Case No: 2205022/19

EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Shankar**
Respondents: **(1) Genpact Ltd**
(2) Mr Garth Jackson-Smith
(3) Mr Ashish Wadhwa
(4) Mr Manoj Baalebail
(5) Mr Daniel Goldup

London Central (in person) at Victory House
Employment Judge Goodman **15 January 2024**

Representation
Claimant: Charles Price, counsel
Respondents: Nabila Mallick, counsel

PRELIMINARY HEARING IN PUBLIC

JUDGMENT

1. The claims are dismissed under rule 37.
2. The claimant is ordered to pay a contribution to the respondents' costs in the sum of £20,000.

REASONS

1. This hearing was listed, following the postponement of final hearing in November 2023, to hear an application by the respondent under rule 37 to strike out the claims, either because it was no longer possible to have a fair trial, or because the claimant's conduct had been vexatious or otherwise unreasonable.

Conduct of the Hearing

2. The claimant arrived 30 minutes late. We had waited for his arrival. The clerk was then asked to bring the parties in but unfortunately the claimant then asked the clerk to print out around 400 pages of the material he had already emailed, and the inexperienced clerk complied without reporting back, not knowing that printing for the parties must not be done without a judge's direction. In consequence the hearing did not start until 11.15.

3. The hearing was in person and in public. It was not recorded. This was because although it had been listed in a hearing room for which recording equipment was available and switched on, the clerk reported, as the hearing started, that the recording facility was not working.

Hearing Bundles, Skeleton Arguments

4. The respondent had filed a 762 page bundle for the hearing, with a 29 page 'skeleton' argument.

5. The claimant emailed two tranches of a 367 page supplementary bundle on the Friday before the Monday hearing, and a third tranche on Sunday. There was a 14 page skeleton argument prepared by counsel.

6. The claimant also filed a 22 page witness statement. Much of this consisted of submission and argument in response to the respondent's skeleton. There was an explanation of the medical evidence he had submitted in November 2023. He was not sworn but did answer questions to explain some of the November 2023 documents. He also intervened at times during both sides' oral submissions to answer some of the respondent's points about matters of fact.

History of These Proceedings

7. What follows is largely based on the tribunal's own case management records and orders. I have numbered the preliminary hearings. I have used bold type for the final hearing dates.

8. The claimant was employed by the first respondent from the 22nd January 2018 until dismissed on 17th June 2019. The first respondent said he had been dismissed for poor performance.

<u>Presentation of Claim and initial case mangement</u>

9. He presented a claim to the employment tribunal on the 2nd of November 2019. On 22nd of November 2019 he filed an alternative grounds of claim document which in parts was confused and contradictory. Employment Judge Glennie directed that he file amended grounds of claim.

10. There was to have been a case management hearing on the 27th March 2020 but because of pandemic it was postponed to the 28th July 2020. A revised draft grounds of claim was filed by solicitors on 17th July 2020.

11. At the case management hearing (1) on 28th July 2020, Employment Judge Glennie recorded that there had now been four versions of the grounds of claim and no response. The claimant was ordered to file an amended grounds of claim by 4th of November 2020 and respondent to respond by 2nd December 2020.

12. At the same time the case was listed for a final hearing of seven days, starting **28th April 2021** and a directions timetable was set.

13. Thus it was took a year to get the pleadings in order; of that four months could be attributed to the pandemic.

14. The claimant applied unsuccessfully for reconsideration, and then appealed the case management orders and a refusal to allow him to add an indirect discrimination claim.

Judge Norris's Case Management

15. On 2nd March 2021 there was a case management hearing (2) before Employment Judge Norris. The claimant attended at 10:00 am. When Judge Norris was not able to complete the hearing before an 11:00am hearing in another case, she adjourned the hearing until 3pm that afternoon. The claimant did not attend the afternoon hearing saying that he had become unwell. Judge Norris decided that the final hearing, due to start in April 2021, should be vacated because the case was not ready for hearing. The claimant had not replied to a December 2020 request for further information. She recorded that his appeal against Judge Glennie's order had been rejected by the EAT on sift but he was awaiting a rule3(10) hearing. She noted that the case management timetable had stalled, in part because of the pending appeal, in part because the Tribunal had not formally accepted the ET3 response the respondents had filed.

16. At a further case management hearing (3) on the 9th March 2021, Employment Judge Norris relisted the final hearing for the **24th November 2021,** gave directions for a judicial mediation appointment at the parties' request, ordered disclosure by the claimant of medical records relevant to disability and a statement on the impact on his ability to carry out normal day to day activities, and listed a further preliminary hearing on 7 May to consider the timetable working towards the final hearing in November 2021.

17. Judge Norris ordered the claimant to file medical evidence for his absence from the hearing on the afternoon of 2nd of March. The claimant says he did file a fit note on the 8th March 2021. I have specifically asked HMCTS staff to search the inbox for this e-mail and I am informed that they cannot find it.

18. The claimant applied for reconsideration of Judge Norris's case management orders. On 4th May 2021 she refused the application. The claimant then presented what appear to have been three notices of appeal to the Employment Appeal Tribunal, contesting the case management orders, the wording of the order, and her directions for a judicial mediation. On 12th November 2021 all three appeals were rejected on the sift by Mr Justice Chowdhury as proper exercises of case management discretion. The appeals were without merit.

Case Management by Judge Hodgson

19. Meanwhile, on 7th May 2021 (4) there was the first of two case management hearings before Employment Judge Hodgson when he made a committed effort to find out what the issues were so as to prepare a list of issues for the hearing. He held a second hearing (5) on 20th July 2021 to complete the list of issues. At both hearings the claimant was represented by counsel. The final hearing was re listed for **14th - 25th of March 2022**. The parties were ordered to exchange witness statements on 14th February 2022.

July 2021 List of Issues and Later Changes

20. By now the issues had been identified as claims for disability under section 15, and section 20, and section 26, that is, unfavourable treatment because of something arising from disability, failure to make reasonable adjustments for disability, and harassment related to disability. There was also a claim for race discrimination which was about the claimant being a British citizen accorded last favourable treatment than Indian citizens. There was a claim for victimisation: Judge Hodgson listed 6 protected acts, all of them oral. The earliest was August 2018, the latest February 2019. Finally, there was a claim for dismissal because of making protected disclosures. There are 10 disclosures. All of them are verbal, the earliest are in August 2018, the last in February 2019. The words used are not on the list of issues. Five concerned visas for Indian staff, five concerned under resourcing of a client project.

21. Disability was not admitted until after the claimant had disclosed medical documents and a statement about the impact of disability, which he did in early June 2022. Whether the respondents knew or ought to have known he was disabled at relevant times remains in dispute.

22. There had also been claims for wrongful dismissal and holiday pay. In April 2023 the respondent agreed that the claimant had been entitled to notice pay on termination. They then paid the notice and holiday pay, and these claims were deleted from the list of issues.

Further Postponement of Final Hearing and Further Case Management

23. In October 2021 the claimant applied to amend his claim. By the end of December 2021 there had been no compliance with case Management orders. On 21 February Employment Judge Elliott postponed the March 2022 final hearing by consent, on the basis that it would not be ready in time.

24. Next there was a case management hearing (6) before Employment Judge Nicklin on 14th March 2022, which was to have been the first day of

the final hearing. The final hearing was relisted for **19th -31st of October 2022**, and the case management timetable adjusted, with longer lead times to allow for the fact that the claimant was now in India as his father was ill.

25. On 8th April 2022 the claimant applied to extend the case management timetable set on 14th March. Some extension was allowed, on the 5th of May 2022, but less than the claimant had asked, noting that for example disclosure of the claimants documents on disability, had been outstanding for over six months, and although the respondents had given general disclosure of documents on 27 January 2022, the claimant had not yet disclosed anything.

26. On 10th June 2022 there was a case management hearing (7) before Employment Judge J. Burns. He refused to extend the claimant's time for disclosing documents further and made an unless order for their service by 24th June 2022. He then made another unless order, for service of the claimant's witness statement by 4th September 2022. He ended the case summary saying that he had:

> "*specifically warned him (the claimant) that if he does not take this last opportunity to comply with directions and take the basic steps incumbent on him to allow the case to be got ready for trial, his claims are very likely to be struck out. I hope that he hears my warning*."

27. On 23rd of June 2022 Judge Burns refused to reconsider his order.

28. The claimant had applied orally at the 14 March hearing to amend by adding depression, hypertension, stress and anxiety to the existing pleaded disabilities of sleep apnoea, a dysfunction of the forearm, and knee pain. He was asked to apply in writing. He did. Judge Burns refused the application to amend at the June 2022 hearing.

29. On 6th of September 2022 Deputy High Court Judge John Bowers KC heard the claimants appeal from the order of Judge Glennie refusing to add the indirect discrimination claim. In a decision sealed 31st December 2022 he held that there had been no error of law and rejected the appeal.

30. On 26th September 2022, Regional Employment Judge Wade refused an application to strike out. She clarified that his claim was not struck out under the unless order to serve a witness statement, because he had served a witness statement of 33 pages, although the claimant said it was not complete. It was ordered that rather than strike out the claim, the witness statement that he had served was to stand as the witness statement for the final hearing and he was not to add to it. It was said that this was "generous to the claimant". The decision had been made because it was better to proceed to a final hearing and avoid satellite litigation on whether he had complied with the order.

<u>Postponement of the October 2022 Final Hearing</u>

31. On 10th October 2022 Employment Judge Stout agreed the respondent's application to postpone by 5 days the final hearing due to start on 19th October, so it would now start on 24th October; this was connected with Diwali celebrations in India where several of their witnesses reside. She discounted the claimant's reference to an outstanding appeal before the Court of Appeal against a case management order as a reason for further postponement.

32. On 19th October the claimant then applied to postpone the final hearing on grounds of ill health. He had recently been to the GP about involuntary movement of the arms and legs and been referred for neurological investigation. He also had a number of appointments pending for physiotherapy, for podiatry, to see a colorectal surgeon, and at the sleep clinic. He also complained that the content of the hearing bundle was not agreed, that Judge Stout's decision had been biassed in favour of respondents, and that he needed a legal representative for the hearing and was still looking for one. The respondent objected. Employment Judge Glennie concluded that it was unlikely that an effective trial would be possible in the light of the claimant's "various health problems". He vacated the final hearing to start on 24th October, and listed a preliminary hearing for case management for 24th October to consider whether the claims should be stayed or relisted, whether the claimant should supply further medical evidence about his ability to participate in a trial, and when he was likely to be able to do so.

33. Unfortunately when it came to 24th October 2022 there were not enough judges and Regional Employment Judge Freer had to take the case out of the list. It was now relisted as a preliminary hearing in public to hear the respondent's application to strike out the claim or impose a stay.

34. This preliminary hearing was held on 10th January 2023 (9) before Employment Judge Sutton KC. The respondent's application was to strike out the claim on the grounds that a fair hearing was no longer possible. Judge Sutton did not strike out the claim. He relisted the final hearing for **20-30 November 2023**. He recorded that counsel for the claimant had said that the case was ready for trial, other than updating list of issues. He ordered the claimant to confirm by 25th September 2023 that he was medically fit for a final hearing in November 2023, and he listed a case management hearing for the 2nd October 2023 to consider whether the hearing could proceed, and if not, whether it should be struck out under rule 37, or further postponed, or stayed.

35. On 3rd May 2023 Judge James Tayler in the EAT heard the claimant's application for leave to appeal in a rule 3(10) hearing. The grounds of appeal included that Employment Judge Burns should not have made unless orders, that the respondent had faked an e-mail, that he should not have been refused permission to amend by adding new impairments on the 3rd May 2021, and that he should be allowed to enlarge his witness

statement served incomplete against an unless order, and that Judge Hodgson had refused to allow him to amend the disability. The appeal was rejected on the basis that there was no arguable error of law. On the making of unless orders he commented that:

"*in the context of the long and unhappy management of this case, the time had come at which progress had to be made*".

He understood that the claimant "*feels extremely embattled by this litigation and... somewhat focused on his attempt to challenge case management orders*". He enjoined cooperation.

36. The claimant had now appealed to the Court of Appeal against the decision of Deputy High Court Judge Bowers. In a decision sealed 7th August 2023 Lord Justice Bean refused permission to appeal, on the basis that there was no error in legal reasoning in refusing the amendment to add a claim of indirect discrimination. He also commented:

"more than four years have passed since this employment tribunal claim was issued... if his amendment was granted, the tribunal would have to vacate the final hearing... It was unacceptable that an employment tribunal case should be delayed for four years, let alone longer".

37. On 2nd October 2023 (10) Employment Judge Akhtar conducted the case management hearing listed in January by Judge Sutton. The claimant first applied to postpone the hearing on the basis that he had been medically advised to take complete rest until 3rd October 2023. The application was refused. The claimant went on to assure Judge Akhtar that although he was currently still in India, and had let his London flat, he would make his way back to the UK well in advance of the hearing. He considered there was no impediment to his health and that he was fit for the hearing. He also said he had instructed counsel (Julian Gun-Cunningham) to represent him at the final hearing. Judge Akhtar concluded that there was no medical evidence that the claimant was not fit for a final hearing, so it was to be left in the list. She added:

"*If the worst case scenario transpires and the claimant is unable to attend the final hearing at any point due to his ill health, it is open to respondents to apply for any necessary orders that stage".*

38. Once it was clear in the 2 October hearing that the final hearing was going ahead, the claimant raised concerns there about the matter not being ready, saying documents were missing from the bundle, his witness statement was incomplete, and the chronology and cast list were not agreed. Counsel for the respondent pointed out that the claim had not been struck out because the claimant had supplied a witness statement which Regional Employment Judge Wade had said must be his final statement. Judge Akhtar decided that in view of the case management history, any unresolved preliminary matters should be raised at the start of the final

hearing in November.

39. On 31st October 2023 Lord Justice Bean refused the claimant permission to appeal to the Court of Appeal against the order of Judge Tayler in the EAT. He had been provided not only with the judgement, but a transcript of the EAT hearing as well. He rejected complaints about the conduct of the hearing, and urged the claimant to "*to cooperate to reach the final hearing currently listed*". He added:

    "*any attempt to abort that hearing, for example on health grounds, should be scrutinithat sed very carefully indeed*."

40. On 8 November 2023 the claimant applied to postpone the final hearing due to start on 20 November 2023. The claimant had prepared a lengthy application about documents not being included by the respondent in the final hearing bundle, which prevented him obtaining further witness statements. The application was referred to me. I refused the application on the basis that Judge Akhtar had already directed that outstanding case management matters should be dealt with on the first day of hearing, that the claimant knew that as he was present throughout the hearing on the 2nd October (Judge Akhtar's orders and case summary had not yet been prepared), and he should prepare his own bundle of materials which he considered relevant, and submit it as an additional bundle.

41. The decision not to postpone the final hearing starting 20 November 2023 was sent to the parties on 15 November.

42. On 16th November the claimant made a further application to postpone the final hearing. This application was made on grounds of ill health. He supplied medical notes indicating that he was being tested for dengue fever. He has explained that on the evening of 15 November he went to a government hospital in Patna in the state of Bihar as he believed he had symptoms of dengue fever. No test was available that evening, so he went to a private hospital for testing next day. The notes say dengue was suspected and that he should rest, but did not appear to confirm a diagnosis. Later that day I decided to vacate the final hearing on grounds that the notes said that the claimant must be reassessed in 10 days' time, pending which he must rest, and that the claimant had said he was cancelling the flight he had booked for the 18th November. I did not then relist a final hearing, but instead listed an open preliminary hearing for the 4th January 2024 to consider whether the claim should be struck out under rule 37 because it was no longer possible to have a fair hearing. The parties should however check their witness availability for June to November 2024, the window when there might be an opportunity to list an 11 day hearing. I noted that by then it would be five years since the dismissal complained of, that there was an unfortunate history of postponements, that Judge Sutton had referred to reconsidering his strike out decision should the claimant not be fit for the final hearing he had listed, that the claimant had already applied to postpone on grounds

unrelated to health, and that the first of the sick notes was dated the 15th November, when he had learned that postponement was refused. The tribunal would therefore consider again whether it was now possible to have a fair hearing.

43. That decision was reconsidered the following day, having regard to points made by the respondents. It was not altered. In written reasons I said that I had taken into consideration that there were "*real grounds for scepticism at the fortuitous timing of the application on grounds of ill health, the initial lack of any medical evidence, the history of previous adjournments and the discussion at hearings, and that the claimant had my cancelling his flight precluded attendance in person*"; I had also taken into account that if he was ill, he might not be fit enough to give instructions.

44. In reply to the respondents' objection that it appeared that as of the 16 November he had not cancelled his flight, and also that he had not instructed counsel, as he had told Judge Akhtar, the claimant was ordered to provide evidence of when he had booked and cancelled his flight, any further medical evidence about his current illness, his fitness for hearing, whether he was still in India or had travelled to London, and (as there may be an application for the costs of postponement) evidence of ability to pay any award of costs that might be made. The Virgin Atlantic documents show he had left booking a flight to London on 18 November until 06.06 GMT on 15 November (so probably on the evening of 14 November in Bihar), and then cancelled it at noon GMT on 16 November, when he applied to postpone on health grounds.

45. The hearing on the 4th January was postponed to the 15th January because counsel for the respondent was not available. The claimant had asked for it to be heard as soon as possible after the 10th January. The claimant then asked for 15th January to be postponed to the following month because he had not been able to find counsel to represent him at the hearing, though he did have someone available for the 10th of January. That too was refused after reviewing the evidence he then submitted about the availability of counsel.

Relevant Law

46. Rule 37(1) provides:

"at any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of a claim or response on any of the following grounds: -

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent as the case may be has been scandalous, unreasonable or vexatious;

…

(e) that the tribunal considers that it is no longer possible to have a fair

hearing in respect of the claim or response ...

47. This is a discretionary power. The tribunal must take it in stages, first considering whether one or more of the five grounds in Rule 37 is made out, then exercising discretion to decide whether to order strike out on that ground- **Hassan v Tesco Stores Limited UKEAT/80/0098/16.**

48. Tribunal decisions must be made pursuant to the overriding objective set out in Rule 2, to deal with cases justly and fairly. This includes making decisions that are proportionate to the issues. In the courts "the power (to strike out) should in principle only be exercised where it is just and proportionate to do so, which is likely to be only in very exceptional circumstances" - **Summers v Faircloth Homes (2012) 1WLR 2004.**

49. In **Blockbuster Entertainment Limited v James 2006 IRLR 630**, the Court of Appeal overturned the striking out of a claim for failure to comply with case management orders when on the first day of the final hearing the claimant had arrived with a substantial number of extra documents which had not been copied for the tribunal or sent to the respondent, along with amended witness statements. The power to strike out was: "*draconic*", "*not to be too readily exercised*".

"*The two cardinal conditions for its good exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that has made a fair trial impossible. If these two conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response. A tribunal must consider whether is a less drastic means to the end……the time to deal with persistent or deliberate failures to comply with rules and orders designed to secure a fair and orderly hearing is when they have reached the point of no return. Proportionality is not simply a corollary or function of the existence of other conditions for striking out. It is an important check, in the overall interest of justice, upon their consequences*".

The tribunal had acted under a misapprehension that the claimant had not filed further particulars as ordered and the matter was remitted to a different tribunal to consider whether the claim should be struck. The court added this on remission it should be borne in mind that:

"*the first object of any system of justice is to get to triable cases tried. The courts and tribunals are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably*".

50. In **Peixoto v British Telecommunications plc 2008 UKEAT/0222** the tribunal was considering whether a fair trial of the claim was still possible. The assessment of whether a fair trial was impossible meant consideration of what other measures could be considered. This is the application in a different context of the **Blockbuster** approach to the rule dealing with unreasonable conduct. The tribunal must examine alternative proportionate

measures to see whether the claim could still be tried in a reasonable period of time. The tribunal had concluded that none of the alternatives would work. In that case the question involved weighing up whether a claim arising in 2003 could be heard within a reasonable time from 2007, when the strike out decision was being made.

51. In **Arrow Nominees and another v Blackledge and others 2000 2BCLC167,** a great deal of time had been taken up at trial with an individual having forged documents, and the claim was struck out because it could not then conclude in the window available. It had been held that the individual "was persisting in his object of frustrating a fair trial", such that the judge had to consider whether it was fair to the other parties and to the administration of trust generally to allow the trial to continue. Such a decision was not about the court's desire to punish the party concerned but was "*a proper and necessary response where a party has shown that his object is not to have a fair trial which is it is the court's function to conduct, but to have a trial the fairness of which he has attempted (and continues to attempt) to compromise*". A judge should consider *"whether it is fair to the respondents, and in the interests of the administration of justice generally, to allow the trial to continue".*

52. **Abergaze v Shrewsbury College of Arts and Technology (2010 IRLR 238)** an employment tribunal struck out a claim where following a liability judgement in favour of the claimant he had not applied for a remedy hearing in six years. He did not want the respondent's medical expert to examine him. The tribunal struck out the case on the basis that it had not been actively pursued. Summarising the law, the Court of Appeal held that where strike out was contemplated because of unreasonable (etc) conduct, a tribunal must take it in stages: first establish whether the conduct was unreasonable (etc), then whether as a result of that conduct there could not be a fair trial, then whether striking out was a proportionate sanction, and whether a lesser sanction was appropriate and consistent with fair trial. When strike out was contemplated for failing actively to pursue the case, there would be different considerations. The tribunal should consider whether there was either intentional default, or inordinate and inexcusable delay, such that there was a substantial risk that it would not be possible to have a fair trial of the issues, or there would be substantial prejudice to the respondents.

53. In **Emuemukoro v Croma Vigilant (Scotland) Ltd (2022) ICR 327**, a response been struck out because respondents failed to comply with any case management orders. They were permitted to participate in the remedy hearing. Reviewing the authorities, it was confirmed that either unreasonable conduct or the case not being actively pursued could lead to strike out. It was held that the correct test is whether a fair trial was possible within an allocated trial window, not whether a fair trial was possible at all, and the question was whether strikeout was proportionate to the default. When considering whether a fair trial was possible the tribunal was also to take into account expenditure of time and money, the demands

of other litigants, and the finite resources of the court. Whether witnesses could remember what had happened was a relevant factor, but not the only issue.

Submissions

54. Respondent. The respondent submits that the claim should be struck out. They say the employment tribunal, the Employment Appeal Tribunal and Court of Appeal have been very patient, allowing him ample tribunal resources with the 12 case management hearings, 15 ET orders, several reconsideration applications, EAT hearing times and consideration by the Court of Appeal. They say the claimant's conduct demonstrates a commitment to not bringing this matter to a hearing. He still insists he should be allowed to expand his 33 page witness statement, asserts that the respondent has forged an e-mail, and continues to insist on further case management about the hearing bundle. He pulled out of a listed judicial mediation in April 2021 because he considered the respondent should give full disclosure first, but now wants a further judicial mediation. He was employed for 18 months and it is now four and a half years since he was dismissed. They say his conduct of litigation has been disruptive, by failing to comply with or continuing to dispute case management orders. Their costs have reached £350,000. They say much costs have been run up by the claimant's conduct of the interlocutory proceedings.

55. They doubt the authenticity of the evidence produced by the claimant to support his most recent application to postpone the final hearing. They point to the concern of Judge Sutton, and the remarks made by the Court of Appeal about medical reasons for postponement, to the claimant assuring judge Akhtar in October that he was fit for a hearing in November, when the alternative was the possibility of striking out the claim altogether, and then two further postponement applications, first (despite Judge Akhtar's order) on case management issues said to be outstanding and then, immediately that was refused, on health grounds. With this hearing, he first said he could attend on 10th January, and when postponed to 15th January, applied to postpone that to the next month. They say there is every reason to believe that he will apply to postpone any further final hearing that is listed for later this year. The respondent: "firmly believes that the claimant will continue to manipulate the tribunal in an attempt to have the matter listed, so as to keep the respondent in battle with him". They also suggest that the claimant has had legal advice about the merits of his claims and so seeks to put off a final adjudication.

56. Next it is argued that it is no longer possible to have a fair hearing because of the effect of delays on three witnesses (including two named respondents). The respondents are concerned that the claimant relies heavily on evidence of conversations in 2018 and early 2019, now nearly six years ago. They have addressed this in their witness statements served in September 2022, but the longer time runs on the less they will be able to answer cross examination on their recall. This applies to the treatment in the various discrimination claims, and more particularly to the victimisation

and protected disclosure claims. In some of the conversations the claimant has not even specified the date when it occurred, and there is rarely documentary evidence to support what he says. The witness who is not a respondent, AP, is concerned with HR matters, and finds it difficult to remember which employees she spoke to and when from over six years ago, and they say her evidence is crucial to their defence. In the race discrimination claim and in some of the victimisation claims, the claimant relies on conversations with the respondent Garth Jackson Smith in the autumn of 2018. That respondent says he deals with HR matters on a daily basis for numerous employees. More delay puts him at even more substantial disadvantage. On oral evidence, the respondent adds that although the claimant mainly used e-mail to communicate in his working day, none of these conversations are referred to in emails.

57. Next the respondent argues that of their witnesses three have left their employment. One is resident in the UK and so could be subject to a witness order, but the respondents Wadhwa and Barnabail have expressed frustration at the disruption of their personal and professional lives at yet another cancellation when they had arranged to travel to the UK for the November hearing, and say they cannot agree to attend a future hearing. They cannot be compelled by the employer to attend as they are no longer employed, and are resident in India, where they cannot be compelled by a UK employment tribunal. Unless the other respondents can persuade these two to attend despite the cancellation history, they are at a substantial disadvantage in defending the claims.

58. They say many of his applications have been without merit. By way of example, they point to an application to reject the response.

59. Claimant The claimant argues that the respondent first argued that striking out the entire claim was necessary after the postponement in October 2022, relying on lack of evidence that he would be able to conduct litigation, the impact of delay on the fairness of the trial, and on the respondents. It is said that many of these arguments have already been addressed by Judge Sutton KC in January 2023, when he refused to strike out because the claim was not actively pursued, concluding that “an order for strike out would be unjustified and disproportionate at this stage”. As of 2nd October 2023, the claimant had confirmed he was going to attend the final hearing in November 2023, even though he had tried to postpone the case management hearing. Far from being committed to obfuscation and delay, he had demonstrated commitment to bringing the claim to hearing despite his own severe illness, and having had to travel to India when his father was ill, and his father’s death in July 2023.

60. As for the medical evidence on his 15th November 2023 application to postpone, he had now provided a witness statement and an explanation of the documents. He had visited 3 hospitals to get clear evidence. The respondent's challenge to the authenticity of the documents by reference to logos, to why he had to visit three different hospitals, and to his WBC being

too high to be diagnostic of dengue fever, was "speculative and unsupported". In the absence of formal medical evidence about the diagnosis of dengue fever and appropriate treatment, the hospital notes should not be questioned.

61. On witness memory, it was submitted that in **Abergaze**, the employment judge had been concerned that a witness for the respondent on the remedy point would have difficulty remembering a conversation eight years later, It seems he had not been asked whether he could remember the conversation, and the difficulty would afflict both sides. In this case, the respondents' witnesses had committed their memory to written statements in September 2022. Also, a "great deal" of the claimant's case was based on documentary evidence. I was told there was an e-mail to support the oral complaint of disability discrimination in August 2018, although I do not have the final hearing bundle and was not told what this e-mail said or when it was. He also had the 2019 recordings (see below) as evidence of the protected acts alleged at 38 (2) and (3) on the list of issues, said there to have occurred in September and October 2018.

62. On witness availability, it was not clear why they could not attend by CVP, the claimant having attended a previous preliminary hearing remotely when in India. It was also suggested that the respondent Daniel Goldup, who informed the witnesses of the postponement a few days before the November 2023 hearing was due to start, had encouraged them to say that they would not attend further. In any case it was in the interest of the two named respondents to attend to give evidence even if they could be compelled.

63. The claimant disputed that he was at fault for pulling out of the mediation in April 2021, when the respondent had refused an offer of judicial mediation in February 2020 (the respondents say that was because they wanted to know what his case was first).

64. The claimant also blames the respondent for making an allegation of data breach in order not to pay his notice, which they have subsequently retracted. This, plus the refusal to admit disability until they had seen the medical records and evidence, and their repeated applications to strike out all or part of the claims, was evidence of unreasonable conduct on the part of the respondent. They were also unreasonable in refusing to include in the hearing bundle some audio recordings he had made. In answer to specific questions about these, he said these were recordings of conversations with Kumar Sorout in January 2019, when Kumar Sorout was leaving the company, and reported what someone had told him three months earlier; another with Ashish Wadhwa (a respondent) in February 2019 about a project he was conducting, and another conversation with him about his performance appraisal. There was a further conversation about an insurance claim made after termination, which goes to remedy. None of these recordings have been transcribed.

65. On the respondents' complaint of the costs incurred by the litigation so far, I was asked to take into account the inequality of arms between a well resourced respondent and the claimant.

66. The claimant himself interjected that Judge Sutton KC was wrong to record that counsel for the claimant had said the case was ready to go ahead. He referred me to paragraphs 40 and 41 of Mr Kibling's written submission for that hearing, about the unless order, and the omission of some of the claimant's documents from the hearing bundle. The claimant disputed that counsel had conceded readiness during the preliminary hearing itself that the case was ready for final hearing and had only to be postponed because of the claimant's health.

67. The claimant also took me to the allegedly faked e-mail. I was shown the version he was given on termination of employment, which omitted (not redacted) the name of the client's employee said to have given poor feedback, and another, received much later, with the omitted name inserted. The respondent read out their e-mail of 18 January 2023 explaining the reason for this. In my view this is a question of evidence that should be considered at a final hearing.

Discussion and Conclusion

68. First I deal with some factual points that arose in submissions:

(1) Employment tribunals are willing to take evidence remotely from witnesses who are abroad, but they are not able to do so unless the state whether witnesses are has consented to a foreign court conducting proceedings in its territory. India has not replied consenting. The witnesses must come to London.

(2) It cannot be said that the respondents acted unreasonably in reviewing the claimant's medical evidence and witness statement before deciding to admit disability: this is very common. If they did not have medical evidence in the course of employment, it is not reasonable to expect them to admit until they have some evidence.

(3) It is not unreasonable conduct to decide, well before a final hearing, that an issue cannot be pursued and must be settled. Narrowing the issues where possible is what parties are expected to do.

(4) Having read the correspondence, it cannot be considered suspicious that Daniel Goldup telephoned his witnesses in November 2023 before emailing them to ask for their availability for re listing, or that it can be inferred that he must have told them to say that they would no longer cooperate if called to a further hearing. There were only days to go before the hearing started, he would need to get them to cancel their travel plans, a telephone call was the quickest way to do that. Further, the tone of the witnesses' replies adequately reflects their understandable frustration and

annoyance at another late postponement and does not suggest coaching.

(5) I cannot make a finding about the authenticity of the Patna hospitals' medical notes. They show dengue fever was suspected. The handwriting is difficult but it does not show a diagnosis. They do show three tests for dengue fever, one positive and two negative. There is no evidence on whether one positive result suffices for diagnosis. These are photocopied documents and the quality is too poor to be able to accept or deny that some have been faked; any decision would benefit from interpretation by an Indian hospital doctor.

(6) The respondents' counsel's research was said to suggest that the white blood count was too high to be diagnostic of dengue fever, but there was no evidence to confirm this interpretation. I have consulted the NHS website on dengue fever. The illness is caused by a bite by an infected mosquito. There may be no symptoms, but if there are, they can be similar to flu with temperature, severe headache, pain behind the eyes, muscle and joint pain feeling or being sick, swollen glands, or a blotchy rash which may affect large areas of the body. Some people get a more severe type of dengue a few days after they first feel ill; this is rare but serious, requiring hospital treatment. Otherwise the treatment for dengue involves rest, drinking fluids, and taking paracetamol for the temperature. The symptoms reported by the claimant on the 15th November are fever and loose motion and nausea for one to two days, on 16th November body ache, severe weakness and nausea, on 2nd December he was advised to rest. On 25th December he sought evidence of fitness to fly and was told he had completely recovered. On return to London he went to Charing Cross hospital on 6th January; there he complained of fatigue symptoms post dengue infection and was tested for malaria, with negative results. He failed an appointment at his GP surgery on 8th January. On10th January the claimant reported post dengue fatigue and was told that this could last for a while. It can be said only that his reported symptoms were consistent with dengue, but without medical expert opinion it cannot be said he was not in fact ill and reported symptoms so as to avoid a final hearing.

(7) I do not accept that counsel for the claimant was misunderstood by Employment Judge Sutton about the claimant's readiness for final hearing in January 2023. The claimant has never disputed this part of his decision until today's hearing.

69. Having addressed those points, I turn to considering the pattern of the claimants conduct of the litigation as a whole, and whether it has been unreasonable. It took a long time to clarify what the claimant's case was. This does sometimes happen with litigants in person, but by March 2021 the pleadings were clear. Neither side had made much progress with disclosure of documents however. Of itself, it was not especially unreasonable that the case could not reach a final hearing in April 2021. However, from that point on, the claimant applied to reconsider, or appealed, case management orders made by Judge Glennie, Judge

Norris, and Judge Hodgson. When rejected on the sift he applied for an oral hearing. When unsuccessful at the Employment Appeal Tribunal he twice appealed to the Court of Appeal. All his appeals were unsuccessful and he was told more than once that the employment judges were exercising reasonable case management discretion in the decisions they had made. He still does not accept that it has been ordered that the witness statement he served in the face of unless order must be his witness statement - he wants to add to it. Persistent refusal to accept any case management decision with which he disagrees indicates unreasonableness.

70. He was noticeably slow in complying with case management directions, applying for extensions, then not complying, to the point where unless orders had to be made in June 2022 to make sure the case would be ready for the final hearing in October 2022. Reviewing his conduct with hindsight indicates that he was not prepared to comply with case management directions with which he disagreed, and wanted his objections to those directions to be resolved *before* he would address preparation for final hearing. He still argues matters which have been discussed at previous case management hearings, such as the redacted or forged e-mail, and the inclusion of documents in the bundle, which he has been told will be considered at the final hearing.

71. Also with the benefit of hindsight, it seems doubtful that the claimant was as ill as he suggests in October 2022, and more that his real reason for seeking postponement was because he wanted to see if his outstanding appeals would succeed, or, less explicitly, that the prospect of a final hearing made him feel ill with nerves.

72. He was given the benefit of the doubt by Employment Judge Glennie. Employment Judge Sutton, while sceptical that his health, as reported by the claimant, would be adequate as the next final hearing approached, allowed him a last chance at a final hearing, at the same time warning that the claim might be struck out if not.

73. Although the claimant had wanted a postponement of Judge Akhtar's hearing on 2nd October 2023 because he needed to rest, and although the correspondence with the Court of Appeal shows that he sought repeated extensions of his time to provide an appeal bundle in September 2023 because he said he was ill, he represented to her on the day that he was now fit. A reason for that unlikely assertion might be that he knew that if there was not going to be a final hearing, the alternative was to hear the application to strike out again. He had given notice to his tenants before the hearing, suggesting that he was contemplating returning to London for the final hearing. He still however engaged in correspondence about case management issues that Judge Akhtar had told him to leave to the final hearing. When, at the end of October, he was turned down by the Court of Appeal, he then applied to postpone the final hearing because of the case management issues he had been told would be resolved at the start of the

hearing. When was this was rejected, he immediately reported symptoms characteristic of dengue and sought postponement on health grounds.

74. The claimant may not have delayed cancelling his flight until after he knew that his second postponement request had succeeded. He may not have reported plausible symptoms in order to get a diagnosis of dengue as the respondent suggests. Keeping an open mind, he may have been unlucky enough to fall genuinely ill. If so, he can be seen as the boy who cried wolf, having so often requested postponements in the past.

75. Taken as a whole, I conclude that his conduct of the proceedings has been unreasonable, by persistent refusal to accept case management directions or let his case reach a final hearing.

76. I also conclude that it is no longer possible to have a fair trial. The claimant has not demonstrated that there is reasonably contemporary documentary evidence available of verbal protected acts or verbal protected disclosures. At five or six years distance from these unrecorded conversations, it is unfair to the respondents, even if witness statements were prepared in 2022. It is also likely that the respondents are to be deprived, by the delay, of the benefit of at least three witnesses. One of those can be compelled, and there is another, but both were dealing with numerous HR queries and likely to have difficulty in recalling anything at such distance in time. The claimant's own memory may also be impaired, overlaid by later assertions of his case; at this distance in time he could be honestly mistaken.

77. I doubt that it is possible to have a fair trial in the second half of 2024, for these reasons.

78. In addition to that, the claimant's past performance in response to final hearings being fixed inspires no confidence that there will not be another postponement application for some health reason as the final hearing approaches. It is a human failing not to want to face a day of judgement. Whatever the claimant's intention, his conduct demonstrates that he is avoiding any hearing of evidence or any findings being made on the disputes. The case may still be triable, but it seems he does not want it tried.

79. Considerable time and effort has been devoted by the tribunal service and the appeal courts to the claimant. The Respondents have been put to considerable expense and frustration, having twice prepared their case for final hearing only to see it postponed on health grounds with inconclusive medical evidence.

80. I see no less draconian alternative step that could be taken to ensure compliance. Making a deposit order on each claim is a possibility. If the claimant decides not to pay, that achieves the same result as a strikeout. But if he does decide to pay, that does not ensure that he will not seek a postponement ahead of another final hearing, and given the level that

costs of reached already, it is doubtful that he could satisfy an award of the costs incurred if the case carries on further. A deposit order would not remove the considerable prejudice to the respondents' ability to defend the case caused by further delay to this already delayed final hearing.

81. Accordingly, the claims are struck out under rule 37.

Costs

82. Rule 76 of the Employment Tribunal Rules of Procedure states:

> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

83. By rule 84**:**

> "In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."

84. By rule 78 (1):

> A costs order may—
> (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.

85. What is unreasonable will usually include having no reasonable prospect of success, or behaving in other ways that are unreasonable. A litigant in person should not always be expected to understand matters with the objectivity and knowledge of a professional representative, but litigants in person can still behave unreasonably – **AQ v Holden (2012) IRLR 648.**

86. The amount of any award should be related to the "nature gravity and effect" of the conduct, though it is not necessary to relate specific costs to specific acts – **McPherson v BNP Paribas (2004) EWCA Civ 569; Barnsley MBC v Yerrakalva (2011) EWCA Civ 1255.**

<u>Submissions</u>

87. The respondent submits that the claimant's unreasonable conduct has been "mainly responsible" for the delay in these proceedings. They say "throughout these proceedings the claimant has acted unreasonably and vexatiously, relying on his status as a litigant in person and his disabilities

in an attempt to run the litigation as he desired". In particular they refer to pulling out of the planned judicial mediation, not attending all preliminary hearings, his repeated applications to vary orders, his application to strike out the response, not complying with directions on repeated occasions, maintaining the case was ready for hearing and then contradicting that later, and repeated allegations that respondent was relying on a forgery. They say he has applied for reconsideration of almost every decision and then launched appeals that were without merit.

88. The respondent asks at least for its costs of the postponed hearings. Their application is capped at £20,000.

89. The claimant submits that no evidence of "wasted" costs has been produced, that is unclear if the two respondents were able to obtain a refund of their hotels and flights, and the "vast sums of costs supposedly accrued by the respondents" has not been scrutinised by any legal representative for the claimant. The claimant points out that those costs have "jumped astronomically" since those claimed in 2022. He should not be ordered to pay costs for a postponement due to illness.

Discussion and Conclusion

90. For the same reasons as I have concluded that the claimant has conducted the litigation unreasonably in relation to strike out, I conclude that his conduct is sufficiently unreasonable to meet the threshold test under rule 76.

91. I have to exercise discretion on whether to make an order for costs at all. Having been legally advised himself from time to time, the claimant will not have been unaware of the respondent accruing costs as his claim proceeded. His unreasonable conduct has persisted over a long time and many hearings. On ability to pay, I do not know about his current income or assets, save that he owns a flat in London which according to the Land Registry was sold for £400,000 on the 22nd December 2014. There is one charge on the property, to HSBC in 2018. If he has other substantial debts which wipe out his equity, he has not told the tribunal about them. Even aside from the likely increase in value over the last nine years, he is well able to satisfy a judgement capped at £20,000. I conclude that it is in the interests of justice that some order for costs should be made.

92. There is some evidence in the bundle of the respondent's costs. Counsel's fee for the brief for the hearing in November 2023 comes to £12,000. The hearing was postponed at such short notice that she will have had to fully prepare, and the solicitors will have had to prepare bundles and brief then or for the 2022 hearing plus updating. I note counsel's fee for the case management hearing in October 2023 was £3,000, and for 10 January 2023 £3,600. The brief fee for the postponed final hearing in November 2022 (a different counsel from November 2023) is also £12,000. The solicitor's charges (Deloitte LLP from March 2021) are much more difficult

to assess as I have only simple invoices which record (taking as a sample the invoice dated 24 October 2022): "legal advice in relation to Anurag Shankar from 1 September 2022 to 30 September 2022 £20,807, VAT £4,161.40, total £24,968.40. The tribunal has no evidence of the hourly rate, or how the time was spent and by what grade of fee earner, or even whether it includes disbursements. The invoice for 20 December 2023, covering the period 2 October 2023 to 29 November 2023, is for £42,194.53 including VAT, which probably includes counsel's £12,000 fee, but it is not stated. Even on a summary assessment, this is inadequate information. More would be required in the courts for summary assessment, and there is no reason why an employment tribunal should have less information about how charges are incurred, or why a solicitor conducting litigation should not know the level of information required.

93. That said, I can make some estimate of the costs incurred by a solicitor in the Milton Keynes. This falls into National band 1 of the guideline rates, where a grade A fee earner (8+ years' experience) is charged at £278 per hour and a grade D (paralegal) at £134 per hour. If I were to allow only 20 hours to one each of these grades for preparing for the 2022 and 2023 hearings, which is very likely to be an underestimate, given the extent of the bundles and the repreparation, that would come to nearly £10,000 including VAT. It would be reasonable too to allow something for the costs of preparing for the 2023 preliminary hearings which were required by the 2022 postponement.

94. The first respondent is a business registered for VAT and the proceedings are close enough to the business for the respondent to offset that VAT against its trading liability. VAT should not therefore be paid by the claimant.

95. Pulling this all together, counsel's fees from November 2022 (and not including this hearing) come to £30,600, and the modest estimate of solicitor's fees is another £10,000; it should probably be more. That totals £40,600. Stripping out the VAT that comes to £33,833.

96. Bearing in mind that costs should bear some relation to the unreasonable conduct, but need not be specifically related, I conclude that it is just to order the claimant to pay a contribution to the respondent's costs capped at £20,000.

Employment Judge Goodman
26 January 2024

JUDGMENT AND REASONS SENT to the PARTIES ON

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. 26/01/2024

FOR THE TRIBUNAL OFFICE