EMPLOYMENT TRIBUNALS

Claimant: **Ms R Waiyego**

Respondent: **First Greater Western Ltd (R1)**
Mr Daryn McCombe (R2)
Ms Ruth Busby (R3)
Mr Barry Milsom (R4)
Ms Jemma Hancock (R5)

Heard at: **Bristol** **On: 2nd October 2023**

Before: **Employment Judge P Cadney**

Representation:
Claimant: In Person
Respondent: Mr R Fitzpatrick (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

i) The claimant has conducted the litigation unreasonably within the meaning of r37(1)(b) Employment Tribunal (Constitution and Rules of Procedure) Regs 2013;

ii) As a fair trial is still possible and/or as it is not proportionate to strike out the claim the respondent's application to strike out the claim is dismissed;.

iii) The claimant's application to strike out the response is dismissed;

iv) The claimant's application to amend her claim to pursue allegations of harassment pursuant to s26 Equality Act 2010is dismissed.

v) Further directions are given below.

Reasons

1. This case has until recently been case managed by REJ Pirani. It came before me on 12th September 2023 when I set it down for a Preliminary Hearing today to determine the following issues:

i) The respondents' application to strike out the claim;

ii) The claimant's application to strike out the response;

iii) Subject to the outcome of the applications above to determine the claimant's application for disclosure;

iv) To consider the claimant's application to amend the List of Issues and/or amend her claim, the claimant contending that these issues have not been addressed or resolved. (*For completeness sake the respondent objected to this issue being further revisited on the basis that the issues were agreed as recorded by REJ Pirani in his CMO of 9th December 2023 as amended in his CMO of 19th May 2023; and that the issues to be determined have been definitively resolved. For the avoidance of doubt it will be open to the EJ who hears the PH to determine that the issues have been resolved and that it is not open to the claimant to have a further attempt to re-litigate issues that have already been determined if appropriate*.)

v) To give further directions and re-list the final hearing as necessary.

Respondent's Strike out Application

2. The respondent asserts that the claims should be struck out on the basis of rules 37 (1) (b) and 37(1)(e) when read in conjunction with the overriding objective:.

Rule 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—*

(1)(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*".

(1)(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).*"

3. The principles against which a strike out application should be considered are well known. In respect of applications under rule 37(1)(b), for a tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response — *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*. (See paras 38-40 of the judgment in *Smith v Tesco* below).

4. In respect of the test as to whether a fair trial is still possible, which is an issue relevant to determining the application on either ground the respondent relies on and refers me to two specific authorities. The first is *Emuemukuro v Croma Vigilant [2021] UKEAT,* and specifically para 19 of the judgment of Choudhury P. The second is *Smith v Tesco Stores [2023] EAT 11*.

5. As the passage from Choudhury P's judgment is set out in the judgment of HHJ Tayler in *Smith v Tesco* I have only set out the relevant parts of that judgment (paras 33 -45) below (para 35 is omitted as it sets out rule 37, the relevant subsections of which for the purposes today's hearing are set out above) :

"33 It is always worth going back to the wording of the overriding objective. Rule 2 of the ET Rules provides:

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.

34. It is important to remember that parties are not merely requested to assist the employment tribunal in furthering the overriding objective, they are required to do so.

(35-See above.)

36. The EAT and Court of Appeal have repeatedly emphasised the great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may, for example,

limit the claim or strike out only those claims that are misconceived or cannot be tried fairly.

37. Anxious consideration is required before an entire claim is struck out on the grounds that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious and/or that it is no longer possible to have a fair hearing.

*38. In **Bolch** Burton J considered the approach to be adopted in considering whether it is appropriate to strike out a claim because of scandalous, unreasonable or vexatious behaviour and concluded that the employment tribunal should ask itself: first, whether there has been scandalous, unreasonable or vexatious conduct of the proceedings; if so, second (save in very limited circumstances where there has been wilful, deliberate or contumelious disobedience of an order of the employment tribunal), whether a fair trial is no longer possible; if so, third, whether strike out would be a proportionate response to the conduct in question.*

*39. This approach was adopted by the Court of Appeal in **Blockbuster Entertainment Ltd v James**, [2006] EWCA Civ 684, [2006] IRLR630, where Sedley LJ stated: 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.*

40. In considering proportionality the Court of Appeal noted:

> *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.*

*41. In **Arrow Nominees Inc v Blackledge** [2000] 2 BCLC 167 it was held:*

> *55. Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court*

42. Choudhury J (President) made a very important point about what constitutes a fair trial in ***Emuemukoro v Croma Vigilant (Scotland) Ltd*** *[2022] ICR 327:*

> *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] 2 BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr 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.*

43. The backdrop to the conclusion that the claimant had acted in a manner that was scandalous, unreasonable or vexatious so that a fair trial was no longer possible, were the extensive attempts that had been taken to clarify the issues in the claim. In his Notice of Appeal the claimant referred to ***Cox v Adecco Group UK & Ireland and others*** *[2021] ICR 1307 in which, in the context of an application for strike out of a claim on the basis that it has no reasonable prospect of success, I considered the particular care the employment tribunal, and represented respondents, should take when dealing with litigants in person:*

> *30 There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success. …*
>
> *31 Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if*

legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

44. That said, while stressing the importance of understanding the difficulties faced by litigants in person, and stressing the paramount importance of seeking to establish the core of the claim and bring it on for a hearing, I also noted:

32 This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues.

Conclusions

45. This claim was not struck out because the failed attempts at identifying the issues meant that the claims had no reasonable prospects of success. Nor was the claim struck out because the failure of the claimant to cooperate in identifying the issues meant that there could not theoretically be a fair hearing of any of the claims because it would not be possible for the tribunal to understand the issues. The claim for unfair dismissal could have proceeded without further particularisation and it might theoretically have been possible to hold a trial of at least some of the discrimination claims on the basis of the list of issues produced by EJ Flood. The reliance placed by EJ Cookson on the two matters raised in the grounds of appeal, as clarified by HHJ Auerbach, the fact that the claimant had not engaged with or agreed the latest draft list of issues and that he had made a fresh application to amend, was not that they meant that there could not theoretically be a fair trial of any of the claims because none of the issues in any of the claims were sufficiently clarified; but that there

could not be a fair trial because the claimant refused to cooperate with the respondent and employment tribunal. The great difficulty in identifying the issues was part of a course of conduct in which the claimant had shown that he was "not prepared to cooperate with the tribunal process". EJ Flood concluded that the course of conduct showed that the claimant would not abide by his obligation to assist in achieving the overriding objective and that his disruptive conduct exhibited at the hearing before her was likely to be repeated. EJ Flood found that the claimant was guilty of a "continued refusal to cooperate". The claimant would not work towards a trial that was fair in the sense of avoiding the undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the employment tribunal. One listing of the full hearing had already been lost and no progress was being made in preparing for the second hearing listed. Preparation was moving backwards, not forwards. There was every reason to believe that the lack of cooperation would persist.

6. The respondent relies on the following principles derived from the authorities as summarised in *Smith v Tesco*:

i) The question of whether a fair hearing is still possible is not to be considered in isolation or in absolute terms;

ii) Fairness in this context includes the question of whether to proceed to trial involves the undue expenditure of time and money;

iii) The tribunal is entitled to analyse the claimant's past behaviour and ask whether there is any reasonable prospect going forward of the claimant complying with case management orders and or co-operating in accordance with the overriding objective.

Background

7. It is necessary to set out the background in some detail, not least because the bundle for this hearing runs to 300 pages and comprises only the pleadings, case management orders and correspondence, which is remarkable in and of itself. However, in order to make the decision comprehensible I will attempt to make the chronology as brief as possible.

8. The claimant previously bought three separate claims against the respondent (1401143/2014; 1400140/2015; 1401795/2015). They were heard in 2016 and the claimant succeeded in two of her claims, in respect of which compensation was ordered by the tribunal. Both parties appealed and cross appealed to the Employment Appeal Tribunal which upheld the tribunal's original decision. The exact sequence of events is not clear to me as neither I nor the employment tribunal itself have been involved in the subsequent enforcement of the judgement which stood as a result of the employment appeal tribunal's decision. The claimant asserts that she has not received the full interest to which she was entitled (the 8% interest issue referred to below) on the sums awarded to her. In addition there has been litigation in the Swindon County Court in which the respondent was successful and the claimant ordered to pay its costs in the sum of £3,500.

9. The claimant should understand, having been informed on a number of occasions, that these disputes are not relevant to any issue in relation to this claim for two reasons. Firstly they relate to compensation in respect of a previous claim which, albeit between the same parties has no bearing on this litigation. Secondly the tribunal is not involved in, and has no jurisdiction over decisions of the County Court. If and insofar as there are issues in relation to that matter which remained to be resolved they will have to be determined either by Swindon County Court or on appeal from it. They are not relevant to these proceedings.

10. This litigation began with the submission of the ET1/claim form on the 12th April 2020. The factual allegations relate to the period 2016 until the claimant's dismissal in February 2020.The case was originally listed for a case management discussion in September 2020. The claimant asked for a postponement of that preliminary hearing on medical grounds, and there was further correspondence and medical information sent by the claimant which resulted in the first case management discussion taking place on the 16th August 2022 almost exactly two years later, and nearly two and a half years after the claim form was submitted. Whilst this is not the fault of either party it follows that case management of the claim was already very substantially delayed.

11. The case came before REJ Pirani on 16th August 2022 at which he gave case management directions and listed the case for a further hearing on 9th December 2022. He gave case management directions specifically in relation to any application to amend or to add further allegations or causes of action beyond those that set out by him within the case management order. The specific claims that were identified by REJ Pirani at that hearing were claims for unfair dismissal direct disability discrimination, victimisation, discrimination arising from disability and the failure to make reasonable adjustments.

12. On 3rd of October 2022 the claimant wrote stating that she will be amending her claim when the respondent provides all the information that she had requested.

13. The 9th December 2022 hearing was an in person hearing. The case was listed for final hearing commencing today 2nd October 2023 and directions were given for all steps leading to the final hearing. In addition REJ Pirani set out in detail the claims brought. At paragraph 12 he had stated that the list of issues was as discussed at the preliminary hearing and that if any party disagreed at that they should notify the tribunal within 14 days. The claims identified by REJ Pirani were claims for notice pay, holiday pay, unfair dismissal, direct disability discrimination, victimisation, discrimination arising from disability, and they failure to make reasonable adjustments. At paragraphs 96 and 97 he records that the issues were agreed with the claimant at the hearing, and that a break was provided in case she wanted to add anything else. He also records that no amendment application was pursued, nor were any other claims being pursued. Subject to any objection to the list from either party this would form the definitive list for the final hearing.

14. On the 6th January 2023 the claimant wrote referring to the absence of the reference to her strike out application in the case management order, and proposed additions to a number of the claims. She stated that she would pursue claims of harassment as an alternative to victimisation and direct discrimination, and referred

to assertions made in letters dated 11th of November 2019 grievance outcome, the letters of 29th November 2019, 7th February 2020, 12th February 2020, 13th February 2020 meeting, and 7th April 2020, 23rd April 2020, and 26th April 2020 although she did not further particularise those proposed claims. It should be noted that in this hearing the claimant accepted that REJ Pirani had correctly recorded that she was not pursuing the harassment claims, but that by 6th January 2023 she had changed her mind.

15. In compliance with the directions the respondent produced an Amended Grounds of Response based on the allegations identified in the case management order.

16. On 31st January 2023 REJ Pirani wrote, in respect of the claimant's reference to her strike out application, stating that if the claimant did wish to make an application to strike out it should be done by reference to the Amended Grounds of Response and agreed to amend the issues as set out in the claimant's letter. He directed the parties to agree a List of Issues by the 28th of February 2023.

17. There was considerable correspondence from both parties which led REJ Pirani to direct a further case management hearing to be heard on the 19th May 2023. The claimant did not attend that day, but REJ Pirani amended the List of Issues in accordance with the claimants application of the 6th January 2023; and gave further directions including in relation to the bundle, any amendment application and /or changes to the List of Issues, and pursuance of strikeout applications.

18. On 30th June 2023 the respondent reiterated its application for the claim to be struck out.

19. Subsequently on the 25th July 2023 the claimant that's submitted her own application to strike out the at response.

Application

20. As set out above the respondent relies on two bases for seeking a strike out deriving from rules 37(1)(b) and (e).

21. Some of the arguments advanced in the 31st March 2023 application have been overtaken by events, such as reliance on the claimant's application for a further stay on the basis of ill health at that point. That application was rejected by REJ Pirani, and had the case been ready for hearing, today would have been the first day of the hearing.

22. The essence of the respondent's application is that the reason the case is not ready for hearing is the claimant's unreasonable behaviour. The consequence, if the case is allowed to proceed is that it will be relisted at some point in 2024, when the earliest allegations will be eight years old, and the most recent four years old.

23. At the heart of the submission of unreasonable behaviour is the claimant's attitude to and actions in respect the List of Issues. When the list was apparently agreed on 9th December 2022 the respondents, and in particular the individual

respondents had had serious allegations made against them which had not resolved in two and a half years. Whilst that was neither parties fault it necessarily meant that adherence with the overriding objective and the parties co-operating to ensure the case was heard when listed was imperative. Even with the addition of further matters set out in the claimant's correspondence which was agreed to by REJ Pirani, and then formalised in the List of Issues on 19th May 2023 there was still adequate time to prepare for the hearing.

24. However the claimant insisted and continues to insist that the list was not agreed on 9th December 2022. For example on the 3rd April 2023 in response to the respondents strike out application she stated "*There was no list of issues agreed so there can be no progress and unless Judge Pirani intervenes to confirm when and what was agreed in the list of issues.*" On the 25th July she repeated the point stating: "*List of Issues - No list of issues was agreed on 9th December 2022 preliminary hearing or discussed as stated in the order of the 23rd of December 2022. Bristol tribunal has not dealt with parties list of issues at any hearing and the order dated 23rd of December 2022 is not correct and has not been amended*."

25. The respondent submits that the claimant's assertions are simply not true, which is by definition unreasonable behaviour. The List of Issues was agreed on 9th December 2022 and was amended in accordance with her own requests on 19th May 2023. The claimant's assertion in her correspondence of 25th July 2023 (above) that there had been no agreement or discussion as to the List of Issues on 9th December 2022 is on the face of it a remarkable one, and appears necessarily to imply that REJ Pirani is lying and has produced a fictitious case management order which bears no relation to the actual hearing. When I asked the claimant whether she was in fact making this allegation she stated that, from the previous litigation she had understood a List of Issues to be agreed when a separate document headed "List of Issues" was produced. A list of issues contained within a case management order was not a "List of Issues", and to compound his error REJ Pirani had never corrected the CMO of 9th December 2022 with the corrections from her correspondence of 6th January 2023, albeit that he had produced a revised list of issues in the CMO of 19th May 2023. When she says a "List of Issues" has never been agreed she means that no separate document has ever been produced.

26. The claimant's position is in my judgement difficult to understand, and impossible to reconcile with paragraph 12 of REJ Pirani's case management order, which the claimant clearly read as she responded to it. In the end in my judgement the assertions made by the claimant as to the 9th December 2022 hearing in her correspondence are plainly untrue.

27. In addition the respondent relies on the claimant's correspondence of 30th March 2023 which it describes as effectively holding the respondent and tribunal to ransom. In it she states that she is "..protesting and is not able to respond to any further orders and ET deadlines until accurate notes case order summary have been signed by Judge Pirani." This is appears to be a reference to her earlier allegation that REJ Pirani had in the case management order failed to deal with her strikeout application and/or the 8% interest issue. This is despite the fact that REJ Pirani had addressed and given directions in respect of the strike out application on 31st January 2023, and that the "8% interest issue" relates to entirely separate

litigation. The respondent submits that this is indicative of the claimant's mindset that she will only participate if and to the extent that she gets her own way.

28. The second specific example relates to the claimant's application to amend to pursue claims of harassment. Having agreed to the List of Issues on 9th December 2022, and the respondent having been directed to, and having produced an Amended Grounds of Response on the basis of them, the claimant on 6th January applied to amend. In today's hearing the claimant accepted that she had agreed on 9th December 2022 that she was not pursuing the harassment allegations but contended that she had, by 6th January, changed her mind. Moreover she asserts that she is entitled to do so as she is entitled to bring any claim referred to in the ET1/claim form irrespective of whether it is identified in the List of Issues. The respondent describes this as a "wrecking or delaying option" which is "unreasonable and abusive."

29. In addition it relies on other behaviour of the claimant as demonstrating the failure to co-operate. Firstly it is not in dispute that notice pay is due to the claimant, although the amount is in dispute. The respondent has asked the claimant to provide her bank details to pay the undisputed amount, which would appear to be in the claimant's interests but which she has refused to do, which is inexplicable other than by a general desire to be as uncooperative as possible. Similarly when the respondent sent a hard copy of the bundle the delivery was initially countermanded by the claimant herself; and she denies receiving a subsequent copy although it is recorded as having been delivered.

30. Put simply the respondent contends that there is a pattern of refusal to co-operate which is unreasonable, has made preparation for the final hearing impossible and has caused it to be postponed.

31. The claimant essentially does not accept that she has done anything wrong. She does not understand why she is being criticized for requiring REJ Pirani to produce a separate List of Issues, or correct his case management order. Both of these are things that happened in the previous litigation and she has assumed that they are, in effect requirements of tribunal litigation. She did not understand that it was acceptable for a List of Issues to be contained in a case management order, or for an order not to be corrected but simply dealt with in correspondence. If she has misunderstood, or got things wrong she relies on the fact that she is a litigant in person, and has a significant and continuing history of mental ill health which should be borne in mind.

32. As set out above, the respondent relies on other conduct, but irrespective of those matters in my judgement the respondent is correct to contend that claimants conduct in relation to the List of Issues is in and of itself at very least unreasonable within the meaning of rule37(1)(b). In a claim spanning four years it will not be possible for a respondent to understand the case it has it meet, or for the tribunal to hear the claim, without significant case management and an analysis and record of the issues to be determined. Even bearing in mind the points set out above made by the claimant, in my judgement in particular her correspondence in which she clearly disputes the fact that there was any agreement or discussion of the issues at all is self-evidently not true, and cannot be explained by any of the points she makes. Her continued insistence on this basic, but untrue, point has in essence

prevented any significant progress in this case since December 2022, and is in my judgement self-evidently unreasonable.

33. It follows that the next two questions are whether a fair hearing is still possible; and whether a strike out is proportionate.

34. In respect of a fair trial the respondent makes a general point as to delay affecting the cogency of the evidence, but does not rely on or set out any specific assertions as to prejudice. It follows that there is no evidence of, or any assertion as to specific prejudice caused by any further delay.

35. However the respondent also takes the broader point that the delay of the last ten months has been caused by the claimants unreasonable behaviour and has resulted in three further preliminary hearings since 9th December 2022 and enormous quantities of correspondence and consequent expense. Whilst a fair trial may still be possible in the absolute sense, in the sense set out by Choudhury P in Emuemukoro it is not fair to require the respondent to be exposed to further unreasonable and disproportionate expense in defending the claim.

36. Moreover, both in respect of a fair trial and proportionality, it submits there is no reason to suppose that the claimants attitude to the litigation will change, and Mr Fitzpatrick submits that if the claim is not struck out it is inevitable that we will be in a similar position in a few months' time.

37. Whilst I accept that there is a significant risk of this given the history set out above it is in my judgement still possible for a fair trial to take place in the circumstances set out below; and I am not quite persuaded that it would be proportionate to strike out the claim .

38. The circumstances in which a fair trial is still, in my judgment, possible are:

i) The List of Issues as set out in the Case Management Order of REJ Pirani of 19th May 2023 is adopted as the definitive List of Issues (which means that the earlier hearings are not wasted and it is not necessary to start the whole process of case management again -which might well have resulted in a different outcome).

ii) Subject to any application for specific disclosure made by the claimant and/or the identification of any specific further documents upon which she seeks to rely (see directions below) the bundle already prepared by the respondent shall stand as the bundle for the final hearing.

iii) That the claimant co-operates fully with the respondent in preparation for the final hearing (the claimant should understand that she has come close to having her claim struck out and it is in her interests to co-operate and ensure that the re-listed hearing can proceed.)

Claimant's Application to Strike out the Response/ Deposit Order

39. The claimant's application is firstly based on the proposition that the respondent is demonstrably lying in parts of its response. As set out above, REJ Pirani gave directions that any application to strike out should be made by specific reference to the paragraphs in the Amended Grounds of Response she contended were demonstrably untrue.

40. On 28th February 2023 the claimant wrote referring to a number of paragraphs in the response which she asserts are untrue.

41. In respect of the claimants first basis for the application, I can deal with that relatively briefly. The proposition that the respondent is lying about certain aspects of its case, as will be demonstrated at any hearing by the documentary evidence, may or may not be correct. However at this stage of proceedings it appears to me impossible to judge and those issues will have to await the determination of the tribunal which hears the claim.

42. The second basis is that the respondent has failed to fully disclose all relevant documentary material in accordance with its disclosure obligations. The respondent disputes this and contends that all relevant documents are in the bundle disclosed to the claimant. It submitted that, in accordance with the claimants wishes, and despite the fact that its evidence demonstrated that the bundle had been delivered already, it had sent the bundle electronically in PDF format in thirty separate tranches. The claimant accepted orally that she had received the electronic bundle in August, but had not read it. In those circumstances it is equally, in my view impossible to make any finding that the respondent is in breach of its disclosure obligations.

43. It follows that in my view there is no proper basis on which I could strike out the response and/or order the respondent to pay a deposit as a condition of being permitted to advance any specific point in its defence.

Amendment Application

44. As set out above the claimant's amendment application is an application to amend to be permitted to pursue claims of harassment.

45. It arises in unusual circumstances. The claimant does not dispute that at the hearing on 9th December 2022 that she agreed that she was not intending to pursue her claim of harassment pursuant to section 26 Equality Act 2010. She subsequently changed her mind and decided she did want to pursue it as set out in the letter of the 6th of January 2023. As it is not clear to me that the claim was formally withdrawn on 9th December 2022 I have, to give the claimant the benefit of any doubt, not treated the claim as withdrawn.

46. The difficulty for the claimant, however, is that it is not at all clear what amendment she is seeking. In correspondence she has referred simply to wanting to re-label the existing allegations of direct discrimination and victimisation as claims of harassment. If that were correct this would simply be a re-labelling exercise and the underlying factual allegations would not be altered. However in her

original application (see para 14 above) she refers to letters and meeting notes which appear to go beyond the factual allegations in respect of direct discrimination/ victimisation as set out in the List of Issues, and there is not identification of which parts of them she relies on as acts of harassment, and in course of the hearing when taken to the List of Issues the claimant was reluctant to confirm that she was restricting the application to those factual assertions.

47. At present there is an unparticularised application to amend, and it is not at all clear what amendment I am being invited to consider. As the starting point of any application is the specific identification of the amendment sought, in my judgment a bound to dismiss the application on that basis alone.

48. Even if I had not done so my provisional view, particularly in the highly unusual circumstances of this case and the fact that the claimant had expressly agreed when the issues were being identified that she was not pursuing that claim, that it is unlikely that I would have exercised any discretion to permit an amendment.

Disclosure

49. As set out above there is a dispute as to whether the respondent has or has not complied with its disclosure obligations; and as was confirmed orally by the claimant she has not yet gone through the bundle to determine what documents are or are not included.

50. The claimant is directed to notify the respondent no later than **3rd November 2023:**

i) Whether she contends there are any documents she believes to be in the respondent's possession, and relevant to an issue in the case, which have not been disclosed;

ii) If so she must identify specifically the documents referred to (e,g. – the meeting notes of the meeting held on….date)

51. The respondent is directed no later than **1st December 2023**:

i) To disclose the document(s); or
ii) Notify the claimant that the document is not in its possession; or
iii) Notify the claimant of any objection to disclosing the document

Bundle

52. No later than **3rd November 2023** the claimant shall notify the respondent of:

i) Any document already disclosed which she asserts should be included in the bundle and the issue in the case to which it relates.

Final Hearing

53. The parties are directed to notify the tribunal no later than **20th October 2023** of inconvenient dates for a re-listed 10 day final hearing between **June- December 2024.**

Further Directions

54. Once the case has been re-listed and any issues in respect of disclosure/bundle have been resolved (in respect of which the parties are required to co-operate – see above) further directions including dates for exchange of witness statements will be given.

Employment Judge P Cadney
Dated: 6th October 2023

Judgment sent to the Parties:
27 October 2023

FOR THE TRIBUNAL OFFICE