EMPLOYMENT TRIBUNALS

Claimant: Miss N Chaara

Respondent: Chanel Limited

HELD AT: Manchester (hybrid by CVP) **ON:** 17 and 18 January 2024 (plus chambers consideration on 16 February 2024)

BEFORE: Judge Johnson

REPRESENTATION:

Claimant: Unrepresented (in person)
Interpreter: Mrs Ebbing (French speaking – for claimant & in person)
Respondent: Ms C McCann (counsel by CVP)
Mr B Williams (instructing solicitor by CVP)

JUDGMENT

The judgment of the Tribunal is that:

(1) In relation to claim 1 (Case Number: 2420018/2020), the claim is struck out in accordance with Rule 37 of the Tribunals' Rules of Procedure. The reasons for this decision are:

(a) Because of the claimant's failure to comply with the orders of Judge Butler made on 28 October 2021 and her further default following Judge Buzzard being ordered for second time to provide those further particulars and which remain outstanding at the date of this preliminary hearing.

(b) Because the claimant has actively failed to pursue her claim.

(c) It is no longer possible for there to be a fair hearing.

(d) The Tribunal does not have jurisdiction to hear this claim because the claim form was presented out of time and it is not just and equitable to extend time in accordance with section 123 Equality Act 2010

(2) In relation to claim 2 (Case Number: 2203956/2022) and pursuant to the respondent's application dated 6 October 2022, the claim is struck out in accordance with Rule 37 of the Tribunals' Rules of Procedure. The reasons for this decision are:

(a) The claim has no reasonable prospects of success.

(b) The Tribunal does not have jurisdiction to hear this claim because the claim form was presented out of time and it is not just and equitable to extend time in accordance with section 123 Equality Act 2010.

(3) The respondent's application dated 31 October 2022 seeking a deposit order in respect of claim 2 is not granted because of the decision to strike out this claim as described in paragraph (2) (above).

(4) The respondent's application dated 31 October 2022 seeking an unless order under Rule 38 of the Tribunals' Rules of Procedure in respect of the provision of medical evidence by the claimant is not granted because of the decision to strike out described in paragraphs (1) and (2) (above).

(5) The further applications made by the respondent concerning the provision of further particulars by the claimant, identifying the list of issues and the making of case management orders are not granted because of the decision to strike out described in paragraphs (1) and (2) (above).

REASONS

Introduction

1. This decision concerns a public preliminary hearing (PH), which dealt with the ongoing matter of the respondent's applications. These applications were originally listed to be heard before Judge Doyle on 21 September 2022. It was not possible to complete the PH on this date and it was 'part heard'. Accordingly, it was listed to take place on the next available date when the Judge, claimant and counsel were next available.

2. The case resumed on 16 February 2022 and was listed to be heard by me. I had been asked to deal with this matter in place of Judge Doyle who was unwell.

3. Unfortunately, the hearing was listed as a preliminary hearing case management (PHCM) held in private. This meant that I was unable to hear the respondent's applications which needed to be heard in public.

4. However, the PHCM was useful in allowing the parties to discuss the background of the case. It also allowed me to consider the next steps to be taken to ensure a fair determination of these applications. I noted Judge Doyle's earlier order that the claimant provide medical evidence so that the Tribunal could understand what adjustments were required to ensure that she could participate in the proceedings.

5. I reserved the hearing of the relisted public PH before me because Judge Doyle remained unavailable to hear the case and I now had some familiarity with the case following the PHCM. However, it was in the interests of justice for this hearing to begin again, as Ms McCann was unable to conclude her submissions at the PH on 21 September 2022 before EJ Doyle, (Doyle PH).

6. Additionally, since the Doyle PH had taken place, Mr Williams (on behalf of the respondent), had made further applications concerning the two claims. This resulted in the following applications being heard by me, when the recommenced PH was listed to take place on 7 July 2023:

a) As per the case management summary from EJ Buzzard (Buzzard PH) dated 15 July 2022, at paragraph (4), a public PH was listed to consider (in relation to claim 1 - 2420018/2020):

    (i) Whether the claimant's claims should be struck out because of her failure to comply with the orders of EJ Butler made on 28 October 2021 (Butler PH) (and because of any further default, following the claimant being ordered for a second time to provide further particulars by 26 August 2022);
    (ii) Whether the claimant's claims were presented in time and, if not, whether it would be just and equitable to extend time to allow the claims to proceed; and,
    (iii) Whether any of the claimant's claims should be struck out for having no reasonable prospect of success or, if any claim has some but little reasonable prospect of success, whether any deposit orders should be made.

b) In relation to the application under Rule 37 for an order being made for strike out, the respondent asserted that the reasons why the order should be made are as follows:

    (i) The claimant has failed actively to pursue her claim;
    (ii) The claimant has failed to comply with the Tribunal's orders;
    (iii) The respondent can no longer have a fair hearing;
    (iv) The claimant's claims in respect of the first claim have no reasonable prospects of success; and,

(v) The claimant's claims in respect of the first claim are out of time.

c) In relation to the second claim (2203956/2022) and pursuant to the respondent's application dated 6 October 2022:

i) Whether the claims were brought outside the required timescales and if so, whether the Tribunal has jurisdiction to hear them and whether the time limits should be extended (whether on a just and equitable and/or reasonably practicable basis). The respondent's position on this issue is set out at paragraph 6 of the grounds of resistance to the second claim.

ii) Whether the claims have either no or little reasonable prospects of success, and whether the claims should be struck out on that basis or whether a deposit order should be made. The respondent's position on this issue is set out at paragraphs 7 to 9 of the grounds of resistance to claim 2.

d) In relation to the outstanding order made by the Tribunal on 23 September 2022 for the claimant to provide a medical report and pursuant to the respondent's application dated 31 October 2022:

(i) Whether an unless order (under Rule 38) should be made requiring the claimant to comply with the order within 14 days of the date of the unless order (or some other appropriate date), failing which her first claim will be struck out.

e) In relation to the second claim and pursuant to the respondent's application dated 31 October 2022:

(i) Whether an order should be made directing the claimant to provide further particulars of the second claim within 28 days.

f) If either of the two claims are not struck out, the respondents ask for the following matters should be addressed – (i) identification of the legal and factual basis of the claim, (ii) the list of issues, and (iii) case management orders.

7. The PH on 7 July 2023 concluded part heard and it was agreed that the case would be listed for a further two days in order that this public PH could be concluded. At this PH however, the claimant agreed to withdraw her claims against the second, third and fourth respondents who are/were employees of the respondent company Chanel. I therefore issued a judgment dismissing these claims upon withdrawal by the claimant.

8. I did begin to hear some of Ms McCann's submissions in support of the respondent's applications, which helpfully involved her explaining the

complicated and lengthy factual history of the case up to 7 July 2023. This was effectively a chronology of events concerning what had happened in these proceedings from the claimant's management by Sarah Cripps, her initial grievance in 2019 and its subsequent appeal which took place between the period of August 2018 and August 2020, with Ms Cripps leaving the first respondent's employment on 31 August 2020.

9. The first claim was discussed and the respondent's request for further particulars raised with the first response on 23 January 2021. I was referred to the numerous requests for postponements of the PHCMs, with the reasons for them being made and the procedural steps taking place within the proceedings. Considerable delay had arisen, and case management orders made in respect of the claimant remained outstanding.

10. As we ran out of time following these initial submissions, I relisted this case for a further PH to continue with my consideration of this matter, (effectively days 2 and 3 of the PH). Days 2 and 3 would involve Ms McCann providing the remainder of her submissions which covered the law and her arguments in support of the application. The claimant would also be provided with an opportunity to reply, and I would then deliberate and give my decision.

11. I made limited case management orders on 7 July 2023 in respect of the claimant and dealing with the outstanding further particulars in relation to the second claim which had not yet been the subject of case management at a PHCM being presented to the Tribunal in 2022. This included an order that the claimant must provide further particulars in relation to claim 2 by 18 August 2023. These further particulars have not since been provided by the claimant either in time or on a later date before the resumed PH took place in January 2024.

12. I explained to the claimant that while I had not yet determined the respondent's various applications, it was *'vital'* that she understood the considerable delay which had already taken place in this case. I observed that this delay was exceptional, even allowing for her personal circumstances and I urged her to consider complying as a matter of urgency with all outstanding case management orders made in these proceedings.

13. I did explain to the claimant that I could not tell her at that stage, what my decision would be in relation to the respondent's applications. However, I explained that her compliance with outstanding case management orders would only assist her in making convincing submissions in reply at the next part of the PH. I anticipated that that she would argue against the imposition of sanctions as requested by the respondent in their applications and it was important that she demonstrated a meaningful attempt to demonstrate a desire to progress her case.

14. The case was able to proceed as listed. No progress had been made in the interim period concerning outstanding case management orders before 17 and 18 January 2024, other than the provision of a short letter from the

claimant's GP Dr L Spurrell dated 5 January 2024 shortly before the PH took place.

15. The claimant however, had identified with her GP that following a recent diagnosis of Autistic Spectrum Disorder (ASD), attendance in person would be of great assistance and I was able to allow her to attend the Manchester Employment Tribunal before me. Ms McCann and Mr Williams continued to join remotely by CVP. This was the most proportionate way of hearing the PH taking into account the claimant's needs and to avoid the respondent incurring further additional costs in what had already been a lengthy process.

16. The report of the specialist diagnosing ASD (referred to above), was not provided by the claimant despite several requests by Mr Williams and at the PH, she confirmed that it was written in French, contained irrelevant personal details relating to her childhood which needed redacting and a translation into English had not yet been obtained. It was noted that the report had been available since November 2023.

History of the case

17. The claimant commenced her employment with the respondent on 18 March 2014. She began a period of maternity leave for her first pregnancy from August 2018 until August 2019 and during this period, she was line managed by Ms Sarah Cripps.

18. Following her return to work, the claimant's first grievance was submitted during December 2020 and a decision was sent to her on 10 January 2020. An appeal was raised in February 2020 and the external investigator invited Ms Cripps to a disciplinary hearing, but it is understood that this employee left her employment before it took place.

19. In the meantime, the claimant commenced a period of maternity leave from 2 August 2020, and which concluded on 16 January 2021. During this period, the claimant notified ACAS of the claims against the respondent (and the former second and third respondents), on dates in October 2020, with early conciliation certificates being issued in November 2020. The first claim form was then presented on 17 December 2020. The claim raised a number of complaints but most significantly, discrimination under the Equality Act 2010 (EQA), in relation to the protected characteristics of disability, maternity and race.

20. There then followed a period in late 2020 and during the middle of 2021, where the claimant raised a second grievance, with a meeting taking place in October 2021. As the claimant failed to clarify and confirm the points under investigation following the meeting with the relevant investigating manager, they proceeded to investigate those matters which they had identified when they met the claimant.

21. The respondent presented a response and grounds of resistance in relation to the first claim on 23 January 2021 and also made a request for further particulars concerning the claim.

22. The claimant had a further pregnancy from May 2021 until she gave birth on 18 February 2022. During June 2021, she attended hospital because of abdominal pains. However, she applied for the postponement of the PHCM listed for 8 July 2021 which would consider the first claim, (the first postponement). The PHCM was relisted for 29 October 2021. The claimant requested a further postponement which was allowed by Judge Butler (Butler CMO) (second postponement) but was ordered to comply with the respondent's request for further particulars by 9 December 2021.

23. Unfortunately, the claimant failed to comply with the order, and she did not seek an extension of time from the Tribunal in respect of the date for compliance. This caused the respondent concern about whether a fair hearing could take place and these concerns were raised with the Tribunal in their letter dated 13 December 2021.

24. Following the birth of her child, the claimant's period of maternity leave continued until 12 June 2022. As the PHCM was listed to take place on 23 February 2023 and the claimant had only given birth a few days earlier, there was a third postponement. The Tribunal relisted the PHCM for a new date on 27 May 2022. Unfortunately, a fourth postponement was necessary, but on this occasion, it was due to a lack of judicial resources.

25. A second claim form was presented on 16 June 2022, following a period of early conciliation during the period between 5 April and 16 May 2022, relating to the respondent and the former second and fourth respondents. It also primarily focused upon complaints of discrimination relating to disability, maternity and race.

26. The PHCM was relisted for 15 July 2022. The claimant did seek the further postponement of this long overdue PHCM on 12 July 2022 because of health issues, but not surprisingly, Judge Howard refused the postponement request. The PHCM took place in the claimant's absence before Judge Buzzard and case management orders were made (Buzzard CMOs), including an extension of time to comply with the Butler CMOs regarding the provision of further particulars.

27. The claimant did write to the Tribunal during the PHCM on 15 July 2022 and referred to several medical issues which required scans but provided no medical evidence in support. Despite her nonattendance at the PHCM, Judge Buzzard provided a clear explanation in his Note of Preliminary Hearing, of what information the claimant needed to provide so that she could comply with the request for further information and originally ordered by Judge Butler. They had first been ordered on 28 October 2021 and revised date for compliance was 26 August 2022. Judge Buzzard was also aware of the respondent's application to strike out and reminded the claimant that a *'timely*

compliance' of the outstanding CMOs, would be relevant when the application was considered.

28. Mr Williams who is the solicitor representing the respondent reminded the claimant of her duty to comply with the CMOs concerning the further particulars, on 30 August and 13 September 2022.

29. A public PH was listed to take place before Judge Doyle on 21 September 2022 and he refused another postponement made by the claimant on the previous day. He began to consider the respondent's applications made up to that date. Judge Doyle adjourned the PHCM part heard and made further CMOs (Doyle CMOs). The following matters are relevant:

    a) Judge Doyle made CMOs which included an order that the claimant provide a medical report by 21 October 2022 which should address,

       '…what, if any, effects her medical conditions have upon her ability to communicate, in writing and/or by email and/or orally, as part of her litigation with the respondent, its legal representatives and the Tribunal… If possible, it will also be helpful for the report to suggest any communication adjustments or accommodations that may be necessary as part of the litigation process.'

       The claimant failed to comply, and Judge Holmes considered the matter and on 17 November 2022, ordered that time be extended to 24 November 2022 in order that it could be provided. It should be noted that the claimant did not produce a medical report which she believed complied with this CMO until shortly before the preliminary hearing on 17 and 18 January 2024.

    b) Judge Doyle also considered the claimant's application for early specific disclosure in advance of normal disclosure CMOs being made. He decided to allow some of the application in order that the claimant would be assisted in providing her further particulars and the respondent was ordered to provide documents relating to her grievances. The respondent complied with this order and provided the documents on 12 October 2022.

    c) The claimant's failure to comply with the outstanding CMOs relating to further particulars remained outstanding. This failure to comply continued until the final part of this PH on 17 and 18 January 2024.

30. I considered this case at the PHCM on 16 February 2023 because Judge Doyle was unwell and was unable to continue with the part heard PH which had commenced on 21 September 2023. As a public PH was required to determine the application and Judge Doyle was unavailable, I discussed case management and a number of matters are relevant for the PH to which judgment relates:

    a) Due to the difficulties faced by the claimant in obtaining the limited medical evidence requested by Judge Doyle in September 2022, I ordered that she

confirm by 24 February 2023 that she had her first appointment with her newly instructed psychiatrist and that a copy of Judge Doyle's order had been provided to them. This was something which the claimant agreed she could do and she appeared confident that she could now progress her case.

b) I reminded the claimant of the ongoing duty to comply with the now long outstanding Butler and Buzzard CMOs and to provide further particulars in support of her first claim.

31. Mr Williams was once again helpful in reminding the claimant of the need to comply with the outstanding CMOs in correspondence which he sent to her on 10 March, 22 March and 20 April 2023. I considered the case during this period and on 6 April 2023 I reminded the claimant that she must comply with CMOs made by the Tribunal and ordered that she write to me within 7 days providing me with the information that I had ordered relating to her psychiatrist or the medical report from Dr Schumacher which she had alerted Mr Williams too in correspondence. This further order was not complied with by the claimant.

32. The public PH which would rehear the respondent's applications was listed to take place on 7 July 2023. It was heard remotely by CVP. It was not possible to resolve the outstanding respondent applications because of the additional support and adjustments that needed to be provided to the claimant. However, Ms McCann provided her opening oral submissions which consisted of the background chronology of the case up to July 2023. I relisted the part heard PH to 17 and 18 January 2024 in order that we would have enough time to resolve these matters as the claimant often needed additional time to deal with difficulties beginning the case and so that breaks could be offered as required.

33. In the meantime, I made the following CMOs concerning the second claim which despite having been presented in 2022, had not yet been the subject of a PHCM:

a) By the 18 August 2023, the claimant was to identify each allegation of discrimination (being race, religion, pregnancy and maternity and disability), including when the allegations happened, what happened and who was responsible.

b) In relation to these allegations, the claimant was also asked to confirm by 18 August 2023, whether they were separate events or part of a series of continuing acts and in the case that any of these allegations might have been presented to the Tribunal out of time, why the claimant believes there are reasons which justify time being extended so that they can be accepted by the Tribunal.

c) In relation to the complaint of disability discrimination, the claimant was asked to provide by 18 August 2023, details of the medical conditions relied upon, the period when she has suffered from these conditions, their

effects on normal day to day activities and when/how she believes the respondent was aware of these conditions.

d) In relation to the whistleblowing complaint, the claimant was asked to provide by 18 August 2023 details of the protected disclosure which she relied upon and the detriments which she says she has suffered because she made these disclosures.

34. I was concerned that the claimant might not fully appreciate the problems her continued failure to comply with CMOs might cause her when disputing the respondent's applications and I wanted to remind her that any attempts to remedy these outstanding defaults would only be to her advantage. In paragraph (34) of my Note of PH, I made the following comments:

'…I explained to the claimant that while I was noy yet in a position to determine the respondent's various applications, it was vital that she understood the considerable delay which had already taken place in this case and which was exceptional, even allowing for her personal circumstances. I urged her to consider complying as a matter of urgency with all outstanding case management orders. While I could not tell her what my decision would be [in relation to the respondent's applications], these actions would assist her in making convincing submissions in reply at the next part of the PH arguing against the imposition of sanctions as requested by the respondents in their applications.'

The claimant failed to provide this information and these CMOs were added to the already outstanding CMOs when this PH resumed on 17 and 18 January 2024.

35. It is understood that the claimant has been fit to return to work, but the respondent has allowed her to remain absent on '*paid permitted absence'* since 10 June 2023. Consequently, she would appear to have had more time available to deal with this case since that date. However, further particulars in respect of her claims have still not been provided.

36. As has already been mentioned, the claimant confirmed to the respondent and Tribunal on 18 December 2023 that she was seeking to obtain a letter from her GP. This was not completed until 5 January 2024 and not provided until shortly before the PH on 18 and 19 January 2024 took place.

37. However, I considered the recommendation of her GP concerning the PH taking place in person and I agreed that she could attend the Manchester Employment Tribunal. I accepted that it was proportionate for the respondent's solicitor and counsel to continue to attend remotely by CVP and accordingly the PH was *'hybrid'* hearing, being part attended in person/part attended remotely.

Law

<u>Strike out of a claim under Rule 37</u>

38. Under Rule 37(1) of the ET Rules of Procedure 2013 (ET Rules), a Tribunal has the discretion to strike out all or part of a claim on one or more of the following grounds:

    (a) It is scandalous, vexatious or has no reasonable prospect of success.
    (b) The manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious.
    (c) For non-compliance with any of these Rules or with an order of the Tribunal.
    (d) It has not been actively pursued.
    (e) The Tribunal considers it is no longer possible to have a fair hearing in respect of the claim.

39. Under Rule 37(2) of the ET Rules, a claim may not be struck out unless the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at the hearing.

40. Rule 2 of the ET Rules also provides that an overriding objective of the Rules is that the Tribunal must deal with cases fairly and justly, so far as is reasonably practicable. This includes ensuring that the parties are on an equal footing, dealing with case proportionately in relation to the complexity and importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay insofar as it is compatible with the issues being properly considered and the saving of expense.

Case law

41. Ms McCann provided both the claimant and the Tribunal with a number of cases which reminded us of how a Tribunal should approach strike out applications where the draconian sanction of strike out is being considered. They are as follows:

    No reasonable prospects of success

    a) *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126. The threshold for striking out a claim for having no reasonable prospect of success, is a high one.

    b) *Abertawe Bro Morgannwg University Health Board v Ferguson* [2013] ICR 1126 (CA). Applications for strike out may save time, expense and anxiety. However, in cases which are likely to be fact sensitive such as those involving discrimination, it will be comparatively rare for a Tribunal to take the step of striking out a claim.

    c) *Community Law Clinic Solicitors Limited v Methuen* [2011] EWCA Civ 1783 (CA). Ms McCann reminded me that despite the decision in *Abertawe*, in this case, Moses LJ observed at paragraph [6] that *'It would be quite wrong as a matter of principle…that claimants should be allowed*

to pursue hopeless cases merely because there are many discrimination cases which are sensitive to the facts.'

d) *Mechkarov v Citibank NA* [2016] ICR 1121. Ms McCann noted that the EAT provided an approach to be adopted when a Tribunal considered strike out:

i) Only in the clearest case should a discrimination claim be struck out.
ii) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.
iii) The claimant's case must normally be taken at its highest.
iv) If the claimant's case is conclusively disproved by or is totally and inexplicably inconsistent with undisputed contemporaneous documents, it may be struck out.
v) A Tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts.

e) *Cox v Adecco and Ors* [2021] ICR 1307. The EAT considered how the Tribunal should approach strike out applications involving a litigant in person. Tribunals were reminded that a reasonable attempt should have been made at identifying the claim and the issues before considering strike out or making a deposit order in cases where the claim is poorly pleaded.

Failure to comply with the Tribunal's orders

f) *Weir Valves & Control (UK) Limited v Armitage* [2004] ICR 371 (EAT) was referred to by Ms McCann and in particular she noted the relevant principles to apply where there had been a failure to comply with the Tribunals' orders:

i) A Tribunal must be able to apply a sanction in response to the breach of an order where there has been wilful non-compliance.
ii) It does not automatically follow that deliberate non-compliance should lead to strike out.
iii) Before making a decision to strike out, a Tribunal should consider all of the circumstances and determine in particular, whether a less draconian sanction will address the claimant's default. These factors can include:
- The magnitude of the default.
- Whether the default arises from a party or representative.
- What disruption, unfairness or prejudice has been caused by the default.
- Whether a fair hearing is still possible

I was also reminded that I should guard against allowing indignation at the disregard of its orders to lead to a miscarriage of justice. I repeated this reminder to the claimant when we discussed her submissions in reply to the respondent's application and at the conclusion of the PH.

g) *Essombe v Nandos Chickenland Limited* UKEAT/0550/06. The EAT held that as a matter of public policy, Tribunal CMOs are there to be obeyed, otherwise cases cannot be properly case managed, and it is not possible to achieve fairness between parties.

h) *Barber v Royal Bank of Scotland plc* UKEAT/0301/15. The EAT noted that while CMOs should be obeyed, a Tribunal should not automatically strike out and should instead consider whether it was a proportionate response in the circumstances of the case and whether a lesser sanction is available.

i) *EB v BA* UKEAT/0139/08. Where a claimant deliberately flouted a Tribunal CMO which had the aim of reducing the allegations so as to narrow down the list of issues, it was proportionate to strike out when the Tribunal had explained the purpose behind the CMOs being made.

Claim not actively pursued

j) *Evans & Anor v Commissioner of Police of Metropolis* [1993] ICR 151 (CA). This Court of Appeal decision held that a claim should only be struck out for this reason where:

   i) The delay has been intentional or contumelious, (i.e. disrespectful or abusive of the court).
   ii) There has been inordinate and inexcusable delay, giving rise to a substantial risk that a fair hearing is impossible, or is likely to seriously prejudice the respondent.

k) *Rolls Royce place v Riddle* [2008] IRLR 873 (EAT). In this case, the EAT held that a Tribunal was wrong not to strike out a claim where the claimant falsely informed, he was medically unfit to attend a hearing and had failed to comply with various CMOs.

Fair hearing no longer possible

l) *Peixoto v British Telecommunications plc* UKEAT/0222/07. This was a case where the claimant sought repeated adjournments on medical grounds and 4 years following the presentation of the claim, the Tribunal could not foresee when the claim could be heard. It should be noted that the Tribunal should consider Article 6 of the European Convention of Human Rights, which includes not only the right to have a fair hearing, but also for that hearing to take place within a reasonable time.

m) *Riley v Crown Prosecution Service* [2013] IRLR 966 (CA). A Tribunal was held to be correct in striking out a claim where they had taken account of the absence of a prognosis which explained when the claimant would be well enough to participate and the balance of prejudice to both parties.

n) *Smith v Tesco Stores Limited* [2023] EAT 11. In this case, HHJ Tayler considered the question of striking out an entire claim and whether a fair trial is no longer possible.

Deposit orders

42. Rule 39 of the ET Rules provides that a Tribunal has the discretion to make a deposit order in respect of any specific allegation or argument in a claim where it has *'little'* reasonable prospect of success.

43. This deposit order which should not exceed £1,000, may be made as a condition of continuing to advance a specific argument. However, before doing so, reasonable enquiries must be made as to the claimant's ability to pay the deposit.

Case law

44. Ms McCann referred to the case of *Hemdan v Ishmail & anor* [2017] IRLR 228 (EAT). The purpose of a deposit order once a claim which has been identified as having little prospect of success is to discourage the pursuit of those claims. The test is less rigorous than that for striking out, but there had to be a proper basis for doubting the prospects of success, though this assessment need only be summary in nature to avoid cost and delay.

Jurisdiction (out of time)

45. Those claims which fall within the Equality Act 2010 (EQA), are subject to test applied in section 123. The relevant question is whether the claimant presented her claim with the period of 3 months (subject to any period of early conciliation extending this period), from the date of the alleged act of discrimination.

46. If an allegation of discrimination forms part of a series of continuing acts, the 3-month period only begins from the date of the final act in that series.

47. If the claim is determined to have been presented outside of the 3-month period, the Tribunal may exercise its discretion to extend time if it is just and equitable to do so.

Case law

48. Ms McCann referred to several relevant cases to be taken into account by Tribunals when considering time limit issues and they are referred to below:

a) *Hutchinson v Westward Television Limited* [1977] ICR 279 (EAT). This case held that a Tribunal must consider all relevant factors when deciding to consider whether to extend time and therefore, it has a wide discretion available to it.

b) *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434 (CA). This well-known decision reminds Tribunals that time limits are meant to be complied with and the expectation is that they be applied strictly. A claimant should not presume that the extension will be granted and it remains their burden to persuade the Tribunal that it is just and equitable to do so.

c) *British Coal Corporation v Keeble* [1997] IRLR 336. This decision reminded the Tribunal that section 33 Limitation Act 1980 provides a useful list of relevant factors to consider when determining issues relating to time limits.

d) *Adedeji v University Hospitals Birmingham NHS* Foundation [2021] EWCA Civ 23 added that the section 33 list (above), should not be treated as exhaustive or used a simple checklist when considering relevant factors before deciding whether or not to exercise its discretion.

e) *Edomobi v La Retraite RC Girls School* UKEAT/0180/16. The EAT noted that relevant factors that the Tribunal may consider are:

- The extent to which a respondent has cooperated with requests by a claimant for information.
- The promptness the claimant acted once she knew of the facts giving rise to a potential claim.
- The steps taken by the claimant to obtain appropriate advice once she knew that she may have a claim.

Where it is reasonably apparent the claimant will face an uphill struggle at a final hearing, an extension of time is less likely to be appropriate. While this will require some enquiry by the Tribunal, it should be expected to hold a 'trial within a trial'.

f) *Miller v Ministry of Justice* UKEAT/0003/15. When considering the prejudice to each party when deciding to agree to/refuse an extension of time, relevant factors may be:

- The extent to which cogency of evidence is likely to be affected, which can be particularly relevant where a respondent's involvement in an allegation ended long before the claim was presented.
- Whether it is possible to have a fair trial.

Though a Tribunal should note that an extension will always have some prejudice as the claim would otherwise have been prevented by a limitation defence succeeded.

Respondent's submissions in support of the applications

49. Ms McCann had already provided two sets of written submissions, one for the PH in July 2023 and a further version for January 2024. I do not propose to

repeat these written submissions in detail as they are contained within the documents provided by Ms McCann.

50. Ms McCann also provided detailed oral submissions augmenting those put in writing and I provide a summary of the matters raised.

51. Firstly, she reminded me of previous guidance given to the claimant by Judge Buzzard in his order dated 26 August 2022, Judge Doyle on 21 October 2022 and myself at the July 2023 concerning the importance of complying with orders and avoiding delay.

52. Similarly, she also referred to numerous attempts made by Mr Williams in email correspondence urging the claimant to comply with the outstanding case management orders.

53. Despite this encouragement being provided, Ms McCann said that the claimant had still not complied with the orders made by Judge Butler, Judge Buzzard and myself and that the two claims remain as unspecified today as they did when the claim forms were presented.

54. In terms of the compliance with the Judge Doyle order to provide medical evidence in October 2022, she said that the claimant had only tried to obtain a letter from her GP on 18 December 2023 and that the information provided was simply too little, too late, '*leaves more unsaid than said'* and doesn't properly engage with what Judge Doyle asked her to provide.

55. She noted that the GP letter did not consider the claimant's impairment of IBS, did not explain the claimant's ability or otherwise to write to the respondent or the Tribunal and referred to a private diagnosis of ASD without disclosing the report in question. Moreover, the actual GP letter was only provided shortly before the PH took place. Ms McCann noted that the claimant had had plenty of time to obtain the medical evidence and had been encouraged and reminded by both the Tribunal and Mr Williams of the need to comply with the case management orders. Instead, the sum total of the medical information provided more than a year after the order was originally made by Judge Doyle, is a single GP letter.

56. In terms of the application to strike out, Ms McCann reminded me of the provisions of Rule 37 and the relevant law. She noted that *Cox v Adecco* (citation above), provided that a Tribunal should make a reasonable attempt to identify the claim before ordering strike out. Once again, she referred to previous case management orders since October 2021 seeking further particulars from the claimant and argued that this represented a reasonable attempt to identify the claim. Indeed, she noted that Judge Doyle attempted to assist the claimant by ordering early disclosure by the respondent of grievance documentation so that she could identify a list of factual events. The respondent complied with this order.

57. In terms of the ongoing failure to comply with the Tribunal's case management order, Ms McCann referred to *Weir Valves* (above) and the

relevant principles to be applied. This included the guidance that noncompliance should not automatically result in a decision to strike out, but that while this might be the case, parties must obey case management orders, (*Essombe* (above)).

58. Ms McCann also argued that both claims did not have any reasonable prospect of success because of an '*embarrassing want of particularity…despite [the claimant] having been afforded a significant amount of time to particularise her claims…'.* The absence of particularisation meaning that a Tribunal could not uphold the complaints of discrimination on any of the protected characteristics raised. She referred to the claims not referring to failures in the grievance procedure despite being the most recent and timely events before the two claims were presented. Additionally, in relation to the second claim, the respondent had submitted that the claimant had brought this complaint because of the second grievance which did not complain about discrimination against her.

59. She argued that a fair hearing was no longer possible once you consider the time that has elapsed in these proceedings, the resources already engaged and the absence of information concerning claims going back to 2014. The delays had prevented the respondent from identifying the issues and obtaining evidence from the relevant witnesses. She noted that Ms Cripps (who until recently was the third respondent), had left the respondent's employment on 31 August 2020 and it may be difficult to obtain her evidence.

60. In terms of the application for a deposit order, Ms McCann noted that Judge Buzzard clearly set out the process involved and that if I felt that a specific allegation had little reasonable prospect of success, I could impose a deposit order at an appropriate amount.

61. Ms McCann reminded me of the *Presidential Guidance for Vulnerable Parties and Witnesses,* the relevant provision of the *Equal Treatment Bench Book* and the *Advocates Gateway Toolkit Number 17.* However, she submitted that the claimant had been treated extremely sympathetically by the Tribunal. However, the case remains in the same position that it was two years ago.

62. She reminded me that the claimant had sought to postpone on 5 occasions the PHs which had been listed and while the Tribunal has still been able to consider the case and make case management orders, there has been a failure to comply by the claimant making a hearing no longer possible.

63. Reference was made on several occasions during Ms McCann's oral submissions to the case of *Smith v Tesco* (above) where HHJ Tayler discussed where a fair hearing was no longer possible and in particular, paragraphs (41) to (42) which referred to previous cases describing the meaning of this term. The emphasis being upon a point being reached where having considered, a disproportionate number of resources will be engaged taking into account the demands of other litigants and the court's resources. This can include not only the resources of the Tribunal in relation to this case, but also in respect of other court users.

64. Ms McCann also considered the question of time limits and reminded me of the relevant legal test under section 123 EQA and the need to consider all relevant factors, but that there was no presumption that it would be just and equitable to extend time if an allegation is out of time.

65. She noted that the first claim was presented on 17 December 2020, but that as she notified ACAS as part of early conciliation on 22 October 2020, any allegation which happened before 23 July 2020 would be out of time. She noted that the claimant based upon her claim as currently presented, did not identify any grievance complaints postdating her grievances submitted to her employer in December 2019 and February 2020. Even though the claimant did not identify the grievance as being discriminatory, the latest possible allegation identified in the claim form dated from 15 February 2020 and 24 February 2020.

66. In terms of the second claim, this was presented on 16 June 2022, following a period of early conciliation beginning on 5 April 2022. Any allegation which took place before 6 January 2022 was out of time. The complaints relied upon by the claimant in this claim form are related to the outcome of the second grievance provided in January 2022, but involve allegations which ended on 13 September 2021. Accordingly, she says that this claim form was presented out of time.

67. In both claims, Ms McCann says that the claimant has not demonstrated it is just and equitable to extend time and accordingly, should be dismissed.

68. She concluded by summarising 5 overlapping matters which should give rise to an order for strike out, namely:

    a) A failure by the claimant to progress her case.
    b) A failure by the claimant to comply with case management orders.
    c) That the delays mean that a fair hearing is no longer possible.
    d) That the claims are out of time.
    e) The claim remains so unspecified that it is necessary to strike out.

Claimant's reply to the respondent's application (and respondent's comments where appropriate)

Preliminary note

69. The claimant was able to consider her reply to Ms McCann's submissions overnight as I had allowed a second day for this resumed PH on 18 January 2024. Despite being unrepresented and not having English as a first language, I found that she was able to argue her position strongly. At times she needed to reminded of the need to deal with the substance of the preliminary hearing issues and not the history of her employment with the respondent, but I was satisfied that she was able to provide an explanation as to why she believed the delay arose and why it was still possible for the

outstanding case management orders to be complied with by her and for a fair hearing to take place.

70. She arrived at the Tribunal complaining of several health symptoms but was allowed time to book a GP appointment for the afternoon and to obtain some medication from a nearby pharmacy before the hearing resumed later in the morning session, which was not until 12:30pm.

71. Before the claimant began her submissions, her reminded her of the issues that I was being asked to consider in relation to the respondent's application and she needed address me concerning the arguments raised by Ms McCann the previous day. I reminded the parties that the case would finish today as it would not be in the interests of justice to allow any further delay and it would not help the claimant if the PH was delayed any further. However, with the limited time remaining, I explained that it was likely that I would need to reserve my decision until a later date.

72. The claimant required a further short break to consider her arguments and I decided that it would be proportionate to break until 12:50pm and then continue without a formal lunch break until submissions had been concluded, but with shorter breaks as required.

The claimant's submissions

73. The claimant began her submissions by accepting that it was correct she was in default of the case management orders made by the Tribunal, and which were the subject of the applications made by the respondent.

74. However, she argued that there were reasons for this delay which she attributed to health issues in February 2023 and July 2023 and that Judge Doyle was the first Judge to engage with her health difficulties.

75. Additionally, she wanted to ensure that the Tribunal was able to look at all of the relevant incidents when she provided further particulars. Her alleged incidents went back to 2014 and were still happening.

76. She also referred to the considerable trauma she had suffered arising from a diagnosis of MS, her suspension and severe IBS, (the latter condition beginning in 2019). She referred to some of the PHs and argued that she became overwhelmed while having to manage several health conditions.

77. While she acknowledged that she had not provided all her medical evidence to the Tribunal and respondent but referred to attending an expert in Switzerland concerning MS in late 2022/early 2023. This meant that she had a report which was not produced in English. This also happened in relation to the diagnosis of ASD in 2023. She believed she had done everything that she could but had faced many challenges. However, she said that she was now at peace she could provide the further information that was required from her within 2 weeks.

Ms McCann's reply to the claimant

78. Ms McCann commented on several the points made by the claimant. She noted the ASD diagnosis report having been provided by 20 November 2023 and yet since then had done nothing to progress the outstanding case management orders. She noted that the GP letter recently disclosed provided no indication of the claimant experiencing problems with writing to the Tribunal, which suggests that correspondence should not be a problem for the claimant as the GP only mentioned a need to attend hearings in person. She noted that Judge Doyle had observed the possibility of neuro divergence at the PH in October 2022 and was aware that the claimant might be a vulnerable party requiring additional medical evidence.

79. She noted that I revised Judge Doyle's order for the claimant to provide medical evidence in February 2023 and urged her to keep the Tribunal and respondent informed of any difficulties being experienced when problems arose. The delays which had arisen she said, rested solely with the claimant.

Discussion

80. This case has had an unfortunate history and involves proceedings which began on 17 December 2020. Since this date, a second claim was presented on 16 June 2022 and it was only shortly after this date, that the first preliminary hearing case management (PHCM) could take place before Judge Buzzard on 15 July 2022. This occurred following several postponements of previously listed PHs which apart from one incident of *'a lack of judicial resources'*, arose from requests made by the claimant.

81. Unfortunately, the claimant was unable to attend the first effective PHCM before Judge Buzzard and had sought a postponement. However, it was in the interests of justice to hold a case management hearing as more than 18 months had elapsed since the first claim form had been presented. Although Judge Butler had made an order for further particulars to be provided by the claimant by 9 December 2021 (made on 28 October 2021), there had been no compliance by the claimant and no progress in advancing the claim. This of course was the claimant's claim, and it was for her to pursue it.

82. It is fair to say that the claimant has had several issues in her personal background including several pregnancies and other health issues, which understandably will have placed her under additional difficulties in attempting to move her claim forward. I have noted the management of the case by Judge Buzzard and Judge Doyle in relation to their PHCMs. They have both attempted to allow the claimant time to set out her claim and comply with case management orders. Moreover, Judge Doyle on 21 September 2022, allowed the claimant time to obtain what was in effect basic medical evidence to assist the Tribunal in identifying the extent of any impairments and the nature of any reasonable adjustments that can be employed to allow the claimant to participate effectively within the proceedings.

83. I have also been acutely aware that this is a case where the claimant has been faced with a respondent who has displayed considerable patience in assisting the claimant (in accordance with the overriding objective) and provided numerous gentle reminders to her when dates for compliance have been approaching and when they have been passed. The Tribunal as a jurisdiction is fortunate in that most legal representatives of parties fully appreciate their duty to cooperate with litigants in person and it is rare that you see examples of them taking advantage of their opponent's lack of legal knowledge. However, in this case I believe that the respondent's solicitor Mr Williams has behaved impeccably and has been supportive of the claimant (insofar as his role as respondent solicitor allows him) and he deserves a great deal of credit as it has assisted the Tribunal in its management of this challenging case. While he has issued applications seeking the imposition of sanctions by the Tribunal against the claimant for failure to comply with case management and jurisdictional issues relating to time, they were reasonably made and could not be considered as having been made prematurely.

84. Accordingly, by the time I first dealt with this case in February 2023, I was faced with proceedings which had been in the Tribunal system for more than 2 years. However, they had not progressed to any real degree with an effective PHCM where a final list of issues could be considered, a final hearing listed and orders made for disclosure, bundles and exchange of witness evidence, having not yet been possible. This is essential to ensure that a case progresses in such a way that provides clarity and keeps the timetable and the hearing length to a manageable and proportionate level.

85. Although the second claim form had been presented in June 2022, it had not been possible to consider it because of the outstanding application made in relation to claim 1 and due to attempts having been made to identify the best way to support the claimant and Judge Doyle' understandable concern that any adjustments be identified.

86. I attempted to continue with this supportive process and was not able to begin (re)hearing the actual PH dealing with the respondent's applications until July 2023. Indeed, rather than rush the decision, adjustments were made to support the claimant during these hearings and a further 2 day PH took place in January 2024. Despite my attempts to encourage the claimant to make some attempt to deal with the outstanding applications, comply with the outstanding case management orders and in effect to use the delays arising in the listing of these PHs, she appears to have taken no steps to attempt even the smallest acts of compliance. Even the medical evidence from her GP which was an attempt to comply with Judge Doyle's original order made in October 2022, was provided immediately before the PH in January 2024, and as explained by Ms McCann, did not fully respond to the questions which Judge Doyle had raised.

87. I do recognise that the claimant has found the proceedings to be challenging, but in the absence of any medical evidence in support, I am concerned that the periods between hearings involve little or no attempts to progress her claim and that it is only at the actual hearings where the claimant actively

participates in what is after all, her claim. Although promises were made by the claimant that she had now turned a corner and could actively progress her claim, I have not been convinced by her previous failures to do so or at least engage in active communications with the respondent to demonstrate what is or isn't happening and why that is the case.

88. Ultimately, the PHs when listed serve as points in the process where in this case the claimant engages in brief activity, but her focus appears to be more about what she hasn't done rather than demonstrate attempts were being made to progress the claim, if only to a small degree.

89. This is a case of course which not only involves the claimant, but a respondent who have no doubt already invested considerable resources in legal professional fees as well as internal HR and other resources. They will also have concerns regarding those staff who might need to be called as witnesses and in the absence of further particulars remain anxious that those staff may leave their employment, (as one already has) and the extent to which they can maintain a clear recollection of the events in question. Cases involving allegations of discrimination (however vague they are initially pleaded), also place the claimant's colleagues under a great deal of stress and anxiety as being accused of discrimination places a huge emotional load upon most right thinking people. It is therefore essential that cases are managed and progressed quickly as a failure to do so not only prejudice a claimant in being able to seek relief, but also a respondent in being able to properly defend a claim and to keep its costs in defending a claim to a minimum.

90. The Tribunal of course also manages a great many cases dealing with a variety of issues, but which all require the involvement of Tribunal staff and Judicial resources and physical and virtual hearing rooms. While the claimant must be supported as a litigant in person, as a mother and as a person with several health issues, there is no question that the Tribunal have not been incredibly supportive and patient in allowing her to reach a point where the claim can be progressed. However, I have become acutely aware that despite the efforts of the other stakeholders in this process to encourage the claimant to make some effort to advance her claim, we are virtually no further forward than we were when the first claim and response were presented to the Tribunal. This does appear to be a real problem given the need to deal with cases efficiently.

91. This is disappointing because I do feel that the claimant has been fairly treated and rather than be faced with an increasingly irritable and indignant judiciary, has been encouraged sympathetically to rescue her claim from what has been a considerable period of inertia.

92. In terms of the application made by the respondent to strike out the claims, the claimant presented her first claim on 17 December 2020 and despite the claimant being ordered to provide a reply to the further particulars, initially by Judge Butler on 28 October 2021 and then Judge Buzzard on 15 July 2022 and reminders being sent by the respondent's solicitor, she has failed to

provide a reply. Judge Buzzard also reminded the claimant in his Note of PH, that non-compliance with his order would be considered when the respondent's initial application for strike out would be considered.

93. I am conscious of the draconian nature of the sanction sought by a party in a strike out application and it is not a decision to take lightly. In the spirit of *Cox v Adecco* (above) I acknowledge Ms McCann's submission that a reasonable attempt should be made to identify the claim and the issues before considering strike out. This has been plainly done by the Tribunal in the way they have allowed the claimant time to comply with the case management orders and Judge Doyle even allowed early disclosure of the respondent's grievance documentation to assist the claimant in setting out her claim.

94. In the absence of these further particulars the respondent and the Tribunal are in an impasse where it is not possible to assess the basis to identify a clear list of issues which reveals a viable case which can proceed to a final hearing. The claimant has not provided any clarity regarding her first claim despite having been ordered to do so, which makes it very difficult for any consideration to be given to what is the arguable case being advanced.

95. In term of the failure to comply with the orders, the claimant accepts that this is the case. I appreciate the claimant's difficulties and do not believe that she has wilfully not complied, but we have reached point having considered the chronology of events where what are effectively less draconian sanctions have been deployed such as extensions of time. However, this has not resolved the problem and the increasing magnitude of the default arising from repeated failures by the claimant to comply with the outstanding case management orders means that less draconian sanctions are no longer practicable.

96. Moreover, as I have already explained, the disruption, unfairness and prejudice these repeated defaults has caused to the respondent have become significant. I have also reminded myself that case management orders should be obeyed by a party, and it would be wholly unreasonable to keep offering chances to a party with the increasingly forlorn hope that they would eventually be complied with. I do feel that this is a point that we have now reached in these proceedings and unfortunately, the claimant has failed to persuade me otherwise in her submissions and general conduct between February 2023 and January 2024.

97. It is now necessary to consider the question of whether either of the two claims have reasonable prospects of success. This is something which should be considered carefully with the claimant's case being considered at its highest and as indicated in *Abertawe* (above), fact sensitive cases such as discrimination should not usually be struck out. However, the decision in such cases is described in that case as being *'comparatively rare'* and *Community Law Clinic Solicitors Limited* (above) reminded me that a claimant should be allowed to pursue a hopeless case and as already mentioned, *Cox v Adecco* reminds Tribunals to make a reasonable attempt to identify the claim and issues before striking out in cases that are poorly pleaded.

98. This of course is the problem for the claimant. She is a litigant in person and has presented two claim forms which while providing some indication of a narrative supporting complaints of discrimination and other matters, they have not been sufficiently pleaded to enable a PHCM to take place to identify a list of issues and allow the respondent to know the case it is facing and the evidence it needs to secure to resist the claim.

99. The claimant has been afforded ample opportunity both in relation to the first claim, but also in relation to my more recent case management order for the second claim to provide further particulars which deals with the simple questions of *'when', 'what', 'who' and 'why'.* Without these a point must be reached where the Tribunal acknowledges as respondent's concerns that these claims cannot proceed due to the absence of those particulars and therefore have no reasonable prospects of success.

100. This is because of the significant failure to comply with the Tribunal's orders (particularly in relation to claim 1) which is of course a ground for strike out raised by the respondent and which is demonstrated by the impact that this failure has had upon the ability of all concerned to progress the claimant. However, a further consequence is that what began as a case with possible arguable grounds, remains in a state where it is appropriate to find that no reasonable prospects of success exist. I make this finding in relation to both claims as it is a ground relied upon by the respondent in both of their applications for strike out.

101. This then leads me onto the consideration of whether the claimant has not actively pursued her claim, which is a ground relied upon in relation to her first claim. In accordance with the case of *Evans & anor v Commissioner of Police for the Metropolis* (above), and for the reasons I have already given above, I do not believe on balance that the claimant has deliberately, disrespectfully or abusively engaged in a delay. However, while this might not be the case, I do believe she has satisfied the second limb of this test applies in that the delay has been inordinate and inexcusable and gives rise to a serious risk that a fair hearing is no longer possible, and that serious prejudice has been caused to the respondent.

102. This of course brings us to the final ground of the respondent's application for strike out, namely the question of whether a fair trial is no longer possible. The claimant has now more than 3 years following the presentation of her first claim failed to provide details demonstrating a viable claim and while there are some health issues involved, has not provided any meaningful medical evidence to support her belief that she is now in a position that she can progress her case and that any further delay in these proceedings can be avoided. I do not feel confident that if I allowed the case to continue, we would be able to avoid a further PH within the next few months arising from a further default on the part of the claimant based upon the repeated defaults having been encountered in these proceedings and without any attempt being made by her to communicate within good time to manage the expectations of the respondent or the Tribunal.

103. The case of *Smith v Tesco* is a helpful reminder that unfortunately cases exist when everything has been done *'to get to grips with the issues in a claim' (para 1)* and that a Judge may reluctantly conclude that through the unreasonable behaviour of a party and a failure to comply with the overriding objective, *'there is no proportionate lesser sanction than striking out the whole claim…'.* Reference is made to a claim not being presented in a logical format and while a litigant in person may not know the relevant law, they should be able identify the basic allegations which set out 'when', 'what' and 'who' happened in relation to allegations, (as I have already mentioned above). Despite patient and lengthy case management we appear to be no closer to identifying the core list of issues which would allow us to proceed to list the case for final hearing, along with appropriate case management orders concerning disclosure, bundles and witness evidence.

104. I must stress that the Judges hearing the case earlier in the proceedings have all tried to case manage effectively, but also sympathetically, taking into account the claimant's litigant in person status, her not having English as her first language, having childcare issues and having health issues. Unfortunately, the claimant has failed to properly engage with her claim despite the allowances being made for her, but which has only served to undermine her prospects of bringing a claim that can proceed to a final hearing. I feel disappointed that this situation has arisen, because there have been many stages along the way where the Judges and even the respondent's solicitor have attempted to provide a *'reality check'* as to what might happen if the claim is not progressed.

105. This delay has therefore had the consequence that a disproportionate amount of time and money has been spent and, likely, the continuation of these proceedings will result in a further delay which increase this outlay further. This is something which will impact upon the possibility of there being a fair hearing. Unfortunately, this is a case where it might be possible at some point in the future to have a viable trial but to do so would involve an ever-increasing use of party time, Tribunal time and consequential financial resources that it would be inconsistent with the notion of fairness and the wider principles of the overriding objective.

106. It is sad that we have reached this stage, but there must be a point when a claimant can be said to have been afforded every reasonable opportunity to advance her claim and yet has failed to do so. It is my finding that we have reached such a point. Theoretically, it might have been possible to reach a position where a viable claim could proceed, but the claimant had simply not demonstrated any genuine cooperation with the case management orders to suggest that it was a reasonable prospect within the near future.

107. I did briefly consider the question of deposit orders under Rule 38 and acknowledge that this is something which I had been asked to consider. However, considering my decision to impose the sanction of strike out, it is likely that such an order would also have been appropriate had I stopped short of deciding to strike out. This is especially the case given that I

accepted the respondent's pleaded ground in both applications/claims that the claims have no reasonable prospect of success. The difficulty was that the claimant had not provided sufficient further particulars to identify the allegations for a list of issues and this application would have been more relevant had a stage been reached where such a list had been finalised. If I am wrong in finding for the harsher *'no reasonable prospects of success'* argument, I would have nonetheless found for the reasons given above, that '*little reasonable prospects of success'* would be an appropriate decision to reach in the alternative.

108. In terms of time limits, the question jurisdiction is no longer important given my decision to strike out. However, I am grateful for the logical arguments advanced by Ms McCann concerning both two claim forms presented by the claimant.

109. In relation to the first claim, I do accept that the claim form was presented more than 3 months after the final allegation with ACAS not being notified until 22 October 2020. The earliest allegation that would have been in time under section 123 EQA would have been 23 July 2020. The grievance decision of February 2020 appears to have been the latest possible allegation (although the respondent notes that the conduct of the grievance process was an allegation in itself) and is some time before the 23 July 2020. The claimant did not provide any explanation of the reasons for the delay and on the face of it, I could see no just and equitable reason for agreeing to extend time under section 123 EQA.

110. The second claim was presented on 16 June 2022, but with ACAS notified on 5 April 2022, meaning any allegation arising before 6 January 2022 would be out of time under section 123 EQA. The second grievance outcome is understood to give rise to this claim and that was given on 6 January 2022. However, the claim was about the allegations which took place several months earlier. I acknowledged the arguments made by Ms McCann concerning the allegations predating the initial grievance meeting and the claim being about them rather than the grievance process. I also took into account the claimant having been supported in the grievance by a trade union official.

111. However, it is the claimant's job to properly identify her claim and she has been given ample opportunity to do so. In the absence of further particulars from the claimant allowing the Tribunal to identify the timeline of the allegations and the role the grievance played in any alleged discrimination, I find that the second claim was not presented in time.

112. The claimant did not identify in her submissions, any grounds supporting and extension of time under section 123 EQA and accordingly this cannot be allowed. This is however, of little consequence given the findings above concerning strike out.

Conclusion

113. Accordingly, considering my decision regarding the respondent's applications made under Rule 37 and my agreement that both claims should be struck out, it is not necessary to deal with the question of unless orders or further case management. The claims have been brought to an end effectively due to the failure to comply with case management orders, giving rise to delay, a failure to pursue and ultimately a situation where the claims as originally presented, have been developed by the claimant in accordance with the further particulars requested by the respondent and ordered by the Tribunal.

114. I appreciate that the claimant has found the proceedings difficult and challenging. However, that is why the Tribunal has been unusually tolerant in allowing postponements, adjustments during hearings and delaying actions insofar as is reasonable. This has involved balancing the claimant's difficulties against the prejudice caused to the respondent and the Tribunal's ability to allocate resources in proportion to the needs and issues of this particular case.

115. For these reasons, the judgment of the Tribunal is as follows:

(a) In relation to claim 1 (Case Number: 2420018/2020), the claim is struck out in accordance with Rule 37 of the Tribunals' Rules of Procedure. The reasons for this decision are:

(i) Because of the claimant's failure to comply with the orders of Judge Butler made on 28 October 2021 and her further default following Judge Buzzard being ordered for second time to provide those further particulars and which remain outstanding at the date of this preliminary hearing.

(ii) Because the claimant has actively failed to pursue her claim.

(iii) It is no longer possible for there to be a fair hearing.

(iv) The Tribunal does not have jurisdiction to hear this claim because the claim form was presented out of time and it is not just and equitable to extend time in accordance with section 123 Equality Act 2010

(b) In relation to claim 2 (Case Number: 2203956/2022) and pursuant to the respondent's application dated 6 October 2022, the claim is struck out in accordance with Rule 37 of the Tribunals' Rules of Procedure. The reasons for this decision are:

(i) The claim has no reasonable prospects of success.

(ii) The Tribunal does not have jurisdiction to hear this claim because the claim form was presented out of time and it is not just and equitable to extend time in accordance with section 123 Equality Act 2010.

(c) The respondent's application dated 31 October 2022 seeking a deposit order in respect of claim 2 is not granted because of the decision to strike out this claim as described in paragraph (2) (above).

(d) The respondent's application dated 31 October 2022 seeking an unless order under Rule 38 of the Tribunals' Rules of Procedure in respect of the provision of medical evidence by the claimant is not granted because of the decision to strike out described in paragraphs (1) and (2) (above).

(e) The further applications made by the respondent concerning the provision of further particulars by the claimant, identifying the list of issues and the making of case management orders are not granted because of the decision to strike out described in paragraphs (1) and (2) (above).

_____

Employment Judge Johnson

Date 16 February 2024

JUDGMENT SENT TO THE PARTIES ON

29 February 2024

FOR THE TRIBUNAL OFFICE

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