EMPLOYMENT TRIBUNALS

Claimant: Mrs L Roy

Case number 1804260/2022

Respondents:
1. Leeds and York Partnership NHS Foundation Trust
2. Mr Christopher Butler
3. Mrs Lindsay Jensen
4. Mr William (Bill) Fawcett
5. Mr Carl Starbuck
6. Rev Christopher Butler
7. Lindsay Jensen

Case number 1804264/2022

1. Mr David T Syms
2. Paul Bullivant
3. Unison HQ
4. Leeds and York Partnership Foundation NHS Trust
5. Dr Sara Munro
6. Mrs Lindsay Jensen
7. Mrs Lindsay Jensen
8. Mr William (Bill) Fawcett
9. Mr Carl Starbuck.

Heard at: Leeds **On:** 2 and 3 November 2023

Before: Employment Judge Maidment

Appearances
For the claimant: In person
For the respondents 1,2 and 3 in case no.1804264/22: Ms A Palmer, Counsel
For all other respondents: Mr D Bayne, Counsel

RESERVED JUDGMENT

The claimant's claims are all struck out.

REASONS

Purpose of today's hearing

1. The tribunal refers to Leeds and York Partnership NHS Foundation Trust as the first respondent, recognising that there are also 6 named individual respondents who were in the first respondent's employment. Unison, Mr Syms and Mr Bulllivant are referred to collectively as the union respondents. Today's preliminary hearing had been relisted to determine applications by the respondents to strike out the claimant's complaints, or some of them. The tribunal is to determine:

    1.1. whether part or all of the claims should be struck out as having already been litigated or as an abuse of process
    1.2. whether part or all of the claims should be struck out as having been settled
    1.3. whether part or all of the claims should be struck out as a result of being presented out of time
    1.4. whether part or all of the claims should be struck out as having no reasonable prospect of success
    1.5. whether an order should be made for the payment of a deposit by the claimant as a condition of continuing to advance all or any of the claims.

Consequences of the preliminary hearing on 6 July 2023 and the claimant's further applications

2. At the start of this hearing, the tribunal referred back to the previous preliminary hearing on 6 July at which it was determined that a significant number of the claimant's complaints stood as dismissed as a result of the claimant's non-compliance with an unless order. The tribunal explained that the respondents' applications, therefore, were in respect only of those claims which remained. This included a claim of unfair dismissal against the first respondent. It had been expected that the above applications would be determined at the hearing on 6 July, as directed by Employment Judge Shepherd at a preliminary hearing on 23 February 2023, but there had been insufficient time to consider them.

3. It had been anticipated at the last preliminary hearing that the claimant would make an application for relief from sanction in respect of the dismissal of the other complaints. The tribunal stated within it case management orders, when considering the arrangements for this preliminary hearing, that, whilst it could not make any orders in respect of an application not yet made, "the claimant was clear in her intention to apply for relief from sanction in respect of the dismissal of her claims arising out of the non-compliance with the unless order." The tribunal determined that it was appropriate to list this further preliminary hearing to deal with the respondents' applications "but in circumstances where at the same time the tribunal can also determine any application for relief from sanction made by the claimant." From the tribunal's perspective, having reviewed the tribunal's file in terms of documentation received from the parties since the earlier preliminary hearing on 6 July, no application for relief from sanction had, however, been made by the claimant.

4. The respondents, as ordered by the tribunal, had provided skeleton arguments in respect of the strike out applications they intended to pursue. Those skeleton arguments were submitted on the basis that they related only to those claims which survived the failure to comply with the unless order and where the claimant had not made any application in respect of the previously dismissed claims. It is noted that the claimant, whilst not herself ordered to do so, had submitted her own skeleton argument in response to those submitted by the respondents.

5. At today's hearing, the claimant asserted that, when the unless order had been made, she had on 21 June 2023 applied "for the opportunity to defend my claims on the schedule which had been dismissed."

6. On 7 June 2023 Employment Judge Davies had made an unless order in the following terms:

> "Unless by 9am on 19 June 2023 the claimant sends to the Tribunal and the respondent an annotated copy of the schedule of allegations sent to her on 30 March 2023, which provides all of the information highlighted for her to provide each and any complaint for which she has not provided the highlighted information will stand dismissed without further order.
>
> The claimant MUST NOT complete the schedule by referring or cross referring to documents. The information itself must be added to the schedule.
>
> The claimant MUST NOT annotate the schedule with comments about disclosure or other comments.
>
> She must simply say in clear words what her complaints are."

7. Within the deadline provided for in this order, the claimant submitted a schedule of allegations with her annotations.

8. The tribunal does not accept that the claimant's document of 21 June 2023 amounted to an application for relief from sanction or was ever intended as such. She referred to this at the preliminary hearing on 6 July as an application for the tribunal to make orders relating to the report of an IT specialist which the claimant had herself independently commissioned to support her claim that her personal IT devices had been hacked. The tribunal refused to make any orders.

9. At the time the claimant made this application, she had attempted to comply with the unless order and considered that she had provided the information highlighted as outstanding within the schedule of claims prepared by the first respondent. She believed that she had complied with the unless order, not that her claims stood as dismissed. It was in that context that the tribunal spent a considerable amount of time going through the claimant's annotations to the schedule of claims to understand whether there had been compliance. It was obvious that, whilst the claimant was seeking further disclosure from the respondent, she believed that she had given the information required by the unless order. As set out, within the unless order, it had been emphasised that

she was being asked to simply say in clear words what her complaints were rather than, for example, refer to any further disclosure required.

10. The claimant was only aware of the application of the sanction of dismissal of many of her claims as a result of the review undertaken at the preliminary hearing. Hence, it was understood that the claimant might then apply for relief from sanction, as confirmed by the tribunal at that hearing. The tribunal referred to Rule 38(2) of the Employment Tribunals Rules of Procedure 2013 and the applicable time limit for making an application for relief from sanction, which was clearly on the basis that time would run from the date of the preliminary hearing. The aforementioned paragraphs of the case management orders again clearly anticipate a future application whilst recognising that there was at that point no live application - a position the claimant clearly understood and never sought to contradict. The tribunal suggested to the claimant that it might be of assistance to her in any such future application if she remedied the defects in the further information required pursuant to the unless order. The tribunal notes that she has not attempted to do so.

11. The tribunal has today revisited the claimant's document submitted on 21 June 2023 which carried the heading: "Notice for a review of expert report, court orders, disclosures and unless order dated 7 June 2023." Her opening paragraph then states: "C requests her application for a review of expert report, disclosures and court orders is now prioritised and a half day hearing is allocated for it. This now being C's sixth request." The claimant then referred to her first request for review having been made on 12 September 2022. She then went through much of the history of these proceedings. The focus was clearly then on the issue of her expert's report. The claimant did assert that the tribunal's failure to consider her application for review of the expert's report had impacted on her not being able to fully respond to the schedule of claims saying: "C now requests a full day case management hearing to review the expert report, prior to any consideration for her claims being struck out."

12. Today, the claimant has referred to this application saying, in addition, that the expert report did not comply with the civil procedure rules, was not honest and her IT devices had continued to be hacked. She said that the tribunal needed expert evidence to understand the claimant's claims.

13. The claimant has also today suggested that her skeleton argument. submitted in the last 2 weeks for this hearing, amounts to an application for relief from sanction. Within that skeleton she addressed biases and dishonesty within her IT specialist's report whilst maintaining that there was evidence to show that the respondent had been hacking her. She then recounted alleged biases in her previous tribunal complaints and the conduct of these proceedings. At paragraph 11(7) on page 10 of her skeleton, she stated that the unless order of 7 June 2023 was "biased, on the basis the ET Judge lacked knowledge on the subject matter of hacking". She referred then in the following paragraph to myself having confirmed at the previous preliminary hearing that I lacked knowledge on the subject of computer hacking, saying that, on that basis, an expert should have been appointed. The claimant then referred once more to the alleged acts of hacking.

14. At paragraph 13 of her skeleton, the claimant referred to the schedule of complaints suggesting that the onus should not be placed on her to recount how the respondent had hacked her over many years. The onus should be on

the first respondent to disclose what it had done. Had there been further disclosure "this would have enabled C to accurately complete her claims and Schedule of Complaints. It is conscious prejudice and dishonesty that have resulted in such disclosures not being granted. C now requests this is put right and she is given reasonable time thereafter to amend her claims." The claimant expressed a willingness still to provide clarification on her complaints. The skeleton argument alleged bias from the Information Commissioner's Office and the EAT. The claimant next referred to her being disadvantaged in her working conditions by the respondent having interfered with her computer and internet access.

15. Against this background, the tribunal concluded that there was no application before it (or which had previously been before it) seeking relief from the sanction of the unless order. The claimant's written submissions are often lengthy and difficult to fully comprehend, but the tribunal is clear that the claimant did not herself understand her application of 21 June 2023 to be for the reinstatement of her claims. She had not received a notice saying that her claims stood as dismissed and she certainly did not believe that she had failed to comply with the unless order resulting in an automatic dismissal. Nor could it be understood as an application to vary the unless order – what would have been a late application in any event given that any non-compliance would have resulted in an automatic dismissal in any event. The claimant had articulated her application as being for the tribunal to make orders compelling her expert to answer questions and potentially for further disclosure. The claimant believes that the tribunal has an inquisitorial role in exposing the respondent's alleged wrongdoing. Employment Judge Davies had already been very clear, in making the unless order, that the claimant had to particularise her claims, not refer to documents and/or further disclosure which might be supportive of her claims. The claimant's failures to comply with the order were, in any event, more than just an inability to give details of alleged acts of detriment. For instance, there was a lack of information as to the protected acts relied upon in complaints of victimisation.

16. The claimant did not ever suggest that there was already a live application when the tribunal referred to her option to apply to set aside the dismissal of the claims on 6 July. At the conclusion of that hearing, the claimant understood the need to make an application and that the tribunal clearly did not understand such application (or an application to vary the unless order) to have already been made – none was articulated by the claimant at the hearing. The tribunal was clear as to what was anticipated in its case management orders. The claimant has never since made an application. Her skeleton argument produced for this hearing (and indeed in response to the respondents' applications) does not constitute an application for relief from sanction. If it had been, it would have been made significantly outside the time limit prescribed where, at this late stage, there is no basis for a just and equitable extension of time. The prejudice for the respondents of dealing with such application now would be significant. Many hours have been spent trying to understand the claimant's complaints in these proceedings – the tribunal's time can certainly be regarded as properly spent in the context of a litigant in person seeking to articulate some complex legal claims. However, it is not for the tribunal to create claims which were never intended to be brought or which make no sense or are so lacking in comprehendible particularity to be ultimately impossible for a respondent to defend or a tribunal at a final hearing to determine. As of today,

the claims the claimant would have wished to bring, but for the effect of the unless order, are no clearer.

17. The claimant also today applies for the striking out of the union respondents' skeleton argument, effectively to prevent it from relying on those arguments in any strike out application. That application is refused. Their skeleton argument was submitted to the claimant one day later than that ordered by the tribunal. Ms Palmer has been very open in explaining that the task involved in preparing submissions was greater than expected and she was unable to complete the necessary work until the day after the date directed. The claimant has, however, not sought to suggest that any prejudice has been caused to her by receiving those submissions a day late. She has had a full opportunity to read and understand those submissions. Her argument is essentially one of fairness where she has, in previous and these proceedings, been penalised for late compliance. However, time limits are regarded differently depending on the type of default involved and whether to allow a late submission is considered on a case by case basis. It would be wholly disproportionate in these circumstances to effectively prevent the union respondents from applying to strike out the claimant's complaints.

18. The claimant has also applied for witness orders compelling the attendance today of a solicitor from Thompsons, who represent the union respondents, Mr Richard Miskella, managing partner of Lewis Silkin, who had acted previously for the union and Mr Roger Quickfall, Counsel who had previously appeared on behalf of the first respondent in earlier proceedings. The tribunal was aware of (and I explained to all parties) that the claimant had in fact prepared witness summonses using a County Court form for the first two of those potential witnesses and also in respect of Ms Amanda Pritchard, CEO of NHS England and Rebecca Pallot, Solicitor who acts for the first respondent. She had served these summonses on such individuals. Correspondence had been received asking whether these were genuine witness summonses, in response to which the tribunal had said that it had not made any witness order nor, up to that point, received any application for one. In any event, the applications were for the relevant witnesses to attend this preliminary hearing. On the tribunal's explanation, the claimant said that she understood that, at this preliminary hearing, the tribunal was not hearing any evidence other than potentially from herself on the question of the reason for any delay in bringing proceedings. On that basis, the tribunal refused the claimant's application for witness orders.

19. The tribunal, in answer to the claimant's question, clarified that witness order applications could still be made at any point in proceedings by her although there was a requirement that she provides the tribunal with a brief summary of the evidence the witness was expected to give together with an explanation as to why a witness order was necessary. The tribunal further explained that it would not make a witness order against an individual whom the claimant wished to attend to be cross-examined by her. Such witnesses would be the claimant's own witnesses and, whilst she could ask them open questions, they could not be cross-examined by her. It might therefore be detrimental to her case to seek to call witnesses who would be hostile to her case. On further discussion, the tribunal wondered whether, in essence, what they claimant was seeking was the production of additional documentation or a straightforward confirmation that a particular document was in the possession of the individual concerned.

The respondents' applications

20. The tribunal then proceeded to hear Ms Palmer's application on behalf of the union respondents. She spoke for 40 minutes amplifying on and emphasising points made in her written skeleton argument. Whilst the tribunal had suggested that it may assist the claimant to respond firstly to those submissions only, before the tribunal heard from Mr Bayne, on behalf of the first respondent, the claimant expressed a preference to make her submissions last, provided she was allowed time equal to the combined amount of time taken up by Ms Palmer and Mr Bayne in their submissions. The tribunal agreed to proceed on that basis.

21. After, hearing from Ms Palmer, the tribunal, however, considered it appropriate to hear the claimant's evidence as to the reason for any delay in bringing her complaints as Mr Bayne's submissions dealt with the issue of the tribunal's jurisdiction in claims submitted outside the applicable time limit.

The claimant's evidence as to why any claims were brought out of time

22. The claimant in fact took this opportunity to largely go through what she maintained were examples of interference with her IT devices and network. She complained of a refusal by Employment Judge Jones on 24 July 2022 to make an order for disclosure against the first respondent. She maintained that he had been in error in not granting this early disclosure and ordering the respondent not to access her cloud-based accounts. She said that she had not been aware of the existence of those cloud-based accounts until 16 September 2019. She had been become aware of the existence of others in July 2020. These were said to be Microsoft accounts created using the claimant's personal email by the first respondent without her consent. She complained that an Employment Judge had not accepted at a preliminary hearing in November 2020 that cloud accounts had been opened by the respondent despite evidence from "Microsoft adviser". She referred to the IT expert's report confirming that her email account was used to register work and personal Microsoft accounts. She said that she had told expert that this was not a requirement of the first respondent. She maintained that every time she created a word document the first respondent was able to tamper with it and held management rights over that document.

23. She pointed to a reference in the expert's report at paragraph 2.2.3.17 that as the account in question, which the claimant was unable to access, was believed to have been created by the first respondent, it was most likely that they had suspended or revoked access to it. She said that she only learnt of this when she got the expert report on 8 January 2021. She said that she had shown the expert pop-ups appearing when she was using her computer, but, despite this, he had concluded that there was no evidence of unauthorised access such that he must have been dishonest in his conclusions.

24. She said that the hacking of her devices/accounts had been continuous up until, most recently, September/October of this year, such that she believed her complaints of harassment were still in time. She maintained that Mr Bullivant had tried to consciously frustrate her claims against the first respondent, him having been late in going to ACAS with the issues and then delaying the submission of her complaints to the union's regional office for them to be assessed. He had then engaged in ACAS early conciliation when he shouldn't

have. As at 18 November 2018, the earlier case against the first respondent had been stayed and the only claims which were going ahead were against the union respondents. Thus, the first respondent had been aiding the union to prevent the claimant from bringing any claims forward and was changing her documents.

25. In response to questions from Mr Bayne, the claimant agreed that most of the exhibits she relied upon (and which had formed the basis of the expert's report of 8 January 2021) had come to her attention in 2020. She confirmed that the latest of the screenshots she relied upon in support of her case was one taken by her on 23 March 2021. The claimant said that she had last written to the expert asking for him to review his report on 5 August 2022.

26. After Mr Bayne's questions, the tribunal allowed the claimant to give further evidence which she said was contained in her skeleton argument where she referred to having being disadvantaged by her working conditions – she had been keeping her internet off and only using her battery charge life when working on her PC rather than it being plugged in, all to mitigate against the first respondent's alleged attempts to try to destroy her evidence.

Submissions continued

27. The tribunal then allowed Mr Bayne to make his oral submissions for 40 minutes amplifying on the points made in his skeleton argument. Both his and Ms Palmer's submissions are reflected in the tribunal's conclusions set out below.

28. The claimant was encouraged by the tribunal to engage with the arguments put forward by Ms Palmer and Mr Bayne in her own submissions, which she made at the start of the second day of the hearing, following which the tribunal reserved its Judgment.

29. The claimant has at times, during this hearing referred to the written skeleton argument she had submitted as her own application rather than a response opposing the respondents' applications. The claimant was told that she would have 80 minutes to make her submissions. The tribunal took a break after 60 minutes, explaining to the claimant that her submissions up to that point were not addressing the issues involved in the respondents' strike out applications. The claimant was given additional time, in excess of an hour, to gather her thoughts. After a further 20 minutes of her submissions, the tribunal allowed the claimant extra time, but on the basis that this had to be a final statement of her position in respect of the strike out applications. The tribunal assured the claimant that, regardless of what she said in her own submissions, the tribunal would look critically at what had been said on behalf of all the respondents and would ensure that relevant legal tests were considered.

30. The claimant's submissions were not focused on the strike out applications the tribunal had to determine. Again, she wished to concentrate on documentation which she said showed that her IT devices and systems had been tampered with. She did say that where she had named individual respondents, she was not saying that they had personally hacked her computer, but rather that they were people in positions of responsibility within the respondent. She suggested that the schedule of complaints which had been prepared by the first respondent (and with reference to which she had been ordered to provide

further information prior to the previous preliminary hearing) had not been accurate. The claimant nevertheless had difficulty in highlighting any specific inaccuracies. She also referred to the difficulties she said she had had in annotating the schedule which she had had to forward to a friend to open on a Mac PC in circumstances where the document would not open on her own Windows PC. The claimant wished to highlight that Ms Pallot appeared to be named as an author of documents which the claimant maintained had never left her own computer. However, the IT expert had, despite evidence provided to him, not acted in accordance with the civil procedure rules in producing an unbiased report and in failing to answer all questions put to him. The claimant referred to a delay in bringing proceedings, saying that she had previously made the tribunal aware that she could not safely access her PC. Furthermore, at one point the police had been involved prevented her from bringing claims pending the outcome of their investigation. She then re-reported matters to the police because the same issues of tampering with her computer re-emerged. She had never been on a level footing because of the first respondent's hacking of her computer. She complained further regarding the conduct of a number of Employment Judges during the various proceedings she had brought and that decisions, in particular, to refuse applications for disclosure prevented her from bringing her claim properly.

31. The tribunal, before reserving its decision, took some further evidence from the claimant regarding her means in the event that it came to the point of determining whether or not to make any of her claims conditional on the payment of a deposit.

Applicable law

32. The effect of a Judgment of an Employment Tribunal is that it is binding as between the parties so as to prevent them from litigating the same issues over again in any future legal proceedings. Such a Judgment is covered by the doctrine of res judicata. The rationale of this doctrine is that there must be finality in litigation and the avoidance of a multiplicity of proceedings on the same issue.

33. The doctrine of estoppel by res judicata encompasses two main principles: issue estoppel and cause of action estoppel. As explained by Lord Keith in **Arnold v National Westminster Bank plc [1991] 2 AC 93**:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter."

whereas issue estoppel

> "may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

34. Adopting Ms Palmer's examples, a claim for disability discrimination by A against B and raising essentially the same complaints as already determined against A in a previous claim would be the subject of cause of action estoppel – having brought that claim and lost, A cannot have a second bite at the cherry.

35. If, however, A brings a second claim for disability discrimination against B based on later and different complaints, that would not be the subject of cause of action estoppel. But a finding in the first claim that A was (or was not) disabled at the relevant time could be the subject of issue estoppel. In other words, that particular issue having already been decided, could not be re-litigated by the losing party. So, if A established in the first claim that A was permanently disabled, B could not argue in defence to the second claim that A was not disabled and hope that a different tribunal would reach a different conclusion.

36. A third type of estoppel has become known as the "rule" in **Henderson v Henderson ((1843) 3 Hare 100**. This applies to claims which have not previously been brought, but which could and should have been brought as part of earlier proceedings. Sir James Wigram V-C stated:

> "… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. A plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

37. The underlying public interest, as the House of Lords later pointed out in **Johnson v Gore Wood [2002] 2 AC 1 at 31**, is namely (a) that there should be finality in litigation, and (b) "that a party should not be twice vexed in the same matter" (per Lord Bingham), or "to avoid the oppression of subjecting a defendant unnecessarily to successive actions" (per Lord Millett).

38. Lord Bingham went on to set out a formulation of the principles to be applied when determining whether a claim (or defence) should be struck out as an abuse of process under the rule in **Henderson v Henderson**:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any

> additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. *It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.* As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. … While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice." (Emphasis added)

39. There is, therefore, no hard and fast "rule". The question for the tribunal is whether in all the circumstances it is an abuse of process for the claimant to bring these claims now (and, if it is, whether the abuse is excused or justified by any special circumstances).

40. A complaint of discrimination should only be struck out as having no reasonable prospect of success in the most obvious and plainest of cases, it being recognised that discrimination cases are generally fact sensitive – **Anayanwu v South Bank Students' Union and South Bank University [2001] IRLR 305**. Nevertheless, a tribunal is entitled to strike out the claims which are so inherently improbable that they can be regarded as "fanciful" and "baseless" – **Ahir v British Airways Plc [2017] EWCA Civ 1392**. In that case the Employment Judge came to a calculation that there was no reasonable prospect of the claim succeeding partly because of its inherent implausibility and partly because the claimant pointed to no material which might support his case. The Court of Appeal considered that this was a permissible basis for his conclusion. It was said that employment tribunals should not be deterred from striking out the claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence is not being heard and explored. In **Anyanwu** it was recognised that the time and resources of employment tribunals ought not to be taken up having to hear evidence in cases that are bound to fail.

41. Time limits in employment tribunal claims are strict. Nevertheless, in complaints of discrimination, a tribunal has a wide discretion to extend time for

the submission of a complaint if it is just and equitable to do so. Whilst factors such as the length of delay and the reasons for it may be relevant, the key consideration for the tribunal is to balance the relative prejudice that extending time would cause to the respondent against the prejudice of not allowing the claimant's complaint to proceed. There will always be prejudice caused to an employer if an extension of time is granted, given that the claim would otherwise be dismissed. However, the prejudice caused needs to amount to more than simply that.

42. The tribunal was referred to the case of **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**. There, the Court of Appeal said that, as part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the delay may be short, the consequence of granting an extension of time may be to open up issues which arose much longer ago. As Mr Bayne submitted, if the first (most recent) 5 allegations of harassment here which were in time or likely to benefit from a just and equitable extension, were struck out on the basis of them having no reasonable prospect of success, there would then have been a delay in submitting the application in respect of the then most recent allegation of 7 months, but which would open up matters having occurred over three years previously.

Conclusions on the union respondents' applications

43. The effect of the claimant's non-compliance with the unless order is that the only surviving allegations against the union respondents were those found at allegations 40 and 41 of the schedule of allegations. Those are both allegations of racial harassment.

44. Allegation 40 is that the union respondents breached a court order of 3 August 2018 by failing to disclose relevant information in order to "hide its aiding acts". The claimant maintains that the dates of the unwanted conduct ran from 9 November 2018 to 8 August 2022. Within the claimant's grounds of claim she referred to a failure to disclose all relevant information at the union respondents' disposal and the listing of some documents that the claimant maintains were not disclosed and should have been (see paragraphs 28(v), 29(iii) and 35 of those grounds of complaint).

45. On 12 June 2018, the claimant had submitted a tribunal application against Paul Bullivant of the union and on 24 June 2018 against the union itself. At a preliminary hearing on 3 August 2018, those claims (of victimisation) were consolidated and the tribunal gave directions to progress the claims to a final hearing commencing on 10 December 2018. These included a standard order for disclosure from both sides on or before 10 October 2018.

46. A further preliminary hearing was held on 1 November, where the issues were further clarified and the time for disclosure of documentation extended to 19 November 2018.

47. The claimant's complaints were dismissed on 14 December 2018 with Judgment and written reasons subsequently provided.

48. The claimant applied for a reconsideration of that Judgment, but this was rejected on 30 January 2019. The claimant was seeking to rely on what she

said was new evidence. A further (very late) reconsideration application made in November 2019 was rejected on 13 December 2019. Within that application the claimant raised the issue of non-disclosure of documents by the union respondents, obtained by her since the hearing through a subject access request. Employment Judge Jones, having considered such documentation, took the view that they would have little, if any, bearing on the issues which were determined in the case brought against Mr Bullivant.

49. The claimant had by then just commenced a further tribunal complaint against the union on 29 November and Mr Bullivant and Mr Syms on 5 December 2019. Within that latter tribunal claim, she complained that, when disclosure of documents was provided around 5 December 2018 in compliance with the aforementioned directions of 3 August 2018, Mr Bullivant and the union failed to disclose the bullying and harassment procedure of the first respondent and associated documentation, the claimant having become aware of the existence of such procedure around 7 September 2019. Those claims were consolidated on 7 February 2020. Prior to that formal consolidation, the claimant had in any event produced consolidated particulars of claim on 19 December 2019 which repeated (at paragraph 33 of those consolidated particulars) the complaint about non-disclosure.

50. That complaint was struck out by Employment Judge Jones at a preliminary hearing on 2 June 2020. He had identified it as one of a number of claims falling within a distinct category of claims of direct race discrimination. Within that he identified 6 types of documentation which the claimant was saying should have been disclosed in the 2018 proceedings. They included the first respondent's bullying and harassment procedure. Employment Judge Jones did not accept there to have been any breach of any order for disclosure. Furthermore, he concluded that the claimant "could and should have raised these matters in the 2018 proceedings" and said that he was satisfied that this was "a collateral attack to reopen the decision in the 2018 proceedings". He determined this to be an abuse of process, noting that the claimant had sought to rely on a complaint of race discrimination only when appreciating that the events predated any protected act, thus excluding a victimisation claim. He expressed himself as satisfied that: "the claimant is using the proceedings to attempt to identify any conceivable legal claim with a view to reopening the decision in the previous litigation…" An appeal against his decision was rejected by the EAT on 30 October 2020.

51. This tribunal considers then whether allegation 40 in these proceedings should be struck out as having already been litigated or as an abuse of process. As recounted above, the claimant has previously raised a complaint that the union respondents breached the disclosure order made on 3 August 2018 in her second application for reconsideration of the first set of claims against the union respondents and again in her 2019 claims. It has already been determined on 2 June 2020 that there was no breach of the order. The bullying and harassment policy was not a document of the union respondents and, even if a copy was in their possession, it had no obvious relevance to the protected disclosures or detriments identified as the relevant issues for consideration in that case. It was not a relevant document which the union respondents would be required to make a search for or disclose. Nor was it understood what detriment or disadvantage the claimant could say she suffered by not seeing the policy. That gives rise to an issue estoppel in respect of that allegation, regardless of the claim having brought in the earlier 2019 proceedings as one

of direct discrimination and now as one of racial harassment. There was on the facts no failure to comply with the disclosure order. That allegation cannot now be pursued.

52. Further, Employment Judge Jones has already determined on 2 June 2020 that these were allegations the claimant could and should have raised in the course of the 2018 claims. Seeking to raise them in the 2019 claims was an abuse of process. Given his reasoning, he would have come to exactly the same conclusion had the complaints been ones of harassment rather than direct discrimination.

53. The claimant is now in these proceedings trying to have a further go at resurrecting the complaint in respect of non-disclosure, albeit as one of race-related harassment. Certainly, this tribunal concludes that she could and should have raised these issues either in the progress of the 2018 claim, as Employment Judge Jones concluded previously (and as upheld by the EAT), or in the 2019 claims which she is simply seeking now to relabel. The claimant is estopped from doing so. In these circumstances, the raising of this particular complaint in these proceedings must amount to an abuse of process. The allegation is very stale and historic. The union respondents should not be faced with having to defend it (again) so long after the events and where the minutiae of the conduct of a disclosure process long ago is unlikely to be easily recalled particularly at this distance. Allegation 40 in these proceedings must, on this basis, again be struck out.

54. Had it not been struck out for estoppel/abuse of process, the tribunal would have had no jurisdiction to determine the complaint because it has been brought outside the applicable time limits in circumstances where it would not have been just and equitable to extend time. The proceedings, in respect of which the claimant complains there to have been a breach of disclosure obligations, concluded on 14 December 2018, more than 3½ years before the claimant presented these claims in August 2022. The tribunal has heard no coherent explanation for the claimant's further delay. The claimant has referred to her only being aware of certain matters more recently, but that does not apply to these complaints which are effectively about the same matter complained of already for some years. The balance of prejudice is overwhelmingly in the respondent's favour in the case of such an historic allegation.

55. Finally, the tribunal has no idea upon what basis and with reference to what factual evidence the claimant will argue that any non-disclosure was related to race. The claimant has not engaged with this issue at all in her submissions (see also below). The tribunal cannot guess at the basis for this complaint. It would have been struck out in any event on the basis of this having no reasonable prospect of success in circumstances also where it has already been determined that there was no breach of the order of course, in any event.

56. Allegation 41 is that, as an act of racial harassment on 26 October 2017, Mr Bullivant incorrectly applied the grievance procedure to prevent the claimant from having access to the investigation material which confirmed that Ms Axall lied in her witness statement. As referred to above, the claimant's first tribunal complaint naming Mr Bullivant as a respondent was submitted on 12 June 2018. This claim could have been presented as part of that initial complaint. Again, the claimant is not suggesting that information has only recently come to light which has made her aware of the issue complained of. Mr Bullivant was

thereafter a named respondent in the claimant's second claim against the union respondents in 2019, although none of the claims against him were allowed to proceed after the preliminary hearing on 2 June 2020. This allegation was not raised then either. The tribunal in the first claim decided on 14 December 2018 found that Mr Bullivant forwarded details of the claimant's case to Mr Syms of the union on 9 February 2018. The case was then taken over by a Miss Ratcliffe of the union. In these proceedings, Mr Bullivant is said (in the grounds of resistance submitted) to have retired on 31 December 2020. To seek now to bring this complaint relating to something Mr Bullivant is alleged to have done in October 2017 in this third set of proceedings against him is a clear abuse of process, which is not excused or justified by any special circumstances.

57. The tribunal considers, in any event, for reasons identical to those in respect of allegation 40, that this claim is submitted significantly out of time in circumstances where it would not be just and equitable to extend time. Nor does the claim have any reasonable prospect of success - again, the claimant is not advancing a factual case which would reasonably allow a tribunal to conclude that Mr Bullivant's actions, even if proven, were in any sense whatsoever related to the claimant's race. The burden of proof would not, in the circumstances, ever shift to Mr Bullivant.

Conclusions on the first respondent's applications

58. Separate from the claims against the union respondents, the claimant brought claims against her then employer, the first respondent on 20 January 2018 for disability discrimination. Those proceedings were settled through ACAS. That agreement effected the termination of the claimant's employment with the first respondent on 23 August 2019. Indeed, the current proceedings against the first respondent all involved claims of post-employment victimisation and discrimination.

59. Somewhat in danger of being forgotten, not least by the claimant, in the number of claims of victimisation and discrimination, is a claim against the first respondent of unfair dismissal. The tribunal has been taken to what on its face appears to be a valid agreement between the claimant and the first respondent reached under the auspices of ACAS, enshrined within an ACAS Form COT3 agreement and signed by the parties. It recites, in a schedule to it, that the claimant's employment with the first respondent has terminated. A significant payment was to be made to the claimant. The claimant does not suggest that this obligation under the agreement was not fulfilled by the first respondent. Then it is provided at clause 5 that: "The Claimant agrees that the Settlement Sum is accepted in full and final settlement of any claims of any nature the Claimant has or may have all against the Respondents arising out of the Claimant's employment with the First Respondent or its termination…" Clause 6 provides for the settlement including the claimant's 2018 tribunal complaint and any other statutory claims including under the Employment Rights Act 1996 and the Equality Act 2010.

60. The claimant has been encouraged at this hearing to explain to the tribunal any argument she has regarding the validity or scope of this agreement. She posed to the tribunal a question as to what reliance might be placed on that agreement if the first respondent subsequently "punched her in the face". The tribunal suggested that this might give rise to the claimant making a complaint about the punch, but queried how the claimant might argue that the punch would

render an agreement, which predated the punch and covered only matters up to the date of the agreement, ineffective. The claimant simply considered that if she was discriminated against after the date of the agreement, the first respondent was prevented from relying on its apparent settlement of earlier claims. That argument does not hold water. The claimant's complaint against the first respondent of unfair dismissal was validly settled by this agreement such that the tribunal has no jurisdiction to hear it.

61. Had the tribunal come to a different conclusion, it would, however, have been faced with a claim for unfair dismissal submitted on 8 August 2022 in respect of a dismissal on 23 August 2019. The tribunal cannot conclude, on the basis of the claimant's attempt at explaining a delay in bringing these complaints, that it was not reasonably practicable for the claim of unfair dismissal to have been submitted within the applicable three month time limit from the date of termination. As has been referred to, she was able to issue tribunal complaints on 29 November and 5 December 2019. She has been able to instruct an IT expert who reported on 8 January 2021 on a large number of detailed questions formulated by the claimant. The claimant was able to engage in ACAS early conciliation between 4 March and 22 March 2022, over 4 months before these proceedings were commenced. The tribunal has no jurisdiction to hear the complaint of unfair dismissal due to its submission outside the applicable time limits.

62. In any event, the claims of unfair dismissal against the individually named respondents cannot proceed in circumstances where the tribunal only has jurisdiction to determine a claim of unfair dismissal against the claimant's employer, not against an individual employee of that employer, however senior.

63. Allegation 35 is that the first respondent falsely accused the claimant of misconduct and subjected her to an unfair grievance process during the latter part of her employment. That conduct therefore must have taken place prior to the termination of her employment and prior to the COT3 settlement agreement. The aforementioned wording of the agreement covers claims arising out of her employment, including any claim under the Equality Act, such as harassment. This claim was also validly settled and the tribunal has no jurisdiction to hear it.

64. Allegations 36 and 62, as explained below, both rely on conduct said to have commenced prior to the date of the COT3 agreement. The tribunal therefore has no jurisdiction to determine those harassment allegations insofar as they relate to matters prior to the date of the ACAS agreement.

65. Mr Bayne has set out the remaining allegations in reverse chronological order as follows:

Allegation 60 - 27 May 2022 – 8 August 2022
Allegation 37 - 24 August 2019 - 8 August 2022
Allegation 62 - 1 December 2017 – 8 August 2022
Allegation 52 - 27July 2022 – 1 August 2022
Allegation 59 – 4 May 2022
Allegation 54 – 20 September 2021 – 23 September 2021
Allegation 50 – 11 January 2021 – 16 February 2021
Allegation 46 – 18 January 2020 – 6 September 2020

Allegation 48 – 20 August 2020 – 5 September 2020
Allegation 36 – 12 August 2019 – 4 August 2020
Allegation 43 – 13 September 2019 – 27 July 2020
Allegation 47 – 21 July 2020
Allegation 53 – 6 February 2020 – 29 May 2020
Allegation 42 – 9 September 2019 – 28 October 2019
Allegation 45 – 22 September 2019
Allegation 35 – 1 September 2015 – 31 May 2019

66. It is accepted by the first respondent that at least some aspects of allegations 60, 37, 62 and 52 are in time. It is accepted that allegation 59 is only a few days out of time such that it might well be considered just and equitable to extend time to allow the tribunal jurisdiction to determine this particular complaint. Mr Bayne has asked the tribunal to consider whether these particular claims have any reasonable prospect of success before then considering, if they do not, whether the "older" clams ought to be struck out as being out of time, whilst considering, as part of that exercise (whether it is just and equitable to extend time), also the merits of the claims.

67. Allegation 60 is that the first respondent tampered with the claimant's Internet service and security such that her householders were unable to use 4 of their devices. This is said to have occurred as an act of unlawful racial harassment almost 3 years after the claimant had left her employment. Allegation 37 is that throughout a period of almost 3 years following the end of her employment, the first respondent hacked into the claimant's personal computer. Allegation 62 is that about 2 years prior to the end of her employment until almost 3 years after the end of it, the respondent conducted cyber-attacks on the claimant's network and her business and business related facilities. Allegation 52 is that almost 3 years after she left its employment, the first respondent tampered with the claimant's submissions to the Employment Appeal Tribunal in an appeal in a tribunal complaint pursued against the union respondents, not involving the first respondent. Allegation 59 is that about 2 years and 9 months after the end of her employment, the respondent caused her Windows 10 printer to reinstall.

68. Allegation 50 is that the first respondent tampered with the claimant's submissions to the Employment Appeal Tribunal in a case against the union respondents in January and February 2021. Allegation 46 is that the first respondent created and accessed the claimant's "one drive" to access information on a number of separate occasions in 2020. Allegation 48 is that the first respondent used "office shared components" to access and tamper with the claimant's PC and information on 2 occasions in August/September 2020. Allegation 36 is that the first respondent hid an email relating to the claimant's mitigation against any IT breaches and to her request for a secondment. Allegation 43 is that the first respondent accessed the MSN Web to hack into the claimant's computer and tamper with her documents. Allegation 47 is that the first respondent deposited information on the claimant's PC which related to Miss Ratcliffe, who was party to the "2018 Unison hearing". Allegation 53 is that Rebecca Pallot, the first respondent's solicitor, tampered with the claimant's computer evident by the fact that she was the author of two of the claimant's privileged documents and modified them. Allegation 42 is that the first respondent used the Bing browser to hack into the claimant's PC. Allegation 45 is that the first respondent hacked into the claimant's PC and created a shortcut to her "Lokhi 2014" folder which contained files related to proceedings.

69. Allegation 54 is of a potentially different nature, it being unclear whether it relates to any IT system (although the claimant's submissions would suggest that it does). Here the claimant alleges that the respondent destroyed some (unspecified) of the claimant's documents relating to current proceedings and to "UNISON's case." Allegation 35 is quite different from the other allegations but, as referred to above, is one where the tribunal has found already that it has no jurisdiction due to the effect of ACAS settlement agreement.

70. The tribunal considers the prospects of success of these allegations of racial harassment. The claimant genuinely believes that the first respondent has carried out the actions alleged. It is, however, in all the circumstances very unlikely that any tribunal will accept that it did. Over the course of the two days of this hearing and at the previous preliminary hearing, which involved a discussion of the issues, the tribunal has listened to and tried to make sense to a stream of consciousness from the claimant which amounted to a mass of confused and confusing assertions. These assertions are made by her without an evidential basis. The claimant extrapolates from apparent anomalies and glitches in her use of her IT systems, equipment and documents created on them, that this can only have occurred due to the deliberate acts of the first respondent. She cannot say who within the first respondent did what to her systems/equipment. It is clear that the claimant expects the tribunal to adopt an inquisitorial approach and allow wide-ranging and unfocussed disclosure requests, which the claimant hopes might expose the first respondent's involvement.

71. She has commissioned her own IT expert to examine her assertions and answer multiple queries. After examining the claimant's own IT equipment, that expert has concluded that: "Analysis of the supplied devices did not provide any evidence that they had been "hacked" or otherwise unlawfully accessed" (see paragraph 2.3.11). At paragraph 2.2.5.6, the expert reiterates: "… No evidence was found to suggest that Ms Roy's devices had been "hacked" or unlawfully accessed. Updates to an operating system, in particular Windows 10 as depicted in the screenshots, are provided automatically by the vendor (Microsoft) and are enabled by default." The claimant's reaction to the report is to accuse her own expert of dishonesty and to ask the tribunal to order him to re-examine his conclusions and answer further questions.

72. Unfortunately for the claimant, in terms of her prospects of success, her own expert exposes that the claimant's allegations are without evidential basis.

73. Again, after listening to the claimant's lengthy representations, the claimant has barely, if indeed at all, referred to her race as the reason why the respondent has treated her in the manner alleged. The tribunal has reminded the claimant that her complaints are of racial harassment and encouraged her to explain how she would relate the respondent's actions to her race. She has not taken that opportunity. She does not frame her complaints as ones of race-related harassment. The tribunal must conclude that this is in circumstances where her all-consuming focus is simply on the acts of alleged computer hacking and interference themselves. These are not matters in which the tribunal has any freestanding jurisdiction without the linkage, for instance, to a protected characteristic. The claimant is not advancing a positive case of harassment.

74. If these complaints were of victimisation, the tribunal might have found an element of plausible logic that an employer might wish to wreak revenge on an employee who has brought a tribunal complaint against it and sought to expose unlawful discrimination. It has to be said, however, that in all of these circumstances, such allegations could properly have been described as fanciful and baseless. That conclusion is even stronger where the claimant is left simply saying that the respondent did all that it is alleged to have done as unwanted conduct related to her Indian ethnicity. Why might that be the case? The claimant will not be able to show any facts from which a tribunal could reasonably conclude that any actions of the respondent were related to race (even if she could show that the acts occurred in the first place).

75. There are public policy reasons why claims of unlawful discrimination ought to be heard and the tribunal appreciates that it is only in the clearest of cases that a complaint of racial harassment should be struck out. However, the tribunal's overriding objective cannot involve a requirement to determine claims which can be objectively classified as fantastical or illusory. It does no one any service, in the interests of justice, including the claimant, to listen to a significant number of allegations over what would be multiple days of hearing where the allegations are almost bound to fail. Many Employment Judges have in their judicial careers come across cases where far-reaching conspiracies are alleged, which appear at first blush to be far-fetched, but turn out, disturbingly from the point of view of an employer's conduct, to have actually occurred. There are employers capable of nefarious manipulation and subterfuge. However, the contention that the first respondent, with the apparent assistance of its legal representatives, has continuously interfered with the claimant's personal IT devices and network (or tampered with or destroyed her documents), years after she has left its employment, let alone for a reason related to her race, is incredible. The claimant has no reasonable prospect of succeeding in these claims. They must be struck out on that basis.

76. The tribunal reaches that conclusion in respect of each allegation individually. The effect of that conclusion in respect of allegations 60, 37, 62, 52 and 59 alone would be that the most recent alleged conduct complained of at allegation 54 took place on 20-23 September 2021 - the allegation that the respondent destroyed documents. That is almost 11 months prior to the commencement of this tribunal claim and over 7 months out of time allowing for the period of ACAS Early Conciliation in March 2022.

77. The tribunal considers that the remaining claims of harassment, assuming a continuing state of affairs from 1 September 2015 until 23 September 2021 are out of time in circumstances where it is not just and equitable to extend time. For this further and separate reason, the tribunal has no jurisdiction to hear them. The delay is lengthy and the claimant has provided no reasonable explanation or justification for it. Fundamentally, the balance of prejudice is in the respondent's favour. If time was extended to allow these claims to be heard the respondent would be having to defend and evidence matters certainly going as far back as the date of the COT3 settlement agreement. That is in circumstances where the claims are often widely and generally framed and, despite attempts to clarify them during the case management process, difficult to comprehend. On the other hand, whilst the prejudice to the claimant is to prevent her from pursuing claims which she passionately believes in, these are claims, the tribunal has concluded, with little possible prospect of succeeding, certainly as claims of racial harassment.

78. Whilst these “older” claims have been struck out as having no reasonable prospect of success on an assessment of their merits (and are time barred in any event), those claims being submitted out of time, with no reasonable prospect of a just and equitable basis for an extension of time, would have been a further alternative basis for the claims not being allowed to proceed as having no reasonable prospect of success.

79. The claimant did, in her submissions, seek to address the basis upon which claims had been brought against individual respondents. Her contention was not that those named individuals had been personally responsible for the actions complained of, but that they were effectively responsible by reason of their seniority within the first respondent. In any event, none of the claimant’s allegations of harassment as pleaded identify any of the individually named respondents employed by the first respondent as responsible for the conduct complained of. Any claims against them would have had to have been struck out in any event.

Employment Judge Maidment

Date 15 November 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

7 December 2023