EMPLOYMENT TRIBUNALS

Claimant: **Ms M Etoh**

Respondent: **University College London Hospitals NHS Foundation Trust**

Heard at: London Central (Judge and Members in person, parties remote via CVP)

On: 19 – 21 September 2023 (struck out on 21 September 2023 but originally listed for 7 days to 27 September 2023

Before: Employment Judge Woodhead
Mrs Moreton and Mr Kendall

Representation

For the Claimant: Representing herself

For the Respondent: Mr Sugarman (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

The Claimant's claims are struck out pursuant to Rule 37(1) (c) of the Employment Tribunals Rules of Procedure 2013 as amended (for non-compliance with orders of the Tribunal).

REASONS

THE ISSUES, SEQUENCE OF EVENTS AND HEARING

1. We make clear that we did not heard evidence in this case and our findings, as set out below, are based on the pleadings, the correspondence between the parties and with the Tribunal and the submissions of the parties at the hearing.

2. The Respondent records in its response to the claims that is one of the most complex NHS trusts in the UK, serving a large and diverse population from a number of sites and provides academically-led acute and specialist services to people from throughout the UK and overseas, seeing over 950,000 patients each year.

3. The Claimant was employed by the Respondent as a Nursing Assistant from 6 October 2003 until 21 December 2021. Early conciliation started on 7 March 2022 and ended on 6 April 2022. The first claim form was presented on 6 April 2022.

4. It is relevant that the Claimant's representative, as noted on this first claim, was Mr Frances Neckles of the PTSC Union. This first claim was for ordinary unfair dismissal, unfair dismissal pursuant to s 103A of the Employment Rights Act 1996, discrimination arising from disability, victimisation, and whistleblowing detriments.

5. In order to give context to this judgment and because it provides a concise summary of what the claim is about the we note the facts pleaded by the Respondent in its defence of the claim (as amended subsequent to the Claimant raising a second claim) which were as follows (A88-91):

> *"In or around October 2017, the Claimant was reported to have had 'vacant' episodes whilst at work. Occupational Health advised that she was not fit for work in her substantive role. The Claimant commenced a period of long term sickness absence. In February 2018, the Claimant advised that she experienced infrequent seizures. The Claimant's Consultant Neurologist advised that she had been put on anti-epilepsy medication, and recommended a temporary period of redeployment to see if a different working environment would lessen the Claimant's seizures. This was supported by Occupational Health, who advised that if temporary redeployment could not be supported, ill health retirement should be considered.*
>
> *Following her return from sick leave at the end of May 2018, the Claimant was temporarily redeployed to the Outpatients Department within the Respondent's Medical Specialities division, from 1 June 2018. The Respondent also made changes to her role to reduce workplace stressors, ensuring that the Claimant was working for the majority of her working day with two other members of staff to ease her workload. The Respondent also proposed reduced working hours*

and considering ill health retirement, both of which the Claimant declined.

The Claimant continued to have vacant episodes and on 4 July 2019, Occupational Health advised that the Claimant was not safe to work in a clinical environment, unless it could be guaranteed that someone was continually with her, which was not possible. There were no further adjustments which could be made. The Respondent placed the Claimant on a period of authorised leave, on full pay, whilst next steps were determined.

Occupational Health later advised that the Claimant was not fit for her role or for any other clinical role due to the frequency of her seizures, the effect that they had on the service, and the risk posed to patients. A non-clinical role could be considered, with adjustments.

In October 2019, the Claimant agreed to explore medical redeployment to a non-clinical role. She was placed on the medical redeployment register on 22 October 2019. She remained on authorised paid leave. Despite an extended search period, and 19 roles being considered, the available roles were considered unsuitable, either by Occupational Health or the relevant hiring manager, or they were discounted by the Claimant. The Respondent gave the Claimant the option to undertake restricted duties, which resulted in the Claimant being placed in an administrative area temporarily to undertake some tasks whilst the redeployment search continued. However, it became increasingly difficult to find the Claimant alternative restricted duties and ultimately, the Respondent could not continue to accommodate this (due to staff starting to work from home at the onset of the Covid-19 pandemic). On 31 July 2020, the Claimant was placed on paid medical suspension whilst efforts continued to support her redeployment into a non-clinical role.

On 23 November 2020, a formal end of redeployment review meeting was held. The Claimant advised that she did not have the skillset to undertake an administrative (non-clinical) position, and indicated that the only way she could undertake an administrative role would be to have intensive one to one training for an unspecified period of time. The Respondent did not consider that reasonable. As a result, it was agreed that a final review meeting would be scheduled, during which one possible outcome was the termination of the Claimant's employment. Whilst the final review meeting was scheduled, the Respondent continued to seek alternative roles for the Claimant. This

included the possibility of a cautious return to her substantive role, with adjustments, following updated Occupational Health advice. However, the Claimant declined an offer to return to work at MCC, where the adjustments could be accommodated, and no other suitable roles were identified prior to the final review meeting.

Throughout the above period, the Claimant had further vacant episodes (on six occasions between 3 August 2018 – 12 June 2019, on 15 January 2020 and on 13 April 2021).

Dismissal

On 9 September 2021, the Claimant attended a hearing to consider her ongoing employment with the Respondent. She was accompanied by her union representative. By that time, the Claimant

had been unable to attend work for two years and two months due to her neurological condition. The Respondent concluded that the Claimant's condition impacted on her ability to safely carry out

her Nursing Assistant role. Despite the Respondent's efforts, it had not been possible to secure a safe return to work for the Claimant, her colleagues and the Trust's patients, or to find a suitable alternative role for her (that she would agree to undertake), with the adjustments required. The Respondent considered alternatives to dismissal, including:

a. Reviewing the possibility of the Claimant applying for ill health retirement, which was discounted based on available Occupational Health advice that it would no longer support ill health retirement.

b. A request made by the Claimant during the hearing to return to work at MCC, despite having previously declined that suggestion.

Following investigation, it was confirmed that there were no clinical, administrative or non-clinical roles available at that time at either band 2, 3 or band 4 in which the Respondent could accommodate the recommendations which had been made by Occupational Health.

In light of the above, the Respondent concluded that the Claimant's employment should be terminated. The Claimant was informed of this in writing on 14 December 2021. She was paid 12 week's pay in lieu of notice, with her last day of employment being 21 December 2021. The Claimant was advised of her right to appeal against her dismissal. She submitted an appeal on 26 December 2021. Following repeated requests regarding the grounds for appeal, the Claimant submitted an amended appeal on 6 April 2022. An appeal hearing was due to take place on 10 May 2022, however, it has been rescheduled to take place on 27 May 2022, due to the availability of the Claimant's representative. After a full and thorough consideration of the Claimant's appeal, the decision to dismiss the Claimant was upheld."

6. There was a preliminary hearing on 27 June 2022 (A43-52) at which the claim was listed for a hearing of 6 days between 1 and 8 March 2023. At this hearing the Claimant was represented by Mr K Taylor (Union Representative). The Parties were ordered to exchange witness statements for the hearing on 18 January 2023 (A46).

7. The Claimant then presented a second claim on 15 July 2022. ACAS Early Conciliation in relation to that claim started and ended on 12 July 2022. This second claim was for discrimination arising from disability, victimisation, and whistleblowing detriments and followed the Claimant's unsuccessful appeal against her dismissal. The representative noted on this claim was Mr Daniel Ibweke (of the Brighton and Hove Race Project).

8. On 26 July 2022 the Respondent applied for an unless order in respect of a failure by the Claimant to provide further particulars of claim and a schedule of loss.

9. On 31 August 2022 the Tribunal listed a further preliminary hearing to take place on 3 November 2022 (A100) but we understand this to have actually taken place on 20 December 2022 (A133-143). Mr Ibekwe attended for the Claimant and further detailed case management orders were issued for the hearing (still due to take place over 6 days between 1 March 2023 and 8 March 2023). The date for exchanging witness statements was varied to 17 February 2023.

10. It is important to note that the full trial bundle was provided to the Claimant prior to the March 2023 hearing (on 24 February 2023) at the request of Mr Ibekwe (page 15 Strike Out Bundle (the "**SOB**")) in soft and hard copy.

11. We accepted, as submitted by counsel for the Respondent (and as recorded in an email in the SOB at page 76) that the March hearing was postponed on the Respondent's application, because (a) the Respondent's counsel had unfortunately suffered a family bereavement, and (b) the Respondent was concerned about the Claimant's readiness for the hearing. We were satisfied, given what we have heard and given the subsequent events that, even had the Respondent's counsel not suffered a family bereavement, the Claimant would not have been in a position to proceed because she had not prepared a witness statement.

12. A preliminary hearing took place on 1 March 2023, at which this final hearing was relisted (for an extended hearing of seven rather than six days via CVP on 19-22 and 25-27 September 2023) to consider both liability and remedy. Case management orders were made for final hearing preparations. Amongst other things the case management orders record:

- The Respondent was to send an agreed List of Issues to the Tribunal by 8 March 2023.

- By 20 March 2023 the Claimant was to send to the Respondent and the Tribunal a Schedule of Loss and all documents relevant to remedy, including mitigation evidence, evidence of earnings etc and a cast list and chronology was to be agreed.

- The date for exchange of witness statements was extended to 20 March 2023.

- By 5 September 2023, the parties were to both write to the Tribunal to confirm that they are ready for the hearing or, if not, to explain why.

- Mr Ibekwe confirmed that the Claimant did not need a translator and that whilst she has difficulty with legal terminology she would otherwise be able to access the hearing.

13. A list of issues was then agreed between the parties and filed with the Tribunal by the Respondent on 8 March 2023.

14. The Respondent had been ready to exchange witness statements before the original March listing (subject to the Claimant providing remedy documents and agreeing the bundle, which the Claimant never did).

15. On 30 March 2023 the Respondent wrote to Mr Ibekwe asking him to confirm when he would be providing remedy documents. The Respondent noted that it would be sensible for them to be added to the bundle before the Respondent sent him a further copy and a date for the exchange of witness statements could then be agreed (p28 SOB).

16. On 18 May 2023 the Respondent chased the Claimant's representative for a response to its 30 March 2023 email (page 28 SOB). However, it seems that at some point in the intervening period Mr Ibekwe had sadly died.

17. The next contact the Respondent had from the Claimant was on 4 June 2023 when Mr Frances Neckles contacted the Tribunal (Claimant on copy) to say:

> *"We write on behalf of Ms Maureen Etoh with regard to the above matter and in reference to the appellants previous representative Mr Daniel Ibekwe of Brighton & Hove Race Project.*
>
> *The Claimant were recently informed of the death of Mr Ibekwe and having just had access to some of the file's, said files are incomplete. We would appreciate it if you can supply us copies of the Claimants ET1, ET3 and any tribunal orders/case managements and judgements for our records.*
>
> *Please note I am assisting the Claimant until she is in a position to find alternative representation, and would appreciate all further correspondence copied to me moving forward.*
>
> *Please also note my dates of unavailability for your attention listed below:*
>
> *2023 June 15*
>
> *2023 July 12-25 & 27-31*
>
> *2023 1-27 August*
>
> *2023 September 1, 17- 25*
>
> *2023 October 4*
>
> *A copy of this email* has been copied to the Respondent."

18. It therefore appeared that the Claimant's intention was for Mr Neckles not to be her long term representative. He was stepping in pending the Claimant appointing another person. It is also important to note the dates of unavailability expressed by Mr Neckles and the fact that they rendered him unavailable for this hearing (albeit he may not have known of the hearing dates on 4 June 2023).

19. On 20 June 2023 Mr Neckles wrote to the Tribunal (Claimant on copy) to say (p45 SOB):

> *Further to my email dated 11 April 2023 and 4/6/2023, can you please confirm whether the above matter has been listed for a FMH, taking into account my dates of unavailability.*

20. We were not provided with a copy of the email of 11 April 2023 and it is not on the Tribunal's record.

21. On 22 June 2023 the Tribunal responded as follows (Claimant on copy):

> *Please see be advised that the FMH has already been listed at the Preliminary hearing on 1 March 2023 - a copy is attached.*
>
> *Any application to postpone the hearing will need to be made, copying in the Respondent.*

22. Therefore on 22 June 2023 Mr Neckles and the Claimant knew the dates of this hearing and that they did not match Mr Neckles' availability. He made no application to postpone at that time (or for that reason) and the Claimant should have known from this date that he would not be able to represent her.

23. On 12 July 2023 the Respondent helpfully sent Mr Neckles an email as follows (we believe the Claimant to have been on copy because she had been on other correspondence) (page 47 SOB):

> *Dear Mr Neckles*
>
> *Further to your email below, as far as we are aware, the Tribunal have not yet provided the requested documents to you. In the interests of progressing this matter, we have attached key documents in respect of the claims.*
>
> *In terms of outstanding actions ahead of the final hearing:*
>
> *1. Cast list and chronology: these had been sent to Mr Ibweke in draft for comment, however, have yet to be agreed. We attach the cast list again for your consideration. The chronology will follow.*
>
> *2. Schedule of loss: the Claimant was required to provide a revised schedule of loss by 20 March 2023. That has not been received.*
>
> *3. Bundle: this had also been sent to Mr Ibweke for his agreement. Please confirm if this has been provided to you, and if so, when you*

anticipate being in a position to confirm if the bundle is agreed. We are still waiting for the Claimant to provide copies of her remedy documents, so that these can be added to the bundle.

4. Exchange of witness statements: this was due to take place on 20 March 2023, however, was delayed pending agreement of the bundle. Again, please confirm when you anticipate being in a position to exchange witness statements.

24. Mr Neckles replied the same day, 12 July 2023, (Claimant on copy) to say (page 46 SOB):

> "*Thanks for your email. However, I am on annual leave until 29/8/2023 and will address the contents on my return.*"

25. Again on 12 July 2023 the Respondent (Claimant again on copy) replied to say (page 46 SOB):

> "*The final hearing in this case is due to commence on 19 September 2023. I am concerned about the parties ability to be ready for that, if you do not return from leave until 29 August and given the outstanding action points. Can you confirm if there is anyone else I can liaise with to progress this case in your absence? My understanding is that you were supporting the Claimant whilst new representation was sought.*"

26. Mr Neckles replied on 14 July 2023 to say (page 54 SOB):

> "*Thanks for your email contents are fully noted. In regards to the four points raised, I will seek clarity from the Claimant with regard to paragraph 3 and 4 and revert back on Tuesday. However, in the meantime I can confirm we do not have a copy of the bundle, not a case list of chronology*".

27. On 26 July 2023 the Respondent wrote to Mr Neckles (Claimant on copy but the email was also addressed directly to her in its body) (page 62 SOB):

> *Dear Mr Neckles and Ms Etoh*
>
> *I write further to Mr Neckles' emails to me of 12 July and 14 July 2023, advising that he is on annual leave until 29 August 2023 and will turn his attention to this case upon his return, and to his later email advising that he would revert on the issues I have previously raised (in my email of 12 July 2023) on Tuesday 18 July 2023. I note I have not yet received a response to the queries I raised.*
>
> *The parties are required to confirm to the Tribunal, by this Friday (28 July 2023), that we are ready for the final hearing which is due to commence in September. The Respondent intends to confirm that it is ready for the hearing (being content with the bundle and having prepared witness evidence), and wants to proceed. However, we are mindful of our duty to co-operate and assist the Tribunal, and are*

therefore seeking to establish your position. Based on current information and the previous delays in this case, we are concerned that you will not be ready to proceed (and note that Mr Neckles has advised that he is unavailable for the listed hearing dates).

Can you confirm:

1. Whether formal representation has been identified for Ms Etoh (my understanding from Mr Neckles' email to the Tribunal of 4 June 2023 that you are assisting Ms Etoh temporarily, whilst alternative representation is secured, and that you are not formally on record in this matter?);

2. If so, please provide the details of the newly appointed representative; and

3. Whether you believe that you will be ready for the hearing commencing on 19 September.

I note that Mr Neckles, you have not been provided with a copy of the proposed Tribunal bundle by Mr Ibweke's office. We will share this electronically with you, via Sharefile (our secure file sharing site). I have previously provided a draft cast list for consideration (attached again for ease), and the draft chronology will follow shortly.

28. 8 August 2023 (page 64 SOB) the Respondent sent an email to Mr Neckles (Claimant on copy) to say:

Further to my previous email, my colleague Jill Robertson will shortly be sharing the Tribunal bundle with you electronically, via a secure file sharing system (OneDrive).

Due to the volume of documents, you will note that the bundle is broken down into Bundles A – C. Mr Ibweke has previously advised that he did not intend to refer to the documents in Bundle C, however, we are providing it for completeness.

We are still awaiting remedy documents from the Claimant. These were requested on a number of occasions from Mr Ibweke, given that the final hearing is for liability and remedy, and in accordance with the Tribunal's orders in respect of disclosure. However, they were never forthcoming. Please provide the remedy documents without delay, so that we have an opportunity to review them and take instructions ahead of the forthcoming hearing.

29. A week later on 15 August 2023 (page 65 SOB) the Respondent sent an email to the Tribunal setting out the position fully and copied Mr Neckles and the Claimant.

The final hearing in the above case was originally due to take place in March 2023. It was, however, postponed on the Respondent's application, because (a) the Respondent's counsel had unfortunately

suffered a family bereavement, and (b) the Respondent was concerned about the Claimant's readiness for the hearing. A preliminary hearing took place on 1 March 2023, at which the final hearing was relisted to commence on 19 September 2023, and case management orders ("CMO's") were made for final hearing preparations. The final hearing is listed to consider both liability and remedy (if the latter proves necessary).

We have endeavoured to comply with the CMO's made on 1 March 2023. We agreed a list of issues with the Claimant's representative (Daniel Ibweke) and filed this with the Tribunal on 8 March 2023. The parties have also progressed the final hearing bundle. However, in mid-March 2023, Mr Ibweke stopped responding to our correspondence attempting to progress the remaining issues in the case, namely, the provision of remedy documents by the Claimant, the exchange of witness statements, and agreeing a cast list and chronology. The Respondent has been in a position to exchange statements since early this year, and is content with the cast list and chronology, however, had been awaiting correspondence from Mr Ibweke on those points, along with the provision of remedy documents (which should have been provided at the original point of disclosure).

In June 2023 we were advised that Mr Ibweke had sadly passed away, and that Mr Neckles was assisting the Claimant until she found alternative representation. On 12 July 2023, we contacted Mr Neckles to progress the outstanding issues in the case. He advised that he in on annual leave until 29 August 2023 and would address the content of my email on his return. Whilst we appreciate that Mr Neckles has only recently returned to this case in difficult circumstances, we expressed concern that he would not be responding until his return from leave, given that the hearing is due to commence on 19 September 2023, and sought an alternative contact in his absence to progress matters. We have received an email from Mr Neckles since, however, that has not substantially progressed matters and no alternative contact has been provided.

Subject to exchanging witness statements, the Respondent will be ready (and wants) to proceed with the hearing in September. This matter has been ongoing since April 2022, when the Claimant lodged the first of her two claims, and it is in the interests of the parties to bring the matter to a conclusion as quickly as possible. However, we are concerned about the Claimant's readiness for hearing in light of the above.

The Respondent will incur Counsel's fees on 4 September 2023, and would be grateful for the Tribunal's guidance in this matter in advance of incurring those fees.

We confirm that we have copied the Claimant, and Mr Neckles into this email, for information.

30. On 23 August 2023 EJ Gidney (page 93 SOB) wrote to the parties as follows (his correspondence was addressed by the administration team to the Claimant's deceased representative but it was sent by email that day to Mr Neckles too):

> *Employment Judge Gidney has considered the Respondent's email of 15th August 2023 and the file. The Judge notes the difficult situation for the Claimant, and the uncertainty that creates for the Respondent in terms of when it instructs Counsel. However, neither party has applied to vacate the hearing, which remains in the list. The Tribunal will expect both parties to be ready to undertake the case, having complied with all directions as required. If the parties are not ready for the hearing, with no prior application to postpone being made, costs are likely to be wasted, and the party in default may be required to explain their default or be at risk as to costs*

31. The Respondent chased the Tribunal on 24 August 2023, raised concern about the hearing dates being in jeopardy, and this appears to have provoked a response from Mr Neckles who replied the same days as follows (page 70 SOB) and copied the Tribunal (but not the Claimant):

> *Thank you for your email that was copied to us today with regard to the above matter scheduled to commence on 19 September 2023, and in response please note the following. I have returned from annual leave and will respond to the contents of your previous email in due course. However, we are in agreement following the death of the Claimants previous representative and having to take on his cases, it has caused an overload in our ability in addressing and assisting some Mr Ibekwe cases. If your clients have no objections to a postponement to the above hearing, we have no objection. In the event the matter continues to the scheduled hearing of 19 September 2023, we will exchange statements on 11/9/2023 at 4pm.*
>
> *Please accept our late response, and thank you for your continuing cooperation.*

32. It is important to note that Mr Neckles and the Claimant had known for two months that he was going to be unavailable for the hearing dates in September and also indicated in this email correspondence that he might still be in a position to exchange witness statements, on a complex case, two weeks later (but only eight days before the hearing i.e. on 11 September 2023).

33. The Respondent replied the same day to the Tribunal (the Claimant remained off copy) to say (page 74 SOB):

> *"The Respondent's wish is for the hearing commencing 19 September 2023 to go ahead as listed.*
>
> *We do not agree to your proposal to exchange witness statements on 11 September 2023. Exchanging statements so late will not allow sufficient time for the Respondent to take instructions and prepare for*

> *the hearing. We propose witness statements are exchanged at 4pm on Friday 1 September 2023.*
>
> *Please confirm that this is agreed."*

34. The next day, 25 August 2023 Mr Neckles replied to say (page 79 SOB Claimant not on copy):

> *"Thanks for your email, and in response please note the following:*
>
> *In regard to the exchange of statements the date proposed is not possible. However, the earliest date of exchange is on 7 September 2023 at 4pm. This is ample time for your client to prepare for the hearing as both parties will be in the same position when statements are exchanged and no prejudice suffered can be advanced by your client."*

35. The Respondent replied the same day (25 August 2023, page 86 SOB Claimant not on copy) saying:

> *"I'm afraid the proposed date of 7 September 2023 for exchange of witness statements will not give the Respondent sufficient time to prepare for the hearing. The Respondent has been ready for exchange of statements for some time and has a conference booked with Counsel and the witnesses on 8 September 2023 to discuss the case. The Claimant's statement is required in advance of that conference with sufficient time for the witnesses and Counsel to consider the Claimant's evidence. That conference cannot be re-arranged given the short notice and the availability of Counsel and the witnesses.*
>
> *By way of compromise we suggest 4pm on Monday 4 September 2023 for exchange of statements."*

36. Five minutes later Mr Neckles replied to an earlier email chain saying:

> "*Can you please resend us a copy of the FMH bundle please, as we are having difficulty opening our copy."*

37. The bundle had been provided some time before (to Mr Ibekwe in February and March and to the Claimant and Mr Neckles on 8 August 2023). The Respondent had also specifically asked Mr Neckles if he had the bundle on 12 July 2023 (page 47 SOB).

38. On 30 August 2023, the Respondent sent Mr Neckles another copy of the electronic bundle with a guide on how to open it and received no response (page 98 SOB). The Respondent then sent Mr Neckles a hard copy of the bundle by recorded delivery on 1 September 2023 which was delivered on 4 September 2023 (page 110 SOB).

39. EJ E Burns wrote to the parties on 31 August 2023 (page 99 SOB) in the following terms but in error the Tribunal administration sent the

correspondence to the Claimant's deceased representative rather than to Mr Neckles. The Respondent's representative realised the mistake having returned from leave and sent it on to Mr Neckles on 12 September 2023 (page 102 SOB)

> *Employment Judge E Burns asks that you provide an urgent response to this email to confirm whether or not the case is ready to proceed to the hearing that is due to commence on 19 September 2023. According to the correspondence received from the Respondent, witness statements have yet to be exchanged. Please reply by midday on 1 September 2023 saying when you will be able to exchange witness statements. If you consider there are other things that need to be done before the hearing can proceed, please say what these are at the same time.*

40. The Respondent's email of 12 September 2023, sending the Tribunal correspondence on, read:

> *The below and attached were received during my absence on leave. I note that have been sent to Ms Etoh's previous representative and you may not therefore have seen this correspondence.*
>
> *Please can you respond, and confirm whether you are in a position to exchange statements today as indicated to my colleague? If so, I propose exchange at 4pm via email.*

41. On 4, 6 and 7 September 2023 the Respondent chased Mr Neckles for witness statement exchange (but did not copy the Claimant) (pages 105/106 SOB). 7 September 2023 was of course the date latterly proposed by Mr Neckles. The Respondent had indicated that it would incur counsel fees on 4 September 2023 and that a conference with counsel was arranged for 8 September 2023.

42. The first response from Mr Neckles (copied to the Claimant) was on 7 September 2023 (page 107 SOB) and said:

> *I write further to our recent conversation with regard to ou mutual exchange of witness statements and respond as follows;*
>
> *We are not in a position to mutually exchange statements until 12 September 2023 due to the fact that the paginated bundle of evidence was only recently received on a couple days ago by post, and as a direct result as such late disclosure , we were not in a position to complete the Claimant witness statements accordingly.*
>
> *We require the additional time in light of the late disclosure to lease with the Claimant so that she has the time to access the lengthy bundles of documents and to allow her to be in a position to complete her witness statement. Allowing this short extension will not cause your clients any detriments of prejudice in this regard and we ask for your consent by return, the mutual exchange on 12/9/2023 at 4pm.*

43. It was untenable for Mr Neckles to blame provision of the bundle as a reason for not being ready to exchange witness statements. The bundle had been provided to the Claimant and her representatives on a number of occasions, dating back to the beginning of the year, in hard and soft copy. It had been provided to Mr Neckles directly by the Respondent on 8 August 2023 and then again on 30 August 2023 with a hard copy arriving with him (by recorded delivery) on 4 September 2023 and he had not asked for it earlier when he became the Claimant's representative. As we have said, the Respondent had also specifically asked Mr Neckles if he had the bundle on 12 July 2023 (page 47 SOB).

44. The witness statement should have been in an advanced state of preparation given that there had been previous orders for disclosure of witness statements for 18 January 2023, 17 February 2023 and 20 March 2023 and Mr Neckles had himself proposed exchange on 11 September 2023, 7 September 2023 and then 12 September 2023.

45. On 8 September 2023 (page 110 SOB) the Respondent wrote to Mr Neckles, copying the Claimant, as follows:

> *"Bundle*
>
> *In response to your earlier email, the Respondent has complied with all disclosure obligations ordered by the Tribunal. The final hearing was originally scheduled for March 2023, but was postponed at short notice due to unforeseen circumstances. However, the Respondent remained ready with the final hearing bundle and witness statements in March 2023.*
>
> *On 4 June 2023, you emailed the Tribunal to inform them that you were now representing Ms Etoh and required copies of the pleadings. In the interests of time, we voluntarily sent you the pleadings on behalf of the Respondent on 12 July 2023. In this email we made it clear that if you needed a copy of the final hearing bundle, you could have one and we also asked if you were in a position to exchange statements (as both parties were originally ordered to exchange in March, therefore it was reasonable to expect that the Claimant was ready to exchange).*
>
> *A copy of the electronic bundle was sent by us to you via OneDrive on 8 August 2023. On 25 August 2023, you asked for a copy of the bundle to be re-sent to you due to technical difficulties.*
>
> *On 30 August 2023, we sent you another copy of the electronic bundle with a guide on how to open it and we received no response. Further to this, we sent you by recorded delivery on 1 September 2023 a hard copy bundle and this was delivered on 4 September 2023.*
>
> *Therefore, we entirely disagree with your statement that the Respondent has disclosed documents at a late stage in these proceedings.*

Witness statements

We do not consent to the extension to exchange witness statements on 12 September 2023 as not exchanging until this date is prejudicial to our client's case. On this date, it will be a week until the hearing and without copies of the statements it negatively impacts our client's hearing preparations.

We therefore request that the Claimant prepares to exchange statements immediately.

Notwithstanding the above and our request to exchange witness statements immediately, if we do not receive witness statements by 12pm on 12 September 2023, we will have no option but to make an application to the Tribunal for strike out for non-compliance with case management orders.

46. As referenced above, on 12 September 2023 the Respondent pointed out to the Tribunal that an earlier Tribunal letter (from EJ E Burns) had been sent to the Claimant's previous representative (page 100 SOB). By this email the Respondent provided EJ E Burns' correspondence to Mr Neckles and pointed out the Respondent's concern over the lack of exchange of witness statements.

47. 12 September 2023 came and went with no sign of the Mr Neckles providing a witness statement for the Claimant and so the Respondent applied for strike out on 13 September 2023 (page 113 SOB).

48. We note from the bundles provided that Mr Frances Neckes and Mr John Neckles of the PTSU Union appear to have supported the Claimant during her employment and that Mr Frances Neckles had been her representative on submission of her first claim. The earliest reference to them which we can see is to Mr John Neckles having accompanied the Claimant at an occupational health case conference on 4 July 2019 (page A128).

49. On 15 September 2023, the PTSC Union sent an email to the Tribunal (not copied to the Claimant) from an email address which appears to be that of a John (rather than Frances) Neckles saying (page 128 SOB):

We hereby make official application for a postponement of the Full Merits Hearing in the above stated matter, which is scheduled to commence on the 19th September 2023 on the following grounds, which is supported by medical evidence:

1. Mr Francis Neckles the Claimant's Representative is currently seized with a reoccurring debilitating historical slipped disk in his lower back which has temporarily incapacitated him to the extent that his mobility is significantly restricted, thus preventing him from standing and sitting for more than 10 minutes at a time. Please refer to the attached GP Fit Note and accompanying medical information on the said matter.

That as a direct consequence of the above, Mr Francis Neckles though he was medically assessed with the diagnosed condition on the 25th August 2023, we had hope that by now he would have made significant recovery to both assist the Claimant and to attend the ET to represent the Claimant's ET Claims on the 19th September 2023. However, Mr Francis Neckles' condition has not improved to a level that he can be in the position to both assist and attend the ET on the 19th September 2023 and throughout the duration of the Claimant's Full Merits Hearing proceedings.

2. There exist no other available ET Representative from the PTSC Union that can attend the ET and represent the Claimant's ET Claims, which is why this postponement application has been made at this late stage.

3. Following the death of the Claimant's previous representative in March 2023, the Claimant is in a state of impecuniosity and cannot afford the fees of an external legal representative to litigate her ET Claims.

4. We humbly beg the ET to grant this late postponement application in the interest of justice and pursuant to the terms of Article 6 HRA 1998 in regards to equality of arms and a fair hearing, as to not do so will prejudice the Claimant ET Claims for lack of representation for which the Claimant has no experience or knowledge of.

5. Additionally, the granting of a postponement application, will not prejudice the Respondent.

6. A copy of this application notice has been forwarded to the Respondent for their response in accordance with ET Rule 30 & 92 accordingly.

50. This was sent on the Friday before the hearing was due to start (on Tuesday 19 September 2023).

51. The fit note accompanying this email recorded that Frances Neckles was not fit for work from 21 August 2023 to 1 October 2023 because of backache and that he had been assessed on 25 August 2023. However, Mr Neckles had already made clear, back on 4 June 2023, that he was unavailable for the dates listed for the hearing. Even had he made a recovery he would not have been available and he had continued to engage with the Respondent in the subsequent period and not raised any question about his fitness to attend. We remind ourselves that it was the Claimant's intention that Mr Neckles just be an interim representative pending her appointment of a permanent replacement to Mr Ibekwe.

52. The Respondent's objection to the postponement application, sent at 17:30 on Friday 15 September 2023) passed further comment on the accompanying medical evidence and we accept the Respondent's position which it set out as follows on (page 137 SOB):

In response to the correspondence from John Neckles, writing on behalf of the Claimant and the Claimant's representative, Francis Neckles, the Respondent objects to the Claimant's application for a postponement.

The Respondent's position is as follows:

 The Respondent has not yet received a witness statement from the Claimant after weeks of trying to exchange and the Claimant refusing to engage, and the Respondent contends that the Claimant's claims should be struck out entirely as set out in its application to strike out dated 13 September 2023 (attached for reference).

 It is disappointing that this matter has been brought to our attention for the first time today, two working days before the hearing is due to start, despite Francis Neckles being in receipt of the sick note since 25 August 2023 and contacting us regarding the case on 25 August, 31 August, 4 September and 7 September 2023. Not once was it mentioned that Francis Neckles was suffering from ill health and that was the reason for the delay with the witness statement or as a factor jeopardising attendance at the hearing.

 It is clear that the Claimant is not ready for the hearing, despite parties being close to a final hearing going ahead in March 2023 before it was vacated and the Claimant's application to postpone is only in response to the Respondent's strike out application.

 The medical evidence provided is old and does not support the restrictions alleged by John Neckles in his email. The sick note for Francis Neckles is three weeks old and confirms that he is off sick from his substantive role due to backache. The other document is an A&E discharge note from June 2023. This document states that the radiological findings were that his back was only slightly worse than it was 8 years ago.

 A further postponement does prejudice the Respondent. The Respondent is extremely concerned regarding the possibility of a postponement due to the hearing originally being scheduled for 1 March 2023 and relisted (due to unforeseen circumstances) to 19 September for 7 days. The time and costs that would be incurred and the implication on the witnesses if the application to postpone is granted would be entirely unproportionate. The events complained about are already old and witnesses' memories will inevitably fade. Some of Respondent's witnesses have left employment and securing their attendance away from a new job again in the future may be problematic.

 The real reason for the request appears to be that the Claimant is not ready to proceed, having failed to serve any witness evidence. Therefore, the claims should be struck out as per the Respondent's application.

53. On 18 September 2023, the day before the hearing, the Tribunal (EJ Joffe) refused the Claimant's application for postponement saying (page 140 SOB):

> *I refer to your letter of 15th September 2023.*
>
> *Employment Judge Joffe has considered your request to postpone the hearing and has refused it.*
>
> *The Judge's reasons for refusing the request are:*
>
> *I have seen the Claimant's application for a postponement and the Respondent's response to the application. The medical evidence provided for the Claimant's representative, Mr Neckles, does not satisfy me that Mr Neckles is unable to attend the hearing on the Claimant's behalf.*
>
> *I note that the Claimant has not agreed exchange of witness statement and may not be prepared for the hearing.*
>
> *In the circumstances, I am not postponing the full merits hearing starting 19 September 2023. It is open to the Claimant's representative to provide further medical evidence and renew the application for a postponement. The Tribunal will consider the Respondent's application to strike out the claim at the hearing if it considers it appropriate to do so.*
>
> *The Tribunal will make any necessary reasonable adjustments for Mr Neckles.*
>
> *The case remains listed for hearing on 19th to 27th September 2023 (7 days) by video (CVP*) at 10am.

54. We note that it was left open to Mr Neckles to provide further medical evidence and renew the application for postponement.

55. On the morning of the hearing the Claimant's Union, still using the address of John Neckles, sent in the following correspondence:

> *We write to oppose any strikeout of the Claimants Claims and thereby renew our application for a postponement of the Claimant's ET Claims on the following grounds:*
>
> *1. The Claimant is devoid of representation in the above stated matter due to the ill-health of her representative who is not in any position to attend and assist the Claimant in her ET Claims.*
>
> *2. The Union became seized of this matter when the Claimant's former representative died and we have taken on the Claimant's ET Claims in order to assist her in this regard. However and through no fault of the Claimant, we have negligently represented the Claimant claims due to work overload and only now having one ET*

Representative who can deal with such matter. We have failed to see to it that the Claimant's evidence in chief is produced in writing for mutual exchange which was further hampered by the Respondent's late disclosure of the parties paginated bundle of evidence within the last 2 weeks.

3. We humbly beg the ET to postponed the said matter in the interest of justice and not to strike-out the Claimant's ET Claims for the reasons cited above. The Tribunal should note that the Union ***(and not the Claimant)*** *gives an undertaking to pay any reasonable wasted cost for its negligence if the matter is postponed for adjudication on another date as a direct result. If the ET is so not minded to postpone the said matter, then alternatively we humbly request for the Claimant to give oral evidence in regards to her ET Claims accordingly. The Tribunal is reminded that any disruption in theses proceedings was through no fault of the Claimant* ***(but her representatives alone)*** *who has no legal knowledge or Tribunal experience.*

A copy of this notice has been forwarded to the Respondent in accordance with ET Rule 30 & 92.

56. The Claimant attended the hearing herself unrepresented and asked for the hearing to be postponed because she did not have a representative. The Respondent attended the hearing with counsel who submitted the Skeleton Argument in support of the Respondent's strike out application together with a small bundle of documents relevant to that application (the SOB referred to above). There were some practical difficulties with ensuring that everyone had a copy of those documents and the primary hearing bundle. We were sitting in person in the Tribunal with all other parties attending remotely via CVP.

57. At the start of the hearing on 19 September 2023 we were presented with:

- A bundle of the Respondent's witness statements totalling 64 pages and including the witness evidence of: Ms Long (in respect of a temporary period of redeployment which the Claimant undertook in the Outpatients department in June 2018), Ms Sweeney (in respect of the Claimant's appeal against dismissal), Mr Marler - Hausen (in respect of the allegations the Claimant made of the management of her health and wellbeing and the support and efforts to which he and the Respondent went to try to secure alternative employment for her), Ms Swift (in respect of the Claimant's dismissal in December 2021) and Mr Baxendale (in respect of the management of the Claimant's ill health, the efforts to which the Respondent went to redeploy her, and her ultimate dismissal on the grounds of ill health capability).

- A Bundle A of 322 pages (covering pleadings, litigation related correspondence, salary and contractual documents and policies and procedures);

- A Bundle B of 2100 pages of core documents;
- A Bundle C of 6195 pages of vacancy bulletins;
- A chronology (prepared by the Respondent and provided to the Claimant but on which she had not provided comment);
- A cast list (prepared by the Respondent and provided to the Claimant but on which she had not provided comment);
- A skeleton argument for the Respondent's strike out application which had been sent to the Claimant and her representative; and
- The bundle of documents relevant to the strike out application numbered to page 141 (but with page numbers 116-127 not having been used).

58. We explained the normal tribunal process to the Claimant (including the processes of giving evidence and cross examination). We explained in detail the significance to her claim of the Respondent's application to strike out. We also explained that the fact that she was unrepresented was not in in itself a problem and that part of the role of the Tribunal is to ensure as far as practicable that she was on a level footing with the Respondent as a litigant in person. We asked the Claimant if she had any questions as the hearing progressed.

59. We gave her until 14:00 on the first day to read the Respondent's strike out application.

60. The Claimant was reluctant to return to the hearing at 14:00 because she was due to be at work with an agency. However she did return to the hearing and at 14:00 we then asked counsel for the Respondent to explain his application in clear terms to help the Claimant understand it, which he did carefully and methodically.

61. We then adjourned until 10am on the second day of the hearing to give the Claimant a further chance to consider what she might want to say about postponement and the strike out applications.

62. When we reconvened at 10am on 20 September 2023 we explained that if the case were to be relisted for a hearing then that would not be possible until mid-May or mid-June 2024.

63. The Claimant had nothing to add and despite the repeated attempts we made to help her, she said she did not understand. We note that she had previously said she did not understand the strike out application before she had even attempted to read it. She appeared reluctant to engage in the proceedings, read the papers or even take a note of what was being said (also despite encouragement to do so).

64. We asked the parties to return at 14:00 on 20 September 2023 so that we could update them on our progress with our decisions. We then asked them to return at 16:00 on 21 September 2023 by which time we been able to fully

consider our decisions and were able to explain them to the parties. We confirmed that we would be sending the parties full written reasons. The Respondent, having heard our decision, reserved its position on costs pending sight of these full written reasons.

THE LAW

65. We have been asked to consider two applications (postponement and strike out), because of the interrelationship between the outcomes of those decisions, we have considered the law and case law in the round and taken it all into account in both decisions.

66. The Employment Tribunal Rules of Procedure contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237 (as amended) are of course central to the decisions we have had to make and we refer to them hereafter as "**the Rules**".

67. Rule 2 sets out 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.***
>
> ***A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.***

The Law - postponement

68. We have reminded ourselves of Rule 30A which provides:

> ***[Postponements 30A.—(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.***

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

(a) all other parties consent to the postponement and—

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

(3) Where a Tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application where—

(a) all other parties consent to the postponement and—

(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii) it is otherwise in accordance with the overriding objective;

(b) the application was necessitated by an act or omission of another party or the Tribunal; or

(c) there are exceptional circumstances.

(4) For the purposes of this rule—

(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability.](a)

69. We have also had regard to:

- the Presidential guidance on postponement applications;
- the interests of justice and the right to a fair trial, (as part of the common law but given specific expression in Article 6 of the European Convention on Human Rights (given effect in domestic law by the Human Rights Act 1998)).

- the degree of prejudice to each party arising from the decisions we are asked to make;
- the parties' ability to influence and agree the Orders of the Tribunal and hearing dates listed;
- the fact, and reasons for, the case having been previously postponed;
- the length of time the case has been waiting to be heard;
- the fact that the case relates to events from 2018 onwards.

The Law - Strike out

70. Rule 37 provides:

> ***"Striking out***
>
> ***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).***
>
> ***(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.***
>
> ***(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."***

71. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), **Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT** is authority for the position that a tribunal will have

regard to the overriding objective set out in Rule 2 of seeking to deal with cases fairly and justly. In that case the EAT held:

> ***16. …The tribunal must be able to impose a sanction where there has been wilful disobedience to an order: see De Keyser Ltd v Wilson [2001] IRLR 324 , 329, para 25 and Bolch v Chipman , para 55(2)***
>
> ***17. But it does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.***

72. The Court of Appeal judgment in ***Blockbuster Entertainment v James [2006] EWCA Civ 684 IRLR 630*** relates to the approach to be taken in exercising the power to strike out under Rule 37 (b) (unreasonable conduct) but is nonetheless helpful in emphasising the draconian nature of strike out and that strike out must be proportionate in order to be lawful. Having set out the predecessor version of Rule 37 contained in Rule 18 of the 2004 Employment Tribunal Rules, Lord Justice Sedley said as follows:

> ***"5. This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible.***
>
> ***If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. The principles are more fully spelt out in the decisions of this court in Arrow Nominees v Blackledge [2000] 2 BCLC 167 and of the EAT in De Keyser v Wilson [2001] IRLR 324, Bolch v Chipman [2004] IRLR 140 and Weir Valves v Armitage [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal."***

73. The Court of Appeal in ***Blockbuster Entertainment v James [2006] EWCA Civ 684 IRLR 630*** also noted that normally claims that have made it to trial

are not struck out on a procedural grounds. Procedural breaches are normally dealt with before trial.

74. Counsel for the Respondent submitted that whilst it is a separate ground for strike out (Rule 37(1)(e)) where a fair hearing is no longer possible but the extent to which a fair hearing is possible will be a relevant factor for the tribunal when considering whether to strike out on other grounds too. He referred us to the EAT decision in **Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327**, a case about unreasonable conduct, when considering whether a fair trial was still possible:

> ***18. …There is nothing in any of the authorities providing support for Mr Kohanzad's proposition that the question of whether a fair trial is possible is to be determined in absolute terms; that is to say by considering whether a fair trial is possible at all and not just by considering, where an application is made at the outset of a trial, whether a fair trial is possible within the allocated trial window. Where an application to strike out is considered on the first day of trial, it is clearly a highly relevant consideration as to whether a fair trial is possible within that trial window. In my judgment, where a party's unreasonable conduct has resulted in a fair trial not being possible within that window, the power to strike out is triggered. Whether or not the power ought to be exercised would depend on whether or not it is proportionate to do so.***
>
> ***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 [2000] 2BCLC167 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.

75. As referenced in by the EAT in ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327***, the Court of Appeal in ***Blockbuster Entertainment v James [2006] EWCA Civ 684 IRLR 630*** also gave guidance on the question of proportionality as follows:

"18. The first object of any system of justice is to get triable cases tried. There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him - though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably. It will be for the new tribunal to decide whether that has happened here.

19. In deciding this, the tribunal needs to have in mind that the application before it is one that was made, in effect, on the opening day of the six days that had been set aside for trying the substantive case. The reasons why this happened are on record and can be recanvassed; but it takes something very unusual indeed to justify the striking out, on procedural grounds, of a claim which has arrived at the point of trial. The time to deal with persistent or deliberate failures to comply with rules or orders designed to secure a fair and orderly hearing is when they have reached the point of no return. It may be disproportionate to strike out a claim on an application, albeit an otherwise well-founded one, made on the eve or the morning of the hearing.

20. It is common ground that, in addition to fulfilling the requirements outlined in §5 above, striking out must be a proportionate measure. The employment tribunal in the present case held no more than that, in the light of their findings and conclusions, striking out was "the only proportionate and fair course to take". This aspect of their determination played no part in Mr James's grounds of appeal and accordingly plays no part in this court's decision. But if it arises again at the remitted hearing, the tribunal will need to take a less laconic and more

> ***structured approach to it than is apparent in the determination before us.***
>
> ***21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see Re Jokai Tea Holdings [1992] 1 WLR 1196, especially at 1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."***

76. As also summarised by the EAT in ***Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327***:

> ***26. If there are several possible responses to unreasonable conduct, and one of those responses is "less drastic" than the others in achieving the end for which the strike-out power exists, then that would probably be the only proportionate response and the others would not. There may be cases, which are likely to be rare, in which two or more possible responses are equal in terms of their efficacy in achieving the desired aim and equal in terms of any adverse consequences. However, in most cases there is likely to be only one proportionate response which would be the least drastic of the options available.***

Conclusions

77. The headings we have used in this judgement should not be taken as an indication that we have not looked at the factual and legal questions in the round. The headings are there to help facilitate the reading of our decision.

78. In the circumstances we decided that it was in the interests of justice to hear and consider the Respondent's strike out application and in doing so considered and decided the Claimant's application for postponement. The Respondent applied for strike out under Rule 37 (1)(c) and in the alternative under Rule 37 (1) (a).

Conclusions on strike out application

Is the strike out power triggered and if so what is the seriousness of the failure to comply with the Tribunal's orders

79. We found that the strike out power under Rule 37(1)(c) had been triggered and accepted the Respondent's submissions that there had been a repeated and serious failure on the part of the Claimant to comply with the Tribunal's orders. The most serious was her failure to produce any sort of witness statement. The non-compliance under 37(1)(c) was such that we deem the conduct of the Claimant to have been unreasonable for the purposes of 37(1)(b) and the threshold for strike out under that Rule was also met.

80. We saw no evidence at all of even a draft witness statement having been prepared (despite there having been orders for its preparation on three previous occasions (being 18 January 2023, 17 February 2023 and 20 March 2023) and despite Mr Neckles having suggested exchange of witness statements on 11 September 2023, 7 September 2023 and then 12 September 2023).

81. Of lesser importance was the Claimant's failure to disclose relevant documents, provide an updated Schedule of Loss and failure to co-operate in the preparation of an agreed Chronology and Cast List (the Respondent having done all the drafting work and merely sought the Claimant's comments on those documents). All of these things were to have been done, as ordered by the Tribunal, by 20 March 2023. Preparing a witness statement would have been a time consuming and more complex task but the Claimant failed even to do these much simpler tasks.

82. Even taking into account the sad death of Mr Ibekwe, we accepted the Respondent's submission that the magnitude of the failure to comply with the Tribunal's Orders here was extensive and the impacts serious.

83. The reasons advanced by the Claimant's representatives (both Mr Ibekwe and Mr Neckles) for failure to comply with the orders were not persuasive (where they existed at all). We reminded ourselves that, as submitted by the Respondent, it was the Claimant who back in March 2023 requested a further delay in the exchange of witness statements until 20 March 2023, which the Tribunal agreed to in its case management orders of 1 March 2023. Taking that into account and given the factual and legal complexity of the case, the Claimant's statement ought to have been complete by the time Mr Ibekwe passed away.

84. Mr Neckles had been acting for the Claimant since at least 4 June 2023 (over 3 and a half months before this hearing) and if he did not have the time

he would have needed to put into the claim (having helped the Claimant submit her first ET1 and therefore having some familiarity with the issues), he should not have taken the claim on. In any event he was described as an interim representative and the Claimant had had time to appoint someone who did have the time the claim needed. This was compounded by the fact that Mr Neckles then suggested that he would be ready to exchange witness statements on 11 September 2023, 7 September 2023 and then 12 September 2023.

85. We accepted the Respondent's submission that it was difficult to tell whether fault lay at the door of the Claimant or her representative. We reminded ourselves that we had not heard evidence, but concluded that fault appeared to lie not solely with Mr Neckles (balancing in particular (i) the extent to which the Claimant was copied on email correspondence over the course of this summer (ii) the fact that the Claimant is not a lawyer or familiar with the Tribunal process and (iii) we did not know what Mr Neckles said to her or she said to him).

86. The Respondent and their advisers had, in contrast, acted diligently and professionally in their attempts to prepare the case for hearing (including giving the Claimant time to comply with Orders following Mr Ibekwe's death). However, as submitted by the Respondent, in the face of persistent failure to progress the case and having warned Mr Neckles that the point of no return was fast approaching, he and the Claimant still failed to comply with the Tribunal's orders and failed to give good reason.

87. The Respondent then understandably applied for strike out. The Respondent submitted that the only response to their application which Mr Neckles then made was to mention ill health. The Respondent submitted that ill health was used as a 'fig leaf' for the real reason the Claimant wanted a postponement (which, the Respondent said, is that she had failed to comply with the Tribunal's orders and was not ready to proceed).

88. We further accepted that the Respondent had suffered significant disruption and prejudice by the Claimant's failure to comply with the Orders of the Tribunal. As submitted by the Respondent, it had had to prepare for two expensive, complex hearings absent having received any evidence from the Claimant. The case was listed for seven days, the bundle ran to around 2,500 pages of central documents (with nearly 6,500 pages of further documents which were less central). The Respondent had had to obtain evidence from various witnesses, including one who had left its organisation, covering events going back five years. The Respondent's witnesses had had to invest significant time in preparing their witness statements (the witness bundle as a whole totalled 64 pages and Mr Baxendale's witness statement alone was 25 pages long). Those witnesses had had to spend time reminding themselves of events that happened some time ago and familiarising themselves with the lengthy trial bundle. The Respondent had incurred, and continued to incur, significant costs in defending the claim and yet the Claimant's case in a number of material respects remained unclear (for example which roles she says she ought to have been offered during the period of attempted redeployment).

89. We concluded that the power to strike out under the Rules was triggered and that the Claimant's failure to comply with the Tribunal's Orders was serious.

Is a fair trial possible in this trial window (19 – 27 September 2023)?

90. We concluded, for the reasons set out below, that a fair trial was not possible in this trial window. Our conclusion on this was of course a factor relevant to the Claimant's postponement application and relevant to the question of whether the claim should otherwise be listed for a future date (for example in determining whether strike out was proportionate).

91. We note that in his application for postponement Mr Neckles said "*If the ET is so not minded to postpone the said matter, then alternatively we humbly request for the Claimant to give oral evidence in regards to her ET Claims accordingly*". However, it was clear to us from what she said that the Claimant was not in fact ready or able to give oral evidence and to have attempted to allow her to do so would have been unfair on the Respondent in the circumstances.

92. The Claimant was not able to adduce any evidence as to, and the Respondent did not know, the specific criticisms she intended to make of the lengthy process that the Respondent followed during and after her employment.

93. The Claimant had done no preparation for the hearing and was not prepared to represent herself. Even with the assistance of the Tribunal in attempting to create a level footing, a fair hearing within the trial window was not possible because she was not ready and had not prepared for what was a factually and legally complex claim. The Claimant at the hearing accepted this. Her claim forms and the list of issues lacked the detail that would have been needed for them to stand as the Claimant's witness evidence and she was entirely unprepared to cross examine the Respondent's witnesses. It would also have been unfair on the parties for us to determine the case on the papers.

94. To proceed with the hearing in the available trial window would have been particularly unfair on the Respondent in circumstances where it had not had the opportunity to understand consider, digest and analyse the Claimant's case (absent a witness statement from her). It was the Claimant's failure to produce any sort of witness statement which was the central impediment to a fair hearing being possible in this trial window.

Should the Claimant's postponement application be granted? If postponement is not granted is a fair trial possible in the future in any event (i.e. should the hearing be relisted for a future date in any event)?

95. We took into account that Mr Neckles in his correspondence said: "*the Union (and not the Claimant) gives an undertaking to pay any reasonable wasted cost for its negligence if the matter is postponed for adjudication on another date as a direct result*." We concluded that this undertaking (even if

honoured) would not address the full prejudice suffered by the Respondent if a postponement were granted.

96. We also took into account the sad death of Mr Ibekwe and the impact that had on the Claimant's preparation for the hearing and the fact that it was he, not Mr Neckles, who had agreed the dates of this hearing when it was relisted in March 2023.

97. We accepted the submissions of the Respondent that the Claimant's renewed application for postponement was made on two grounds:

- Mr Neckles, as representative, being ill and not able to attend.
- The Union not having prepared the Claimant's case properly, the Union accepting negligence and the Claimant therefore having no evidence/witness statement and the Union undertaking to pay any reasonable wasted cost for its negligence arising from a postponement.

98. The Respondent submitted, based on the medical evidence provided by the Claimant's representative, that Mr Neckles' health was not the real reason for his requesting the postponement (and even if it was ill health postponement should not be granted on that ground).

99. We kept in mind that we did not hear evidence from Mr Neckles. It did nonetheless appear to us that the reasons for the postponement request were also that (i) Mr Neckles was unavailable to attend the hearing (he said this as early as 4 June 2023, and he had not subsequently revised that position) and (ii) the Claimant's case had not been prepared (most importantly, she had no witness statement, not even a draft).

100. We also accepted that the first ground had already been rejected by EJ Joffe on Friday 15 September 2023 and that no new evidence had been submitted subsequently to vary that decision. For the avoidance of doubt we also considered that EJ Joffe's decision was the one that we would also have taken and that it remained valid at the time of us reaching this judgment.

101. It was also apparent that the Claimant's representative had not complied with Rule 30A (1) because he had not presented his postponement application to the tribunal and communicated it to the other parties as soon as possible after the need for a postponement became known (whether that was his original non-availability or subsequent ill health he had still not presented it as soon as the need for postponement became known). He was even invited to apply for postponement (having made clear that he was not available for the listed hearing dates) by the Tribunal on 22 June 2023 but did not then apply to postpone. An application for postponement could and should have been made earlier and would have saved the Respondent cost and its witnesses significant preparation time. It would have also saved the Tribunal time and resources.

102. On the basis of the Rules, we were only be permitted to postpone the hearing (based on the Claimant's renewed application) if we considered that there were exceptional circumstances under 30A (2)(c). Rule 30A(2)(a) did

not apply because the parties did not agree to the postponement. Rule 30A(2)(b) did not apply because the Claimant's application was not necessitated by an act or omission of the Respondent or the Tribunal.

103. We of course had sympathy for the Claimant given how she had been represented, but she was copied on many of the material emails and so knew the position with respect to the state of preparation of her claim for this hearing. She did not explained to us why she did nothing about it (and we gave her time and a number of opportunities to do so).

104. We concluded that the circumstances leading to the Claimant's application for postponement did not justify postponement.

Could there be a fair trial in a future trial window and is strike out proportionate?

105. Having decided not to grant the Claimant's postponement application, as part of the determining the Respondent's strike out application we considered whether it was possible to have a fair trial in a future trial window.

106. We reminded ourselves again of the guidance of the EAT in **Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327** and the following helpful passage in particular (our emphasis added):

> *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 [2000] 2BCLC167 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.*

107. We took into account that the hearing could not be relisted for seven days until the middle of May or the middle of June 2024 at the earliest and many of the events in question were already many years in the past.

108. We accepted the Respondent's submission that there were contentious issues of fact that required oral evidence, such as the frequency and severity of the Claimant's seizures and the Respondent would be unfairly prejudiced by a further substantial delay in the case coming to trial.

109. Relevant to this was that we accepted that one of the Respondent's key witnesses had already left its employment and future cooperation, a significant amount of time already having been given up to prepare for this hearing, could not be guaranteed.

110. We accepted the Respondent's submission that a relevant consideration was also that its witnesses would have the stress and anxiety of the case hanging over them and that they would have to divert precious time away from their roles in the NHS to again prepare for and participate in a further hearing. We concluded that would not be fair in the circumstances (circumstances which included the Claimant's and her representatives' serious failings).

111. The magnitude of Claimant's and her representatives' failings (which did not have good explanation) were in contrast with the diligence shown by the Respondent.

112. We took into account all the circumstances we have described including:

- those set out in respect of whether the strike out power had been triggered
- the time, resources and expense that has been incurred by the Respondent and its witnesses; and
- the Tribunal time and resource that has been incurred.
- the prejudice to the Respondent (and indeed other litigants waiting to have their cases heard if a further seven days of tribunal time had to be dedicated to this claim) if the claim were to be relisted in the future.

113. We concluded that it would not be possible to have a fair hearing in a future trial window.

114. Strike out of a claim is a highly draconian step and it must not be taken if there is a less draconian or less drastic step that can fairly be taken (such as relisting the case for a future date). However, we concluded that a fair hearing could not be achieved at a future date, that postponement of our own motion would not have been fair and for the reasons we have explained, a fair trial could not be achieved in the trial window that we did have. Whilst clearly a draconian step we concluded that, in all the circumstances, strike out pursuant to Rule 37(1) (c) was proportionate.

Strike out under Rule 37(1)(a)

115. Having struck out the claim under Rule 37 (1) (c) we did not gone on to consider whether strike out would have been warranted under Rule 37(1)(a).

Employment Judge Woodhead

21 September 2023

Sent to the parties on:

10/10/2023

For the Tribunals Office