EMPLOYMENT TRIBUNALS

Claimants: C1 Ms Costello
C2 Mrs Kilner
C3 Mrs Barton
C4 Ms Caldwell

Respondent: Disclosure and Barring Service

Heard at: Liverpool **On:** 11,12,13 September and 25 and 26 September 2023

Before: Employment Judge Aspinall
Mrs Winter
Mr Gill

Representation

Claimants: Mr Morgan, Counsel

Respondent: Ms Knowles, Counsel

JUDGMENT having been sent to the parties on 2 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Short History of the Proceedings

1. The claimants are former employees of the respondent. They brought a claim in case number 2405069-21 against DBS and its employee Mr Topham on 30 April 2021 (The First Claim). The complaint against Mr Topham was rejected as there was no EC Certificate in that complaint. The First Claim included a long narrative Grounds of Complaint.

2. The claimants brought a second claim in case number 2414925-21 on 30 November 2021 against DBS, the Home Office and the Cabinet Office (The Second Claim). The Second Claim was also accompanied by a long, narrative Grounds of Complaint.

3. The First Claim was case managed at a private hearing by Employment Judge Johnson on 12 August 2021. It was not possible to clarify the complaints and issues at that time.

4. Both Claims were case managed by Employment Judge Buchanan at a private hearing on 16 May 2022. The First and Second Claims were consolidated by consent and orders made for further and better particulars to be provided and for a public preliminary hearing. The complaints and issues were not clarified and further information from the claimants was ordered.

5. At the public hearing on 12 September 2022 Employment Judge Rice-Birchall made Deposit Orders in respect of the complaints against The Home Office and The Cabinet Office. Those deposits were paid. The complaints against the Home Office and Cabinet Office were subsequently dismissed on withdrawal on 11 September 2023.

6. On 9 December 2022 the cases came before Employment Judge Benson for further case management. It was confirmed that there was no age discrimination complaint for any claimant and all complaints were said to lie against each respondent.

7. Employment Judge Benson saw a draft Agenda and draft List of Issues from the respondent. The issues were discussed and Employment Judge Benson ordered that the claimant provide an updated List to record the complaints and issues as had been discussed, by 13 January 2023 with an opportunity for the respondent to reply to it by 27 January 2023. There was then a tight schedule for preparation of the case for its final hearing which was extended to the September 2023 15 day listing.

8. The claimants sent a document entitled List of Issues which included narrative complaints and a table of matters complained of but did not specify which claimants relied on which factual matters alleged. The respondent replied seeking clarification. The claimants then sent a different version of a List on 1 February 2023.

9. During the spring of 2023 there was correspondence between the parties with the respondent seeking clarification and saying that the claimant was not complying with case management orders. On two occasions an application for an Unless Order was made and declined, but Employment Judge Benson gave clear direction that if orders were not complied with she would consider striking out the claims.

10. In August 2023 a bundle had not yet been agreed. The respondent prepared a bundle and invited the claimants to provide it with a list of any additional

documents they wanted including with information as to their relevance by reference to the List of Issues. The respondent indicated that it would consider their inclusion. There was still no agreed bundle. The respondent then wrote suggesting that any additional documents would need to be collated by the claimant into a supplemental bundle. This was not done. The respondent became concerned that the claimants were acting unreasonably in the conduct of the litigation in particular in not complying with case management orders so that the case would not be ready for final hearing on 11 September 2023 for fifteen days and wrote to the supervising employment law partner at the claimant's solicitors firm Napthens. Napthens then sent a file, not a supplemental, but a 7000 page differently constructed electronic file that did not match its index list sent previously, to the respondent and indicated its readiness to exchange statements.

11. Witness statements were then exchanged on 25 August 2023. The claimants made an application for postponement of the final hearing based on their own lack of readiness for hearing. The respondent opposed the application. Regional Employment Judge Franey rejected the postponement application; the parties having had two years since they agreed the date of the final hearing in which to be ready and the claimants having been represented by Napthens throughout.

12. On 5 September 2023 the claimants Counsel withdrew from the case based on its poor preparedness. The claimants renewed their application for postponement and Regional Employment Judge Franey directed that it be heard at the outset of the final hearing. The respondent indicated in correspondence that it would make an application that the claims be struck out as the lack of preparedness meant that it would be impossible to have a fair hearing and that it would seek its costs. Mr Fox, solicitor for the claimants, who had been unwell for some time, then reached a point where he could not continue and went off sick.

13. On 11 September 2023 the Tribunal heard the postponement application and on 12 September 2023 gave its decision to postpone within the trial window of three weeks, (giving the claimants the opportunity to seek alternate representation, to consider representing themselves and to consider seeking medical evidence as to their inability to do so and allowing the panel time to read into the case in more detail before considering striking out). The Tribunal ordered the parties to return on 25 September 2023 when it would hear the respondent's strike out applications and costs applications and if the claims were not struck out, for case management hearings.

14. On 13 September the panel spent the full day in chambers with "its sleeves rolled up", attempting to identify the complaints brought by each claimant, the factual basis of each complaint, where if at all in the witness statements or narrative grounds of complaint those alleged facts could be found and attempting to locate key documents relevant to those factual allegations.

15. Written Reasons for the postponement were provided in full on 18 September 2023.

16. The panel reconvened on 25 September and it was agreed that the running order would be, strike out applications to be heard first by submission only, then a discussion as to the costs application and what progress if any could be made in it during the trial week given potential conflict between the claimants and their representatives and then any case management as appropriate.

17. Mr Morgan explained that as the claimants and Napthens both opposed strike out he was jointly instructed to represent them but if the claims were struck out then a conflict may arise for Napthens and himself in relation to both costs and further case management.

The Panel hearing the strike out application

18. Employment Judge Aspinall and Mrs Winter were present at Liverpool Employment Tribunal. Mr Gill appeared remotely with the consent of the parties. This was the same panel that had decided the postponement application in this case on 12 September 2023 and read into the case on 13 September 2023.

Documents for the strike out application

19. The Tribunal had a bundle, referred to by the respondent as its supplementary costs bundle and labelled R2, of 115 pages. It had the original final hearing bundle of 15 lever arch files (approximately 7000 pages) and it had the written statement of Mr Fox.

20. A supplementary pack of exhibits was produced detailing the claimants' ill health.

21. Ms Costello produced a photograph of a prescription from Millbrook Medical Centre on 12 September 2023 for 50mg sertraline tablets. She produced an extract of medical records showing a diagnosis of mixed anxiety and depressive disorder from February 2021 and anxiety state on 12 September 2023. She had also had a fit note declaring her not fit for work from 19 September 2023.

22. Ms Kilner produced a letter from Dr Eman Saad at Woolton House Medical Centre dated 21 September 2023. Dr Saad said "I support her request that her court attendance be postponed until she is legally represented due to her mental health status". She provided a photograph of a packet of 40mg Propranolol medication dispensed to her on 14 September 2023.

23. Ms Barton produced an unsigned or dated letter from Rainford Health Centre saying that the prospect of having to represent herself had caused a significant deterioration in her anxiety following events of 11 and 12 September in this case. She had a three year history of anxiety and depression at work secondary to stress at work and subsequent legal proceedings. She provided a photograph of a packed of Propranolol 10mg tablets and a screenshot from a phone showing an NHS prescription app order for sertraline 50mg on 18 February 2023.

24. Ms Caldwell produced a letter from Dr Melissa Siddorn dated 25 September 2023 which said that due to her current health she should not self-advocate at Court as this would exacerbate her symptoms. It said "she is not in a situation where she should represent herself". The letter confirmed Ms Caldwell is also dyslexic and being assessed for ADHD.

25. The Tribunal had skeleton arguments and authorities from the claimants and respondent and a most helpful chronology of the conduct of the litigation in neutral terms from the respondent.

The List of Issues

26. The sole issues for determination was whether or not the claims should be struck out. The application was made under Rule 37(1) (b) unreasonable conduct of the litigation such that it was not possible to have a fair hearing and (c) breaches of case management orders and (e) not possible to have a fair hearing.

Procedure at the hearing

27. The respondent made its application during the morning on 25 September from around 11.15 until 1.15. After lunch, with the hearing having been agreed to resume at 2.15, the claimant's representative asked if he might have more time as he was using the lunch break to take further instruction. He said that he had only been instructed on the afternoon of Thursday 21 September 2023. He had found taking instruction from his clients over lunch difficult and demanding because they were shocked and unwell.

28. The Tribunal explained that any time would have to come out of his presentation time that afternoon, 2 hours having been agreed for him to resist the application. The respondent had no objection to adjustment to the timetable.

29. Mr Morgan then said that the claimants had not had any lunch. The Tribunal agreed that it would sit late to accommodate a short period of extra time with the hearing resuming at 2.40, allowing time for the claimants to eat and drink. The hearing resumed at 2.37 and the Tribunal sat late to allow the claimants a full two hours to resist the application. Having had Mr Morgan advocate for them neither Ms Barton, Ms Caldwell nor Ms Kilner who were present and given the opportunity to speak, wished to be heard themselves. Ms Costello was too unwell to have attended. She was represented by Mr Morgan.

The Relevant Law

30. In exercising any of its powers in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 the Tribunal shall have regard to the overriding objective set out at Rule 2:

> **Rule 2**
>
> **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.

31. The discretion to strike out is contained in Rule 37:

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 —

(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.

32. The Tribunal had regard to Presidential Guidance on General Case Management 2018 at paragraphs 8 -13 on striking out under rule 37 which notes that before striking out a party will be given a reasonable opportunity to make representations and adds “the Tribunal does not use these powers lightly”.

33. There is in effect a two stage test. First the Tribunal assesses whether one of the grounds in Rule 37 is made out and in particular in relation to 37(1)(b) whether the unreasonable conduct is such that there can no longer be a fair

hearing and then at the second stage the Tribunal considers whether or not to exercise its discretion to strike out, having regard to the overriding objective and proportionality. This will engage the Tribunal in considering what lesser action might be taken and in balancing the interests of the parties.

Submissions

34. The respondent gave a detailed submission on the law citing the following authorities:

Blockbuster Entertainment Limited v James [2006] EWCA Civ 684

Bolch v Chipman EAT [2002] IRLR 140

Emuemokoro v Croma Vigilant (Scotland) Limited EA-2020-06

Harris v Academies Enterprise Trust [2015] IRLR 208

Harmony Healthcare plc v Drewery [2000] Lexis Citation 4120

Mukoro V Independent Workers Union of Great Britain UKEAT/0128/19/BA

Abegaze v Shrewsbury College of Arts and Technology [2009] EWCA Civ 96

35. Miss Knowles then took the Tribunal through her neutral chronology of the litigation and an analysis of both sides of the correspondence in the Supplemental Costs Bundle showing the conduct of the litigation from December 2022 to the final hearing date.

36. The respondent submitted that unreasonable conduct *such that there can be no fair trial is made out*. It submitted on the exercise of the discretion to strike out that Rule 2 and Emuemokoro requires the Tribunal to have regard to the impact on the respondent. The respondent was as ready as it could be in the circumstances of the way in which the litigation had been conducted to go to hearing. It had 16 witnesses, one of whom has daily dialysis, three of whom no longer work for the respondent and two of whom are retired. As the case is not ready for trial in this trial window, and the claimants accept that it is not ready; it was the claimants who applied for postponement on that basis, there can be no fair hearing.

37. The Tribunal was told on 11 September that the next opportunity to hear a 10 day plus case would be in 2025 and on 25 September the Tribunal was told that the next available date would be 31 March 2025.

38. The claimant made its submissions and acknowledged the relevance of the above authorities.

39. The claimant accepted that the case was not trial ready in the trial window because (i) of the level of preparedness of its case and because (ii) the claimants

wished to be represented and their Counsel had withdrawn (because of the poor preparedness of the case which would leave her professionally embarrassed) and they had found it impossible to obtain alternate representation. The claimants said they needed to postpone to obtain representation.

40. The claimants submitted that the claimants themselves are not responsible for Napthens failings and implored the Employment Tribunal not to strike out their complaints. The claimants submitted that they were each too unwell to represent themselves. They could not give dates by which they might be able to be litigants in person and they estimated that it would be weeks if not months, after the shock of the barrister stepping aside, for them to be well enough to give detailed instruction. They had found it difficult to give instruction to Mr Boyd on 11 and 12 September 2023 and to Mr Morgan on 25 September 2023 and were each unwell.

41. They submitted that their cases were capable of being fairly tried in the future but accepted that it would be a matter of weeks if not months after they were well enough to engage with the case to obtain alternate representation and then a further period of weeks for that firm and counsel to be up to speed with the case.

42. Mr Morgan rejected the argument that Emuemokoro looked at whether there could be a fair hearing *in the trial window* and said that a corollary of that proposition would be that every postponement of a final hearing ought also to amount to a strike out.

43. The claimants' overarching submission was that the Tribunal could not conclude that there could never be a fair hearing in *these cases*, he dealt with them together, and that the granting of the postponement itself on 12 September 2023 amounted to a finding that the cases were capable of being tried in future.

44. Mr Morgan submitted that Abegaze requires the Tribunal to consider a lesser sanction and that relisting at a later date is an appropriate lesser sanction. Mr Morgan submitted that Harmony is old and stale law so that the claimants are not bound by the unreasonable conduct of litigation by their representatives and that Harris is the better authority distinguishing the conduct of the claimants themselves from that of their representatives. He submitted that, in any event, the conduct of the litigation may not have been ideal but had not reached the threshold of unreasonableness.

45. Mr Morgan submitted that the Tribunal would misdirect itself in law and reach a perverse decision if it did anything other than postpone and relist the claim in the future at the next available date, a remedy being available to the respondent for the delay in costs.

46. At the end of his submissions Mr Morgan sought to introduce exhibits attesting to the claimants' ill health and a table commenting on those exhibits. Ms Knowles objected to the table on the basis that one of its columns, a commentary on the documents, amounted to oral evidence and she would not have the opportunity to cross examine on that evidence and it had been expressly agreed

that the strike out applications would be determined on submission only. The Tribunal adjourned to consider the point and agreed with Ms Knowles. The exhibits were admitted but not the table.

Application of the law

The first stage: the grounds in Rule 37

47. The respondent's application was made under three separate provisions of rule 37.

The first ground Rule 37(1)b: unreasonable conduct of litigation

48. In Emuemokoro JJH Choudhury recited the authorities as to what would amount to unreasonable conduct. At paragraph 22:

> **"……The authorities are clear that what is required in terms of unreasonable conduct is "deliberate and persistent disregard" of the required procedural steps. The reference to the conduct being "deliberate" would probably exclude mere oversight or negligence which is not the result of any intentional or deliberate failure to implement proper systems for managing case progress ……..it would be to distort the Court of Appeal's choice of terminology in describing the kind of unreasonable conduct necessary for the exercise of the power to strike out, if it were to include "ordinary" negligence cases, particularly where, as in this case, the default appears to be the result of oversight rather than contumelious default. ….."**

49. If there is a case of unreasonable conduct which is not of the character of being deliberate or "contumelious" then the conduct can still mean that the ground for strike out is established where the conduct means that a fair trial is no longer possible.

> "….. **It is not strictly necessary to consider whether there was any error of approach in considering the nature of the respondent's unreasonable conduct, since it is enough to trigger the power to strike out that a fair trial is no longer possible."**

50. The Tribunal finds that the claimants have acted unreasonably in the conduct of the litigation such that a fair trial is no longer possible.

51. Given that strike out is a draconian power and not exercised lightly the Tribunal recites examples of the ways in which the Tribunal scrutinised the extent of unreasonableness and its impact on the possibility of a fair trial.

In relation to the List of Issues

52. Employment Judge Johnson at his case management hearing on 12 August 2021 had not ordered a List of Issues as the complaints had not been clarified. Orders were made for further and better particulars. Employment Judge Buchanan on 16 May 2022 at paragraph 20 of his Summary attempted to codify the complaints brought by each claimant but could not do so definitively. At that time they included unfair dismissal, disability

discrimination, sex discrimination, detriment on the ground of having made a protected disclosure, breach of contract and personal injury. He said:

"The claim form does not clearly set out the complaints each claimant is advancing or the grounds relied on nor is it clear against which respondent or respondents the various complaints are advanced."

53. He ordered additional information and said:

"Is it hoped that at the next private preliminary hearing a definitive list of complaints and the issues arising in each complaint can be finalised. …given the state of the pleading with which I was faced, it was not possible for that task to be completed."

54. Napthens first sent a list of issues to the respondent on 12 October 2022. (This came after two claim forms with long narrative grounds of complaint that did not clearly identify issues. Further and Better Particulars had been ordered and provided. In response to F&BP's the respondent sought an Unless Order – seeking clarity as to the complaints, before it filed its Amended Response. The Unless Order was denied.) On 12 October 2022 Napthens sent a List and said *if certain claims or certain allegations are not mentioned it is because they are not being pursued.*

55. This required the respondent to undertake an exercise in which it went through the Grounds of Complaint documents in each case number, the Further and Better Particulars and the content of the case management summaries as a record of what the claimants had alleged and map them against the claimant's List so as to identify what was being pursued and what was not. The claimants did not write formally to identify and withdraw any complaints from the Employment Tribunal.

56. At a preliminary hearing for case management on 9 December 2022 Employment Judge Benson recorded that a full discussion had taken place as to what was being claimed and she ordered at para 2.1:

"The claimant is to update the draft list of issues to reflect the matters discussed and agreed at this hearing and send it to the respondents by no later than 13 January 2023.

The claimant is to confirm to the respondents that the schedule contained within the draft list of issues comprises the total of the allegations relied upon.

By no later than 27 January 2023 the parties are to have agreed the list of issues and to have sent the agreed list to the Tribunal. Should agreement not be reached on any part, the parties should provide their comments on the draft for the Tribunal to consider."

57. On 13 January 2023 Napthens sent a draft List to the respondent. What was produced was a long narrative document with a table within it. It was not clear, and remains unclear at the date of final hearing, which complaints are pursued by which claimants. For example – the words *breach of implied term mutual trust and confidence* appear in a table alongside many of the allegations but only the fourth claimant, as the Tribunal understands from discussion with Mr Boyd on the last occasion, brings a breach of contract wrongful dismissal complaint.

58. It is not clear for those entries whether the other claimants also rely on those factual allegations in relation to their Equality Act and protected disclosure complaints or if they also claim breach of contract (though their employments we are informed by Mr Morgan ended by voluntary redundancy), and if so, which claimant relies on which factual allegation and in support of which complaints against which respondent. It is not clear at all which factual allegations underpin which complaints. The List as provided on 13 January 2023 was not fit for purpose and required further work of the respondent than would ordinarily be undertaken even in a complex and voluminous multi-party litigation.

59. The respondent made detailed tracked changes to the List which amounted to requests for clarification of issues. It reverted to the claimants with those changes by the deadline date of 27 January 2023 set by Employment Judge Benson. So far as the Employment Tribunal can see from correspondence disclosed, the claimants never engaged with those requests and that clarity has never been provided.

60. On 1 February Napthens provided a different draft List of Issues. It was described by them as an "updated" draft. It did not respond, in a way that could be tracked, to the respondent's points on the 13 January list as amended by the respondent but it instead restructured and redrafted a list and included new allegations. This required the respondent to undertake additional work mapping the 1 February List against the 13 January List and the content of the discussion before Employment Judge Benson in December 2022. This was unreasonable and the respondent said so.

61. The respondent wrote:

"A significant number of additional allegations …adding a whole host of additional allegations to the list of issues significantly after the date ordered to provide particulars and even after the date that the List of Issues was due to be agreed is unacceptable conduct in these proceedings."

62. The respondent wrote to the Employment Tribunal citing Employment Judge Benson's clear direction about an exhaustive list by 13 January and Napthens said in response:

"They are not new, they have either been included in previous iterations of the list of issues or they have been included in the claim forms."

63. Napthens assertion that the contents of the February List were either in previous iterations or the Claim Forms was unreasonable conduct of litigation given the letter of 12 October in which they had said that if a matter did not appear in the List on 12 October then it was not being pursued. This required additional work for the respondent in tracking back to the Claim Forms in February 2023 when the claimants had said in October 2022 that matters were not being pursued. It created uncertainty for the respondent as to what was being claimed post the List of 13 January 2023.

64. The List presented at the start of the trial window, some 37 pages, we are informed by the respondent, is the 13 January 2023 List showing the respondent's 27 January 2023 tracked changes. It is not a fit for purpose list of issues, it still contains uncertainty as to what is being claimed and what allegations are relied on in support of which complaint by whom against whom.

65. A significant amount of work is still to be done to achieve an agreed workable list of issues.

In relation to disclosure

66. In December 2022 Employment Judge Benson also addressed disclosure.

Paragraph 3 of Employment Judge Benson's order 9 December 2022, she ordered:

"By no later than 28 March 2023 each party shall have provided to the other party a copy of any document in the disclosed list that has been requested."

67. The claimants did not provide copy documents. It said:

"I am instructed that DBS already has copies of the documents …as they were provided as part of our clients' DSAR. It would therefore be duplication for my client to send these documents back to you. Please advise if this is not the case and you do not have these documents.

68. The Tribunal finds this is not what the case management order required and again it puts the respondent to additional cost in having to track what was in the subject access request against its own documents identified as relevant for the litigation and requires the respondent to seek the claimant's disclosure from its own client. What the claimants did not do was tell the respondent what they thought were the *relevant* documents for the trial.

69. The respondent objected and made an application for an Unless Order to compel compliance with Employment Judge Benson's Order. The respondent said that this was unreasonable conduct of litigation and was causing it to incur additional cost. The Unless Order was denied but clear direction was given. The claimant then provided 2769 pages of disclosure in a different order to that in the List of Documents they produced. It did not map its disclosure against documents on the respondent's list and just provide the additional documents.

70. This required additional work of the respondent to map the documents against the claimant's list and to map against its own documents to see if there was duplication. Ordinarily, a representative would send only the additional documents and send them clearly labelled to match the list so as to assist its opponent in inserting them into a bundle.

71. The ET is reminded of the duty in rule 2 to assist the tribunal and cooperate with each other. Employment Judge Benson reminded the claimant of her orders and reiterated that the List of Issues of 13 January 2023 would stand as the totality of the allegations.

72. The respondent collated the documents, prepared an index and sent a line by line analysis stating which documents it proposed to include in a hearing bundle and which it challenged on grounds of relevance. It invited the claimants to identify by reference to the List of Issues why the documents it wanted including were relevant.

73. The claimants did not engage in the process of agreeing documents based on relevance to the matters to be determined. It insisted all its disclosure was relevant and that the Employment Tribunal should be the arbiter of relevance.

74. Napthens said:

"The claimants request that all of the documents provided by them be included in the bundle as they all remain relevant. If there is a discussion to be had as to whether specific documents are relevant to the claims being pursued I suggest the Tribunal can make that decision."

75. This did not meet the obligation in rule 2 to cooperate and assist the Employment Tribunal, it did not comply with Employment Judge Benson's order or her restatement of the disclosure provisions.

76. On 23 August 2023, 11 working days before the final hearing, the claimants sent a 7000 page electronic file to the respondent, which did not match the Index to the bundle and did not have pagination that worked against a separate Index and as at the start of the trial window the claimants, by Mr Boyd, could not say that it did not contain documents not previously disclosed.

77. The respondent, understandably, declined to undertake the mapping exercise.

In relation to the bundle

78. Employment Judge Benson had ordered on 9 December 2022 at paragraph 4.1:

"The parties must cooperate with each other in assembling and agreeing the hearing bundle contents and index."

79. The claimants did not agree the bundle. The claimants refused to say why additional documents it wanted including were relevant to the matters to be determined at final hearing and did not adopt, when invited to do so, the usual process of providing supplementary documents for inclusion. The claimants sent the file of 7000 pages 9 working days before the final hearing and did not identify which of those were duplicates, which new and which if any had not previously been disclosed.

80. At the start of the trial window the Tribunal was faced with a Final Hearing bundle of 15 lever arch files prepared by the respondent with pagination and an index, so that documents could be referred to in the witness statements and could easily be found. It was told that the bundle was not agreed. The claimant wished to adduce a 7000 page file.

81. On 31 August 2023 at a preliminary hearing for case management, Employment Judge Benson recorded:

"It is completely unworkable and disproportionate for the parties, their representatives and the Tribunal to work from two separate bundles…….the claimants' witness statements are to be amended to change any reference to documents to page numbers within the Final Hearing Bundle……{the respondent} asked that I make an Unless Order to ensure the claimants comply as they have failed to comply with orders on numerous occasions…..I consider it not appropriate to make such an order but if any delay to the hearing including the possibility that it is postponed is occasioned by the claimant's failure to comply with my order…the Tribunal will give full consideration to …costs."

82. Employment Judge Benson also sought to avoid a situation in which not previously disclosed documents might be adduced by the claimants at final hearing. She recorded:

"*If the claimants believe that there are documents missing from the Final Hearing Bundle which are relevant AND that they intend to refer to in their evidence or cross-examination, then they may produce a separate bundle which they should provide to the respondents as ordered below."*

83. Employment Judge Benson recorded that Napthens said that such documents would amount to 2000 pages and Employment Judge Benson recorded:

"It is difficult to see how all 2000 pages will need to be referred to and the claimants are asked to rationalize this bundle to reduce its size."

84. Employment Judge Benson addressed the ongoing lack of clarity as to what was being complained of. She ordered the claimants, their Solicitors and with the support of their Counsel:

"To consider whether there are any allegations which they no longer wish to pursue."

85. She addressed the witness statements, recording:

"The witness statements should only refer to factual matters which are relevant to the issues which the Tribunal is to decide…I have directed the claimants….to review their witness statements and remove anything which is not relevant to the issues."

86. Employment Judge Benson made orders to the effect of the above and set deadlines of 5 September 2023 for the additional bundle and revised witness statements to be provided. The claimants, each of them individually, gave an assurance to Employment Judge Benson that the task of (i) reducing their witness statements and (ii) mapping the references in their witness statements to the Final Hearing Bundle (not their own 7000 page file) could be undertaken in that time as they were not working at the weekends.

In relation to witness statements

87. Employment Judge Benson had ordered on 9 December at para 5.1:

"The witness statements…must be in short numbered paragraphs...should set out in logical order the facts about which the witness wishes to tell the Tribunal…where reference is made to a document the page number from ***the hearing bundle*** *must be included."*

88. The deadline dates were not met and had to be put back because the claimants had not completed disclosure and would not agree the bundle. The claimants then, in August 2023, shared the 7000 page file and agreed to exchange witness statements on 25 August 2023. What was disclosed were lengthy statements that lacked structure (they did not for example run chronologically nor relate to the complaints as sub headings with factual allegations set out below) and lacked focus (they contained much content about impact on the individual and made many assertions and contained descriptive allegations, for example "unethical conduct" without clarifying which complaint that new descriptor related to. The statements were long: Ms Costello 89 pages, Ms Kilner 235 pages, Ms Barton 209 pages and Ms

Caldwell less voluminous at 15 pages but also lacking clarity, structure and focus.

Finding of unreasonable conduct such that there can be no fair hearing

89. For the reasons set out above there cannot be a fair hearing of any of the complaints brought by any of the claimants during the trial window. The failings went to the heart of what the case was about; it wasn't, and still isn't in the third week of what was to have been the trial window, clear what the claimants each complained of.

90. This was not the kind of case where Counsel is taken suddenly ill. In this case Counsel withdrew prior to the trial window citing the poor level of preparedness of the case.

91. The conduct in this case in seeking postponement because of its own unpreparedness was unreasonable and meant there could not be a fair trial within the trial window.

<u>The second ground Rule 37(1)(c) non compliance with Rules or an Order of the Tribunal</u>

92. There were breaches of Employment Judge Benson's Orders from 9 December 2022 as follows. The claimants did not comply with paragraph 3 of Employment Judge Benson's case management order regarding disclosure. It was required to send a list and copies of documents to the respondent by 28 March 2023. It did not send copies. It told the respondent it already had the documents as they had been sent to the claimant as part of the response to their Subject Access Request. The claimants did not comply with paragraph 5.1 of that Order. They missed the deadline for exchange of witness statements on the dates that had been set though a variation was agreed and, at the opening of the trial window on 11 September 2023 the witness statements still did not include page numbers for documents in the Final Hearing Bundle.

93. The Tribunal accepts Mr Morgan's submission that if it were to strike out for non compliance the Tribunal would need to clearly identify each instance of non compliance. Two instances are cited above but the Tribunal has not undertaken a comprehensive exercise on identifying non compliance, it was not necessary to do so because (i) it did not strike out for non compliance and (ii) it struck out for unreasonable conduct such that a fair hearing was no longer possible, so a determination under 37(1)(c) was not necessary.

94. The Tribunal declined to strike out for breaches of case management orders for the following reasons.

95. Some of those breaches were considered by employment judges in Spring 2023 when the respondent's letters were referred to them and two different judges each declined to make an Unless Order. At that point Employment Judge Benson's orders were varied.

96. It is not uncommon in litigation, particularly in the current climate in which parties wait a long time for their cases to get to final hearing, for there to be slippage on compliance dates. This is not ideal but it is the experience of this Tribunal that employment judges encourage the parties, in accordance with the overriding objective, showing flexibility, to agree to vary the dates themselves and keep the timetable overall on track, and where that cannot be done they try to assist the parties to get litigation back on track by making an order to vary dates or providing more specificity as to what is required so that the matter can still be ready for final hearing.

97. This Tribunal notes that what could not have been apparent to the employment judges declining to make Unless Orders in Spring 2023 was that non compliance with dates was just part of the problem. It was a part that was subsequently overcome. It later became clear to this Tribunal on 11 September 2023, and was emerging as an issue before Employment Judge Benson on 31 August 2023 that quite apart from the delays and non compliance (eventually there was a bundle or bundles, there were witness statements that had been exchanged and there was a List of Issues), the state of unreadiness was a *qualitative* issue that went to the heart of whether or not there could be a fair hearing in the trial window.

The Third Ground Rule 37(1)(e): it is no longer possible to have a fair hearing

98. The Tribunal accepts the respondent's submissions, citing Emuemokoro, that its position must be taken into account in determining whether or not it is possible to have a fair hearing.

99. At paragraph 19 HHJ Choudhury said:

> **"19. I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.**
>
> **20. Mr Kohanzad's reliance on Rule 37 (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 (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.**
>
> **21. In this case, the Tribunal was entitled, in my judgment, to accept the parties' joint position that a fair trial was not possible at any point in the five-day trial window. That was sufficient to trigger the power to strike-out. Whether or not the power is exercised will depend on the proportionality of taking that step. I bear in mind when considering whether or not to interfere with the Tribunal's decision here that the test for the Employment Appeal Tribunal ("EAT"), as confirmed in the case of Riley v Crown Prosecution Service [2013] IRLR 966, is a "Wednesbury" one; that is to say, in an appeal against striking out, a case will only succeed if there is an error of legal principle in the tribunal's approach or perversity in the outcome. In my judgment, there was no such error of principle here and neither was the Tribunal's conclusion perverse in respect of Ground 1. Mr Kohanzad's primary submission under Ground 1 therefore does not succeed. In those circumstances, Ground 1 fails."**

100. The Tribunal asked itself was it possible to have a fair hearing. The Tribunal deliberated in chambers on 13 September seeking to extract from the muddle of the claimant's documentation, clean lines of complaint, allegation, evidence in chief and relevant document, and could not do so.

101. The Tribunal also considered broader factors. The Tribunal was not concerned about the potential erosion of memory. Much of what might eventually be relied on was already committed to documentation by the claimants, albeit in a format that was not fit for purpose, and the respondent had witness statements from its 16 witnesses. The events complained of related back as far as 2018 so they were already as much as 5 years old in some instances as at the trial window. It seemed to the Tribunal that the significant degradation of memory would already have happened. The Tribunal at a final hearing would be skilled in considering the passage of time and its effect on memory and hearing oral evidence and looking at contemporaneous actions and documents and deciding for itself weight to be attached to evidence.

102. The Tribunal was not concerned about inconvenience in terms of having to rearrange the attendance of the four claimants and the sixteen respondent witnesses. Those arrangements could be made and where necessary ground rules established to consider reasonable adjustments for the respondent witness who had medical treatment to manage, or for Ms Caldwell who is dyslexic.

103. The Tribunal did not shy away from listing a hearing that might be document heavy, complicated, messy or difficult. It reminded itself that Tribunals are open to the difficult as well as the compliant. It is not unusual for a Tribunal to hear a case where documents are adduced during the hearing, or a bundle assembled on the hoof from documents that are brought along by the parties (provided neither side is prejudiced by this approach), or for relevant documents to be extracted as the case progresses and they are referred to in evidence.

104. The Tribunal did not shy away from listing a hearing in which the witness statements contained lots of not-so-relevant content about how things made people feel, or which contained opinions and assertions. Again, the Tribunal is skilled at extracting from documents and people the relevant evidence that is needed to decide a case. The Tribunal is also experienced in taking a Grounds of Complaint document with other witness statement or letters or emails together as a witness' evidence in chief.

105. The Tribunal is regularly faced with a draft List of Issues which needs some refinement and parties' representatives are often invited to spend the morning of a first day refining that List whilst the Tribunal begins its reading. The Tribunal often produces a draft List itself for litigants in person and seeks agreement as to the content of that list in clear words that are not too legalistic so that everyone knows what the case is about. That could not be done in this case because it was not clear who was claimant what and because to get that clarity required a case to be constructed; information obtained, advice given, this was not something an impartial Tribunal can do.

106. The claimants did not want to be litigants in person and when asked if they had medical evidence to say that they could not be they went away and returned on 25 September with the exhibits referred to above.

107. The hallmark of this case was that it was *qualitatively* not ready for hearing. The claimants accepted this, applied for postponement, their Counsel had walked away because she had felt it was not ready and could not be ready in the trial window. Mr Boyd who appeared on the postponement application submitted that it could not be ready within the trial window. He tried, and abandoned the task, to compile a list of complaints brought by each claimant. Mr Morgan accepted it was not ready on 11 September and that no further progress had been made towards making it ready between 12 and 25 September 2023.

108. After having rolled up its sleeves to find out if that were true for itself, assuming the claimants could have found representation or proceeded as litigants in person, that submission is accepted. The case was not ready.

109. The Tribunal concluded that there could not be a fair hearing.

Exercise of discretion

110. The grounds for strike out having been met under 37(1) (b) and (e) the Tribunal considered exercising its discretion to strike out.

111. The Tribunal had regard to Blockbuster v James and to Abegaze in which the Court of Appeal said that the strike out power on grounds of unreasonable conduct of litigation is draconian. The Court of Appeal gave direction that a structured examination is required.

112. The Tribunal had regard to Cox v Adecco and had set about seeking to identify the complaints before considering striking them out. It had prepared a

Schedule on 12 September 2023 and shared it with the parties. Mr Boyd at the postponement stage went to take instruction on it and abandoned that task. He described that process as difficult and spoke of the depth of unreadiness of this case.

113. The Schedule the Tribunal prepared was as follows: neither Mr Boyd on 12 September 2023 nor Mr Morgan nor the claimants themselves on 26 September could confirm that it was complete and accurate.

114. The first claimant's complaints appear to be;

(1) ordinary constructive unfair dismissal

(2) automatically unfair (protected disclosure) dismissal

(3) protected disclosure detriment

(4) direct sex discrimination

(5) harassment sex discrimination

(6) victimisation sex discrimination

(7) disability discrimination (arising from disability)

(8) disability discrimination failure to reasonably adjust

(9) disability discrimination harassment

and the second claimant's complaints appear to be:

(1) ordinary constructive unfair dismissal

(2) automatically unfair (protected disclosure) dismissal,

(3) protected disclosure detriment

(4) direct sex discrimination,

(5) harassment sex discrimination

(6) victimisation sex discrimination

and the third claimant's complaints appear to be:

(1) ordinary constructive unfair dismissal

(2) automatically unfair (protected disclosure) dismissal

(3) protected disclosure detriment

(4) direct sex discrimination

(5) harassment sex discrimination

(6) victimisation sex discrimination

and the fourth claimant's complaints appear to be:

(1) ordinary unfair dismissal

(2) automatically unfair (protected disclosure) dismissal

(3) public interest disclosure detriment

(4) victimisation sex discrimination

(5) disability discrimination failure to reasonably adjust

115. The Tribunal had Regard to Rule 2. Applying Emuemokoro the Tribunal considered the proportionality and had regard to the impact of relisting the case on the respondent. It had regard to the factors set out in paragraph 19 of that case

"the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court"

116. Relisting the case would mean that the respondent would be required to rerun the litigation. This would cause undue expenditure of time and money to the respondents. It would lead to potential and actual prejudice to the respondents as their witnesses may be required, once the case had been clarified by new representatives for the claimants, to revisit witness evidence. The process of preparing for this hearing may have itself shaped memory so that if a case was put differently on re-run the respondent's access to evidence on a differently constructed case may be limited.

117. The Tribunal also considered the demands of other litigants and the finite resources of the court. Rule 2 requires consideration be given to the proportionate use of judicial time and resource. This panel was in place and ready to hear a 15 day case. The parties had been aware of the listing date for two years. The respondent had been signalling to the claimants and the Tribunal its concerns about readiness for final hearing. The next available listing date would be in 2025. There are other parties bringing and defending complaints since these complaints were commenced that are awaiting hearing dates. It would be a disproportionate allocation of resource to give the claimants in this case a second chance, putting other people's hearings back, when the claimants had consented to this listing and had every opportunity in which to be ready and when so many people were waiting for their cases to be heard.

118. The Tribunal considered the impact of strike out on the claimants; they would lose their rights to have their complaints heard. The Tribunal considered that this was likely to have a devastating effect on them; they had each described the deterioration in their mental health since hearing that their barrister had withdrawn and being advised of the necessity of a postponement and risk of strike out. The Tribunal also considered that striking out extinguishes rights to complain about matters that it takes most seriously; dismissal, discrimination and disclosures.

119. The claimants submitted that postponement necessarily means the case can be ready later, that all postponements ought by corollary to be strike outs. The Tribunal rejects that submission. The postponement granted on 12 September 2023 was a short adjournment to allow the claimants time, as they had requested, to seek representation. The claimants further submitted that the claims could be relisted and a remedy for the respondent would lie in costs. That submission is rejected. In Emuemokoro at paragraph 19

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.

120. The postponement on 12 September was to a date within the original trial window and was done to allow the claimants time to seek alternate representation, to consider becoming litigants in person, to try to mitigate the unreadiness into something that could still be heard and to allow the Tribunal time to read into the case before considering strike out. On 12 September the Tribunal suggested, before it had taken a day in Chambers to consider the position in depth, that the following might be achieved:

- A reduced List of Issues might be produced clearly identifying which complaint is brought by which claimant.
- Revision of witness statements might be undertaken to remove much content on impact and focus on factual allegation underpinning each complaint.
- Re referencing of the documents in the witness statements to the page numbers in the Final Hearing Bundle as ordered by Employment Judge Benson on 31 August. The claimants had referenced their witness statements with page numbers from their 7000 page disclosed file and not the Hearing Bundle. The Tribunal was told by Mr Boyd on 11 September 2023 that the process of re- referencing ordered by Employment Judge Benson was underway and two thirds complete.
- The claimant's file of 7000 pages mapped against the Final Hearing Bundle, duplicates removed and the remaining docs shared as a

supplementary bundle and any previously undisclosed docs sent to the respondent not less than 7 days before 25 September 2023.

121. None of those things had been done by 25 September and it was clear to the Tribunal after its day in Chambers on 13 September 2023 that supporting the claimants as litigants in person to do that, in accordance with the Equal Treatment Bench Book (had they wished to be litigants in person) would be insufficient. Someone would have to construct the claimant's case and that is not something the Tribunal could do. The case was in such a poor state of preparedness that not only time would be needed. The claimants would need to give information, take advice, a case would need to be constructed and this would mean, in effect, appointment of new representatives and a rerun of the litigation. The Tribunal had regard to the impact of that on the respondents and rejects the submission that a remedy lies in costs. It is a question of proportionality. Rerunning the litigation because the claimants were not ready for final hearing is not an appropriate or proportionate response.

122. The balance of prejudice in having to rerun the litigation lay with the respondent and outweighed the loss of the right to pursue the complaints to the claimants.

123. In Abegaze the application to strike out was made under the previous version on Rule 37(i)(e), that there could be no fair hearing. The Court of Appeal found that the Tribunal had erred when striking out because it took into account *improper considerations*. They were; (ii) the composition of a remedy hearing being different from that of a liability hearing and (ii) the extent of remedy that might be awarded and in particular concern about how complicated it might be to consider causation. The Court of Appeal considered that it was a severe step to deprive a claimant who had succeed on liability, a remedy hearing. A more proportionate response would have been an Unless Order. Mr Morgan advocated for Unless Orders in this case.

124. The Tribunal considered whether there might be a less drastic approach than strike out. In Emuemokoro:

> **"27. In the present case, I see no error in the Tribunal's approach to proportionality. It correctly directed itself that strike-out is a severe sanction to be used with restraint (see para. 10 of the Judgment). It then concluded that it was necessary in the interests of justice to strike out in this case, but at para. 11 of the Judgment it specifically found that an adjournment would have entailed "unacceptable prejudice to the Claimants". This was because of the delay since losing their jobs almost two years prior to the hearing and the fact that the Claimants' considerable losses continued to grow substantially from week-to-week. Striking out was, therefore, considered to be the least drastic course to take in this case, given that the alternative, suggested by Mr Kohanzad, would necessarily entail unacceptable prejudice.**
>
> **28. It was a highly relevant factor, as confirmed by the Court of Appeal in Blockbuster, that the strike-out application was being considered on the first day of the hearing. The Parties were agreed that a fair trial was not**

> **possible in that hearing window. In other words, there were no options, such as giving the Respondent more time within the trial window to produce its witness statements or prepare a bundle of documents, other than an adjournment. If adjournment would result in unacceptable prejudice (a conclusion that is not challenged by the Respondent), then that leaves only the strike-out. The Tribunal did not err in considering the prejudice to the Respondent; indeed, it was bound to take that into account in reaching its decision."**

125. This case was a postponement application on the first day of a final hearing. The claimants had been professionally represented throughout and had consented to the hearing date. The lesser option taken on 12 September was to give more time to see if readiness could be achieved in the trial window and it could not. An adjournment beyond the trial window would result in unacceptable prejudice to the respondent in this case in having to rerun the litigation.

126. Emuemokoro involved striking out the response. In this case the Tribunal was concerned that in striking out the claims it was extinguishing individual rights to pursue those claims. It could not find a lesser sanction that did not result in unacceptable prejudice to the respondent. None, other than relisting to a later date with Unless Orders in place and a costs hearing, was put forward by the claimants.

127. In considering lesser sanction and the impact of strike out on the claimants Mr Morgan made an emotional appeal that the complaints should not be struck out as, in effect that would be to hold the claimants accountable for the failings of Napthens. In Harris citing Bennett it was argued that what is done in a party's name is done presumptively but not irrebuttably on that party's behalf. In Harris the fault was that of a solicitor who had plainly lost control of the action. The judge in Harris was right, said the EAT, to think that it would be a prejudice to the party to have a finding made against them without the right to respond. He was entitled to separate the respondents from their lawyers and this did not mean the exercise of his discretion was flawed. The case did not go so far as to say that to fail to separate the actions would be a flawed exercise of discretion. Each case turns on its own facts.

128. The claimants in this case were each asked about the postponement individually on 11 and 12 September 2023 and given the right to respond. They said the case was not ready and could not be ready in the trial window. They did not want to be treated separately from their lawyers, they did not want to represent themselves. They were given time to find alternate representation but could not do so.

129. The Tribunal finds that the claimants and Napthens taken together, what was done by Napthens was done on the claimant's behalf, were unreasonable in the conduct of the litigation such that there could be no fair hearing, for the purposes of this strike out application. Unreasonableness and costs is a separate matter. The Harmony case in which a representative went off on a frolic of his own, assaulting a party in a waiting room, turned so significantly on its own facts that it has not been applied here. On the exercise of discretion, even if the

claimants had not been fixed with the actions of their representatives, the impact on the claimants themselves does not outweigh the prejudice to the respondent.

130. The Tribunal considered whether it might be able to impose lesser sanctions than strike out and still achieve the overriding objective to be fair and just to both parties. The Tribunal considered striking out some but not all of the complaints. It considered that the complaints had been consolidated but that it may be possible to deal separately with each claimant or each complaint so as to avoid strike out. This was not a submission made by the claimants but one that the Tribunal raised with the parties on 12 September when Mr Boyd began his exercise of seeking to clarify who brought what complaint, and raised again prior to closing submissions on the strike out, and considered of its own volition.

131. The Tribunal had prepared a schedule of complaints, as set out above, and shared it with the parties on 12 September 2023. The claimants could not confirm its accuracy. The Tribunal considered whether or not it could hear any of the complaints in isolation but it was not possible to match factual allegations to complaints. Even if it had been possible to do that, and the Tribunal came closest in relation to Ms Caldwell's constructive unfair dismissal complaint (though even there it was not clear what was the fundamental breach or breaches relied on and whether Ms Caldwell was relying on things that happened just to her or things that happened to each of the other claimants as fundamental breaches) the prejudice to the respondent in having to rerun the litigation, even for Ms Caldwell's constructive unfair dismissal complaint or any one other single complaint, was substantially the same (in having to seek clarity as to what was complained of, ascertain whether anything in the 7000 page file was relevant, produce a new or amended bundle, revisit its evidence both documentary and witness statement evidence in chief and reconsider its position) and outweighed the loss of the right to have any one of the single complaints for any one single claimant heard.

132. The members wished these Reasons to record that Mrs Winter is a non legal Tribunal member of 24 years standing and Mr Gill a member of 15 years standing and neither of them have ever before struck out a case at final hearing on the basis that there can be no fair hearing. To extinguish discrimination, unfair dismissal and protected disclosure complaints is a draconian step but it is one that this Tribunal, having read into the case and assessed the level of unpreparedness of this case for itself, took unanimously. In the interests of justice the complaints were struck out.

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Employment Judge Aspinall

Date: 25 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1 November 2023

FOR EMPLOYMENT TRIBUNALS