Neutral Citation Number: [2023] EAT 119

Case No: EA-2019-000607-NLD

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11 September 2023

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

T

Appellant

- and –

ROYAL BANK OF SCOTLAND PLC

Respondent

- -
- -

Ms N Mallick (instructed by way of direct access) for the **Appellant**
Mr B Campbell (solicitor, Brodies LLP) for the **Respondent**

Hearing date: 27 July 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Striking Out

The claimant in the employment tribunal was dismissed following about a year's sickness absence, which had begun about five months after he had moved into a new role. He brought claims of unfair dismissal and of disability discrimination relating to the dismissal, and to aspects of what happened or did not happen after he moved into the new role. He relied upon mental health disabilities. Disabled status was contested and the claims were resisted on their merits.

At a hearing two weeks before the full merits liability hearing was due to open, the tribunal struck out the claims on the basis of the claimant's non-compliance with orders and/or that the matter was no longer capable of fair trial. It erred in doing so. Notwithstanding that orders had not been fully complied with, and the claimant's challenging approach to the litigation, the tribunal did not reasonably conclude that the claims were entirely incapable of being tried at the listed hearing, and that there were no orders it could make that could reasonably be expected to secure that. It also did not purport to find, and could not reasonably have concluded, that the claimant's breach of orders or other conduct was such as to warrant or necessitate a strike out, even if a fair trial was still possible.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal appeals against the decision of the tribunal sitting at Birmingham striking out his claims at a hearing on 4 February 2019. Written reasons were sent to the parties on 25 April 2019.

2. The hearing of this appeal was listed to take place in July 2022 but was postponed on the day at the request of the claimant, and without opposition from the respondent, when it transpired that there had been some miscommunication about whether Ms Mallick would be representing him. She represented him at this postponed hearing and Mr Campbell appeared for the respondent. They both attended the hearing in person. The claimant joined by MS Teams link. At a couple of points the link broke down, but we paused while it was reinstated. The claimant also communicated with Ms Mallick via her laptop during the hearing, and breaks were also offered to assist their communication.

3. The claimant was employed by the respondent from October 2008. From April 2012 he moved to the new role of expert claims handler. Following a period of sickness absence which began in September 2012, he was dismissed with effect on 30 September 2013. In December 2013 he claimed unfair dismissal and disability discrimination, acting in person. The claim was struck out in July 2015. The claimant appealed. The appeal was allowed by the EAT in January 2018. The matter was remitted. The present appeal relates to the later strike-out decision in 2019.

4. The chronology of the proceedings up to the point of the previous decision of the EAT is, in very brief summary, as follows. The claim was considered to require clarification in respect of the specific complaints of disability discrimination. The claimant was also required to provide information and disclosure on disabled status and to produce a schedule of loss. Over the course of 2014 orders were made, extensions agreed or granted, and some compliance achieved.

5. At a hearing in November 2014 further orders, including an unless order, were made. A solicitor, Mr Pettifer, then came on record for the claimant. At a hearing in January 2015 a further unless order was made. That led to a decision striking out the claim, but following further compliance with the order, it was reinstated. At a hearing in May 2015 further orders were made for provision of information and disclosure by the claimant. The respondent subsequently applied for the claim to be struck out on the basis that the claimant had not fully complied with those orders. That led to the further decision to strike out the claim, and then the refusal of an application for reconsideration of that decision, that were together the subject of the first appeal that was allowed.

6. In summary that appeal was allowed in particular because the tribunal failed to consider whether a fair trial was still possible, and/or a lesser sanction was available. The EAT observed that previous unless orders had secured compliance in respect of their subject matter and, by the time the reconsideration application was determined, the claimant had fully or substantially complied with the May 2015 orders. There was nothing to suggest at that stage that a fair trial was no longer possible.

The Employment Tribunal's Decision

7. The decision which is the subject of the present appeal runs to 29 pages. In the section dealing with the law, and then in the concluding section, the paragraph numbering begins again at 1. I will cite from it in the format [a/b], being [paragraph number(s)/page number(s)]. The decision opens by identifying that the judge had directed that there be a hearing to consider whether to strike out the claims on grounds of unreasonable conduct, non-compliance with tribunal orders, because the claims were not being actively pursued and/or because it was no longer possible to have a fair hearing.

8. Following the matter returning to the employment tribunal from the EAT there had been a case management hearing on 5 June 2018. I will set out in full the account of that hearing given in the decision which is the subject of the present appeal, at [11 – 23/3 – 5].

> **"11. After the strikeout judgment was set aside on appeal, the case was remitted,**

and I heard a closed preliminary hearing on 5 June 2018. At that stage, the claimant was again represented by Mr Pettifer, his solicitor. The claimant attended, albeit late – I waited 20 minutes for him to arrive before starting the hearing and he arrived shortly after the start.

12. The respondent's representative at that hearing, Mr Kennan, said that the allegations were "worryingly vague". There was a Scott schedule and addendum; it was clear that the respondent was still disputing disability, and that it would contend that some of the matters in Scott schedule were not covered by the initial claim. In May 2015, the parties had agreed that the tribunal dealing with the final hearing would have to decide whether an amendment was required (and if so, whether it should succeed) before some of those allegations could be considered.

13. Having scrutinized the Scott schedule and addendum, I adjourned for a short period and asked the claimant's representative to provide details of the provisions, criteria or practices relied upon in the context of the reasonable adjustments claim, as these were unclear from the information provided at the earlier stage of the proceedings (in 2015). He was able to do so whilst I waited.

14. There were some details of the disability claims which were manifestly unclear and which Mr Pettifer was not able to clarify on the day of the hearing. On 29 April 2018 the respondent had requested further information about which condition(s) the claimant relied upon in respect of each disability claims, and in respect of the reasonable adjustments claims. On 18 May 2018, they had asked the claimant to identify the protected acts relied upon for the victimization claims. The claimant had already produced a 9 page Scott schedule and 10 page addendum to it, in response to the orders of Judges Dawson and Gaskell in 2014/2015) which were referred to at the Employment Appeal Tribunal hearing, but in the respects identified above they were still unclear.

15. Before the hearing on 5 June 2018, the claimant had replied with the assistance of his solicitor, but in relation to request 2.2 (particulars of the disadvantage to which the claimant said he was subjected by each provision, criterion or practice complained of in the context of section 20(3) of the Equality Act 2010), the claimant had simply replied " Scott Schedule Section 6 : see the response in relation to the [9 page] addendum", so that it was not possible to identify which parts of the addendum were relevant, and he had done the same in relation the disadvantages said to arise from the matters set out in sections 14 and 16 of the Scott schedule and section (a) of the addendum to it. I considered that it was not in the interests of the overriding objective for the respondent and the tribunal to have to guess at the disadvantage asserted in each case and that it would be proportionate to direct the claimant to clarify this (a matter which should have been within his own knowledge) before disclosure occurred and witness statements were exchanged, as it was something the respondent (as well as the claimant) may need to address in evidence. I therefore directed the claimant to provide clarification of the parts of the Scott schedule and its addendum being referred to (at paragraph 3.2 of the Order).

16. Secondly, there had been no reply to the request that the claimant identify the protected acts relied upon for the victimization claims; I took the view that as this was a basic matter (and an essential ingredient of the victimization claim) that the respondent should know the case it had to meet, again before disclosure or exchange of witness statements, and made a direction that the claimant identify the relevant protected acts – order 3.3 of the order of 5 June 2018. The respondent

> **may well have had some relevant documentation about these matters as well as the claimant.**
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> **17. I therefore gave directions that the claimant should comply with these Orders by 4:30 PM on 26 June 2018 I observed, in paragraph 4 of the case management summary which preceded those Orders, that when those details were provided, it was likely that this was as much information as the respondent was likely to get from the claimant ahead of exchange of witness statements. I deliberately restricted my directions to those matters about which I considered the respondent (and Tribunal) required information in order to understand the claims being advanced by the claimant.**
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> **18. There was no suggestion by Mr. Pettifer at the time (almost 5 years after the claimant's dismissal) that any further amendment to the claim would be required. Mr Pettifer did not suggest that the timescales given for compliance were unrealistic.**
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> **19. A copy of the case management summary and directions is attached to these reasons. I directed that Schedule of Loss be produced by 9 July 2018 (this included a direction at paragraph 4.2 that the schedule must include information about whether the claimant had obtained alternative employment, and if so when and what employment; about how much money the claimant has earned since dismissal and how it was earned; and full details of Social Security benefits received as a result of dismissal.)**
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> **20. I directed that the parties were to send each other copies of all other relevant documents by 9 July 2018 (direction 5.1). This was because the parties indicated that full disclosure had not yet occurred, although previously directed in 2015.**
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> **21. The parties were directed to agree the contents of a final hearing bundle by 24 September 2018 (direction 6.1), and to exchange witness statements by 29 October 2018 (direction 7.1).**
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> **22.The time estimate for hearing was 7 days, and the final hearing was listed (for the fifth time) between 18 and 26 February 2019. At that time, this was the earliest that a listing of that length could be achieved in the Region.**
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> **23. As a precautionary measure, I listed a further preliminary hearing to ensure compliance with my previous orders. This was listed for 26 November 2018 and was to be in person. By direction nine, the claimant was also to provide a draft chronology to the respondent by 26 November 2018."**

9. The tribunal then set out a detailed account of events in the course of the litigation between that hearing in June 2018 and the hearing on 4 February 2019. It runs to more than 16 pages. That reflects the very high volume of correspondence. This section of the decision should be read for its full content. I will not attempt to summarise it here. Material aspects are referred to in the judge's conclusions to which I will come. However, I note at this stage the following aspects.

10. First, although the claimant's solicitor appeared at the June 2018 hearing, thereafter the material correspondence on the claimant's side came from the claimant himself. Although there were references for an initial period to his solicitor's ongoing involvement, the claimant asked to be copied in on all correspondence with his solicitor. In September the claimant wrote that he was again a litigant in person, although his solicitor only wrote to take himself off the record in November.

11. I need to refer also to a further order that was made in November, and the judge's related comments in the course of her narrative. On 23 November 2018 the claimant applied for a postponement of the case management hearing on 26 November, on the basis of various health matters, including relating to ADHD. He attached some medical evidence. That application was granted by EJ Woffenden, but she directed him to provide further medical evidence by 30 November, specifically to the effect that he had been medically unfit to attend that hearing and as to his prognosis.

12. In the bundle for the February 2019 hearing was an email from the claimant to an NHS Trust on 20 November 2018. He referred to his renewed prescription for Elvanse but also said he would stop taking it. The judge described the contents and observed that three days before his postponement application he was "apparently telling a medical practitioner that he was feeling much better" than he had when he attended the hearing in June 2018. The claimant also produced a letter from a GP, Dr Turpin, of 29 January 2019. Dr Turpin had not seen him in November, but referred to his ADHD, which he noted can cause problems with people organising themselves. The claimant was now receiving Atomoxetine. The judge observed that this letter did not indicate that the claimant had been unfit to attend a hearing in November, and that there was nothing to indicate that he could not have visited the GP, as directed, to get a letter in November.

13. Thirdly, on 21 December 2018 the respondent's solicitors applied for an unless order on the basis that: (a) the claimant had stated that his schedule of loss provided only partial details of his

income since dismissal and had yet to provide the remaining information; (b) he had not yet provided all of his mitigation documents; (c) he had not agreed the hearing bundle with they had provided; and (d) he had not complied with EJ Woffenden's order. On 8 January 2019 the claimant replied referring to ill health and being a litigant in person and stating that he wanted to apply to debar the respondent. The judge thereafter directed that a hearing be listed to consider whether to strike out the claim. The notice of hearing went out on 17 January. On 21 January the claimant supplied some further mitigation documents, and he wrote a letter objecting to the strike-out listing on 24 January.

14. As to the law, the judge set out the relevant parts of rule 37 **Employment Tribunals Rules of Procedure 2013**. She noted that the EAT in the present case had made it clear that, while non-compliance with an order is a ground of strike-out, there is nothing automatic about it. She referred to the need to have regard to the overriding objective and the duty of the parties to assist the tribunal to further it and to co-operate with each other and with the tribunal. She continued, at [5 – 10/23]:

> **"5. As set out in paragraph 12 of the EAT judgement, in the context of noncompliance with the rules, the overriding objective requires consideration of all the circumstances and, in particular: the magnitude of the non-compliance; whether the failure was the responsibility of the party or his or her representatives; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the failure in question.**
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> **6. Even where the conduct under scrutiny consists of deliberate failure is, the fundamental question for any tribunal considering whether to strike out a claim is whether the party's conduct has rendered a fair trial impossible – Bolch v Chipman [2004] IRLR 140 EAT. In that case, Burton P said that firstly, there must be a finding that a party is responsible for a default falling within rule 37(1); secondly, if so, the tribunal must consider whether a fair trial is still possible. Save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.**
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> **7. Even if a fair trial is not possible, consideration must be given to whether strikeout is a proportionate sanction, or whether there is a lesser sanction that can (and ought) to be imposed.**
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> **8. In James v Blockbuster Entertainment Ltd, Sedley LJ pointed out that the power to strikeout is Draconian in nature and should not be exercised readily. In the case of unreasonable conduct, the tribunal must either be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible. He repeated that even where the conditions for making a strikeout order are fulfilled it is necessary to consider**

> **whether the sanction is a proportionate response in the particular circumstances, taking account of whether there is time for orderly preparation to take place so that the claim can be tried, or whether a fair trial cannot take place.**
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> **9. The claim (or response) cannot be struck out unless the party in question has been given a reasonable opportunity to make representations (at the hearing if the requesting party has asked for one - or in this case, as directed by the tribunal).**
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> **10. At paragraph 15 of the EAT judgment, it is pointed out that a failure to comply with the notice requirements before striking out claim will render any order to strikeout invalid."**

15. There is then a concluding section which I will set out in full, which draws on the earlier litigation chronology. It is at [1 – 28/23 – 29] (including two paragraphs numbered 17):

> **"1. Focusing on what has occurred since the Employment Appeal Tribunal hearing in January 2018, we have gone from a situation where the issues were relatively clear (subject to some clarification) to one where they are manifestly unclear (given the claimant's declaration that he intends to apply to amend his claim in accordance with the very much expanded schedule of allegations, which he sent to the respondent in early December 2018). Even that is said by the claimant to be incomplete.**
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> **2. The respondent contends that many of the issues referred to in the most recent Scott schedule were not included in the original claim, and this would be unsurprising given the relative length of each of the documents. If the claimant did intend to pursue the amendments, as he has stated that he does on numerous occasions, it would take a significant part of the seven days allocated simply to disentangle which are new claims which are not, and to deal with any amendment application that results. This would result in the time estimate being totally inadequate. I have no confidence that if the question of amendment were to be dealt with separately, and if the claimant were to be given a deadline to set out a comprehensive list of the amendments that he seeks, he would comply (or comply with sufficient clarity for the matter to be dealt with proportionately).**
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> **3. Magnitude of non–compliance: Turning to legal tests that I must apply, and focusing on the order made on 5 June 2018 at the preliminary hearing, the response to order 3.2 set out in the claimant's amended Scott schedule sent to the respondent on 5 December 2018 is far from clear. The same is true in respect of order 3.3, as mentioned above. In my view, it is not reasonable (or sensible) to expect the respondent (or tribunal) to trawl through several pages of text in an attempt to deduce what is said to be a protected act. That is a matter the claimant should be able to identify.**
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> **4. There has still not been full compliance with direction 4, as the claimant accepts that relevant documentation is missing, and he has still not confirmed his earnings during the period since his dismissal by the respondent.**
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> **5. The claimant has not complied with order 5.1 of the order made on 5 June (when he was present) either. There are still documents which he has declared that he possesses (in correspondence), and which he has not disclosed.**

6. The parties have not yet agreed which documents are going to be used at final hearing, in accordance with paragraph 6.1 of that Order. Although the claimant seeks to blame the respondent, the respondent has sent him all of its relevant documents, and the bundle cannot be agreed because of the claimant's failure to specify in detail his objections (although he has managed to specify many other complaints in detail) and because of his failure to confirm whether he is content with the transcription of his own recordings and to produce all relevant documents that he has (as set out above). He admitted that he received a copy of the bundle in September 2018 (above) but he did not spend time going through it so that he could identify what he thought was missing or should be added, but sent it back to the respondent.

7. The respondent has indicated that, all things being equal, if the claimant had been in a position to rapidly comply with the other orders, it would have ensured that its witness statements were ready for exchange prior to final hearing. By contrast, the claimant told me today that he would need "a few more weeks" to produce a witness statement (even if everything else could be done to get the matter ready), so that there is no possibility that they would be ready before (or even during) the period for which the final hearing is listed. In any case, the repeated his intention to apply to amend the claim in accordance with the amended Scott schedule, which runs to tens of pages.

8. I am excluding for the moment, in the context of rule 37(1)(c) at least, the failure to comply with Judge Woffenden's order of 30 November 2018, as it was very unfortunately attributed the wrong date in the Order sent out by the tribunal. Just dealing with the failure to comply with the order of 5 June 2018, it seems to me that there has been a really serious failure to comply by the claimant. The delay has been lengthy and deliberate; the correspondence I have referred to above shows that the claimant was well aware of his obligation to comply with the order but chose not to comply with it, saying either that he considered order 3 to be "inappropriate" when his representative had consented to it in his presence, or that he had other important matters to attend to which had precluded compliance or that he was choosing to comply with order 4 in the two or three weeks before the final hearing rather than 6 months earlier, as directed.

9. As I have indicated above, he has still not fully complied with orders 3 and 4, so that the respondent and tribunal cannot clearly understand the disadvantage to which he says he was put by the relevant provisions criteria and practices in the context of the reasonable adjustments claim, and it is still unclear which are the protected acts relied upon, an essential ingredient of victimisation claim. As I have previously indicated, both of those matters are likely to need to be addressed in evidence by the respondent as well as by the claimant, and it may yet be that the respondent (as well as the claimant) has relevant documentation in respect of these matters.

10. It is difficult to say how much documentation has so far been withheld by the claimant, and so is yet to be disclosed, but the failure to do so, and in particular the claimant's failure even to start to draft a witness statement are very serious defaults. I am not satisfied, on the evidence before me that the claimant has suffered more than minor ailments in the last eight months; he was certainly able to produce very lengthy emails, quoting relevant law, which were sent to both the respondent and tribunal in the intervening period.

11. Reason for non-compliance: Although to begin with, up to about August or

early September 2018, the claimant was complaining about his solicitor (and difficulty in contacting him), by 23 August 2018, the claimant was showing, in his correspondence with the respondent's solicitor, that he was fully aware of his obligations in respect of the order of 5th June, and was intending to comply with it himself. By 9 September 2018, he had notified the tribunal (although not apparently his solicitor) that he was intending to represent himself. It is clear that the respondent had written to the claimant on many occasions clarifying what parts of the order he had failed to comply with. He made repeated promises that he would comply with paragraph 3 of the order of 5 June 2018, but has failed to do so with any clarity. He had said quite clearly from an early stage that he was not intending to comply with paragraph 4 of the order (as early as 16 July 2018). His failure to comply has continued since 6 November 2018, when it was absolutely clear (if had not been before) that the claimant was no longer represented by his solicitor. My conclusion is that the claimant does not intend to comply with the Tribunal's Orders, nor to further the overriding objective, but rather to follow his own agenda of obfuscation and delay, for whatever reason.

12. Effect of failure to comply: In the context of failure to comply with the order of 5 June 2018, in my view it is absolutely clear that this failure has caused significant unfairness, disruption and prejudice to the respondent. At this stage, almost six years after the claimant's dismissal from a post in which he was employed for 17.5 hours per week, it still does not have clear details of the case has to meet, and due to the claimant's own default, it seems to me that postponement of the final hearing is inevitable - apart from anything else, on the claimant's case, he has not begun to draft his witness statement. Given its likely length, and his own declaration that it will take several more weeks before he can complete it, so that (as he said) it will not be ready by the time that the final hearing is listed, it would not be possible to conduct a hearing on those dates. I believe that this is the 5th time the final hearing has been listed, and on 3 occasions the fact that the claimant has not complied with the tribunal's directions has contributed (at least) to that decision. This has caused disruption and expense not only to the respondent and its witnesses, but has delayed the hearings of other litigants at a time when Tribunal time is at a premium. It is easy to forget that each time a final hearing is listed, the witnesses have to make sure they are available and remind themselves of events so long ago.

13. I have kept in mind the [EAT's] words, in [the] judgment on appeal, that "any further or continued delay would be inimical to fairness and the interests of both sides and will serve only to make it harder for the fact-finding process to take its course."

14. After more than 5 years, with the issues still not clear, it is easy to see how the delay that has occurred since last June (and the postponement of the final hearing once again) will prejudice the respondent. If the case were to continue, even if the claimant finally complied fully with direction 3, and even if any application to amend were refused, it is likely that the respondent would still have to ask its witnesses for the first time about details of disadvantage suffered by the claimant and about alleged protected acts. Even in respect of matters where the issues are relatively clear, it would be well over 6 years since the relevant events before the witnesses were questioned about them (if, contrary to experience in this case, a listing in early to mid 2020 was actually effective) As a matter of common experience, this would be extremely disadvantageous to the respondent's witnesses. As [the EAT] pointed out, such a delay does not assist the claimant either, but at least he has the benefit of knowing the nature of his own claim.

15. The need to postpone the final hearing again will be extremely disruptive – the claimant has not prepared but the respondent has briefed its witnesses and arranged for them to be available to attend the trial. If the matter proceeds, there will be further disruption and it is probable that an even longer listing will be required.

16. Is a fair trial still possible? in the context of rule 37(1)(c) and (e), I do not consider that, now, a fair trial is still possible, whether that is commencing on 18 February 2019 or at a later date when this hearing can be relisted (realistically, in approximately one year's time; cases of this length are currently being listed into February 2020 in this region).

17. Despite having had not one but two attempts to clarify his schedule of allegations, the claimant has expanded it by a factor of four or five since the last hearing (although he says it is still incomplete), so that the issues are manifestly unclear. If the claimant were given a deadline to supply the respondent and tribunal with full details of the amendments he is seeking I consider it very likely that he would simply choose not to comply, as he has chosen on a number of occasions since June 2018. I have set out the correspondence at length above because it demonstrates that a number of occasions the claimant has declared that he is not going to comply with tribunal's orders because he does not consider it to be appropriate.

17. Even if I am wrong, and were the claimant to attempt to comply with such a direction, I consider that a preliminary would be necessary to clarify the allegations, identify which of the allegations are within the original claim, which require an amendment if they are to be pursued and in respect of which the amendment should be granted. I would anticipate that such a hearing would take at least 3 days (judging by the pace today), and that at the end of it the claimant may yet seek to challenge the outcome and attempt to add yet further complaints. All of this would need to take place before the issues of disclosure could be concluded and exchange of witness statements could occur. In my view, it is highly likely that further case management preliminary hearings would be required to ensure that appropriate disclosure had taken place and that the claimant completed his witness statement(s).

18. I do not consider that such intensive oversight by the tribunal (at this stage in the proceedings, and given all of the hearings which have occurred before) would be proportionate or appropriate, given not just the effect on the respondent and its witnesses, and on the costs of these proceedings but also the effect on other litigants waiting to have their cases heard. In the absence of such intensive involvement by the Tribunal (which is unlikely to be feasible given current resources even if it were appropriate) a fair trial is simply not possible within a reasonable period – the issues are too unclear, it would be impossible to say whether the claimant has complied substantially with disclosure and given the claimant's unwillingness to comply, it is likely the next hearing would have to be vacated, also.

19. I bear in mind that I should only consider the situation as of now, taking account of what has occurred since the previous appeal hearing in January 2018. I am well aware how Draconian an order to strike out the claim is, and that it should be used only as a last resort. I have considered seriously whether to simply postpone the final hearing and give further directions for a preliminary hearings to deal with amendment and to clarify the issues, as mentioned above, then to direct

further disclosure and exchange of witness statements (and to order yet a further case management hearing to try to ensure they are complied with before a lengthy final hearing).

20. As I have said, however, bearing in mind the volume and nature of the correspondence in which [the claimant] has indulged since the last hearing, I simply do not consider that it is at all likely that it would be possible to carry all of this out in a proportionate manner. [The claimant] has been unable or unwilling to comply with the relatively straightforward orders that I made on the last occasion, despite the fact that he was represented for part of that period and has raised all sorts of other issues. The claimant's submissions today, and his conduct to date, gives me no confidence whatsoever that we would be in a better position in 6 to 12 months' time than we are now.

21. In my view, the intervening year since the appeal hearing has shown that rather than being intent on progressing his case, the claimant has sought to obfuscate and delay. The single clearest example of that is the claimant's misleading application to the tribunal on 23 November 2018, on the Friday afternoon before a preliminary hearing which I had deliberately listed to ensure that the case was kept on track for final hearing starting in February 2019, to postpone that hearing, and his subsequent failure to comply with Judge Woffenden's order regarding the production of medical evidence, when she granted that application.

22. I say that it was a misleading application, because the claimant's own evidence reveals that only three days before, he was writing to an NHS practitioner saying that his health was currently much better than it had been for some considerable time - he made reference to a previous period of about 1.5 years when he said he had an adverse symptoms due to medication which he had, by then, stopped. The medical evidence which the claimant produced today did not show that he was unfit to attend on 26 November 2018, but rather suggested that he had overlooked it. He clearly had not, as he wrote applying for postponement on 23 November 2018.

23. Had the claimant attended on 26 November 2018, I would have made appropriate directions to get the case ready for trial in February 2019, including quite possibly by making "unless" orders. The claimant's conduct, in obtaining a postponement in November 2018 on a false premise, persuades me that this would no longer be an appropriate course. I do not consider that the claimant is committed at all to bringing this matter to hearing. If he was, he would have complied with the relatively simple directions I gave in June 2018, and would have started drafting his witness statement many months ago. After all, his witness statement should only contain information which is already within his possession.

24. Instead, the claimant has focused on peripheral matters, such as whether the respondent was one day late in confirming its interest in judicial mediation, or whether the tribunal should copy correspondence both to him and his solicitor, and has said in terms that he is choosing not to comply with the tribunal's directions at a particular time – see for example the claimant's letter to the Tribunal dated 2 August 2018. It is correct that in August the claimant had applied to vary paragraph 3 of the order of fifth June, and it is very unfortunate that the tribunal clerk failed to transcribe my direction that the time for compliance with order three extended to 17 September 2018, but the claimant continued to fail to comply with that direction thereafter, and only partially complied in December 2018. Had he attended on 26 November I would have made a direction (quite

> **probably an unless order) that he comply with it within a further period of no more than 14 days. By obtaining a postponement of that hearing on false pretences, that opportunity was lost, and by conducting himself in that way, the claimant has destroyed any confidence I may have had that a further unless order would be an effective tool. I note that on the previous occasions when there was some compliance with unless orders, the claimant was represented by a solicitor. He is not now, and his own conduct is such that I do not consider that such an order would be effective – it is likely that the claimant would comply to some minor extent such that further clarification was required or would then make some other application so that enforcement of the unless order was not appropriate, and this would simply delay, in my view, the inevitable, and cause further prejudice, delay and cost.**
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> **25. I have considered whether a strike out order is in accordance with the overriding objective and whether, in particular, it is proportionate to use this sanction of last resort. I conclude that it is: if matters were to proceed, the parties would not be on an equal footing. The claimant, who has been represented for large periods of time, would know what his case is, and would have access to all available relevant material. The respondent would not. If I were to make unless orders and order further preliminary hearings, in my view this would be far from a proportionate use of the Tribunal's resources, and would go far beyond what can reasonably or sensibly be expected, given all of the circumstances, including the history of the case. The issues are complex and discrimination cases are always important, but in my view the claimant has had a more than fair opportunity to make his case, which he has not taken.**
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> **26. I have to avoid unnecessary formality and manage cases flexibly, but, essentially, the respondent and tribunal and to know what the claimant's case is, and that all relevant material had been made available, in order for the parties to be on an equal footing and there to be a fair hearing. I have no confidence that, taking all reasonable steps to manage it, that can be achieved in this case.**
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> **27. Importantly, I should avoid delay so far as compatible with the proper consideration of the issues and should seek to save expense. I find that prolonging this claim will lead to unconscionable delay and will only serve to further amplify the costs, which must be very substantial already.**
>
> **28. For all of those reasons I have decided to strike out this claim under rules 37(1) (c) and/or (e), on the basis that the claimant has not complied with the Order of the Tribunal dated 5 June 2018 and/or that a fair trial of the claim is no longer possible. Had it been necessary, I would also have found that the manner in which the proceedings were conducted by or on behalf of the claimant were unreasonable, for the reasons set out above."**

The Grounds of Appeal and Summary of the Arguments

16. The claimant's original notice of appeal was not in proper form. It also contained allegations of bias. HHJ Shanks gave directions for various steps to be taken followed by a preliminary hearing. At that preliminary hearing, before HHJ James Tayler, the claimant was represented by Ms Mallick

of counsel under the ELAAS scheme and the respondent by Ms Owen of counsel. Ms Mallick had drafted six proposed amended grounds of appeal, of which five were permitted to proceed to this full appeal hearing. The sixth, relating to alleged bias or apparent bias, was not permitted to proceed.

17. I had the benefit of skeleton arguments from both representatives, and full oral submissions. I have taken into account everything that I have read and heard. What follows is a summary of the grounds and of what seem to me to have been the most significant points on each side.

18. By way of overarching submission Ms Mallick noted that the EAT considered that there was no basis to strike out, as at the date of its 2019 decision. Any further decision to strike out would therefore have to be the result of further developments. By the time of the preliminary hearing on 4 February 2019 the claimant had provided a schedule of loss. The respondent had provided a bundle and the claimant a further bundle. There were transcripts of the claimant's audio-recordings to which the respondent had identified proposed tracked changes, albeit not agreed by the claimant.

19. The claimant had not provided particulars of his proposed amendments, or all of the particulars required by the June 2018 orders. But the tribunal could have proceeded by identifying the complaints that had been sufficiently pleaded at that point, and confining the trial to those. Essentially, the original claim form set out, in lay terms, complaints about the dismissal having been unfair and amounting to discrimination relating to disability and a failure to comply with the duty of reasonable adjustment. The premise of the victimisation complaint was that the claimant had intimated, and/or the respondent anticipated, that he would complain of disability discrimination. The substance of the treatment prior to the dismissal being complained about was clear from the claim form and Scott schedules provided prior to the first appeal. There was a sufficiently clear basis at least for the complaints relating to the dismissal to be tried. The rest could be treated as background.

20. The trial was still two weeks off at that point. The tribunal could have set a date for exchange

of witness statements confined to addressing the existing complaints, in the form of an unless order. Experience showed that unless orders did work with this claimant. The matter could even have proceeded on the basis of treating the claimant's original particulars of claim and Scott schedules as his witness statement. To the extent that his remedy evidence was incomplete, the hearing had been listed as confined to liability only. Further directions could have been given for a later remedy hearing, if required. That possibility appeared to have been contemplated by the June 2018 orders.

21. Bearing in mind the evidence before the tribunal that the claimant now had diagnosed ADHD and ASD, and his partial compliance with the June orders, it was wrong to treat him as having deliberately and wilfully failed to comply with orders or as not having sought to pursue the matter to trial. Regarding the postponement of the November 2018 PH, if the medical evidence from Dr Turpin was considered insufficient, the matter could have been the subject of a further direction or even a wasted costs order. The tribunal had not held that this was an exceptional case where non-compliance with orders alone justified a strike-out, even if the matter was still capable of a fair trial.

Ground 1

22. Ground 1 challenges the tribunal's assessment at [1/23], that the issues had gone from being "relatively clear" in June 2018 to now being "manifestly unclear", as contradictory. Although the tribunal referred at [9/24] to the disadvantages relied upon in respect of the reasonable-adjustment claims, and the protected acts in relation to the victimisation claims, remaining unclear, the position had not changed since June 2018. The proposition that the issues were now "manifestly unclear" could rely only on the fact that the claimant had intimated that he intended to apply to amend or seek to introduce new claims, and, as noted by the tribunal, at [107/21], that in December he had provided a further Scott schedule of close to 100 pages, which the tribunal regarded as "very different".

23. The claimant had from the outset identified that he was complaining of unfair dismissal and

disability discrimination in relation to dismissal. It was clear that he was contending that his absence was related to mental health disability, and that the respondent should have adjusted its absence-management procedure to take account of this, and acted unfairly by proceeding to dismiss him when it did, and at a hearing at which he was not present. The substance of the complaints about treatment during employment was also apparent.

24. The respondent submits that there was no contradiction in the tribunal's reasons. It had been specifically identified in June 2018 that the disadvantages complained of in respect of the reasonable adjustments claims, and the protected acts relied upon in the victimisation claims, were not clear. These were the subject of order 3 made then, which, as of the 4 February 2019 hearing, had not been complied with satisfactorily. The judge properly concluded that these matters remained unclear at that point. Accordingly, the lack of clarity relating to the issues as of February 2019 did not arise only from the claimant's proposal, or stated intention, during the course of the second half of 2018, further to amend his claims, or the tabling of his further Scott schedule in December 2018.

Ground 2

25. Ground 2 relates to the judge's conclusion that the claimant had failed to comply with his duty to disclose documents. It asserts that she erred by failing to consider making an order under rule 29 of the **Employment Tribunals Rules of Procedure 2013** to address this. Apart from transcripts of audio recordings, where the issue was that the claimant had not agreed the amended transcripts, the tribunal did not identify any other documents he was believed to have in his possession, but had not disclosed. The tribunal could have managed the matter by directing that he not be permitted to rely on any further documents that were not already in the bundle, or not provided by him by a given date.

26. The respondent makes a number of points about this. In particular, the claimant had indicated more than once in the correspondence that he had further documents, but was not specific about what they were; and his stance was that he was not, or not yet, willing to disclose them. The judge also

made the point that, because of the continuing lack of clarity about aspects of the claims, it was not clear what further documents were required or might be relevant to be disclosed or relied upon by the respondent itself. Further, the judge specifically did consider, at [19/27], the option of postponing the trial and giving further directions, including for disclosure, but in the succeeding paragraphs explained why she rejected that option. Her reasons set out there were sound.

Ground 3

27. Ground 3 challenges the tribunal's conclusion that if, instead of striking the matter out, further directions were given, the claimant would not comply with those orders. It asserts that this is contrary to findings in the main body of its decision, that indicated that there had been significant compliance by him with directions, including with unless orders. Ten passages are cited as being to that effect. The narrative also records that there were some errors and delays on the part of the tribunal itself. All that was really required at the point of the 4 February 2019 hearing was a direction for exchange of witness statements, which could have been in the form an unless order. The issue of substantial disadvantage could have been addressed on the basis that it was for the claimant to show that the respondent knew of some identifiable disadvantage at the time.

28. The respondent submits that the tribunal's conclusion was amply supported by its findings made about the course of the litigation in 2018. There were a number of instances of the claimant disregarding orders, and simply proceeding according to his own view of what steps should or should not be taken, or when. There were also a number of instances of him indicating that he would comply by a certain date, and then putting the matter off further. Examples are set out. The judge had come to a balanced view on this issue. This ground amounted to an unsustainable perversity challenge.

29. The respondent also notes that the judge, at [17 – 18/27], in any event considered the position on the alternative footing that she was wrong, and that the claimant would attempt to comply with

any further direction that she gave; and she came, properly, to the conclusion that, even on that alternative scenario, the February trial would still have to be adjourned off.

Ground 4

30. Ground 4 challenges the tribunal's conclusion that the effect of the claimant's failures to comply with orders was to cause unfairness, disruption and prejudice to the respondent. It is said that no sufficient reasons were given for that conclusion. A number of features of the history are said to paint a different picture. It is said that this conclusion was reached by the tribunal of its own volition, and without considering that the respondent was, in principle, ready to exchange witness statements.

31. It is submitted that the tribunal appears to have relied, wrongly, on the pre-2018 history of the litigation, whereas the EAT's 2018 decision indicated that the clock should be reset. Bundles had been prepared and the respondent's witnesses were ready to attend the trial. None of the matters identified by the tribunal at pages 26 – 27 demonstrated that the dismissal-related complaints could not be fairly tried. The dismissal process was well documented. The passage of time should not be a cause for concern, as such, in this case.

32. The respondent submits that the tribunal's conclusion that the claimant's non-compliance adversely affected the respondent's ability to defend the claims was sufficiently supported by its detailed review of how matters had unfolded. The reasons were more than adequate. The tribunal was not obliged to set out all the submissions. It had properly identified that, because of the claimant's non-compliance, a final bundle could not be agreed, *comprehensive* witness statements could not be produced, and a postponement of the trial was inevitable, with consequential impact on witnesses and their ability to recollect events of many years before. The tribunal also recorded that the claimant's stance was that he would still require several weeks to produce his witness statement in any event.

Ground 5

33. Ground 5 contends that the tribunal failed to follow its own correct self-direction as to the law, being that a strike-out is a draconian measure, and to be exercised sparingly. This, as HHJ James Tayler noted, was really the overarching ground, covering the more particular points made in support of the other four grounds. An unfair dismissal claim should only be struck out in exceptional circumstances. The disability discrimination claim relating to the dismissal was also clear.

34. The tribunal failed to consider alternatives to strike-out, such as restricting the issues that would be considered at the hearing to those that were clearly identified already, confining the documents to those in the bundles that had been prepared, and making unless orders for witness statements. The respondent had not in fact sought a strike-out order. Rather, its application, made on 21 December 2018, had been for an unless order relating to limited aspects. However, the judge had decided instead on her own initiative to list a hearing to consider whether to strike out the claim.

35. The respondent submits that the self-direction as to the law was correct in all respects. In the concluding section the tribunal reminded itself of the salient principles and demonstrably addressed them, including specifically considering alternatives to strike-out, and whether a fair trial was still possible. Further, submitted Mr Campbell, the tribunal found both that there had been wilful non-compliance with orders (rule 37(1)(c)) and that a fair trial was no longer possible (rule 37(1)(e)); and it would have been entitled to regard either alone as sufficient to warrant a strike-out in this case.

36. There was much more detail in the written and oral submissions, and I will refer to some of these further points in what follows. I have taken all of it into account.

The Law

37. Rule 37(1) **Employment Tribunals Rules of Procedure 2013** provides:

> **"37.**—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
>
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
>
> (d) that it has not been actively pursued;
>
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

38. If any of (a) to (e) apply, a tribunal "may" strike out, but is not obliged to do so. In deciding whether to exercise the power the tribunal must have regard to the overriding objective and what is fair and just to both sides. As the EAT observed, in its first decision in this case, at [12]:

> **"That is the guiding principle and requires consideration of all the circumstances and, in particular, the following factors: the magnitude of the non-compliance; whether the failure was the responsibility of the party or his or her representative; the extent to which the failure causes unfairness, disruption or prejudice; whether a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience in question."**

39. The EAT continued its summary of the law, at [13]:

> **"Even in a case where the impugned conduct consists of deliberate failures in relation, for example, to disclosure, the fundamental question for any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible: see Bolch v Chipman [2004] IRLR 140 EAT where, having cited De Keyser v Wilson [2001] IRLR 324 EAT and Arrow Nominees Inc v Blackledge [2000] EWCA Civ 200, Burton P set out guidance for Tribunals when determining whether or not to make a strike out order, as follows:**
>
> > **(i) There must be a finding that the party is in default of some kind, falling within Rule 37(1).**
> >
> > **(ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.**
> >
> > **(iii) Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.**
> >
> > **(iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so.**

> **See also James v Blockbuster Entertainment Ltd [2006] IRLR 630 CA to similar effect, where Sedley LJ recognised the draconian nature of the strike out power and that it is not to be readily exercised. He held, even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether the sanction is a proportionate response in the particular circumstances of the case, and the answer to that question must have regard to whether the claim can be tried because time remains in which orderly preparation can take place, or whether a fair trial cannot take place."**

40. There are examples in the authorities of cases where the specific nature of a litigant's impugned conduct means that the conduct has itself inherently made it impossible for there to be a fair trial. From time to time there will also be cases where, unfortunately, a litigant's conduct is for example, so threatening, abusive or disruptive that, whatever the cause, it ought not to be tolerated; and they will be done no injustice by being treated as having thereby forfeited their right to have their claim or defence tried. But, outside of such cases, a claim should not otherwise be struck out on account of conduct, unless the conduct means, or has created a real risk, that the claim cannot be fairly tried. See **De Keyser** at [24] citing the discussion of the earlier authorities in **Arrow Nominees**.

41. In **Emuemukoro v Croma Vigilant (Scotland) Ltd** [2022] ICR 327 the EAT (Choudhury J), said this:

> **"19. I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.**
>
> **20. Mr Kohanzad's reliance on Rule 37(1)(e) does not assist him; that is a specific provision, it seems to me, where the Tribunal considers that it is no longer possible to have a fair hearing in respect of a claim, or part of a claim, that may arise because of**

> **undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons. However, that provision does not circumscribe the kinds of circumstances in which a tribunal may conclude that a fair trial is not possible in the context of an application made under Rule 37(1)(b) or (c), where the issue is unreasonable conduct on the part of a party or failure to comply with the tribunal's orders or the Rules."**

42. **Emuemukoro** also contains a valuable reminder, at [21], that the test to be applied by the EAT in considering an appeal in respect of a strike-out decision is a *Wednesbury* one; that is to say, the appeal will only succeed if there is an error of principle in the tribunal's approach or its decision to strike out is in some material respect otherwise perverse.

Discussion and Conclusions

43. I start by noting that what I have to consider is the decision to strike out, taken in February 2019, in all the circumstances as they stood at that date. I also note at the outset, that the stated basis for the judge's decision was non-compliance with the June orders (rule 37(1)(c)) and/or that a fair trial was no longer possible (rule 37(1)(e)) although she also considered that the claimant had conducted himself unreasonably. The judge considered both that it was not possible to have a fair trial on the currently listed dates, nor, were she to postpone, would it be possible to have a fair trial on some future date (see in particular [16/26] and [28/30] and the intervening discussion).

44. I turn first to the judge's conclusion that the matter was not capable of proceeding to a fair trial, to open as then listed, two weeks later on 18 February 2019. Her concerns or misgivings can be broadly divided into two kinds. The first was that the substantive issues were not sufficiently clear or particularised. The second was that, because of the claimant's non-compliance with the June 2018 orders, which she considered would not or could not be remedied in the short time remaining (if ever), the case could not and would not be fairly prepared for trial on those dates.

45. As to the issues, HHJ Tayler, in his reasons for permitting the five amended grounds to proceed to a full hearing, noted that the claimant presented his claim as a litigant in person and did

not refer to specific statutory claims or provisions. But the particulars that he attached "would be read by a lawyer as setting out claims of unfair dismissal and disability discrimination, specifically, discrimination because of something arising in consequence of his disability, his absence, and failure to make reasonable adjustment. It appeared to be a straightforward claim of the type the employment tribunal deals with regularly."

46. I respectfully agree. I also agree with Ms Mallick that the issues in relation to the unfair dismissal claim and the **Equality Act** claims relating to dismissal were sufficiently clear. They related in particular to the application of the respondent's long-term sickness absence procedure to someone whose case was that their absence was linked to disability, his case that the dismissal decision was premature, unfairly taken in his absence, that he was unfairly treated in relation to the opportunity he was given to appeal an adverse decision of UNUM under the respondent's disability cover scheme, and that more consideration should have been given to the options for him to return in a different role. These are claims and issues of a kind with which tribunals are very familiar.

47. The other claims related to what happened, or did not happen, in a very short time window, from April of 2012, when the claimant started in his new role of expert claims handler working part-time hours, to September of 2012, when his sickness absence began. His original particulars of claim give the substance of at least the principal complaints about that period. His case was that, on account of mental health disabilities (particularised as dyslexia, migraines, light sensitivity, anxiety, depression), he should have been given full-time or flexible hours in the new role, and not confined to his fixed part-time hours; that he was not sufficiently trained in the new role; that he did not have sufficient or suitable software or monitor/work station; and that when other members of his new team were moved to a different work area he was left behind. He gave his critique of the handling of these matters. Again these are all claims of a type very familiar to employment tribunals.

48. The original grounds of resistance give the respondent's side of the story in relation to the

same period following the start of the new role. They also give an account of its management of the sickness absence, including the UNUM application and appeal process, and generally of the dismissal process. The respondent contended that this was a fair dismissal by reason of capability. Disabled status was not admitted and in any event disability discrimination was denied.

49. Prior to the strike-out order which resulted in the first appeal to the EAT the claimant had provided some further information, a Scott schedule and an addendum schedule. These contained more information about the detail of his complaints in respect of a number of the foregoing aspects. The respondent's annotations indicated that it considered that they also raised some new matters. They indicated where it accepted that the matter raised was within the scope of the original claim and where it considered that it was outside the factual or legal scope of the original particulars of claim.

50. At the June 2018 hearing the judge had observed that the parties had agreed in May 2015 that the tribunal at the final hearing would have to deal with whether some matters raised in the Scott schedules went beyond the scope of the initial particulars of claim and, if so, whether amendment should be permitted. She also recorded the further particulars given at that hearing about the PCPs relied upon in the reasonable adjustment complaints. She observed that, apart from those matters that she addressed in her further directions, "about as much information as the respondent was likely to get ahead of exchange of witness statements has been provided." The further information she directed, at paragraph 3 of her June orders, was confined to: clarification of the disadvantage to which each PCP was said to give rise, and the protected act relied upon in the victimisation complaints.

51. In her decision which is the subject of this appeal, at [88], the judge noted that, when they wrote to the tribunal on 12 November 2018, the matters raised by the respondent's solicitors included that the claimant had not complied with paragraph 3 of the June orders. But I note also that, when they wrote again in December 2018, not only did the respondent's solicitors not seek a strike-out, but paragraph 3 was *not* among the areas in respect of which they sought an unless order.

52. I therefore agree with Ms Mallick, that the claims relating to dismissal – of unfair dismissal, under section 15 **Equality Act 2010**, and of failure to comply with the duty of reasonable adjustment – were, on any reasonable view, sufficiently clear in February 2019 to be capable of fair trial.

53. It also seems to me that there were, at least, sufficient particulars in the original claim form (together with the particulars of PCPs given in June 2018) to enable those complaints of failure to comply with the duty of reasonable adjustment in the April – September window that were referred to in the original particulars to be fairly defended. The respondent knew what, in substance, each of these complaints was about, and the PCPs being relied upon. As to clarification of disadvantage, the gist of the claimant's case was plainly that he had struggled in the new role, because of the mental impairments on which he relied, without the adjustments which he said should have been made by way of such matters as further training, bespoke software and monitor, and modification of the tasks required from him and how they were to be carried out. The onus would be on him to show such disadvantage and knowledge of it; and the respondent would have the safeguard that it could raise an objection if any new matter were raised during the trial, that it could not fairly address in evidence.

54. In relation to victimisation Ms Mallick referred to entries in the Scott schedules that referred to the claimant having mooted in June 2012 raising a grievance, and considering in September 2012 that his line manager was uneasy about his requests for support. Those passages do not particularise his having in substance alleged discrimination; but she fairly submitted that the information he had provided advanced a case, at least, that the respondent feared or anticipated that he would do a protected act. Again the onus would be on him to make out that case by evidence; and the respondent would have the safeguard that it could object, were it to be ambushed by the claimant seeking to rely upon some specific evidence of an alleged protected act during the course of the trial, to which it was not able fairly to present evidence in response.

55. I conclude that, in so far as the judge considered that, because of lack of particulars, the entirety of the claimant's claims could not be fairly tried, that conclusion was not reasonable.

56. The parties had, as was noted at the June 2018 hearing, already agreed back in 2015 that issues about whether the Scott schedule and amended schedule went beyond the bounds of the original particulars in some respects could be left to the trial tribunal. There was no suggestion at the June 2018 hearing, or in the orders arising from it, that this was, on reflection, a piece of unfinished business that needed to be further addressed pre-trial. The respondent did not seek to revisit this.

57. The tribunal's decision does document the numerous intimations on the part of the claimant, following the June 2018 hearing, that he would be applying to amend and expand his claims. The decision also records at [107/20] that on 5 December 2018 the claimant tabled a further Scott schedule "running to close on 100 pages" which the judge said was very different to the existing Scott schedule and addendum; and his intimation that even this would in the future be "expanded upon". In the concluding section of her decision the judge indicated that dealing with the question of amendment at trial would take a significant part of the seven days allocated; and that she had no confidence that the claimant would comply with any orders that attempted separately to require him to clarify what amendments he was seeking, in a way that could be managed proportionately.

58. Though the claimant, through Ms Mallick, protested, I do consider that the judge was fully entitled to take all of those views, as such. However, taking account of those very aspects, it appears to me that she would have been fully entitled to rule that the December Scott schedule would not be considered, and that no application to amend, whether in the run-up to, or at, the trial would be entertained, and that the tribunal would only adjudicate those complaints which it was satisfied were sufficiently covered by the existing particulars of claim. Ms Mallick conceded that the claimant could not reasonably have objected the tribunal taking this very firm approach. This option, which would not require the claimant pro-actively to do anything further, does not appear to have been considered.

59. I turn to the second aspect, relating to steps that were or were not still needed to ensure that the matter was sufficiently prepared for the trial. The respondent had prepared a trial bundle but the claimant did not agree it, and had returned his hard copy. I was told that his principal concern was that it contained sensitive medical evidence, and he was concerned that members of the public attending the hearing should not have sight of that. The decision does allude to his having raised that, at one point, although it appears that he had other issues as well. But in any event it seems to me that the tribunal could have directed that the bundles as they stood, including the unagreed marked-up transcripts of recordings, should be placed before the trial tribunal, which could also take a view as to whether any restriction on public access to sensitive medical documents should be directed.

60. In so far as the claimant may have intimated in some general way that he might have more documents relating to liability, the tribunal could have directed that he would require permission to rely on any further documents disclosed after a certain date. Once again, the respondent would have the safeguard, that, in the event that he sought to rely on any issue during the trial (such as a new alleged protected act) in relation to which it had not been forewarned, and might itself have had documents that could not now be searched for, or produced, it could raise an objection accordingly.

61. So far as witness statements are concerned, the judge observed at [17/26 – 27] that the claimant had not begun to draft his witness statement and that that he had indicated that it would take him several more weeks to complete it. Once again, through Ms Mallick at the hearing before me, he protested that this was not a fair representation of his position. However, on this, as on other aspects, he cannot go behind the judge's record of what he said. But in any event I agree with Ms Mallick that a solution short of strike-out would have been to order that unless the claimant tabled his witness statement within seven days, then his original particulars, together with (so far as relevant) the further information and Scott schedules provided prior to the first appeal (therefore excluding the further schedule tabled in December 2018) would stand as his statement of evidence in chief.

62. So far as the respondent's witness statements were concerned, as the judge recorded at [7/24], and Mr Campbell confirmed before me, its position at the February 2019 hearing was only that it had not *finalised* and tabled its witness statements, because of the outstanding matters of compliance with orders on the part of the claimant. They were otherwise essentially ready. So, it seems to me, the judge could have directed that its witness statements now be finalised and exchanged on the basis of the information about the claimant's case thus far provided. Once again the tribunal could have indicated that he would not be able to rely on any new factual allegation at trial, which the respondent's witnesses had not addressed, and could not now fairly address during the trial.

63. So far as remedy is concerned, it appears to me that what was at issue was whether the claimant had fully disclosed all the income he had received since dismissal, and any further associated documentation that there might be. An issue was raised before me, as to whether his position was that he had more documents to disclose, but was not yet prepared to do so, or, as Ms Mallick submitted on his behalf to me, that he simply had no further documents in his possession. Again I go by the judge's record, which was to the former effect.

64. In a general sense, it is not necessarily an automatic or complete answer to this concern that the February 2019 trial had been listed as in respect of liability only. Any claimant who brings claims for losses flowing from dismissal has a duty to be candid, and give full disclosure, about their work circumstances, and income or remuneration, since dismissal. They should not ordinarily have any difficulty in providing the essential factual information and disclosure, updated as necessary, on an ongoing basis, at least in relation to basic features of remuneration, and identifying in principle other features that may be harder to quantify, such as pension loss. Tribunals routinely require this at an early stage, not least so that the respondent has a clear idea of the financial scale of the claim, and to facilitate and encourage early and ongoing consideration of alternative dispute resolution.

65. However, to the extent that the claimant had not fully complied with his obligations in this regard as of February 2019, this did not mean that the liability-only hearing could not fairly proceed, as such. Nor would these aspects be unamenable to solution if one or more claims succeeded.

66. Pausing to take stock thus far, while I do not think it is right, per ground 1, that the judge's decision was contradictory, I do consider, as I have explained, that grounds 1 – 4 as a whole raise a number of valid criticisms of her decision to strike out the claims as not reasonably open to her.

67. The matters that were considered sufficiently particularised in June 2018 remained so in February 2019. The liability trial as listed could have been confined to those matters. The lack of further clarification or particulars directed by order 3 in June 2018 did not mean that none of the claims was capable of fair trial. The claimant could also have been refused permission to amend further at that late stage. Given the history of the litigation since June 2018 the judge was fully entitled to her scepticism as to whether the making of unless orders requiring *positive* case management steps to be taken by the claimant would be effective; but the tool was available of restricting the evidence on which he could rely, as to both what would stand as his witness evidence in chief, and as to documents, to what had already been provided and was in the bundles that had been prepared. Ms Mallick entirely realistically accepted that orders along those lines would not have been inappropriate and not unfair to her client in all the circumstances. In my judgment, such orders would also have enabled the liability trial to proceed as listed in a way that would not have been unfair to the respondent.

68. Mr Campbell submitted that the judge had directed herself correctly as to the law, had then demonstrably worked through the relevant questions, and reached conclusions that were reasonably open to her. However, for the reasons I have given, in my respectful judgment she erred in concluding that, on account of the claimant's conduct, and non-compliance with aspects of the June 2018 orders, the matter was entirely incapable of fair trial at the forthcoming liability hearing as listed. Other

solutions were available. She was not obliged to take the view that it was all or nothing.

69. Nor, in any event, do I think it was reasonably open to the judge to conclude, on the information before her, that, if it did not proceed as listed, the matter was entirely incapable of fair trial at any later date. The judge was right, in a general sense, to be concerned about the potential future impact of the passage of time, a point that had also been flagged up by the EAT in its first decision. But such matters, if raised, require consideration of the actual particular circumstances and features of the given case at the point when they are raised. In this case the respondent had not submitted, or advanced a case, that the passage of time meant that it could not now, in February 2019, fairly defend the claims, whether because of fading memories, particular witness difficulties, or otherwise. How matters might stand on some future date remained to be seen.

70. Pausing there, I do not think that the judge had a reasonable basis when she took her decision to conclude that the claims were now entirely incapable of fair trial as listed or at any future point.

71. Mr Campbell, as I have noted, submitted that the judge was in any event entitled to strike out on the alternative basis of non-compliance with an order or orders under rule 37(1)(c). The difficulty with that submission is that ordinarily, even where that provision (or rule 37(1)(b) – unreasonable, etc., conduct) is relied upon, that also requires a finding, at least (**Emuemukoro**) that (whether on account of the non-compliance (or other conduct) or otherwise) the matter is now incapable of fair trial as listed, unless the case is one where the tribunal has properly found that the nature of the non-compliance or conduct is such that it warrants a strike out, though a fair trial is still possible.

72. As to that, in this case the judge considered that the history of the litigation since June 2018 demonstrated that the claimant did not intend to comply with orders or further the overriding objective but to "follow his own agenda of obfuscation and delay" [11/26] and was "not committed all to bringing this matter to a hearing" [23/28]. She considered that the clearest example of this was what

she called, for reasons she explained, his "misleading application" to postpone the 26 November case management hearing and subsequent failure to comply with EJ Woffenden's order [21/28 – 29].

73. Ms Mallick criticises these conclusions – principally on the basis that the judge failed to take sufficient account of the evidence before her that the claimant had a diagnosis of ADHD for which he had also been prescribed medication, and to consider whether that might go some way to explaining his behaviours in the litigation, and also on the basis that she failed to take into account the significant efforts to comply, and measure of compliance, that there had been.

74. As to that I observe, first, that what the tribunal, and indeed the respondent's solicitors, had to grapple with, was the way that the claimant in fact did conduct himself in the litigation, and the consequences and impacts of that conduct. Even if these behaviours were to some extent influenced by mental health disabilities that were not his fault, that would not mean that the consequences or impacts could simply be overlooked or ignored, or that an obvious solution would then present itself. But even if it was reasonably open to the judge to take the view of the claimant's conduct, as such, that she did, there are more fundamental difficulties with this strand of the response to this appeal.

75. First, although it was included in the notice of hearing for consideration, the judge did not, ultimately, rely, on the proposition that the claim was no longer actively being pursued – rule 37(1)(d) – as an alternative basis for her decision. I would add that, given that, notwithstanding his past record, and application in relation to the November 2018 hearing, the claimant did attend both the June 2018 and 4 February 2019 hearings, and he was not himself applying for the February 2019 trial dates to be postponed, I think the judge was right not to rely on rule 37(1)(d).

76. Secondly, notwithstanding her trenchant criticism of the claimant's approach to the June 2018 orders, and application to postpone the November 2018 hearing, the judge did not in fact anywhere in the substance of her discussion find that his breach of orders, or conduct of the litigation, was of

the sort that would, exceptionally, warrant his claims being struck out even if they (or some of them) were, contrary to her view, still capable of fair trial as listed or, reasonably, on a later date.

77. The judge viewed as most serious of all, the claimant's conduct in applying to postpone the November 2018 hearing combined with her conclusion that the medical evidence that he had tabled did not support the contention that he was in fact medically unfit to attend that hearing, and that there was no good reason why he had not complied with the timescale to produce such evidence set by EJ Woffenden's order. However, she specifically did *not* rely on non-compliance with that order – but only on non-compliance with the 5 June 2018 order: see [8/24] and [28/29].

78. Further, the conclusion that she drew in substance, as to the significance of the claimant having secured a postponement of the November hearing, was that it had deprived the tribunal of the opportunity to make orders in November, that it was now, in February, too late to make, and meant that she could not be confident that he would comply with any such orders in relation to a postponed hearing [23-24/29]. But she did not also hold that this conduct was so serious as to cause the claimant to have forfeited the right to have his case heard, even if still capable of fair trial; and, for reasons I have given, I do not think that it was reasonably open to her to conclude that it had fatally sabotaged the possibility of the trial proceeding as listed, or at any later date.

79. In some cases, unfortunately, though it may be no fault of the litigant concerned, the impact of mental health disabilities may give rise to conduct and behaviour which is so very serious in its nature or consequences that it cannot or should not be treated as acceptable, or permitted to continue, for example because of its seriously offensive, threatening or abusive (in the ordinary sense) nature. But nothing of that sort was alleged in this case. Rather, the respondent's principal (and perfectly fair) concern when it raised the November postponement appears to have been that it had caused wasted costs by way of solicitors' preparation time and irrecoverable travel expenses.

80. In conclusion on this aspect, if a claim (or response) is to be struck out on account of conduct or non-compliance with orders, notwithstanding that the matter is still capable of fair trial as listed, or proportionately on a later date, that requires a specific conclusion to that effect, and some account of why the tribunal has concluded that the breach of order or other conduct is so serious in its nature or effects as to fall into that category. The present tribunal did not so find, and, having regard to the guidance in the authorities, would not, in my judgment, have had a reasonable basis for doing so, notwithstanding the catalogue of matters relating to events since June 2018 to which it referred.

81. I bear fully in mind the *Wednesbury* approach that I must apply. However, the context is one in which the authorities emphasise repeatedly the draconian nature of a strike-out decision, and the stringent considerations governing its exercise. The claimant's conduct of the litigation was, on any view, very challenging, frustrating, time-consuming and difficult to manage, and the task facing this experienced judge upon the return of the claims from the EAT was not at all an easy one. But for reasons I have given I therefore conclude that the judge erred in striking out the entire claim. It was not necessary or proportionate to do so. I will allow ground 5 and allow the appeal.

Next Steps

82. As I have noted, my task has been confined to determining whether the judge erred in striking out this whole claim on 4 February 2019, in the run up to the trial listed to take place later that same month. I have concluded that she did so err; and could not have properly done so. Accordingly, I will simply quash the strike-out decision made in February 2019 and substitute a decision declining to strike out the claims as at the date when that decision was made. That disposes of this appeal.

83. Ms Mallick, as I have noted, conceded that it would have been then proper, and not unfair to the claimant, for the tribunal to make various other orders along the lines that I have discussed. She also sensibly conceded before me that it would be appropriate, and not unfair, for such orders to be made now. However, I do not myself need to give further case management directions to dispose of

the appeal; and precise further directions are better left to the tribunal, though assisted, I hope, by the discussion in this decision.

84. Though Mr Campbell gave no intimation of it, Ms Mallick invited me to give some guidance about the approach that the tribunal should take, were the respondent to make a fresh strike out application based on any developments there may have been since the 2019 strike-out was made. However, I decline to do so. Any such application will need to be an entirely fresh application to the tribunal based on identified developments since February 2019. Any arguments about how any such application, if made, should be approached, would need then to be directed to the tribunal.

85. The particular decision that was the subject of this appeal will not fall to be remade, as such. The claimant's grounds, or proposed grounds, alleging bias were considered earlier, found not to be arguable and did not proceed to a full appeal hearing. It would be neither necessary nor appropriate for me to given any direction restricting which judiciary may deal with the matter going forward.