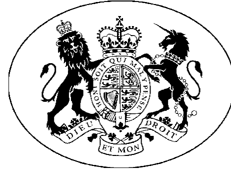

EMPLOYMENT TRIBUNALS

Claimant: Mr D Hoppe

Respondent: Commissioners for His Majesty's Revenue and Customs

Heard at: Manchester **On:** 15, 16, 17, 18, 19, 22, 23, 24 and 25 May 2023

Before: Employment Judge Cookson
Ms Atkinson
Ms Cadbury

REPRESENTATION:

Claimant: In person (by CVP and by telephone on 15 and 16 May)
Respondent: Mr J Hurd (Counsel)

JUDGMENT

The claimant's claims are struck out in accordance with Rule 37(1)(b) and 37(1)(e) of the Employment Tribunal Rules of Procedure 2013.

REASONS

Introduction

1. These reasons explain why the Employment Tribunal determined on day nine of a 14-day hearing that there was no option but to take the exceptional step of striking out the claimant's claims because of his unreasonable conduct and because a fair trial was no longer possible.

2. Unusually the tribunal notified the claimant of its decision on 25 May 2023 but did not give any oral reasons. The reason for that was that in the past it is clear that the claimant has misunderstood decisions and explanations provided orally and it appears to be source of frustration and suspicion on his part if a later document does not correspond with his recollection of what he has been told. In the circumstances the tribunal wanted the claimant should know what its decision was, but we also

concluded that it was appropriate for a full and detailed written explanation to be provided to the claimant to avoid any misunderstanding or confusion.

3. In order to explain why such a decision was taken, it is necessary to set out and explain the significant procedural background to these claims, to give an explanation of the difficulties the Tribunal faced during the course of the hearing and to explain why the Tribunal reached the conclusions it did. These various matters are addressed below.

Documents before this Tribunal panel at the hearing

4. The Tribunal panel had before it the following documents:

(1) A bundle of witness statements comprising the claimant's witness statement and respondent witness statements from Jan Beesley, John Owen, Kerry Black, Lee Elliott, Marie-Claire Uhart, Tim Starkey (although it was made clear that Mr Starkey would not be attending to give evidence), and Eleanor Gibson.

(2) A main hearing bundle running to just over 1,000 pages.

(3) A bundle of documents relevant to the Civil Service Injury Benefit Scheme ("CSIBS").

(4) A bundle of relevant pleadings including the various claim forms and responses but also including Case Management Orders, Employment Tribunal Judges and EAT Judgments and Orders.

(5) The Tribunal bundle for the 2013 proceedings which runs to some 14 lever arch files and includes some 4,600 pages.

(6) Written submissions from the respondent which include an explanation of the questions that Mr Hurd would put to the claimant in cross examination.

(7) A cast list and chronology.

(8) An email sent by the claimant to the Employment Tribunal on 10 May 2023 which he had asserted should be seen by the Tribunal panel.

(9) An email from the claimant received by the Tribunal on the morning of the first day at 09.33.

(10) A number of emails received from the claimant during the course of the hearing.

(11) A letter from the claimant's GP received by the Tribunal at around mid-day on 18 May 2023.

5. Oral evidence was heard from Ms Gibson, Mr Beesley, Mrs Black and Mr Owen.

Background: The Claims and Procedural History

6. As the employment judge explained to the claimant at the outset of these proceedings, there are a large number of judgments and case management orders which are to be found in the pleadings bundle which the Tribunal had read at the outset. However, the Tribunal holds a number of very large files of correspondence which the judge had not read. This record of the procedural history refers to some correspondence but to be clear that is based on the records contained in the judgments and case management orders. The tribunal had not attempted to read the many large correspondence files in this case.

7. What is set out below seeks to provide a relevant background summary, but it does not purport to be comprehensive.

8. Mr Hoppe (who is referred to as "the claimant" throughout these Reasons) worked for many years as a civil servant for HMRC. In July 2013 he presented a Tribunal claim against his employer alleging that he had been subject to detrimental treatment for having made protected disclosures in relation to a particular scheme called Managed Office Infrastructure Services ("MOIS") which he considered to be unlawful. The claimant's complaints were that because he had raised objections and concerns in relation to the MOIS scheme, he had been subjected to bullying, victimisation and harassment. That claim, which was given case number 2409957/2013, was never considered at a final hearing because the claimant failed to comply with an unless order requiring him to produce a witness statement and his claim was dismissed in consequence of that failure.

9. In June 2015 the claimant was dismissed for alleged gross misconduct. In the course of disclosure in relation to the 2013 claim, the claimant had disclosed a number of covert recordings he had made of meetings with managers. Following a disciplinary process, the respondent concluded that those covert recordings had been a breach of its Code of Practice and dismissed the claimant as a result. Following his dismissal, the claimant brought a number of complaints under the Employment Rights 1996; that his dismissal had been automatically unfair because he had made a protected disclosure under s103A, and on the grounds that it was procedurally and substantively unfair contrary to section 94 and in accordance with the provisions of section 98. He also brought complaints under s47B that he had been subject to detrimental treatment during his employment on the grounds that he had made protected disclosures. That claim, known as "the 2015 claim" is claim number 2408488/2015.

10. At the time the 2015 claim was lodged, claims in the Employment Tribunal were subject to a fees regime. The claimant's claim had initially been rejected because he had paid the wrong fee (albeit that he had sought to pay more than was required to lodge a claim), and when his claim was re-presented it was found that the claim had not been presented in time. The claimant brought an appeal against that decision, but in the meantime the Supreme Court found the fees regime to be unlawful in the Unison case and in consequence the 2015 claim was reinstated in 2018.

11. During subsequent case management discussions issues were raised about the extent to which the complaints of detriment raised by the claimant were in fact a restatement of elements of the 2013 litigation. In a reserved decision sent to the parties

on 3 January 2020, Regional Employment Judge Parkin struck out all of the complaints of detrimental treatment. That decision was appealed and in due course three of those complaints were reinstated by His Honour Judge Auerbach in a Judgment dated 11 October 2021.

12. In August 2017 the claimant presented a claim against the respondent, Health Assured Limited, the National Audit Office ("NAO") and the Independent Office of Police Complaints ("IOPC"). That is claim number 2404018/2017. In 2018 the complaints against the NAO and the IOPC were struck out.

13. In July 2018 the claimant presented a claim of detriment on the ground of a protected disclosure against the Cabinet Office and the Civil Service Commission. It was given case number 2413478/2018. That claim was struck out in April 2019 by Employment Judge Ross.

14. On 20 December 2018 the claimant presented a further protected disclosure detriment claim which (after processing by the Tribunal) was given a 2019 case number (2400171/2019) This is referred to as "the 2019 claim". That claim was brought against the respondent, a body called MyCSP, Health Management Limited, the Cabinet Office and the Minister for the Civil Service. It was combined with the other surviving claims.

15. In 2020 REJ Parkin struck out the claims against MyCSP, Health Management Limited and the Minister in the 2019 claim. In April 2021, following a further preliminary hearing, Employment Judge Slater dismissed the 2017 claim against Health Assured Limited and the 2019 claim against the Cabinet Office.

16. In 2021 the claimant issued a further claim against the respondent, the Minister for the Civil Service and the Government Legal Department. This was claim number 2410506/2021. The complaints in that claim were struck out by Employment Judge Horne in judgments sent to the parties in October 2022 and January 2023.

17. Accordingly the claims to be considered by this tribunal were the 2015 claim and the surviving elements of the 2017 and 2019 claims.

Background: Past case management issues relevant to these proceedings

18. It is relevant to note that in addition to the Judgments in relation to the striking out of the claimant's various claims already referred to, various significant case management issues had arisen and been dealt with by judges in the course of these proceedings. These reasons do not seek to set out all of the contested issues but, in particular, in the course of 2021 there were a series of case management applications and decisions made by Regional Employment Judge Franey, many of which the claimant sought to appeal unsuccessfully. The issues at the heart of those case management decisions are relevant to the circumstances which have led to the strike out judgment because of the claimant's reluctance to accept those case management decisions.

19. In particular, the claimant had continued to argue that the Tribunal should consider expert evidence regarding the legality of MOIS, both before REJ Franey and

the EAT in his appeals. This was an issue which can be traced back to the 2013 proceedings. An application for expert evidence in relation to that was first made to, and refused by, REJ Parkin in 2019. That application has been restated on a number of occasions since then, but it has always been refused and this tribunal refused to re-entertain that application.

20. Throughout the proceedings, the applications for expert evidence had been resisted by the respondent on the ground that there was no need for evidence, and it has pointed to the fact that a similar application had been made and rejected in the course of the 2013 litigation. In 2019 REJ Parkin refused permission to rely on expert evidence when the application was first made in these proceedings, not only because the application was premature at the stage of the proceedings when it had been raised, but because expert evidence would not assist the Tribunal to determine the issues before it.

21. The claimant appealed that decision, and a hearing took place on 30 October 2019 before the then President of the Employment Appeal Tribunal, the Honourable Mr Justice Choudhury, under rule 3(10) of the Employment Appeal Tribunal Rules 1993. The President summarised the argument in this way:

> *"A fundamental part of the claimant's case is that [HMRC's] refusal to accept that MOIS was illegal caused him detriment. As it was a fundamental part of the case, it is something which the Tribunal would need to determine…"*

22. The President rejected that argument and explained why. He said this:

> *"It is apparent from the provisions of the Employment Rights Act 1996 that none of that requires the Tribunal to find, as a matter of fact, whether or not the allegation is true.*
>
> *Of course, what the claimant says is that the employer's failure to accept the illegality of the position resulted in further mistreatment of him, and in order to address that part of the case, whereby the respondent is, effectively, justifying its actions, expert evidence would assist.*
>
> *I disagree. The respondent does not have a defence of justification if there is detriment…That goes to show, it seems to me, that the critical issues which the Tribunal needs to determine do not require expert evidence."*

23. Notwithstanding those comments from the President of the EAT, in January 2021 the claimant made a further request to rely on expert evidence concerning the illegality of MOIS. A preliminary hearing was listed to take place on 16 June 2021 to consider that request and a number of other matters. On 15 June 2021 the claimant emailed his written submissions for the hearing the following day. One of the submissions made by the claimant was:

> *"It is clearly an absolute requirement that in hearing the case brought the Tribunal shall have to reach a determination of if the employer acted illegally treating me the way it has when acting illegally in awarding MOIS…"*

24. In response to that the respondent sought to produce its own written submissions because it was clear that the claimant would not be attending the preliminary hearing. REJ Franey postponed the preliminary hearing, and the respondent was invited to reply to the claimant's written submissions on the basis that REJ Franey would then decide how to proceed.

25. In response the claimant complained that the Tribunal had not responded to an allegation of bias that he had also made, and over the following days the claimant continued to send emails, some of which made applications for specific disclosure, and also seeking clarification of the respondent's position on his submissions. He also continued to make assertions about the relevance (in his view) of expert evidence. Although the respondent had suggested it would provide a reply to the claimant's submissions, it appears no submissions were in fact forthcoming.

26. On 25 June 2021 REJ Franey wrote a detailed letter to the parties. That letter addressed the application for expert evidence, and he observed that the matter *"did not appear to have any bearing on the issues to be determined at the final hearing".* He also added that the claimant would have a chance to explain the relevance of these matters at the next preliminary hearing before a decision is taken as to whether permission to rely on expert evidence would be granted.

27. The claimant objected to the observations made by REJ Franey, and he sent a number of replies to that letter. In due course REJ Franey sent the parties a Case Management Order which, amongst other things, refused the claimant's application to postpone the final hearing (although that application would later be successful in light of medical evidence); refused permission for the claimant to rely on expert evidence and refused to make an order or disclosure of an application for an injunction.

28. On the issue of the legality of MOIS, REJ Franey provided the following explanation:

> *"Essentially, the claimant says that he made protected disclosures about the legality of this matter which then resulted in unlawful treatment. As the [combined] List of Issues sought to make clear, the Tribunal is not determining whether there was illegality in the MOIS. It is concerned with identifying whether the claimant disclosed information which he reasonably believed tended to show illegality. That is a question of assessing the information before him and whether he had a reasonable belief at the time he made the disclosure. Whether, with hindsight, he was right or wrong is not for the Tribunal to determine. Expert evidence of this kind would not therefore be relevant.*
>
> *Nor would it be relevant to the question of unfair dismissal. It appears the claimant intends to argue that the decision to dismiss him for breaching trust and confidence through covert recordings was unfair because it was HMRC that had already destroyed trust and confidence by acting illegally. The fairness of the dismissal would be assessed in the light of the information available at the time to HMRC, or information which could reasonably have been acquired through an investigation within the band of reasonable responses. Introducing expert evidence in hindsight is not relevant to the question of fairness."*

29. That decision was appealed to the EAT and this ground was considered by His Honour Judge Auerbach in his judgment in October 2021. The appeal on this point was dismissed and HHJ Judge Auerbach explained his decision as follows:

> *"The claimant applied to be permitted to call expert evidence on the question of the legality of MOIS. As I have described, his case that it was illegal and fraudulent was at the heart of his claimed disclosures, and he considers that the fact that it had never been accepted that he is correct about that is itself a grievous wrong. But Regional Employment Judge Franey was right to say that the lawfulness of MOIS, as such, is not an issue which needs to be determined in order to adjudicate whether he made protected disclosures or the other issues raised by his complaints that are live before the Tribunal. The claimant also contends that, if he is right about MOIS being illegal, then the conduct for which HMRC says he was dismissed could not properly have been regarded as conduct undermining the relationship and justifying his dismissal; and therefore the issue does have to be determined for that reason. But this too is legally misconceived."*

Background: Postponement of the final hearing in November 2021 and subsequent case management

30. As already noted, in October 2021 the EAT reinstated three of the detriment claims struck out in January 2020 but the claimant's other appeals against various decisions and Case Management Orders made by the Employment Tribunal were unsuccessful. The surviving claims were due to be considered by the Employment Tribunal at a full merits hearing commencing on 29 November 2021. However, at a preliminary hearing on 10 November 2021 Regional Employment Judge Franey decided that the final hearing had to be postponed.

31. In brief summary, the reason why that postponement was necessary was that the claimant was not ready, the litigation had taken a toll on the claimant's mental health, and he provided a letter from his GP in support of what he said about that. It is material to note that amongst the reasons given was that the claimant could not deal with the thousands of pages of documents that were disclosed to him and he still could not accept the Tribunal's view of the scope of the issues for determination. The final hearing was relisted to be heard in 2023, that is this hearing. Regional Employment Judge Franey warned the parties at the time he allowed the adjournment application that in his view if a further adjournment of the final hearing was necessary, consideration would have to be given as to whether a fair trial was still possible.

32. REJ Franey postponed the final hearing. At the same time he made a number of Case Management Orders. Those included that "*by Friday 14 January 2022 the claimant must have confirmed to the respondent whether there are any other additional documents to be inserted into the final hearing bundle, providing copies or identifying those documents if so"*. REJ Franey also ordered that *"by 11 March 2022 each party must have supplied to the other a written statement from each person that it is proposed will give evidence at the final hearing. Witness statements served after this date may be relied upon only with permission from the Tribunal"*.

33. On the application of the claimant, those Case Management Orders were varied slightly so that the claimant was allowed until 25 March 2022 to identify other relevant documents (although he never did), and the date for exchange of witness statements was extended to Friday 20 May 2022.

34. Notwithstanding those orders, there was still a failure by the claimant to produce his witness statement or any disclosure. This tribunal has not seen any evidence that disclosure of relevant documents has never been provided, although the claimant has suggested that he did in fact comply, perhaps by sending links to websites where relevant documents could be found. His witness statement was not sent to the respondent until he was compelled to do so by an order of REJ Franey sent to the parties on 23 December 2022 as follows:

> *"(1) Unless the Tribunal orders otherwise, the claimant will not be permitted at the final hearing to refer to any documents beyond those disclosed to him by the respondent unless by Friday 27 January 2023 he has provided to the respondent a copy of any such documents on which he wishes to rely.*
>
> *(2) Unless the claimant has provided the respondent with a copy of his witness statement by Friday 24 February 2023 his claims will be dismissed without further order under rule 38."*

35. The witness statement produced by the claimant in response to that order for this hearing does not refer to any documents in any of the bundles before this tribunal. The witness statement is 19 pages long and runs to some 156 paragraphs. Much of the first 80 or so paragraphs deal with issues relevant to the 2013 litigation, although there are brief references to some of the protected disclosures in this case. The claimant's continued insistence that expert evidence on MOIS is required is evident in para 28, despite this having been addressed by REJ Parkin, REJ Franey, HHJ Auberbach and HHJ Choudhury. His witness statement says this at para 28

> *"28. I am aware that the Tribunal has on various points proclaimed it does not need to determine a view about if the MOIS deal was or was not legal and this may be true if the Tribunal is simply looking to determine if it was reasonable for me to believe I was making a protected disclosure in order to decide if the PIDA protections should apply that is not the only decision the Tribunal shall need to take here because the legality or not determines if the Employers actions towards me are reasonable or not. If the Employer could truly claim to think that the concerns raised were baseless then its actions could be considered to be unfortunate bad management. However the truth of the matter which is to be for the Tribunal to consider and determine is that the status of the legality was clear to the Employer and that the steps taken by the Employer towards me were clearly illegal."*

36. Paragraph 135 of the statement says, "*the litigation so far*" and the paragraphs which follow largely refer to the claimant's grievances about the tribunal process. It is only in the 55 paragraphs between 80 and 135, over some 6 pages, that the claimant sets out his evidence in relation to the claims before this tribunal. Some of the detriments we had to consider are referred to only in passing and indeed it is difficult to see where the claimant has set out his claim in relation to others at all. Even his

unfair dismissal claim is only referred to in relatively brief terms. These matters would prove to be significant because of the difficulties the tribunal panel faced understanding in precise terms what the claimant's case was.

What happened at this hearing

Summary of the nine days

37. During the first two days of the hearing, the Tribunal heard from the parties on various preliminary matters including the claimant seeking various adjustments to the hearing in addition to those already covered by ground rules identified by REJ Franey; various matters arising out of a series of emails he had sent to the tribunal; timetabling and the list of issues. Those are discussed below. The claimant attended by telephone. Although these discussions might usually be expected to be reasonably brief, the nature of the issues raised by the claimant and his unwillingness to engage with the hearing unless certain matters had been addressed was a significant hurdle to the hearing getting underway.

38. On the third and fourth days the tribunal undertook its reading. When the hearing reconvened on day 5 the claimant attended by CVP. There were further discussions about adjustments and other matters and the tribunal took a formal decision to allow the claimant to make his own recording of the hearing and to refuse to allow the inclusion of additional documents by the claimant, copies of which had not actually been sent to the respondent but referred to as being accessible on various internet links.

39. On the afternoon of day 5 it was possible to start hearing evidence. Evidence was heard from Ms Gibson and Mrs Beesley's evidence was started.

40. On day 6 Mrs Beesley's evidence continued but the hearing finished early because the claimant disconnected at around 2pm after he had been directed to say where in a document a comment that he had said was recorded there was to be found. That claimant failed to re-join, and it was necessary to adjourn for the day.

41. On the morning of day 7 the judge highlighted some timetabling concerns in light of progress and, bearing in mind the need to allow sufficient time for the claimant's cross examination which would require additional breaks, informed the parties that Mrs Beesley and Mrs Black's evidence would need to completed during the course of the day to allow for the evidence of the key witness, the dismissing officer, Mr Owen, on day 8 because he had availability issues for health reasons. Regrettably the claimant disconnected from the hearing at around 3pm before Mrs Black's cross examination had been completed. That was after the claimant had been told he could not cross-examine on something that was part of his 2013 claim. The claimant told the clerk he would not re-join.

42. On the morning of day 8 Mr Owens attended to give evidence. However, an application for a "stay" was made by the claimant which he did not attend to explain. This appeared to be made on various grounds including that the claimant suggested he would be making an appeal, although it was not clear what his appeal would be

against; on the grounds that he needed legal advice; and because of his health although without any supporting medical evidence.

43. Having considered objections from the respondent, the application for a stay, better described as an application for an adjournment, was refused. The respondent then made an application for the claim to be struck out. The claimant did not re-join and the tribunal decided that it would hear Mr Owen's evidence in the claimant's absence and hear the strike out application the following day, to give the claimant time to prepare representations about the strike out application.

44. On day 9 the claimant attended by CVP. The respondent's application and the claimant's objections to that were considered and, after deliberations, the tribunal found it necessary to strike out the claimant's claims for the reasons explained in this judgment and reasons.

The Claimant's Health and the Issue of Reasonable Adjustments

45. Significant time was spent over the first week discussing matters relevant to the claimant's health. It has been clear to employment judges throughout these proceedings that the claimant finds the proceedings extremely difficult to cope with and it is accepted by all concerned that the difficulties he experiences arise to some lesser or greater extent from his mental health conditions. However, it is striking how little medical evidence has been presented by the claimant in support of what he says about his mental health.

46. In terms of this tribunal hearing, the most recent expert evidence before us at this hearing was the 2018 report from the psychiatrist Dr Incaid. That report refers to anxiety and depression. It appears that at the time that report was prepared the claimant's condition had been expected to improve with treatment. It was this report that formed the basis of the adjustments, referred to as "ground rules" put in place before this hearing.

47. The most recent evidence of any sort from the claimant's GP available to us at the start of the hearing was that submitted in support of the application to adjourn the November 2021 hearing. That medical evidence was from Dr Adam, dated 27 October 2021, which confirmed that the claimant's symptoms of anxiety and depression had worsened due to stress associated with these proceedings, and in particular going through evidence of past traumatic events. By October 2021, the claimant's day-to-day activities were being affected by his anxiety and depression, including his ability to concentrate and sleep.

48. At this hearing the claimant told us that he has Complex Post Traumatic Stress Disorder. However, we have not been provided with any evidence of a diagnosis of that condition, let alone any advice from a psychiatrist or other expert about how we could mitigate the impact of that. We asked if the claimant could provide us with additional medical evidence. As the claimant himself pointed out, it might be unlikely that his GP could assist us in providing an expert psychiatric or psychological diagnosis, but the request was made because if the claimant has been assessed as having the disorder presumably his GP would be able to tell us about that from his medical notes.

49. It is of course a matter for claimants how much or how little medical information they disclose, but the absence of expert advice to help us understand any mental health condition or disorder and advice about what we may do to reduce the impact of these proceedings on the claimant has undoubtedly been a challenge in these proceedings. At one stage the claimant appeared to seek to blame the tribunal for the absence of medical evidence, but in July 2021 REJ Franey had observed at a case management hearing that the claimant had not submitted any medical evidence since EJ Holmes had set ground rules in 2020 and in relation to the final hearing said *"it is open to the claimant to set out clearly the ground rules he suggests to enable that final hearing to be effective, supported by medical evidence if he so wishes*". In October 2021 the claimant submitted medical evidence in support of his application to adjourn the hearing starting in November 2021 and that application was granted. The claimant had produced various medical evidence in the past including the psychiatrist's report in 2018 from Dr Incaid and through various GP letters. We therefore could not accept that the tribunal's expectation of medical evidence could have taken the claimant by surprise.

50. The absence of medical evidence to support any application for reasonable adjustments had been raised with the claimant on the first day. Although he appeared to object in principle to this being considered necessary, during the course of the first couple of days he was able to get an appointment with a duty GP and on day 5 we took a break in the morning to enable the claimant to go to his surgery, pick up a letter and send it to us. The letter (described further below) told us little except that the claimant was experiencing stress and emotional difficulties although it did assist us in our decision about adjustments. What it did not do was to help us to understand any more about the claimant's mental health given his repeated insistence that he has another serious mental health condition which we needed to take into account.

51. Although there was an absence of up-to-date medical evidence, it was clear to us, and acknowledged by Mr Hurd, that the claimant was experiencing difficulties because of his mental health. He showed signs of stress. At times he stammered, and he told us that this was not usual for him. He referred to self-harming. He told us that his sleep was disturbed and that he was finding difficulty ordering his thoughts and expressing himself clearly.

52. At times both in the hearing and in correspondence to us the claimant has resorted to swearing and to making accusations of corruption on the part of judges and HMCTS. We knew that he done that before. We recognise that this appears to be an indication of the claimant's stress levels and we have not made any assumptions about the claimant's attitude or the merits of his case as a result. For the reasons explained further below we concluded that the claimant has acted unreasonably at times, whether intentionally or not, but our conclusions about that were not based on his language or the accusations of corruption that he made. It is relevant however to record that it appears to this tribunal that the claimant has a deep-seated belief that the tribunal and the higher courts are corrupt which, despite the employment judge's attempts to offer reassurances about this tribunal's intention to deal with the case as fairly and justly as we could, we were wholly unable to displace. Unfortunately, it appears that that belief has created a barrier to the claimant being able to participate

in these proceedings which we have been unable to overcome and for the reasons explained below that belief eventually became a hurdle to a fair hearing.

Adjustments already in place for the claimant's health before this hearing

53. “Ground rules” were put in place to assist the claimant in the course of the claims before this tribunal in the order of Employment Judge Holmes in November 2020 as follows:

> *“That the Tribunal would inform the claimant of what was to be considered at each hearing, that it would provide written reasons for its decisions, that he would be given two weeks’ notice of actions required of him, and arguments or skeletons within the same timescale, that case management hearings would be conducted remotely, and that all hearings will be recorded by the Tribunal.”*

54. REJ Franey also made or proposed a number of adjustments to enable the claimant to participate in the final hearing. The proposed ground rules for the final hearing were attached to the Case Management Order sent to the parties on 7 October 2021. They are as follows:

> *“(1) Not less than seven days before he starts to give evidence the claimant will be provided by the respondent with a list of the paragraph numbers in his witness statement about which he is to be questioned.*
>
> *(2) The respondent’s witnesses will give evidence before the claimant gives evidence.*
>
> *(3) The claimant can be accompanied by a companion, supporter or advocate of his choice.*
>
> *(4) When being cross examined the claimant will be allowed reasonable additional time on request to consider questions and formulate his response. This may include additional breaks in the hearing, and possibly starting the hearing day later than usual or finishing earlier than usual. The Tribunal hearing the case will determine what is reasonable.*
>
> *(5) When cross examining the respondent’s witnesses the claimant will have the opportunity to have such additional questions as the Tribunal considers reasonable put to those witnesses after they have completed the main part of their evidence. This could be done by recalling the witness to give additional oral evidence or by means of written questions and answers. The means by which it is done and the additional questions which are permitted, are a matter for the Tribunal. Whether witnesses are released from their oath or kept under oath until the additional questions are answered will also be a matter for the Tribunal.”*

55. In addition, the hearing was recorded by the tribunal which is not yet the usual practice in the employment tribunals. Manchester Tribunal has no equipment to allow the routine recordings of hearings but the ability to record hearings via CVP was used.

"Ground rules" and reasonable adjustments put in place for the claimant at this hearing

56. During the first two days of this hearing during discussions to enable the preliminary hearing to proceed we discussed the ground rules above in the course of this hearing;

a. In relation to advance notice of questions, the claimant told us that he did not need that adjustment.

b. In relation to the order of witnesses, there were attendance issues for one respondent witness who has retired which meant the respondent wanted that witness, (Ms Uhart), to give evidence after the claimant, which the claimant did not object to. Other that accommodating that we proceeded on the basis of the respondent witnesses giving evidence first.

c. The claimant told us that there was no-one who could accompany him;

d. In terms of cross-examination, we discussed how the claimant wanted to take breaks. He told us that he would tell us if he needed a break. As the claimant's cross examination never began this was not discussed further.

e. In terms of cross examining the respondent's witnesses, the claimant had been asked to say if he wanted to ask additional questions within 2 days of evidence being completed so that we could seek to manage the evidential process. The claimant was told that he would be allowed to ask additional reasonable questions through the tribunal but no requests to ask such questions were made.

57. The claimant requested that a number of additional adjustments be put into place. As noted, he did not initially produce any medical evidence in support of those requests. The adjustments sought initially were:

a. To be able to attend the hearing including to give evidence and be cross-examined, by telephone;

b. To be able to record the hearing himself.

58. It was explained to the claimant that in considering whether to make an adjustment the tribunal must be able to understand what impairment the adjustment will help with and why and that is why expert medical evidence may be required.

59. Mr Hurd objected to the adjustments on various grounds including that it was not clear why the claimant sought the adjustment in the absence of medical evidence and because it appeared they were not requested to mitigate against the impact of any impairment as such but rather because the claimant does not trust the tribunal.

Recording

60. In terms of recording the claimant referred to the possibility of the respondent's witnesses being intimidated or unsettled if they knew they were being recorded and the risk that the claimant would use the recording in an unauthorised way.

61. The claimant's attention was drawn to the decision of HHJ Choudhury in *Dr Heal v The Chancellor, Master and Scholars of the University of Oxford and others UKEAT/0070/19/DA* which deals with the question of recording, particularly in light of the general prohibition on recording which can be found in the Contempt of Court Act. In that judgment HHJ Choudhury says this at para 27, summarising the position

The effect of these provisions in the present context, read with the authorities above and the terms of s.9 of the 1981 Act, may be summarised as follows:

a. Tribunals are under a duty to make reasonable adjustments to alleviate any substantial disadvantage related to disability in a party's ability to participate in proceedings.

b. Where a disability is declared and adjustments to the Tribunal's procedures are requested in the ET1 form, there is no automatic entitlement for those adjustments to be made. Whether or not the adjustments are made will be a matter of case management for the Tribunal to determine having regard to all relevant factors (including, where applicable, any information provided by or requested from a party) and giving effect to the overriding objective.

c. The Tribunal may consider whether to make a case management order setting out reasonable adjustments either on its own initiative or in response to an application made by a party. d. If an application is made for reasonable adjustments, the Tribunal may deal with such an application in writing, or order that it be dealt with at a preliminary or final hearing: see Rule 30 of the ET Rules.

e. Where the adjustment sought is for permission for a party to record proceedings or parts thereof because of a disability-related inability to take contemporaneous notes or follow proceedings, the Tribunal may take account of the following matters, which are not exhaustive, in determining whether to grant permission:

i. The extent of the inability and any medical or other evidence in support;

ii. Whether the disadvantage in question can be alleviated by other means, such as assistance from another person, the provision of additional time or additional breaks in proceedings;

iii. The extent to which the recording of proceedings will alleviate the disadvantage in question;

iv. The risk that the recording will be used for prohibited purposes, such as to publish recorded material, or extracts therefrom;

v. The views of the other party or parties involved, and, in particular, whether the knowledge that a recording is being made by one party would worry or distract witnesses;

vi. Whether there should be any specific directions or limitations as to the use to which any recorded material may be put;

vii. The means of recording and whether this is likely to cause unreasonable disruption or delay to proceedings.

f. Where an adjustment is made to permit the recording of proceedings, parties ought to be reminded of the express prohibition under s.9(1)(b) of the 1981 Act on publishing such recording or playing it in the hearing of the public or any section of the public. This prohibition is likely to extend to any upload of the recording (or part thereof) on to any publicly accessible website or social media or any other information sharing platform.

62. Following discussions about these matters the claimant told us he would make arrangements to see his GP which he did while the tribunal undertook reading of relevant documents on days three and four.

Attendance by telephone

63. For the first two days of preliminary discussions the claimant was allowed to attend by telephone. To enable recording via CVP this was achieved by him dialling into the video link by telephone. That in itself was not without difficulties. On occasion the claimant disconnected from the call without warning and one of the difficulties where there is attendance by telephone is that it is not immediately apparent to those in the hearing room that this had happened.

64. During the first two days of hearing there were lengthy discussions about the appropriateness of continuing with the claimant's attendance by telephone. Although the claimant had been allowed to attend all previous hearings by telephone, none of them had involved him giving evidence.

65. Mr Hurd on behalf of the respondent objected to the claimant being allowed to give evidence by telephone, pointing out how exceptional that would be, although it is permitted within the scope of the rules. In the course of discussions about that the Employment Judge referred to the Equal Treatment Bench Book. That does refer to the possibility of individuals giving evidence by telephone, but she pointed out that there is limited guidance within the Bench Book about how the interests of justice can be maintained, especially if evidence is given over a sustained period of time, and she pointed out that although this is referred to as a possibility in sections such as that dealing with children giving evidence against an alleged abuser, the discussion within the Bench Book was of a vulnerable witness giving evidence via a live video link, perhaps hidden from view from the alleged abuser, but so that they could be seen by the Judge. This showed how unusual it would be for significantly disputed evidence to be given by telephone unless there were clear medical reasons requiring that adjustment which had not been offered by the claimant.

66. In seeking to understand why this particular adjustment was sought, one of the matters raised by the claimant was that he felt it was necessary to protect his dignity if he became distressed. The claimant also referred to the fact that he felt that this

way of giving evidence was necessary for him to avoid what he felt was the prejudice he has been subject to by the Employment Tribunal.

67. After lengthy discussions the claimant helpfully agreed to try attending the hearing by CVP which would enable the Judge and Tribunal members to see him and in particular assess if he was upset and find it easier to see if he had finished making a point or was simply pausing in the course of asking or answering questions or making submissions. It was suggested by the Employment Judge that the claimant's concerns about his dignity could be managed by him being allowed to turn off his CVP camera if he became upset, as a way of us managing him taking short breaks in the proceedings. The claimant helpfully agreed to try that and that was how he attended the rest of the hearing in this case. In the end the claimant did not make any formal application to attend by telephone.

Outcome of the claimant's application for a further adjustment by making his own recording

68. In terms of the claimant making his own recording, the Tribunal gave a formal decision about that on day 5 after receiving a letter from the claimant's GP, Dr Marsden, which says this

"I would be grateful if you could consider making reasonable adjustments for the upcoming final hearing of this gentleman's employment tribunal, to help reduce his stress and emotional difficulties.

This would include allowing him to turn the camera off if needed during the video call, as he can get emotional/upset, to reduce stress and preserve dignity. Could he also be able to record the evidence given so he can replay it as necessary. At times of stress, he finds it difficult to process and recall information."

69. The Tribunal concluded that allowing the claimant to record some of the proceedings so that he could record the evidence given by the respondent's witnesses, would give him time to process and formulate additional questions, and that was consistent with the medical evidence provided in 2018 by Dr Incaid. The claimant was asked if he would agree to certain conditions being placed on him if he were to be allowed to record proceedings for this purpose, and the claimant agreed to those. Accordingly, and notwithstanding the respondent's objections, this request was allowed.

70. The conditions were

(a) The claimant will make an audio only recording, not video;

(b) He will not publish the recording or make it available to any other person without express permission in advance from the Tribunal;

(c) He will not seek to rely on a transcript of his recording for any purpose, since an official transcript will be available via form EX107;

(d) He would not retain the recordings after he had listened back to the evidence and formulated any additional/written questions for witnesses and would confirm deletion if requested.

Other initial matters raised during the first few days of hearing

The claimant's emails of 10 and 15 May 2023 and the allegations against REJ Franey and other judges

71. In the course of April various correspondence had been sent by the parties to the Tribunal which was referred to Regional Employment Judge Franey. On 10 May 2023 at 11:38 the claimant wrote the email which stated that the 3 May response from Regional Employment Judge Franey *"simply obfuscates and compounds the stress and anxiety present. This has been a common feature of the treatment from Judge Franey".*

72. The email went on to argue that the correspondence should not have come from Regional Employment Judge Franey at all but from Employment Judge Cookson or *"any other late substitute whose late substitution can cause further uncertainty and anxiety*". The claimant stated that it was appropriate for the communication to be sent to the other members of the panel. The email asserted that the claimant had been led to understand that the panel would all be Employment Judges based on what the claimant had been told by REJ Franey, *"attempting to offset the concerns expressed at his prejudice"*, but the claimant had just found out that the panel would be representatives from *"union and CBI (whose integrity as an organisation has been brought into considerable question recently, especially cases of discrimination)".*

73. In the email the claimant referred to REJ Franey asking towards the end of 2022 if the claimant would attend a hearing and said this:

> *"I indicated that I would if he demonstrated that I was wrong in my perception of there being blatant prejudice on his part by the expression that the only unfairness he would consider in a final hearing was if dismissal was an appropriate sanction. Such clearly demonstrating contempt for the ACAS determination of fairness that the law requires to be upheld."*
>
> *The email continues to make various complaints about REJ Franey and his previous conduct of the case, and also alleging a failure by the President to act in relation to a complaint about REJ Franey.*

74. EJ Cookson had directed a reply to that email before the hearing as follows:

"Dear Sir

Your email of 10 May 2023 has been referred to Employment Judge Cookson and she has directed me to reply to you as follows.

Employment Judge Cookson and the tribunal panel next week cannot comment on Mr Hoppe's complaints about Regional Employment Franey nor the procedure involving the President.

Employment Judge Cookson assures Mr Hoppe that she will provide a copy of this email to the tribunal panel members before the start of the hearing on Monday. At the start of the hearing the panel will discuss the grounds rules for the days that follow with parties, what reasonable adjustments should be made for Mr Hoppe and what issues will be determined at the final hearing, bearing in mind previous judicial decisions as appropriate.

In terms of the start of the hearing on Monday, she is content for Mr Hoppe to attend the start of the hearing remotely but attendance at the rest of the hearing is something to be discussed. It would be preferable if Mr Hoppe can that hearing attend by video if possible but she will ask for details of how to join by telephone and video be sent to him so Mr Hoppe can attend remotely. She will also make arrangements for the hearing to be recorded if possible. Whether the hearing can be separately recorded by Mr Hoppe is one of the matters to be discussed at the outset of the hearing. The tribunal panel will have to be able to understand why that would be reasonable adjustment for Mr Hoppe's disability and what medical evidence the tribunal panel has to explain why such an adjustment is appropriate."

75. At the outset of day one EJ Cookson assured the claimant that a copy of this email had been provided to the panel members, and she explained that the agenda for that first day would be to discuss ground rules for the hearing and what reasonable adjustments the claimant would require, to go through the List of Issues for the hearing to make sure that the scope of the hearing was clear to everyone involved, to deal with any other preliminary matters and in particular to look at the timetable for the rest of the hearing. In light of the contents of the email of 10 May 2023 the Employment Judge reiterated again that this Employment Tribunal has no ability or authority to overtime previous judicial decisions. She also pointed out to the claimant that she and the lay Tribunal panel members would not be able to comment or deal with any aspects of any complaint about Regional Employment Judge Franey's conduct or the handling of a complaint by the President. The claimant expressed his dissatisfaction about that.

76. It quickly became apparent that the claimant did not wish to discuss the email of 10 May but instead expected a response to an email which he had sent to the Employment Tribunal at 09:33 on 15 May, shortly before this hearing was due to start. As she had been making her own preparations for the final hearing and briefing the Employment Tribunal Panel, the Employment Judge had been unaware of that email. It is a long email which when printed ran to some four pages, but significantly the email said this:

> *"This email is intended as a submission in the absence of being able to enter into discussion without the matter of discussion causing significant distress or debility. This state of affairs has worsened over the ten years the Tribunal has been kicking the shit out of the case brought rather than hearing them which has caused significant detriment. It is however the current state of affairs and such makes being able to obtain a fair hearing a remote wish rather than a possibility particularly as from the outset there has been a failure or unwillingness to listen. In the letter of 11 May it suggests that there must be a medical reason for the adjustment to enable recording of the hearing, ignoring the clearly made point that whilst there is impact on awareness from agitation*

of mental state the more overpowering reason for the requirement to record being the lack of integrity that has been shown by the Employment Tribunal.

….

Now if the hearing is to be fair then the Tribunal has two options as I see:

(1) To ignore all prior judgments about what evidence is appropriate for what issues are appropriate to consider; and

(2) The other is to postpone and await the investigation and outcome of the complaint that Judge Franey has misrepresented what he has said on these matters in the late 2021 hearings."

….

77. Mr Hurd responded to the email. He understood the email to be, in essence, be an application for adjournment, and indeed that is how the Tribunal panel had understood it, because the claimant had referred to two options – the first being one the Employment Judge had already made clear was an impossible option for the Tribunal to consider. Mr Hurd made clear the respondent's objections to the case being adjourned, but it became clear that the claimant was not in fact seeking an adjournment at all. The claimant acknowledged that the case needed to be heard and told us he was not applying for an adjournment. Instead he maintained that what the Tribunal panel had to be prepared to do was disregard previous case management decisions and judgments in terms of the issues to be considered; notwithstanding that he had been told that was impossible. The claimant argued that this was required to address the prejudice that he alleged that he had been subject to. The claimant was told that again by the employment judge that this tribunal had no power to set aside previous judgments but it was clear the claimant was unhappy about this.

78. Although discussions moved on to other matters, the claimant returned to this issue several times alleging several times that his case had been unreasonably limited by the tribunal and EAT through the case management process because in his words, "the Tribunal has kicked the shit out of my claims", and he continued to maintain that the Tribunal should have been prepared to order expert evidence and should be prepared to deal matters the claimant wished it to consider despite the clear orders of REJ Franey referred to above. Unfortunately, it appeared that the tribunal being unable to concede that the claimant had been subject to the prejudice he alleged, led the claimant to perceive that he was being treated unfairly by this tribunal too. This was reflected in the emails he sent to the tribunal in the course of the hearing.

79. The claimant's unwillingness or inability to accept that this tribunal could not reopen the decisions already taken in the course of the case also became relevant in the discussions about the list of issues for this hearing which had been drafted by REJ Franey. As highlighted in the introductory sections above, this is a case in which the scope of the matters to be considered at this hearing as been considered not only by various employment judges but also by the EAT. This should have made the matter of agreeing what issues the tribunal would consider a straightforward matter but because the claimant considered that the tribunal refusing to consider matters on

which decisions have already been taken was a sign of the tribunal's corruption, he could or would not accept the limitation of his scope of his case. One of the features of the claimant's conduct was that he would seem to acknowledge that the tribunal could not reopen matters, but then return to the issue again or refuse to accept that if it was a not a legal or factual issue in the case, it was legitimate for the employment judge to manage time by not allowing lines of questioning about those matters. That led to the assertions of unfairness and ultimately to the *"stay application"* and in turn, the respondent's strike out application.

The claimant's lack of preparation for this hearing and the impact on the hearing of him disconnecting from the hearings forcing early finishes

80. During the first day's hearing the claimant revealed that he had not read any of the respondent's witness statements and he did not have the bundles of documents readily to hand because reading the bundles and statements was traumatic for him. This led to some discussions about what the claimant had and had not received from the respondent, with the claimant seeming to suggest that the respondent had not provided this Tribunal with all of the relevant bundles from the 2013 hearing, although that was disputed by the respondent and it appeared to be based on a recollection from the claimant of the number of boxes the original bundle had been in rather than any attempt by him to check. It was unclear how the claimant could assert that he did to have all of the relevant bundles if he had not read anything that had been sent to him.

81. The claimant told us that it would cause him trauma if he was asked to go into a bundle to identify a relevant document and that was why his witness statement does not contain any pagination references.

82. Mr Hurd expressed some concern about how the claimant would be able to undertake any cross-examination of respondent witnesses in those circumstances and pointed out that in such a document-heavy case it was inevitable that the claimant himself would have to look at relevant documents and be asked searching questions about his interpretation of those documents and what he had said at particular times.

83. Mr Hurd also referred to the difficulty in understanding the claimant's case from his witness statement when he explained why he had not simply sent the claimant a list of the paragraph numbers he would be referring to in the claimant's cross-examination, as the ground rules put in place by REJ Franey had anticipated, and instead had set out the respondent's position on the case that would have to put at some length in his written submissions.

84. The claimant was encouraged to read the statements and documents and it was clear when the witness evidence began with Ms Gibson that he had read the statements. However, the claimant's failure to have prepared for this hearing by reading the bundles became apparent when it came to the questioning of Mrs Beesley and Mrs Black. The claimant put questions to the witnesses on the basis of what he recollected documents referred to but when he was asked to identify where in a document it said what he claimed he was unable to.

85. For example, when questioning Mrs Beesley he suggested that the covert recording transcript from 2011 showed that he had been instructed not to raise concerns but there is nowhere within the transcript he was referring to where that appeared to be said. It was pointed out to the claimant that this was an unfair way to ask questions when witnesses were being asked questions about documents relating to matters that had happened eight or more years before. In the cases of Mrs Beesley and Mrs Black he was asking questions about documents they might not have seen before so he was instructed that he needed to take witnesses to the specific part of the document he was relying on. The claimant was not able to do that. During the evidence of both Mrs Beesley and Mrs Black when the claimant was asked to refer to the specific part of the document, the claimant became distressed or agitated. While questioning Mrs Black the claimant began asking questioning which appeared to relate to the 2013 proceedings and when he was told that he needed to limit questions to the current proceedings he also became agitated. It was these incidents which led to the claimant disconnecting and the hearing days being unable to restart. This meant that the hearing on day 6 ended at around 2pm and at around 3pm on day 7.

The claimant's application for a stay

86. In light of the need to allow the claimant time to raise additional questions in writing and to process the evidence before making submissions, the tribunal had indicated it was content for submissions and deliberations to happen at a time to be determined after the end of the allocated 14 days of the hearing. However, but that it was important in terms of the management of the case, for witness evidence to be dealt with within the 14-day trial window. On the morning of day 7, given the amount of time which had been lost during day 6 the claimant was told that we needed to deal with Mrs Black's evidence on the afternoon of day 7 in light of the importance of dealing with the evidence of Mr Owen, the dismissing officer, on day 8 because of limitations on his availability. That was to give day 8 for Mr Owen, allowing the morning of day 9 for Mr Elliot and then several days for the claimant's cross examination as it had been recognised he would need to be able to take breaks. Finally that would also leave time for the final respondent witness, Mrs Uhart. However as noted above the claimant disconnected at around 3pm during the course of Mrs Black's evidence on day 7.

87. Having heard representations from the respondent and in light of the issues with Mr Owen's attendance, the tribunal decided how to proceed and this was explained to the claimant in a letter was sent to the claimant by email as follows at 16.06 on 23 May 2023:

"*Dear Mr Hoppe*

Employment Judge Cookson has directed that I write to you on behalf of the tribunal panel as follows:

Although you had decided to absent yourself this afternoon, because of what we had already been told about Mr Owen's availability later this week it was necessary for us to hear from Mr Hurd to confirm the position and to decide whether to release Mrs Black and to determine who we would hear from tomorrow.

Mr Hurd confirmed that Mr Owen has to attend hospital for tests on Thursday, but he is available tomorrow. On that basis Mrs Black has been released. You can make representations to us about that, but it is proposed that you raise your additional questions with her in writing in accordance with our instructions about that process. That is you must send any questions to the tribunal copied to the respondent.

This will allow all of tomorrow, Wednesday 24 May, for Mr Owen's evidence and cross examination as he will not be available on Thursday. We intend to hear evidence from Mr Elliot on Thursday.

In order that we do not lose time tomorrow morning, we will deal whether Mrs Black should be recalled or whether she will only answer questions in writing at the conclusion of Mr Owen's cross examination rather than at the start of the day."

88. In response the claimant sent to the following letter to the Tribunal at 17.31 (set out as received)

> *"fao judge cookson*
>
> *i had not finished asking questions of mrs black whislt mrs bleack has confirmed that she has not seen or been amde aware of the condiuct of the investigation if it could be called an investigation or the dave henderson investigation of the bhvd or steve cottam investigation of the bhvd or the 21 month long grievance or the disciplinary investigation she is the only witness brought forward on the standards of the hmrc actions and she can provide evidence on if the grievance should or should not have considered secret evidence etc in order to provide evidence of the defficient nature of the hmrc processes that it is asserted constitute maladministration and discrimination*
>
> *i am sure that is known as it appears to be the reason why intervention to prevent evidence of the maladministration being taken has come about in what i can only conclude to be further prejudicial actions*
>
> *in addition questions about the detriments mrs black indicated she could speak about have not been asked yet*
>
> *put at its basic the hmrc action in the avoidance of investigating any of the matters which should have been done in accord with the wb policy and the standards in public life still needs to be given if no evidence is offered and there is no witness statement covering the suppression of the concerns and grievance and mgt behaviour identifying the clear intent to not repair the working relationship and this is relevant in evidencing the true intent and reason for the disciplinary action and decision*
>
> *if i am not able to eluciate this evidence even in general recognition of the standards of the investigations such as ig355 not seeking evidence and ignoring evidence as per the five frauds disclosure to jenny grainger for which it appears there is no evidence of there being any action taken to deal with under the wb policy and no explanation of the misrepresentations identified then as indicated an adverse determintion of failure to investigate the five frauds disclosure shall be requested and its relevance to the true motivation of dismissal linked.*

also in linkage is the failure to refer the jan 2015 accident form for oh assessment kerry had indicated she can provide evidence on that and it appears clera that the failure to make the oh referal is an expectation that the outcome of the disciplinary shall be dismissal questions remain to be asked about if hmrc failed its duty of care deliberately in failing to make the referal which remains especially pertinent given the completion of the accident form was upon the advice from the nominated officer who was appauled at the failure of duty of care

it does strike me that there is a watershed here in whether the tribunal seeks to suppress evidence and run time out or make clear how the true status of the hmrc behaviours identify the intent to end the working relationship by any means available including the will ful neglect of duty of care or the execution of an unfair dismissal process that builds on the maladministered determination of the other supposed invetigative processes in seeking to ignore as already determined the actual circumstance of the actions alleged to be missconduct

it also remains unclear as to how i am able to evidence arguement of self defence if the maladministration of the supposedly investigative processes and concealment of the actual circumstance of the alleged missconduct continues to be obstructed by the tribunal effectively saying such defence is not relevant

self defence needs to evidence that the supposedly investigative processes have been maladministered and are not safe and identify that the trust and confidence that john owen thinks was damaged by the alleged acts of missconduct were not actually damaged as there was no trust and confidence present in the first place

hmrc has not put forward any evidence forward to support the veracity of the supposedly investigative processes despite it having been made clear previously that the acts alleged to be misconduct are considered to be reasonable and proportionate self defence it appears the failure to provide evidence has been on the understanding that the tribunal will not consider an arguement of self defence but shall with prejudice accept the supposedly investigative actions it has taken as having veracity in much the same way that judgements first found cabinet office to be associated with hmrc and then completely seperate from hmrc with out actually being inconvenienced by any evidence of the nature of such relationship.

as i say there has been considerable prjudice which has not been in the interests of justice and the position identified on day one needs to be considered by the tribual in determining if it is now going to hold a hearing which shall consider the linkage between the hmrc actions and dismissal or seek to continue to proclaim that process must trump justice."

89. This was followed the next morning by the following email at 9.38. The claimant did not attend the hearing (the email is set out in full as received)

"***Subject:*** *Re: 2408488/2015 - stay appeal*

fao judge cookson

further to the below when the tribunal is seeking to protect the determination of the veracity or rather complete lack of it in the grievance as being that the grievance is irrelevant the grievance is cited in the witness statement by john owen as being the correct avenue for the illegal detriment to be determined

very clearly the argument from hmrc relies upon the veracity of the conduct of the dave henderson steve cottam grievance ig355 concern investigation all being ok the john owen statement says that is the route that was appropriate and relies upon the veracity

the truth is that there is no veracity in thise processes and hmrc has put no evidence forward as it can not as those processes were all fubar

the arguement for unfair dismissal is that they are not and the obstruction of evidence that they are not safe is prejudicial

further it is of note in replying in my thoughts last night that you also went on to seek to suggest that there would not be consideration from the tribunal of the veracity of the investigative failures by hmrc as the acas process was not law

such position shall be a failure to up hold the law and is taken as a direct threat of an unfair hearing

it is my understanding that unfair is identified in law and definition is identified to be by compliance with the acas minimum standard

such comments made along with the obstruction of evidence to identify the true intent and hence prove the unfair dismissal was with intent to never restore the trust and confidence that hmrc had breached clearly make the conduct of the hearing unfair

my understanding based the prior explanations of the tribunal which may yet prove to be bullshit is that whislt the tribunal has sought to remove from consideration detriments such acts of detriment are not removed from the consideration of the tribunal in respect of the determination of the unfair dismissal and the determination of the hmrc motivation for dismissal such are being conflated that just because the suppression of the vlidity of the concerns as a detriment has been dismissed as to be considered and determined to be a detriment or not that consideration of the suppression of the validity of the concerns shall not be considered in the determination of the motivation of the unfair dismissal

such boild back to the fundamental prejudice that the tribunal has demonstrated for the eight years that this case has been kicked the shit out off that the tribunal will not consider the matters pertinent to the case brought if it causes the hmrc to acknowledge the truth of the situation

the protections in pida simply can not be upheld if the tribunal allows hmrc to create its alternative truth and not be challenged or required to produce evidence of that alternative truth such as is the case in this case where hmrc maintains it did not act with detriment in the grievance because the concerns were not valid and then seeks to conflate such unchallengable untruth with a unfair dismissal process that relies upon a blatantly prejudicial conduct in which that alternative truth is beyond the consideration of the tribunal

i have not slept well given the aggressive attack to suppress the truth and as has already been identified there has already been considerable prejudice shown with judge franney misrepresenting what he said on pretty much this very matter i do not feel it appropriate to attend via video link today and shall obtain medical evidence if it is indicated that shall be required.

your indication at the start of the hearing was that this would be dealt with fairly and that if it was not appeal could be lodged that ythe conduct of the case was unfair and this would appear to be the case and appropriate

given the apparent lack of clarity about what the tribunal shall or shall not consider and the apprent exclusion of any consideration of the true intent hmrc has demonstrated consistently since the concerns were raised and the apparent intent by the tribunal to not determine the fairness of the relevant grievance and dismissal processes by reference to the minimum standards identified in acas i do not see any option but to appeal against the conduct of the case

today my anxiety and perception of threat from you conducting the tribunal process in a manner deliberately intended to not consider the relevant acts facts abd behaviours and matters are causing considerable debilitation and i do not feel able to properly represent myself further i do not feel stable

i would be grateful for your written explanation of the conduct and position of the tribunal in respect of what will and will not be considered and determined and what evidence shall or shall not be taken and how such shall enable the a hearing that shall consider the detriments remaining the fairness of the dismissal process which by reference by the respondent includes the grievance processes the link by behaviours showing the true intent by hmrc to terminate the working relationship as a result of the concerns being raised and the breach of trust and confidence and the continued breach of trust and confidence by hmrc to support self defence

i shall then wish to seek legal advice an lodge and appeal

please treat this communication as an application for a stay

David"

90. It is worth making the point that the claimant refers in this email to the employment judge having made certain comments which she had not made. The discussion for example about the relevance of the ACAS code had not been about the ACAS code of practice in relation disciplinary procedures, but about the claimant's allegation that the respondent had breached the ACAS code in relation to the handling of grievances and that this was relevant to the fairness of his dismissal. This is the "trust and confidence" issue which had been explained by REJ Franey and HHJ Auberbach, as set out above.

91. The Tribunal considered this application for a stay, having heard submissions from Mr Hurd. Mr Hurd objected to the application. In brief terms he pointed to the issues already explained in detail in these reasons about the scope of the claimant's case and pointed out that limitations placed on the claimant were consistent with the previous tribunal decisions and case management, in light of the passage of time since the claimant's dismissal it was important that the case go ahead in the allocated trial window and he emphasised the lack of any proper grounds set out for an adjournment – the claimant had had a decade to seek legal advice, it was not apparent what decision was to be appealed and no evidence of ill-health had been presented. He argued that if the stay was refused the tribunal should consider if the claim should be struck out on the grounds of the claimant's unreasonable conduct, because his claim

was not being actively pursued and because a fair trial was no longer possible, and he made some submissions about that.

92. The panel agreed with Mr Hurd on the question of the stay. The claimant was not being prevented from presenting his case about his dismissal but that did not mean the tribunal examining the previous grievance processes or the past allegations of detriments which had previously been dismissed. The relevance of these matters to the legal issues in this case had been looked at in the past and in fact this was the claimant seeking to argue the case he had been told was not within scope of his claim. That flawed understanding meant the claimant's objections to the tribunal process were not legitimate and it would not be consistent with the overriding objective to delay the case at this late stage on that basis. No proper grounds for an adjournment or a stay had been made out.

93. The adjournment had not been granted and, in those circumstances, it was appropriate for the hearing to recommence. However, we faced some difficulty. The claimant had absented himself from the hearing. At that point we faced Mr Hurd's application for a strike out and needed to decide how to proceed. The tribunal was not willing to consider striking out the claim without giving the claimant an opportunity to make representations about that and we needed to give him some time to consider what he wanted to say, but Mr Owen was present at the tribunal to give evidence and would not available the next day. If the application to strike out was not granted, the Tribunal would face considerable difficulty if we had not heard evidence from Mr Owen because he would not be available to attend the following day and in any event, we recognised that the time to hear evidence from the claimant was also further reducing.

94. With reluctance the Tribunal considered that the only way we could proceed was under rule 47 – to continue to hear the case in the absence of the claimant. For this reason, on the afternoon of day eight we heard evidence from Mr Owen. We already had his witness statement, but in order that we could understand his position on documents on which he would not doubt have been asked questions, Mr Hurd took him through the documents he had considered in the course of his decision making and raised with him some of the challenges it appeared that the claimant makes to what he says. The Employment Judge also asked Mr Owen questions based on her understanding of the claimant's case, drawing on the matters referred to in the claimant's witness statement. However, this demonstrated the difficulties faced by the tribunal in light of the sparsity of the claimant's witness statement. In terms of the claimant's case it is difficult to discern, except in the very broadest of terms, why he says Mr Owen's decision was by reason of his protected disclosures, or why he was otherwise unfairly dismissed.

95. At the end of the day, the claimant was informed that *"The tribunal panel has concluded that the panel should consider striking out the claimant's claim under Rule 37(1) (a) on the grounds of that his conduct has been unreasonable and on the ground in Rule 37(1)(e) that a fair trial in this case is no longer possible.*

Mr Hurd has made submissions about that but the tribunal want to give Mr Hoppe an opportunity to respond to those submissions. If Mr Hoppe attends tomorrow morning Mr Hurd will be asked to restate his submissions in full. Mr Hoppe would also be given time to consider his response before addressing the tribunal. Although the tribunal

hope that Mr Hoppe could attend by CVP if he would prefer to attend by telephone he may do so."

96. The following morning the claimant sent a further email and he attended the hearing by CVP.

"FAO Judge

At the present time my head is still not functioning properly and the suggestion of representation of my self in real time is not possible.

In some anticipation of what Mr Hurds submission shall seek i have prepared this short submission in response to what is expected to be asserted in Mr Hurd's application for strike out.

The case/s submitted have been butchered over the last eight years of attrition from both the Respondent as well as the Tribunal its self however there remains three primary strand to the case/s remaining as I understand to be the case. They are:-

1. *That the dismissal was ordinarily unfair by the failure to comply with any of the minimum standards identified by ACAS*
2. *That the reason for the dismissal was as a result of raising raising concerns*
3. *That validity of the remaining detriments that have been identified*

The position reached is currently that the Tribunal has sought to suppress evidence being obtained of the breach of trust and confidence by HMRC and the consistent refusal and or failure to seek to repair such breach of trust and confidence to enable the true reason for the disciplinary action and dismissal to be evidenced. This is not the first time that there has been problems and the Tribunal has been asked to clarify why such evidence is inappropriate but has failed or otherwise been unable or unwilling to do so leading to the current application from Mr Hurd which it is expected shall repeat the assertion that the case is not being actively pursued. I would reference here the communications sent since having to terminate the evidence session with Kerry Black. It is clearly not the case that the case is not being actively pursued. I would also refer to the attendance in difficult circumstance and with little or no effective adjustment that has caused significant impact and caused relapse into self harm.

The assertion of the matter not being actively pursued is clearly nonsense however it is clear that the manner of pursuit in resisting the prejudicial exclusion of evidence about the veracity of the HMRC conduct and consistent actions towards me and consistent failure in duty of care are clearly not the pursuit of the case that the Respondent or the Tribunal are seeking. Clearly the Respondent and the Tribunal acting with considerable prejudice are seeking to conflate the dismissal of detriments identified such as the suppression of the validity of the concerns with the role such suppression pays in evidencing the true reason for the HMRC disciplinary actions and dismissal.

The application for dismissal of the whole of the matters remaining before the Tribunal is therefore resisted.

The legal advice that I have received has been that as stated in the ET1 2408488/15 the Employer has an obligation to make clear what it considers to be gross misconduct. It is clearly indicated in the ET1 that the case brought includes that HMRC failed to do this. Such requirement for prior indication of the Employers view of what would be considered a dismissal offence is identified as a minimum standard in the ACAS standards and is clearly to prevent any Employer picking on any act or failure to act that could be construed as miss conduct and then and with out notice or warning to the employee consider such to be gross misconduct in order to abush and conduct a disciplinary process that could not be reasonably expected.

Now the Tribunal has given an ambiguous position on up holding the law here. Judge Franney made a clear statement that it would not up hold such minimum standards in the hearing on 1/10/21 and then missrepresented what was said subsequently and indicated the Tribunal would be considering and applying the minimum standards. At the outset of this hearing what the Tribunal would and would not be considering was raised and frankly not answered satisfactorily. The prejudice of the prior Tribunal position and the failure by the Tribunal to investigate and consider such prejudice was unresolved at the start of the hearing. The position stated was that the orders made only would be considered and that the correspondence would not.

Again in causation of the mental disturbance currently still being experience by the Tribunals failure to make clear its position statements were made that the ACAS minimum standards did not really form part of the law. This being in seeking to justify the evidence being sought of the willful actions by HMRC to suppress the concerns not address the breaches of trust and confidence and the causation of a toxic environment to effect constructive dismissal and achieve its objective of termination of the employment.

With in the considerations of the first matter listed there are three unfair failures to comply with the minimum standards for a fair disciplinary process. they are:-

1. *Failure to make explicitly clear what acts or failures to act it considers to be gross misconduct.*
2. *Failure to objectively determine the circumstance of the alleged act or failure to act.*
3. *Use of secret evidence.*

The action proposed in Mr Hurds application is to dismiss all aspects of the case. Such would be throwing baby out with the bath water and would not be fair and equitable.

Whilst the case can not be heard with out the due process for the second and third aspects of the orinarily unfair dismissal the first aspect of failure to make clear its view of the alleged acts being a matter of gross misconduct and a matter of potential dismissal does not require any further evidnece than is already available in the evidence and ET1.

The evidence includes the relevant extract from the HR handbook. This is referred to as HR22002 and sometimes HR22003. It is specific in that section to the alleged act of covertly recording and describes such as as potentially missconduct. It does not describe such act as

potentially gross misconduct. This discrepancy was pointed out by PCS when the notice of diciplinary was received and the matter was clearly identified as always being considered a matter of gross misconduct. As I recall in the ET1 this specific failure was identified and it was asserted that had the HR accurately reflected the post event assertions by HMRC my actions would have been different.

Whilst John Owen states he did not consider the matter raised with him to warrant considering the matter as missconduct with out giving any reasons it is not whether John Owen considered this to meet or not the minimum standards identified it is the matter before the Tribunal and for the Tribunal to detemine on the evidence up to the time of the alleged action to consider if HMRC had provided an explicit indication of its view that such action shall be considered gross misconduct. The legal advice has been that this is very clear cut in being unfair and dismissal of this aspect would not be equitable or appropriate when it can be considered on what is already before the Tribunal.

Whilst I do not agree with the application to stike any of the case out because there is a week still available and the Tribunal can make clear that it shall up hold the minimum standards and there is still opportunity for evidence of the true intent of HMRC to terminate the emloyment can be gathered I would suggest that an equitable resolution of the whole matters before the Tribunal would be for the consideration of the unfairness of the dismissal to be found reflecting the change from the HR stated position and that stated in the diciplinary and up holding the minimum standards.

Such a judgement would not be appealed as it shall provide a minimum of recognition and compensation

This submission made not cover all that is included in Mr Hurds application. As I have not slept properly since the start of the hearing and have reason to doubt how genuine the hearing is causing considerable anxiety i shall not be able to respond any further with being given time to do so and this shall be again by a written submission like this one formulated over last night."

Respondent's strike out application

97. Mr Hurd restated the respondent's strike out application. When the claimant declined to join the tribunal and applied for a stay, Mr Hurd had outlined to us why we should entertain an application to strike out the claim on the grounds that the claim was not being pursued, the claimant's unreasonable conduct and because a fair trial was no longer possible. However, on the morning of 25 May when he made his formal application for strike out, Mr Hurd did so only on the grounds of unreasonable conduct and because a fair trial was no longer possible.

98. The application was made on the basis that under rule 37(1)(b) the claimant's unreasonable conduct meant that a fair trial was no longer possible, and a separate application under rule 37(1)(e) that a fair trial in this case was no longer possible.

99. In relation to unreasonable conduct Mr Hurd relied on two aspects of the claimant's behaviour which he said were unreasonable: the failure by the claimant to prepare at all for the final hearing over 14 days by not reading the respondent's witness

statements and taking any steps to access the trial bundle; and the claimant's conduct in disengaging from the hearings in the manner described above.

100. In terms of why the respondent said that a fair trial is not possible, Mr Hurd suggested to us that it was clear that the claimant's mental health was such that he was not able to engage with the issues, that he faced profound difficulties in representing himself and that where the Tribunal has sought to explain issues to him, he had misunderstood what he has been told. However, he highlighted to us that if the claimant did not like what has been said to him, the claimant has misunderstood what has been said or if he found himself unable to comply with an instruction, such as to refer to a specific part of a document that he purported to be quoting from, his response had been to disconnect completely from the hearing. Mr Hurd likened that to a claimant who simply walks out of a tribunal hearing and argued that conduct was unreasonable.

101. We were reminded that in accordance with the ground rules set at the outset it had been agreed that the claimant could switch off his camera but that was to enable him to regain his composure and to protect his dignity if required, with it being envisaged the hearing would resume. On two occasions that had not happened resulting in the loss of significant hearing time. Mr Hurd pointed out the particular difficulties that this has caused in relation to Mrs Black's evidence. The claimant had been warned that he needed to complete cross examination of Mrs Black in the afternoon to enable the following day to be available to deal with the evidence of the dismissing officer Mr Owen but the claimant had chosen to absent himself from much of the afternoon resulting in her cross examination not being completed.

102. Mr Hurd highlighted to us the contents of the claimant's emails received the day before this application which make clear that the claimant would have profound difficulties in responding to the tribunal in relation to the list of issues and asking questions. Mr Hurd also reminded us that it had emerged on the first day that the claimant had not read any of the bundles or the witness statements and that although the claimant has clearly done some reading subsequently and was able to identify some relevant documents, he was still unable to identify specific references. It was this issue which had led to the claimant to problems in the cross examination of both Mrs Beesley and Mrs Black. It was also the case that when the employment judge had addressed the claimant about the legal tests and issues in the cases he continued to be misunderstand what was being said. That had led directly to the claimant choosing not to the attend the tribunal for the most important respondent witness, the dismissing officer, despite knowing that witness is on long term sickness absence, was attending from Northamptonshire and due to hospital appointments would only be available on that one day, if the respondent was to be allowed a fair allowance of time for the claimant's cross-examination.

103. Further the most important part of the case was still to come because if the claimant chose to give evidence he would have to be subject to cross examination which would involve the claimant having to be taken through documents. Based in the experience of that last few days Mr Hurd invited us to conclude that it would be unlikely we could conclude his evidence and that the difficulties faced so far in the case would continue.

104. It was put to us that that the above concerns have to be seen in a very particular context of a dismissal which happened in June 2015 and a previous hearing in November 2021 which was postponed shortly before hearing on grounds of the claimant's health. Mr Hurd pointed out that it does not appear that the claimant's health has improved and indeed the claimant himself had suggested that delving into past issues had exacerbated the claimant's stress and anxiety. Mr Hurd reminded us about what had been said when he had understood the claimant was applying for a postponement of the hearing at the start about the difficulties of the passage of the time and the need for this case to be heard which the claimant had agreed with. Mr Hurd underlined the prejudice for the respondent; the fact that two of the witnesses still not heard by the tribunal have retired from the respondent's employment and that the respondent was reliant on their goodwill. He argued that there has to be justice between parties and even in a case where decisions and meetings have been extensively documented, it is simply impossible for witnesses to recall what has happened after a long passage of time. Further there was no suggestion that the claimant was temporarily unwell. The claimant's health problems extend back to at least March 2013 with no indication that they were likely to resolve in the foreseeable future.

105. Mr Hurd suggested that the tribunal now found itself in a difficult situation with apparently little prospect of continuing based in what the claimant had said in recent correspondence and equally little prospect of that changing over time. The claimant has identified that he needed legal advice. The respondent did not disagree with that but Mr Hurd made the observation that it was something which should have been sought years before in relation to the list of issues and the jurisdiction of the Tribunal.

106. In summary we were reminded that the strike out is, on any analysis, a step not be taken lightly and there are numerous authorities which make clear that it is a draconian step which can only be taken in the most unusual of circumstances. That was recognised by the respondent, but Mr Hurd reiterated his grounds of making this application were that the manner the claimant has pursued the proceedings in the case have been unreasonable and his principle basis for making that application was that by turning off his camera the claimant had effectively walked out of the hearing and refusing to attend with the consequent difficulty for the ability of the tribunal to effectively timetable and manage the case. Secondly it was submitted a fair hearing was no longer possible and our attention was drawn to the authority in the *Croma Vigiliant* case (see below) that the power is exercisable if the case cannot be heard in the available trial window, although that does not mean that it is not appropriative to consider postponement as an alternative.

107. In terms of any alternative to strike out, it was suggested to us that our only realistic alternative was to carry on whether or not the claimant chose to participate. Mr Hurd suggested to us he could call the remainder of the respondent witnesses but argued that in light of the difficulty with understanding what the claimant's case was from his statement and where the claimant had been unable to articulate that further the tribunal had to consider if a fair hearing was possible for either party.

108. We also heard further oral submissions from the claimant. He told us that he considered Mr Hurd's submissions to be discriminatory. He told us that he wished the

hearing to proceed but also acknowledged his difficulties and that he did not know how he could participate.

109. In terms of the contents of his email, the claimant was asked if he was saying that he wished to withdraw all of his claims other than the "ordinary unfair dismissal claim" in relation to the identification of covert recording as misconduct which is how he seemed to suggest we could proceed. The claimant told us that he was not withdrawing his claims, but he would accept them being struck out if we proceeded on this basis. When asked how he was proposing we would proceed in terms of evidence and cross-examination he did not answer directly. He suggested that the aspect of his unfair dismissal case he wanted us to decide was clear cut and had to be found in his favour, but Mr Hurd disputed that. Mr Hurd pointed out that the documents did not say what the claimant told us that they did. The claimant told us that the respondent policy referred to covert recording as *"conduct"* not "gross misconduct". Mr Hurd pointed out that the wording in the relevant policy is actually that if there was covert recording that would result in disciplinary action without specifying how it would be categorised, and although it was not identified expressly as gross misconduct, Mr Owen had explained why, in terms of the respondent's policy on assessing gross misconduct, he said that the claimant's conduct justified dismissal.

110. Mr Hurd also raised concerns about how we could proceed as suggested by the claimant or otherwise because that would require careful case management which the claimant had made repeatedly shown he was not prepared to accept and he regarded as evidence of bias. Mr Hurd suggested that based on the reality of the previous eight days in hearing we could only expect that the problems would continue and increase, and we would inevitably find ourselves back in the same position again. In any event the claimant had told us that he was too unwell to continue. If the present case was to be adjourned and relisted to wait for the claimant to be well enough to continue there would inevitably be a long delay in being able to obtain the necessary trial window for a hearing which would require at least the same listing as this one. Mr Hurd argued that this Tribunal panel had to recognise the passage of time and their ability to recall events which are already (in relation to the dismissal) almost eight years ago. Mr Hurd also pointed to the very real possibility that the respondent would lose the cooperation of witnesses, some of whom have left employment and who have already made themselves available for a hearing on two previous occasions. Finally, and most significantly, Mr Hurd pointed to the fact that the real and crucial basis for the problems in conducting the hearing for this Tribunal appeared to be the claimant's belief that he faces prejudice and lies from the Tribunal, and that in the circumstances where there seemed no possibility of that belief changing, there appeared to be every possibility that we would face the same problems again.

111. In terms of proceeding on the limited unfair dismissal basis, the claimant to made further submissions about what the tribunal should consider which referred to us taking into account issues relevant to whether the dismissal had been automatically unfair because he had made protected disclosures. In other words although the claimant told us that he wanted to proceed on a limited basis, his position was inherently contradicted by what he wanted us to take into account. The claimant told us he could not say if he would participate in the hearing or not based on his health.

The law

Rule 37 Employment Tribunal Rules of Procedure

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

(a) …

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

(c)…..

(d) ….

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

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

112. The application of our strike out powers requires a two stage process. First we must consider if the power to strike out has been engaged, that is we must assess if there has been conduct on the part of the claimant which can be categorised as unreasonable or if circumstances exist which mean that a fair hearing may no longer be possible.

113. Having reached that conclusion we have to consider if we *should* exercise that power to strike out and that means considering if there are less draconian means by which we could address our concerns. It is always in the interests of justice that a case is heard if that is possible. It is also in the public interest for claims of serious allegations of wrongdoing involving public interest disclosures ('whistleblowing') or discrimination to be determined on their facts. Faced with such a claim we recognised that we should do all we could to hear the case

114. In considering whether a claim should be struck out on the grounds of scandalous, unreasonable or vexatious conduct, a tribunal must consider whether a fair trial is still possible — *De Keyser Ltd v Wilson* 2001 IRLR 324, EAT. In that case the EAT made it clear that certain conduct, such as the 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.

115. In *Bolch v Chipman* 2004 IRLR 140, EAT, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

a. 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

b. once such a finding has been made, he or she must consider, in accordance with *De Keyser Ltd v Wilson* (above), 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 and 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.

116. This process will include considering whether striking out the claim was a proportionate sanction and whether there is an alternative, such as allowing the hearing to proceed in the absence of the party.

117. We recognised that it is very unusual indeed for conduct to be much that it justifies striking out on procedural grounds a claim that had arrived at the point of trial even if claimant has been "*difficult, querulous and uncooperative'*, because the courts and tribunals must be open to the difficult as well as to the compliant so long as they do not conduct their cases unreasonably. In considering whether a case has been conducted unreasonably, a tribunal should bear in mind that the time to deal with persistent or deliberate failures to comply with rules or orders is when they have reached the point of no return.

118. Mr Hurd highlighted the decision in *Emuemukoro v Croma Vigilant (Scotland) Ltd and ors* 2022 ICR 327 to us. In that case the EAT rejected the proposition that the question of whether a fair trial is possible must be determined in absolute terms; that is to say, by considering whether a fair trial is possible at all, not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where a party's unreasonable conduct has resulted in a fair trial not being possible within that the allocated window, the power to strike-out is triggered. We recognise that this case is somewhat different from the situation in *Emeumukoro* which is a case where the issue was the strike out of a response where the respondent had failed to comply with case management orders and the strike-out application was considered on the first day of the hearing. The parties were agreed that a fair trial was not possible in the hearing window and it was not disputed that an adjournment would have resulted in unacceptable prejudice to the claimant. Nevertheless, we accepted that in assessing whether our power to strike out on the basis that a fair trial is no longer possible where there has been unreasonable conduct, that power is engaged when a fair trial is not possible in the relevant trial window, albeit we must also look at whether there are less draconian alternatives to striking out.

119. In terms of the free-standing ground of strike out in Rule 37(1)(e), that a fair trial no longer being possible, there is of course a clear overlap with the conduct ground for striking out because it is only appropriate to strike out where there is unreasonable conduct and a fair trial is no longer possible, but it is possible ground on its own, albeit a somewhat unusual one to rely on.

120. Mr Hurd drew our attention to *Peixoto v British Telecommunications plc* EAT 0222/07 in which it was held that that an employment tribunal had not erred in striking out claims of unfair dismissal and disability discrimination made by a claimant suffering from chronic fatigue syndrome on the basis that it was no longer possible to have a fair hearing. The claimant had asserted that she would not be physically able to give oral evidence, the case could not be decided on the documents alone and there was no prospect of the claimant being able to proceed at any time in the future, particularly given the nature of the medical evidence, which had persistently predicted a sufficient recovery that did not in fact materialise. In the absence of any prognosis for recovery, the tribunal was unable to establish any point in the foreseeable or even distant future when a trial could take place and concluded that a fair hearing was no longer possible. This conclusion was rooted in Article 6 of the European Convention on Human Rights, which lays down the right to a fair trial, including the right to have a trial within a reasonable time. The tribunal had considered less draconian measures but was entitled to strike out the claims on the ground that a fair trial was impossible. Accordingly, the EAT could find no error of law in the tribunal's decision and the appeal was dismissed. In reaching its conclusion, the EAT commented that those who know most about whether a fair trial is possible in an employment tribunal are those specialist members and employment judges who are there day in and day out.

121. The extent to which our power to strike out on this ground should be exercise cautiously is illustrated well by the decision of the then President of the EAT, the Honourable Mr Justice Langstaff (PRESIDENT) in *Osonnaya v South West Essex Primary Care Trust* EAT 0629/11 to which our attention was also drawn. In that case it was held that an employment tribunal had erred in striking out a claim on its own motion on the basis that a fair hearing was no longer possible in circumstances where a preliminary hearing, initially listed for half a day, had still not been concluded 133 hearing days later. The tribunal sat on 32 of those days but not even all of those were effective. The claimant was not at fault in any way for this. The principal reason was her serious illness. Part way though the case the employment judge had held that he could see no end to the case because of the claimant's ongoing ill health and identified prejudice in the continuing cost to the respondent and the possible absence of a witness who was abroad. It was held that that this approach was in error. To say that "no end was in sight" was an overstatement given the stage the case had reached; he could have but did not ask for more detailed medical material; did not sufficiently consider the use of case management powers to ensure expeditious hearing; did not appreciate the impact the determination of the pre-hearing review might have on the claim as a whole, and the basis for his decision was insufficient.

122. We knowledge that it was not open to us to strike out a claim because of the apparent damage to the claimant's wellbeing being caused by the effects of the litigation. We cannot say that it would be in the claimant's best interests to strike out his claims (*Mukoro v Independent Workers' Union of Great Britain and ors* EAT 0128/19).

Discussion and decision to strike out

123. The Tribunal recognised that the best way for this way for this Tribunal to serve justice for everyone involved in this case would be for us to determine the substantive

issues and merits of the case if we could. From the start, that is what this Tribunal panel had sought to do and indeed, after overcoming some initial difficulties, we had thought perhaps there was some hope that we could achieve that after the claimant had agreed to proceed by way of CVP.

124. It was always clear that this was going to be a challenging hearing for all involved. The Tribunal panel agreed with Mr Hurd's observations that the claimant clearly has significant mental health issues. This Employment Tribunal panel struggled in the absence of any expert medical diagnosis of the claimant. The only such diagnosis that we have points to depression and anxiety, but the claimant himself suggests that he suffers from mental health difficulties which perhaps would have an even greater impact than those already potentially serious conditions.

125. We have no doubt whatsoever that the claimant has found this hearing to be very difficult in terms of his mental health. He has told us on several occasions that his mental health has worsened as a result of this hearing, and we have no reason to doubt what he says about that. Our difficulty was that in the absence of expert guidance on how we should approach the mental health difficulties that the claimant experiences, and despite our best attempts to find solutions which did seem to be available to us, it is clear we have not been able to ameliorate the difficulties faced by this claimant. We did the best that we could with the information provided to us.

126. It is important that we make this clear in our decision because we recognise in circumstances where we categorise conduct as unreasonable that may appear to be an inappropriate thing to say, where the difficulties have been caused by mental health. Categorising conduct as unreasonable appears to attribute blame to the conduct in question. We are unable to say if the conduct which the Tribunal has seen is indeed in consequence of the claimant's mental health.

127. The claimant has been told many times, and by many judges, what the Tribunal can and cannot consider in terms of the scope of its jurisdiction in relation to claims relating to protected disclosures and unfair dismissal, but the claimant is unwilling, or unable, to accept that. That dissatisfaction has led him to perceive prejudice and appears to have led to a belief on his part that the Tribunal is actively seeking to avoid considering his claims and finding in his favour. That is not the case, but this Tribunal finds itself powerless to overcome the claimant's refusal to accept that he may be wrong in his belief about what the Employment Tribunal can and cannot consider. We have not found that to be unreasonable conduct in itself but it is the context of the claimant's conduct, aspects of which we have found to be reasonable.

128. We do not expect dissatisfied parties to agree with the Tribunal says in circumstances like this and we acknowledge, of course, the importance of allowing access to justice for everyone – including the "difficult, querulous and uncooperative". We recognise that they are unlikely to do so and it is not unusual for someone to continue to express their happiness. The problem faced by the Tribunal here was that the claimant's perception of bias appeared to have made him unable or unwilling to prepare for a hearing involving thousands of pages evidence and witness statement evidence going back over many years. It also prevented him from being able to cooperate with the Tribunal to enable us to progress through the evidence in a way which was fair to the claimant and the respondent's witnesses. His expression of his

unhappiness with the tribunal by disconnecting from the hearing, meant that we had not been able to get through the evidence in the way we needed to. It was due to the claimant's conduct that by Day 9 of 14 we had only got through four witnesses even though three of those witness could be expected to be short, and the main respondent witness had not in fact been cross-examined by the claimant.

129. We agreed with Mr Hurd that this conduct of the proceedings by the claimant was objectively unreasonable. The claimant told us that he had not prepared for the hearing because it would cause him trauma to do so, although he also told us that if he had a reason to read the documents he could do so. The approaching final hearing was of course a good and focused reason to read the documents and statements and prepare for this case. We have no doubt that preparing for the case would be stressful and difficult, that it has an unfortunate consequence of the litigation process and that was never going to change. The claimant has known about the dates of this hearing since it was listed. In November 2021 REJ Franey had emphasised that if it was not possible for this hearing to go ahead there might be no alternative to strike out his claim because a fair trial was no longer possible. The claimant can have had no reason to doubt the importance of being ready for this hearing. Through the extensive case management in this case, the claimant can have had no misapprehension about the fact that he would have to present his case at this hearing. In that context we found the claimant's decision not to do even the most basic preparation for the final hearing, such as retrieving bundles from boxes and reading statements, to be unreasonable.

130. Of course, not preparing for this hearing was the claimant's own choice. It is not in itself grounds to strike out his claim, but in this case that unreasonable decision by the claimant not to prepare had also contributed directly to his conduct in the course of the hearing. The claimant appeared to find it unfair for him to be required to take a witness to where in a document it said what he said it did and it was that led him to disconnect, but if he had read the documents he would have known what they said, as opposed to relying on his recollection or perception of what a document had said. The claimant's conduct of the cross examination of respondent's witnesses had been unreasonable.

131. The claimant also perceived it to be unfair bias of the tribunal for it to refuse to allow him to prosecute matters he had been told that on several occasions by different judges are not relevant. It is not unreasonable for him to disagree with those decisions, but it was unreasonable for him not to allow the hearings to progress because of that disagreement. That conduct resulted in much time being lost. When that was coupled with the claimant disengaging with the tribunal hearings that his conduct became more than simply disruptive or challenging. It had also led the claimant to make an application for a stay which he could not reasonably believe would be granted. The claimant knew from November 2021 what would be required for an adjournment on medical grounds and he had been told repeatedly over the years about the scope of the law. The claimant cannot reasonably have believed that this final hearing should be delayed for him to take legal advice, nor can the claimant have reasonably though the hearing should be paused to allow him to lodge an appeal.

132. The claimant's conduct of his case had unreasonably disrupted these proceedings and as a result of the conduct in question we considered that there was

no prospect of completing the evidence within the trial window. Accordingly, we were satisfied that the power to strike out the claim on the grounds submitted by Mr Hurd had been engaged.

133. The fact that the power to strike out had been engaged did not mean that we should strike out the claims. As a panel we wanted to hear the claims if we possibly could and we approached our decision on that basis so at the that the next stage of considering if we should exercise our power to strike out, and our focus was on whether we could find a less draconian to manage conduct and to achieve a fair trial.

134. We considered carefully what we could do to keep the hearing on track, at least to some extent. We concluded that our biggest barrier to being able to do that was the claimant's inability or unwillingness to accept any case management or direction from the Tribunal because he appeared to see all such attempts as attempts to unreasonably or unfairly limit his case.

135. This was not a case where we could see seeking to deal with conduct challenges through costs warnings would assist because that would simply increase the claimant's perception of bias and make matters worse.

136. We considered if we could determine the case in a fair and just way by treating the claimant's witness statement as a written submission. The Equal Treatment Bench Book (ETBB) identifies difficulties commonly encountered by litigants in person. The introduction to Chapter 1 says this: *"Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party."* We took that on board.

137. The ETBB identifies various steps which can be put in place to help those with mental health conditions including anxiety when it comes to tribunal hearings but some of the suggestions whilst helpful in the course of the case management, such as allowing additional time for action or holding additional hearings, do not assist at a final hearing. One of the suggested adjustments is: *"In severe circumstances, allow…written submissions to be provided*". In the circumstances we considered if we could proceed on that basis, but we faced the difficulty that this was case where there are disputed facts and the claimant had presented a witness statement which did not seem to explain his case in any meaningful sense by reference to the list of issues, nor did it tell us what documents the claimant wanted us to consider. We agreed with Mr Hurd that the claimant's case about the claims which were where within scope of this hearing could not be said to be sufficiently clear. For example the issue about the respondent's policy not referring to covert recording as gross misconduct is not referred to all in the claimant's witness statement. As a panel we did not see on what basis we could proceed with a case when we understood the claimant would no longer participate in the evidential process in those circumstances and we determined that this would be a just way to continue.

138. We gave serious consideration to proceeding on the limited basis suggested by the claimant in relation to his unfair dismissal claim. On balance we agreed with Mr

Hurd that although the claimant himself had suggested that as a possibility, in fact he would not or could limit his case in the way he suggested. It was very clear from his own submissions about covert recording being an unfair reason to end his employment in terms of the respondent's policy, that in fact he intended to present a much wider case referring to his protected disclosures. His position was contradictory. The only way that amended case could be considered would be through careful case management and agreement about the issues, but it was clear to us that based on the experience of judges over previous hearings and our own experience of the claimant's conduct that that would be impossible. Even when the claimant appeared to accept something, for example in terms of the list of issues, he would change his mind and we are particularly concerned about the claimant's misrepresentation about what he had been told both by the judge in this case and also by judges in previous hearings. We concluded that trying to complete this case by applying strict case management to limit the scope of the issues would not only be fruitless, it would simply make matters more stressful and unmanageable for this claimant who was already telling us the tribunal process was causing him to self-harm.

139. Finally we considered if we should adjourn and relist this case for a future hearing. We considered and accepted Mr Hurd's submissions about that could not result in fair trial. First as Mr Hurd pointed out this was not a situation where we had any reason to believe that that the claimant's health would improve. He told us that his mental health has got worse not better. The claimant clearly continues to believe that the past decisions of the tribunal have been fundamentally biased and after so many years we could not see any reason why that would change. We concluded that unless and until the claimant could accept that the Tribunal could only determine the issues in the List of Issues and not claims which had been struck out, it would be impossible to conduct a hearing at which the claimant would be able to present his case. What is more this is not a case where we could wait and see if things improved in this regard. We must ensure fairness, not only for the claimant but also for the respondent and its witnesses who even at this hearing face the challenge of being asked questions about matters from some 8 or more years ago.

140. We noted that REJ Franey had warned the claimant that no future adjournments were likely to be possible because of the threat to the possibility of a future fair trial. We considered that warning had been made for good reason. We have to recognise the impact of the passage of time on witnesses' recollection of events especially if, as here, any adjournment would inevitably be significant.

141. It was therefore with reluctance that we concluded that a fair trial in this case was no longer possible, for reasons which were partly within the claimant's control and due to his unreasonable conduct, and partly for reasons which it appeared were outside his control and related to his health. In the circumstances, concluded we had no alternative but to dismiss the claims.

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Employment Judge Cookson
Date: 22 June 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 June 2023

FOR THE TRIBUNAL OFFICE

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