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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000793/2024

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Preliminary Hearing held by CVP (Dundee) on 18 February 2025

Employment Judge R Mackay

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**Dr P Dymoke**

**Claimant  
In Person**

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**Ernst & Young LLP**

**Respondent  
Represented by:  
Mr Brown, Counsel**

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## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

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1. The claimant was not at the relevant times disabled as defined in the Equality Act 2010 ("**the Act**"); his claim of disability discrimination as it relates to his own condition is, accordingly, dismissed.

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2. The claimant's claim of disability discrimination by association with the alleged disability of his wife (or his son) is struck out under Rule 38(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2024 ("**the Rules**") on the basis that it has no reasonable prospect of success.

## REASONS

### Introduction

3. At a case management preliminary hearing held on 3 October 2024, this preliminary hearing was fixed to determine the question of disability status of the claimant, and, if the claimant wished to continue with a claim of associative discrimination, whether that claim should be struck out as having no reasonable prospects of success. The claimant chose to pursue the latter claim.
4. During the course of subsequent correspondence between the parties and the employment tribunal, it was also agreed that this preliminary hearing would consider whether the claimant's claim of disability discrimination as it relates to his own alleged disability should be struck out, again on the basis of having no reasonable prospects of success. Ultimately, for the reasons which follow, the tribunal did not require to consider that point.
5. The claimant's ET1 contained limited specification of the claims being made. At a case management preliminary hearing on 4 September 2024, the need for further specification was highlighted and the claimant was given 8 weeks to do so. By the time of the second case management preliminary hearing on 3 October 2024, the claimant had not produced further written specification. At that preliminary hearing, therefore, there was an exploration of the discrimination claims being brought.
6. In summary, the employment judge noted that the claim was that in or about 2017, the claimant had notified the respondent of caring responsibilities for his (disabled) wife, and that in or about 2022, he notified them of his own difficulties which he considered amounted to a disability. It was the claimant's position that the respondent had applied policies to him such as pushing ahead with disciplinary and performance management processes and embarking on a redundancy process without making allowances for his own

disability or for the caring responsibilities he had for his wife. The employment judge noted that the claims appeared to relate entirely to do with a failure to make reasonable adjustments. The claimant was asked to particularise these further, including the precise terms of each provision, criterion or practice which the respondent was said to applied, and why this put the claimant at a particular disadvantage.

7. So far as the claim for associative disability discrimination was concerned, the employment judge gave a preliminary view (reflected in his note) that a claim for a failure to make reasonable adjustments relating to the disability of the claimant's wife was not competent. He set out a summary of the law so as to assist the claimant. He referred to ***Hainsworth v Ministry of Defence*** [2014] EWCA Civ 763, which he noted clearly states that there is no concept of an associative duty to make reasonable adjustments. He also outlined the scope of section 19A of the Act.

8. The claimant prepared further specification which he provided in advance of this preliminary hearing. Although lacking some clarity, the claim as it relates to associative discrimination refers to a failure to take account of caring responsibilities on a number of occasions. Although labelled by the claimant as indirect discrimination in a number of places, it was clear that he was referring to a failure to make reasonable adjustments to take account of his caring responsibilities for a disabled wife (and potentially also his disabled son). That is consistent with the pleadings in the ET1.

9. Parties agreed a joint bundle of documents running to over 450 pages. The vast majority of these were not referred to. The tribunal was taken principally to the claimant's medical records which were not in dispute and were taken at face value.

10. At the first case management preliminary hearing, the employment judge noted that the claimant confirmed disability status to arise due to his being on the autistic spectrum and having narcissistic personality disorder. The

claimant confirmed that both conditions had been with him all of his life albeit not diagnosed until recent years. During the course of the present preliminary hearing, the claimant's position shifted slightly in that he defined the disability as arising from his having "traits" of those conditions as opposed to having the conditions themselves. Moreover, his primary focus was on traits of autism rather than traits of narcissistic personality disorder.

11. The claimant gave evidence on his own behalf. He had prepared a disability impact statement to which he spoke. To some extent, the claimant's evidence was not entirely aligned with the medical evidence. Relevant examples of discrepancies are set out in the next section of this judgment.

### Findings in Fact - Disability Status

12. The claimant is a chartered accountant. He was employed by the respondent from 30 July 2013 until 2 May 2024 when he was dismissed by reason of redundancy.

13. Over the years, he has been assessed by various medical professionals. At no time has he been diagnosed with autism or narcissistic personality disorder.

14. The claimant accepts that the conditions he relies upon are lifelong conditions rather than conditions which can arise later in life (recognising that they may not be properly identified, diagnosed or labelled until a later stage of a person's life).

15. Some time in 2008, the claimant was seen by a consultant psychiatrist because there was some dubiety that he was suffering from an autistic spectrum disorder. He was going through a stressful situation at the time and it had been suggested to him that he may have autism.

16. In a letter from the claimant's GP dated 12 February 2010, there is reference to the earlier consultation and a statement that: "*after a period of quiet the problem seems to have reared its head again*". At that time, the claimant's

wife had undergone a major operation, he had lost his father, and he was having difficulties in his business.

17. On 24 March 2015, the claimant was seen by a doctor at a mental health clinic. He had been referred by his GP due to anger issues and a question mark over whether he may have ADHD. Around this time, the claimant's wife had suffered a brain injury which the claimant found difficult to deal with. The doctor is noted as stating that the claimant's anger issues are usually triggered by interactions between him and his wife. He is noted as stating that he did not have any anger issues when at work. He was not diagnosed with ADHD and his anger outbursts were said to be very situational.

18. By letter dated 12 May 2015 from the same doctor to the claimant's GP there is reference to the claimant having been presented with issues around anger. The claimant is noted as being concerned that he may have a diagnosis of autism. He completed an autism questionnaire. His score was deemed "*not consistent with a diagnosis of autism*". The assessment of the doctor was that the claimant's "*...difficulties with anger appear to be very situational and he does not seem to have issues when he is at work*". She goes on to say: "*I did explain to [the claimant] that if he had a diagnosis such as autism it would be unlikely that this would never surface in his professional life.*" Whilst the claimant gave evidence that he gamed the system to avoid a diagnosis, that is not consistent with his apparent desire to gain an explanation for the anger issues he faced and his express request some years later that it would be helpful to have a diagnosis of autism.

19. In a letter dated 29 September 2016 from a consultant psychiatrist the claimant is described as having "*... been troubled with significant issues around anger he does not show evidence of any major mental illness*".

20. In a letter dated 16 February 2021 from a consultant psychiatrist to the claimant's GP, reference is made to the claimant describing longstanding problems with expressing himself, particularly emotionally, verbal aggression,

a deteriorating relationship with his wife and irritability with his young son. He was diagnosed with depression at that time. Reference is made to difficulties with a business lease resulting in a "*rather physically violent argument*" with the claimant's wife.

- 5     21. By letter dated 6 February 2024 from a clinical psychologist to the claimant's GP, reference is made to an assessment carried out on the claimant. The letter makes reference to the claimant having been recommended for a form of therapy known as schema therapy. It is said to help people change longstanding patterns of feelings and behaviour that are causing them  
10     difficulties in their lives. Although the claimant's position was that the psychologist had diagnosed him as having traits of autism, the letter does not refer to such a diagnosis. The claimant's position was that it should be inferred from the provision of schema therapy, that he did have a diagnosis. He accepted in cross examination, however, that schema therapy may be  
15     used for a variety of conditions. On being questioned as to why he did not obtain a medical report for the purposes of this tribunal, he stated that he did not consider it to be necessary. He was questioned by the tribunal if there was a letter from the specialist to the GP confirming the diagnosis. He confirmed that there was not.
- 20     22. On 8 March 2024, the claimant visited an A&E department due to stress he felt about the redundancy process he was going through. He was not found to have signs of any treatable illness and was discharged back into the community.
- 25     23. By letter dated 11 March 2024, the clinician who had observed the claimant in A&E wrote to the claimant's GP. In the letter, the claimant is described as having got into the hospital with "... *suicidal ideation, anger and frustration as he has been made redundant from his job*". He also described stresses in caring for his wife. In narrating the claimant's psychiatric history, the claimant is reported as having had mild reactive depression when his  
30     father passed away. The claimant is also noted as saying that he had been

investigated due to concerns over narcissistic personality disorder and autism and that he was not diagnosed with either of these but was told he had traits of both. In a section headed Social History it is noted: *"[the Claimant] denies any issues at school or growing up"*.

5     24.     On 9 May 2024, the claimant visited his GP. He is noted as saying that it would be *"helpful"* to have a diagnosis of autism. It was put to him in cross examination that he was seeking that diagnosis with a view to making this claim. He accepted that that was a possibility. Work related issues are noted as continuing to be a stressor with reference to the redundancy process and  
10     enhanced sick pay having been stopped. He is reported as *"...coping with daily activities but experiences an "occasional crisis" when feeling overwhelmed"*. This is not consistent with the claimant's disability impact statement which sets out a range of adverse effects which are said to impact on his day-to-day activities.

15     25.     Towards the end of his employment, the claimant was absent from work. His fit notes variously refer to mental health distress, mental health stress and work-related stress. The reason for the absence and the distress was (as accepted by the claimant) the redundancy process.

20     26.     In his disability impact statement, the claimant refers to a number of impacts of the disorders alleged. These include an inability to think flexibly, a tendency to ignore situations, frustration or brain freeze, and a tendency to become withdrawn or uncommunicative in social situations. In the extensive medical evidence referred to in the hearing, there is very little of anything to substantiate that account. Whilst he does refer to anger in the disability  
25     impact statement, he presents this as being a more general issue than is apparent from the medical evidence. The medical evidence focuses very much on anger issues and particularly his relationship with his wife in this context.

27. He lists the number of impacts which he says the impairments have on work including prevarication, irritation, inflexibility, social interaction and emotional distress. This is at odds with the medical evidence and in particular the claimant's account in consulting with a clinician in 2015 that he had no issues at work. Whilst it is accepted that he did suffer emotional distress on being made redundant, he accepted that the cause of that was the redundancy process and not necessarily an underlying medical condition.

### Relevant Law and Submissions – Disability Status

28. Section 6 of the Act defines disability as follows:

10 (1) A person (P) has a disability if

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities

29. "Substantial" means more than minor or trivial under Section 212(1) of the Act.

30. In ***Goodwin v Patent Office*** [1999] IRLR 4 the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:

20 a. Does the person have a physical or mental impairment?

b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

c. Is that effect substantial?

d. Is that effect long-term?



31. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.
32. The term “impairment” is not defined in the Act. In ***Rugamer v Sony Music Entertainment UK Ltd*** and another 2002 [ICR] 381 the EAT referred to  
5 “some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition.”
33. What are normal day to day activities has also been considered in case authorities. The Court of Appeal in ***Chief Constable of Norfolk v Coffey*** [2019] IRLR 805 approved the approach of the EAT in that case, that “*The phrase ‘normal day to day activities’ should be given an interpretation which encompasses the activities which are relevant to participation in professional life*”.
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34. In ***Igweike v TSB Bank Plc*** [2020] IRLR 267, it was held that an effect on normal day-to-day activities may be established if there is a requisite effect  
15 on normal day-to-day or professional or work activities, even if there is none on activities outside work or the particular job. The EAT commented that “*In many, perhaps most successful cases, disabled status is established because the requisite effects are found on normal day to day activities outside work, or both outside and in work*”.
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35. It is accepted that neurodivergent conditions such as autism may amount to a disability. Where difficulties flowing from such a condition are such that they have a substantial adverse effect on day-to-day activities, the definition may well be met (***Hewett v Motorola Ltd*** [2004] IRLR 545).
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36. Mr Brown agreed to make his submissions first. In summary, he invited the tribunal to find that the claimant had not discharged the burden of proof. He described it as extraordinary that despite the extensive medical records over many years, there was not a single piece of evidence the claimant had the conditions alleged.

37. He accepted that the claimant had a longstanding history of personality traits but that they should not be considered mental or psychiatric impairment. Instead, he pointed to what he said was a close relationship between significant life events causing the claimant suffering distress, and the situational context of the claimant's mental health issues.
38. In relation to day-to-day activities, he invited the tribunal to prefer the contemporaneous medical records over the claimant's account in his disability impact statement.
39. In response, the claimant stated that he did not get a formal diagnosis as he did not consider it to be necessary. He referred to the schema therapy provided to him by the NHS, which is not available to everyone, as evidence of there being an underlying condition. He accepted that everyone has a personality and may react differently to life events but characterised his response and the abuse to which he subjected others as being not normal.
40. Following the conclusion of the hearing, the claimant made a further written submission to the employment tribunal. In this, he referred to Acas guidance on neurodivergence, which referred to the possibility of a person being disabled in the absence of a formal diagnosis. In response, the respondent's solicitor highlighted what he said was an inconsistency in the claimant's argument, given that his evidence was that he did have a formal diagnosis of "traits" of the conditions.

### **Decision – Disability Status**

41. The tribunal first considered whether the claimant has the mental impairment which forms the basis of his claim, namely traits of autism and narcissistic personality disorder. In answering the question, the tribunal has had the benefit of seeing extensive medical evidence over many years. In none of the records is there a finding of such a diagnosis. The only reference is in the report of 11 March 2024 which confirms that the claimant had not been diagnosed with either condition but had been "told" that he had traits of both.

In relation to autism itself, there is an express finding from a clinician that the claimant was not autistic. It is notable that, at that time, it was explained to the claimant that were he autistic, it was unlikely that this would not surface in his professional life (the claimant having confirmed that he had did not seem to have issues at work).

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42. In terms of the claimant's evidence that he had been diagnosed with having traits of both conditions, the tribunal found it surprising that no such diagnosis is reflected anywhere in the medical records. It also found it surprising that, had such a diagnosis been made, the claimant did not obtain evidence to that effect for the purposes of this hearing. It was, therefore, satisfied that the claimant does not suffer from the conditions, or the traits of the conditions, he asserts. It preferred the contemporaneous medical records in this regard.

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43. The tribunal considered whether the claimant might nonetheless have a mental impairment, being mindful the uncertainty which can apply to neurodivergent conditions. It is clear from the medical records that the claimant has longstanding issues with anger in particular. It is notable from the various medical interventions, however, that the claimant has not been identified as having a particular impairment. Clinicians have described his issue as being one of anger, particularly directed towards his wife. His behaviour is also described on more than one occasion as being situational. He reacts badly to negative life events including, in his case, bereavement, the unfortunate diagnosis of his wife, business troubles and being made redundant. In other respects, the evidence shows long periods where there are no issues. In looking at this evidence, the tribunal concluded that it was more likely than not that the claimant's reactions to negative events, whilst more extreme than the reactions of others might be, were an aspect of personality, but not one which flows from there being any defect or disorder as compared with a person having a full set of mental equipment in normal conditions.

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44. It reached the same conclusion in considering the claimant's anger issues. Having been assessed by a number of specialist clinicians over a number of years, the tribunal considered that an underlying impairment would likely have been identified, if one existed.
- 5 45. The Acas guidance referred to by the claimant highlights that people with neurodivergent are often undiagnosed either due to waiting lists for treatment or a lack of awareness of the condition. Neither applies to the claimant. He has had the benefit of the number of referrals to specialists and he actively sought out a diagnosis.
- 10 46. He was diagnosed with depression in 2021. That is not, however, a condition upon which the claimant relies. In any event, the records point to this having been a single episode for which the claimant was treated and from which he recovered. Equally, it is not possible to conclude that the claimant has a mental impairment simply by virtue of his having been offered counselling therapy.
- 15 47. Recognising, however, the possibility that the claimant may suffer from an impairment despite there being no precise diagnosis, the tribunal went on to consider the question from a different angle and assessed whether the claimant demonstrated that there is an adverse effect on his ability to carry out normal day-to-day activities.
- 20 48. As noted above, the claimant set out a number of adverse effects in his disability impact statement. He covered both work and non-work life. In cross examination, the claimant was challenged for having used a template and having had his wife input into the document. Whilst the tribunal is not overly critical of the claimant for that in itself, the document is inconsistent with the medical records in a number of respects.
- 25 49. Considering especially the claimant's reliance on a lifelong condition, the medical records show that there are no issues for long periods. In his own words, he is recorded as saying that he had no issues at work. His anger

issues are described as being situational rather than ongoing and being focussed on his personal relationship. He is recorded as having no issues at school or growing up. As recently as his visit to his GP on 9 May 2024, at a time when he said that it would be helpful to have a diagnosis of autism, his GP reports him as coping with daily activities but experiencing an occasional crisis when feeling overwhelmed. This is consistent with the rest of the medical evidence which points to the claimant coping badly with significant negative life events, but otherwise coping normally.

50. Against that background, the tribunal was not satisfied that the claimant demonstrated that there was an adverse effect on his ability to carry out normal day-to-day activities, and certainly not that any effect was substantial.

51. For these reasons, the tribunal concluded that the claimant has not discharged the burden of proof and does not meet the definition of disability.

### **Strike Out Application – Relevant Law and Submissions**

52. The tribunal went on to consider the respondent's strike out application. In light of the finding on disability status it required to consider only the claimant's claim of associative disability discrimination.

53. Section 37 of the Rules provides as follows:

*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

*(a) that it is scandalous or vexatious or has no reasonable prospect of success;*

*(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

*(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

*(d) that it has not been actively pursued;*

5 *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

10 54. In ***Anyanwu and another v South Bank Students' Union and South Bank University*** [2001] IRLR 305, the House of Lords ruled that discrimination claims should not be struck out as an abuse of process for having no reasonable prospects of success, except in the plainest and most obvious cases. Particular caution must be exercised in cases where the claimant is not professionally represented.

15 55. The EAT in ***Cox v Adecco*** [2021] 4 WLUK 11 summarised the approach to be taken:

(a) Only in the clearest case should a discrimination claim be struck out. However, no one gains from truly hopeless cases being pursued to final hearing.

20 (b) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.

(c) Where factual issues are disputed, it is highly unlikely that strike-out will be appropriate. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

25 (d) It is necessary to consider, in reasonable detail, what the claim and issues are in order to determine whether a claim has reasonable prospects of success.

(e) If the claim would have reasonable prospects of success if it had been properly pleaded, consideration should be given to the possibility of an amendment.

(f) The claimant's case must ordinarily be taken at its highest.

5 (g) If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.

56. Where any of the grounds listed have been established, the Tribunal must go on to decide whether to exercise its discretion to strike out or to take some  
10 other action (***Hasan v Tesco Stores Limited*** UKEAT/0098/16).

57. In considering whether to strike out a claim, it may also be relevant to assess whether a fair trial is still possible (***De Keyser Ltd v Wilson*** ***UKEAT/1438/00***).

58. For the respondent, Mr Brown submitted that the claim should be struck out  
15 on the basis that it had no reasonable prospects of success. He referred to the authorities on reasonable adjustments and the absence of an entitlement to make such a claim based on another person's disability.

59. In response, the claimant confirmed that he had researched the law following the earlier case management preliminary hearing. He candidly stated that he  
20 understood his claim to be very difficult although he did not want to say that it would definitely not succeed. He accepted that the essence of his claim was a failure to account of his caring responsibilities arising from his wife's disability (and also his son) in the implementation of internal process carried out by the respondent. He had considered the reference by the judge at the  
25 second case management preliminary hearing to section 19A of the Act but concluded that that did not apply to him.

60. He referred to the fact that he was not legally represented and referred to cases he had read which emphasised the caution which should be exercised

in striking out a discrimination claim, as well as the overriding objective of the tribunal to ensure that parties are on an equal footing.

### Strike Out Application - Decision

- 5 61. Although very mindful of the caution which must be exercised, the tribunal decided that this was one of the clearest cases where striking out was permissible. It is sufficiently clear that the claimant's position is that reasonable adjustments ought to have been made to the respondent's internal processes to account for caring responsibilities. In some parts of his further particulars her refers to indirect discrimination, but he uses this term not in the legal sense, but instead to distinguish between failures as they relate to his disability (direct) and failures as they relate to the disability of his wife and son (indirect). His phraseology of "*failure to account for*" is consistent with a failure to make reasonable adjustments and he did not suggest otherwise. He does not suggest making any associative direct or harassment claim which might be permissible under associative discrimination concepts. It is also clear that the claimant brings this claim under the head of associative *disability* discrimination and no other.
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62. A claim for associative discrimination relying on a failure to make reasonable adjustments is not permissible and this tribunal is bound by decisions of higher courts (including *Hainsworth*) to that effect.
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63. This is not a case where the merits depend on disputed facts. Even taking the claimant's claim at its highest, were he to establish all of the necessary factual components of his claim, it is bound to fail given the clear legal position. Whilst it is possible to envisage a claim under section 19A of the Act, based on a different protected characteristic, there is nothing in the pleadings, the further particulars, or the oral explanation of the claimant's claims at this or earlier case management preliminary hearings to suggest even the possibility of such a claim. The claimant has been clear that his
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claim relates to associative disability discrimination only. The question of amendment does not, accordingly, arise.

- 5 64. Having concluded that the claim has no reasonable prospects of success, the tribunal went on to consider whether to strike it out or to take some other action. Whilst other action short of striking out, such as ordering a deposit order, may be appropriate in most cases (particularly where there is any factual dispute) this is not such a case. The claim is bound to fail regardless of the facts. For similar reasons, questions of a fair trial as it relates to this particular claim are largely irrelevant. It is noted, however, that the claimant has a valid unfair dismissal claim to pursue and the striking out of the discrimination claim will not preclude a fair trial in the unfair dismissal claim. Moreover, it is possible that any alleged failures to take account of the claimant's circumstances in making the claimant redundant could be relevant in assessing the fairness of the dismissal. No view on that is, however, expressed as this tribunal had not heard the relevant evidence.
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65. Against that background, the tribunal determined that striking out the claim was the appropriate step to take in the current case.

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**Date sent to parties**

04 April 2025

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