Case Numbers: 6006601.24, 6010246.25, 6021063.25 & 6028466.25

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr Baker	Jaguar Land Rover Ltd

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT	Midlands West	**ON**	22 June – 10 July 2026 & 21 - 28 September 2026

EMPLOYMENT JUDGE Harding

Representation
For the Claimant: Mr Morgan, KC
For the Respondent: Ms Badham, Counsel

REASONS

JUDGMENT having been sent to the parties on 2 October 2026, and written reasons having been requested by the claimant orally at the hearing on 28 September 2026, in accordance with Rule 60(4) and (4A-F) of the Employment Tribunal Procedure Rules 2024, the following full written reasons are provided:

Summary

1 On the respondent's application, this claim was struck out part way through a second final hearing on the basis that a fair trial was no longer possible.

Relevant background

2 The claimant presented four tribunal claims on; 24 July 2024, 25 March 2025, 5 June 2025 and 1 August 2025. He pursued claims of direct disability discrimination, discrimination arising from disability, a failure to make reasonable adjustments, harassment related to disability, whistleblowing detriment (with 14 asserted protected disclosures), victimisation, automatically unfair dismissal contrary to section 103A of the ERA, ordinary unfair dismissal and breach of contract. The asserted disabilities were chronic pain, PTSD and anxiety and depression. It remained a live issue between the parties as to whether the claimant was disabled by way of these impairments from 24 July 2024 until the termination of his employment on 22 May 2025.

3 On 2 May 2025, at a case management preliminary hearing, the case was listed for an 8 day final hearing to take place from 22 June -1 July 2026, page 467. That listing was made prior to the submission of the third and fourth claim form.

Dr Andrews' advice of 13 June 2025

4 Dr Andrews is the claimant's treating consultant psychiatrist. In a letter dated 13 June 2025, pages 581-582, Dr Andrews confirmed that the claimant was continuing to present with intense anxiety and a state of low mood stemming from post-traumatic stress disorder. He confirmed the claimant was currently on two antidepressants as well as Clonazepam, a tranquiliser, and Ramipril to manage hypertension. He confirmed that, in his opinion, the claimant's mental state would start to improve once his dispute with his employer was satisfactorily dealt with, and that within 12 months of this point he would make a symptomatic recovery and begin to be able to plan his long term future. In other words, it was the opinion of Dr Andrews that whilst the litigation continued, and until it was satisfactorily dealt with, there would be no improvement in the claimant's mental state.

5 Various preliminary hearings followed the case management hearing of 2 May 2025. At a preliminary hearing held on 16 December 2025 Employment Judge Dimbylow extended the listing for the final hearing by another 7 days, meaning it was now listed for 15 days. That was to take account of the fact that the four claims had been consolidated. Judge Dimbylow did not, however, timetable the final hearing at this point, stating that this would need to be

reviewed following a further preliminary hearing due to take place in February 2026, page 1077. However, on the application of the respondent, the February hearing was subsequently vacated.

6 And so the case came on for its final hearing on 22 June 2026, and was listed for 15 days, to last until 10 July. As set out above, the hearing had never been timetabled and 15 days was, in fact, an underestimate of the amount of time needed; it was discussed and agreed with the parties at the very outset of the hearing that, likely, a further four days were needed (i.e. making it a 19 day hearing in total). Even that, I considered, once I had seen the length of the asserted qualifying disclosures, was an underestimate because substantial reading time and deliberation time would be needed to work through these. In my view this required a further 2 days meaning this was, in fact, a 21 day hearing.

7 I commented at the start of the first final hearing that the claim was one that appeared to lack focus. The list of issues ran to 27 pages. In relation to the whistleblowing claim there were 14 asserted written protected disclosures, all of them lengthy, some of them exceptionally so. For example, asserted disclosure 2 (19 July 2024) was 32 pages long, asserted disclosure 4 (19 August 2024) was 51 pages long with attachments. For each disclosure the whole of the written document was said to be the disclosure. The vast majority of disclosures were said to be qualifying disclosures in multiple different ways, it being the claimant's case that he had a reasonable belief that the disclosures tended to show multiple asserted breaches of legal obligations. To take one example, the asserted legal obligations for disclosure 2 were: "breach of duty of care to employees with mental health difficulties, breach of statutory obligations under the Equality Act, conduct by managers designed to undermine employee rights, violation of the ACAS code, breach of duty of care, failing to address resource concerns in the business, exposure of employees (including the claimant) to harm, attempts to deceive employees regarding their legal rights, comparison with other cases - some of which have been litigated, failure to honour or investigate grievances and a culture of mistreatment of employees", see the PIDA and detriment table produced for the purposes of the final hearing. This lack of focus was not limited to the whistleblowing claims; by way of example, for some of the section 15 claims there were up to five asserted "somethings" that were said to be causative of the treatment complained of.

8 The claimant has been legally represented throughout most of the litigation, but as he had the particular benefit of being represented by Mr Morgan for the final hearing I asked, at the start of the first hearing, if it might be possible to bring some more focus to these claims; in particular whether it might be possible to narrow down the asserted disclosures to particular passages in the lengthy written documents and/or reduce the number of disclosures and/or reduce the basis on which they were said to be believed to be disclosures that

tended to show breach of a legal obligation. Mr Morgan duly took instructions, but these were not fruitful.

9 The list of issues therefore remained at 27 pages. There were multiple claims and complaints which covered events from January 2022 onwards. As might be expected, there was considerable factual dispute between the parties.

10 Whilst the claims spanned the period January 2022 to May 2025 there was relevant background information, relied on by both parties, that considerably pre-dated 2022. For example, the respondent asserted that there were performance concerns about the claimant, as far back as 2018, which persisted from then on, and that was central to the respondent's defence in respect of one of the claims of disability discrimination (the reason why HMB decided she needed to replace the claimant in June 2023). The claimant, on the other hand, relied on the results of a leadership and culture review that took place in 2018, in respect of which he asserted certain inferences could be drawn, and indeed Mr Volkaerts, from the respondent, was cross examined about this review. There was factual dispute between the parties in relation to this relevant background. In reality, therefore, this case spanned the period 2018 – 2025.

11 Additionally, the respondent sought to mount a significant challenge to the claimant's credibility, and/or his perceptions of the respondent's conduct, and that was a significant element of their defence. That, of course, was potentially an overarching issue in respect of all of the claims but might have been particularly relevant to the claimant's asserted reasonable belief in respect of the qualifying/protected disclosures.

12 The claimant's schedule of loss, which had risen steadily throughout these proceedings, is currently in excess of £4 million, pages 926 – 930. The claimant was in a senior role at the respondent, he was an HR Director, and so he was a high earning employee.

13 The respondent produced witness statements for seven witnesses; HMB, Sara McCarthy, Martin Limpert, Jane Cooke, John Reading, Alan Volkaerts and Andrea Debbane. The claimant also produced a witness statement but called no other witnesses. The witness statements ran to 113 pages. The documentation in this case was very extensive indeed; the main bundle ran to 4426 pages and the supplementary bundle ran to 655 pages.

14 There were, at the outset of the first final hearing, a number of outstanding contested applications to be dealt with. These included an application from the claimant to be given cross examination questions in advance in writing. In support of this application a letter had been produced from Dr Andrews, dated 16 February 2026, in which it was written that the court case was likely to trigger intense anxiety and Dr Andrews requested that the tribunal consider regular

breaks and that cross examination questions be submitted in advance, page 125, supplementary bundle.

15 However, through the good efforts of counsel for both the respondent and the claimant, all of these outstanding applications were ultimately resolved by consent. The application to be given cross examination questions in writing in advance was withdrawn by counsel for the claimant.

Adjustments for the claimant

16 At the start of the hearing the following adjustments were agreed for the claimant when he was giving his evidence; regular five minute breaks every 30 minutes, but with the claimant able to request a break earlier than this if required, being given additional time to answer questions if required, having with him a pen and paper whilst giving evidence in order that he could write things down, oral signposting by counsel for the respondent of each topic that she was about to ask questions about, an allocated, private quiet space that the claimant could utilise during breaks and, where possible, starts earlier than the usual 10 AM with an earlier finish.

17 After evidence had started a further adjustment was made for the claimant, who was finding the paper bundles difficult to manage, in the form of a laptop on which he could access electronic copies of the documents.

HMB

18 I was made aware by Ms Badham, for the respondent, at the start of the first final hearing that one of the respondent's witnesses, HMB, was finding the tribunal process very stressful. Whilst she had provided a witness statement and was present and ready to give evidence, I was told that it was vital that her evidence was heard in this trial window because HMB did not feel she could tolerate further delay. It was agreed that her evidence would be taken straight after that of the claimant.

19 Once the preliminary matters had been dealt with I started my reading, which took a considerable period of time given the amount of documentation that there was to read, the length of some of that documentation, and the length of the witness statements. Reading was completed by close of play on Wednesday 24 June. Thursday 25 June was taken up with various other housekeeping matters that had arisen, including an application to amend made by the claimant. That application was granted in part, and refused in part, for the reasons announced orally at the time.

20 Cross examination of the claimant therefore started on Friday 26 June. The tribunal was not listed to sit on Monday 29 June (there had been an

administrative error in relation to this date) and we were therefore due to restart cross examination of the claimant on Tuesday 30 June. At the start of the hearing, however, the claimant informed the tribunal that he had been unwell over the weekend. He said that his blood pressure over the weekend had gone up to stage IV, which is the point at which urgent medical intervention is required. He said that he wanted to get the process done but he asked if he could have the cross examination questions in writing. We adjourned in order for Mr Morgan to take instructions. After the break I was informed by Mr Morgan that that the claimant's blood pressure had been steadily rising over the weekend, culminating in it being 163/111 as of Tuesday morning, and that the claimant had also experienced chest pain and shortness of breath. I was told that the claimant's blood pressure had gone up despite the claimant taking double the amount of his normal blood pressure medication. Stage IV hypertension, we subsequently established, is a reading of 180/120.

21 After discussions with the parties we arrived at an agreed position that the hearing should not proceed for the moment and that medical advice should be sought, initially from the claimant's GP, as to the claimant's fitness to proceed as both as a witness and a party. In addition, if the claimant was fit to proceed, any further adjustments that could be made to the hearing process. A response from the claimant's GP was not produced as quickly as we had originally hoped for, and it was not until Thursday 2 July that a letter was received in which the GP stated he could not advise on the claimant's fitness to participate in the hearing.

22 It was agreed that the parties would seek input either from Dr Andrews or an alternative psychiatrist, albeit as it turned out there was no alternative psychiatrist available to help within the immediate term. It was also discussed that we might be able to start cross examination of HMB on Monday 6 July.

23 A letter was received from Dr Andrews on Friday 3 July at 4:05 PM. In this letter Dr Andrews confirmed that the claimant was fit to proceed. He also incorrectly suggested that the tribunal had earlier in the hearing declined to order that cross examination questions be submitted to the claimant in advance. He pointed out that he had previously recommended that any points that needed to be examined should be shared with the claimant earlier. He also wrote that the claimant was aware that prolonging the case meant prolonging the agony. He wrote that the claimant was suffering from intense anxiety and that the adversarial approach in the hearing had triggered an injection of adrenalin which produced a spike in blood pressure. He wrote that "this style of questioning" triggered intense symptoms of PTSD. The doctor wrote that if there were no adjustments made, as he had recommended earlier, he did not expect any different outcome and he explained that the claimant's blood pressure "spikes to dangerous levels when he is faced with hostile treatment as he feels intimidated". The respondent indicated it would strongly contest any application for cross examination questions to be provided in writing in advance.

HMB

24 We reconvened on Monday 6 July. The respondent indicated it wished to make an application to interpose the evidence of HMB. I was told that HMB had become increasingly anxious and stressed, particularly with the delays in the hearing that we had encountered and the uncertainty this gave rise to as to when she would be giving her evidence. I was told that there was a very real concern that if her evidence was not heard at this point she would no longer feel able to participate. It was agreed that the claimant would be released from his oath in order to give instructions to Mr Morgan on two specific points; the respondent's application to interpose the evidence of HMB and whether or not the claimant now wished to pursue an application for cross examination questions to be provided in writing in advance.

25 We reconvened again on the morning of Tuesday 7 July By this time a witness statement had been served from HMB explaining why, from her perspective, it was important that she be allowed to give evidence during that week of the hearing. In essence, she wrote that she was finding the tribunal process very stressful. She explained that she had given evidence for the respondent during the preliminary hearing that took place in late 2025, and that she had found this incredibly difficult. It was further explained that the tribunal process was adding to some stresses and strains in HMB's personal life. These arose out of the death of HMB's mother in July 2025, which had left her as the primary carer for her adult sister, who is disabled by way of severe learning difficulties, which responsibility she was juggling with looking after three school age children. She wrote that as a result of these stresses and strains in her personal life she had, in fact, given up work, having left the respondent some 12 months earlier.

26 I was informed, however, by the respondent at the start of the hearing on 7 July, that events had rather overtaken what was written in the witness statement. I was told that HMB had become very distressed and was no longer willing to give evidence. After being given time to take instructions, and having spoken to HMB herself, Ms Badham confirmed that HMB was no longer prepared to give evidence and that, in the circumstances, the respondent had decided not to compel her to attend.

27 By this point it had been confirmed that the claimant did wish to make an application to be provided with cross examination questions in advance and arrangements had been made for Dr Andrews to give evidence on Friday 10 July in relation to this application. In the meantime, we interposed the evidence of Mr Volkaerts, of the respondent, which was heard on Wednesday 8 and Thursday 9 July.

The evidence of Dr Andrews' at the hearing on 10 July:

28 Dr Andrews gave evidence for well over 2 hours. He was asked questions by the tribunal, Mr Morgan and Ms Badham, in that order.

Findings of Fact

29 Relevant findings of fact based on Dr Andrews' evidence are;

29.1 The claimant had experienced a dangerous spike in his blood pressure; 180/120 is stage iv hypertension, at which point immediate medical attention should be sought.

29.2 The claimant's anxiety triggers his PTSD, which in turn causes the spikes in blood pressure.

29.3 As to the triggers for the anxiety/PTSD, these are twofold; (i) being exposed to a situation which reminds the claimant of the alleged index incidents at work, and (ii) the tribunal process as a whole but in particular the style of questioning. Whilst Dr Andrews accepted that, objectively, there was a difference between hostile treatment and adversarial questioning, the claimant perceives adversarial questioning as hostile.

29.4 Whilst the claimant was currently on a low dose of blood pressure medication, it was not medically recommended that his blood pressure medication be increased. That was because, in essence, the claimant's resting blood pressure is low and an increase in medication would likely drop his resting blood pressure to a point where he suffers side effects.

29.5 There was an alternative medication that could be added in namely a tranquilliser, clonazepam. Dr Andrews confirmed that he had already recommended that the claimant start on a very low dose of this and that the claimant had started to take this a couple of days previously. Dr Andrews was of the view this "might help" the claimant further because clonazepam carried out a different role to beta blockers, which the claimant was already on.

29.6 In terms of adjustments for the claimant, from a medical point of view Dr Andrews saw no difference between the claimant being provided with a list of the topics he would be asked questions about in cross-examination versus being provided with a list of the actual questions. In fact he stated that this (a list of topics) is what he (Dr Andrews) thought he had recommended.

29.7 Dr Andrews was of the opinion that the benefit of providing a list of topics/questions to the claimant was that it would give him the opportunity to plan, think things over and consider his answers. It was explained that if the claimant was given the opportunity to see what he was facing and had a chance to consider his responses that, in turn, could enable the claimant to better respond face-to-face. That said, in Dr Andrews' medical opinion the benefits to be derived from such a course of action had to be balanced against the fact that the anticipation/rumination that would come with preparing in advance could also bring with it its own issues.

29.8 Dr Andrews was of the view that it might also be helpful to the claimant to write out his answers in advance so that he could read the answers out at the hearing. That said, his medical opinion was that the claimant was able to answer questions orally.

29.9 Dr Andrews also considered that it might be helpful for the claimant to take with him into the witness box a written aide memoire document. This to be prepared in advance by the claimant to help him structure his answers, perhaps by reference to documents in the bundle. (Note: this was not an adjustment that had been recommended by Dr Andrews, it was raised as a suggestion by the tribunal during the evidence of Dr Andrews as part of exploring alternative options).

29.10 In Dr Andrews' professional opinion there were no further adjustments that could be made for the claimant.

29.11 In Dr Andrews' professional opinion the claimant is someone who feels a compelling need to take notes, see also page 1097.

The remainder of the hearing on 10 July

30 At the conclusion of Dr Andrews' evidence Mr Morgan submitted that, whilst the application initially posed had been for written cross examination questions in advance, it was clear that there was a measure which was short of the provision of written questions which could be adopted, namely the written signposting of topics the claimant would be asked about. That, it was said, would enable the claimant to engage with the issues and deal with the questions asked. It was an option that did not impinge on the respondent's rights, it was submitted. Mr Morgan asked for an order that there be signposting of topics and that the claimant be allowed to rely on a written aide memoire document to be prepared by the claimant. He submitted that if further difficulties arose with the claimant the tribunal would then know that all necessary, appropriate and proportionate measures had been adopted. He accepted in submissions at this point that there was no evidential basis on which the tribunal should entertain the idea of an entirely written exchange (a reference, as I understood it, to the evidence of Dr

Andrews that the claimant, having prepared in advance, would be able to answer questions orally).

31 The respondent continued to resist this application in strong terms.

32 I granted the claimant's application to be provided in advance with a written list of topics for cross examination. I refused his application to be allowed to use a written aide memoire when giving evidence, for the reasons that I announced orally at the time.

33 After discussion with the parties about the manner in which the claimant should be allowed to use the list of topics to help him prepare for cross examination I issued an order verbally that:

The respondent shall provide to the claimant's solicitor by no later than 4.00pm on 15 September 2026 a list of cross examination topics for the claimant to review at his solicitor's office with a copy of the trial bundles.

34 It was not part of this order that this list of topics should include page references. There was a discussion about use of page references but that had been in relation to the aide memoire, which, as set out above, had been raised as a suggestion by the tribunal, but ultimately was not ordered. Specifically, there had been discussion about whether it might help the claimant if he compiled a list of relevant page references in relation to the topics to reduce any strain caused by trying to remember where documents were in the bundle.

35 Note: regrettably, it would appear that as a result of an error by the judge, this order, whilst typed up, was not sent out by the administration. This only came to light during the second final hearing, as neither party wrote in to the tribunal to ask for a copy of the order to be sent to them. I apologised to the parties for this oversight. Before me both counsel confirmed, however, that the order, as set out above, was the order issued verbally and was consistent with their note.

36 There had been 6 effective hearing days in this first listing (i.e. days where evidence was heard or reading was undertaken).

37 Unusually, as a result of a gap that had arisen in listing's diary, we were able to re-list the case much more quickly than is normal; for 21 September 2026 – 9 October 2026, with a further 2 days for deliberations later on in October – i.e. a further 16 days in total.

Events after the hearing on 10 July

38 The respondent duly complied with the order to provide a written list of cross examination topics. Ms Badham provided the claimant's solicitor with a

detailed list of topics, which ran to 7 pages. The list contained headings and then subheadings of topics to be asked about.

39 After a reading in day on 21 September, cross examination of the claimant resumed on 22 September 2026. At his request we took 10 minute breaks every 30 minutes, as opposed to 5 minute breaks every 30 minutes, which we had adopted in the first hearing.

40 During the course of his evidence the claimant confirmed that he had received the list of topics and looked at it but had decided not to use it to prepare in advance of the hearing, he said because it lacked page numbers. He suggested that in order for the adjustment to be non illusory (i.e. to be of help) page references would have been required. As set out above, it had never been part of the claimant's application that the list of topics produced by the respondent should contain page references, and this was not ordered. The discussions about page references had only arisen in relation to the aide memoire document.

41 The claimant also confirmed in evidence that he had taken clonazepam for a period of time but had stopped taking it because he did not view it to be practical. He felt that it was difficult to function effectively cognitively whilst on it.

42 The claimant also confirmed that in his view there were no further medical steps that could be taken to support him during the trial process.

43 On the morning of 23 September I was informed by counsel for the claimant that the claimant had experienced high blood pressure during the hearing on 22 September. That had not been evident to either counsel or the tribunal. Whilst he had not taken a blood pressure reading that day I was told that he had taken his blood pressure after he arrived at tribunal on the morning of 23 September and his current blood pressure reading was 184/116.

44 This was a higher blood pressure reading than previously; it definitively took the claimant over the stage iv hypertension threshold and meant that immediate medical treatment was required. We adjourned in order that the claimant could attend hospital.

45 At the point when we adjourned cross examination of the claimant was timetabled for a further 4 days, followed by 4 days of cross examination of the respondent's witnesses and 1 day for submissions. Initially, I discussed with counsel whether, if the claimant became well again, with some robust case management (i.e. reducing the time available to counsel in cross examination and possibly interposing some of the respondent's witnesses) we could still retain this trial fixture. Both counsel were of the view (for differing but persuasive reasons) that interposing the respondent's witnesses was not possible, but there

remained the possibility, at this stage, of completing within the current trial fixture with robust case management. Perhaps unsurprisingly however, the claimant was not seen quickly, and the entire hearing day was lost.

46 Then, on the morning of the 24 September, the respondent made an application to strike out the claim on the basis that a fair trial was no longer possible (such an application had been foreshadowed by the respondent on a number of occasions). Additionally, Mr Morgan wished to make various cross applications and he needed half a day to take instructions on this and the respondent's application. Ultimately, we reached an agreed position that, as a result of the amount of time already lost, taken together with the amount of time that would be needed to deal with the application and cross applications, it was no longer possible to conduct a fair trial (even with robust case management) in the amount of time we had available within this trial fixture.

Other relevant background to the applications

The manner in which the claimant answered questions on 22 September

47 The claimant, initially at least, had appeared slightly tense whilst answering questions on 22 September and I had decided, consequently, that to start with the claimant should be left to respond to the respondent's questions without significant judicial guidance. During this time the claimant frequently either did not answer the question asked or he endeavoured to answer it but in a way that was quite often difficult to follow and quickly went off topic. This included, with some regularity, a commentary on how the respondent had prepared for trial and what witnesses it had chosen to call. Many of the answers given by the claimant were very long, lasting several minutes. In fairness to the claimant, once there was some judicial intervention to encourage him to focus on the question and answer it he tried to do so. But the initial part of cross examination, in my view, was a good indication of how the claimant would, likely, respond to questions in the absence of any guidance.

The applications

48 The respondent's application was to strike out the claim on the basis a fair trial was no longer possible, Rule 38(1)(e).

49 The claimant made a number of counter applications. However, one of those applications, an application to press on within the current trial listing was not, in the event, pursued; it being recognised and agreed by counsel for the claimant (and respondent), as set out above, that a fair trial within the current trial listing was no longer possible.

50 The remaining applications from the claimant were:

(i) That the hearing be re-listed and the tribunal order the respondent to provide written cross examination questions in advance. This application was made on the basis that either the claimant would respond to these questions orally during the hearing or that he would provide a written response to the questions. It was said in relation to this application, and indeed the other applications, that the claimant would also take additional medication in the form of clonazepam, which is the medication he had decided to discontinue sometime earlier.

(ii) The claimant be permitted to give evidence remotely from his home under the supervision of his solicitor,

(iii) `That the hearing be relisted and further medical information be obtained prior to determining the strike out application. However, it was the claimant's primary position that Dr Andrews had already provided all necessary medical evidence.

The Law

51 Rule 38(1) provides, relevantly:

(1) The Tribunal, may on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—

…..

(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, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

52 Rule 3: The overriding objective

(1) The overriding objective of these Rules is to enable the tribunal to deal with cases fairly and justly.
(2) Dealing with a case fairly and justly includes, so far as practicable-
(a) ensuring that the parties are on equal footing,
(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,
(c) avoiding unnecessary formality and seeking flexibility in the proceedings,
(d) avoiding delay, so far as compatible with proper consideration of the issues, and
(e) saving expense.

A Tribunal must have regard to the overriding objective in interpreting or exercising any power given to it by the Rules, and it hence applies to the exercise of the power under Rule 38.

53 Ordinarily at least, the operation of the power to strike out involves a two stage test; (1) has one of the grounds of strike out in Rule 38 been established on the facts? (2) If so, is it just to proceed to strike out in all the circumstances (which will include considering whether it is proportionate to strike out, i.e. whether other lesser measures will suffice), **Hassan v Tesco Stores Ltd UKEAT/0098/16.** The second stage of this exercise under Rule 38(1) is important. It is a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit, paragraph 19, **Hassan.**

54 **Emuemukoro v Croma Vigilant (Scotland) Ltd and Ors UKEAT/0014/20** is authority for the proposition that the power to strike out is triggered if a fair trial is not possible within the allocated trial window.

55 It is well established that striking out a claim of discrimination is considered to be a draconian step which is only to be taken in the clearest of cases: see **Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391**. A similar approach is to be taken to whistleblowing claims, **Daly v Northumberland Tyne and Weir NHS Foundation Trust UKEAT/0109/16**.

56 In **Blockbuster Entertainment Ltd v James [2006] IRLR 630** it was emphasised that “the first object of any system of justice is to get triable cases tried”.

55 The issue of striking out where a claimant was ill and unable to proceed was considered in the case of **Pexioto v British Telecommunications Plc [2008] UKEAT/0222/07**. It was said, paragraph 47, that “discrimination claims in a diverse society cry out to be tried on their merits”.

57 It was further explained at paragraph 49 that the assessment of whether a fair trial is impossible obviously invokes consideration of what other matters can be considered. In every case there must be some question of proportionality. It was said that when dealing with rule 18(7)(f) cases, as it was then, questions of proportionality arise at stages prior to the determination that a fair hearing is not possible. That is because, once the judgement has been made that a fair trial was impossible, if a tribunal were to order the case to go ahead, it would be allowing itself as a public authority to commit a violation of Convention Article 6 (1). Further, paragraph 50, the fact that it must conclude that a fair trial is impossible involves consideration of all lesser alternatives, including proportionate measures, to see whether the case can be tried.

58 Convention Article 6(1) states, relevantly;

"In the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

59 In **Riley v CPS [2013] EWCA Civ 951** the issue of ill-health was once again considered. The claimant had issued tribunal proceedings in September 2009 bringing claims of race discrimination, disability discrimination and whistleblowing. She issued a second claim in December 2009. The case was listed for a four week hearing beginning in May 2011. The claimant was unfit to attend the final hearing. The tribunal struck the claim out pursuant to Rule 18(7)(f), as it was then. The tribunal found that the medical evidence showed that the litigation was a cause of significant stress for the claimant and that the determination of the litigation would have been a step in the claimant's possible recovery. It described that there was a "chicken and egg situation" in that she was not fit to attend the hearing to achieve that determination and accordingly would have continued to have been affected by the stress or worry associated with the litigation. The tribunal found that the medical evidence showed that she would not be fit enough to attend the hearing in 12 months and on the balance of probabilities not before the expiry of two years. Accordingly, the tribunal struck out the claimant's claims. This was upheld by both the EAT and the Court of Appeal.

60 The Court of Appeal observed, paragraph 27,
"It is important to remember that the overriding objective in 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 for more than a reasonable time.
Paragraph 28: It would in my judgement 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 the 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 past, striking out must be an option available to a tribunal".

61 As to what is meant by a fair trial, this has a number of different aspects to it. Matters such as the availability of witnesses and the effect on the cogency and reliability of evidence clearly go directly to whether a fair trial can be held. But a fair trial is also a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court, **Smith v Tesco Stores Ltd UKEAT [2023] 11**.

62 See also **Harris v Academies Enterprise Trust UKEAT/0097/14**. Justice is not simply a question of the court reaching a decision that may be fair as

between the parties in the sense of fairly resolving the issues; it also involves delivering justice within a reasonable time. It must also have regard to cost. Overall justice means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court. If a case drags on for weeks, the consequence is that other cases, which also deserve to be heard quickly and without due cost, are adjourned or simply are not allotted a date for hearing. Decisions made in the Employment Tribunal can accommodate these considerations because a Tribunal has to deal with a case fairly and justly, paragraphs 33 and 34.

63 Where it is said that the extent to which the quality of the evidence has been diminished by the passage of time is so severe that a fair trial is no longer possible a number of questions must be considered such as; what is the claimant's case, who are the witnesses needed by the respondent to answer that case, what recollection of the material events do they have and what contemporaneous documents or other sources of evidence are available which bear upon the case and the respondent's defence of it, paragraph 65, **McMahon v Axa ICAS Ltd [2025] EAT 8.**

The Equal Treatment Bench book

64 It is, of course, a fundamental right of a person with a disability to enjoy a fair hearing and to be able to participate effectively in that hearing. Whilst, strictly speaking, the duty to make reasonable adjustments under the Equality Act does not apply to the exercise of judicial functions it is well established that similar obligations arise from other sources such as the overriding objective and Article 6 read with Article 14 of the ECHR.

65 The advice in the Equal Treatment Bench Book regarding disability is important advice which every judge is under a duty to take into account when hearing a case involving a person with a disability. For example, in the disability glossary at appendix B, under the heading mental health, examples are discussed of the types of adjustments that might be made during the hearing which include taking regular breaks and "in severe circumstances" allowing evidence to be given before the hearing by video link or in the form of written question and answer, page 280.

Presidential Guidance: vulnerable parties and witnesses in employment tribunal proceedings

66 Tribunals must have regard to the Presidential Guidance, see paragraph 2, the principal purpose of which is to focus the attention of tribunal judges (and members, parties, witnesses and representatives) upon the issue of vulnerability. We are reminded, paragraph 5, that the requirement is to deal with a case justly, as set out in the overriding objective, and this includes the tribunal ensuring that

all parties can effectively participate in proceedings and that all witnesses can give their best evidence, paragraph 5. As the guidance points out, paragraph 9, some employment tribunal litigants are vulnerable because of the nature of the adversarial proceedings in which they are engaged, and particular difficulties may arise when giving evidence in the tribunal, paragraph 11. Examples of adjustments for vulnerability that may be made are set out at paragraph 22. Footnote 7, page 6, reminds us that the examples given are not an exhaustive list and that in some cases requiring written questions rather than oral questions might be good practice. It is said that this will always be a matter for judicial discretion and decision in all the circumstances.

Submissions

67 The respondent produced three authorities; **Riley**, **Pexioto** and **Emuemukoro**. The respondent submitted that a fair trial was not possible within the current trial window. Further, it was submitted, it was not possible to identify a point in the foreseeable or even distant future when a fair trial could likely occur. The medical evidence before the tribunal was to the effect that the claimant would not recover his mental health until the dispute with his employer had been resolved. Moreover, the medical evidence was that the claimant's condition was exacerbated by the existence of the litigation. Dr Andrews had written in his letter of 3 July that the claimant knew that "prolonging the case was prolonging the agony". This was the "chicken and egg" scenario identified in **Riley**.

68 On Tuesday 30 June 2026 the claimant had reported symptoms of high blood pressure. It was said in Dr Andrews' letter of 3 July 2026 that an adversarial style of questioning triggered intense symptoms of PTSD causing the claimant's blood pressure to spike to dangerous levels when faced with what was termed hostile treatment. Dr Andrews had confirmed in his oral evidence that he had used the words "hostile" and "adversarial" interchangeably because the claimant perceived the adversarial approach as hostile.

69 During questioning on 10 July Dr Andrews had confirmed that his recommendation was, in effect, the provision of cross examination topics in advance rather than the provision of full written questions. Following the first hearing, the tribunal made a further order for reasonable adjustments and the respondent was to (and did) provide in advance written signposting of topics, which were to be considered by the claimant at his solicitor's office. Neither the provision of page numbers in this document nor an aide memoire were ordered. That said, whilst that adjustment was made, it should also be noted that the evidence of Dr Andrews was that there was a fine balance between giving the claimant an opportunity to prepare and allowing him to ruminate, which would also be injurious to his well-being.

70 On the morning of 23 September, following one day of cross examination during the reconvened final hearing, the claimant produced a blood pressure reading taken at around 9:15 AM that morning of 184/116. It was agreed between the parties that this constituted a hypertensive crisis that required immediate medical assessment. When the claimant contacted NHS 111 he was told to call an ambulance, and he went to hospital.

71 The respondent submitted it was highly significant that the claimant's medical position on 23 September was demonstrably worse than it had been on 30 June, and that his blood pressure reading had crossed the critical threshold. That was all the more concerning because this reading was taken on the morning of the day after cross-examination had taken place, when the claimant had had overnight to rest and recover.

72 The respondent submitted that we were, therefore, in the chicken and egg scenario identified in **Riley**. The claimant was too unwell to proceed but would not be well enough to proceed until the hearing was concluded.

73 It was submitted that all possible medicative avenues had been explored for managing evidence safely. The claimant had accepted that was the case in evidence. An increase in blood pressure medication was not recommended and the claimant had discontinued clonazepam due to cognitive impact. No further medical options had been recommended.

74 The tribunal had already made extensive adjustments to facilitate the claimant's participation and these extensive measures had not worked. Dr Andrews' principal recommended measure (a list of topics) had been implemented. The list of topics that had been provided to the claimant was not sparse, it covered 7 pages. The claimant had chosen not to consider the topic indicator. We were, once again, in a position where, following a single day of giving evidence, the claimant was too unwell to continue, and in fact his medical position had worsened.

75 This was not a claim that could be dealt with on the documents or in writing. The claims concerned hotly disputed facts. Almost all issues remained in dispute. The claimant's credibility and reliability of his recall were issues on which the respondent sought to rely and oral cross examination was important to this.

76 It was submitted that the provision of written questions in advance had been dealt with at the previous hearing, and therefore a material change in circumstance was needed for this issue to be re-opened. Written cross examination questions in advance had been the basis of the claimant's application initially. Dr Andrews was asked about this in evidence, and he had drawn no distinction medically between provision of a list of topics and a list of questions. This application had, therefore, effectively been dealt with. There was

no material change in circumstance and that was fatal to the claimant's application now. In any event, written questions in advance were disproportionate, unworkable and an unjustified interference with the respondent's right to a fair trial. Such an approach would generate more questions than it resolved and would likely lead either to the respondent being unable to challenge the claimant's answers or to the claimant being required to return to the witness box in any event. It would also be a grossly disproportionate use of the tribunal's time and resources, and cause considerable delay and expense.

77 Any further adjourned hearing, it was submitted, breached the respondent's Article 6 right to a fair trial due to loss of cogency of evidence, delay and cost. The respondent's ability to challenge the claimant's evidence through effective cross-examination would be undermined. If the hearing was re-listed in November 2027 (which listing had indicated was the first available date for a 13 day hearing) that would be a 14 month delay in circumstances where there was bo prognosis that the claimant's medical situation would have changed in this period of time. In fact, the medical evidence made it clear that it was very likely his mental health would remain the same.

78 We were already some three years eight months on from the facts relied upon in respect of the claimant's first claims and other relevant matters were significantly older than this. For example, the historical performance of the claimant from 2018 onwards was directly relevant to the claims and so, in reality, we were already eight years or more on from some of the relevant events. Whilst the respondent's witnesses had provided earlier accounts they were not able to respond to an earlier account from the claimant as he had declined to give one to the Ishaq investigation. Moreover, the claimant's case comprised shifting sands and it was likely that witnesses under cross examination would face new or altered allegations which they had not previously considered and to which they must endeavour to turn their memories for the first time. An example of this, it was submitted, was what the claimant had said about HMB; he had asserted for the first time in cross examination that HMB had admitted to him verbally that Ms Grice had been a replacement for him. That (whether Ms Grice was a replacement for him or not) was a material issue in this case, and this was a new factual allegation.

79 The respondent had already lost a material witness (HMB) due in significant part to the delays and uncertainties in proceedings already occasioned by the claimant's late applications, medical condition and the time taken to establish his position. She had given evidence previously for the respondent and had prepared herself to give evidence again at the first final hearing. It was accepted that there was no medical evidence that HMB was too unwell to be a witness but she had been sitting at the back of the hearing room and had been ready and prepared to give evidence during the first hearing. There were claims

in respect of which she was the respondent's principal witness. For example, it was alleged that she had said to the claimant that she needed someone with more energy in the role. This was a section 15 claim.

80 As to the other elements of the claimant applications, it was submitted that there was no medical evidence to support the application that the claimant should be permitted to give evidence remotely. It was not an adjustment that had been recommended by Dr Andrews. The application that there be an adjournment and re-listing of the hearing whilst further medical evidence was sought was described as being speculative and overly optimistic given the steps already taken and the information already provided.

Claimant's submissions

81 Mr Morgan, for the claimant, firstly addressed what he described as the "flags of convenience hoisted by the respondent". In relation to HMB, it was submitted, it was her choice not to attend the hearing and there was no medical reason preventing her from participating. He submitted it was not unusual for witnesses to become unavailable because of listing. As to the suggestion that the respondent would be wrongfooted by new aspects of the evidence, this was not unusual in a case of this nature and it was not unusual for a witness to have to recalibrate their evidence. The issue of fading memories was a trope, easily trotted out, when dealing with cases such as this one. There were thousands of pages of documents, which would help preserve memories, and the respondent's submissions in this regard should be treated cautiously. **Daly v Northumberland** was a reminder that evidential difficulties needed to be established rather than assumed.

82 Mr Morgan reminded me of what was said in the cases of **Blockbuster, Riley and Pexioto**. He reminded me that both the Presidential Guidance and the Equal Treatment Bench Book note that it is not always critical that an individual is cross examined on their witness statement, and that in some cases written questions and answers are appropriate. The claimant, it was said, was not suggesting he was not fit to be cross examined at all, only that reasonable adjustments be provided to the standard structure and process so that the process was reduced to writing. Dr Andrews, it was submitted, had agreed that cross examination questions and answers in writing was a helpful adjustment.

83 The purpose of cross examination was twofold; firstly to test the evidence of the claimant and secondly to provide the claimant with the opportunity to respond to the respondent's case. Both purposes would be achieved through written questions and answers. This would also allow the most effective participation from the claimant. It was noted that the respondent might seek to ask some oral questions of the claimant in response to his written answers, and it was said this would not be contested as long as oral questions were focused on

what was, in the opinion of the tribunal, necessary to determine the issues and which satisfied the other adjustments provided.

84 However, even if the tribunal did not order this, the claimant requested in the alternative written cross examination questions and oral answers. That proposal would also allow the tribunal to listen and view the claimant's responses.

85 These were alternatives by which the prospects of a fair hearing could be preserved.

86 Mr Morgan submitted that there could be no issue of blame in respect of the claimant and his medical difficulties. That was significant, it was submitted, in this jurisdiction more than any other because there is a duty to seek out those difficulties and engage with them and accommodate them. The claimant is disabled and the tribunal has a statutory duty to make reasonable adjustments. The claimant was seeking to participate in the hearing and that set him apart from the **Riley** case. The claimant was committed to the process and committed to engaging with his clinicians in order that he could see the process through.

87 There was, it was said, no medical opinion that the claimant was not well enough to participate; Dr Andrews' opinion was that the claimant was fit to engage and he had not departed from that conclusion. Dr Andrews had foreshadowed that the claimant might experience a hypertensive crisis and he had put forward the measures that he thought would pre-empt that. It was not clear, it was submitted, how Dr Andrews could have got that wrong and Mr Morgan queried rhetorically whether something else had happened and whether, therefore, it could be said the existing medical evidence was incomplete.

88 If the tribunal was of the view that there was an additional line of enquiry to be pursued medically then it would be possible to postpone the case and seek a more detailed diagnostic opinion on whether what had happened was likely to recur. One possible option would be to put off determination of the strike out application until further medical evidence was obtained to test the proposition that we were in the **Riley** situation.

89 I was reminded that the test is whether a fair trial is not possible and Mr Morgan queried whether it could really be said that the impossibility threshold was met. Mr Morgan submitted the medical evidence indicated that it would not be possible for the claimant to experience a complete recovery until the litigation process had ended but what we were looking for, he submitted, was a more narrow compass of enquiry; can we arrive at a position where evidence can be taken from the claimant within certain tolerance levels to maintain the claimant's welfare.

90 Whether it is impossible to have a fair trial is a binary question; it is either impossible to have a fair trial or it is not. The Equal Treatment Bench Book obliges tribunals to ensure that the disabled and vulnerable are accommodated as far as possible.

91 Mr Morgan accepted in oral submissions that a fair trial was no longer possible within the current trial fixture, and it follows from this that he also confirmed that the option set out at paragraph 36.1 of his written submissions (to press on in the current trial window with additional medication) was no longer pursued.

92 Mr Morgan recognised that the proposal of providing the claimant with written questions and allowing him to answer them in writing might be viewed as the "least attractive plan", acknowledging that such an approach would bring with it certain additional challenges. But measures could be put in place to deal with those challenges, he submitted, such as a word limit count being placed on the claimant when responding to questions, controlling the environment in which the claimant could look at the questions and invigilating him when he was looking at the questions/providing his answers.

93 As to the proposal that the claimant be permitted to give remote evidence from a different venue, Mr Morgan pointed out that tribunals were well experienced in hearing evidence remotely. Mr Morgan acknowledged that there were concerns on the part of the respondent about the integrity of the process if the claimant was permitted to give evidence remotely but, once again, he suggested this could be dealt with by ordering that the claimant's remote participation be invigilated by his solicitor, who could also provide clean copies of the documents for the claimant to use. In that way, it was submitted, the integrity of the process could be preserved.

Conclusions

94 I should say at the outset that I did not find this an entirely easy application to determine. The Tribunal is under a duty to make reasonable adjustments for the claimant (and I assumed for the purposes of dealing with this application that the claimant is disabled), striking out a claim is a draconian measure which should be used sparingly, and there is a great deal of public interest in whistleblowing and discrimination claims being heard on their merits. Moreover, the claimant is a vulnerable individual, whose vulnerabilities impact his ability to participate in the hearing. He cannot, of course, be blamed for his ill-health, and he wants to proceed with the claim. That is the backdrop against which I make my decisions.

95 Ordinarily, as set out above, there is a two stage test to be applied to a strike out application, has the threshold test been met and, if so, should the

discretion to strike out be exercised, which will almost always involve a consideration of whether a fair trial is possible. That, it seemed to me, was something of a circular position when it came to an application under Rule 38(1)(e), because the ground for strike out (the threshold test) is whether a fair trial is impossible. To the extent that there was a threshold test to be passed that was satisfied, in my view, by the fact that the parties were in agreement that a fair trial was not possible within this trial window, **Emuemukoro**.

96 But in any event, that particular difficulty did not seem to me to be something with which it was necessary to engage, because the parties were agreed that, as per **Pexioto**, the correct approach legally to this application was for me to consider (i) whether there were alternative proportionate measures to see whether the case could be (fairly) tried which (ii) was the gateway to a conclusion as to whether a fair trial was possible or not.

Application for written questions/answers (combined with the claimant restarting clonazepam)

97 And so I turn to the first of the alternative measures put forward by the claimant, which is that written cross examination questions be provided to him in advance, combined with him answering those questions either in writing or orally.

Did there require to be a material change in circumstance?

98 The respondent's position, as set out above, was that an application for cross examination questions in writing had already been determined, at the hearing that took place on 10 July 2026, and that, therefore, this issue could only be reopened if there was a material change in circumstances. It was a live issue at this hearing, it was submitted, because it formed part of the claimant's application, Dr Andrews was asked about it in evidence and Dr Andrews drew no distinction in evidence between provision of a list of questions and provision of a list of topics.

99 I reject the respondent's submission that there required to be a material change in circumstance before I could consider this element of the application. The simple answer to this point, it seemed to me, is that I did not issue an order refusing the claimant permission to receive cross examination questions in writing (nor, of course, did I issue an order granting such an application). Whilst **Serco** is authority for the proposition that it is not possible to vary a case management order unless there has been a material change in circumstance (or material omission or misstatement or some other substantial reason), in the absence of any order at all on this issue **Serco** cannot, in my conclusion, bite.

100 It does not matter, in my conclusion, that the claimant's application was initially made on the basis that what was being sought was written cross

examination questions, nor that the issue was discussed during the hearing, nor that Dr Andrews drew no distinction from a medical point of view between provision of a list of questions and provision of a list of topics. What matters is that there was no order granting or refusing this element of the application.

101 There was no such order because, as Mr Morgan correctly submitted, the applications made by the claimant during the hearing on 10 July were dynamic and changed during the course of the hearing in response to the evidence given by Dr Andrews. As set out above, Mr Morgan, in submissions on 10 July, indicated that whilst the application initially posed had been for written questions in advance there was a clear measure short of provision of written questions, which was the signposting route. This, together with an application for an aide memoire, was the application, ultimately, that was pursued by the claimant and dealt with by the tribunal.

102 Turning to the substance of the application, I concluded that it would not be reasonable or proportionate for the respondent to provide the claimant with cross examination questions in advance in writing for the following reasons:

103 From a medical standpoint, Dr Andrews drew no distinction between the claimant being provided with a list of questions versus the claimant being provided with a list of the topics he was to be questioned about. It was explained that the key was to provide the claimant with a document in advance that would enable him to think about his responses and prepare psychologically. It was explained that if the claimant was given the opportunity to see what he was facing and had a chance to consider his responses that, in turn, would enable the claimant to better respond face to face in the oral part of the hearing, see above. In the opinion of Dr Andrews either document would achieve this purpose.

104 The right to a fair trial of both parties requires to be considered, not just the claimant's right to a fair trial. Providing a list of written cross examination questions to the claimant in advance would represent a very substantial impingement on the respondent's right to a fair trial, and a list of topics would also represent an impingement, but to a lesser extent. In circumstances where there is no distinction drawn between either option medically for the claimant, the reasonable and proportionate measure to take is that which impinges least on the respondent's right to a fair trial.

105 The claimant has, moreover, been given this opportunity. The first hearing was adjourned and a list of topics was ordered and provided. The claimant then chose not to use the list of topics to prepare because he did not consider it to be helpful. That was a view that the claimant took, of course, despite knowing that this course of action had been recommended by Dr Andrews.

106 That leaves the claimant in a position where he is now asking for a much more restrictive measure to be imposed on the respondent, in circumstances where there is available a lesser, equally effective, measure from a medical point of view which the claimant is not willing to use.

107 There was no good reason put forward for the claimant's unwillingness to use the topics document. He simply said that it would have needed page numbers for it to be a "non illusory" adjustment. But page numbers for this document had not been suggested or ordered. As set out above, the discussion about page numbers had arisen in the context of the aide memoire, which was not ordered. It was not, for the avoidance of doubt, suggested that there was some confusion in the claimant's mind as to whether page numbers had been ordered in respect of the list of topics document. Indeed, it is difficult to see how there could have been, even in the absence of the written order having been issued. The claimant was present at the hearing when the order was issued verbally and, given that counsel's notes of the verbal order were consistent with that of the judge's, it is clear the terms of the order would have been relayed to the claimant accurately after the hearing.

108 Secondly, it is relevant, in my view, to take into account that the medical evidence was not completely clear cut as to the impact on the claimant of these adjustments. Whilst Dr Andrews did clearly say in evidence that written questions (and topics) would assist the claimant at the hearing, he also acknowledged that the time to ruminate in advance of the hearing that would come with this would be unhelpful, and there was a balance to be struck. That is a factor that is relevant to reasonableness/proportionality. Indeed, as I understand it, it is that evidence which led Mr Morgan to note in his written submissions, paragraph 19.2, that Dr Andrews considered that the benefits derived from such a course of action were finely balanced.

109 In any event, and perhaps more fundamentally, whilst I accept fully that there are some cases where verbal questioning is not a necessary element of a fair trial, and I bear in mind, of course, that written questions are specifically mentioned as a possible adjustment in the Presidential Guidance and the ETTB, I do not consider that this is one of those cases. This is a very substantial claim. The claimant pursues multiple claims of discrimination and whistleblowing detriment against the respondent. He makes some very serious allegations against the respondent within his case, particularly with regard to the conduct of the respondent's Board of Directors. He seeks compensation in excess of £4 million from the respondent. The case is full of factual dispute, and credibility/ the claimant's perceptions of the respondent are very much in issue and an important part of the respondent's defence. In such circumstances, I concluded, requiring the respondent to provide its cross examination questions in advance to the claimant was a fundamental interference with the respondent's right to a fair trial and was unreasonable and disproportionate. That was all the more so when

there was no medical recommendation that this specific adjustment needed to be made in preference to the provision of a list of topics.

110 Lastly, the application for written questions was combined with the suggestion that the claimant would re-start clonazepam. But there was no suggestion on the medical evidence that this, as a step on its own, would enable oral cross examination to proceed. Indeed, had this been the case, there would have been no need for Dr Andrews to consider and recommend other adjustments. The medical recommendation re clonazepam was that the claimant take a "very small dose, which might help". Moreover, the claimant had the opportunity to try this; it was prescribed in July 2026. The claimant tried it and stopped it. That is a factor which goes to whether it is reasonable/proportionate for the claimant to have a further opportunity to try it again.

111 The second part of the application was that the claimant be allowed to provide written answers to written questions. That, of course, is predicated on the claimant's application to be given written cross examination questions succeeding, which it has not, for the reasons I have just set out. But, for the avoidance of doubt, even had I ordered written questions in advance I would have considered and concluded that allowing the claimant to provide written responses was a disproportionate and unreasonable measure to take. This was not least because, whilst Dr Andrews had said in evidence that this was a measure that would likely help the claimant, he also said that if the claimant was given the opportunity to prepare in advance (via a list of topics/question) he would be able to answer questions orally.

112 Additionally, I concluded that such a step, very likely, would render cross examination wholly ineffective. Indeed, even Mr Morgan acknowledged that this might be considered as the "least attractive" plan, accepting as he did that it raised certain difficulties.

113 As Mr Morgan submitted, paragraph 34.6, the purpose of cross examination is twofold; to test the evidence of the claimant and to provide the claimant with an opportunity to respond to the respondent's case. Very likely, neither objective would be achieved, in my view, were the claimant permitted to provide written answers. I concluded that for the following reasons.

114 The claimant has a particular, lengthy written style. By way of example, as set out above, his second asserted protected disclosure made on 19 July 2024 was 32 pages long. Asserted disclosure number 4 (19 August 2024), with attachments, was 52 pages long. Asserted disclosure 8 was 13 pages long.

115 A tendency to write at length is not restricted to the asserted disclosures. Particulars of claim which were written by the claimant were lengthy. For

example, the particulars of claim in respect of his second claim ran to 36 pages, pages 226 – 263.

116 Writing at length, of course, is entirely consistent with Dr Andrews' medical opinion that the claimant is someone who feels "a compelling need to make notes", page 1097.

117 Anticipating, perhaps, that the length of the claimant's written work might be a concern in relation to the feasibility of this adjustment, Mr Morgan suggested that a word limit could be placed on the length of each of the claimant's responses. That might be of some utility in reining in the very lengthiest of answers, but would itself, in my view, raise issues. During any cross examination process some questions can be answered by a simple yes or no, and some questions might take 200 words, or more, to answer. Short of going through each cross examination question in turn and imposing an individual limit per question, which is not practicable, an upper limit would have to be imposed. Very likely, given what is set out above, the claimant would simply write up to that upper limit when answering each question, thus substantially and unnecessarily elongating the whole exercise.

118 Then there is the style in which the claimant writes. Documents, whilst lengthy, are often quite hard to follow and understand and, frequently, are somewhat lacking in factual content. Taking the claimant's second asserted protected disclosure made on 19 July 2024 as an example, there are some facts contained in this document (and of course I make no judgment at this stage about whether there is sufficient factual content and specificity for there to be a qualifying disclosure), but the facts are relatively few and far between, particularly given the length of the document. Much of the document is no more than bare assertion. Asserted disclosure 8 is another example, written in a similar style.

119 The claimant's witness statement was somewhat better. It was more factual and more focused, and much easier to follow as a result. But the claimant would have had assistance from his legal team in drafting this document, whereas for the purposes of answering cross examination questions in writing he would need to be left entirely to his own devices.

120 If left to write out his answers, the claimant for these reasons would, in my view, likely, not provide answers that could be easily understood or that could be easily understood within a reasonable timeframe.

121 But, more fundamentally, I concluded that it is highly unlikely that, if left to answer questions in his own time in the privacy of his own home or at the offices of his solicitor, the claimant will actually answer the questions asked. He struggles to find focus in his written work generally, see above, and as I have already also set out, it was evident during the hearing on 22 September that he

was somebody who had difficulty in answering the question asked. He has a narrative that he wishes to put across, and also a commentary that he wishes to make about how the respondent has prepared for this case, and often he simply failed to engage with the question asked or if he did engage with it he quickly diverted off onto another, unrelated, topic which, to the claimant, chimed with this narrative/commentary.

122 He did better with assistance from the tribunal, but he still required quite regular interventions and, of course, any opportunity for helpful interventions would be wholly removed under this proposal.

123 For these reasons I considered that this proposal (written answers) was unreasonable, disproportionate and unworkable. It would, very likely, elongate the hearing whilst not serving the purpose for which cross examination exists.

Claimant's other applications

The claimant be permitted to give evidence remotely from his home, under the supervision of his solicitor, combined with taking additional medication in the form of a low dose of clonazepam

124 Put shortly, giving evidence remotely was not, I concluded, a reasonable or proportionate measure because there was no evidence, medical or otherwise, to suggest that giving evidence from home might be a step that was of any utility. Remote participation was not suggested as an adjustment by Dr Andrews, and it would not remove any of the triggers that are causing the anxiety and spikes in blood pressure, namely re-living the alleged trigger incidents, the tribunal process and the adversarial style of questioning.

125 As to the clonazapem, I refer to my comments at paragraph 110 above..

That the hearing be re-listed and further medical information be obtained prior to determining the strike out application.

126 The first point to note about this application is that it was the primary position of the claimant that all necessary medical information had already been provided, see paragraph 36.4 of Mr Morgan's written submissions. I gave anxious consideration, nevertheless, to whether this step might be of some utility but ultimately concluded there was nothing to be gained from doing this, and accordingly the step was neither reasonable nor proportionate. I reached that conclusion because this tribunal has already had the benefit of several letters and a report from the claimant's treating psychiatrist, Dr Andrews. Not only this, but the tribunal had the benefit of Dr Andrews giving evidence for over 2 hours in July 2026. There is absolutely nothing to suggest that the claimant's health position has in any way changed since then, and therefore no grounds, in my

view, on which it could be concluded that further medical evidence might be of use.

127 Mr Morgan did at one point question, in his oral submissions, whether it could be said that the medical evidence was incomplete. That submission was made on the basis that Dr Andrews had foreseen a hypertensive crisis and had put forward measures which he thought would pre-empt it, and we did not, he submitted, have a clinical opinion as to how Dr Andrews had got that wrong. But there is no missing link of this nature in the medical evidence, in my view. What, in fact, has happened is that the tribunal ordered the principal measure recommended by Dr Andrews as an adjustment for the claimant (the list of topics), and the claimant failed/refused to use it. It is not a question, therefore, of Dr Andrews having got it wrong or the medical evidence being incomplete. What has happened is that the claimant failed/refused to use the (medically recommended) adjustment made for him.

Press on in this trial window

128 As set out above, Mr Morgan confirmed this application was no longer pursued, it being accepted that a fair trial was no longer possible in this trial window.

Summary

129 And so we arrive at a position where, in my conclusion, a fair hearing is no longer possible. We are in a catch 22 situation (or to use the terminology from **Riley**, a “chicken and egg” situation). That is because;

1 The claimant’s mental health will not start to improve until the litigation is resolved to the claimant’s satisfaction (Dr Andrews’ letter 13 June 2025),

2 The claimant is not well enough to conduct cross examination in the usual way – that much is evident from the fact that he has become seriously unwell following just one day of cross examination on not one but two occasions. See also the opinion of Dr Andrews in his letter of 3 July, that if his recommended adjustment was not made he “did not expect any different outcome”, with reference to the claimant’s blood pressure spiking to dangerous levels.

3 That is the case despite reasonable adjustments having been made for the claimant from the outset.

4 In terms of further adjustments, the claimant has failed/refused to use the adjustment that it is reasonable and proportionate to make to the cross examination process, and

5 The other proposed adjustments to the cross examination process which the claimant now seeks are unreasonable and disproportionate, for the reasons set out above, and

6 It follows from all of this that if we were to postpone and re-list any further trial will, very likely, be ineffective, because the claimant will, once again, become unwell and not manage cross examination, and
7 For these reasons a fair trial is no longer possible.
8 Accordingly, the respondent's application to strike out is granted on this basis.

130 That, then, was my primary conclusion in respect of the respondent's application to strike out. I also considered what the position would be if, contrary to my primary conclusion, there is a possibility that the claimant's health would permit an effective trial at a later date (i.e. in November 2027). Would a fair trial in those circumstances be possible in November 2027? That I considered to be finely balanced but ultimately I concluded there was no possibility of a fair trial taking place then, even if the claimant was fit, taking into account the following factors.

131 Fairness includes holding a trial within a reasonable timeframe, with a reasonable and proportionate amount of preparatory work on both sides and with the commitment of a reasonable and proportionate share of the tribunal's resources.

132 Were the matter to be postponed and relisted the respondent would be required to prepare for what is a very lengthy and substantial hearing for a third time. Because the hearings are starting and then becoming ineffective at a very early stage there is very little progress being made on each occasion, and the respondent, more or less, is being required to prepare for the entire, very substantial hearing each time it is re-listed. That carries with it a significant burden in terms of the amount of preparation time required, and the cost associated with that, and to relist this hearing for a third time is, in my view, imposing an unreasonable and disproportionate burden on the respondent in terms of time and cost.

133 Additionally, it is in accordance with the overriding objective to have proper regard to the demands of other litigants upon the finite resources of the tribunal. As I have already commented, this is a claim that lacks focus and that, in no small part, is why the final hearing is so lengthy. Whilst it is fundamentally, of course, a matter for a claimant as to how they plead their case, claimants who choose to do as the claimant has done place a very significant burden on the tribunal system. Each day this case is listed for trial another case is held out of the list. This case has, to date, been allocated 31 final hearing days of which 7 have been effective. If it were re-listed a minimum of a further 13 hearing days would be required to deal with liability, more likely 15 days, given the length of the list of issues and the amount of deliberation time that would be required; a total of 46 allocated final hearing days. Re-listing such a claim for a third time, in

my conclusion, would be to allow the case to take up a disproportionate share of the tribunal's currently very stretched resources

134 That said, the prejudice that arises for the respondent in respect of the time and cost of preparing time and again for this trial, whilst it is a real prejudice, should not, in my view, be overstated, nor should the burdens placed on the tribunal system by the claim. That is because, fundamentally, the overriding objective requires cases to be dealt with justly and with a focus on a fair resolution of the issues by evidence if possible. Whilst this type of prejudice is relevant, therefore, of more importance was the issue of whether there could be a fair trial at all of the issues in November 2027, which, as set out above, was the next available date according to listing.

135 In this case, as I have already stated, there are significant disputes of fact, relevant to the claims, that date as far back as 2018. By November 2027 we will be nine years on from these events. That is a very significant period of time.

136 Mr Morgan's answer to this was to remind me that we have a very substantial bundle of documents relevant to the issues in this case. That, of course, is true.

137 For example, in relation to the claimant's performance, we have some (but not all) of the mid-year reviews and end of year reviews covering the period 2018- 2022. These are contemporaneous documents which bear directly on the respondent's defence.

138 But they are not a complete answer. There are disputes between the parties about performance that cannot be resolved on the documents. There are disputes about conversations that were allegedly had with the claimant and how those conversations should be understood. For example, it is the respondent's case that the claimant told HMB on 17 March 2023 that Ms Lewis Horner (his previous manager) had said she saw him as a "developing performer". The claimant denied he had said this to HMB, he challenged this as a mischaracterisation. It is also the respondent's case that Ms Lewis-Horner had told HMB that she was having performance conversations with the claimant. The claimant denied Ms Lewis Horner was having performance conversations with him and sought to put a wholly different context on the conversations with Ms Lewis Horner to that described by HMB.

139 One of the complaints of discrimination is that Ms Grice was bought in in early 2023, not to assist the claimant whilst he recovered from his accident as the respondent asserts, but to replace him. Whilst there are contemporaneous documents concerning the appointment of Ms Grice which are directly relevant to the respondent's defence they do not, once again, provide a complete answer because the claimant asserts that things were said to him about Ms Grice being

his replacement; for example it is now his case that HMB admitted to him verbally that Ms Grice was his replacement.

140 Another key disputed area between the parties, which is the subject matter of discrimination claims, is how it came to be that there were discussions with the claimant about moving him from his role; how those discussions were positioned and what the reasons for them were. These complaints relate to meetings that took place between the claimant and HMB. Both the claimant and HMB have produced relatively brief file notes of these meetings, which are said to be contemporaneous. The claimant's and the respondent's versions of the notes are disputed by the respondent and claimant respectively. That aside, there is no contemporaneous documentation. Memories will be important therefore.

141 Of course, there is an agreed list of issues and the respondent's witnesses have been proofed. This, combined with the contemporaneous documentation, will assist in preventing memories from fading.

142 However, this is such a wide ranging case, involving such an extensive factual background that it is inevitable that witnesses will be asked about matters, sometimes quite key matters, which are not contained in documents, and that may not been dealt with in their witness statements. Recollections will inevitably have faded.

143 That situation is, in my view, exacerbated by the fact that the claimant, having raised a grievance/complaint, then refused to participate in the grievance investigation conducted by Ms Ishaq in late 2024. That, it would seem, was done specifically with the tribunal claim in mind. On 4 October 2024 the claimant emailed the respondent to say that he would not be participating in the grievance investigation. He wrote that he was not willing to participate in helping create the illusion of an unbiased investigation with his input to "cook books" or to allow the respondent to entice more evidence out of him to improve their defence of the tribunal, page 1128. The claimant was making a choice to keep his powder dry, therefore. That is significant because an early, full, investigation of the issues can be a step that helps preserve memories.

144 In fact, it was apparent during the evidence of the claimant and Mr Volkaerts in the first two hearings that memories are already adversely affected. Mr Volkaerts, particularly when being questioned about matters relating to the factual background for the period 2018 – 2020, said with some regularity that he could not remember or could not recall what was being put to him. Likewise, the claimant, on a number of occasions when he was being questioned by Ms Badham on 22 September about events between 2018 and early 2022 made the point that he was being asked questions about events that were a long time ago

(i.e. he was making the point that it was difficult for him to remember). A delay of 14 months is clearly going to exacerbate this situation further.

145 Of course, it might be said that both the claimant and respondent will be labouring under the same burden so far as the passage of time and likely effect on memories is concerned, but that is often not the case in a claim of this nature. This is a very wide ranging case involving multiple allegations some of which concern relatively mundane day to day matters. Incidents about what might be termed day to day matters (such as who received a recognition and who did not – which is the basis of one of the discrimination claims) that were important at the time to the claimant, because he perceived them as hurtful and upsetting, likely will not have been viewed in the same way by the respondent, and likely will not, therefore, be recollected as readily by the respondent.

146 There is also an element of shifting sands in the claimant's case, in that new matters are arising in his oral evidence. For example, in oral evidence the claimant asserted, as set out above, that HMB had told him that Ms Grice had been bought in to replace him. That is a central issue in respect of one of the claims of disability discrimination. This assertion from the claimant was new, he had not led evidence to this effect in his witness statement (although he had of course asserted that, as a matter of fact, Ms Grice had been bought in to replace him). It is not entirely surprising in a case of this size and nature that new matters are emerging, of course, but that becomes more significant when the case faces delay and when the claimant declined to engage with the earlier internal investigation.

147 Then there is the fact that the respondent has now lost one of its key witnesses, HMB. She is a witness in respect of eight of the disability discrimination claims. The loss of HMB is significant because, as a result of the shifting burden of proof, it may well be that if the claimant proves facts which move the burden across to the respondent, then what is written in HMB's witness statement may be insufficient, in the absence of verbal evidence from her, to discharge that burden.

148 Had it been the case that as a result of the delay HMB had become too unwell to participate in the hearing, I would have considered this to be a very significant factor indeed, given that she is a witness of central importance to the respondent's defence. But that is not, of course, what happened in this instance. Fundamentally, HMB has made a choice not to attend, essentially based on the level of stress she experienced when giving evidence at the preliminary hearing, the level of stress she believes she would experience giving evidence again and the level of stress she is experiencing in her personal life. Likewise, the respondent has made a choice not to compel HMB to attend.

149 But that did not mean, in my view, that the absence of HMB was entirely insignificant. That is because it is evident that it is the delays and uncertainties that occurred during the first final hearing when the claimant become unwell that pushed HMB over the edge. She had provided a witness statement and was present and ready to give evidence. Had the hearing run to timetable the respondent would have retained HMB as a witness. Accordingly I consider this was a factor to which some weight could be given.

150 For these reasons I concluded in the alternative that, even if there could be an effective trial of the issues in the claim in November 2027, it was not possible for this to be a fair trial

Case No:60066012.24
Employment Judge Harding
Approved on: 30 October 2026