EMPLOYMENT TRIBUNALS

Claimant: Ms F. Rustvara

Respondent: Marriott Hotels Limited

Heard at: London Central (CVP)

On: 29,30,31 January 2024 and 1 February 2024

Before: Tribunal Judge Peer acting as an Employment Judge
Mr Daniel Jenkins
Ms Jessica Marshall

Representation:

Claimant: Mr. E. Lixandru of Counsel instructed by Calices Solicitors
Respondent: Mr. L. Bronze of Counsel instructed by Lewis Silkin LLP

JUDGMENT

1. The respondent's application, made at the hearing on 31 January 2024, to strike out the claim under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious and/or under Employment Tribunal Rule 37(1)(c) because it has not been actively pursued is refused.

2. By the tribunal acting on its own initiative on 1 February 2024, the claimant's claim is struck out under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.

JUDGMENT having been given orally on 1 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. The claimant was employed by the respondent as a kitchen porter from 3 May 2022 until dismissal with effect 28 April 2023. By a claim form

presented on 9 May 2023 following a period of early conciliation from 28 February 2023 to 11 April 2023, the claimant brought complaints of direct sex discrimination, harassment related to sex and holiday pay. All other claims brought by the claimant have been dismissed on withdrawal.

2. Further to a case management hearing before EJ Nicolle on 24 August 2023, a list of issues was agreed. The tribunal allocated five days for the trial and an indicative timetable was set out in the case management orders of EJ Nicolle sent to the parties. The trial was listed for 29, 30 and 31 January and 1 and 2 February 2024.

3. On Friday 26 January 2024, the tribunal wrote to the parties to ask whether there were any objections to the hearing being converted to a remote format. The respondent replied to the tribunal to confirm that they did not object. The claimant did not reply to the tribunal's communication.

4. The hearing commenced on 29 January 2024. There was no objection raised at the outset of the hearing to the hearing proceeding in the remote format by either party.

5. On 31 January 2024, the respondent made an application to strike out the claim under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious and/or under Employment Tribunal Rule 37(1)(c) because it has not been actively pursued. Accordingly, the respondent's application and the claimant's submissions in reply were heard. The tribunal deliberated and reached a unanimous decision on the application. On 1 February 2024, the tribunal gave an oral decision with reasons refusing that application. The written record of that decision was issued on 1 February 2024. Written reasons were not requested.

6. On 1 February 2024, the tribunal acting on its own initiative decided to strike out the claimant's claim under Employment Tribunal Rule 37(1)(b) because the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious. The tribunal reached a unanimous decision and gave its decision orally with reasons. The written record of that decision was issued on 1 February 2024. Written reasons were not requested.

7. On 1 February 2024, the respondent indicated its intention to apply for wasted costs. The tribunal discussed with the parties that the application for wasted costs could be heard on 2 February 2024 given the time available to the tribunal. The tribunal heard the application and reserved its decision. The tribunal's unanimous decision dated 20 February 2024 was sent to the parties on 1 March 2024.

8. By way of order sealed 7 June 2024, the Employment Appeal Tribunal in the matter of an appeal from the decision sent 1 March 2024 stayed that appeal to allow the appellant the opportunity to make an application to the employment tribunal for written reasons for the judgment sent to the parties on 1 February 2024. By way of email dated Friday 28 June 2024 @ 716PM, the claimant requested written reasons for the judgment sent 1 February 2024. The email noted that the timing of the request for written reasons

related to the claimant having withdrawn her instruction and then re-instructed Calices Solicitors.

9. These written reasons are therefore written reasons for judgments (1) and (2) above dated and sent to the parties on 1 February 2024.

CLAIMS AND ISSUES FOR DETERMINATION

10. Although the claim was struck out, the claims and issues listed for determination in these proceedings are set out below for completeness.

Time limits

11. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 1 December 2022 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

12. Were all the claimant's complaints presented within the time limits set out in sections 123(1)(a) and (b) of the Equality Act 2010 ("2010 Act")? Dealing with this issue may involve consideration of subsidiary issues including when the treatment complained about occurred, whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures and whether time should be extended on a "just and equitable" basis.

Direct sex discrimination

13. The claimant complains of direct sex discrimination under ss.13 and 39(2) of the Equality Act 2010 in relation to the following allegations of less favourable treatment:

    a. the respondent, specifically Mr Yakout, gave more tasks to the claimant including those of a supervisor, specifically:
        i. On 6 and 7 December 2022 emptying the big bar bottles.
        ii. On 6 and 7 December 2022 emptying heavy bins.
        iii. On a date between November 2022 and February 2023 cleaning the oven.
        iv. On 7 January 2023, taking the claimant to the booking office to do washing, parking plates, mopping the floor, tidying the kitchen, organising the dishes.
        v. On 16 and 17 January 2023, removing the blue bins and the red bins and the bins in the booking office and the breakfast kitchen.
    b. In February 2023 did Mr Yakout refuse to allow the claimant to use the lavatory causing the claimant to wet her clothes?
    c. In October 2022, did Mr Yakout ask the claimant if she would be his girlfriend?
    d. On 17 January 2023 did Mr Yakout push the claimant?
    e. From February 2023 did Mr Yakout start calling the claimant "fake", "suffer" and "suffering"?

14. The tribunal must decide:

a. whether the conduct identified above occurred?
b. if it did, did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators.
c. If the claimant was treated less favourably, was that because of her sex?
d. If the claimant was subjected to unlawful direct sex discrimination, what injury to feelings (if any) did she suffer, and what compensation should be awarded for any such injury?

Harassment related to sex

15. The claimant complains of harassment related to sex and of a sexual nature under ss26(1), (2) and (3) of the Equality Act 2020.

16. Did the respondent engage in conduct as set out in paragraph 6 above? In addition, did the respondent subject the claimant to the following:
    a. On or around January /early February 2023, did Mr Yakout refuse to provide the claimant with PPE causing her to suffer injury?
    b. On or around January/early February 2023, did Mr Yakout prevent the claimant from using her phone when others were allowed to.
    c. Between November 2022 and February 2023, did Mr Yakout prevent the claimant from taking a lunch break?
17. If so, was that conduct unwanted?
18. If so, did it relate to the protected characteristic of sex and/or was it of a sexual nature?
19. Did the conduct have the purpose or (considering the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Working Time Regulations – unpaid annual leave

20. When the claimant's employment came to an end, was she paid all the compensation she was entitled to under regulation 14 of the Working Time Regulations 1998?
21. What was the claimant's leave year?
22. How much of the leave year had elapsed at the effective date of termination?
23. In consequence, how much leave had accrued for the year under regulations 13 and 13A?
24. How much paid leave had the claimant taken in the year?
25. How many days remain unpaid?
26. What is the relevant net daily rate of pay?
27. How much pay is outstanding to be paid to the claimant?

Remedy

28. If the claimant succeeds, in whole or in part, the tribunal will be concerned with issues of remedy and, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

a. If it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?
b. What reduction, if any should be made to any award as a result of the claimant's conduct prior to the termination of her employment?
c. Did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("section 207A")?
d. Did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any compensatory award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?

HEARING

29. The format of the hearing was a fully remote hearing by way of Cloud Video Platform (CVP). All parties were content to proceed by way of remote hearing and no objections were received to the hearing proceeding in this format in advance of the start of the hearing further to it being converted to CVP format. The tribunal was not appraised of any need for any particular adjustments or any interpreter in advance of the hearing or at the start of the hearing. The hearing was before a panel.

30. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

31. The claimant in these proceedings has professional legal representation and is represented by Calices Solicitors who instructed Mr E. Lixandru of Counsel to represent her at the hearing. The respondent was represented at the hearing by Mr L. Bronze of Counsel instructed by Lewis Silkin LLP.

32. The tribunal had available to it an agreed hearing bundle of 563 pages (HB). The respondent filed a skeleton argument. There was also a late disclosure bundle from the respondent together with the claimant's witness statements and four respondent's witness statements.

FINDINGS OF FACT

33. The claimant was acting in person when she presented her claim form on 9 May 2023. The claimant's chronology sets out that she instructed Emmanuel Solicitors on 9 July 2023 until they came off the record on 14 September 2023. The claimant's current solicitors were instructed on 9 November 2023. We find that at all relevant times the claimant had professional legal representation.

34. The hearing dates were confirmed at a case management hearing on 24 August 2023 and the record of that hearing was sent to the parties on 25 August 2023. We acknowledge the claimant changed representation but

this was after the case management hearing. Whilst we note that the claimant's current representation was not instructed until November 2023, we find that the parties were on notice of the hearing from 24 August 2023 and thus from that date are to be taken as understanding the need to prepare the case for trial in compliance with the case management orders made at that case management hearing.

35. The hearing was converted to remote format on 26 January 2024. There were no objections raised with the tribunal to the hearing proceeding in a remote format in advance of the hearing or at the start of the hearing.

36. The case management orders sent to the parties on 25 August 2023 set out a provisional timetable for trial which was three hours for reading in and any preliminary matters, maximum two days for oral and other evidence on liability, 30 minutes for submissions on liability and approximately one day for the Tribunal to make its decision and prepare reasons, one hour for the Tribunal to give judgment and three hours to deal with remedy. Claimant's counsel referred to day one as just being for housekeeping. We find that the provisional timetable makes it clear to the parties that the expectation is that oral evidence will commence on day one. We find that even if counsel understood the entirety of day one would be for housekeeping contrary to the provisional timetable laid down by the tribunal, the claimant still needed to be prepared for trial.

37. Day one of the hearing was 29 January 2024. We started at 10AM. The claimant joined the CVP platform and whilst she had an audio connection, she could not resolve switching her camera on despite support and assistance from the tribunal clerk. We were told claimant's counsel had spoken with her that morning. A range of options were then discussed and explored to support the claimant joining the hearing given the expectation that she would be giving evidence on the afternoon of day one.

38. We identified the papers available to the tribunal noting we had a hearing bundle of 563 pages. Claimant's counsel told us that he did not have a copy of the hearing bundle. Respondent's counsel said the bundle was served on and downloaded by the claimant on 29 November 2023. We accept this. Claimant's counsel told us that he had copies of the witness statements and the late disclosure bundle available to him. We note the respondent's witness statements cross-refer to the hearing bundle. We therefore find the existence of a hearing bundle should have been obvious to claimant's counsel on that basis in addition to the ordinary expectation that there would be a hearing bundle for a five day trial.

39. We adjourned so we could do our preliminary reading. We expected that steps were being taken to secure a copy of the hearing bundle for claimant's counsel. We note the tribunal could have sent a copy to claimant's counsel if necessary although expected the parties could work together to resolve this. At 1052AM, the tribunal emailed claimant's counsel to request confirmation that they had 'the bundle, skeleton, late disclosure bundle [and witness statements]'. We note this email makes it clear that there was a hearing bundle in addition to the late disclosure bundle.

40. At 2PM, the hearing re-started. The claimant was still not able to switch her camera on. We were told that the claimant was trying to use a laptop. The other device available to her was her smartphone but we were told it was not charged. Claimant's counsel proposed postponing the hearing until the following day. We noted that it would still be necessary for the claimant to be in a position to fully join the hearing if we postponed and asked about what steps might be taken to support the claimant joining the hearing. We discussed options to facilitate the claimant providing her evidence including offering the option of attending the tribunal in person where facilities could be made available and/or suggesting that she might attend her solicitors offices or her counsel's chambers to give evidence. We were told that options would be discussed with the claimant for the following day.

41. Hearing evidence from a respondent's witness as an alternative to starting with the claimant's evidence to make use of the remaining time on the afternoon of day one was then discussed. Although the claimant could not switch her camera on, she could hear. We took a short adjournment to consider whether we wanted to proceed and hear from a respondent's witness.

42. We returned at 3PM. A respondent's witness was made available. We noted our concerns around ensuring the claimant would be able to participate the following day. We referred to the list of issues in the bundle at page 97. Claimant's counsel then indicated that he had thought he had everything but he didn't think he had access to the hearing bundle. We were told by claimant's counsel that he could proceed with cross-examination of a respondent's witness. We noted our concern that claimant's counsel would be conducting the claimant's case including by cross-examining a respondent's witness without sight of the hearing bundle. We were told he would have proceeded without the hearing bundle although also told that this would not have been beneficial. We asked what steps had been taken during the course of the morning to obtain the hearing bundle and what his instructing solicitors had said. We were told by claimant's counsel that instructing solicitors had said they didn't have the hearing bundle.

43. We took a further short adjournment. The hearing began again shortly after 1530. Claimant's counsel then suggested that respondent's counsel could directly send him the hearing bundle so that he had it. Respondent's counsel replied that claimant's counsel had messaged to say he had the bundle. We note that at 1533, Claimant's counsel had replied to the tribunal's email of 1052 stating, 'I've got the bundle'. In light of the time, we decided that sensible progress could not be made with hearing evidence that day. We expressly stated that the claimant also needed to have access to the hearing bundle and be ready to provide evidence on day two. We ran through the papers again to ensure that claimant's counsel did now have everything.

44. We do not accept that the claimant's solicitors and counsel were unaware in advance of the hearing of the existence of a hearing bundle. We find that prompt and proactive steps were not taken during the morning of day one to put claimant's counsel in possession of the bundle. We find that having identified the existence of a 563 page hearing bundle at the start of day one, emailed counsel to ask if he had the bundle and given counsel told us he

had the respondent's witness statements that cross-referred to the hearing bundle, claimant's counsel must have understood there was a hearing bundle. In that context, we find it of serious concern that counsel told us during the afternoon of day one when we were about to hear evidence from a respondent's witness that he had assumed he had everything when he still did not have sight of the hearing bundle. We note the coincidence in time of claimant's counsel in the hearing before us asking for respondent's counsel to send him the bundle and claimant counsel's reply to the tribunal's email sent in the morning stating he had the bundle. We consider that a hearing bundle is a basic first step in hearing preparation and for a hearing and we find this conduct unreasonable. We find this delayed the progress of the hearing on day one. We did not have any reasonable explanation for this.

45. On day two, the claimant was able to fully join the CVP for the start of the hearing at 10AM. The claimant joined from her home. We were told that she preferred to stay at home and her husband would assist her. We were then told that the bundle was on her computer and that she was not very good with computers. We were concerned because we wanted to ensure that she had access to the papers for her to present her evidence.

46. Around 1010, all participants were disconnected from the platform and we came to understand that this was a national incident. Thereafter and around 1030 all participants were able to rejoin effectively apart from the claimant.

47. Time was taken to support the claimant but this could not be resolved. We find that the claimant had chosen to remain at home on day two with all the risks that entailed given circumstances on day one even though options had been discussed at length to support her and she had been offered facilities at the tribunal in person or could have opted to attend her representatives' offices.

48. At this point claimant's counsel suggested that the claimant needed an interpreter on the basis that he did not think her English was sufficient. He did not know what language would be required. The respondent expressed surprise at the suggestion an interpreter was necessary for the claimant, no difficulties had been noted at the case management hearing and no issue as to interpretation raised on the agenda. We suggested that counsel explore this and take instructions on the issue of an interpreter. Hearing evidence from a respondent's witness was discussed as a possible solution to using the time available on day two given the claimant could not fully connect and/or had not made herself available. Claimant's counsel confirmed that he would be content to proceed with the claimant joined by telephone.

49. We adjourned. We needed to consider as a panel whether it was appropriate to continue with the claimant attending by telephone only in circumstances where we had been given an indication that the claimant might require an interpreter. Claimant's counsel also needed time to confirm instructions having raised the issue with the tribunal. We were also concerned as to whether the claimant would be able to participate and manage cross-examination and as to whether there would need to be any adjustments to ensure simple questions were asked if we proceeded

without an interpreter in the circumstances. However, as we had heard very little directly from the claimant at this point, we were not in a position to form our own impressions. We expressly record this in these written reasons as on more than one occasion, claimant's counsel suggested that the breaks the panel took were not necessary and that this had delayed the hearing. We note that the panel's role is to ensure a fair hearing and any case management decisions arising due to matters raised by parties and regarding the progress of the hearing are to be taken collectively when sitting as a panel and this necessitates discussion.

50. By 1200, the claimant had still not joined the hearing. We were told the claimant did not want an interpreter and considered her English was sufficient. We asked for an explanation as to what steps had been taken or discussion been had with the claimant about supporting her to join the hearing given her inability to effectively join on day one. Claimant's counsel said he had encouraged the claimant to attend. When the claimant joined by telephone, she was very upset and concerned that her phone might not have sufficient charge but she was able to hear. We explained that we would monitor and stop if she lost connection.

51. During the afternoon we heard evidence from a respondent's witness, Mr Ladanyi. After cross-examination, we adjourned to consider whether there were questions we needed to ask Mr Ladanyi in light of what had been covered in cross-examination and the issues we had to determine. We asked a number of clarificatory questions. There was re-examination.

52. At the end of day two, we again raised the issue of ensuring the claimant could be supported and facilitated to give her evidence on day three. We said there needed to be discussion with the claimant about which option she would prefer but clearly it did not work for her to remain at home even if that was her preference. We reassured ourselves that the claimant was aware of the address and how to get to counsel's chambers and we emphasised the need for her to arrive by 9AM so she could be set up and papers provided. We decided it was appropriate to order the claimant to attend counsel's chambers to give evidence to underline the importance of her being able to fully participate in the hearing of her claim and to be able to comfortably and effectively give evidence.

53. At the start of day three, counsel confirmed that there were no issues to address before we heard evidence from the claimant. The claimant herself then asked that clear and simple English be used. The claimant was located at counsel's chambers to provide evidence. We explained the process for giving evidence in that it would be by way of being asked questions for her to answer and checked she had the hearing bundle. The claimant told us that she had an electronic version of the bundle but was not good on computers. We note that this had been raised the day before. The claimant chose to give evidence by and was placed under oath.

54. When cross-examination commenced, we observed that the claimant was struggling to navigate the electronic bundle. We expressed our concern as to why this had not been discussed with the claimant or a hard copy bundle provided. The claimant told us that she needed a larger font in order to be able to read the text.

55. During cross-examination, it appeared to the panel that the claimant had a phone with her from which it seemed a voice could be heard although not what was being said. The claimant told us it was ringing and that it was nothing. She then told us she had forgotten to switch it off and she had brought it for charging.

56. The claimant often asked for questions to be repeated during cross-examination. At times, the claimant did not appear to be focussing on the questions being asked. The claimant could express herself in English although at times was difficult to follow, gave information which did not relate to the question asked and gave the impression that she was distracted. An early question was to establish that a particular document was her contract of employment as a kitchen porter and she agreed she had signed and accepted it. She also gave additional explanation that she was a chef but there were no vacancies for that role but was told vacancies might come up. This answer was coherent and did not give rise to any obvious or immediate concerns as to any material lack of understanding or ability in the English language. However, thereafter in response to a question as to whether it was her signature on the contract of employment given it included her job description, she gave contradictory evidence and said she, 'didn't sign this' followed by 'this is my signature' and then that, 'I say someone put my signature there' and then 'I did not sign anything except my contract'. A number of questions were therefore necessary to establish typically straightforward matters and secure clear evidence as to matters such as whether the contract of employment in the bundle which presented as having the claimant's signature was her contract of employment and carried her signature. We found that the progress of cross-examination was likely to be relatively slow.

57. Given the difficulties navigating the electronic bundle, we asked whether the claimant might be provided with a hard copy bundle. Claimant's counsel provided this having initially indicated concern as to the size and capacity of available printer. However, the claimant still presented as struggling to locate pages identified during cross-examination. We were shown that the claimant had a loose pile of paper. Claimant's counsel told us that he had no facilities to fix the papers together. We had no real or reasonable explanation as to why, given the time available and all the circumstances, that the claimant had not been supported to be in a position where she was comfortable giving evidence with access to papers. We found this interrupted the progress of cross-examination.

58. Cross-examination continued and the claimant was rummaging in a bag and then appeared to be accessing a phone. The claimant told us she was not recording the hearing. The claimant said, 'it's my evidence can I play it'. The claimant then held up what appeared to be a tablet device. We found that the claimant was not focussing on questions and that this action interrupted cross-examination.

59. At this point it was just before 1PM on day three of the hearing. Limited progress had been made with cross-examination. Respondent's counsel told the tribunal that he was instructed to make an application for strike out in the circumstances. This was discussed and it was agreed the application

could be made at 2PM. At 2PM, the claimant indicated that they were ready to proceed and respond to the application. We were concerned to ensure there had been sufficient time for counsel to prepare in addition to the lunch break and was ready to proceed. We offered claimant's counsel any additional time required. Claimant's counsel was given and took up the opportunity of additional time. Claimant's counsel did not indicate at any point that he had insufficient time to prepare to respond to the respondent's application.

60. When responding to the application, claimant's counsel referred to the claimant as a vulnerable witness. There had been no application made to the tribunal to treat the claimant as a vulnerable witness and at no point was a formal application made. We asked claimant's counsel a number of questions to clarify this. Claimant's counsel submitted the claimant was a vulnerable witness based on her feeling emotional today and because of what she had experienced in the workplace and the ongoing effect on her of the situation. We acknowledge that in a context where there are discrimination allegations raised, a claimant will likely feel emotional and that there was said to be an ongoing effect on her. We also acknowledge the tribunal setting is unusual for a claimant. We find that there was no evidential basis before us to indicate that the claimant should be treated as a vulnerable witness. We find any such application should preferably be made in advance or at the start of a hearing. We had no real or reasonable explanation as to why it was made during submissions in reply to the respondent's application for strike out.

61. At this point it was close to 4PM. We hoped to be able to give our decision that day but, in the event, we notified the parties that we would deliver our decision the following day. The claimant was released from her oath.

62. On day four, the tribunal having reached a unanimous decision delivered its oral decision and reasons refusing the respondent's application for strike out. At this point the expectation was that we would continue to hear the claimant's evidence.

63. Claimant's counsel then told the tribunal that the claimant wished to adduce additional evidence of video recordings. Claimant's counsel explained that he had not been instructed at the stage his instructing solicitors and the respondent were preparing the evidence for the hearing and this video evidence was not included in the bundle. We were told by claimant's counsel that this evidence was relevant and it was in the interests of justice that it be admitted.

64. We asked if the video recordings had been disclosed to the respondent. Claimant's counsel told us the evidence had not yet been disclosed as yesterday had been disrupted by the strike out application. In all the circumstances including that the claimant has professional representation, we did not find this a reasonable or sufficient explanation for the late disclosure and timing of the application to admit additional evidence.

65. We also asked which issue the evidence was relevant to and were told by claimant's counsel that he thought it related to the allegation at 3(a)(i) and (ii) of the list of issues. This is the allegation set out at paragraphs 13(a)(i)

and (ii) above that Mr Yakout had given more tasks to the claimant including that of a supervisor specifically on 6 and 7 December 2022 emptying the big bar bottles and emptying heavy bins and this was less favourable treatment because of the claimant's sex.

66. The respondent suggested this might be a video of a few seconds that the respondent had seen which did not advance matters and referred to page 93 of the hearing bundle which references video evidence. Claimant's counsel told the tribunal that he did not believe it was the same video and told the tribunal he had seen the video during lunch yesterday. We adjourned to consider the circumstances in which the claimant was asking to admit additional evidence part way through cross-examination and on day four of the hearing. We had been told by claimant's counsel that he had seen this video, that it was relevant, went to issues for our determination as set out in the list of issues and it was in the interests of justice that the evidence be admitted.

67. We adjourned at 1050. When we returned it was 1130. We indicated that we were now contemplating strike out of our own initiative. We asked claimant's counsel to explain to us the circumstances in which he had seen the video evidence on the claimant's phone during the lunch break given she was under oath at that point.

68. Claimant's counsel told the tribunal that the claimant had been noisy, grabbed her phone and during the lunch break had told him that she wanted to show it to the court. He said he had no chance to go analyse the video and planned to discuss with his instructing solicitors to see the video and if relevant. Claimant's counsel then told us that he had only received the video today at 1053 after the decision refusing the respondent's strike out application had been delivered and had forwarded it to his instructing solicitors at 1055. They had a phone call to discuss and his instructing solicitors told him they had never seen the video before. Claimant's counsel told the tribunal that he had not discussed this with the claimant yesterday, was focussed on the strike out application and had only spoken with the instructing solicitors after the hearing yesterday to update them there would be the decision in the morning.

69. We asked counsel about his references to discussing the strike out application with the claimant which suggested he was having some form of discussion with the claimant. Counsel said, 'I did not discuss evidence or case with claimant yesterday if that is what you want to hear.' Counsel then explained further that the claimant had been screaming I have this video I want to show the tribunal and all he had said was that she needed to calm down and not to discuss anything now. He did not see the video that was playing on her phone and he did not discuss any details with the claimant. Claimant's counsel suggested that as he had said he believed the video was relevant to issues 3(a)(i) and (ii) this proved he had not seen the video previously as now he had seen the video and it related to something else and it had only been his assumption that it related to 3(a)(i) and (ii).

70. We asked claimant's counsel if he agreed that it was unfortunate that he had initially told the tribunal he had seen the video and submitted it was relevant evidence that needed to be admitted in the interests of justice given

that had resulted in an adjournment for the tribunal to consider the consequences of what they had been told whereas now counsel said he had not seen the video until 1053 which was different. Claimant's counsel told us he had explained everything about the circumstances.

71. We adjourned at 1150. We returned and gave our decision to strike out the claim shortly before 1PM. The parties then discussed with the tribunal managing a respondent's application for wasted costs.

LAW

Procedure Rules

72. Rule 2 (Overriding objective) of the Employment Tribunals Rules of Procedure is as follows:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable-
> (a) ensuring that the parties are on an equal footing;
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
> (e) saving expense.
> A Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

73. Rule 37 (Striking out) of the Employment Tribunals Rules of Procedure is as follows:

> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-
> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Purpose of strike out

74. Strike out is a draconian measure and exercise of the power should only be in rare circumstances. The effect is severe. If a claim is struck out, the claim ends. However, where appropriate strike out can save time and costs and avoid the stress and anxiety associated with a case being decided at a hearing **Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT**. This can be positive for both parties.

Approach to take when considering whether or not to strike out a claim

75. The power to strike out is discretionary. The tribunal must first establish whether one of the specified grounds are made out. Then the tribunal must consider whether to exercise its discretion to strike out.

76. In considering its discretion, the tribunal should have regard to the overriding objective to deal with cases fairly and justly. The power can be exercised at any stage of the proceedings but must be exercised in accordance with reason, relevance, principle and justice, including the overriding objective, **Williams v Real Care Agency Ltd 2012 ICR D27, EAT.** Thus proportionality is a relevant consideration such as saving expense and avoiding delay, **Mallon v AECOM Ltd 2021 ICR 1151, EAT.**

77. Where the ground relied upon is that the manner in which proceedings are conducted is unreasonable, the tribunal must be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible and striking out must be a proportionate response, **Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA.** In Blockbuster, Sedley LJ stated: *"This power, as the employment tribunal reminded itself, is a draconic power, not to be readily exercised. It comes into being if, as in the judgment of the tribunal had happened here, a party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response."*

78. It is not necessary for a fair trial not to be possible at all to trigger the power to strike out and it is enough for the power to be exercisable that as a result of the party's conduct, a fair trial was not possible within the trial window, **Emuemukoro v Croma Vigilant (Scotland) Ltd 2022 ICR 327, EAT**. In **Mr T Smith v Tesco Stores Limited [2023] EAT 11,** His Honour Judge James Tayler held that in the factual circumstances of the claim, a fair trial was not possible because the claimant refused to cooperate with the respondent and noted the factors relevant to a fair trial set out by the Court of Appeal in **Arrow Nominees Inc & Anor v Blackledge & Ors [2000] EWCA Civ 200.** A fair trial is a fair trial in the sense of avoiding undue expenditure of time and money, taking into account the demands of other litigants and the finite resources of the employment tribunal.

79. In **Rolls Royce v Riddle [2008] UKEAT 0044/7** at paragraph 35 the EAT made the central point that whilst strike out is a serious outcome, it is important to avoid reading the authorities as indicative of it never being appropriate to use it. The circumstances as a whole must be considered.

ANALYSIS AND CONCLUSIONS

Respondent's application for strike out

80. The respondent applied for the claim to be struck out on the basis that by lunchtime on day three the middle of the trial window had been reached and cross-examination of the claimant had not progressed beyond a few initial questions during which the claimant had been disruptive and this taken with other matters was indicative that the claim was not being actively pursued and/or there was unreasonable conduct. There was a failure to provide

evidence in relation to several allegations in the claimant's witness statement and there was no skeleton argument.

Claimant's submissions

81. Claimant's counsel submitted that the claimant did not have legal representation until recently and the situation would have been different if this had been an in person rather than a remote hearing. Counsel submitted that he had done all he could to assist the claimant when she attended his chambers. The claimant had no intention to cause delay and the matter had been prolonged by the breaks the tribunal was taking. The claimant had started her evidence and is a vulnerable witness. Today the claimant had said she feels emotional and is vulnerable. The tribunal should have raised with him the lack of a claimant's skeleton on the first day which is the housekeeping day. He had only been instructed on Friday. The afternoon of day one was also taken up with housekeeping.

82. The claimant decided to stay at home on day two and was able to access a laptop and had told him she was not comfortable or feeling well to travel so did not wish to use court facilities to give evidence and preferred to stay at home. The claimant had switched off her phone promptly when asked. The tribunal had been taking longer breaks than necessary, longer than expected. There was no delay on the claimant's side. The application had used up the afternoon of day three but there was still time to conclude the hearing and complete cross-examination of the claimant and respondent's witnesses tomorrow and Friday. Submissions could be made after lunch on Friday and then the tribunal would have time to prepare and deliver its decision or provide it in writing.

83. There was no unreasonable conduct in relation to claimant's counsel not having the hearing bundle and the tribunal normally rises at 4pm anyway. It was a matter for him and his client if cross examination was not properly prepared and any time lost to the hearing bundle, was not delay affecting the respondent and was not a big issue.

Our decision and reasons refusing the respondent's application

84. We concluded that certain matters had given us serious concerns and we considered them unacceptable. We did not accept that the claimant's representatives were unaware in advance of the hearing of the existence of a bundle. We had no explanation as to why it was not provided to counsel in advance of the hearing or as we were told by counsel that instructing solicitors did not have the bundle steps were not taken to secure it in advance of the hearing. We had found that prompt and proactive steps were not taken during the morning of day one to put counsel in possession of the bundle.

85. We considered our serious concern that counsel considered himself in a state of readiness to cross-examine a respondent's witness without sight of the hearing bundle. We note counsel had referred to day one as just being for housekeeping. We acknowledge counsel's forceful submission that his preparation and conduct of cross-examination is not a matter for the respondent or the tribunal but rather for his client, the claimant. Given our role to ensure a fair trial and having been alerted to this, we could not ignore

it. The impression given was of a lack of readiness to sensibly progress the hearing.

86. We considered the point raised by the respondent that the claimant had failed to comply with an order to file a skeleton. We acknowledge that counsel was instructed on the Friday but were surprised counsel readily accepted there was such an order thus was accepting non-compliance by the claimant with an order of the tribunal. We were not however convinced there was an explicit direction in the case management orders to file a claimant's skeleton given the reference to 'any' skeleton.

87. We noted the submission that the claimant had only recently instructed legal representation. We refer to our findings above based on the claimant's chronology as to when she had legal representation and it was not only recently; the current representation were instructed in early November 2023.

88. We considered our concern that the issue of an interpreter was only raised on day two given the claimant is professionally represented and such matters should have been explored and relevant requests made in advance of the hearing. We noted that this was not raised at the case management hearing which records that no adjustments were requested. We understand there were no requests in advance of the hearing for any particular accommodations or adjustments. The tribunal is well used to putting a range of arrangements in place to support parties/witnesses and to ensure a fair hearing. In the event once time was given and instructions taken, counsel told the tribunal the claimant did not require an interpreter as her English was sufficient.

89. We were surprised that counsel raised the suggestion that the claimant was a vulnerable witness during submissions in reply to the application for strike out. Again, this is an issue that those instructed should have explored with the client in advance of the hearing if relevant. It was said to relate to her ongoing experiences and thus the asserted basis was not recent. We note our finding that there was seemingly no evidential basis for the suggestion beyond the claimant feeling emotional. The tribunal is well used to dealing with persons who face unfamiliar settings and in difficult circumstances. Such matters can and should be raised by those instructed in advance of the hearing if genuine and relevant.

90. We noted the submission that matters would have been different if this had been an in person hearing. We considered that the hearing was originally listed as an in person hearing. We understand the hearing was converted to a CVP format on the afternoon of Friday 26 January 2024. However, neither the respondent nor the claimant presented any objection to the format of the hearing. At no point was any application made to postpone the hearing on this basis. Counsel told us that the claimant had only objected to this on day three. We observed that until conversion of the format the expectation as no concerns had been raised with the tribunal was that parties would attend the tribunal in person from 0930 each day of the hearing.

91. We considered that time was taken on day one to discuss a range of options to support the claimant joining the hearing with video connection in addition to audio given the expectation that she would be giving evidence on the afternoon of day one but this was not possible. We considered there was a lack of prompt and pro-active steps by those representing to support and enable the claimant to join for day two. We were told that the claimant herself was not feeling well enough but this was then clarified that she did not feel comfortable or preferred not to travel. We note that emphasis was however also being placed on the hearing having been initially listed as an in person hearing. Those positions present somewhat inconsistently. We note our finding that the claimant chose to accept the risks of not attending in person or somewhere other than her home for day two even though we had emphasised the need for her to be able to present her evidence and suggested a range of options to facilitate this.

92. We were mindful that there was a connectivity issue on day two which disconnected everyone from the platform but it was unclear to us why only the claimant was not able to rejoin having initially joined with a video and audio connection. We are not without sympathy for any claimant who may not have ready devices and may not be experienced with computers and in the position the claimant told us she was. However, she was professionally represented, there were no objections to the format, a range of options were canvassed on day one and it is wholly unclear why the tribunal was placed in the position it was placed in on day two. We concluded this was unreasonable.

93. We considered that the tribunal had to take the extraordinary step of ordering the claimant to attend counsel's chambers to present her evidence after more time had been spent discussing arrangements and what was preferable for her. We considered that it became immediately evident to the tribunal that she only had access to papers electronically and was struggling with this. We were not clear why those representing her did not support the process. We note the overriding objective. We had to then identify that she had been provided with loose papers which was further interrupting the progress of cross-examination. We concluded this was unreasonable.

94. We considered our concern that counsel felt it appropriate and reasonable to indicate to the tribunal his view that the tribunal was taking more time than necessary for breaks and that this caused delay. We were not simply taking breaks but during adjournments considering various matters including as to the progress of the hearing or because they had been raised with us including by the claimant.

Not actively pursuing

95. We assessed whether the ground of not actively pursuing was met. We found that the progress of cross-examination was slow. We took account of the claimant's conduct in reaching for her phone and rummaging in her bag and not appearing to focus on the questions being asked. We were mindful that her written statement puts forward no evidence at all in relation to several of the allegations she raises against the respondent and that she is professionally represented. We noted the claimant's choice to remain at home on day two which contributed to delay in hearing her evidence.

96. The respondent submits that this demonstrates at the least discourtesy to the tribunal. We agree that discourtesy is demonstrated but we were not wholly convinced that this was entirely deliberate or intentional on the part of the claimant who finds herself in an unfamiliar setting. We were more concerned that the claimant has representation but had not set out any evidence as to certain allegations in her witness statement. We however concluded that the ground of not actively pursued was not made out.

Manner in which proceedings have been conducted has been unreasonable

97. We assessed whether the ground that the manner in which the proceedings have been conducted has been unreasonable had been met so as to trigger the power to strike out. We concluded that we had very serious concerns about a range of matters we have been faced with during these proceedings so far; we considered the tribunal had been extremely tolerant thus far and we had made it clear what we considered was unreasonable conduct and of concern.

98. We considered the factor of whether a fair trial was still possible. We noted the respondent had submitted that it was futile to say can reasonably be disposed of within the trial window. We agreed with respondent's counsel that there was no prospect of the matter being disposed of within the trial window in the sense that there be sufficient time for the tribunal to deliberate and deliver judgment but we concluded that it remained possible evidence and submissions might be heard. We reflected that this carries the consequence of impacting on other tribunal users and the tribunal's resources as it will necessitate additional time for the panel to deliberate and for the reserved decision to be prepared. That in turn will likely introduce additional time in getting judgment to the parties which is preferably avoided. In addition, if the claimant were to succeed on some or all of her allegations, a further hearing will likely be necessary to address the issue of remedy.

99. We noted that in light of the provisional timetable which allocated 'approximately one day for the tribunal to determine the issues which it has to decide, reach its conclusions and prepare its reasons' and then 'one hour to give judgment' followed by 'three hours to deal with remedy including hearing further evidence if appropriate, reaching conclusions and giving judgment', it was hopelessly optimistic as submitted by claimant's counsel that the tribunal might address all of that on Friday afternoon. We were mindful that if for any reason the hearing did not progress, a need to adjourn arose or the matter goes part heard there may be a need to consider the costs powers at the tribunal's disposal.

100. We considered whether strike out was a proportionate response in all the circumstances.

101. We noted the draconian last resort nature of strike out. We considered that if we cannot complete the hearing within the trial window and adjournment is necessary there may be costs consequences for the claimant herself. Overall, we do not consider it is in the interests of justice for the claimant not to have the opportunity to present her case. We note that most if not all of the issues before us rely on witness testimony. We

note that the respondent had identified issues for determination by the tribunal regarding which the claimant despite having professional representation has not set out her evidence on and which her witness statement fails to address at all. The holiday pay claim. The allegation prevented from using the toilet. The allegation about cleaning the oven. We considered very carefully whether or not to strike out certain allegations/complaints if not the whole claim. We noted that where no evidence is presented by a claimant that will obviously be relevant to the tribunal's decision on those issues.

102. We applied **Blockbuster** and considered whether the unreasonable conduct took the form of deliberate and persistent disregard of required procedural steps or had made a fair trial impossible. We reached the conclusion having considered everything that the threshold as explained in the case law of deliberate and persistent unreasonable conduct was not quite met in all the circumstances notwithstanding the range of unreasonable conduct identified. We noted our conclusion that a fair trial was still possible notwithstanding all the impacts that the delay and unreasonable conduct thus far gave rise to. We were mindful that strike out would end the claimant's claim and in all the circumstances this did not present as proportionate.

103. We therefore refused the respondent's application.

Tribunal's decision to strike out on its own initiative

104. We considered the circumstances we were presented with on day four immediately after having delivered our decision refusing the respondent's application to strike out the claim. We noted our findings and conclusions with regard to unreasonable conduct and the range of matters regarding which we had serious concerns as set out when giving our decision and reasons on the respondent's strike out application. We were now confronted with further circumstances which disrupted the progress of the hearing.

105. We took account of the decision of Her Honour Judge Eady QC in **Chidzoy v BBC, 2018, UKEAT 0097/17.** In that case, the tribunal had concluded that the claimant had been party to a discussion about her evidence in disregard of warnings given and the EAT found the tribunal had permissibly concluded there was unreasonable conduct and correctly concluded that trust had broken down and a fair trial was not possible and that it was proportionate to strike out having considered and concluded there were no alternatives.

106. Claimant's counsel provided a copy of the decision in **Hughes Jarvis Limited v Searle & Anor [2019] EWCA Civ 1.** The Court of Appeal held that a judge had no jurisdiction to deal with an alleged contempt except as breach of an order of the County Court but there was held to be no such order and the way in which the judge dealt with the alleged contempt was procedurally wrong and committal overnight was disproportionate. In striking out, the judge had not been measured and the assessment of whether there could be a fair trial was flawed. This judgment does not directly concern proceedings in the tribunal and the different powers available although addresses exercise of a power to strike out by a judge.

107. We considered that claimant's counsel had accepted there had been an interaction between the claimant and counsel when she was under oath on day three and had received a warning not to discuss her evidence with anyone over lunch.

108. We had received different explanations from claimant's counsel as to what had transpired between the claimant and counsel.

109. Before 1050AM, counsel told us he had seen the video and submitted the video was different from a video the respondent had identified in the bundle as already disclosed. Counsel was also submitting that the video was relevant evidence as he thought it went to specific identified issues for determination and needed to be admitted in the interests of justice and was applying to have that evidence admitted.

110. After we had indicated that the tribunal was considering whether to strike out the claim of its own initiative, claimant's counsel then told us that he had not seen the video and had not received it until 1053AM that day. He had not had time to analyse the video. He told us that his interaction with the claimant had been in a context where she was waving her phone at him and discussion was focussed on the strike out application.

111. We fully acknowledge and understand that there is a difference between having awareness that a video is playing on a phone that is waved at you and attentively watching a video such that one can analyse its contents. However, it was having different versions presented as to what had occurred which was our key concern at this point. Counsel had put forwards for the tribunal to take under consideration that he had seen the video and here was evidence that went to issues for determination and that it was in the interests of justice that we admit it but only thereafter explained that was all assumption and asked us to accept he had not actually seen the video to the extent he was in a position to analyse it as to relevance. The explanation provided as to why he had not seen the video the day before although he had said he had was that he had only seen it at 1053 and he had been putting forward his assumption as to relevance having believed it related to certain issues. We did not find this reasonable. The alterations as to what the tribunal was told when questions were asked or clarification sought affected even more how reliably we could view what we were told and was eroding our confidence.

112. We did not have an account from the claimant as to what had transpired. Counsel had clearly become aware of additional video evidence and accepted there had been an interaction and given the claimant's distracted behaviour during cross-examination and that she had been waving a device around referring to evidence, we thought it probable she had also done this during the lunch break. We considered it unreasonable that having been told not to discuss evidence with anyone, the claimant seemingly took no account of that and had sought to approach her counsel during lunch on day three, waving her phone with a video on it and telling him that she had evidence on her phone. We did not go so far as reaching further or more specific findings such that the claimant and her counsel engaged in detailed discussion as to the evidence she was in the process

of giving but there could well need to be further assessment if the hearing was to continue. The awareness of the circumstances as presented did not give a favourable impression and had the potential to impact on any assessment of the claimant's evidence as to its reliability and the fairness of the trial.

113. We took account of these additional circumstances in the context of what had happened in the course of the hearing thus far including that we had already found unreasonable conduct. We concluded that we were now faced with a continuing pattern of issues being raised which should have been covered during case preparation and the progress of trial being constantly interrupted. Our confidence in what we were being presented with for the purpose of hearing the claim had been eroded. We concluded that the manner in which the proceedings were being conducted was unreasonable and we now viewed this as deliberate and persistent as explained in the case law such that the threshold was crossed establishing the ground and trigger for strike out.

114. We considered whether a fair trial was still possible given that we now approached the afternoon of day four and had lost all the time that we had anticipated would be used for cross-examination of the claimant during the morning of day four given the claimant was now asking for additional evidence to be admitted. We note that case management orders made provided for disclosure in the ordinary way and available evidence should have been disclosed and included in the evidence for hearing if relevant. We had no real explanation as to why video evidence additional to that in the bundle was only now being put forwards. We would need to fully consider and formally decide that application with the time that would take and the additional time that might be needed thereafter. We had seen the pace of progress as to the cross-examination of the claimant that had already taken place. We did not consider it realistic that we could complete the claimant's evidence and the respondent's evidence and hear submissions in the remaining day and a half. We concluded that a fair trial was now not possible within the existing trial window.

115. As the trigger for strike out on the ground that the manner in which proceedings were being conducted was unreasonable was established, we turned to consider whether strike out was proportionate given its draconian nature and took account of the alternatives which might be going part heard or having the trial postponed. We took account of the fact that there had been a range of unreasonable conduct earlier and the claimant was clearly on notice of the difficulties arising with progress of the hearing and our concerns about various conduct matters. We concluded that the manner in which the proceedings had been conducted was unreasonable, a fair trial was no longer possible in the trial window and that in all the circumstances it was proportionate to strike out the claim.

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Tribunal Judge Peer acting as an Employment Judge

Case No: 2207970/2023

Date 8 July 2024

JUDGMENT SENT TO THE PARTIES ON

11 July 2024
.....

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FOR THE TRIBUNAL OFFICE

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