EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

Heard at: Manchester (by CVP) **On:** 5 February 2024
15 March 2024
(in Chambers)

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: Not in attendance
Respondent: Mrs L Banerjee, Counsel

RESERVED JUDGMENT

The claim is struck out under Employment Tribunal Rule 37(1)(c) because the claimant has not complied with the Tribunal Rules or a Tribunal order.

REASONS

Introduction

1. This was a public preliminary hearing to decide whether the claimant's claim should be struck out. The claim was issued on 27 February 2021. It relates to a number of incidents between 1 October 2019 and 2 February 2021 when the claimant was employed by the respondent. The claimant's complaints are that some or all of those incidents amounted to acts of direct sex discrimination, sex-related harassment, sexual harassment or victimisation in breach of the Equality Act 2010.

Anonymisation Order

2. I have made an anonymisation order under Employment Tribunal Rules 2013 rule 50(3)(b). I have explained my reasons for doing so in the reasons attached to that anonymisation order of today's date. As I explain in those reasons, I decided that the anonymisation should apply to the claimant, the respondent and to an

individual against whom the claimant makes allegations of discrimination and harassment. In this judgment I refer to that individual as "S".

Background to the strike-out hearing

3. As I explain below, this case has had a complicated procedural history with a number of hearings being postponed. The final hearing was listed for 9 days and was due to take place from 5-15 February 2024.

4. The claimant did not exchange her witness statement(s) by the date ordered by the Tribunal. As a result, on 19 January 2024, Employment Judge Tobin ordered that if the claimant did not send the respondent her witness statement(s) by 10 a.m. on 29 January 2024, the final hearing of the case would be postponed and the hearing converted to a 1 day public preliminary hearing to consider striking out the claimant's claim. The claimant did not send her witness statements by that date so the final hearing was converted into a public preliminary hearing to consider striking out the claimant's claim ("a strike-out hearing").

5. Employment Judge Tobin directed that if the hearing was converted into a strike-out hearing the Tribunal was to consider striking out the claim:

   a. on the basis of rule 37(1)(b) of the Employment Tribunal's Rules of Procedure 2013: that the manner in which proceedings have been conducted by the claimant has been unreasonable; **and/or**

   b. rule 37(1)(c): for non-compliance with the previous orders of the Tribunal; **and/or**

   c. rule 37(1)(e): i.e. that a fair hearing is no longer possible.

6. On 28 January 2024 the claimant applied to postpone the final hearing, requesting that it be re-listed after September 2024. The respondent objected to the request to postpone the final hearing. It also objected to any postponement of the strike out hearing.

7. On 31 January 2024 Employment Judge Childe confirmed that the final hearing was postponed but directed that the 1 day strike-out hearing should go ahead as listed on 5 February 2024. The Tribunal's letter recording his decision said that "the parties are expected to attend the hearing on 5 February 2024". It was accompanied by a notice of hearing confirming that the strike out hearing would start at 10 a.m.

8. The claimant says that the incidents giving rise to the claim have had a severe impact on her mental health. This is not a disability discrimination claim so there has been no claim or finding that the claimant is a disabled person for the purposes of the Equality Act 2010. The claimant has provided medical evidence relating to her mental health issues during the case which I consider in this judgment. The claimant says that as a result of her mental health issues, she is a vulnerable party for the purposes of the Presidential Guidance on Vulnerable parties and witnesses in Employment Tribunal proceedings ("the Vulnerable Parties PG") and a disabled person for whom the Tribunal should make adjustments to its standard procedures and practices.

The Strike-out Hearing

9. The strike out hearing started at 10 a.m. It was held by CVP videolink. A Spanish interpreter attended to interpret for the claimant. The claimant's first language is Spanish. Although Employment Judge Leach at the hearing on 4 April 2022 noted that her written and spoken English is excellent, the Tribunal at the claimant's request arranged for a Spanish Interpreter to attend hearings from September 2023 onwards.

10. The respondent attended and was represented by Mrs Banerjee of counsel. The respondent had prepared a 440-page preliminary hearing bundle. References to page numbers in this judgment are to the printed page numbers in that bundle rather than to the page numbers in the electronic document.

11. The claimant did not attend the hearing. However, between 10 a.m. and 10.06 a.m. she sent 6 emails to the Tribunal. They included an email timed at 10.00 a.m. in which she requested that the Employment Tribunal "revoke and set aside" Employment Judge Childe's order of 31 January and Employment Judge Tobin's order of 19 January 2024 ordering the strike-out hearing take place. I explain my decision on that application and my reasons for it below under the heading "The claimant's application to revoke and set aside the decision to order the strike out hearing".

12. Attached to that email was a 22 page letter dated 29 January 2024 applying for an extension of time for exchange of witness statements headed "Legal Back Up and Extension of time for exchange of WS" ("the Extension of Time letter"). The top of the Extension of Time letter explained that the claimant had not been able to send that letter until 5 February because of "her mental health disabilities' flare ups and symptoms". Also sent by email was over 200 pages of documents marked "Evidence" and split into Parts 1,2 and 3. At 12:04 the claimant sent a further 6 page letter dated 5 February 2024 which set out the claimant's reasons why her claim should not be struck out ("the claimant's strike-out submissions").

13. I adjourned the hearing to allow time for me and Mrs Banerjee to read the documents the claimant had emailed in. I decided not to grant the claimant's application to revoke or vary Employment Judge Tobin's decision to list the strike out hearing. I also refused the application to postpone the strike out hearing. I have set out my reasons for doing so below.

14. Having decided to proceed with the hearing I heard oral submissions from Mrs Banerjee. I decided the appropriate course of action was to reserve my judgment. That reflected the limited time available at the end of the hearing and the need to give proper consideration to the claimant's written submissions. I considered the matter in chambers on 15 March 2024. In finalising my judgment I decided it was necessary to obtain the parties' written submissions on whether I should make an order under rule 50 of the Employment Tribunal Rules 2013 anonymising the claimant, respondent and S in my judgment. I apologise to the parties that the need to do so, my absence from the Tribunal for various reasons including sickness and other judicial work has led to a delay in finalising this judgment and sending it to them.

15. There was further correspondence between the parties and the Tribunal since 5 February 2024. It included an exchange of correspondence arising from the respondent's request for an update on the reserved judgment. On 23 May 2024 the claimant sent a five page letter making extensive legal submissions explaining why she believed the respondent was putting unreasonable pressure on me to conclude my Judgment. There are two points to be made about that letter. The first is that I do not accept that the respondent was behaving unreasonably by seeking an update on my Judgment. The second is that nothing in the content of that letter from the respondent seemed to me to amount to putting unreasonable pressure on me as the claimant alleged.

16. On 30 May 2024 the claimant sent a further 7 page letter. In it she noted that previous correspondence from the Tribunal had referred to a Reserved Judgment. However, she pointed out that in one of the emails she sent to the Tribunal on 5 February 2024 she said that she was requesting a revocation or setting aside of the Case Management Orders made by Employment Judge Childe on 31 January 2024 and Employment Judge Tobin's orders of 19 January 2024. She set out arguments in support of those applications. I deal with those below in giving my reasons for refusing those applications. The letter also made further submissions relating to the proposed striking out.

17. On 6 June 2024 I wrote to the parties seeking their submissions on the proposal to make an anonymity order. Both parties provided written submissions on or around 17 June 2024. I deal with those and the claimant's subsequent submissions relating to anonymity in my reasons for making the Anonymity Order. Of relevance to the substantive decision, the claimant's attachments to that letter included further medical evidence, namely a letter from the Bodey Medical Centre dated 17 June 2024. It stated that the claimant was suffering extreme anxiety and distress in relation to her upcoming Employment Tribunal decision. The claimant said that she had apparently been suffering online abuse over the last few months in relation to her mental health and was concerned that that would escalate if she was named in the Tribunal decision. The letter from Dr S Taylor GP said that she would be grateful if the Tribunal would consider protecting her anonymity to minimise the effect on her mental health and supporting them in treating her.

18. On 23 June 2024 the claimant sent an email with two further attachments. That was a letter dated 23 June 2024 together with a further 55 pages of "further evidence" relating to the anonymisation issue. On 2 August 2024 the claimant sent a further letter reminding me that reasons for her application for an anonymisation order under rule 50(3)(b) must be given.

19. On 4 November 2024 the claimant sent an email attaching fit notes confirming she was not fit for work. The latest signed her off for 8 weeks from 29 September 2024 due to PTSD, Severe anxiety and depression. The claimant also attached correspondence relating to her recent grant of a Personal Independence Payment ("PIP").

20. Although I do not set out the detail of all the submissions and materials provided by the parties after the hearing in giving my reasons below, I have read them and taken them into account in reaching my decision on the strike out application and anonymisation order.

Relevant Law

The obligations of the Tribunal towards disabled or vulnerable parties

21. An exercise of judicial discretion in the case management of ET proceedings is excluded from the scope of the Equality Act 2010 (see paragraph 3 of schedule 3 to the Equality Act 2010, and the observations of Underhill LJ at paragraph 33 **J v K (Equality and Human Rights Commission intervener) [2019] IRLR 723 CA).** However, because such an exercise of discretion must take into account all relevant considerations, the ET would still need to have regard to any disadvantage that might be caused by a litigant's disability, and the reasonable steps that might alleviate that; see **J v K**.

22. In **Rackham v NHS Professionals Limited UKEAT/0110/15** it was emphasised that the overall aim must be to overcome the barriers caused to the individual by their disability so that they can "give the full and proper account that they would wish to give to the tribunal, as best they can be helped to give it" (per Langstaff J at paragraph 36). Practical guidance on how best to achieve this is given by the Equal Treatment Bench Book issued by the Judicial College.

23. The Tribunal must have regard to the Presidential Guidance on Vulnerable parties and witnesses in Employment Tribunal proceedings but are not bound by it.

Varying or revoking case management decisions

24. The Tribunal has power under rule 29 of the Employment Tribunal Rules 2013 to vary or revoke a case management order where that is necessary in the interests of justice. In **Serco Ltd v Wells EAT 2016 ICR 768, EAT**, the EAT held that a Tribunal should be sparing in the exercise of that power. The principles of finality and certainty mean that challenges to an order should normally be pursued via an appeal. The phrase 'necessary in the interests of justice' should be interpreted narrowly. For example, if there has been a material change of circumstances, or if the order was based on a material omission or misstatement, a variation or revocation may be appropriate.

Postponements

25. A decision on an application to postpone a hearing involves the exercise of case management powers under rule 29 Employment Tribunals Rules of Procedure 2013 ("the Employment Tribunal Rules").

26. Rule 30A relates specifically to applications to postpone a hearing. It provides, at 30A(2), that such an application made less than seven days before the start of the hearing may only be granted where all parties consent (further subject as provided), the application was necessitated by the act or omission of another party or the tribunal, or "there are exceptional circumstances".

27. Rule 30A(4) provides that exceptional circumstances "may include ill health relating to an existing long term health condition or disability".

28. Presidential Guidance on postponement applications was issued in 2013. Pursuant to rule 7, tribunals must have regard to it, but are not bound by it. It

includes provision that, where a postponement is sought on medical grounds, supporting medical evidence should include a statement from a medical practitioner that in their opinion the applicant is unfit to attend the hearing.

29. The principles to be applied in considering an application for a postponement due to ill-health have been considered in particular in **Teinaz v London Borough of Wandsworth [2002] ICR 1471 CA**; **O'Cathail v. Transport for London [2012] ICR 614 CA** and **Phelan v Richardson Rogers Ltd [2021] ICR 1164, EAT**. Those principles were summarised more recently by the president of the EAT in **Hall v Transport for London [2024] ICR 788 at [31].** :

    (1) …

    (2) Where the application is to postpone a trial or other hearing, the outcome of which may dispose of the claim, or some other substantive issue in the case, the applicant's article 6 rights under the European Convention of Human Rights ("ECHR") and common rights to a fair trial will be engaged; thus, while an adjournment is a discretionary matter, some adjournments must be granted if not to do so amounts to a denial of justice, and an applicant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of their own, will usually have to be granted an adjournment; (**Teinaz**, paragraphs 20-21; **Phelan** paragraph 75).

    (3) Article 6 ECHR and common law rights to a fair trial do not, however, compel the Tribunal to the conclusion that it is always unfair to refuse an application for an adjournment on medical grounds if it would mean the hearing would take place in the applicant's absence; the Tribunal has to balance the adverse consequences for the applicant with the rights of the other party to have a trial within a reasonable time, and the public interest in prompt and efficient adjudication of cases in the Tribunal (**O'Cathail**, paragraph 47; **Phelan** paragraph 76).

    (4) In any event, the ET is entitled to be satisfied that the inability of the applicant to be present is genuine, and the onus is on the applicant to prove the need for such an adjournment; if there are doubts about medical evidence, the ET has a discretion whether or not to give a direction allowing such doubts to be resolved, which may include directing that further evidence be provided promptly, although it is not necessarily an error of law to fail to take such steps (**Teinaz**, paragraphs 21-22).

    (5) Fairness to other litigants may require that if an applicant has not adequately taken the opportunity to justify a postponement that indulgence is not extended (**Andreou v Lord Chancellor's Department [2002] IRLR 728 CA**, paragraph 46)".

<u>Strike-out</u>

30. Rule 37 of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim:

> **"37. — Striking out**
>
> **(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)."**

31. Rule 37(2) says that 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.

32. The process for striking-out under Rule 37 involves a two stage test (**HM Prison Service v Dolby [2003] IRLR 694, EAT; Hasan v Tesco Stores Ltd UKEAT/0098/16**). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied. That means that if any of 37(1)(a) to (e) apply, a tribunal "may" strike out, but is not obliged to do so. In deciding whether to exercise the power the tribunal must have regard to the overriding objective and what is fair and just to both sides (**T v Royal Bank of Scotland [2023] EAT 119, para 38**).

33. The overriding objective is set out in Rule 2 of the Employment Tribunal Rules of Procedure 2013 which provides:

> **2. 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.

34. Even in a case where the impugned conduct consists of deliberate failures in relation, for example, to disclosure, the fundamental question for any Tribunal considering the sanction of a strike out is whether the parties' conduct has rendered a fair trial impossible: see **Bolch v Chipman [2004] IRLR 140 EAT**. In **Bolch**, Burton P set out guidance for Tribunals when determining whether or not to make a strike out order, as follows:

(i) There must be a finding that the party is in default of some kind, falling within Rule 37(1).

(ii) If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.

(iii) Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.

(iv) If strike out is the only proportionate and fair course to take, reasons should be given why that is so.

35. The power to strike out a claim is a draconian one – in other words, it should not be used unless there are very clear grounds for doing so. That is because any party to a case should ultimately have the opportunity to have their claim heard at a final hearing. However, in some cases the behaviour of a party can lead to a Tribunal deciding that it is appropriate to strike out a claim.

36. The relevant grounds for potentially striking out in this case were those identified by Employment Judge Tobin, i.e. Employment Tribunal Rules 37(1)(b),(c) and (e).

<u>Rule 37(1)(b) – the manner in which the case has been conducted is unreasonable</u>

37. When it comes to striking out for conducting proceedings unreasonably, scandalously or vexatiously (rule 37(1)(b)), the case of **James v Blockbuster Entertainment Ltd [2006] IRLR 630 CA** says that for the Tribunal to strike out for unreasonable conduct it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps, or that the conduct has made a fair trial impossible. In either case the striking out must be a proportionate response.

38. In **Emuemokoro v Croma Vigiliant [2022] I.C.R. 327** the EAT held that authorities did not support the employer's contention that whether a fair trial was possible was to be determined in absolute terms, namely by considering whether a fair trial was possible at all and not just within the allocated trial window. Where a strike-out application was considered on the first day of trial, it was a highly relevant

consideration as to whether a fair trial was possible within that trial window. Where a party's unreasonable conduct had resulted in a fair trial not being possible within that window, the power to strike-out was triggered. Whether the power should be exercised would depend on whether it was proportionate to do so. The proposition that the power could only be triggered where a fair trial was rendered impossible in an absolute sense would not take account of all the factors relevant to a fair trial. Those factors, which include undue expenditure of time and money, the demands of other litigants and the finite court resources, were consistent with taking into account the overriding objective.

Rule 37(1)(c) – failure to comply with Tribunal orders

39. The leading authority on striking out for non-compliance is **Weir Valves and Controls (UK) Ltd v Armitage (2004) ICR 371**. At paragraph 17 in that case the Employment Appeal Tribunal said that:

> "It does not follow that a striking-out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.'
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> Repeated non-compliance is to be deprecated, and it may give rise to a view that if further indulgence is granted, the same will simply happen again: see Harris at paragraph 26."

Rule 37(1)(e) –the Tribunal considers a fair hearing is no longer possible.

40. In **Leeks v University College London Hospitals NHS Foundation Trust 2024 EAT 134** the EAT considered the interaction between the "fair hearing" test which applies to rule 37(1)(a)-(d) strike outs and rule 37(1)(e). The EAT noted that the questions of whether a fair trial is impossible and whether there is a significant risk that a fair trial could not take place appear to be treated as interchangeable in many of the authorities but suggested that there might be a lesser test where conduct falling within rule 37(1)(b)–(d) has been established than where the party relies on rule 37(1)(e) alone. Strike-out under rule 37(1)(b)–(d) will generally only require that there is a 'significant risk' that a fair trial could not take place, whereas rule 37(1)(e) requires it to be established that it is not 'possible' to have a fair hearing. In the EAT's view, there would be some logic to having a lower threshold for the impact of default on the possibility of a fair trial where some specific conduct has been established.

41. In the same case the EAT said that where a party has conducted proceedings in a manner that has been scandalous, unreasonable or vexatious, has failed to comply with the Tribunal Rules or an order of the tribunal, or the claim has not been actively pursued, that may be relevant to the possibility of a fair trial because, if there has been repeated default in the past, it is common for it to be repeated in the future.

42. In addition, where there is conduct that falls within rule 37(1)(b)–(d), the likelihood of recurrence is relevant to the possibility of a fair trial, while a claim could be struck out under rule 37(1)(e) even where the party against whom the application is made has done nothing wrong. For example, the ill health of a party could mean that it is no longer possible to have a fair hearing even though a party cannot be criticised for being unwell.

Proportionality and Article 6 ECHR

43. In **Blockbuster** Sedley LJ said (at para **21**):

> "21. It is not only by reason of the Convention right to a fair hearing vouchsafed by article 6 that striking out, even if otherwise warranted, must be a proportionate response. The common law..has for a long time taken a similar stance. What the jurisprudence of the European Court of Human Rights has contributed to the pinciple is the need for a structured examination. The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact if it is a fact that the Tribunal is ready to try the claims; or as the case may be that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist. If a straightforward refusal to admit late material or applications will enable the hearing to go ahead, or if, albeit late, they can be accommodated without unfairness, it can only be in a wholly exceptional case that a history of unreasonable conduct which has not until that point caused the claim to be struck out will now justify its summary termination. Proportionality, in other words, is not simply a corollary or function of the existence of the other conditions for striking out. It is an important check, in the overall interests of justice, upon their consequences."

44. In **Riley v Crown Prosecution Service [2013] IRLR 966** the Court of Appeal upheld a striking out on the basis that the Claimant's depression, which prevented her from attending to her claim and which was of indefinite duration, meant that it was no longer possible to have a fair hearing. Longmore LJ said as follows in paragraphs 27 and 28 of his judgment:

> "27. It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to "a fair trial within a reasonable time". That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. Judge Hall-Smith correctly found assistance in remarks of Peter Gibson LJ in Andreou v The Lord Chancellors Department which are as relevant today as they were 11 years ago:—
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> > "The Tribunal in deciding whether to refuse an adjournment had to balance a number of factors. They included not merely fairness to Mrs

> Andreou (of course an extremely important matter made more so by the incorporation into our law of the European Convention on Human Rights , having regard to the terms of Article 6): they had to include fairness to the respondent. All accusations of racial discrimination are serious. They are serious for the victim. They are serious for those accused of those allegations, who must take very seriously what is alleged against them. It is rightly considered that a complaint such as this must be investigated, and disputes determined, promptly; hence the short limitation period allowed. This case concerned events which took place very many years ago, well outside the normal three months limitation period. A Tribunal also had to take into account the fact that other litigants are waiting to have their cases heard. It is notorious how heavily burdened Employment Tribunals are these days."
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> 28. It would, in my judgment, be wrong to expect Tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a Tribunal."

Findings

The claimant's claim

45. The claimant's claim was issued on 27 February 2021 following early conciliation from 18 December 2020 to 28 January 2021.

46. Employment Judge Leach summarised the facts of the case at paras (12) to (19) his case management order from the preliminary hearing on 18 October 2022 ("the Leach October 2022 CMO"):

a. The claimant was employed by the respondent between September 2019 and February 2021 in a telemarketing role.

b. In her claim she raises various complaints of harassment and direct discrimination, relying on the protected characteristic of sex. These mainly relate to the way the claimant says she was treated by a male manager, S.

c. The claimant's performance was in part measured on her meeting or exceeding targets including targets for appointments generated from leads. In October 2020 the respondent investigated allegations (made by S and another employee) that the claimant had offered to pay employees for them to transfer leads to her. The additional leads would help enable her to improve her performance against targets. The claimant alleges these allegations (and the subsequent investigation) amount to further acts of harassment and discrimination.

d. Also in October 2020, the claimant raised a grievance about S's treatment of her. This grievance was not upheld and on 4 January 2021 the claimant submitted an appeal. The appeal was not upheld.

e. The disciplinary process against the claimant had been suspended pending the outcome of her grievance. It was resumed and the claimant was invited to a disciplinary hearing to be held on 4 February 2021. She did not attend that hearing. On 3 February 2021 she submitted a letter resigning with immediate effec alleging constructive dismissal on the grounds of sex discrimination.

f. The claimant had been absent from work due to sickness from on or about 19 October 2020 and did not return to work prior to her resignation on 3 February 2021.

47. Details of the incidents relied on as the basis for the claimant's complaints were set out in a list of issues annexed to the Leach October 2022 CMO. It set out 7 incidents numbered 2.1.1 to 2.1.7. All but one incident included more than one alleged act of unwanted conduct or detriment. There are a total of 25 acts complained of. They are all said to be acts of sex-related harassment (s.26(1) of the Equality Act 2010) or direct sex discrimination (s.13 of the Equality Act 2010).

48. One act (2.1.3.1) was alleged to be sexual harassment within the definition in s.26(2), i.e. conduct of a sexual nature or within s.26(3), i.e. less favourable treatment because the claimant rejected unwanted conduct of a sexual nature or related to sex. That relates to the allegation that at the End of Year celebration on 30 January 2020, S put his arm over the claimant's shoulder and said "with lust to the claimant 'we all have a room booked by the company in a hotel, you can go with me to my room if you want'" and that after the claimant rejected that proposition, S threatened that "if [the claimant] did not do anything with me, I'm going to find the opportunity to harm you, to destroy you".

49. The incidents are in broadly chronological order. The oldest acts complained about (2.1.1.1 to 2.1.1.7) date from 1 October 2019 to 30 November 2019. The most recent acts complained of (2.1.7.1 to 2.1.7.7) date from October 2020 to February 2021 and relate to the conduct of the grievance and disciplinary processes.

50. 3 of the later incidents (2.1.7.5 to 2.1.7.7) are said to be acts of victimisation in breach of s.27 Equality Act 2010. The relevant protected acts are said to be the claimant sending a "cease and desist" notice on 9 November 2020 and the grievance she raised on 15 October 2020.

51. I did not hear evidence about the substance of the complaints. There is no application to strike out the claim on the basis that it has no reasonable prospect of success. However, the nature and date of the alleged acts are relevant in assessing whether a fair hearing of the case is possible. I find that a number of the allegations, especially those against S, are likely to involve disputes of fact and turn on the assessment of the reliability of witness evidence. That is because they turn on whether S said or did things to the claimant and, if so, how he did so. For example, 2.1.1.1 is an allegation that S said to the claimant "aggressively and with contempt"

(a)"can you not see that?" and (b) "that's really obvious". 2.1.2.1 is an allegation that S made "demeaning and mocking facial expressions directed towards the claimant".

52. I find that although the claimant did raise a grievance in October 2020 which was investigated by the respondent and will provide some documentary evidence about the earlier acts complained of, the grievance was raised some 11 months after allegations 2.1.1.1 and 2.1.1.7 and 8-9 months after the allegations at 2.1.2. to 2.1.3. That includes the sexual harassment allegation about the End of Year Celebration at the end of January 2020.

The procedural history of the claim

53. Having received the claimant's claim form, the Tribunal followed its standard practice in discrimination cases by listing a 2 hour case management hearing. It was to take place by telephone at 14:15 on 14 May 2021 ("the May 2021 CMPH"). The time estimate for the hearing was 2 hours.

54. The claimant ticked "no" to question 12 on the claim form asking whether she had a disability and did not in the box below that identify any assistance she might need as her claim progressed. She attached a 20 page, structured document setting out the details of her complaints. It included references to and quotes from relevant legislation and ACAS guidance relating to discrimination and to disciplinary and grievance matters. The claimant did not in that attachment identify herself as a disabled person or as a vulnerable party. She did, however, refer to the impact of the incidents on her mental health. Specifically, she referred to having been admitted to A & E on 17 October 2020 to seek medical support for her mental health and to her having been prescribed anti-depressant medication by her GP.

The postponement of the May 2021 CMPH

55. On 21 March 2021, before the respondent had filed its response to her claim, the claimant wrote to the Tribunal applying for "Support for a vulnerable party" and for privacy and reporting restrictions under rule 50 of the Employment Tribunal Rules 2013 ("rule 50").

56. In her letter, she said that due to the respondent's actions she had been "under unbearable amounts of distress, anxiety, fear, stress, depression and confusion for over a long period of time". As a result her mental health had been severely affected and she was undergoing medical treatment. She said she was a vulnerable party according to rules 4 and 8 of the Vulnerable parties PG and "would be grateful if you would inform the Employment Judge I will need support and considerations during Tribunal proceedings in regards to my vulnerability, according to Rules 6, 14, 15, 21, 22 and 37" of that guidance.

57. The claimant also applied for a permanent privacy protection order and a permanent restricted reporting order. She cited rule 50, her Convention rights and s.11 of the Employment Tribunal Act 1996, referring to the fact that her case included allegations of sexual harassment and to the sensitive nature of the evidence the Tribunal would need to hear to decide her case.

58. The respondent filed its response to the claim on 30 March 2021. It denied the claim and asserted that incidents 1 to 5 were out of time and did not form part of a continuing act.

59. In a separate email of the same date, it also objected to the applications in the claimant's letter of 21 March 2021 on the grounds that the claimant had not set out adequate grounds on which the Tribunal could reasonably satisfy itself that such applications should be granted. The May 2021 CMPH was postponed by the Tribunal and re-listed on the 7 June 2021 ("the June 2021 CMPH") to enable the claimant's applications dated 21 March 2021 to be considered at that hearing.

Request to postpone the 7June 2021 CMPH and supporting medical evidence

60. On 27 May 2021 the claimant applied to postpone the 7 June 2021 CMPH on the grounds that her mental and physical illnesses meant she was incapable of participating in any hearing either orally or by written representations. She asked that the preliminary hearing be re-listed in November 2021.

61. In her letter applying for a postponement the claimant described severe symptoms of low mood, depression and traumatic stress-related disorders which she said resulted from sex discrimination and sexual harassment by the respondent. She said those symptoms included flashbacks and memories of what she referred to as the "attacks and torture" which S subjected her to and the feelings of distress and anxiety those incidents caused her. She described feeling sick, vomiting and feeling dizzy when doing tribunal proceedings tasks such as writing her letter requesting the postponement. She described being unable to concentrate, experiencing confusion and suicidal thoughts. She said that writing the letter requesting the postponement had been an "excruciating" task which took her ages to complete. She described having no energy to do anything including day to day tasks such as taking showers and preparing food. She also described physical symptoms including sudden headaches, paraesthesia-like symptoms and unusual and acute hair loss. The claimant said the symptoms appeared all of a sudden, involuntarily, without any triggers and that new symptoms had developed as the months passed. She said they were debilitating to the point where she was completely incapable of doing anything, leaving her in bed over long periods of time from 3 weeks to a month.

62. The claimant confirmed that she had been unable to work since October 2020 and that she had fit notes from her GP as evidence of that. She reported that she had received therapy from Greater Manchester Mental Health Services from November to December 2020 when her mental health illness became worse and that she had been receiving CBT Therapy from the same Service since the end of March 2021. She reported that she had been prescribed the anti-depression medication Sertraline but could not yet bring her symptoms under control.

63. The respondent confirmed on 28 May 2021 that it did not oppose the claimant's postponement application. E J Ainscough postponed the 7 June 2021 CMPH and ordered the claimant to provide medical evidence by not later than 11 June 2021. On 7 June 2021, E J Allen confirmed the postponement and directed that the Tribunal would review the case on 3 September 2021. He noted that medical evidence had been received in support of the postponement application but asked the parties to provide an update prior to 3 September 2021.

64. The medical evidence provided by the claimant in support of the application to postpone the June 2021 CMPH consisted of:

a. a fit note dated 21 May 2021 signed by the claimant's GP ("Dr Johnston") certifying the claimant as not fit for work from 1 May until 31 October 2021 because of "Stress at work".

b. a "to whom it may concern letter" dated 25 May 2021 from Dr Johnston confirming that the claimant was under the care of Greater Manchester Mental Health Services ("GMMHS") who had diagnosed "Anxiety Work Stress and low mood". Dr Johnston reported that the claimant had expressed suicidal ideation and was receiving high intensity cognitive behaviour therapy for this. She reported that symptoms of the low mood and anxiety could lead to an inability to concentrate, forgetfulness, lack of energy, and an inability to make decisions. She also reported that the claimant reported severe debilitating headaches, which also could be due to anxiety stress and that the claimant also complained of paraesthesia and hair loss. In light of the claimant's symptoms Dr Johnston said she would support the claimant's feelings that she was not fit to attend a tribunal hearing at the present time.(p.189)

c. a report in the form of a letter from GMMHS to Dr Johnston ("the GMMHS Report"). Although undated it must date from before 25 May 2021 because it is attached to Dr Johnston's letter of that date. In it, a CBT Psychotherapist with GMMHS reports on the 5 sessions of therapy she had undertaken with the claimant:

i. The therapist records the claimant as reporting a number of symptoms connected to having been the recent victim of work place harassment by a male colleague and notes the symptoms reported included symptoms suggestive of depression such as "appetite changes, tearfulness, an inability to focus, sleep disturbance, reduced motivation and reduced ability to concentrate with associated memory loss".

ii. She records the claimant reporting that at times she finds herself involuntarily recalling images of the content of the alleged harassment, leading to her experiencing high levels of distress and anxiety with associated physical symptoms including nausea and vomiting.

iii. She records that the reported experiences had left the claimant hypervigilant for actual or perceived danger; in particular people who resemble the alleged perpetrator. The claimant had reported throughout therapy an increased sense of hopelessness which has on occasion led her to contemplate suicide by overdose; although there is no current indication reported that she would act on these thoughts and she cited her mother as a protective factor. The report records the claimant feeling "trapped" by her situation and mistrustful of others to the extent that she avoids leaving her home address and has become socially isolated.

iv. She reports that she and the claimant have adopted a CBT approach and are in the process of formulating the claimant's difficulties with the aim of understanding the maintenance factors.

v. She notes that the claimant discussed the Sertraline medication she had been prescribed and noted that she had experienced a limited improvement in her mood since commencement. Dr Johnston was asked in the report to review the antidepressant medication with the claimant.

vi. The therapist said that she would write to Dr Johnston again at the end of treatment or before should the claimant's risk profile change.

Events from 3 September 2021 to 3 November 2021 – the claimant's request for adjustments at the next case management preliminary hearing

65. On 2 September 2021 the claimant wrote to the Tribunal in compliance with Employment Judge Allen's direction to provide an update. She reported that her mental and physical health conditions described in her letter 27 May 2021 were still the same. GMMHS had confirmed that her symptoms were of low mood, depression and traumatic stress-related disorders.

66. The claimant said she had been "striving to get rid of her illnesses". She confirmed that she had been receiving CBT from GMMHS and that she had recently changed the anti-depression medication she was taking from Sertraline to Citalopram. The effect of that change was still under medical review. The claimant attached the medical evidence previously sent in May 2021 but no updated medical evidence.

67. In her letter the claimant accepted that despite her symptoms a further postponement was "not suitable". She agreed to a date being set for a case management preliminary hearing but requested adjustments to the way the hearing was conducted. She referred to the Vulnerable Parties PG, the Equal Treatment Bench Book ("the ETBB") and the overriding objective and set out specific conditions which she asked the Tribunal to apply in conducting the next case management preliminary hearing. There were 5 conditions labelled A to E:

A. To allocate 3 hours to the hearing because the claimant would need to ask for submissions, instructions and interventions by the Judge and the respondent to be repeated. That was because of the claimant's difficulties in concentrating, thinking and making decisions and the confusion she experienced as symptoms of her mental health and physical conditions.

B. Avoidance of the use of jargon and/or idioms during the hearing.

C. To consider the possibility that the claimant may ask for an adjournment of the hearing until a later time if the claimant experienced flashbacks, crying or the physical symptoms triggered by doing tasks related to the tribunal case such as dizziness or vomiting. The claimant

said that at times recalling the feelings caused by S's conduct debilitated her to such an extent that she was incapable of doing anything.

D. To allow the claimant to respond to questions in relation to case management by reading her answers. This was because the claimant experienced amnesia and confusion.

E. That in accordance with paragraph 21 of the Vulnerable Parties PG, the preliminary hearing be set for a date after her then current sick note's end date (31 October 2021). (Paragraph 21 says that "A particular feature of the management of cases involving a vulnerable person will be a readiness to provide extended time for compliance with any step").

68. The respondent wrote on 7 September 2021 to agree to the conditions apart from condition C. It submitted that once the preliminary hearing was underway the parties and the Tribunal should use utmost endeavours to avoid adjournment until a later date. It acknowledged that the claimant could make another application to adjourn the hearing if she felt unable to attend but said it may not be supportive of a further adjournment without updated medical evidence. It asked the claimant to notify the Tribunal and the respondent as soon as possible if any such application to adjourn were made. The respondent asserted that its position was in line with the overriding objective of avoiding delay and saving costs.

69. On 8 October 2021, I considered the claimant's request for adjustments as part of judicial duty work. I directed that the claimant clarify what format of hearing would be better for her (in person, CVP or telephone). I proposed a preliminary hearing split into 2 parts either on the same day or over different days. That was to enable the claimant to have a longer than usual break during the hearing and to enable her to provide answers in writing for the second part of the hearing as suggested by the claimant in her condition D.

70. On 22 October 2021 the claimant confirmed she preferred an in-person hearing, a hearing split over 2 days and asked if a family member could attend. On 3 November the respondent confirmed it did not object to that approach. It pointed out that it had provided a case management agenda and draft list of issues for the May 2021 CMPH. It suggested it would be beneficial if the claimant provided her comments on that prior to the re-listed preliminary hearing.

Preparation for the "Split" CMPH listed for March and May 2022

71. I listed the "split" case management preliminary hearing to take place on 4 March 2022 ("the March 2022 CMPH") and 26 May 2022 ("the May 2022 CMPH"). The hearing on each day was listed for 2 hours in person at the Tribunal. In my directions sent to the parties on 19 November 2021 (pp.107-109) I set out what matters would be dealt with at each hearing. In summary, the March 2022 CMPH would primarily include considerations of adjustments needed to ensure the parties were on an equal footing, identify what further information the claimant needed to provide at the May 2022 CMPH and decide at which hearing the claimant's applications for a Restricted Reporting Order and Permanent Privacy Order would be

decided. I made it clear the judge conducting the hearings could decide to vary those matters. The gap of 10 weeks between the hearings was to give time for the claimant to receive and respond to the case management orders made at the March 2022 CMPH and for the respondent to provide comments in response (if so required).

72. I ordered that by 5 working days before the March 2022 CMPH the parties provide to the Tribunal a bundle of docs including a joint agenda or, if one could not be agreed, an agenda each. Attached to the letter setting out the directions was an example of the standard List of Issues format used by the Tribunal for cases of sexual harassment and direct sex discrimination (at that point it had not been clarified that the claimant was also bringing a victimisation complaint).

73. An agreed agenda was sent to the Tribunal 25 February 2022. In it the claimant indicated she would be seeking permission to amend and that she had served a discrimination questionnaire on the respondent. At paragraph 7.2 of the agenda the claimant proposed that witness statements be exchanged 16 weeks before the final hearing.

74. The claimant also provided a List of Issues dated 20 February 2022 (referred to in the agenda). It included a great deal of narrative, substantially repeating the details of claim attached to the claimant's Claim Form. It also included answers relevant to the questions from the example list of issues, e.g. comparators (para 1.10). I find it was a genuine attempt by the claimant to provide a list of issues in the format she understood the Tribunal required. The respondent also provided a list of issues which it had prepared for the May 2021 CMPH and which was significantly briefer than the claimant's list and closer to the list the Tribunal is used to seeing. On 3 March 2022 the claimant provided the wording of proposed draft orders including a restricted reporting order, privacy order and orders relating to preparation of the case for a final hearing.

75. I accept Mrs Banerjee's submission that the documents show that the claimant was at that point at least able to concentrate and engage with the tribunal proceedings sufficiently to prepare her response to the agenda, a list of issues which dealt with incidents in her claim and draft orders.

The March 2022 CMPH

76. The split case management hearing was conducted by Employment Judge Leach. He provided a full summary of the matters discussed at the March 2022 CMPH in his case management order from that hearing (pp.151-165).

77. Paragraphs (5) to (17) of the case summary is headed "Dealing with the case fairly and justly". It records that the claimant referred to the Vulnerable Parties PG and requested the Tribunal for support because she considered herself a vulnerable party. Employment Judge Leach noted the medical evidence (which appears to be the same GP letter and GMMHS letters provided by the claimant in May 2021), noted that there was no indication that the claimant lacked capacity (as she had suggested at the hearing) and that there was no reference in the medical evidence provided to the claimant having been diagnosed with PTSD (paras 7, 8 and 9). He also recorded (para (3)) that when he gave an explanation of the Tribunal process at

the start of the hearing, the claimant was able to discuss the process knowledgably and understood the process of disclosure, the concept of standard disclosure under the civil procedure rules and other aspects of the process.

78. Employment Judge Leach decided there were no grounds for seeking further medical reports in relation to the claimant at that point. He made it clear that would not prevent the claimant from relying on further medical reports for any purpose relevant to the proceedings, including as evidence that she had suffered discrimination or harassment. He also confirmed that should the claimant have further medical information going forward that was relevant to any particular point (for example to support the claimant's position that a particular course of action should be followed at or before the final hearing) it would of course be considered (paragraph (11)).

79. The claimant raised again her need for extended time to respond, the need to avoid jargon and for cross examination to be controlled and not oppressive. She also raised the difficulties she expected in facing S at the final hearing. Referring to the Vulnerable Parties PG she proposed that S did not attend the final hearing apart from during the cross examination and that the cross examination of S should be carried out either by the Judge or by an appointed litigation friend. Employment Judge Leach indicated those matters may be considered at the May 2022 CMPH or that it may be appropriate to hold a "ground rules" hearing before the final hearing took place.

80. In answer to Employment Judge Leach's question the claimant confirmed her first language was Spanish. Employment Judge Leach noted that the claimant's written and spoken English were excellent. However, he suggested that the claimant consider whether it would assist her to have a Spanish interpreter at future hearings.

81. Employment Judge Leach decided the rule 50 applications would be dealt with at the May 2022 CMPH.

82. At paragraph (22) of his case management summary, Employment Judge Leach records a discussion about the List of Issues. I set it out in full here because it was the subject of dispute between the parties later in the proceedings:

> "(22) Following discussion, it was evident that the claimant understood the need for a List of Issues that identified the alleged acts of discrimination/harassment, and that the respondent's draft list did that without further narrative. The claimant's draft list was a much fuller narrative more in the way of a witness statement. However, the claimant expressed concern about the questions asked by the respondent's draft List of Issues, noting that it had not followed precedent provided by the Employment Judge. I asked the respondent for its cooperation in amending its List of Issues so that it retained the clarity and brevity already there in terms of the particular complaints, but that it followed more closely the precedent provided by the Tribunal which would give the claimant confidence that the right questions were being addressed. I am grateful to Ms Greenley for confirming that she/her instructing solicitors would do this and would provide the claimant with an amended draft list by **18 March 2022**."

83. I understand the reference to the "Precedent" to mean the example standard List of Issues which had been sent to the claimant with my directions in November 2021.

84. After initially expressing some reservations, the claimant confirmed to Employment Judge Leach that she would provide the additional information requested in the respondent's list of issues. The claimant asked whether she would have an opportunity to make further comments on the respondent's List of Issues and Employment Judge Leach confirmed that she would. The claimant confirmed that a 3 week period would give her enough time to provide her comments and Employment Judge Leach ordered that she provide her response to the amended draft List of Issues by **8 April 2022**.

85. The claimant was to specifically consider whether she was going to continue to pursue the complaints of breach of contract and of breach of trust which she had included in the claim form. Employment Judge Leach explained that the Tribunal did not have jurisdiction to decide claims of negligence/breach of statutory duty.

86. Employment Judge Leach provisionally listed the final hearing in the case for 8 days on 5-15 February 2024. He identified the matters to be dealt with at the May 2022 CMPH hearing on 26 May 2022 as being

(i) The claimant's application under rule 50 (privacy/anonymity);

(ii) The claimant's application to amend her claim to include a complaint of victimisation;

(iii) Finalising the List of Issues;

(iv) Making Case Management Orders leading up to the final hearing;

(v) Reviewing a time estimate for the final hearing.

87. With his case management summary Employment Judge Leach included a leaflet providing details of potential sources of advice for the claimant.

Postponement of the May 2022 CMPH

88. The respondent sent the revised list of issues to the claimant and the Tribunal on 16 March 2022. The claimant did not respond by 8 April as ordered by Employment Judge Leach, so the respondent sent chasing emails on 11, 14 and 22 April 2022. In the email of 22 April, the respondent's representative asked for an update and warned the claimant that if there was no response the respondent would have no option but to raise her continuing non-compliance with the Tribunal.

89. Having received no response, on 29 April 2022, the respondent wrote to the Tribunal notifying it of the claimant's non-compliance. It asked it to make a further order that the claimant provide her response to the list of issues as a matter of urgency to ensure the list of issues could be finalised at the May 2022 CMPH.

90. On 4 May 2022 Employment Judge Howard wrote to the claimant to remind her to comply with Employment Judge Leach's direction to respond to the list of

issues. The claimant did not respond. On 11 May the respondent wrote to the Tribunal again, expressing its concern about the claimant's failure to engage in the proceedings especially given the proximity of the May 2022 CMPH, then only 2 weeks away.

91. On 12 May 2022 Employment Judge Slater directed that if the claimant did not provide her comments to the respondent by 19 May 2022, the discussion at the hearing on 26 May 2022 about finalising the list of issues would have to be based on the respondent's draft list as it currently stood. The respondent was required to send the Tribunal by 24 May 2022 a copy of the list of issues with the claimant's comments, if any had been received, or without comments from the claimant, if none had been received.

92. On 18 May 2022 the claimant applied to postpone the May 2022 CMPH until after 31 July 2022. She said she was still experiencing the symptoms set out in her letters dated 27 May 2021 and 2 September 2021. She repeated the list of symptoms in those letters. She said that she had recently switched medication from Citalopram to Mirtazapine and the effects on her mental health were to be reviewed. She said it was vital for her to be provided with "buffer/extra time" to take the new medication so these symptoms can be addressed before attending the Second Part of this Case Management Hearing.

93. The claimant submitted that the postponement would not prejudice the proposed final hearing listed in February 2024 and that the respondent would not be prejudiced by the postponement. She asked that the case management hearing be listed for one day rather than 2 hours.

The supporting medical evidence

94. The medical evidence by the claimant in support was Dr Johnson's letter from 25 May 2021, the letter from GMMHS also supplied in May 2021 and a letter dated 7 December 2021 from the same GMMHS therapist. The claimant had changed GP practices so that letter was addressed to her new GP, Dr Sukumar. It confirmed that the claimant had been discharged from the Trafford Psychological Therapies service after 13 sessions.

95. That December 2021 letter reported that the claimant dreaded discussing the incidents in her claim. That was impacting on her ability to talk about her experiences in therapy sessions and leading to increased fear about attending the Tribunal. The claimant reported that she had felt "trapped" by her situation and mistrustful of others to the extent that she now avoided leaving her home address and had become socially isolated. The letter went on to say that over the course of therapy the claimant's mood and anxiety levels had improved with greater improvement noted in relation to her anxiety based symptoms. It reported that the claimant had engaged well with the therapeutic process and with interventions targeted towards her low mood but that she was having difficulty sustaining and maintaining those improvements over time.

96. Of particular relevance to my decision, the letter recorded that "it was hard for the claimant to make significant changes to her mood as her cognitions and troubling emotions were directly connected to the up coming tribunal". As a result, the

therapist reported that "the content of their sessions became focused on the claimant's thoughts in relation to this with some problem solving and normalising undertaken with her. We talked about the benefit of delaying further treatment at present in favour of focusing her attention on attending to the requirements of the tribunal and agreed that after the tribunal, should symptoms persist then it would be appropriate to re engage with therapy for a further needs based assessment."

The List of Issues dispute

97. In her postponement application the claimant also requested that the respondent be ordered to provide the Claimant with an amended version of its draft List of Issues. She submitted that the respondent had failed to comply with the order made by Employment Judge Leach in paragraph 22 of his case management order from the March 2022 CMPH because the List of Issues it had supplied did not follow the format of the Tribunal's template List of Issues.

98. The respondent emailed on 19 May 2022. It confirmed it did not object to the postponement application. It noted, however, that this was the second time the claimant had requested the postponement of a hearing at relatively short notice. It objected to the claimant's assertion that it failed to comply with Employment Judge Leach's order regarding the updated List of Issues. It maintained it had complied.

99. On 22 May 2022 the claimant responded by email criticising what she saw as the respondent's failure to comply with Employment Judge Leach's instructions and requesting a further order requiring the respondent to provide her with an amended List of Issues in accordance with the order in para (22).

<u>The October 2022 CMPH</u>

100. The Tribunal agreed to postpone the May 2022 CMPH. The case management hearing was re-listed on 31 August 2022 with a time estimate of 1 day. That proposed August hearing was postponed by the Tribunal because of Employment Judge Leach's unavailability and re-listed on 18 October 2022 ("the October 2022 CMPH").

101. In the meantime, on 16 August 2022 the claimant chased the Tribunal for a decision on her application in May 2022 for an order that the respondent provide a List of Issues which complied with para (22) Employment Judge Leach's case management order. The respondent responded to say it had complied. The matter was referred to Employment Judge Butler. On 18 August 2022 he directed the Tribunal write to inform the claimant that it may not always be possible for a list of issues to follow precedent exactly. He directed that it was "important that the claimant considers the list provided by the respondent and indicates whether further detail is needed by 24 August 2022, and what that detail is, and this can be discussed further at the next hearing. Employment Judge Butler asks that he claimant just to try her best with the list she has been sent."

102. The claimant responded on 25 August 2022 with a one page email (p.218) to make points about what she said was missing from the respondent's List of Issues.

103. On that same date she also emailed the Tribunal and the respondent an 8 page detailed letter. It included:

1) A request for permission to amend the claimant's claims and name of the Respondent (because the respondent had changed its trading name).

2) A request not to issue a judgment on withdrawal of the claimant's personal injury claim, in case that should raise issues of res judicata and prevent her from bringing such a claim in the county court of high court.

3) A request for an order for the production of a Psychiatric joint expert report for the liability hearing to ensure the case was dealt with fairly and expeditiously.

4) A request for a direction in regard to the redaction of the claimant's home address in any document to be used during proceedings.

5) Further particularisations about the r.50 applications submitted on 21 March 2021 for a Permanent Privacy Protection Order and a Permanent Restricted Reporting Order

6) Discussion on the arrangements for a Ground Rules Hearing.

104. The letter dealt with technical matters such as not issuing a judgment on withdrawal of her claim under rule 52 of the Employment Tribunal rules (citing relevant case law on that point), addressing the grounds for making rule 50 orders. Attached to it was an amended version of the claimant's particulars of claim. Those amends including detailed typographical corrections or cross references, additions to the text and a significant amends to the Law section. I accept Mrs Banerjee's submission that at that point, the claimant was able to engage with the substance of the case, engage with complex technical legal issues and articulate clearly the points she wanted to make.

105. Attached to the claimant's email was the medical evidence from 2021 previously supplied and 2 pieces of medical evidence from 2020.

106. The first was a "to whom it may concern" letter dated 10 November 2020 from Dr Johnston confirming that since 2016 when the claimant was registered with the GP practice, no history of psychological or mental health problem had been logged under her medical record. The letter recorded that Dr Johnston had recently spoken to the claimant following the claimant's presentation at A & E on 17 October 2020 when she had been experiencing suicidal thoughts. Dr Johnston said that she had no doubt that the decline in the claimant's mental health related to the "bullying and sexual harassment that she has been subjected to by a work colleague…[who] went on to spread malicious and untrue allegations about [the claimant's] work practices". She confirmed that the claimant was unable to work due to stress induced by the episode and that she did not know when she would be well enough to return.

107. The second was a letter to Dr Johnston from a trainee psychological wellbeing practitioner from GMMHS who had carried out an initial assessment with the

claimant on 11 November 2020. She reported that the claimant had been placed on a waiting list for CBT. The letter reported that the claimant presented with symptoms of low mood and anxiety. In terms of risk, it reported the claimant had no current thoughts of self-harm. It noted suicidal ideation around escaping a difficult work situation but that the claimant denied any plan or intent and reported a strong protective factor in her mum. Dr Johnston was asked to continue to re-assess the claimant's risk each time she saw her. The claimant had agreed to contact her GP or other services should their risk become worse or if she needed any additional support."

108. The October 2022 CMPH took place in person at Manchester Tribunal. The claimant attended and the respondent was represented by Mr Plat-Mills of counsel. The claimant requested that a professional notetaker be allowed to attend by CVP videolink. The respondent did not object.

109. Employment Judge Leach's case management order from that CMPH records that the hearing lasted until 4.45 p.m. and that most of the day was taken up with the List of Issues. It is clear that the hearing was not straightforward. Employment Judge Leach records (para (20)) that the claimant was badly prepared. He also records that, having seemingly agreed that the List of Issues worked through in the morning of the hearing included all the discrimination and harassment allegations she was making, the claimant from around 3 p.m. the claimant raised various additional allegations of unlawful treatment (para (20)(ix)). She also told Employment Judge Leach at the end of the hearing that she had many more allegations to raise which she had not been able to because there had not been enough time. Employment Judge Leach noted that the claimant had had ample time to engage in compiling the List of Issues and that list had been worked through methodically with the parties during the hearing.

110. Employment Judge Leach considered and refused the claimant's application to amend her claim. He recorded that the claimant's complaint of breach of contract was withdrawn but agreed to the claimant's request not to issue a judgment formally dismissing that claim because the claimant indicated she may pursue it in another court. He confirmed the Tribunal did not have jurisdiction to hear a complaint of breach of statutory duty concerning health and safety.

111. At the hearing, Employment Judge Leach made a Restricted Reporting Order but refused the claimant's application for the final hearing to be heard in private. He considered that it was not at that stage appropriate to make an anonymity order.

112. Under the heading "Disability" Employment Judge Leach considered the medical evidence provided by the claimant in relation to her requests for adjustments and assistance. He noted (at paras (53)-(55) of his case management summary) that there was no updated medical evidence from the March 2022 CMPH. Having reviewed the evidence he considered that the case was not one where a ground rules hearing was required. He noted the claimant may intend to submit other medical evidence and that the hearing was listed for an 8 day hearing on liability only which would allow the opportunity for regular breaks. He confirmed the final hearing would be 5-14 February 2024. On 16 November 2022 he directed that an additional day be added making the final hearing a 9 day hearing on liability only.

113. The respondent indicated it was interested in Judicial Mediation but the claimant was not.

114. Employment Judge Leach made case management orders to prepare the case for the final hearing ("the Leach October 2022 CMO"). The main steps required were:

a. The claimant to provide a Schedule of Loss by 30 December 2022

b. The provision of lists and copies of relevant documents by the parties to each other by 31 March 2023

c. The parties to co-operate to agree the Final Hearing Bundle with the respondent to send a paper and electronic copy of the agreed bundle to the claimant by 21 April 2023.

d. Witness statements to be exchanged by 21 July 2023.

115. The case management order was sent to the parties on 26 October 2022. It included a requirement that any concerns about the accuracy of the List of Issues be raised within 14 days of that date. The claimant requested until 12 December 2022 to provide her comments, saying that her ill health prevented an earlier response. Employment Judge Leach granted that request.

Events from the 2022 CMPH to January 2023

116. On 30 December 2022, as required by Employment Judge Leach's case management order, the claimant sent her Schedule of Loss to the Tribunal and respondent. At the start of that document the claimant said it was "not fully complete" because her "mental health illnesses (caused by the respondent) have prevented me from doing so".

117. The Schedule of Loss was 6 pages. It was set out in a logical order with a number of headings but for most of the sections the amount of compensation claimed was said to be "TBC". Detailed figures were given for the amount of Vento compensation claimed and the amount claimed for personal injury. I find that some of the information missing was information which the claimant could have been expected to have had to hand, such as the amount of Universal Credit she had received.

118. The next document in the preliminary hearing bundle after the Schedule of Loss was a letter from the Tribunal to the parties dated 1 September 2023. Since it appeared that letter responded to correspondence received from the parties, I checked the Tribunal file to ensure I had a full picture of events. Based on that file, the claimant wrote to the Tribunal (copying the respondent) on 19 December 2022. She said she did so in the middle of "a difficult flare-up of my mental health illness". While expressing her gratitude to Employment Judge Leach, she queried a number of points in the Leach October 2022 CMO. She disputed that she was badly prepared at the hearing and said that her ability to participate in those proceedings were affected by mental health issues. She made some additions to the List of Issues and cited a number of legal authorities relating to modification of the List of

Issues. She also set out and quoted from a number of authorities relating to the duties of tribunals to parties with disabilities or mental health issues.

119. The claimant attached to her email a GP Letter from May 2022 and fit notes from October 2020 to July 2022. She said she was waiting for a new GP's letter which she would send to the Tribunal as soon as she received it. She also said that she "noticed that I lack mental capacity (this lacking may be fluctuating) under the Mental Capacity Act 2005" and she was awaiting a "Specialised Medical Assessment" in relation to her mental capacity which she would send to the Tribunal as soon as she received it.

120. The GP letter referred to was dated 16 May 2022 and was from Dr Win. It confirmed that the claimant suffered with "a lot of stress, leading to mix anxiety and depressive disorder" with her symptoms including very low mood, anxiety leading to concentration difficulty, forgetfulness, feeling lethargic and having difficulty in planning and focussing. Dr Win reported that the claimant had been taking different anti-depressants but had been experiencing side effects. The letter reported that due to her stressful condition, the claimant had been having suicidal ideas which had required close attention by the medical profession. The letter said the claimant "was unable to attend the tribunal hearing at present an I am unable to predict when she is able to attend the tribunal". That letter appears to have been written with the May 2022 CMPH hearing in mind. It was not clear form the file whether the claimant had submitted it with her application to postpone that hearing on 18 May 2022. The fit notes attached all said the claimant was unfit for work due to "Stress at Work". The latest was dated 20 May 2022 and signed the claimant off until 31 July 2022.

121. In January 2023 the respondent confirmed it had no objection to the claimant's additions to the List of Issues.

<u>Preparation of the final hearing bundle and witness statements</u>

122. Employment Judge Leach's timetable required disclosure by lists and copy documents by 31 March 2023 and preparation of the final hearing bundle by 21 April 2023 with witness statements being exchanged in July 2023. That timetable slipped considerably.

123. Mrs Banerjee accepted that an initial 6 weeks' delay was due to the respondent not being ready to exchange lists of documents until 5 May 2023. The correspondence between the parties about this was not in the Bundle. Mrs Banerjee's instructions were that the claimant had asked until 1 June 2023 to respond. The respondent wrote on 28 June 2023 and disclosure eventually took place on 24 July 2023.

124. On 23 July 2023 the claimant emailed to say that she "had been made aware" that it would be useful if a Spanish interpreter were available at the hearing. On 1 September 2023 Employment Judge Tobin confirmed that a Spanish interpreter would be booked for the final hearing. He directed that the claimant write to the Tribunal if that was not required. He also directed that the parties confirm how much time was required for reading, cross examination and submissions so that the hearing could be timetabled.

125. The parties agreed revised dates for the remaining steps ordered by Employment Judge Leach. The hearing bundle was to be agreed by 16 October 2023. On 18 September 2023 (p.333) the respondent emailed the claimant to query the relevance of documents in the claimant's list of documents to the issues to be decided in the case. The claimant did not respond. The respondent chased for a response on 9, 16 and 26 October 2023. In the last of those emails the respondent said that if the claimant did not respond it would prepare the final hearing bundle without the documents it had queried.

126. In the meantime, on 10 October 2023, the claimant wrote a letter to the Employment Tribunal Customer Contact Centre in Leicester. It was sent by post with the claimant explaining she was unable to find an email address for the contact centre. The letter was a request for information about any source of free in person mental health/emotional/moral support or advocacy during Tribunal hearings. The claimant set out a comprehensive list of charities and other organisations she had already approached unsuccessfully for support. She explained that it had taken her a long time to write the letter because of her mental health illnesses. She referred to having been diagnosed with Major Depressive Disorder, Anxiety and likely Post Traumatic Stress Disorder". That letter was forwarded to the Manchester Tribunal who responded to explain it could not provide advice to parties about their case.

127. On 6 November 2023 the claimant responded to the respondent's correspondence about the bundle of documents. She explained that the symptoms of her mental health illness had prevented from replying sooner. She said that she "had been informed" (it is not clear by who) that she was under no obligation to respond to the query raised about her documents and that "no answer would be provided". If the respondent insisted that the documents would not be added to the bundle it was "free to do so". She also said that she had some objections to some of the documents included by the respondent in its disclosure on 24 July 2023 and that would be communicated "over the course of this afternoon".

128. The claimant did not communicate further that afternoon and on 14 November 2023 the respondent sent a chasing email asking for her comments. In the absence of a response, it chased again on 22 and on 30 November 2023.

129. On 14 December 2023 it confirmed that in the absence of a response it would prepare the final hearing bundle including all documents disclosed by the parties. It would email details of how to access the electronic copy of the bundle the following day and send a paper copy of the bundle.

130. In the same email the respondent explained that because of the delays with finalising the bundle, it would not be possible to exchange witness statements on 15 December 2023. It asked the claimant to confirm she would be in a position to exchange witness statement by the 17 January 2024.

131. On 15 December 2023 the claimant emailed the respondent a 22 page table setting out commentary on the respondent's disclosure bundle (included in the attachment called "evidence part 3" emailed by the claimant on the day of the strike-out hearing). The introduction to that table explained that the claimant objected to the inclusion of a number of documents in the form in which they appeared in the bundle because they included personal details (either of the claimant or others). She

required redaction of those documents and the wording of the table suggests she would provide redacted versions of those documents in pdf form for inclusion in the bundle. The introduction noted that the disclosure by the respondent on 23 July 2023 amounted to 618 documents amounting to 1450 pages. It also said the claimant had not been able to inform the respondent of her position on the respondent's disclosure before 15 December 2023 because she found that dealing with the information contained in the documents triggered symptoms of her disabling mental health illnesses which made the task for her very complicated and time consuming, among other things.

132. On 2 January 2024 the Tribunal carried out a pre-hearing check to see whether the case was ready for final hearing. The respondent responded on the following day to explain that the parties had provisionally agreed to exchange witness statements on 17 January 2024 due to the earlier delays in finalising the hearing bundle. It confirmed that at that point it was reviewing comments provided by the claimant on the hearing bundle. It anticipated that it would be ready for the hearing. It confirmed that the respondent's key witness, S, was no longer employed by the respondent, although it was still in touch with him. The respondent had 8 witnesses, one of who it asked to be allowed to attend remotely by video. In its assessment of the adequacy of the length of hearing it suggested the claimant may not need interpretation of the whole of the hearing given she had carried out her job and previous preliminary hearings in English.

133. The claimant responded to the Tribunal on the 4 January 2024 asking for an extension of time until 8 January 2024 to provide her full response. On 8 January 2024 she confirmed that the parties had discussed exchanging witness statements on 17 January 2024. The majority of her email reiterated the need for an interpreter, referring to extracts from the ETBB, case law and human rights in support of her right to have an interpreter present.

134. The matter was referred to Employment Judge Ross who was confirmed on 9 January 2024 that a Spanish interpreter was booked for the hearing. She expressed concern that the final hearing bundle did not appear to be agreed. She ordered the respondent to confirm by 12 January whether the bundle had been agreed and sent to the claimant and, if not, explain why. She ordered the parties to exchange witness statements by 17 January 2024 and write to the Tribunal by 4 p.m. on 18 January 2024 to confirm whether they had done so.

135. The respondent emailed the claimant on 17 January to confirm it was ready to exchange witness statements. The claimant did not reply. The respondent emailed the Tribunal to provide an update. Shortly afterwards on 18 January 2024 the claimant emailed to the Tribunal (copying the respondent) to ask to be given until 22 January 2024 to "update her position" due to what she described as an "awful flare-up of mental health disabilities". She referred to the ETBB, citing in particular what it says about the potential impact of short deadlines on parties with mental health issues.

136. The case was referred to Employment Judge Tobin. At 8:28 on the morning of 19 January 2024 he ordered that:

(1) The respondent should send the bundle as it stood to the claimant;

(2) That if the claimant had any additional documents or objected to any redactions made by the respondent she must prepare a supplementary hearing bundle including those documents which must be sent to the respondent by 10 a.m. on 25 January 2024. Any documents not so disclosed were excluded from further consideration by the Tribunal;

(3) That the claimant appeared to have disregarded Employment Judge Ross's ordered to exchange witness statements by 17 January 2024. Witness statements should be exchanged straightaway with the absolute cut-off date for doing so being 10 a.m. on 29 January 2024.

137. As already mentioned in my introduction, Employment Judge Tobin, ordered that if witness statements were not exchanged by 29 January 2024 the final hearing of the case would be postponed and the hearing converted to a public preliminary hearing to consider striking out the claimant's claim.

138. On 20 January 2024 (page 367) the claimant wrote to the respondent acknowledging receipt of its witness statements and asking that the password to open them not be sent until she advised that she was ready to proceed with exchange of her witness statements.

The claimant's application to postpone the final hearing

139. On 28 January 2024 the claimant applied to postpone the final hearing. She started her letter by explaining (as previous such applications had) that she was writing in the middle of awful flare-ups of her mental health disabilities.

140. She based her application on the fact that she was unable to attend the hearing because she was suffering from "paralysing/debilitating symptoms" of her mental health disabilities. She summarised her symptoms at paragraph 2(a) to (m). She explained that she would set the symptoms out in in full at paragraphs 65-66 onwards of a letter dated 29 January 2024 she would soon send. Those symptoms were in substance the same as she had described in 2021 when seeking postponement of the case management hearing. She had in 2021 referred to the difficulties she experienced in carrying out tasks related to the Tribunal because it required her to think about the events forming the basis for her claim. In the 28 January 2024 application she characterised this as "avoidance" (point j and k of her letter) explaining that she couldn't do anything in relation to the Tribunal case because thinking about the incidents led to "further emotional and mental debilitation and therefore further physical paralysis". She said she could not see "the perpetrators" in a week's time and that even thinking about them made her feel "distressed, anxious, panicked, tortured, tormented, nauseous".

141. The claimant argued that postponement was in accordance with the overriding objective, her right to a fair trial under Article 6 of the ECHR, the UNCRPD, the general duty of the judiciary to act fairly and guidance at paragraphs 91 of the letter dated 29 January 2024 which she would soon send.

142. The claimant did not send any medical evidence with her application. As I understand it, she sent her application on 28 January 2024 (rather than waiting to complete her letter to be sent on 29 January 2024). That meant her application to

postpone was made 7 days or more before the hearing she was seeking to postpone.

143. The claimant did not send a letter dated 29 January 2024 on that date. On 30 January 2024 the respondent wrote to object to the application. It pointed out that, in any event, because of the terms of Employment Judge Tobin's order, the final hearing had now been converted to a one-day preliminary hearing to consider strike out because of the failure to exchange witness statements. The respondent's position was that the claimant's claim should be struck out. It argued that a postponement was not appropriate given the undue prejudice resulting to the respondent. That prejudice arose from the fact that some of the allegations related to allegations which were 4 years' old; that a number of key witnesses no longer worked for the respondent and although it had been possible to secure their attendance at the final hearing that might not be the case if hearings were postponed; it was unfair for the serious allegations to continue to hang over the relevant individuals; and the respondent would incur further costs and delay through no fault of its own.

144. Employment Judge Childe refused that application to postpone, meaning that the strike out preliminary hearing went ahead as ordered by Employment Judge Tobin.

<u>The documents sent to the Tribunal by the claimant on the day of the strike out hearing</u>

145. The documents sent by the claimant had a covering letter of six pages dated 5 February 2024. The covering letter referred to the claimant's "awful flare-ups of my mental health disabilities" and said (at paragraph 5) that after her request for a postponement of the final hearing and an extension of time for exchanging witness statements she did not think the Employment Tribunal would need to go ahead with a hearing to consider striking out her claims or, in the alternative, an application for costs. The document then goes on to set out the claimant's submissions about striking out if the Tribunal was to consider that. I will return to what those submissions are in my discussion and conclusions section below.

146. By way of supporting evidence, the claimant attached a copy of a letter from Wilmslow Road Medical Centre signed by Dr B Otubellu dated 2 February 2024. That letter said that the Practice had "not been able to prepare a medical letter to support [the claimant's] request for a postponement of the final hearing and to provide explanations on why she has not been able to provide her witness statement". It said that "we aim to have that medical letter to you as soon as possible". A second letter was signed by Dr H Win of Wilmslow Road Medical Centre. That was a two page letter dated 5 February 2024. In that letter Dr Win confirmed that the claimant was diagnosed with depression and anxiety symptoms "since 2020". It said that "According to [the claimant] her stress and anxiety is related to her workplace discrimination and harassment. She has been on variety of antidepressant medication and is currently on antidepressant medications".

147. The letter went on to say that the claimant has "mix [sic] anxiety and depressive episode which has leaded [sic] to confusion, slowing, inadequate thinking process, lack of concentration, tiredness and sleep problem. She is having

flashback episodes which has led her to recurrent suicidal ideation. She has had thoughts of using rope or overdose of medication to end her life on a few occasions. Recently she was admitted in A & E Department at Manchester Royal Infirmary for suicidal ideation". The letter said that due to the claimant's symptoms "it has prevented her from completing her witness statement". Dr Win went on to say that the claimant had been advised to continue with her medications and "she has been referred to the counselling team to improve her condition". The letter says that "hopefully her condition should improve in 7-9 months' time". The letter's final paragraph said that "[Dr Win] confirmed that [the claimant] is not fit to attend her Employment Tribunal hearing in current situation and due to her physical and mental problems she will not be attending any further meeting or completing her witness statement until her mental status improves".

148. The claimant sent through pdf documents headed "Evidence Part 1", "Evidence Part 2" and "Evidence Part 3". The emails were received by me after the hearing had started. I read them during the adjournment of the hearing before hearing Mrs Banerjee's submissions and have reviewed them again in preparing this judgment. In summary, the evidence relevant to my decision was:

a. Medical evidence supplied previously by the claimant, including the letters to and from Dr Johnston in 2020 and 2021 and the letter from Dr Win dated 16 May 2022

b. A further letter from Dr Sukumar dated 19 December 2022 from the same GP Practice confirming that the claimant was diagnosed with depression since 2020. It repeated the "current disabling symptoms" referred to by Dr Win. It said that the claimant was waiting for further appointments with a local psychiatrist for review of her mental health issues and that she was "currently on regular antidepressant". It finished by saying, "I would be grateful if you could kindly consider her medical mental problems and help with her request". It is not clear what request was being referred to at that point.

c. Documents confirming that the claimant had been assessed in June 2021 and found to have "limited capability for work and work-related activity" as part of her assessment of her claim for Universal Credit. That Universal Credit included an additional amount to recognise the claimant's limited capability for work and work-related activity up to 16 January 2024.

d. A letter dated 7 August 2022 from the Department for Work and Pensions confirming that the claimant was receiving a Personal Independence Payment ("PIP"). The record of the claimant's PIPs showed that they started on 8 December 2021 with an end of award date of 28 July 2024.

e. Fit notes signed by the claimant's GP (initially Dr Johnston) confirming that the claimant was not fit for work due to stress at work until 31 October 2021 (these being fit notes which the claimant had previously sent to the Tribunal in support of postponement applications).

f. Further fit notes confirming that the claimant was not fit for work due to due to “mixed anxiety and depressive disorder” from 1 November 2021 until 1 May 2022. Further fit notes signed by that same Practice extended the claimant's certification as being not fit for work for that reason until 30 March 2023 in a continuous period from 1 November 2021.

149. The claimant’s submissions in relation to the rule 50 orders sent on 17 June 2024 also included medical evidence. There was a letter from the Bodey Medical Centre dated 17 June 2024. It stated that the claimant was suffering extreme anxiety and distress in relation to her upcoming Employment Tribunal decision. The claimant said that she had apparently been suffering online abuse over the last few months in relation to her mental health and was concerned that that would escalate if she was named in the Tribunal decision. The letter from Dr S Taylor GP said that she would be grateful if the Tribunal would consider protecting her anonymity to minimise the effect on her mental health and supporting them in treating her. There was no detail of the specific nature of treatment or a prognosis.

150. Prior to finalising this judgment the claimant also sent to the Tribunal a letter from Greater Manchester Mental Health NHS Foundation Trust dated 5 March 2024. That referred to an appointment on 1 March 2024 and included a diagnosis of severe anxiety and depressive episode with marked impairment in her functioning and PTSD-like symptoms. The letter was from Dr Oliver Woolf. It referred to the fact that the claimant had attended the Emergency Department on 31 January 2024 and was seen by the Mental Health Liaison Practitioner who discharged her back to the care of her GP. The Mental Health Liaison Practitioner was aware of the medical appointment with the Mental Health Team which was imminent. The appointment was on 1 March 2024. The letter stated that the claimant had been seen by Dr Siddique in March 2023 who had recommended a mental health assessment. Dr Woolf referred to the fact that the claimant had been open to the team on the assessment pathway for many months with ongoing psychological stressors due to a workplace Tribunal. The letter simply said that the management plan was that “after discussion with senior manager it was agreed that she could be stepped down to primary care”. The claimant was therefore discharged to primary care and could be referred to the Crisis Pathway if need be.

Findings on the claimant’s medical condition and ability to participate in the case

151. The medical evidence supplied by the claimant during the case confirms that she was diagnosed as having anxiety and depression from May 2021 at the latest. The claimant’s medical evidence (specifically Dr Win’s letter of 5 February 2024) confirms that at the time of the strike out hearing the claimant remains on antidepressant medication.

152. The evidence about the effect of the claimant’s mental health conditions on her is not entirely one way. The effect on her is sufficiently debilitating to entitle her to a PIP since 2021, the DWP’s assessment being that she has a limited capability for work and work-related activity. The claimant’s case, as set out in her applications to postpone previous hearings, is that the effects are significant and debilitating. She refers to ongoing and significant impacts on her ability to concentrate and think clearly. She says that she has problems sleeping and suffers from extreme tiredness

which can on occasion mean she cannot leave her bed for weeks at a time. She talks of physical symptoms such as nausea when she thinks about the incidents giving rise to her claim and those involved, especially S. Dr Win's letter corroborates the claimant's case to the extent of referring to "confusion, slowing, inadequate thinking process, lack of concentration, tiredness and sleep problems". It confirms that her inability to complete her witness statement is because of her symptoms. It also confirms the claimant having flashback episodes which has led her to recurrent suicidal ideation, including one which resulted in an admission to the A & E Department at Manchester Royal Infirmary for suicidal ideation.

153. Mrs Banerjee did not seek to challenge the medical evidence submitted by the claimant. However, she did point out that the claimant's own conduct during the case suggested that the claimant may be overstating those effects. In particular, she noted that the claimant has at times been able to engage with the case in a way which suggested an ability to concentrate and focus. She had been able to produce her own list of issues and engage in discussion about the respondent's. She had completed her disclosure of documents by July 2023 and had produced detailed and lengthy documents in the proceedings such as the table of December 2023 responding to the respondent's disclosure. As I have recorded already, Employment Judge Leach's view from the March 2022 CMPH was that the claimant did not lack capacity and was able to engage and discuss the disclosure process. His view based on his interactions at that hearing was that there was no need for a "ground rules" hearing nor for any further medical evidence about the claimant's ability to participate.

154. I accept there is something in Mrs Banerjee's submission. I also note that the applications and supporting documents sent by the claimant during proceedings extensively cite legal authorities in support of her arguments on points in the case. I do find, however, that the claimant's pattern of engagement with the case is consistent with what she says about the effect of her mental health issues on her. First, that effect is not consistent. There are "flare ups" in her condition. I find that she does seek to engage with tasks (such as disclosure or commenting on the respondent's disclosure) and is able to do so but it takes her a long time and a lot of effort to do so. On occasion, however, the effort of completing a task is too much particularly if it is required in a comparatively short timescale (e.g. her inability to complete her letter dated 29 January 2024, leading to her having to send a different letter on 28 January 2024). Second, I find that the claimant finds it easier to engage with technical arguments which do not involve revisiting the incidents giving rise to the case.

155. The fit note for 23 September 2024 refers to Post Traumatic Stress Disorder. There is no reference to PTSD in the letter from Dr Win but it does refer to "flashbacks" and I find, based on the medical evidence, that engaging with the facts of the case (as opposed to more "abstract" legal arguments such as those about rule 50 or the obligations of the Tribunal to disabled parties) tends to exacerbate the symptoms experienced by the claimant including those impacting her concentration and the physically debilitating symptoms which she refers to in her applications to postpone.

156. On balance, I find that the effect of the claimant's anxiety and depression is as she describes in her applications to postpone. I find that it means she is at times

unable to muster the energy (physical or mental) and the concentration required to complete the tasks required by the Tribunal process. That results in significant delays in completing tasks required by the Tribunal and, on occasion, such a "flare up" of her condition that she is unable to complete those tasks. I find that the effects are more pronounced when the task involves revisiting the events giving rise to the claimant's case.

157. Looking at the medical evidence as a whole, it does not seem to me that there is evidence that the claimant's mental health is showing signs of improvement. I find, based on that evidence, that (other than anti-depression medication) the claimant has not been receiving treatment since the course of CBT she undertook in 2021. The most recent evidence at the time of the hearing was that in Dr Win's letter of 5 February 2024. That letter noted that the claimant had been advised to continue with her medications and "she has been referred to the counselling team to improve her condition".

158. In terms of any prognosis for improvement. that letter says that "hopefully her condition should improve in 7-9 months' time". The letter's final paragraph said that "[Dr Win] confirmed that [the claimant] is not fit to attend her Employment Tribunal hearing in current situation and due to her physical and mental problems she will not be attending any further meeting or completing her witness statement until her mental status improves".

159. The claimant has supplied one further piece of medical evidence since the hearing, namely the letter from the Bodey Medical Practice dated 17 June 2024. That does not provide a prognosis or any suggestion that the claimant's condition has improved since the strike out hearing.

Discussion and Conclusions

<u>The claimant's application to postpone the strike-out hearing – my decision to proceed with the hearing</u>

160. The first decision I needed to make was whether to proceed with the strike out hearing in the claimant's absence or grant her application to postpone the hearing. The claimant had on 28 January 2024 applied to postpone the final hearing. She had in that application requested that the hearing be relisted after September 2024. Employment Judge Childe rejected that application and directed that the strike out hearing proceed.

161. The claimant renewed her application in her emailed submissions on 5 February 2024. Unlike when her application was considered by Employment Judge Childe, she supplied medical evidence in support. I decided that evidence amounted to a material change of circumstances in the **Serco v Wells** sense which meant it was in the interests of justice for me to consider whether to vary Employment Judge Childe's order and grant a postponement of the strike out hearing. The respondent objected to any postponement.

162. I decided it was not in accordance with the overriding objective to grant the postponement. In doing so I took into account the materials emailed to the Tribunal by the claimant on the day of the hearing. Based on those materials and in particular

the letter from Dr Win dated 5 February 2024, I accepted that the claimant's inability to attend the hearing was as result of her mental health issues. I accepted that one potential outcome of the hearing was to dispose of the case by strike-out. In those circumstances, the claimant's Article 6 rights were engaged and the principles discussed in **Phelan** were engaged. I considered whether proceeding in the claimant's absence would amount to a denial of her article 6 rights. I also took into account the obligations of the Tribunal to a disabled party as explained in **Gallo**, **Rackham** and the Vulnerable Parties PG.

163. Dr Win's letter indicated that the claimant would not be in a position to attend a hearing until her mental status improved and that "hopefully" her condition should improve in 7-9 months' time. The claimant's own evidence, then, suggested that any postponement would lead to a delay of 7-9 months in the strike-out hearing taking place. I accepted Mrs Banerjee's submission that such a delay would impact the respondent's Article 6 rights to have a trial within a reasonable time. Allowing a further delay in a case which had already been ongoing for almost 3 years was not in accordance with the overriding objective which recognises that dealing with a case fairly and justly includes (so far as practicable) avoiding delay, so far as compatible with proper consideration of the issues.

164. Mrs Banerjee submitted that I should take particular note of the fact that Dr Win's letter only went as far as suggesting that the claimant's condition would "hopefully" improve in 7-9 months. There was no indication in the documents before me that the claimant was receiving any kind of course of treatment or that there was a more certain prognosis that her condition will improve. I accepted, based on the progress of the case to date and the claimant's own case as to her condition and its effect that there was no certainty the claimant would be in a position to attend a hearing in 7-9 months even if the postponement were granted.

165. It seemed to me that simply postponing proceedings would not guarantee the claimant would be able to engage in a strike out hearing at a later date. I took into account the obligations on the Tribunal to ensure it was making adjustments to enable a disabled party to fully participate in proceedings. In this case, there was no indication of any reasonable adjustments which would enable the claimant to participate in a strike out hearing other than postponing it.

166. In reaching my decision to proceed I also took into account the nature of the hearing I was conducting. It was not a final hearing at which the claimant was due to give evidence. Instead, I would be hearing submissions from the parties about whether the case should be struck out. The claimant had provided written submissions on that point which I could take into account. I decided that by reserving my decision I could also give myself further time to review the claimant's written submissions to ensure that I was giving them equal weight to the submissions made orally for the respondent at the hearing.

167. Taking all those matters in the round I decided it was in accordance with the overriding objective and the parties' respective rights under Article 6 to proceed with the hearing in the claimant's absence.

<u>The claimant's written submissions on 30 May 2024</u>

168. The claimant sent in further correspondence after the strike out hearing. She attached to her letter of 30 May 2024 materials in support of her applications to revoke or vary the orders made by Employment Judge Tobin and Employment Judge Childe. The letter referred to **Serco v Wells** and relied on the materials explanations, arguments and medical evidence provided in and via her emails of 5 February 2024 as the basis for saying it was in the interests of justice to vary those orders.

169. The material change of circumstances relied on in relation to Employment Judge Childe's refusal of the postponement was the provision of updated medical evidence (i.e. Dr Win's letter of 5 February 2024). I have explained above why, having taken into account that medical evidence. I decided to proceed with the hearing on 5 February 2024. There was nothing in the 30 May 2024 submission which meant it was in the interests of justice to vary or revoke that decision.

170. In relation to Employment Judge Tobin's decision to order a strike out hearing itself, the material change of circumstance was said to be the claimant having supplied an explanation regarding her failure to comply with the order to provide her witness statements. The letter then set out a table in which the claimant went through Employment Judge Tobin's reasoning and against each paragraph set out what she regarded as the material change of circumstances. In summary, the primary material change of circumstances was the medical evidence she provided which she said was set out in the attachments to her emails on 5 February 2024. She also said that as part of her 5 February 2024 emails she applied for an extension of time to provide her witness evidence. It seems to me that those submissions amounted to arguments as to why the proposed strike out should not take place rather than grounds as to why it was inappropriate to hold such a hearing. For completeness, I confirm that I reject the application to revoke Employment Judge Tobin's order. I took into account the claimant's 30 May 2024 submissions in reaching my decision whether to strike out her claim.

<u>The decision whether to strike out the claimant's claim</u>

Striking out under 37(1)(c) – failure to comply with a Tribunal Order

171. It is not disputed that the claimant failed to comply with an order of the Tribunal. She was required to provide her witness statement(s) to the respondent by 17 January 2024 and did not do so.

172. The claimant's case is that the failure was not her fault in the sense that it was a result of the effect of her mental health conditions. I accept that. I find the failure was neither wilful nor deliberate. I find that the claimant was unable to complete the task because of the effect on her of her mental health issues which were particularly acute when the claimant had to revisit the events giving rise to her case. She would inevitably have to do so in preparing her witness statement.

173. When it comes to the considerations identified in **Weir Valves**, I find that the magnitude of the claimant's default was significant. There was a complete failure to provide a witness statement by the ordered date. The disruption was substantial. It led to a 9 day hearing which had been listed for a number of years being postponed. It meant delay in a case which was already taking place 4 years after some of the

events it concerned and 3 years after the more recent events it concerned. As I have said, however, I do not accept that the failure was part of a pattern of disobedience or persistent failure to comply with orders. I accept Mrs Banerjee's submission that there had been a number of postponements of hearings at the claimant's request. I do not find that amounted to a pattern of avoidance on the claimant's part. Based on my review of the proceedings I find that the claimant was doing her best to comply within the mental and physical resources available to her but that "pressure points" such as hearings exacerbated the effects of her conditions resulting in "flare ups" which rendered her unable to progress matters.

174. **Weir** makes clear that strike out is not the inevitable outcome where there is a failure to comply with an order. If anything the opposite is true. It is a draconian step and should be avoided if a lesser step is appropriate. In this case, it is clearly a relevant consideration that the claimant's failure arises from a mental health issue rather than deliberate disobedience which might merit sanction.

175. On the other hand, as Mrs Banerjee submitted, it is clear form **Riley** that the fact that a failure is not a party's "fault" does not rule out strike out as a permissible option. The respondent and S also have rights. I need to consider whether a fair hearing is still possible and whether striking out is proportionate.

176. Mrs Banerjee reminded me that **Croma Vigilant** holds that the relevant question is whether a fair hearing could take place in the allocated hearing window.

177. For completeness, I confirm that I find that the absence of the claimant's witness statement meant that a fair hearing was not possible during the original final hearing window of 5-14 February 2024. The final hearing was a liability hearing. The claimant needed to provide evidence to support her case. Her claims are of discrimination, harassment and victimisation under the Equality Act 2010 and the initial burden is on her to prove facts from which the Tribunal could conclude that discrimination had occurred. The nature of the allegations meant this was not a case which could be decided on documentary evidence alone. There were disputes both about whether some incidents had happened at all and, where they had, the "reason why" actions were taken.

178. The progress of the case does not support a finding that the claimant would have been able to give her evidence in chief orally had the hearing proceeded as listed. The flare ups she experiences when thinking about the events giving rise to her claim seem to me to mean that it was almost inevitable that she would be unable to proceed on that basis. In the unlikely event she had been able to do so, I find that the respondent would have been unduly prejudiced by the claimant providing her evidence in chief in that way. In the absence of a written witness statement those representing the respondent would have no advance notice of the evidence to be given by the claimant and would need, at the very least, time to take instructions before being in a position to cross examine the claimant. Apart from the prejudice to the respondent of that approach, the extra time required for the claimant to give her evidence in chief and for the respondent's representatives to take instructions on that evidence seems to me to mean it would be vanishingly unlikely the case could be concluded within the originally listed window.

179. In this case, by the time the strike out hearing took place the decision had already been made to postpone the final hearing from the original hearing window. In those circumstances, it seems to me that the appropriate course is to approach matters on the basis that there is no current final hearing listing at the point I am making my decision on strike out. I need to assess whether there can be a fair hearing at the point in the future when that final hearing is likely to take place.

180. If the final hearing was to go ahead, the claimant would first need to complete her witness statement. On the claimant's own case and based on Dr Win's letter, she will not be able to begin to participate further in the case until after September 2024. On her own case, revisiting the events which gave rise to her claim lead to flare-ups of her mental health issues. There is no indication that that issue has improved over time. There is no indication the claimant is receiving any treatment which is being successful in alleviating those effects. There is no prognosis indicating the claimant's condition will improve.

181. Assuming the best case scenario, it seems to me that if the claimant is able to complete a witness statement, it is likely to take her some time to do so. She has applied for an extension of time to prepare her witness statement. The Tribunal would, in light of **Rackham** and the Vulnerable Parties PG, give the claimant additional time to do so compared to that afforded to a party who was not experiencing mental health issues. It seems to me the claimant would need a period of a few months rather than weeks. The respondent's representatives would then need some time (a minimum it seems to me of 3-4 weeks) to take instructions on the claimant's witness statement and prepare for a final hearing

182. Realistically, that means, Tribunal resources allowing, that any relisted hearing in this case will take place at the earliest in the second half of 2025. Mrs Banerjee submitted that there was a significant risk that a hearing at that point would not be a fair hearing given the passage of time since the events complained about. I accept that submission. The case involves a dispute about whether incidents took place as the claimant alleges. If the hearing is in late 2025, determination of the case will turn on witness evidence based on recollection of events which took place 4 and in some cases 5 years earlier. I accept there will be some documentary evidence arising from the grievance the claimant raised, but it seems to me that in this case it can genuinely be said that the passage of time is such that witnesses' memories will have faded. That is relevant not only to the harassment allegations and the alleged acts of discrimination but also to the evidence about the "reason why" the alleged acts of discrimination took place. It does seem to me there will be a significant prejudice to the respondent in defending the claim because of the passage of time.

183. A final hearing taking place in late 2025 is, it seems to me, to adopt the best case scenario. It seems to me, based on the history of the case to date and the claimant's medical evidence, that there is a significant risk that engaging actively in the proceedings by revisiting the events giving rise to the claim to prepare her witness statement would lead to a further "flare-up" of the claimant's mental health issues. That raises the possibility of her needing further time to prepare that witness statement and the possibility of the need for a further postponement of any final hearing listed. I do not see, given the seriousness of the symptoms which the claimant sets out, that even if reasonable adjustments were made that risk can be removed.

184. If the claimant is able to engage with the proceedings and complete her witness statement, the claimant would need to engage fully in the final hearing. She has sought representation but has been unable to find it. In those circumstances, it seems to me the likelihood is that the claimant would be in a position of representing herself at the hearing. The Tribunal would, in accordance with **Gallo**, **Rackham** and the Equal Treatment Bench Book, need to make adjustments at the final hearing. Given the nature of the allegations and the burden of proof provisions, the claimant would need to give evidence about the incidents complained of, and specifically the incidents of harassment. If adjustments were made, for example by questions being provided in advance, it does not seem to me that that would lead to any certainty that the claimant will be able to proceed.

185. The position, then, is that if all goes well the case is likely to be heard some 4-5 years after the events giving rise to the events in the claim. If things do not go well, the risk is that there will be a further postponement and the final hearing (if it goes ahead at all) will take place more than four years after the events in the claim.

186. I also accept Mrs Banerjee's submission that there is significant prejudice to the respondent and to S in the allegations "hanging over them" for a further period of time. It does not seem to me that that prejudice is removed by my decision to anonymise them.

187. It is always a difficult decision for a Tribunal to decide that a claim should be struck out where the reason for that arises from a claimant's long-term health issues and results in a claim not being heard. It is not the claimant's fault that she is in this position but a consequence of her mental health issues. On the other hand, it is also not the respondent's fault. I need to take into account both parties' article 6 rights. I also need to take into account the impact on other Tribunal users. I do find in these circumstances that even taking into account the claimant's article 6 rights and the Tribunal's duties to disabled parties, the appropriate course of action is to strike out the claimant's claim.

188. I have considered whether that is the proportionate step to take. It does not seem to me that there is a lesser step which could remove the significant risk of the need for further postponement. There is no alternative to the claimant providing her witness statement and giving evidence about the events which she says amount to discrimination, harassment and victimisation.

189. I have considered whether it would be proportionate to make an unless order as an alternative to striking out the claim. Given the medical evidence, any such order would need to allow a period of months for the claimant to prepare her witness statement. I have set out above why, on balance, I consider that there is a significant risk that the claimant would not be able to comply. Making such an order would, it seems to me, be to delay finality in the case in the hope that the claimant's condition would improve. It does not seem to me that would be in accordance with the overriding objective.

190. In those circumstances my decision is that the claimant's case is struck out.

Striking out under rule 37(1)(b) - unreasonable conduct

191. Had I been required to decide the issue under this rule I would have concluded that the claimant had not acted unreasonably in the conduct of her case. it seems to me that it would be incorrect to characterise the claimant's conduct of the case as "unreasonable " given my finding that the default in complying with Tribunal orders was a consequence of her mental health issues. If I am wrong about that and her conduct was unreasonable, I would have struck out the claim on the basis that there was a significant risk that a fair hearing was not possible and that strike out was proportionate.

Striking out under rule 37(1)(e) – fair hearing not possible

192. Had I been required to consider the issue under rule 37(1)(e) my conclusion would be the same in that a fair hearing was not possible in an absolute sense. I take into account what was said in **Riley** about it being wrong to expect Tribunals to postpone heavy cases merely in the hope that a claimant's medical condition will improve and in the absence of any realistic prognosis of sufficient improvement within a reasonable time. Had I been deciding the issue under the rule I would have struck out the claim.

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Employment Judge McDonald

Date: 5 January 2025

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

10 January 2025

FOR THE TRIBUNAL OFFICE

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