EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mrs J Hill	**v**	Frimley Health NHS Foundation Trust

Heard at: Reading **On:** 3 May 2023 (with written representations on 5 May and 30 June 2023)

Before: Employment Judge Anstis (sitting alone)

Appearances:
For the Claimant: In person
For the Respondent: Mr A Shellum (counsel)

RESERVED JUDGMENT

All of the claimant's claims except for a claim of unfair dismissal and a claim of wrongful dismissal are struck out.

REASONS

A. INTRODUCTION

The claimant's claims

1. The claimant submitted her claim to the employment tribunal on 19 July 2020.

2. The claim was said to be a claim of or for (box 8.1):

   - Unfair dismissal
   - Disability discrimination
   - Religion or belief discrimination
   - Notice pay
   - Holiday pay
   - Arrears of pay
   - Other payments

And from box 8.3:

- Home responsibility protection discrimination
- Religious discrimination
- Ethnic minority
- Polish nationality discrimination
- Disability discrimination
- Part-time employee discrimination

3. The claimant attached to her claim form a document titled "My Claim Statement", dated 19 July 2020.

4. That document starts by describing the events leading to her dismissal, her dismissal and appeal (where she says that her summary dismissal was both unfair and wrongful).

5. There follows 17 pages under the heading "Dates of the incidents and names of the people involved". This gives a timeline of events. The first four paragraphs of the document give an indication of its contents and format:

   "1. 21/09/2017 Unwelcomed letter from manager … "cancelling clinic" where one of my responsibilities was to also see Polish childbearing women who struggled with English language.

   2. 31/03/2019 I raised concerns with respect of being discriminated at work with my manager … and heard nothing in return.

   3. 18/07/2019 contacted at home via my private [email address] *by manager and agreed a meeting on 25 July.* [She] *has refused to explain her reason for calling me to attend despite her knowing that I am worried because it is a surprise and I do not understand it.*

   4. Management conspiracy behind my back to oust me, a long serving NHS employee out my long-served position erupts in an incident of 21/07/2019. Harassment, Bullying and Discrimination on religious grounds, an incident by manager … She ignores my following reminders during the incident: "… what you are doing is inappropriate." My reminders do not stop her. Consequently, my manager intentionally disregards Human Factors and therefore disregards Patients' Safety, carrying out the abuse to suit her case. I recorded this incident and emailed it to manager … who ignores it. I send her a reminder 4 August."

6. The claimant continues to outline her history with the NHS and picks up her timeline of events from 2016 (the Brexit referendum) through to 2020. She

goes on to "*Allegations against Frimley Health Management*" and addresses her dismissal.

7. She concludes:

> *"I am a discrimination, harassment, and bullying in a workplace survivor and that is profoundly serious to take that stance for me personally in a situation where Frimley Health management is in a position of power and I am not in a position of power.*
>
> *Being subjected to ill treatment by my ex employer is the reason for submitting my claim. Because I take offence and I have been suffering injuries to my feelings, damages to my health, distress to my family, torment to my peace of mind, disturbance to my household, chaos to my lifestyle, I lost my career and I am subjected to significant financial losses, all caused by Frimley Health Management' both actions and inactions."*

8. Setting aside the question of her dismissal, the claimant's claim form and attachment consists of broad headings of legal claims with details given of particular incidents across a number of years.

9. The difficulty that arises is that although much use is made of legal terms such as discrimination and harassment, it not clear from the attachment to the claimant's claim form which particular incidents she is bringing her claim in respect of (as opposed to simply relying on them for context or background) and what particular claim relates to what particular incident. The attachment also seems to refer to matters which would not be within the jurisdiction of the tribunal.

10. This is not a case in which general allegations have been made but no details given. Much detail has been given but it is unclear how it relates to the different heads of claim.

11. The respondent submitted a response addressing the dismissal, giving some background, making various points about time limits, replying to the claimant's timeline and denying any discrimination. At the same time as submitting a response the respondent made an application to strike out most of the claim (or for a deposit order) on the basis of time limits, adding that "*may of the claimant's claims are not properly pleaded and are lacking in any proper detail as to events alleged to have occurred*".

12. None of this is particularly unusual, and the tribunal has seen many examples of similar claims and responses.

13. A preliminary hearing was listed. The claimant wrote proposing that his should be extended from two to five hours, and submitting "further evidence" including a letter she had sent to the respondent following her appeal and a witness statement that went with that.

Further particulars

14. On 27 January 2021 EJ Hawksworth wrote to the parties saying that the preliminary hearing would be limited to two hours, and would be a private hearing. She moved it to be heard by CVP rather than telephone and directed that the claimant should, by 12 February 2021, explain her claim specifically under the different discrimination headings. The letter gave bullet points setting out what would be required. As expected, this was the kind of information that may later be set out in a list of issues or schedule of allegations: who did what when in respect of each allegation of discrimination.

15. Although the distinction is sometimes a fine one and may not have been appreciated by the claimant at the time, this seems to me to have been clearly an invitation to identify the acts of discrimination by reference to incidents already set out in the attachment to her claim form, rather than to identify other incidents or claims for which an application to amend would be required.

16. On 3 February 2021 the claimant wrote asking for an extension of time for her response to that direction. The respondent did not oppose this, and on 23 March 2021 EJ Hawksworth granted the extension requested by the claimant (to 31 March 2021) and made further directions in respect of the claimant identifying any relevant disability and providing medical evidence and a disability impact statement.

17. On 31 March 2021 the claimant submitted her response to EJ Hawksworth's direction. This response was 48 pages long and set out the claimant's claims against the headings provided by EJ Hawksworth, albeit in many cases it remained unclear what form of discrimination was alleged. For instance, under "E" the allegation is "*Direct discrimination by manager refusing a benefit to the Claimant and at the same time the manager using the benefit herself.*" The incident in question is described, but there is nothing to say which protected characteristic it relates to, and that is not obvious from the description of the incident.

18. The claimant also prepared and submitted her impact statement and description of her disabilities.

The first preliminary hearing

19. The preliminary hearing proceeded on 4 August 2021 before EJ Shore. The claimant was represented by counsel on a pro bono basis (with solicitors also acting pro bono). A final hearing was listed for ten days in October 2022. A further preliminary hearing was listed on 1 February 2022. The case management summary says that "*The nature of the hearing will be determined once the matters to be resolved by the case management orders herein have been finalised. The hearing may be a private preliminary hearing, if only case management issues are to be determined, or may be a public preliminary hearing if issues concerning applications to amend the claim are to be determined, or may take both forms.*"

20. EJ Shore noted the following:

> *"7. The claimant had not been represented in these proceedings before today. She was able to find pro bono legal assistance … that was limited to this hearing. Unfortunately, it is not clear if any further pro bono assistance will be available to the claimant, so some of the orders made in this document are made to cover the possibility of the claimant having qualified legal assistance for the next step of the case and her not having such assistance ...*
>
> *9. These proceedings were presented on 19 July 2020 and in the year since their presentation, they do not appear to have advanced very far. A number of case management orders have been made that have required the claimant to provide further information about her claims. She has done her best to comply with those orders and I have no criticism of her for her efforts to engage with what is a difficult and complex subject. However, the overriding objective of the Tribunal is to deal with cases justly and fairly, and that includes avoiding the waste of time and costs. I and the parties have sought to plan a route to a fair and just outcome ...*
>
> *12. I had read all the papers … and noted that I had thought that some of the matters in the further information provided could be considered as 'new' and therefore may require an application for amendment of the claim ...*
>
> *14. I discussed with the representatives how we could best progress the case. I was mindful that the claimant would have difficulty complying with case management orders requiring her to agree a list of issues with the respondent without legal advice … further pro bono assistance may be available ... It was agreed that the best way forward was to try and agree a list of issues as a first step. If this was done, then a further preliminary hearing could deal with any applications to amend and further case management.*
>
> *15. If the claimant was unable to obtain legal advice, then the preliminary hearing would have to work through the claimant's documents to identify the claims and issues before making decisions about any amendments that may be required and making further case management orders."*

21. So by that point the difficulty that had been identified was that the allegations contained in the claimant's further information went beyond what could be found in her original claim form. On that basis she would need to make an application to amend if those claims were to be considered. Agreement of a list of issues was ordered "as a first step" towards identifying what applications to amend may be necessary.

22. The orders made by EJ Shore were in an alternative form depending on whether the claimant was able to continue with pro bono legal representation.

Further orders were made addressing the question of the claimant's disability. As an Annex to the order, EJ Shore included various statutory extracts relating to discrimination, and case law on amendments.

23. On 17 December 2021 the respondents submitted a list of issues. It seems the claimant's pro bono solicitor had produced the first draft of this, which the respondents had marked up. It was said that there was further version that the claimant had worked on separately. The claimant submitted that list of issues to the tribunal the same day.

24. The 1 February 2022 preliminary hearing was put back to 25 May 2022 on the claimant's application (made on medical grounds).

The second preliminary hearing

25. The hearing on 25 May 2022 was before EJ Reindorf. This is EJ Reindorf's summary of the preliminary hearing:

> *"8. This is a brief summary of the case intended to help Employment Judges who make case management decisions. It is not a substitute for the contents of the claim and response forms, or the witness statements on both sides.*
>
> *9. The Claimant was employed by the Respondent as a Midwife from 23 March 1998 until she was summarily dismissed on 9 March 2020 on grounds of gross misconduct … she lodged her ET1 on 19 July 2020. She complained of unfair dismissal, disability discrimination and sought notice pay, holiday pay, arrears of pay and other payments. In Box 8.2 of her ET1 she stated that she was also making complaints of "home responsibility discrimination", religious discrimination, "ethnic minority", "Polish Nationality discrimination" and part-time employee discrimination. Her Particulars of Claim ran to 18 pages.*
>
> *10. In its ET3 the Respondent sought to distil the claim as follows:*
>
> > *a. unfair dismissal;*
> >
> > *b. wrongful dismissal;*
> >
> > *c. failure to make reasonable adjustments;*
> >
> > *d. direct race discrimination;*
> >
> > *e. harassment because of religion or belief; and*
> >
> > *f. part-time worker discrimination.*
>
> *11. The Respondent denies the claims and argues that any complaints about matters occurring before 27 February 2020*

were presented outside the time limit for presentation of complaints.

12. *On 12 November 2020 the Respondent made an application for the bulk of the Claimant's claims to be struck out on the basis that they had no reasonable prospects of success, alternatively for a Deposit Order to be made as a condition of the Claimant pursuing her claims.*

13. *In response to case management Orders made in 2020 and 2021 the Claimant produced … further particulars extending to 51 pages.*

14. *At a Preliminary Hearing on 4 August 2021 Employment Judge Shore broadly identified the issues. The Case Management Summary and Orders arising from that hearing should be read in conjunction with this Case Management Summary. Employment Judge Shore ordered the parties to agree a list of issues. The current hearing was set down with the intention that, if the Claimant had obtained pro bono legal representation, it would be used to determine whether any claims pursued required permission to amend. If the Claimant had not obtained pro bono representation, it was intended that the current hearing would be used to finalise the list of issues. Employment Judge Shore also set down the final hearing for ten days from 17 October 2022.*

…

16. *The current hearing was originally set down for a full day in February 2022. The Claimant was unwell on that date and the matter was postponed to a two hour hearing. The Respondent objected to the shortness of the listing, given that the parties had not reached agreement on the list of issues. The Respondent requested that the current hearing be relisted for two days. The Employment Tribunal was unable to accommodate a two day hearing and informed the parties that the position would be reviewed at the current hearing.*

17. *The case therefore came before me for a two hour hearing to finalise the list of issues … decide the Respondent's strike out application and make case management orders as appropriate.*

18. *The latest iteration of the list of issues ran to 16 pages. This version had been very extensively marked up by the Respondent to show which parts it disagreed with.*

19. *It was clear to me that no useful progress could be made on the list of issues within the two hour listing and that there was no possibility of dealing with the other outstanding issues and getting the case ready for a final hearing starting on 17 October 2022. Moreover the Claimant said that she could not attend any*

hearings in the mornings for medical reasons. She did not show me any medical evidence specifically dealing with this point.

20. It was therefore agreed that the first five days of the existing listing for the final hearing would be converted into a mixed Closed and Open Preliminary Hearing, sitting in the afternoons only, to deal with the various issues which remained to be dealt with before the matter could proceed to final hearing. On the basis of the representations made orally by the Claimant I was content to list the next Preliminary Hearing for the afternoons only to accommodate her medical needs. I was not content to list it for a CVP hearing, as requested by the Claimant, because I considered that this was a matter which would benefit from an in person hearing and furthermore we had encountered significant disruption during the course of the current CVP hearing due to difficulties with the Claimant's connection."

26. The subsequent case management hearing was to take place from 14:00 every day during the week commencing 17 October 2022, and was to address the following matters:

"The issues for determination at the hearing will be:

a. agreement of a final list of issues;

b. the Respondent's application of 12 November 2020 for a strike out order and/or a deposit order;

c. whether the Claimant was a disabled person at the relevant times by reason of chronic pain, chronic fatigue and insomnia; and

d. case management as appropriate."

27. By the time of the preliminary hearing the respondent had conceded that the claimant was a disabled person by reason of chronic pain, chronic fatigue and insomnia. This meant there were no outstanding issues remaining in relation to the claimant's disability.

28. On 30 September 2022 the claimant submitted an application to rename her "home responsibilities" claim as a claim in relation to sex discrimination.

29. On 10 October 2022 the claimant submitted a letter in preparation for the hearing which included the following:

"The Claimant complains about acts of discrimination dating back to 2016/2017. She alleges that there was a continuing course of conduct by the employer beginning in 2016/2017, that the Claimant was 'managed out' of her job and consistently treated less favourably than colleagues who had been born in the UK and had English as their first language."

30. Accompanying that letter was a document headed "facts of the case/list of issues" in the form of a Scott schedule and consisting of 57 pages. As with previous documents drafted by the claimant although apparently set out in an organised fashion it is very difficult to interpret it in the legal terms necessary for any eventual hearing. For instance, against "3 March 2020" the claimant talks of her grievance not being investigated and instead her being forced into a disciplinary hearing. Under the section that seems to be identifying the legal claim that arises from this, the claimant includes:

> *"Breach of Health and Safety at Work Act of (1974)*
>
> *Disability Discrimination*
>
> *Ongoing Discrimination and ill treatment of the Claimant by the Respondent.*
>
> *Breach of Trust Grievance Policy*
>
> *Breach of Contract of Employment*
>
> *Breach of Trust Disciplinary Policy*
>
> *Breach of Equality Act 2010*
>
> *Breach of Duty of Care by Intentional or negligent or reckless infliction of still more emotional distress upon the Claimant is a cause of action.*
>
> *Grievance policy and disciplinary policy are 2 separate Trust policies and therefore should have been organised separately as requested repetitively by the Claimant.*
>
> *Breach of Trust Grievance Policy.*
>
> *Coercion.*
>
> *Aggravated damages.*
>
> *Pain and suffering."*

The third preliminary hearing

31. This preliminary hearing was held before me.

32. This is what I say about the hearing in my case management summary:

> *"23. On commencing the hearing on Monday 17 October 2022, the claimant refused to receive a written skeleton argument prepared by Mr Shellum, on the basis that it was not served in accordance with rule 42. I explained that such a skeleton argument would not typically be considered as a "written representation" under rule 42, but the claimant still refused to receive it.*

24. The early part of the hearing on Monday 17 October 2022 was taken up with an application by the claimant to record the hearing. That is addressed in a separate order.

25. Confusion followed as to which of the two lists of issues (p224 or p259) the tribunal should be working from. The claimant considered the marked-up version of the list of issues to be too complex to follow. In practice we worked from p259, cross-referring as necessary to the respondent's markings on the document at p224.

26. The claimant appeared confused by the task of establishing the list of issues, and by the respondent's objections to what appeared in her list of issues. Substantial time was taken on Monday 17 October setting out this task, by reference to the matters appearing at para 10(a)-(c) at p261, which the respondent objected to. The hearing concluded on Monday 17 October with no progress having been made, other than to set out (up to 10(v)) the matters the respondent objected to.

27. On resuming the hearing on Tuesday 18 October, the claimant said she was not in a position to address the list of issues (which she said she had understood to be dealt with on Wednesday). She handed up written submissions concerning her application to record the hearing, but I told her than I considered that to have been dealt with the previous day and would not revisit my decision.

28. The claimant went on to say that she could not understand the bundle prepared by the respondent as it set out chronologically oldest to newest rather than, as she preferred, newest to oldest. She also said that the bundle was missing many relevant documents – primarily her various objections to the respondent's original application to strike out her claim. It was not clear to me why those points had only now been appreciated when the claimant had had the bundle almost a week before the hearing. Minor progress was made in establishing the issues up to 10(e), and the issues in dispute were set out up to and including para 13.

29. On Wednesday 19 October the claimant presented me with written representations which, amongst other things, accurately recorded the areas of dispute in relation to her direct race discrimination claim. Mr Shellum also submitted a further bundle which he said contained the documents the claimant had said were missing from the previous bundle. The claimant refused to accept the further bundle.

30. It was eventually possible to make some more progress on the list of issues. With many of the disputed points, the claimant's position was that she had said in her ET1 that her claim was of

“Polish nationality discrimination”, and that she had not thought that full details of that claim needed to be set out on her claim form. She read me extracts from the guidance to completing the claim form, particularly in relation to continuing acts. It appeared to be her position that if she was alleging a continuing act, she simply needed to refer to that act in her claim form and could later give details in the list of issues of the individual matters that went to make up that continuing act. She also emphasised that she had been in a difficult position when initially completing her claim form. I told her that I did not consider that that was a correct approach, and that in my view the respondents were entitled to object to (and require an application to amend in respect of) any allegations that were not set out in her claim form.

31. *There is a clear instance of this at para 10(a)-(e) at p261-2 of the tribunal bundle. It has always been clear that elements of the claimant’s race discrimination claim relate to the ending of Polish-language antenatal services, but that does not mean that anything in relation to that can then be alleged by the claimant as a specific instance of race discrimination. I consider the matter is well put in para 8.10 of the IDS Handbook on Employment Tribunal Practice and Procedure: “It [is] necessary for claimants to set out the specific acts complained of, as tribunals were only able to adjudicate on specific complaints.”*

32. *I spent some time checking with the claimant that she intended each of the allegations on the list of issues as separate allegations of discrimination, rather than as background matters to be taken into account when the tribunal considered whether or not there had been discrimination. She was clear that these were intended as individual allegations of discrimination.*

33. *During the course of Wednesday afternoon we were able to get up to 10(o) on the list of issues. In each disputed point we had dealt with I found that the respondent was correct to say that it was not an allegation of discrimination made in the ET1 and therefore would require an application to amend the claim if it was to be considered by the tribunal. These were 10(a), (b), (c), (e), (g), (h), (i), (j) (but confined to the deletion of “there is only 1 patient in the claimant’s antenatal clinic to be seen by her. Instead”), (k), (m), (n) and (o).*

34. *It was apparent early on in this hearing that the tribunal would not be able to complete (or even get near to completing) the first element of the task set by EJ Reindorf: “agreement of a final list of issues”, let alone matters that may follow from that, such as any application to amend the claim or the respondent’s application to strike out the claim on the basis of time limits. In three of the four afternoons available we had addressed about half of the allegations of direct race discrimination, and I note*

that in principle direct race discrimination was one of the more straightforward claims brought by the claimant, without getting into the complexities that may be involved in, for instance, an indirect discrimination claim or a claim of disability discrimination."

33. There followed an application by the respondent to strike out the claimant's claim, which is what is now before me. That application was made in writing and has been replied to by the claimant in detail in writing.

The fourth preliminary hearing

34. The fourth preliminary hearing was due to take place on 3 & 4 May 2023, in order that I could hear any oral argument from the parties.

35. Unfortunately, that hearing was ineffective. My reasons for my order of 3 May 2023 record:

> *"4. On arrival at the hearing centre on 3 May 2023 the claimant was unable to access the hearing room. The hearing room is on the fifth floor of the building and the only lift in the building has been out of order since late March 2023. I apologise to the claimant that we were not able to accommodate her in the tribunal building. Staff made arrangements to transfer the hearing to an available room at Reading Magistrates' Court where the hearing resumed.*
>
> *5. The claimant objected to late production of the hearing bundle by the respondent. She said she had received it in hard copy form on 27 April 2023. This was a week before the hearing, whereas the order had required it to be produced two weeks before. She also said that it was not an agreed bundle and omitted three particular handwritten submissions that she wanted to be included. She said that this was the latest in a long line of deliberate breaches of tribunal orders by the respondent, designed to undermine and intimidate her.*
>
> *6. Mr Shellum accepted that hard copy of the bundle had been delivered late. He said that this was down to errors arising on the absence on holiday of a member of staff at the respondent's solicitors.*
>
> *7. In the meantime, Mr Shellum said that the claimant had submitted a 42-page witness statement earlier this week, which I did not have. The claimant said that she had only submitted her witness statement at that time (1 May) because of the late submission of the respondent's bundle.*
>
> *8. Mr Shellum considered that matters raised in that witness statement required him to refer to the recent case of <u>Smith v Tesco Stores</u> [2023] EAT 11 in response. He had brought copies*

of that case with him. The claimant objected to consideration of that on the basis that she would not be able to respond to it in the hearing and would require a few days to consider and reply to it. She also agreed that everything she wanted to say about the respondent's application was contained in her response of 3 February 2023 and the witness statement of 1 May 2023.

9. Whatever the rights and wrongs of the situation it appeared by that stage that the oral hearing was operating as a hinderance rather than as a help to resolving matters, and I recalled that the claimant had initially suggested that the respondent's application be dealt with on the papers. I raised with the parties the idea that Mr Shellum could prepare (perhaps by the end of the week) written submissions referring to the Smith case and any other points he had intended to raise in oral submissions. I also invited him to include in those written submissions whether the unfair dismissal and wrongful dismissal claims brought by the claimant could properly be considered distinct from the discrimination (including part-time workers) claims for the purposes of this application."

36. Given these difficulties, I ordered the respondent to provide any further written submissions by 6 May 2023, with the claimant to reply by 30 June 2023. That extended time was allowed for the claimant's response at her request.

37. On 18 June 2023 the claimant submitted an application which was, amongst other things, to revisit the October 2022 order that had established the process for considering the respondent's application.

38. On 30 June 2023 the claimant submitted her response to the respondent's application, though I have worked from her later, corrected, version, submitted on 3 July 2023.

39. On 18 July 2023 the claimant made an application for me to recuse myself.

40. I have addressed the applications of 18 June and 18 July 2023 in separate orders. I considered they needed to be addressed first, since the effect of either application succeeding was likely to be that I could not consider the respondent's application to strike out the claim (or at least not consider it by this process).

Summary

41. We are now three years since the claimant submitted her claim – a claim which itself dated back up to four years from its submission.

42. Except perhaps in the case of unfair and wrongful dismissal the claimant's claim as originally submitted did not properly define and set out the claimant's claims. An attempt to clarify that by an order for further particulars has added to the confusion. The further particulars make no attempt to distinguish between claims and matters previously referred to and new matters, and even

within those further particulars the details of the claim are not set out in a proper legal form.

43. Although much of the tribunal's recent focus has been on the production of a list of issues, in fact the problem here is defining the nature and scope of the claimant's claim. That is what the disputes about the lists of issues have been: both in defining what the claim actually was to start off with, and in defining what new claims the claimant may wish to bring, for which she would have to make an application to amend (and I note that no application to amend has been made, except on the question of substituting sex discrimination for home responsibilities discrimination).

44. I have mentioned earlier that the initial claim and response are not in particularly unusual forms. What has brought the claim outside the realms of normal litigation is the fact that one or perhaps two rounds of further particulars and three preliminary hearings across five part-days have served only to make the nature of the claimant's claim less rather than more clear.

The claimant's status as a vulnerable litigant

45. It is not in dispute that the claimant is a disabled person: she has multiple disabilities. It is also not in dispute that her first language is not English and she is not legally trained.

46. The scope of the claimant's disabilities led me to say in the previous preliminary hearing that she was to be considered a vulnerable party within the terms of the "*Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings*". As I mentioned in that earlier order, no question of capacity to litigate seems to arise in this claim. Similarly, I do not seen this as being a case in which the claimant has any learning or other disability that may require the use of an intermediary.

47. The claimant's disabilities, lack of English as a first language and status as a litigant in person also engage the provisions of the Equal Treatment Bench Book (presently at the April 2023 revision to the February 2021 edition).

48. As regards litigants in person, para 17 of the Equal Treatment Bench Book says:

> *"The aim is to ensure that litigants in person understand what is going on and what is expected of them at all stages of the proceedings – before, during and after any attendances at a hearing. This means ensuring that:*
>
> - *The process is (or has been) explained to them in a manner that they can understand.*
>
> - *They have access to appropriate information (eg the rules, practice directions and guidelines – whether from publications or websites).*

- *They are informed about what is expected of them in ample time for them to prepare and comply.*

- *Wherever possible, they are given sufficient time for their particular needs. "*

49. For litigants in person whose first language is not English, para 20 provides that:

> *"English … may not be the first language of the litigant in person, and they may have particular difficulties with the written language. Any papers received from the court or tribunal or from the other side may need to be translated. In some circumstances, an interpreter will be required."*

50. While the claimant has emphasised that English is not her first language she has never made any request for an interpreter or translation of materials, nor do I see that any such interpretation or translation has been necessary.

51. I note and accept that (para 22): "*Difficulties faced by disabled witnesses [*or parties] *are likely to be exacerbated where the individual is representing him or herself.*"

52. As regards case management hearings (para 28): "*Case management hearings, where they are held, provide a greater opportunity to assess what the LIP might realistically be able to do, give a fuller explanation, and check understanding.*"

53. I have endeavoured to do that, and as far as I can tell from the case management summaries, EJs Shore and Reindorf had this in mind too.

54. Para 30 addresses particularisation of the case – the main point at issue in this hearing:

> *"Ordering LIPs to provide complex schedules of their claim is rarely a good idea. Where necessary, it is better to hold a case management hearing and talk the LIP through their claim, extracting the required particulars and recording them in the case management order. In regard to the list of issues, if the other party is represented, they can be asked to prepare the first draft from what the LIP has so far put in writing."*

55. The claimant has never been ordered to provide a complex schedule of her claim, although she has taken it upon herself to do something like this in the latest Scott schedule she has prepared. The list of issues that the respondent sought to address at the previous hearing, though complex, had first been prepared by the claimant's pro bono solicitors.

56. "Overload" or being overwhelmed by matters is something the claimant has referred to from time to time. Para 30 addresses this too. An example of how this has been addressed is in allowing the claimant as much as three months to reply (in writing) to the respondent's application.

57. Advice is given on the conduct of hearings involving litigants in person at paras 63-65.

58. I have had regard to the specific reference to disabilities given at Appendix B of the Equal Treatment Bench Book.

59. It appears to me that apart from the question of hearings in person (rather than CVP) and recording the most recent preliminary hearings the claimant has always been given any adjustment she has sought from the tribunal, albeit that in many cases, as Mr Shellum points out, there has not been any specific medical evidence submitted by the claimant in support of that adjustment.

60. The duty to make adjustments is not confined to adjustments requested or identified by the claimant. I have a free-standing obligation to consider what adjustments may be necessary, irrespective of whether they are requested by the claimant or not. I have not found any adjustment that should be made but has not been requested by the claimant.

B. THE APPLICATION AND RESPONSE

61. I will refer to the parties' submissions in detail where necessary later in my decision, but this is intended to give an outline of their positions.

The application

62. The question that arises is what should be done when a claim is almost three years old and despite what appear to be the best efforts of everyone involved is becoming less well defined and more complicated, rather than being properly defined and structured ahead of a final hearing.

63. The respondent says that the answer to that question, in the circumstances of this case, is that the claim should be struck out. The respondent relies on rule 37(1)(d): "*a tribunal may strike out all or part of a claim … on … the … grounds … that it has not been actively pursued*". While the respondent's position is that this situation is covered by rule 37(1)(d) it does not limit itself to that, and draws on wider concepts under rule 37, such as a fair trial no longer being possible.

64. From Evans v Commissioner of Police of the Metropolis [1993] ICR 151 and Rolls Royce v Riddle [2008] IRLR 873 Mr Shellum says that striking out can occur where there has been (a) delay that is intentional or contumelious, or (b) there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent.

65. Mr Shellum makes out the respondent's case on the basis of (b) rather than (a), and I accept that we are not in the territory established by (a). If there has been delay on the part of the claimant it is not intentional or contumelious.

66. Mr Shellum also correctly reminds me that if circumstances arise in which a claim could be struck out I must first consider all lesser alternatives before striking out.

The claimant's response

67. The claimant helpfully summarises her position at the start of her written response (the corrected version dated 3 February 2023):

> *"Claimant objects to Respondent's strike out application made under Rule 37(1)(d) and implied also under any of the basis in Rule 37(1), including on the basis that it is no longer possible to have a fair hearing. Instead, Claimant respectfully submits that Respondent's application should be rejected by Employment Tribunal in its entirety for the following reasons:*
>
> - *It is not in the interest of the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*
> - *It is a further attempt, and an ongoing pattern of behaviour by Respondent, to intimidate, overwhelm and continue to persecute Claimant.*
> - *It imposes further undue burden and pressure on Claimant which conduct by Respondent is not in the interest of Equality Act 2010.*
> - *Respondent repeats an incomplete, false, and misleading information and is constructing an out of context LoI story (29 April 2021) to suit its predatory strike out application.*
> - *The authorities presented in its strike out application are cited incompletely, are inconsistent with the current case or quoted out of context. Specifically, "Evans" of 19 October 1992 is cited incoherently.*
> - *Respondent's repetitive claims are not evidence based.*
> - *The claims made by Respondent/Applicant are often false and always exaggerated.*
> - *Respondent's application is creating further burden on judicial resources and is delaying the current case ironically being the one of the claims that Respondent attempts but fails to prove in its application against Claimant."*

68. It is the claimant's position that the application should be rejected by the tribunal.

69. Amongst other things, the claimant relies on <u>Cox v Adecco</u> [2021] ICR 1307 as authority for the proposition that a claim should not be struck out before it has been properly understood or defined.

70. That was a whistleblowing case. A respondent applied to strike it out on the basis that it had no reasonable prospect of success (rule 37(1)(a)). HHJ Tayler said:

> *"9. … It is important, wherever possible, to have properly identified the issues in a case before considering strike out.*
>
> *10. Things often go wrong at preliminary hearings when considering strike out … where there has been insufficient consideration of the issues. In this case, a good starting point would have been to identify with care the protected disclosures asserted …*
>
> *28(5). … It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is."*

71. It is clear from this that in making those remarks HHJ Tayler had in mind striking out a claim under rule 37(1)(a) rather than rule 37(1)(d). It must be true in principle that you cannot strike out a claim for having no reasonable prospect of success without having some idea of what that claim is, but the same considerations would not apply to rule 37(1)(d), particularly where it is difficulty in defining the claim that is said to amount to the failure to actively pursue it.

72. Having said that, I am grateful to the claimant for drawing this case to my attention since it contains much useful advice generally on the approach to striking out a claim, particularly in cases where a claimant is acting in person. Paras 28-32 of the decision has much that could be said to be relevant for this case:

> *"28(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.*
>
> *28(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.*
>
> *29 If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is*

that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem …

30 There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success …

31 Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable ...

32 This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the

possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focused as possible."

73. Setting aside the references to striking out on the basis of no reasonable prospects of success, much of what is said there is applicable to this case. Striking out under rule 37(1)(d) should not be regarded by either the tribunal or the respondent as a short cut, easy answer or alternative to the hard work of identifying what the claimant's claim actually is. Repeated rounds of orders for further particulars will seldom be the right answer, though equally the tribunal should be careful of expecting too much of a claimant during a hearing. But HHJ Tayler also cautions claimants as to the difficulties that may arise in the case of "*prolix and convoluted*" claims, encouraging them to "*focus on their core claims*" with the aim of simplification, where possible.

74. Another aspect of the claimant's position (both at this and the earlier preliminary hearing before me) was that she was only doing what was permitted by guidance given in HMCTS Form T420 which gave guidance on making a claim to an employment tribunal.

75. Page 19 of this form gives guidance on how to complete box 8.2 with details of a claim of discrimination:

> *"In the box please describe the incidents which you believe amounted to discrimination, the dates of these incidents and the people who were involved. Explain in what way you believe you were discriminated against. If you are complaining about discrimination when you applied for a job, please say what job you were applying for. If you are complaining about more than one type of discrimination, please provide separate details of the act (or acts) of discrimination. You should describe how you have been affected by the events you are complaining about. <u>If you are unable to give the dates of all the incidents you are complaining about, you must at least give the date of the last incident or tell us if the discrimination is ongoing.</u>"*

76. The underlined passage is that relied upon by the claimant. As I understand it, her point is that having identified that the discrimination she was subject to was ongoing she had done what was required by T420. The further particulars she then submitted were part of the ongoing discrimination and therefore already covered by any reference in her claim form to continuing discrimination.

77. I do not accept that. First, form T420 has no authoritative legal status. Second, form T420 does not say that all that needs to be said is that the discrimination is ongoing. It starts by saying that the form needs to include the incidents of discrimination, their dates and who was involved. The final paragraph would only apply in situations where the individual cannot give the dates of all the incidents. If so, they must give the date of the last incident or say that the discrimination is ongoing. They are not relieved of any obligation to identify the relevant incidents.

78. The claimant gives her own detailed timeline of events at para 21 of her response to the respondent's application which, she says, "*demonstrates Claimant's consistent conduct and subsequent progress achieved*". She says it would not be in accordance with the overriding objective to strike out her claim.

79. The claimant questions whether Peixoto v BT (UKEAT/0222/07) remains good law after the introduction of the Equality Act 2010, and draws distinctions between that case and hers (similarly drawing distinctions with other cases relied upon by the respondent). She goes on to criticise the respondent's behaviour, suggesting that they have been the ones responsible for any delay or lack of progress.

80. She says (and I accept), "*the burden is on respondent to show that there was a delay, that claimant caused a delay, how claimant caused a delay, what prejudice has been suffered as the result of the delay and what are the reasons that a fair trial would not be possible.*"

The parties' further submissions

81. Shortly before the hearing (on 1 May 2023) the claimant submitted a lengthy witness statement with attachments. This is in similar terms to her earlier response. This in turn prompted a response from Mr Shellum and the second written submissions from the respondent, submitted in their final form on 5 May 2023. In this he expanded the respondent's application to include rule 37(1)(b), and addressed a point that I had asked him to address on the question of a partial strike out of the claims.

82. The reference to rule 37(1)(b) relied on the claimant's recent actions (including her witness statement) and Smith v Tesco Stores Ltd [2023] EAT 11.

83. Mr Shellum cites from Smith:

> *"1. This appeal concerns the exceptional circumstances in which, when all that can reasonably be done to get to grips with the issues in a claim brought or defended by a litigant in person has been done, an employment judge may reluctantly conclude that person is refusing to comply with the obligation to assist the tribunal to further the overriding objective, through conduct that can properly be described as scandalous, unreasonable or vexatious, so that a fair hearing is no longer possible, and there*

is no proportionate lesser sanction than striking out the whole claim or response.

2. *Good case management requires strong judicial skills. I appreciate it is easier to comment on than to undertake. It is particularly important at the early stages of a case. From the outset, the aim should be to identify the core claims and to manage them through to a full hearing, without the fundamental claims becoming encrusted with lengthy further particulars, in which more and more subsidiary claims and issues get added that obscure the real dispute between the parties. That is why it is best to avoid sending litigants in person away to provide additional information, whenever practicable.*

3. *If a claim form, or response, is of excessive length, and is not set out in a logical format (generally chronological), effective early case management is extremely difficult, and the more likely it is that there will have to be some form of further particularisation and case management before a hearing can be fixed. Litigants in person may not know the law, but they should generally be able to set out a coherent history of the events and explain the claims they consider arise. Claims rarely succeed because of the quantity of the allegations, it is the quality that matters.*

4. *The longer case management goes on, the greater the risk that a litigant in person will become embattled and fail to engage properly with the employment tribunal. Good case management requires that the parties work with the employment tribunal and each other in a constructive manner. Even litigants in person must focus on their core claims and engage in clarifying the issues. It is not the fault of a litigant in person that she or he is not a lawyer, but neither is it the fault of the other party or the employment tribunal. While the employment tribunal should take reasonable steps to assist litigants in person, this must not be at the expense of fairness to the other parties to the claim, and to litigants in other proceedings who seek a fair determination of their disputes, having regard to the limited resources of the employment tribunal.*

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

84. As with the extracts from <u>Cox</u> that I have referred to, I find this a useful statement of the problems and issues that can arise in a case such as this. Mr

Shellum says that the claimant's conduct in this case is "*even more serious than the claimant's in* <u>*Tesco Stores Ltd*</u>". I will consider that later.

85. Mr Shellum goes on to contemplate the question of a strike out which permitted the unfair and wrongful dismissal claims to continue – something that I particularly asked him to address in those submissions.

86. The claimant replied to this on 30 June 2023, though I am working from the "corrected" version sent on 3 July 2023.

87. The claimant objects to Mr Shellum's reference to <u>Smith</u> at the previous hearing. She says "*my standing remains unchanged*". She says there was nothing new in her witness statement that required this response from Mr Shellum. She says her claims are clear from her ET1, and her position is different from that in <u>Smith</u>. She cites the following from Smith:

> *"This judgement should not be seen as a green light for routinely striking out cases that are difficult to manage. It is nothing of the sort. We must remember that the "tribunals of this country are open to the difficult". Strike out is a last resort, not a short cut. For a stage to be reached at which it can properly be said that it is no longer possible to achieve a fair hearing, the effort that will have been taken by the tribunal in seeking to bring the matter to trial is likely to have been as much as would have been required, if the parties had cooperated, to undertake the hearing. This case is exceptional because, after conspicuously careful, thoughtful and fair case management, the claimant demonstrated that he was not prepared to cooperate with the respondent and the employment tribunal to achieve a fair trial. He robbed himself of that opportunity."*

88. The claimant goes on to address <u>Smith</u> at length. She also objects to the partial strike-out of her claim that I had raised with Mr Shellum.

C. THE FACTS

89. Many of the facts necessary for this decision are undisputed and are set out in my introduction. However, the parties differ on some matters. In particular it is the claimant's case that delay in progressing matters has been caused or substantially contributed to by the respondent, rather than her, and that this application is improperly made.

90. I do not see any evidence that the respondent has sought to frustrate the claimant's ability to advance her case. Much of what the claimant complains of (such as late preparation of a bundle) is commonplace even in well-conducted litigation. In some cases the claimant's particular requirements (such as for the bundle to be in a particular order) have caused difficulties.

91. The reasons for the claim not having progressed are the responsibility of the claimant. This starts with her view that the initial claim form can amount simply to an outline of her claim, with details being provided later. That is not a correct view of the law. It continues with what appears to be a failure to realise

that the further particulars and similar documents she has submitted may be an extension of her claim, and may require an application to amend. She has sought to advance a substantial and complex claim which she has not, so far, even with the assistance of pro bono counsel and solicitors, been able to define or properly frame.

92. In saying that, I do not mean to suggest that the claimant has been deliberately delaying things or doing anything other than trying to progress the claim to the best of her ability. In the absence of medical evidence I am not able to attribute any specific cause to her difficulties, but it is clear to me that a large part, probably the majority of, these difficulties stem from the matters that make her a vulnerable litigant. My view is that the claimant is simply not equipped to explain or account for a claim of the ambition and scope that she seems to want to bring.

93. Looking at the efforts that have been made by the judiciary – the four employment judges including me who have so far sought to understand what the claimant's claim is – I do not see anything more than could have been done by anyone on the occasions they made orders or held hearings. As recorded above, I also consider that all necessary and appropriate adaptations have been made to tribunal procedure to enable the claimant to properly participate in advancing her claim.

94. My decision will proceed on the basis that everyone involved – that is, the claimant, the respondent and the judiciary so far – have done their best to try to advance the case. That it has not progressed is the responsibility of the claimant, though that is through lack of ability to progress the claim, rather than through any deliberate failure to do what is required. (I will speak in this decision of a lack of progress. I acknowledge that there has been some progress – notably in the respondent's concession that the claimant was a disabled person – but it seems to me that compared with the wide range of undefined issues in the claim that progress is essentially negligible. As far as any list of issues is concerned, the progress in the October 2022 preliminary hearing had been to identify only a range of claims of direct race discrimination which had not previously been raised by the claimant and, if they were to be considered by the tribunal, would require an application to amend that had not then and has not yet been made.)

D. DISCUSSION AND CONCLUSIONS

Introduction

95. Article 6 at Schedule 1 of the Human Rights Act 1998 provides that "*In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

96. Both parties emphasise the need for a fair hearing "*within a reasonable time*".

97. Rule 2 of the Employment Tribunals' Rules of Procedure gives the overriding objective:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense."

98. I note there the requirement for the parties to be on an equal footing, but also the requirement to avoid delay "*so far as compatible with proper consideration of the issues*".

99. Rule 37 provides as follows:

"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 …

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious …

(d) that it has not been actively pursued;

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

100. Mr Shellum had originally made out his application by reference to rule 37(1)(d), but says that other parts of the rule may be relevant, including in particular rule 37(1)(e). He later extended his submissions to cover rule 37(1)(b).

101. I accept Mr Shellum's statement of the relevant factors under the Civil Procedure Rules, and that they apply in this case to the equivalent jurisdiction of the employment tribunal. Since this is not a case of "*intentional or contumelious*" delay he can only succeed in relation to rule 37(1)(d) on point (b) – that is:

"there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent."

102. It is clear to me that there has been inordinate delay in this case. We are three years into the claim but there has been no useful progress made. If anything, the confusion over further particulars and amendments means that matters are in a worse state than they were when the original claim was submitted.

103. "*Inexcusable delay*" is a more difficult concept, in circumstances where I have found the claimant is trying her best to progress the claim. However, "inexcusable" does not require some sort of deliberate delay by a claimant (which would fall into the "intentional" category),

104. Birkett v James [1978] AC 297 contemplates "inexcusable" in the context of delay by solicitors, rather than by a litigant in person. It also contemplates that delay may be excusable where it arises from the actions of someone other than the party against whom the accusation is made – but that does not apply on the facts of this case.

105. Aside from her criticism of the respondent's behaviour (which I do not accept) the only matter relied upon by the claimant for any delay is the circumstances in relation to her being a vulnerable litigant. I do not think it prevents her delay being "inexcusable". There must be some mechanism for addressing cases that are inordinately delayed, even where that delay arises from an inability rather than a disinclination to progress the claim.

106. The questions of whether there is a "*substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the respondent*" are closely related. Mr Shellum relies on two points – the first is "fading memories" in relation to matters that date back to 2016. That is now seven years ago. A hearing in January 2024 would require consideration of matters almost eight years before. Mr Shellum concedes that the majority of the claimant's claims relate to 2019, so would be around five years old by the time of a hearing in January 2024.

107. A greater concern is that at least in the case of the discrimination claims there is no suggestion of when or how the scope of those claims might be established. It will not happen in the near future. It will not happen in time for a January 2024 hearing, and any relisted hearing could not now be accommodated until 2025.

108. There cannot be a fair hearing of the discrimination claims until what they are has been established. There is no immediate prospect of that occurring, and I am at a loss at to how it could occur at all given the previous history of this case. There is, at least in respect of the discrimination claims, "*a substantial risk that a fair hearing is impossible*".

109. There is also Mr Shellum's second point – that two significant witnesses have left the respondent in March and September 2022, with a further witness leaving in October 2023. As he points out, two of those would have been in employment with the respondent if the claim had proceeded when already listed.

110. These missing witnesses include both of the claimant's managers, against whom it seems a number of allegations of discrimination are made, and the individual who heard her appeal against her dismissal.

111. In her submission the claimant says that each of the witnesses has already provided a witness statement. I am not sure, but imagine that that is in the context of a disciplinary or grievance process, which would not necessarily cover the full range of complaints the claimant now wants to bring (whatever they may be).

112. It is not unusual for witnesses for a respondent to have moved on, and that of itself does not demonstrate "*serious prejudice to the respondent*", but there are factors in this case that I find do move it into the territory of serious prejudice. The first is that the claimant's claim so far has been so difficult to understand that I accept Mr Shellum's submission that it would have been very difficult to take instructions from those witnesses while still employed. The second is that the likely scope of the claims (whatever they might be) would make properly taking instructions and drafting statements for people no longer employed a very difficult task. He is also right to point out that these difficulties would not have arisen to the same extent if the claim had been heard when originally listed.

113. As for the question of documents, Mr Shellum says that the delay may have impaired the respondent's access to relevant documents. I do not accept that and it does not form part of my decision. As the claimant points out, the respondent has not identified any particular documents which may previously have been available to it but are not longer available, nor why those documents are not available.

114. I find that there has been inordinate and inexcusable delay, and that, at least so far as claims other than her claim of unfair and wrongful dismissal are concerned, this has given rise to a substantial risk that a fair hearing is impossible and has caused serious prejudice to the respondent.

115. A further leg to Mr Shellum's application is now that the claimant's behaviour has been "*scandalous, unresonable and vexatious*" in accordance with Smith. In line with my findings of fact, Mr Shellum does not say that the claimant's behaviour has been (or needs to be) ill-intentioned or malicious in order to be unreasonable, and I understand it is "unreasonable" that he is relying on rather than "scandalous and vexatious". He speaks of the claimant's "*unreasonable withdrawal of cooperation with the tribunal process*", and says that a fair trial is no longer possible.

116. I have considered the Smith case in detail. There are some similarities. Extensive efforts have been made by the judiciary in this case to establish what the claimant's claim is. At each point the claim has become more complicated by the attempted addition of claims by the claimant. I accept the claimant's position that in her case there is not the breach(es) of order(s) seen in Smith. There is also criticism of the claimant's behaviour in Smith that I have not made of the claimant in this case. Despite possibly different motives and attitudes towards their claims, the factual situation described in the

introduction to Smith is very similar to that in this case. I note that "*great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may, for example, limit the claim or strike out only those claims that are misconceived or cannot be tried fairly*".

117. Para 45 of Smith makes it clear that the ultimate decision in that case was a strike out on the basis that the claimant was "*not prepared to cooperate with the tribunal process*". There have plainly been difficulties of communication between the claimant and the respondent, and possibly also between the tribunal and the claimant, but I do not find in this case that the claimant is "*not prepared to cooperate*". She is ostensibly willing to cooperate, although it seems her other difficulties may have served to limit the effectiveness of that cooperation.

118. Although I have found that Smith does not apply in this case, I do not consider that Mr Shellum's reference to it has been improper.

Alternatives?

119. Before moving to strike out the claimant's claim, I must consider alternatives.

An employment judge working from the claimant's original claim form?

120. This is the approach encouraged by Cox and similar cases. Striking out ought not to be seen as the "easy option" nor as an alternative to the hard work of interpreting the claimant's original claim. Setting aside the question of amendments, it ought to be possible for an employment judge working alone or with the assistance of the claimant during a preliminary hearing to identify what claims are brought by the claim form.

121. Given the caution in Cox about striking out as an alternative to the hard work of identifying the claim, I have given considerable thought to whether the right approach here is for me to apply myself to identifying as best I can what the claims are. In Cox HHJ Tayler cautions against requiring too much of a claimant during a hearing and also against ordering further particulars. For HHJ Tayler the answer can often be found in "*a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims*".

122. This is echoed in the claimant's submissions to the effect that her claim "*shouts out*" from the documentation submitted. However, while themes of the claimant's discontent with her treatment by the respondent are clear, that is far from what we need – identification of individual complaints along with identification of the cause of action that goes with those complaints.

123. I have sought to do carry out "a proper analysis" of the complaints by reference to the materials submitted by the claimant. Above I have cited the initial paragraphs of the attachment to her claim form, which gives some idea of the problems involved. The cancellation of the Polish language ante-natal clinic is something that the claimant has often mentioned as the first thing in

her claim, but it is not at all clear form para 1 what claim she intends. On the face of it there is no claim identified there, but it appears from the later correspondence that there is more to it than simply an "unwelcomed letter". I do not know what to read into that paragraph. Perhaps it is simply background. If it is intended as a detriment on the basis of race it is not immediately obvious how that might arise. Is it a direct discrimination claim or an indirect discrimination claim? At the second paragraph the claimant says she complains of discrimination but does not say what that discrimination was, nor whether hearing nothing back from the manager is itself discrimination and, if so, what form of discrimination it is. Para 3 appears to contain no allegation of discrimination. Para 4 mentions religious discrimination but it is not at all clear what the detriment complained of is and how it relates to her religion.

124. There are aspects of her discrimination claims that may, at first glance, appear clearer. For instance, later on in her claim, under the heading "religious discrimination, harassment and bullying incident", she says of her manager: "*she looked at me and scanned me blatantly criticising; "you are wearing your cross necklace", brown colour shoes and my small loop earrings "all wrong and against the Trust uniform policy"? I felt absolutely bewildered and devastated by her complete lack of respect and dignity towards me and disregard for me as a person whom she had known for the last 22 years.*" The reference to wearing a cross necklace could be seen as a reference to the claimant being a Christian, but if so is it said by the claimant to be direct discrimination, harassment or are we in the territory of indirect discrimination by reference to a uniform policy? What is the relevance of brown shoes and loop earrings which would not seem to be anything to do with the claimant's religion? Even an apparently obvious reference by the claimant in her claim to her religion seems simply to beg questions as to what the claim actually is, and this is, arguably, one of the clearer references in the claimant's lengthy original claim.

125. Except for one point, in relation to the unfair dismissal and wrongful dismissal claims, I have no confidence that I could work through the claimant's claim form and accurately identify the claims she intended to bring. Unfortunately it seems to me that we are in the territory identified by HHJ Tayler where the claimant's claim is so "prolix and convoluted" that it is futile for me to try to analyse it myself on the documents and form my own view on what it consists of.

126. In terms of doing this with the claimant in a preliminary hearing, that is what has previously been attempted at some length, but without success.

An unless order?

127. What about an "unless" order requiring the claimant to properly particularise her claim or face it being entirely or partially struck out? I have no confidence that that would be effective or do anything other than lead to further disputes between the parties.

Costs?

128. I do not consider a costs award to be any sensible alternative to striking out all or part of the claim.

Further consideration of adjustments?

129. The claimant's status as a vulnerable litigant is central to this decision and the difficulties that have arisen. Has everything been done that should be done to enable her to present her case as far as she is able?

130. I have set out above the advice given in the Equal Treatment Bench Book, and have previously referred to the Presidential Guidance on Vulnerable Parties and Witnesses. It seems to me this has been followed and the tribunal has done as much as it can.

A partial strike out of the claim?

131. I asked Mr Shellum to include in his submissions a section on a partial strike out of the claimant's claim – not including the unfair and wrongful dismissal elements of the claim.

132. It seemed to me that the difficulties in understanding the claimant's claim arose entirely in the context of the discrimination and other elements of her claim that did not relate to her dismissal. A claim of unfair and wrongful dismissal does not typically need much particularisation. I note that this kind of partial strike-out was a course of action contemplated in para 45 of the EAT's decision in Smith.

133. The claims of unfair and wrongful dismissal also arise, of course, at a much later date than most of the discrimination of other claims, so any prejudice caused to the respondent (or difficulties with a fair trial) arising out of faded memories or lack of witnesses might be expected to be less acute.

My decision

134. Questions of "*a substantial risk that a fair hearing is impossible*" or "*likely to cause serious prejudice to the respondent*" exist, in a case with extensive allegations such as this, on a spectrum. Some of the claims carry a higher risk than others. Given the way things have gone so far, I consider there is no realistic prospect of the claimant's discrimination and similar claims being ascertained in the near future. I have already identified the risks to a fair trial and prejudice to the respondent that arises. However, I do not see quite the same problem with the unfair dismissal and wrongful dismissal claims.

135. First, an unfair dismissal and wrongful dismissal claim does not generally require the kind of particularisation or individual identification that has caused insurmountable difficulties with the other elements of the claimant's claim.

136. Second, as I understand it, the dismissing officer remains employed by the respondent. The appeal officer has left, but to ask her to account for the conduct of the appeal (if it is relevant) is not particularly onerous. The respondent says that the dismissal was for gross misconduct, and the relevant process (not including any appeal) spans the period from July 2019 to March

2020. I would expect such a process in an organisation such as the respondent to be heavily documented, and if the respondent has disposed of any relevant documents in relation to the dismissal, that must be considered to be its fault, since it has always been clear that it would have to face an unfair and wrongful dismissal case. There is much less risk to a fair trial or prejudice caused to the respondent in the case of the unfair and wrongful dismissal claims.

137. Striking out part of a claim must always be a last resort, and striking out the whole claim even more so. The way matters have been conducted by the parties to date suggests to me that the path to an unfair dismissal or wrongful dismissal hearing will not be a smooth one, but I am prepared to allow the claimant an opportunity to continue to pursue that part of her claim as it seems to me it does not need to be struck out at this stage.

138. If time had permitted I would have preferred to list a further case management preliminary hearing in respect of preparation for a final hearing of the unfair dismissal and wrongful dismissal claims. However, I do not see how this can be done and still allow preparation to be done in time for the hearing listed for the end of January and early February 2024, so I have prepared a separate order intended to address preparation for the hearing. The parties should note that if for some reason they are not able to complete their preparation in good time for that hearing, a resumed hearing is unlikely to be listed before 2025.

139. For the avoidance of doubt, in referring to a wrongful dismissal claim I am only referring to a claim that the claimant being dismissed without notice is a breach of her contract of employment, and that, if she was to be dismissed, she ought to have been dismissed with notice.

Employment Judge Anstis
1 August 2023

Sent to the parties on: 2 August 2023

For the Tribunals Office

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