only "edited highlights" of Mrs. Pilkington's reports was not only wrong-headed (which Mr. Mulholland was very willing to accept) but constituted a deliberate decision to do something which he appreciated was wrong. We have some concerns about whether that finding may be too harsh, particularly in view of the factual errors identified at para. 13 above: cf. Mr. Mulholland's "point (c)". But we appreciate that the Tribunal had the advantage, which we have not had, of seeing Mr. Bayley senior in action over several days and of hearing him cross-examined. However, there is clear authority that even in a case of deliberate failures of disclosure the fundamental question for the Tribunal is whether a party's admitted conduct has rendered a fair trial impossible: see Bolch v Chipman [2004] IRLR 140, per Burton P. at para 55 (2) citing De Keyser Limited v Wilson [2001] IRLR 324 and Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167. A further authority to similar effect which was not cited to the Tribunal (it had been decided but not at that point reported) is Blockbuster Entertainment Ltd. v James [2006] IRLR 630: see per Sedley LJ at para. 5 (p. 633).

21. The Tribunal did indeed address that fundamental question, at para. 11.4 (see para. 17 above), and it held that a fair trial was not possible because of the impact of the withholdings on both the hearing which had already taken place on the issue whether the Claimant was disabled and on the hearing then in progress (though as we read it, it was the former on which it placed the greater weight). We do not believe that its conclusion in either respect is sustainable. We consider them in turn.

22. As regards the preliminary issue, we can identify nothing in the withheld portions of P and Q which could have had a significant bearing on the experts' assessment on the questions of whether the Claimant suffered from dyslexia to such a degree as to constitute a disability. That is entirely to be expected. Mrs. Pilkington believed that the Claimant was severely dyslexic. That appeared from her technical appendix, and unsurprisingly the omitted sections of P and Q were entirely consistent with that view. It is hard therefore to see how they could have affected the views of either expert – whether Mr. Snodgrass, who relied on Mrs. Pilkington's findings as stated in P1 and Q1, or (still less) Dr. Wilson, who had conducted his own assessment. Mr. Peacock was unable to point to anything in the full P or Q that tended to undermine the conclusions in P1 and Q1 that the Claimant was severely dyslexic. Nor, more

importantly, could the Tribunal: it went no further than saying that it was "a matter of conjecture" (see para. 10.2.8 quoted at para. 18 (3) above) and that the omissions must have had "some impact" though it could not say how much (para. 10.2.12, loc. cit.). That is insufficient While we fully accept that it was unnecessary for the Respondents to show that the outcome would certainly have been different if the withheld passages had been available, it was necessary to show at least that there was a real chance that it might have been. Otherwise there is no injustice and no risk to a fair disposal of the issues between the parties.

23. *As regards the reasonable adjustments issue, we have already expressed our view – in agreement with the Tribunal – that the withheld passages were potentially relevant, particularly because of the references to the Claimant's reluctance to accept that he needed help. But those passages were now before the Tribunal. They could be deployed in evidence and used as the basis of cross-examination. The only prejudice to a fair trial which Mr. Peacock was able to suggest was that the Respondents had decided not to seek evidence from Dr Wilson for the purpose of the reasonable adjustments hearing and that they might have taken a different decision if they had seen P and Q earlier. (This also seems to have been the point being made in the Tribunal in the garbled passage from para. 10.2.11 of the Reasons quoted at para. 18 (3) above.) We are unimpressed by this point. It is hard to see what Dr Wilson, from a specifically medical expertise, could have added to the points that could be made from P and Q themselves. But in any event the Respondents had had Q since June and had appreciated its significance since early September. If they had wanted to call Dr Wilson they had ample opportunity to do so.*

24. *Accordingly we believe that both the bases for the Tribunal's view that a fair trial was impossible are flawed. Even granted that Mr. Bayley senior had behaved deplorably, no irreparable damage had been done. We fear that the Tribunal allowed its strong (arguably over-strong) disapproval of the way that Mr. Bayley senior had conducted himself to obscure a clear assessment of what actual harm had been done*.

Rule 37(1)(c)

73. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), we must have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. That requires us to consider all relevant factors, including:

- the magnitude of the non-compliance
- whether the default was the responsibility of the party or his or her representative
- what disruption, unfairness or prejudice has been caused
- whether a fair hearing would still be possible, and
- whether striking out or some lesser remedy would be an appropriate response to the disobedience.
  Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371, EAT.

In that case the EAT found that a Tribunal had erred in striking out an employer's response for failure to comply with an order for simultaneous exchange of witness statements. The employer had not in fact taken any unfair advantage, the claimant was not prejudiced and a fair trial was still possible. Even if there had been unfairness the Tribunal had power to exclude all or part of a witness statement if it was proportionate to do so.

Disclosure obligations

74. Rule 31 of the Tribunal Rules 2013 gives an employment tribunal a specific power to order 'any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court or, in Scotland, by a sheriff'.

75. Standard disclosure is governed by rule 31.6 CPR and requires a party to disclose: (a) the documents on which he or she relies, and (b) the documents that adversely affect his or her own case, adversely affect another party's case or support another party's case.

76. The effect of rule 31 is that the Tribunal's powers in respect of disclosure are as set out in CPR Pt 31. CPR PD 31 contains very helpful and clear statements of the principles which should be applied in relation to disclosure in order to achieve a fair disposal of the issues between the parties. It is not open to a tribunal to order disclosure of documents which would not be disclosable under the CPR. The test for standard disclosure under r.31.6 is not one of relevance. The test was whether an order for discovery was "necessary for fairly disposing of the proceedings".
Santander UK plc and ors v Bharaj [2021] ICR 580, EAT.

Submissions

Respondent's submissions

77. After his oral submissions and to make sure that the Tribunal and Ms Andrews understood fully the ambit of the new strike out application(s), we asked Mr Sheehan to reduce the application to a written summary of all the applications and he produced the following account:

The Respondent relies upon the following rules

1. Rule 37(1)(b), "*that the manner in which the proceedings have been conducted by or on behalf of the respondent (as the case may be) has been scandalous, unreasonable or vexatious."* For the avoidance of doubt, the Respondent says that the conduct set out below was scandalous, unreasonable and vexatious, and relies upon each in the alternative.

2. Rule 37(1)(c), "*for non-compliance with any of these Rules or with an order of the Tribunal*".

The Respondent relies upon the following Rules, orders and directions of the Tribunal

3. The order of Employment Judge Davidson dated 20 June 2022 ('the First Order').

4. The order of Employment Judge Burns dated 16 December 2022 ('the Second Order').

5. The order of this Tribunal (Employment Judge Joffe, Mr Ashby, and Mr Brione), ('the Third Order').

The Respondent relies upon the following conduct

6. The Claimant's late disclosure of the recording of the probationary meeting between the Claimant and Kitty Brown on 26 August 2021, which took place on 28 February 2023. The Respondent says that this is unreasonable, vexatious and scandalous conduct, and that it is a breach of paragraphs 12 and 13 of the First Order, paragraph (ii) of the Second Order, and paragraph 50 of the Third Order.

7. The Claimant's extensive amendments to her witness statement, which go beyond what was permitted by the Tribunal, which impermissibly adds new evidence, which repeat contents of the transcript of the covert recording of 26 August 2021 and which reply to the evidence of the Respondent's witnesses. The Respondent contends that this is unreasonable, vexatious and scandalous conduct, and that it a breach of paragraph 20 of the First Order and paragraphs 52 and 53 of the Third Order.

8. The Claimant's inclusion of handwritten notes within the supplemental bundle, which are incomplete transcripts of undisclosed covert recordings. The Respondent contends that this is unreasonable, vexatious and scandalous conduct, and that it demonstrates a breach of paragraphs 12 and 13 of the First Order.

9. The Claimant's non-disclosure of any and all other covert recordings as she possesses, the extent of which are still unknown to the Respondent but which the Respondent contends must at least include recordings of all three probationary meetings. The Respondent says that this is unreasonable, vexatious and scandalous conduct, and that it is a breach of paragraphs 12 and 13 of the First Order and of paragraph (ii) of the Second Order.

10. The Claimant's inadequate medical evidence. The Respondent contends that this is unreasonable conduct and that it is a breach of paragraph 56 of the Third Order.

78. In his oral submissions, Mr Sheehan's emphasis was very much on the effects of the claimant's disclosure of the transcript and recording of 26 August 2021.

79. That recording showed that, contrary to the evidence in Ms Brown's witness statement, the claimant had referred to the impairments which have been found to be a disability at that meeting. Ms Brown would be forced to alter her evidence mid trial and her recollection would be called into question more generally. This was unfair to the respondent as the situation would not have arisen if Ms Brown had had the opportunity to refresh her memory at an earlier stage. The claimant had achieved that outcome by a blatant and deliberate breach of the Tribunal's unambiguous direction.

80. Mr Sheehan pointed out that the transcript of the 26 August 2021 recording was largely identical to the handwritten notes written on pages of a diary earlier disclosed by the claimant in her supplementary bundle (but not earlier). He said that this suggested that she had written this and other notes in the diary to obscure the fact that they were transcripts of audio recordings. It seemed highly likely that there were more covert recordings, particularly of significant meetings such as the September 2021 probation meeting and the further meeting on 26 August 2021 about a change to her working hours, which the claimant had not disclosed. He submitted that the likelihood was that the claimant had cherry picked those recordings which she considered assisted her case.

81. Mr Sheehan pointed out that the claimant's disclosure obligations had been made very clear to her in orders and that her own long disputes about disclosure showed she understood disclosure obligations and was engaged with the disclosure process. The fact that she referred to the transcripts in her witness statement showed that she was aware of her obligation to disclose them.

82. The claimant's correspondence in which she introduced the recording showed what was intended. Although the recording was initially proffered as an opportunity for Ms Brown to refresh her memory, the later reference to Ms Brown having her credibility 'in tatters' showed what the claimant was seeking to achieve in disclosing the recording and transcript mid-way through the full merits hearing. He submitted that the claimant had achieved that outcome by misusing the rules of the Tribunal and that her conduct was an abuse of process. In addition, the claimant was still threatening to make use of the transcript of the November 2021 meeting which the Tribunal had expressly ordered should not be referred to.

83. Mr Sheehan made further submissions about the complexion the transcript put on the handwritten notes only disclosed in the supplementary bundle The handwritten notes for 26 August 2021 were not only clearly a transcription of the recording, they were also only a partial transcription. The part transcribed was the part the claimant would have perceived was helpful to her in that it was the part where she referred to her impairments, She had not included the parts of the meeting where performance concerns were discussed with her, passages which Mr Sheehan submitted supported the respondent's case. The claimant was attempting to pass off as contemporaneous notes of the meeting a subsequently prepared partial transcription of a recording of that meeting.

84. Looking through that lens at other handwritten notes in the claimant's supplementary bundle, it seemed likely that the handwritten notes relating to the 2 November 2021 meeting were also a partial transcription of the recording the claimant said she had made of that meeting. It was impossible without the recording to say what had been suppressed from the transcription but it was also evidently incomplete.

85. Mr Sheehan submitted that the claimant had tried to include only material which advantaged her and had sought to sneak the transcripts in under the guise of handwritten notes. The parties could not be said to be on an even footing given the claimant's approach.

86. On the subject of the claimant's amended witness statement, Mr Sheehan said that she had gone far beyond the Tribunal's order in introducing new evidence, some of which was explicitly in response to the respondent's witness statements. She also included material which was directly taken from the transcript of the recording of the 26 August 2021 meeting.

87. Mr Sheehan said that it would not be fair for the Tribunal to consider this statement, which had been produced by amendments the Tribunal had ordered the claimant not to make, after she had seen the respondent's witness statements and heard the oral evidence of Ms Jones.

88. Mr Sheehan submitted that, because of the claimant's failures to comply with directions, there was now so much wrong with the hearing and so much prejudice to the respondent, that it was not possible to repair the damage and have a fair trial. Mr Sheehan initially submitted in reliance on Croma Vigilant that the question as whether a fair trial was possible in the three day trial window but later relied on a submission that a fair trial was no longer possible at all.

89. On the subject of the medical evidence, Mr Sheehan said that the claimant had not attempted to improve on the evidence initially provided, after receiving the letter from the GP but did not press the application under this head with any force.

Claimant's submissions

90. On the subject of the medical evidence, Ms Andrews said that the Tribunal had not in fact granted a postponement on the last occasion and that the purpose of requiring the medical evidence had been in order to ascertain a prognosis and the claimant's fitness for future hearings. The claimant had done everything she could to comply with the Tribunal's order and could not be blamed for her GP's failure to answer all of the questions asked.

91. On the subject of the amendments to the witness statement, Ms Andrews said that she did not agree that the order allowing for some revisions of the witness

statement was unambiguous although she did not expand on that submission. She said that in any event the correct course would be to strike out those parts of the witness statement which went beyond the order rather than striking out the claimant's case.

92. Ms Andrews spent some time explaining why the transcript was disclosed and I asked her why the claimant had not disclosed the recordings / transcripts at the appropriate time in the disclosure process. Ms Andrews did not have instructions on the point when I first raised it with her. She objected to the request and I made clear to her that it was an invitation and not an order for the claimant to explain what had occurred.

93. We had Ms Andrews' thorough and helpful skeleton on the morning of 19 May 2023. She summarised the relevant law in respect of rule 37(1)(b) and (c) and submitted that the respondent had not argued that the claimant's conduct was scandalous or vexatious as defined in Bennet v London Borough of Southwark (scandalous) and A-G v Barker (vexatious).

94. Ms Andrews relied on Croma Vigilant for the proposition that unreasonable conduct was a 'deliberate and persistent disregard of the required procedural steps' which would probably exclude mere oversight or negligence. Negligent or reckless breaches should be considered under rule 37(1)(c). there must be an adequate basis for a Tribunal's finding that there has been unreasonable conduct and we must identify the magnitude of the breach as part of our exercise in assessing proportionality.

95. Ms Andrews relied on this passage in Blockbuster:
It takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.

96. The skeleton recorded the history of the proceedings including some instructions taken from the claimant as to history of the proceedings and the reasons for deficiencies in her earlier disclosure. In brief there were references to the claimant's other ongoing employment tribunal proceedings which had required her attention and caused stress and a flare up of her disability at the relevant times. It was said that the claimant had drip fed her own disclosure as she had had to pile up all her documents in her study after a leak at her home. She had found her diary over the Christmas period in 2022 when her husband was assisting her to go through the 'mess caused by the leak'.

97. It was only when the claimant was preparing her statement in response to the unless order that she recalled the audio recording. Her focus was on the witness statement given the unless order. The transcript had to wait.

98. We had some discussion with the parties as to whether the claimant would be called to give evidence about these matters, but ultimately nether party requested that she do so. In the circumstances, the Tribunal did not require her to give evidence but there were some consequences in terms of the ambit of the findings we felt able to make.

99. Ms Andrews submitted that the way in which the new bases for strike out had been presented had been unreasonable. No notice of the applications had been given. The unreasonable behaviour of the respondent was something the Tribunal should bear in mind when considering the proportionality test. Furthermore, it was not open to the respondent to ambush the claimant with an application which required the claimant to have a day to prepare to respond to it and then argue that the trial window had been used up in support of a submission that a fair trial was no longer possible within the trial window.

100. If some unfairness accrued, the Tribunal could use its powers short of strike out to, for example, exclude all or part of a witness statement.

101. As to whether there had been breaches of disclosure orders. Ms Andrews argued that the history showed that both parties had failed to comply with their disclosure duties, the latest example being the respondent's recent disclosure of the IHASCO document. Ms Andrews said that the disclosure of this document would require Ms Jones to be recalled in any event and so she could be asked questions about other matters,

102. Ms Andrews argued that the recording and transcript were not required to be disclosed as they did not meet the test for disclosure; they were not required for a fair disposal of the issues because the claimant had disclosed her handwritten notes of the meetings. Insofar as the notes did not cover the latter part of the meeting the essential issues raised in that part of the meeting were elsewhere recorded in the respondent's notes of the meeting and the claimant was not disputing that they were raised.

103. Alternatively, the claimant had given disclosure within the meaning of the CPR by referring to the transcripts in her witness statement. The respondent could have asked for copies of the transcripts at that point.

104. The claimant's instructions were that there were no other covert recordings and it was unreasonable for the respondent to suggest without evidence that there were further such recordings.

105. As to whether a fair hearing was possible, Ms Andrews said that the issue of the recording / transcript could have been dealt with by a different Judge as the claimant had requested but in any event the Tribunal were capable of appreciating that Ms Brown may have misremembered the 26 August 2021 meeting and not generalising about her credibility based on the difference between her witness statement and what she was now having to accept due to the disclosure of the recording / transcript.

106. If the Tribunal did consider that there was unfairness it should consider less draconian alternatives to strike out. It could refuse the application to admit the transcript, and permit Ms Brown to provide an updated statement. It could order a rehearing by a different tribunal. Only one witness had been heard and she would need to be recalled to deal with the IHASCO documents so only half a day would be wasted. She submitted that the respondent would benefit from a rehearing as Ms Jones would have the opportunity to improve on her evidence from the first occasion; she submitted Ms Jones was 'wholly unbelievable' on that occasion.

107. There were a number of disputes between the representatives during the course of submissions as to who had the right to reply to what in the other parties 'submissions. We had sought to allow some flexibility in allowing further submissions, in part because the Tribunal had drawn to the parties' attention the case of Bayley after Mr Sheehan's submissions and in part to ensure that we had all of both parties' relevant submissions. We were disappointed that the parties evidently viewed one another and the Tribunals' efforts with suspicion.

Conclusions

108. Although we considered that the respondent had behaved unreasonably in not giving the claimant advance notice of the additional grounds on which it was applying to strike out, we considered that ultimately the claimant had been given a reasonable opportunity to make representations on all of the grounds, in accordance with rule 37(2), in circumstances where it seemed to us to be in accordance with the overriding objective that we hear the application because of the Tribunal's concerns that a fair trial might not be possible.

109. We considered first whether there were breaches of orders. If there were such breaches was there also unreasonable conduct?

The medical evidence

110. The claimant had not complied with the letter of the order which required her to send to the respondent and the Tribunal the written answers provided by her medical practitioner. We were satisfied, however that she had done what she could to comply with the order but that ultimately it was not within her power to compel her GP to do more than he had done.

The claimant's revised witness statement

111. We did not accept that the order made was ambiguous. It set out very clearly what the claimant was permitted to do by way of revisions to her witness statement. We made it very clear that the purpose of allowing the amendments was to make the statement more comprehensible by the Tribunal. We made clear that the claimant was not to make further revisions as these could create unfairness in circumstances where the respondent had disclosed its own witness statements and one of its witnesses had completed her oral evidence.

112. We considered that the claimant, who is an educated woman, and Ms Andrews, who has legal training and acts as an advocate, would both have been entirely aware that the revisions went beyond what the Tribunal had ordered and that the breach of the order was deliberate. The claimant clearly considered that she had had insufficient time to draft her statement as a result of the unless order and was hoping that either the respondent would not complain or the Tribunal would simply allow the wider amendments she made. We considered that this behaviour was unreasonable.

Disclosure issues

113. We were not in a position to make any findings that there were other recordings which had not been disclosed and we focussed on the recordings we knew about.

114. These recordings (and the claimant's handwritten notes) were not disclosed on the original date for mutual disclosure. We bear in mind that both parties continued to disclose documents throughout the period up to and beyond exchange of witness statements. The breach of the order became significant in relation to the transcripts after witness statements had been exchanged.

115. The documents were clearly disclosable since they advanced the claimant's case on points relating to knowledge of disability and potentially advanced the respondent's case in relation to what was said about the claimant's performance at that 26 August 2021 meeting. It was sophistry to suggest there was no failure to comply with disclosure orders after the handwritten notes were disclosed (late but before disclosure of witness statements). The handwritten notes did not purport to be transcripts of recordings and were radically incomplete. That failure of disclosure was not and could not be repaired by the existence of some limited handwritten notes disclosed by the respondent covering the same part of the meeting, as Ms Andrews submitted.

116. Our orders from the last occasion relieved the claimant of the obligation to disclose the recordings and transcripts. We made those orders, which neither party objected to at the time, because we were conscious that late production of recordings of disputed meetings was likely to produce possibly irreparable

unfairness to witnesses who had provided statements and given oral evidence in ignorance of the existence of those recordings. The orders were very clear that it was not just recordings / transcripts of the 2 November 2021 meeting which were not to be referred to, but all recordings / transcripts.

117. What followed was the disclosure of the 26 August 2021 recording and transcript. Again this seems to us to have been a deliberate breach of our very clear orders. It was, it seems to us, disingenuous of the claimant to suggest that the recording was being disclosed in a neutral way to assist Ms Brown to refresh her memory.

118. Once the recording was disclosed, contrary to the order, as Mr Sheehan pointed out, the respondent had no option but to have Ms Brown correct the evidence in her witness statement. He and his instructing solicitors would not have been complying with their duties to the Tribunal had any other path been pursued. Excluding the transcript ceased to be a useful option.

119. It was submitted on behalf of the claimant that this mischief could have been avoided by a different employment judge considering whether the recording should be admitted and Ms Brown then being permitted to submit a new witness statement.

120. Even disregarding the significant additional burden on Tribunal resource, the proposal would have involved:

- A different employment judge varying this Tribunal's original order. No material change of circumstances was advanced which would make such a variation appropriate in any event;
- Had the order been varied, the existing Tribunal would still have had to put out of its minds Ms Brown's original statement and its divergence from any updated statement produced in response to a dispute about a recording and transcript.

Unreasonable conduct

121. We did not consider that there was any unreasonable conduct in relation to the order for medical evidence.

122. In relation to the amendments to the witness statement, we considered that these were deliberate. It seemed to us that both the claimant and her representative would have been well aware that the amendments were not within the terms of the order. We considered this conduct to be unreasonable.

123. In relation to the breaches of disclosure orders, the account given by the claimant that she had forgotten about the recordings right up until the time she was preparing her witness statement was difficult to understand. These were important meetings and what was said at those meetings was of great

significance to the claims. The claimant had taken the trouble to covertly record the meetings. She had either contemporaneously or more recently partially transcribed the meetings in handwriting in a diary. We were not invited to hear evidence from the claimant and in the absence of evidence, we do not consider that we can properly find that what the claimant told her representative is false, or that her behaviour was unreasonable up to that point in time. For similar reasons we do not feel able to conclude that there are other recordings which have been suppressed.

124. No explanation has been given of how the claimant came to make a partial transcription of at least the 26 August 2021 recording in the diary and then present it as simply 'handwritten notes'.

125. What we consider was deliberate on the part of both the claimant and her representative was the decision to disclose the transcript in breach of this Tribunal's case management orders. In the circumstances described, we consider that that behaviour was unreasonable.

Is a fair trial still possible?

126. Under both subrules, we have to consider very carefully the magnitude of the risk that a fair trial is not possible, whether strike out is proportionate and whether there are ways of avoiding the unfairness short of strike out.

127. The magnitude of the non compliance is significant both in relation to the witness statement and the transcript. Both orders were made in the presence of the claimant and her representative for reasons which were explained at the time. In both cases we consider it is both the claimant and her representative who are responsible.

128. We considered carefully the damage or potential damage created by disclosure of the recording and transcript in breach of our order.

129. It is not only the credibility of Ms Brown which was put in issue by disclosure of the recording and transcript. When Ms Jones gave her evidence, she was challenged on the basis of a recording which we did not understand was in evidence. The suggestion was that her evidence was going to be shown to be untrue by a document which would be produced later.

130. This was clearly entirely unfair to Ms Jones and was the reason we ordered that there be no further references to recordings or transcripts. The situation was that, in order to be fair to the claimant, we had made time for her to obtain further evidence of her ill health and had in the end postponed her evidence to another occasion because of her ill health. To be fair to the respondent, who informed us that Ms Jones' personal circumstances (which were explained to us) meant that they might feel unable to ask her to attend on a future occasion, we heard the evidence of Ms Jones. In the difficult

circumstances of this case, we concluded that it was overall fairest to both parties to have a part heard hearing. A corollary of that is that there would be unfairness to Ms Jones and the respondent if the claimant was allowed to produce or refer to previously undisclosed documentary evidence which impugned the evidence given by Ms Jones.

131. In breach of the order we made as to the admission of recordings and transcripts, the claimant disclosed the transcript of a meeting that Ms Jones was not involved in, the 26 August 2021 meeting.

132. The disclosure of that transcript caused the respondent's representatives to compare the transcript with handwritten notes which were in the claimant's supplementary bundle. That comparison showed that the handwritten notes written on diary pages spanning that date appeared to be a partial transcription of the recording made by the claimant of the meeting.

133. As Mr Sheehan pointed out, the disclosure of the recordings after Ms Brown had produced and the Tribunal had read her witness statement meant that Ms Brown would have to resile from evidence in her witness statement, such as the evidence she gave that the claimant had never referred to her impairments.

134. The Tribunal panel is well aware of the reflections of Leggatt J in Gestmin SGPS SA v Credit Suisse [2013] EWCA 3560 (Comm):

While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be

recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the

strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

135. Even bearing in mind all of that wisdom on the subject of memory and oral evidence, we were troubled by the unfairness to a witness of a late disclosure of this kind. It would be difficult for the panel, presented with the various disputes of fact between the two parties, not to have in mind the fact that Ms Brown had at best failed to remember some significant aspects of this meeting on 26 August 2021. Although Ms Brown would no doubt have also been cross examined on the respondent's response, which denied knowledge of the claimant's impairments, and might in any event have given evidence that she had not in fact recalled the reference to the impairments until she heard the recording / saw the transcript, she would at least have had the opportunity in live evidence to establish the genuineness or otherwise of her failure to remember the claimant discussing her impairments, without having produced a witness statement denying the discussion occurred. There is a difference between being challenged on a position in a pleading and being challenged on a position in a pleading in tandem with the evidence in your witness statement. In relation to matters in the case where there was no documentary record of any kind, we would now be in difficulty putting out of our minds Ms Brown's continuing failure to remember these matters being discussed in the 26 August 2021 meeting.

136. There was a further effect of the disclosure of the transcript. On the last occasion, as we have said, we had a suggestion in cross examination that Ms Jones' evidence was inconsistent with a recording of the 2 November 2021 meeting. Without more flesh on that suggestion, we felt able to assess her evidence of that meeting on the basis that there was no incontrovertible documentary evidence which undermined it. Ms Jones was cross examined to the effect that the claimant had named her impairments at the meeting and said that they had been affecting her for over 1.5 years. Ms Jones denied that that was the case.

137. The disclosure of the 26 August 2021 recording and transcript altered the impression the Tribunal had as to the provenance of the claimant's handwritten notes in the bundle. It now appeared that the notes of the 2 November 2021 meeting might also be a partial transcript of a recording of the meeting rather than a note made at the time or subsequently purely from the claimant's memory. That inevitably affected the Tribunal's impression of her oral evidence . Ms Jones could have been recalled but she would then have been exposed to questioning about the relationship between evidence she gave months earlier and such further evidence as she gave at the resumed hearing. Damage to her credibility would already have been done by her earlier evidence.

138. The situation as it appeared to the Tribunal was that both of the respondent's witnesses had been put in a position where their witness statements had been prepared on an erroneous basis. Doing our very best, we struggled to see how we could prevent our perception of the respondent's witnesses' evidence being affected. At best, they would have to say that their memory of key meetings was inaccurate. In a case where much was likely to turn on which version of disputed events we accepted, and where we would be required to find some material facts on the basis of oral evidence only, it was difficult to see how the respondent could now have a fair hearing. This situation had come about because the claimant had sought to introduce a transcript in direct contravention of a Tribunal order that she should not do so, having failed, whether deliberately or accidentally, for many months to disclose the recordings at a point when they could have been dealt with fairly.

139. We considered what options there were short of strike out. One possibility which was mentioned by the claimant's representative was that we could direct that the entire full merits hearing be started afresh in front of a new tribunal. We would have had to list for no less than four hearing days and would be looking at a hearing probably no earlier than January 2024. There would be further costs to the respondent.

140. We bore in mind that the strike out application which seemed to us to have merit (that relating to the claimant's conduct in relationship to recordings and transcripts) was only made on the morning of the hearing and the loss of the hearing time set aside for the balance of the full merits hearing cannot be laid entirely at the claimant's door. We did not consider solely whether a fair hearing was possible within the existing trial window but whether one was possible at all. We concluded, for the reasons explained above, that it was not possible to have a fair hearing in front of the existing tribunal panel at all. Excluding transcripts would make no difference since we were aware of some at least of their contents.

141. We had to consider whether there was a proportionate alternative to strike out. So far as the claimant's witness statement was concerned, it could have been amended to remove the sections which went beyond the order. A fair

trial was not impossible and, had this been the only issue, we would have considered ordering sections be removed from the witness statement.

142. The claimant suggested that an alternative to strike out was to direct that the hearing be recommenced in front of a fresh tribunal. We had to consider whether there could be a fair trial in those circumstances and whether that would be proportionate.

143. Listing the matter in front of a new tribunal would have required new dates even if the respondent had made its strike out application in good time so that the application could have been responded to and decided on the first day of the listing. We could not think of any sensible way in which a fresh tribunal could approach the matter without being aware of this tribunal's orders, which would themselves reveal the issues which in our view are preventing a fair trial being possible.

144. We bore in mind also the following matters:

There would be not insignificant added costs for the respondent;

By the time the matter could be relisted for a fresh tribunal, the evidence would be a full year older and less cogent than it was in January 2023;

The proceedings would be hanging over the respondent's witnesses;

Resources would be diverted from other tribunal users.

145. These are the consequences of the deliberate decision by the claimant to produce the recording and transcript in deliberate disobedience to Tribunal orders.

146. Also of some concern to us was the fact that the claimant had on several occasions, as it seemed to us, deliberately disregarded clear orders – in relation to the content of her witness statement and in relation to the disclosure of the transcript. So a subsidiary but significant concern which we weighed in the balance was a concern that the claimant would continue to disregard orders in a way which might cause further unfairness. There was no good or clear explanation as to why the claimant had acted in this way.

147. We therefore reluctantly arrived at the conclusion that, on these particular facts, the unusual course of exercising our discretion to strike out the claimant's claims was appropriate. There was no alternative course which repaired the unfairness and was otherwise in accordance with the overriding objective.

Employment Judge Joffe
13th June 2023

Sent to the parties on:
13/06/2023

For the Tribunal Office