EMPLOYMENT TRIBUNALS

Claimant: Ms Conaghan
Respondent: IAG GBS Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: (in public (by CVP))
On: 22 November 2023
Before: Employment Judge Daniels

Appearances:
For the claimant: In person
For the respondent: Ms Cairney (Solicitor)

Reasons for decision not to strike out the Respondent's case

Timeline of events

1. The claimant was employed by the respondent as a Business Liaison Lead from August 2019, until she was dismissed by reason of redundancy with effect from31 December 2021.The claim form was presented on 23 May 2022. The claim is about the manner in which the claimant was treated by three of her colleagues: Ravinder Neta, Shahid Aziz and Geoffrey Collins, during her employment. She also complains about her redundancy, specifically the alleged failure to give her suitable alternative employment, namely a job that was available in Newcastle. The claimant says that she was subjected to sexual harassment by Mr Neta and Mr Aziz in 2019. She complained to James Spender about this conduct in December 2019. At that time, Keith Bushell was the claimant's reporting manager. However, Mr Bushell retired in August 2020, and Mr Neta took over the role. The claimant says that from around December 2020 she was subjected to treatment by Mr Neta, Mr Aziz and Mr Collins that she says was harassment and victimisation. The claimant is making the following complaints: unfair dismissal; harassment related to sex; and victimisation.

2. On 8 September 2022 the Claimant requested the Respondent to disclose 18 pieces of evidence she felt was vital to the claim and this included the request to disclose the grievance outcome/investigation. The Respondent responded on 27 October 2022 advising to wait until the disclosure stage. (Bundle page 152).

3. A preliminary hearing was scheduled for January 2023. There was a failure by the respondent to comply with the Employment Tribunal order with regard to the 10 January 2023 ordering that the agenda for the hearing should be completed and sent to the Tribunal, with a copy to each side, seven days before the hearing. The Respondent sent it to the tribunal the night before the hearing on 9 January 2023.

4. The Claimant again requested 18 documents she felt were relevant and within the Respondent's possession. This detailed request was provided on the Case Management Agenda form for the 10 January 2023 preliminary hearing under point 2.3. The request was seen by the Respondent on 3 January 2023.

5. Judge Shastri-Hurst's order dated 10 February 2023 instructed the Respondent to send a draft bundle to the Claimant by March 6, 2023 and for both parties to agree on the draft bundle by March 13, 2023.

6. There was then a further PH with Judge Alliott on 17 April 2023. He ordered:

   2.1 The existing case management order for disclosure was varied as follows:-

   2.1.1 On or before 4pm, 31 May 2023, the claimant and the respondent shall send each other a list of all documents they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

   3. Final hearing bundle

   3.1 By 4pm, 26 July 2023, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by 4pm 9 August 2023. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:

7. On 31 May 2023, the Respondent shared their index of documents.

8. On 1 June 2023, the Claimant requested to see all the documents in the Respondent's index. No response was received from the Respondent.

9. On 7 June 2023, the Claimant requested the ET to strike out of the Respondent's defence due to allegedly not complying with the orders of disclosure. On 13 June 2023, The Claimant sent a reminder email to the ET to state there was still no

response from the Respondent and she wished to proceed with a strike out request.

10. The Respondent objected to the strike out claiming that staff shortages meant they could not send the documents. They stated there was time untll 26 July 2023 to agree the contents of a bundle hence the Claimant would not have been prejudiced.

11. On 19 June 2023, the Claimant considered that none of the requested 18 pieces of evidence she wanted were in the Respondent's disclosure. A reminder to the Respondent was sent on the day to disclose the information requested from 10 Jan 2023 case management agenda including the Grievance outcome, Thaina Duarte's meeting and the CCTV footage.

12. On 12 July 2023, HCR law solicitors requested the ET to remove them from the claim and that Weightmans LLP had taken over as the Respondent's new representatives and would be in touch in due course. On 24 July 2023 after repeated requests to the Respondent the Claimant made a request for an 'unless order' for disclosure of documents as the date to agree on the bundle by 26 by July 2023 was approaching. The Claimant pointed out to the ET that there were no contact details for the Respondent or their new solicitors thereby making it difficult to chase them for the bundle and for the missing evidence.

13. On 30 August 2023, Ms Cairney from Weightmans emailed the Claimant proposing new dates for all the CMO deadlines. On 31 August 2023, the Claimant requested a strike out of the Respondent's defence.

14. On 1 September 2023, Judge Alliott ordered the Respondent to disclose certain information requested by the Claimant by email dated 24 July 2023 and to inform the Judge by 15 September 2023 if they have not complied, with reasons.

15. On 15 September 2023, the Respondent sent across the Thaina Duarte' meeting transcript and the grievance outcome but no CCTV footage. The Respondent did not email or send a letter to the Employment Tribunal Judge on the reasons for failing to disclose items by 15 September 2023. On 19 September 2023, the Claimant emailed the Respondent querying their reply.

16. On 26 September 2023, the Respondent sent across the grievance meeting recordings but did not supply CCTV footage. The remaining 18 documents requested by the claimant were not enclosed.

17. On 5 October 2023, Judge Alliott ordered a Preliminary hearing for 22 November 2023 to discuss a strike out/cost order.

18. In response to the PH hearing for a strike out/cost order, the Respondent emailed Judge Alliott on 5 October 2023, claiming they had met all their obligations of disclosure. They further blamed the Claimant for not engaging with them on 30 August 2023.

19. The Employment Tribunal declined to strike out the case on 22 November 2023 and instead issued various orders for disclosure against the respondent signed by Employment Judge Daniels on 22 November 2023 (but not sent to the parties by the Tribunal until 15 January 2024).

20. A request for reasons was made on 16 January 2024 and this was sent to the Employment Judge on that date.

The Claimant's Argument for a strike out against the Respondent's defence

21. The claimant's case was that the respondent had breached orders as follows.

21.1 There was an alleged failure to comply with the Employment Tribunal order with regard to the 10 January 2023 ordering that the agenda for the hearing should be completed and sent to the Tribunal, with a copy to each side, seven days before the hearing. The Respondent sent it to the tribunal the night before the hearing on January 9, 2023.

21.2 Judge Shastri-Hurst's order dated 10 February had instructed the Respondent to send a draft bundle to the Claimant by March 6, 2023, and for both parties to agree on the draft bundle by March 13, 2023. The Final bundle needed to be sent to the Tribunal by April 10, 2023. The Claimant made an application to the Tribunal on April 13, 2023, to address the Respondent's non-compliance with case management orders.

21.3 Judge Alliott on April 17, 2023 had ordered both parties to disclose the list of all documents by 31 May 2023 and send copies to each other if requested, to agree on the bundle by July 26, 2023, and for the Respondent to send a hard copy and an electronic copy of the bundle to Claimant by August 9, 2023. The claimant says the Respondent failed to comply with the order of sending copy of the documents when requested by the Claimant on June 1, 2023 and failed to comply with the order of agreeing the bundle by 26 July 2023 and failed to comply with the order of providing the Claimant with the bundle by 9 August 2023.

21.4 The respondents did not comply with the order for witness statement exchange on 6 September 2023. The Respondent's failure to comply with a number of the CMO deadlines has led to the delay in exchange of Witness statements for the Final hearing.

21.5 The claimant says the respondent failed to comply with the **'order'** from Judge Alliott on 1 September 2023 'to disclose copies and recordings of the items requested in paragraphs 1,2 and 3 + CCTV footage requested or send a letter to the Tribunal explaining why it cannot or will not disclose the items by 15 September 2023.' Further, that the Respondent had failed to comply with the order to disclose the requested items by 15 September 2023 or send a letter to the Tribunal

explaining why they couldn't disclose the items. From the Respondent's email to the Claimant on 15 September 2023, the claimant said that only item 1 and 2 (The transcript of the conversation with Thaina Duarte and the Grievance outcome) were shared. Item 3 (recordings of the Grievance process) and the CCTV footage weren't shared with the Claimant nor did they send a letter to the Tribunal to explain the reasons for not disclosing them by 15 September 2023.

21.6 That several attempts had been made by the Claimant for the Respondent to engage in meaningful dialogue with regard to the grievance raised on 20 December 2021 by the Claimant for the Respondent to investigate the harassment, bullying and unfair dismissal;

21.7 The claimant also argued that the respondent's grounds of resistance were just a bare denial with no coherent statement of facts regarding all the claims of harassment, victimisation and unfair dismissal brought against them. She contends there are no reasonable grounds to defend the claim.

Impact on the Claimant

22. The Claimant alleges says she was subjected to extreme forms of bullying and harassment by the Respondent. These are matters for the final Tribunal hearing the matter. I cannot make any such finding at this stage.

23. The Claimant had a baby on 20 September 2022. However, the Claimant explained she had worked around the clock to make sure all CMO deadlines were met while caring for her baby and her 7 year old son. The claimant was also unwell at this time including suicidal thoughts and feelings of hopeless and worthlessness. However, the Claimant says she still worked around the clock to make sure all CMO deadlines were met despite such challenges. The claimant contends that the CMO dates set by Judge Alliott at the Preliminary Hearing on 17 April 2023, were crucial for managing the Claimant's family commitments, her mental health and the expectations of the Tribunal. The Respondent who was represented at the hearing agreed to all the dates with no reservations. Had the bundle been completed and emailed to the Tribunal on August 9, 2023, the Claimant argues she would have had the opportunity to focus on her well-being and her family. The claimant argues that the ongoing non-compliance has left the Claimant dealing with increased anxiety and depression.

The Respondent's position

24. The respondent disputed the application in relation to the order of Employment Judge Alliott dated 5 October 2023. The respondent objected to any order seeking to strike out the respondent's response and/or the making of costs/preparation time order against the respondent and requested that no such order be made, in light of the following:

24.1 First, the respondent's new representatives say they first contacted the claimant by way of email on 30 August 2023 and asked whether dates for

further directions could be agreed and for the claimant to provide a list of any disclosure she believed to remain outstanding (attached).

24.2 Secondly. rather than respond to this email, the respondents say the claimant made a premature application to strike out the respondent's case on 31 August 2023 (attached) and referred to only 3 items she stated were outstanding:

(1) Thaina Duarte's meeting with the Grievance hearing manager notes, transcript and video recording.

(2) Grievance outcome.

(3) The Grievance meetings were all recorded and I need to have the recordings as the transcripts aren't accurate.

24.3 Thirdly, that Employment Judge Alliott sent an order dated 4 September 2023, requesting that the respondent provide disclosure of the 3 items listed above. The respondent says it responded to this application/order accordingly on 5 September 2023 and stated that it would endeavour to provide the documents, albeit it was not clear why those documents were relevant to the live issues in the claim. The claimant previously had allegations dismissed for being presented out of time, and the respondent was of the view that the majority of documents the claimant was seeking related to the issues that no longer form part of the claim and/or had never formed part of the allegations in this claim. The respondent averred that this email also referenced and complied with the order of Employment Judge Alliott, where the respondent was asked to confirm why it could not or would not disclose various requested items. On 15 September 2023 the respondent says it disclosed the transcript of the meeting with Thaina Duarte (re point (1) above) and the grievance outcome (re point (2)).

25 The respondents say they remained of the view that there were no live issues relating to the grievance/grievance outcome (see the list of issues), yet nevertheless disclosed these documents accordingly. The respondents say they also explained to the claimant that there were technical difficulties in accessing all of the recordings in order to satisfy the remainder of point (1) and point (3), due to the 'owner' of the relevant folder having left the respondent's business.

26 The claimant responded on 19 September sending a list of a further 18 items which she was seeking disclosure of, that were not included in the aforementioned correspondence.

27 On 26 September 2023 the respondents say they disclosed to the claimant the remaining items from points (1) and (3), thus they say completing compliance with the specific disclosure order of Employment

Judge Alliott, albeit accepting that part of this was later than 15 September 2023 for the reasons given above.

28 The respondents also provided a list of issues and asked the claimant to clarify which disclosure requests (from the 18 requests sent on 15 September 2023) related to which of the issues in the claim, so that the respondent could consider/be satisfied that all of those documents were relevant to the claim and thus fell to be disclosed accordingly, before incurring further time, costs and resources in seeking those documents.

29 The respondents said that claimant had not, at the time of writing that letter, provided confirmation of the same and so the respondent accepted that it had not as yet disclosed those documents, albeit they say they were not the subject of a specific disclosure order and the respondent does not believe they are relevant to the issues in the claim. The respondent, however, agreed to within 14 days provide disclosure of documents to the claimant as follows:

> "In regard to the claimant's request 8 in her letter dated 19 September 2023, a copy of her grievance document and related emails to Ms Giles an/or others dated in or about December 2021 with regard to Ashmi Parihar sent to Ms Giles and all related emails and documents with regard to the investigation, findings and outcome of that matter (the claimant alleges that Shahid Aziz had called Rashmi some extremely derogatory terms in Hindi (Kuti Motie in Hindi meaning 'Fat Bitch' when translated in English) but no proper investigation allegedly took place).
>
> In regard to request 12, all documents relevant to complaints or grievances by staff about gender/sex discrimination, sexual harassment and/or victimisation under the Equality Act 2010 in the respondent's IT team/dept, between 1 June 2019 and 30 June 2022, including documents relevant to the investigation conducted, the findings and the outcome.
>
> In regard to request 15, the BLL planning day electronic recording of 24 September 2020 and the Teams chat between Raja Javaid and the claimant on this day. (The claimant says she spoke up about her concerns on being bullied in front of the whole team in those communications).
>
> In regard to request 18, all documents, including emails to or from Ms J Giles or C Mcnulty between 11 November 2021 and 16 June 2022 relating to the claimant or to any role she was performing (or had expressed interest in) or to the investigation/outcome of her grievance and/or relating to her dismissal."

Relevant legal provisions

Strike Out: General Principles

28 Rules 37 ET Rules 2013 provides materially as follows:

> 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—
>
> (c) for non-compliance with any of those Rules or with an order of the Tribunal.

29 Satisfaction of any of the gateways in Rule 37 ET Rules 2013 is simply the first step: the second step entails consideration of whether a strike out order should be made: **Hasan v Tesco Stores Ltd UKEAT/0098/16.**

30 Striking out a claim is an exceptional course. The exceptional nature of the jurisdiction requires "a clear explanation tailored to the facts of the case:" **Xia v Tag Europe Ltd EAT 0270/20. Blockbuster Entertainment Ltd v James** [2006] IRLR 630 provides the ET with authoritative guidance as to how any such decision should be approached. Per Sedley LJ at [6], [18] and [21] (emphasis added)):

> *"*5. *This power, as the employment tribunal reminded itself, is a Draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response.* The principles are more fully spelt out in the decisions of this court in *Arrow Nominees v Blackledge* [2000] 2 BCLC 167 and of the EAT in *De Keyser v Wilson* [2001] IRLR 324, *Bolch v Chipman* [2004] IRLR 140 and *Weir Valves v Armitage* [2004] ICR 371, but they do not require elaboration here since they are not disputed. It will, however, be necessary to return to the question of proportionality before parting with this appeal.
>
> 18. *The first object of any system of justice is to get triable cases tried.* There can be no doubt that among the allegations made by Mr James are things which, if true, merit concern and adjudication. There can be no doubt, either, that Mr James has been difficult, querulous and uncooperative in many respects. Some of this may be attributable to the heavy artillery that has been deployed against him - though I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. *But the courts and tribunals of this country are open to the difficult as well as to the compliant, so long as they do not conduct their case unreasonably.* It will be for the new tribunal to decide whether that has happened here.
>
> 21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law, as Mr James has reminded us, has for a long time taken a similar stance: see *Re Jokai Tea Holdings [19921 1 WLR 1196,* especially at *1202E-H. What the jurisprudence of the European Court of Human Rights has contributed to the principle is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact if it is a fact that the tribunal is ready to try the claims; or as the case may be that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist.* If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify

> its summary termination. *Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."*

31 When striking out a claim for non-compliance with a case management order, the employment tribunal should identify the extent and magnitude of the claimant's noncompliance. A failure to consider whether the sanction is proportionate including by reference to whether a fair trial remains possible or whether a lesser sanction was available renders any such decision impermissible: **Baber v Royal Bank of Scotland plc EAT 0301/15.**

32 Per Simler P (as she then was) at [10] in **Daly v Northumberland Tyne and Wear NHS Foundation Trust UKEAT/0109/16/JOJ**:

> "10. Where a tribunal is considering striking out the proceedings on the basis of unreasonable conduct or behaviour, it is important to recognise that even if the threshold for such an order is established a decision to strike out does not follow automatically. Before concluding that a strike out is justified in the particular case, a tribunal should consider alternatives to striking out, including the possibility of ordering specific particulars or at least the possibility of some alternative measure that is proportionate in the circumstances, short of striking out the claim and depriving a claimant of a hearing on the merits of his case. As emphasised in *Bolch v Chipman* [2004] IRLR 140 EAT, where a fair trial remains possible careful consideration must be given to whether a strike out order is a proportionate sanction to apply. In most cases it is unlikely to be so. Even in a case where a tribunal concludes that a fair trial is not possible, it is still necessary for the question of proportionality of this sanction to be considered."

33 In **Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371** the EAT held that an ET had erred in striking out the whole of the employer's response for failure to comply with an order for simultaneous exchange of witness statements. In deciding whether to strike out a party's case for non-compliance with an order under rule 37(1)(c), a tribunal will have regard to the overriding objective set out in rule 2 of seeking to deal with cases fairly and justly. The EAT in **Weir Valves** considered that this requires a tribunal to consider all relevant factors, including:

a. the magnitude of the non-compliance;

b. whether the default was the responsibility of the party or his or her representative;

c. what disruption, unfairness or prejudice has been caused;

d. whether a fair hearing would still be possible; and

e. whether striking out or some lesser remedy would be an appropriate response to the disobedience.

34 As to (e), it is clear that what must be considered is the disruption, unfairness or prejudice *caused by the default* rather than any other feature which cannot be visited upon the defaulting party.

35 Per HHJ Richardson at [27]:

> "27. It seems to us that whether a fair hearing is impossible is to be judged objectively by the employment tribunal. The feeling of one party or the other, whether soundly based or not, is not in itself a decisive factor. What the employment tribunal must do is address its mind to the issues in the case, address its mind to the fairness of allowing the case to proceed in the face of the default and reach an objective decision as to whether a fair trial is possible."

36 In the ordinary course proportionality will only admit of one answer. Per Choudhury P at [26] in **Emuemukoro v Croma Vigilant (Scotland) Ltd and ors 2022 ICR 327:**

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

37 It is doubtless for this reason that the EAT has regularly overturned decisions of the first instance ET when striking out of the grounds that the decision is disproportionate in the circumstances: **Weir Valves**; **Ridsdill and ors v D Smith and Nephew Medical and ors EAT 0704/05**; **Otehtubi v Friends in St Helier EAT 0094/16**; **Hazelwood v Eagle EAT 0011/09**; **North Tyneside Primary Care Trust v Aynsley and ors [2009] ICR 1333**

38 As the purpose of the rule is to achieve compliance with the order, the basic question to be asked is whether there is a real or substantial or serious risk that, as a result of the default, a fair trial will no longer be possible **(Landauer Ltd v Comins & Co [1991] Times, 7 August, CA**; **National Grid Co Ltd v Virdee [19921 IRLR 555, EAT).** Applying these principles, the EAT in **Virdee** held that it was inappropriate to strike out part of the respondent's response where the non-compliance with an order for disclosure (saying that certain documents did not exist, when in fact they did exist) was not deliberate but careless, where the error was promptly rectified, and there was no question of a fair trial being impossible.

39 Maintaining a strike out once there has been compliance with an order is therefore likely to be disproportionate: **Aynsley.**

40 'Courts should not be so outraged by what they see as unreasonable conduct as to punish the party in default in circumstances where other sanctions can be deployed and where a fair trial is still possible: **Laing O'Rourke Group Services Ltd and ors v Woolf and anor EAT 0038/05.**

41 The purpose of the orders of the ET is to secure the fair trial of a claim. Where, notwithstanding prior default, the purpose of the order has been achieved, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules if that objective is otherwise achieved: **Arrow Nominees v Blackledge [2000] 2 BCLC 167; De Keyser.**

42 Because of the very severe consequences that flows from a decision to strike out, the power should only be exercised on the clearest grounds and as a matter of last resort. It should never be exercised in a rush or be based on inadequate information: **Otehtubi v Friends in St Helier EAT 0094/16.**

Conclusions in this case

The magnitude of the non-compliance;

43 There was, firstly, a failure by the respondent to comply with the Employment Tribunal order with regard to the 10 January 2023 ordering that the agenda for the hearing should be completed and sent to the Tribunal 7 days before but this was breach was very minor. The delay in sending the draft bundle was also very minor. The Respondent's failure failed to comply with the order of sending copy of the documents requested was also minor. The respondents did not comply with the order for witness statement exchange on 6 September 2023. The Respondent's failure to comply with a number of the CMO deadlines led to the delay in exchange of Witness statements for the Final hearing. But any prejudice arising was very small.

44 As regard disclosure, there is an acceptable difference of opinion over the extent to which the respondent failed to comply with the **'order'** from Judge Alliott on 1 September 2023 'to disclose copies and recordings of the items requested. The respondent could not provide documents not in their possession nor were they required to provide documents that the claimant considered were relevant but only documents that were relevant to the remaining issues in dispute.. However, they should have sent a letter to the Tribunal to explain the reasons for not disclosing certain documents by 15 September 2023.

45 The claimant's argument that the respondent's grounds of resistance was just a bare denial with no coherent statement of facts regarding all the claims of harassment, victimisation and unfair dismissal brought against them is not persuasive. In fact, there are numerous disputed facts and I have to assume that the respondent's version of events is or may be correct at this stage. I cannot conduct a mini trial of the facts at this stage. Hence, this contention is not made out.

Impact on the Claimant

46 The Claimant explained she had worked around the clock to make sure all CMO deadlines were met while caring for her baby and her 7 year old son. The claimant was also unwell at this time. This was admirable attention by her to the deadlines.

47 The claimant argues that the ongoing non-compliance has left the Claimant dealing with increased anxiety and depression. However, no medical evidence has been provided to support this and whilst the respondent's delays and its casual approach to the meeting of deadlines was sincerely regrettable it is hard to see any serious lasting impact from such matters. Litigation is indeed

stressful but it is hard to distinguish between the ordinary stress of this litigation and the added impact of the respondent's relatively minor breaches.

Whether the default was the responsibility of the party or his or her representative;

48 The default appeared to be partly the fault of the representatives and the respondent. The respondent changed lawyers which typically causes delay and then the new lawyers were slow to correspond with the tribunal.

What disruption, unfairness or prejudice has been caused;

49 In my view, the disruption or unfairness caused to the claimant is minor. It was unfortunate and upsetting for the claimant but such upset and disruption was temporary and alone was not enough to substantively prejudice the claimant in any lasting sense.

Whether a fair hearing would still be possible;

50 The claimant did not appear to make the case that a fair hearing was now impossible, nor could she in my view. The full hearing is listed for June 2024 and there is ample time to prepare for the full hearing. This is crucial in this case. It is completely arguable to suggest a fair trial cannot now proceed. The case law that applies makes clear this is a key issue, indeed potentially the crucial issue.

Whether striking out or some lesser remedy would be an appropriate response to the disobedience

51 In my view, giving the respondents more time to comply with focussed disclosure orders was the most appropriate response.

52 The purpose of the orders of the ET is to secure the fair trial of a claim. Where, notwithstanding prior default, the purpose of the order has been achieved, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules if that objective is otherwise achieved. This is just the case here.

53 Hence, the request to strike out was dismissed.

Employment Judge Daniels
8 February 2024

Sent to the parties on:
13 February 2024
…….
For the Tribunal Office:

……..……..