EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 2201106/2020 (A) Preliminary Hearing by Cloud Video Platform (CVP) on 2 December 2021

Employment Judge: M A Macleod

Mr P Singh	**Claimant** **Represented by** **Mr J Kiddie** **Advocate**
Allenbuild Limited	**Respondent** **Represented by** **Mr P Sangha** **Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application to strike out the claimant's claim on the grounds of unreasonable conduct is refused.

REASONS

1. In this case, a Preliminary Hearing was fixed to take place on 2 December 2021 in order to determine the respondent's application for strike-out of the claimant's claim.

2. The Hearing took place by Cloud Video Platform (CVP) on 2 December 2021. The claimant attended, although due to technical difficulties he was

only able to participate by telephone, and was represented by Mr Kiddie, Advocate. The respondent was represented by Mr Sangha, Barrister.

3. The Hearing proceeded without incident, and all participants were able to hear and see, and be seen and heard. I was satisfied that the parties were readily able to make their submissions without interruption or difficulty, and thus that the interests of justice were served by the use of remote video means to conduct the Hearing.

4. The parties each made oral submissions, and referred to a bundle of productions which had been agreed between them for the purposes of this Hearing. Although that bundle was not before me during the Hearing, I had access to the Tribunal file which contained all of the documents to which I was referred.

5. I set out below the details of the submissions presented and the decision taken and reasons for it.

The Respondent's Submissions

6. Mr Sangha referred, firstly, to the PH which took place before Employment Judge d'Inverno on 17 May 2021, at which the claimant represented himself and the respondent was represented by Ms McDowell. A number of items were identified as being suitable to be assessed at the PH then fixed to take place on 4 and 5 August 2021 (paragraph 1.6). The claimant was informed of that hearing and was told how it would take place. The claimant confirmed that he preferred that that hearing should take place by CVP (Cloud Video Platform). Directions in relation to the CVP hearing were issued by the Tribunal.

7. The respondent sent, as ordered, a disclosure list, hearing bundle and skeleton argument to the claimant. On 28 July 2021, when attaching the skeleton argument, the respondent argued that they had not heard from the claimant despite having contacted the claimant on three occasions (namely 23 June, and 12 and 16 July 2021), the claimant had not been in touch.

Mr Sangha said that the respondent had acted as required, and had heard nothing in return from the claimant.

8. Next, he pointed to the claimant's application to postpone the hearing, submitted at 2.34pm on 3 August 2021. In that application, the claimant said:

"Please can someone help me I'm not well u spoke to molly in the did mention cvp clearly told her I'm not well. Please can someone get my case postpone as I'm feeling I'll. (sic)"

9. At 3.10pm that day, the Tribunal required the claimant to confirm the nature of his illness, and what steps he had taken to obtain medical advice as to his ability to attend the hearing on the following day. It was made clear by the Tribunal that he required to provide medical evidence to support such an application. It was also pointed out that the claimant had failed to intimate his application to the respondent, as he was required to do.

10. The respondent wrote to the Tribunal to oppose the application to postpone, given that the basis of the application appeared to them to be disingenuous, and as amounting to unreasonable conduct on the part of the claimant during the proceedings.

11. The claimant was invited to provide a response to this, but did not do so by the deadline of 5pm provided by the Tribunal. As a result, the application was refused by email by the Tribunal dated 3 August 2021 at 5.04pm, on the basis that it came too late, and was unsupported by any medical evidence. It was confirmed that the hearing would proceed at 10.45am the following day.

12. At the PH on 4 August 2021, the claimant did not attend nor was he represented. The Tribunal recorded that Hearing and its decision in a Note issued to the parties on 6 August 2021. In the course of that Note, Mr Sangha pointed out, there was recorded the attempts by Ms Smith, barrister, for the respondent, to persuade the Tribunal either to strike the

claim out, or to issue an Unless Order requiring him to provide an explanation for his non-attendance at the hearing on 4 August 2021.

13. The Tribunal then issued an Order to the claimant, though not in the terms of an Unless Order, requiring him, within 21 days of the date of the hearing (that is, by 25 August 2021) to provide a full explanation as to why he did not attend at the hearing on 4 August 2021, and a medical certificate by a medical practitioner certifying on soul and conscience that the claimant was unfit to attend the hearing, setting out the illness from which he was suffering, and why the claimant was unable to attend the hearing, in the medical practitioner's view.

14. Mr Sangha submitted that the Tribunal had gone the extra mile to ensure that a fair process was followed when the claimant did not attend. A very fair way forward, he said, was to allow the claimant the opportunity to explain his non-attendance.

15. Although Mr Sangha did not in terms refer to it, it is useful for the Tribunal to interject at this point to address the letter of 10 August 2021, sent by the respondent's agent to the Tribunal, and duly copied to the claimant. In that letter, the respondent made an application for strike-out of the claimant's claims pursuant to Rules 37(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013.

16. Firstly, that letter stated that the claimant's claim should be struck out on the basis that the manner in which the proceedings had been conducted by or on behalf of the claimant had been scandalous, unreasonable or vexatious. In particular, the respondent observed that, the application for postponement having been refused, the claimant was obliged to attend the hearing of 4 August 2021, but he failed to do, and that failure amounted to unreasonable conduct in these proceedings.

17. The PH had been listed for three months, but the claimant only contacted the Tribunal at the last possible moment, said the respondent. The respondent was put to effort and expense in preparing for a hearing which, it appears, the claimant had no intention of attending. Further, the claimant

failed to respond to the Tribunal's Order to provide an explanation for his non-attendance, and confirmation of the medical reason preventing him from attending.

18. The letter went on, secondly, to submit that the claimant's claims should be struck out on the basis that they have no reasonable prospect of success.

19. Mr Sangha then addressed the Tribunal on why the application should succeed, which is simply that the claimant had failed to comply with the Order issued following the PH of 4 August 2021.

20. The claimant has made two attempts to provide medical information, neither of which comply with the Order.

21. The first attempt was a fit note provided on 26 August 2021; the second attempt was a letter, dated 30 November 2021, from a private GP, different from the claimant's own registered GP, provided to the respondent and the Tribunal on 1 December 2021. Mr Sangha submitted that neither document does what the Tribunal required the claimant to do.

22. He addressed the first letter first. This was provided by the claimant's newly instructed solicitor, who wrote to the Tribunal on 26 August 2021 by email at 6.28pm.

23. In that email, the solicitor confirmed that he had been instructed on that date, the day after the deadline for compliance with the Tribunal Order. He apologized on behalf of his client for the failure to provide an explanation for his failure to attend at the hearing of 4 August 2021, and said that he had not been aware that he required to reply to the Tribunal by 25 August 2021.

24. The email then referred to a fit note, in respect of which the assessment was carried out on 25 August, and attached a copy. The fit note covered his unfitness to work from 2 August to 1 September 2021, and referred to depression and anxiety, and stress, as the reasons for his unfitness. The solicitor also argued that the evidence therefore demonstrated that the claimant was unfit to appear at a two day trial.

25. Mr Sangha submitted that that argument is simply not made out. He said that it is not unusual for a claimant to be unfit for work while being able to attend a Tribunal hearing, and it does not follow that the claimant would be unfit to attend a final hearing. A Tribunal can make adjustments for a claimant who is suffering from illness. This is, in any event, a claim of discrimination on the grounds of race, not of disability, and there was no suggestion that the claimant was unable to attend or participate in any of the previous four PHs in which he had engaged.

26. Mr Sangha then pointed out that the Tribunal may infer that the solicitors understood that that information was insufficient, as they provided more information prior to the hearing, on 1 December 2021, namely a letter from a private GP, Dr Karen Gladwin, who confirmed that she was not the claimant's own GP and had not had access to his medical records. He argued that the terms of this letter did not amount to a medical opinion, and that the reason for the claimant's non-attendance at the PH was not made out.

27. He submitted that the application for strike out must success in relation to the claimant's conduct. There was a requirement for the claimant to explain all of this, but he has not done this, and has not provided the supporting evidence to do so. There is no basis for any suggestion that this late presentation of evidence is a feature of the claimant's anxiety. He did not engage with the Tribunal, a wholly unsatisfactory situation which was not explained.

28. Mr Sangha said that the Tribunal requires to consider whether a fair trial is now possible. This is a situation entirely of the claimant's own making; there is no explanation as to why he did not correspond further with the Tribunal on 3 August; the claimant did not attend and resume his application for postponement; and he was given every possible opportunity by the Tribunal to remedy the situation, an application for a strike out and for an unless order both being refused at the PH on 4 August. How can the Tribunal be satisfied that this situation will not arise again, he asked. This

amounts to a proper basis to say that it will not be possible to have a fair trial.

29. The point of the hearing of 4 August was to get the claims sorted out, but this did not take place, and it would be prejudicial to keep going and forgive the claimant. This is the 6th PH in this case, and there comes a point where a line in the sand requires to be drawn.

30. He referred to the authorities touched upon by Mr Kiddie, for the claimant.

31. He observed that he was not making the point that the doctor's letter was not on soul and conscience – that is not relevant to this matter, but the point is that the medical opinion was devoid of any opinion.

The Claimant's Submissions

32. For the claimant, Mr Kiddie sought to outline what he called the "relevant practical realities" in this case.

33. Even though the view may be taken that the medical evidence is limited, there is an indication that the claimant suffers from anxiety, stress and depression. If the Tribunal will at least treat that as being of some value, it's been signed off by a registered GP.

34. He invited the Tribunal to consider how the modern justice system approaches anxiety in relation to witnesses, and referred to the Vulnerable Witnesses (Scotland) Act which applies to civil proceedings. No application has been made for the claimant to be treated as a vulnerable witness under the Act or the Tribunals Rules of Procedure but it may very well be appropriate to do so. The Tribunal should appreciate the significance of the claimant having an anxious condition and the impact which it has upon him.

35. Notwithstanding any shortcomings which arise out of the claimant's dealings on and after 3 August, the Tribunal should note the context that the claimant had advised the Tribunal that he was ill on that date. It is not clear when that illness arose. There is, however, a fit note confirming that he was not fit for work from 2 August.

36. Mr Kiddie suggested that in the back and forth between the Tribunal and the claimant that afternoon, only so much can be taken from that by the Tribunal given that he was ill on that day.

37. Another reality is that it has been extremely difficult to have access to medical services over the past 18 or so months due to the pandemic. In August there were still restrictions in place in terms of securing medical appointments. The claimant has said that he had tried to make contact with the GP prior to 26 August but was told he had to await a telephone consultation.

38. In August, the claimant was representing himself, while the respondent has throughout this case had robust and capable representation. The claimant has articulated himself in such a way as to show that reading and writing are not his strong suits.

39. Mr Kiddie said that the claimant had told him that he had experienced delays in receiving emails, though he could not specifically say that this was the reason why the Tribunal's emails went unanswered on 3 August.

40. At its core in this case the claimant is making very serious allegations, which, if treated pro veritate, must be considered worthy of consideration at trial unless there is an exceptional reason why the claim should be struck out.

41. Mr Kiddie referred to the authorities provided to the Tribunal.

42. He pointed out that here the claimant did make contact with the Tribunal on 3 August to notify them that he was not fit to attend the hearing.

43. He suggested that it would have been easy for the claimant to have emailed the Tribunal to say that he had Covid-19, and could not therefore attend. That was not the line he took. He was entirely candid. He was not suffering from Covid-19. Mr Kiddie asserted that the Tribunal would be aware that a number of people have falsely suggested to courts that they were suffering from Covid-19 and therefore could not attend a hearing.

44. It would have been easier for the claimant to relate his condition to a GP in a face to face meeting, and the fact that the consultation took place by telephone is significant, he said.

45. The claimant is the type of gentleman who would prefer not to trouble his GP, and is therefore not accustomed to regular contact with the practice.

46. Mr Kiddie pointed out that the fit note and the GP letter amount to medical evidence. He suggested that he was unsure what meaning the term "soul and conscience" has in England, as the claimant's solicitor did not seem to be aware of its meaning.

47. Between 2 August and 9 September the claimant was not fit for work, signed off by a GP, who must be registered with the GMC and comply with their codes of ethics. The BMA has a role in issuing guidance. Just because the fit note only refers to fitness for work does not mean that the Tribunal cannot draw an inference from that as to his state of health and ability to attend a hearing to give evidence. This was, in any event, all that the claimant's GP would provide. It is not clear what reasons were given for that position.

48. The claimant had to pay for a private GP report out of his own money.

49. He would say that there was sufficient to allow the Tribunal to find that the reason for the claimant's not attending on 4 or 5 August was genuine. No opinion was given by the doctor, but she has supplied primary hearsay evidence, saying what the claimant has told her.

50. Her statement that the claimant appeared anxious, confused and struggled to understand some of the legal information in his solicitor's letter does have some evidential value and clinical weight.

51. The hearing on 4 August is the only hearing that the claimant has failed to attend, and he has not taken a casual approach to this litigation.

52. As to the future, Mr Kiddie submitted that since the claimant has now instructed legal advisers, the Tribunal may be confident that he will be able to progress this matter appropriately.

The Relevant Law

53. Rule 37(1)(b) of the Employment Tribunals Rules of Procedure 2013 provides:

"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-

…(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…"

54. Rule 37(2) provides:

"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."

43. In **Blockbuster Entertainment Ltd v James 2006 IRLR 630 CA**, the Court of Appeal found that for a Tribunal to strike out a claim based on unreasonable conduct, it has to be satisfied that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, striking out must be a proportionate response.

44. The court went on to say (paragraph 21): *"The particular question in a case such as the present is whether there is a less drastic means to the end for which the strike-out power exists. The answer has to take into account the fact – if it is a fact – that the tribunal is ready to try the claims; or – as the case may be – that there is still time in which orderly preparation can be made. It must not, of course, ignore either the duration or the character of the unreasonable conduct without which the question of proportionality*

would not have arisen; but it must even so keep in mind the purpose for which it and its procedures exist."

45. Sedley LJ, in **Bennett v Southwark LBC [2002] ICR 881**, considered the question of proportionality in the context of that appeal: *"But proportionality must be borne carefully in mind in deciding these applications, for it is not every instance of misuse of the judicial process, albeit it properly falls within the descriptions scandalous, frivolous or vexatious, which will be sufficient to justify the premature termination of a claim or of the defence to it. Here, as elsewhere, firm case management may well afford a better solution…."*

46. In that same case, which dealt with the conduct of proceedings by a lay representative on behalf of the claimant, Ward LJ had some trenchant observations about the performance of judicial duty:

"Judicial duty is to be performed both without fear as well as without favour. The tribunal did not act fearlessly when it capitulated to the inexcusable petulance and insolence displayed by Mr Harry [the claimant's representative]. It was wrong not to listen to Mr Harry's diatribe with phlegmatic fortitude, retiring, if necessary, to compose itself and to cool the advocate's ardour, and then calmly continuing. Instead it allowed invective to infect it with prejudice. In getting on its high horse it fell off the judgment seat. I do not deny that it is thoroughly unpleasant and uncomfortable to be accused of bias. It is, sadly, not an uncommon charge. It is, on the contrary, a worryingly increasing challenge to the court's authority at all levels. Judges, members of tribunals, magistrates, all have to rise above such a challenge because all must be confident in their ability to judge impartially."

47. The case of **Faron Fariba v Pfizer Limited & Others UKEAT/0605/10/CEA** was a case in which the EAT found that an Employment Judge was entitled to strike out claims by a claimant who had demonstrated by her disregard for Tribunal orders and the allegations made in correspondence against the respondent, their solicitors and the Tribunal that she was incapable of bringing her complaints to a fair and orderly trial.

48. In reviewing the claimant's conduct, Mr Justice Underhill noted: *"Dr Fariba said at this hearing that the Tribunal was being distracted from dealing with her employment claim. I entirely agree with that statement, but in my judgment it is Dr Fariba who has not been focussing upon the specific legal claims that she wishes to have the Tribunal determine, but has consistently sought to divert attention from them by raising peripheral issues and making extensive and excessive allegations."*

49. At a later stage in the judgment, Mr Justice Underhill said: *"This is not… a case of the (not uncommon) kind where a litigant in person fails to meet deadlines and/or behaves unreasonably or offensively but is nevertheless doing his or misguided best to comply with the directions set by the tribunal in order to get to trial. Instead, the scatter of allegations of misconduct, the applications for a stay, the pursuit of other proceedings, the threats of resort to criminal or regulatory sanctions, clearly indicated that the Appellant's focus was entirely elsewhere and that if the case remained live she would, if I may use my own language, continue to thrash around indefinitely. That is why, and the sense in which, the Judge concluded that a fair trial was impossible."*

55. In **Anyanwu & Another v South Bank Student Union & Another 2001 UKHL 14**, Lord Steyn said:

"In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

56. Both parties referred to the case of **McAllion v Apache North Sea Ltd & Others [2018] SAC (Civ) 1**, in which paragraph 22 sets out the approach to be taken (in the Sheriff Court) to medical evidence.

"Some analysis of the approach which the court should take to the provision of medical information in these circumstances is justified. Scottish Ministers v Smith involved a consideration by the Inner House of a purported medical report provided when an appellant failed to appear. The report said:-"This 36 year old lady attended the surgery today for assessment of a health condition. In my professional opinion I consider her medically unfit to attend Court on Tuesday the 18th May and I would be grateful if you could take this into consideration." Lord Gill, then Lord Justice Clerk, gave the opinion of the court and said the following.

"[6] The certificate is not given on soul and conscience. Although certification on soul and conscience is no longer an indispensable requirement (cf practice note, 6 June 1968), the absence of it is a factor that we are entitled to take into account. More importantly, Dr McCartney fails to specify the health condition for which he assessed the second respondent. He fails to specify for how long she has suffered from this health condition, whatever it may be, or for how long he expects it to continue. He also fails to specify why, in his opinion, the second respondent's health condition makes her unfit to attend court today.

[7] A medical certificate to the effect that a person is unfit to attend court is not conclusive evidence of that fact. In every case it is for the court to decide, from the certificate and any other relevant circumstances, whether it is persuaded that the person concerned is unfit to attend and, if so, what the consequences of that should be."

Discussion and Decision

57. The focus of this hearing was to determine whether or not the claimant's claim should be struck out on the grounds of his unreasonable conduct of the proceedings.

58. That unreasonable conduct is said to be the failure by the claimant to attend the hearing of 4 August 2021, and to comply timeously, and indeed at all, with the Order of the Tribunal issued on 6 August by the sitting Employment Judge following the claimant's non-attendance at the Preliminary Hearing on 4 August 2021.

59. The claimant was ordered, at the conclusion of that Note, to provide in writing a full explanation, expressly to be presented by 25 August 2021) as to why he did not attend the hearing listed to take place on 4 August 2021, and, if the explanation was that the claimant was unwell, "a medical certificate by a medical practitioner certifying on soul and conscience that the claimant was unfit to attend the hearing on 4 August 2021, setting out he illness from which he was suffering and the reason why, in the medical practitioner's opinion, he was unable to attend the hearing".

60. It is important to determine the extent to which this Order has been complied with, before determining what steps, if any, the Tribunal should take in relation to the application made by the respondent.

61. Firstly, the claimant did not attend at the hearing on 4 August 2021. The Note which followed that Hearing narrates the steps taken to confirm to the claimant that the application for postponement would not be granted. It was clear that an email was sent to the claimant at 1707 hours on 3 August 2021 making clear that the postponement was refused, and that the hearing would proceed at 10.45am on 4 August 2021, by CVP.

62. Secondly, it is quite clear that the claimant did not provide any written explanation as to why he did not attend at the hearing of 4 August 2021 in response to the Order, by the date specified.

63. The claimant provided, through his solicitor, an email dated 26 August 2021, with a copy of a fit note confirming that he was unfit for work due to stress, depression and anxiety, for a period of some four weeks starting on 2 August 2021. That information was provided beyond the deadline specified in the Order. No application was made by or on behalf of the claimant to vary or revoke that Order, either before or after the deadline had passed.

The claimant's solicitor asked that the claimant be "awarded relief from sanction", on the day after the deadline for compliance had passed.

64. It should be noted that the Order, while not an Unless Order, confirmed that if the Order were not complied with, the Tribunal may strike out the whole or part of the claim or response under Rule 37.

65. Thirdly, a further item of correspondence was provided by the claimant's solicitor to the Tribunal on 1 December 2021 in preparation for this Hearing, namely a letter from Dr Karen Gladwin, from the Private GP Clinic at Nuffield Health. Dr Gladwin is not the claimant's registered GP, and she confirmed in her letter that she did not have access to any of the claimant's medical notes.

66. Dr Gladwin confirmed that she had been contacted on 30 November 2021 at the Bournemouth Nuffield GP service. No explanation has been given as to why a Bournemouth GP was contacted by the claimant; his home address is in Gillingham, in Kent.

67. Dr Gladwin's letter is notably precise in its terms. It is useful, in the context of this application, to consider what she said.

68. She said that the claimant had contacted her clinic because he had been suffering with anxiety and depression. That appeared to be information which Dr Gladwin was simply repeating from the claimant, rather than the expression of a medical opinion.

69. She said that she believed that he was due to appear in court on 2 December, and "this is the second court date" as he was unable to attend the hearing on 4 August 2021. Two points arise here: firstly, that the PH on 4 August was more than the second hearing date convened by the Tribunal in what has already been a lengthy process; and secondly, that, again, the letter reads as a narration by the doctor of what the claimant has told her, that he was unable to attend the hearing on 4 August 2021. It is not suggested on the claimant's behalf that the doctor was in any position to express a view as to the claimant's capability of attending that hearing,

nearly four months later, particularly since she did not have any prior knowledge of the claimant and had no access to his medical records.

70. The next paragraph makes clear that the claimant has told Dr Gladwin about the reasons why he was unable to attend the hearing on 4 August, namely that he was suffering a recurrence of a preceding diagnosis of anxiety and depression, and that he was frustrated, confused and unable to engage sufficiently in the procedures due to his mental state.

71. Dr Gladwin then goes on to say that the claimant was "apparently" – meaning, it seems, that this is what he told her – given a sick note at the time by his NHS GP, and was unable to attend the court. Given that the sick note (or fit note) said nothing about the claimant's ability to attend the hearing, this represents rather an overstatement of the position.

72. Dr Gladwin then makes an assessment of the claimant's conversation with her, in which she relates that the claimant felt that his symptoms were returning, that he did not feel in the "correct state of mind to engage in legal proceedings and certainly on the telephone today he appeared anxious, confused and struggled to understand some of the legal information in his solicitor's letter".

73. The letter concluded by asking that this "information" be taken into account regarding this case, and referred to his NHS GP for any further information.

74. The two questions before me, therefore, are whether the claimant acted unreasonably by failing to attend the hearing on 4 August 2021, and whether he has acted unreasonably thereafter by failing to comply with the Tribunal's Order of 6 August 2021.

75. I have considered, in determining this matter, the authorities to which I have been referred. It is clear from those authorities that any decision to strike out a claim which involves allegations of discrimination should only be taken in the most obvious and plain cases of an abuse of process.

76. Both parties referred me to the **McAllion** case, but I take the view that that decision must be treated with some caution. The rules of procedure

governing Sheriff Courts are different to those to which the Tribunal is subject, and reference is made by Lord Gill in the quotation attributed to him in that judgment to a practice direction which is of no standing within the Tribunal.

77. I address first the question of whether the claimant's failure to attend the hearing of 4 August 2021 amounted to unreasonable conduct. That was a matter which was raised by the respondent's barrister at that hearing itself. As Mr Kiddie has pointed out, unlike some of the cases to which reference has been made, the claimant did at least communicate with the Tribunal on the day before the hearing to attempt to have it postponed, and to say to the Tribunal that he was unfit to attend. He did not ignore the Tribunal, but sought to explain the position to it on the day before.

78. It is also correct that the claimant was unrepresented at the point when he was instructed that the hearing would proceed, but the terms of that email confirming the position to him were clear and unequivocal. There is a suggestion by Mr Kiddie that the claimant may have suffered a delay in receiving emails, but he accepted that there is no basis upon which he could say that that happened on this occasion. As a result, it must be taken that when the claimant failed to attend the hearing on 4 August 2021, he did so in the knowledge that the hearing would be proceeding, and that his application to postpone had been refused.

79. The claimant has conducted these proceedings for a substantial period of time. He has not previously protested that he was struggling to understand or engage with the language used in correspondence. There is no reason for the Tribunal to believe that he had any difficulty understanding the true position with regard to that hearing.

80. However, it is clear that the Tribunal did not consider that his non-attendance was so egregious at the time as to attract either a strike out judgment or an Unless Order. The reason for that is simply that the claimant had indicated in his email in advance of the hearing that he was unwell.

81. As a result, I am not persuaded, on the basis of the information before me, that the claimant's failure to attend the hearing on 4 August was, of itself, unreasonable conduct on his part. It caused inconvenience and expense, it is quite true, and it must have been clear to him that he was placing himself at risk of sanction by not attending in the face of the email from the Tribunal confirming that the hearing would proceed.

82. I take into account the fact that the hearing would have proceeded by CVP rather than in person, and so the effort required for the claimant to attend would not have been significant.

83. However, the issue here is that the claimant was saying to the Tribunal, at short notice, that he was unfit to attend the hearing the following day. That may have been true. That is why the Tribunal granted the claimant time to provide medical evidence in support of that assertion on his part, so as to allow him to prove to the Tribunal that he was unable to attend. This is consistent with the Tribunal's practice in determining postponement applications, and the respondent's submission – that this was an extremely reasonable course of action – tends to suggest that the Tribunal had a number of alternative options before it at that time, and decided that the claimant should be given some leeway in order to prove that he was unable to attend that hearing.

84. At this point I make a slight digression to observe that Mr Kiddie, in his submission, said that at least the claimant did not do what some parties might have done and tell the Tribunal that he was suffering from Covid-19 as an excuse which could have justified his non-attendance. I regarded this suggestion as being entirely without merit. The claimant was not suffering from Covid-19. He should not be given credit by the Tribunal for refraining from lying about his condition in this way. It is unclear, in any event, whether he would have been unable to attend a CVP hearing after testing positive for the virus, and of course no assistance on that front could be provided by Mr Kiddie since his submission was a hypothetical one. Further, even if he had suggested that he was suffering from Covid-19, I can say with some certainty that he would have been required by the Tribunal to

provide evidence of a positive test, something which should have been available to him. As a result, I rejected that submission out of hand.

85. The second question which arises, then, is whether the claimant's failure to comply with the Order of 6 August amounted to unreasonable conduct on his part, and if it did, whether strike out is the appropriate sanction.

86. In my judgment, the claimant's failures in this regard do amount to unreasonable conduct, for the following reasons:

- The claimant failed to comply with the deadline of 25 August 2021, which was expressly set out in bold font in the Order;
- It was said on his behalf by Mr Kiddie that the claimant did not know he had to comply with the Order by that date. Quite what the basis for that assertion was is entirely unclear to me. The Order was clear and specific. In my view, the only way in which he could be unaware of that deadline would be if he did not read the Order, a course of action which could not be regarded as reasonable;
- The timing of the claimant's activity in instructing a solicitor is illuminating. Their email of 26 August 2021 confirmed that he had consulted them on that date. In my judgment, it seems an extraordinary coincidence for the claimant to have acted on the day after the deadline for response had passed by contacting a solicitor, and no other explanation was given on his behalf for the timing of that action;
- The claimant has failed to provide any medical information which complies with the Order, in my judgment. He has provided a fit note which addresses only the question of fitness for work, and as Mr Sangha points out, that covers a long period of time whereas there is no opinion expressed as to the claimant's capacity to attend a hearing over two days. The second letter, by Dr Gladwin, does not express any opinion at all about the claimant's fitness to attend the hearing on 4 August, perhaps not surprisingly, since Dr Gladwin had

no way of knowing what the situation some four months before actually way. Her letter is, in my view, entirely proper in the cautious way in which it is worded, and goes no further than simply saying that the claimant had told her that he was unfit to attend the hearing.

- The information available to the Tribunal, therefore, goes no further than the claimant's original application for postponement. The claimant has completely failed, in my judgment, to provide a medical certificate on soul and conscience, certifying that he was unfit to attend the hearing on 4 August 2021, setting out the reason why, in the medical practitioner's opinion, he was unable to attend the hearing.

- By the time the claimant obtained Dr Gladwin's report, he had had the benefit of legal advice for some months, having instructed his solicitor towards the end of August 2021. He could have obtained assistance in seeking to instruct an opinion or to obtain a report from his own GP.

- Even if the second report had been instructive, it would have been very considerably out of time.

- The claimant, in my judgment, can have been in no doubt as to the importance of complying with the Order. In paragraph 21, I noted that the claimant, having been involved in these proceedings for some time and having attended a number of hearings, could be "in no doubt of the authority of the Tribunal to issue and compel compliance with Orders, and therefore it is essential that he reads carefully the Order issued below and takes seriously his obligation to comply with it." That is an unambiguous statement by the Tribunal making quite clear to the claimant that he had to respond to the Order.

87. For these reasons, I consider that the claimant has failed to provide to the Tribunal any medical evidence to justify his failure to attend at the Preliminary Hearing of 4 August 2021, and that his non-compliance with the Order of 6 August 2021 amounts to unreasonable conduct, in that it

suggests that he has no respect for the authority of the Tribunal and either disregarded or simply did not pay attention to the terms of the Note and Order. This is unacceptable.

88. The final question, then, is whether it is in the interests of justice to strike out the claimant's claim on this basis.

89. I recognise that the authorities do make clear that a claim should only be struck out in these circumstances, when it involves an allegation of discrimination which can only be determined by the finding of fact following evidence at a final hearing, for the most exceptional reason.

90. It is also necessary for me to determine whether a fair trial of these issues is now possible in the circumstances.

91. With considerable hesitation, I have come to the conclusion that the claimant's default should not, in this case, bring down the draconian sanction of strike out upon him, for the following reasons:

- I accept that in the current exceptional circumstances it is very difficult to obtain the assistance of a GP, particularly in relation to the provision of a report, owing to the absence of in person consultations and the extraordinary pressure under which health professionals are having to operate at present due to the pandemic. As a result, it would be wrong not to take account of the claimant's inability to obtain a report from his own GP beyond the terms of a fit note, which is a matter not entirely in his own hands;

- The claimant did, as his representative points out, state to the Tribunal in advance of the hearing that he was unfit to attend due to ill health, and has been consistent in his position since then;

- The claimant was, at that time, unrepresented, and while I consider that the terms of the Order and the Note accompanying it were clear, it is not necessarily the case that an unrepresented party would quite appreciate the draconian nature of the sanction which could be imposed upon him;

- Paragraph 23 of the Note following PH on 4 August warned the claimant that if he did not reply to the Order, an Unless Order would be issued. It appears that this was superseded by the respondent's application for strike out of the claim, but it did suggest to the claimant that there may be a further stage of action taken by the Tribunal prior to the final sanction, and accordingly it would not be fair or in the interests of justice, in that light, to strike out his claim now; and

- The fundamental question of whether the claim can now be the subject of a fair trial is a critical one. The respondent has suggested that the claimant's attitude suggests that he will not comply with any further Order issued by the Tribunal. However, it is true to say that he is now being represented by a solicitor, and therefore it is to be expected that any doubts in his mind as to the importance of acting in compliance with Orders and in a timeous manner should be dispelled. I cannot reach the conclusion with any certainty that a fair trial of the issues in this case is impossible.

92. Accordingly, I have concluded, rather hesitantly, that the application for strike out of the claim should not be granted, for the reasons set out above.

93. What I would say, however, with unambiguous force, is that the claimant must take this as a serious warning to him that he must comply with Orders in the future, and that if he wishes to seek a postponement of any hearing due to ill-health, he must comply with the requirements of the Tribunal, and with the Presidential Guidance issued by the President of Employment Tribunals (Scotland) on the seeking of postponements in Tribunal hearings. If he fails to do so then he must expect no further leeway to be granted to him, particularly now that he has the benefit of legal representation.

94. My hesitation in reaching this conclusion is based on the considerable sympathy which I have for the respondent's position in all of this. They have been blameless in this aspect of the process, and have attended at each hearing and conducted themselves, through their representatives, in

exemplary fashion. The submission made by Mr Sangha was very persuasive, but ultimately, I am not convinced that the case is such as to justify the strike out of the claimant's entire claim in a discrimination claim.

95. The next stage in the proceedings, therefore, will be to reconvene a two day PH on the earlier application for strike out, which was postponed on 4 and 5 August 2021 for the reasons above. Date listing letters will be issued to the parties in order to identify suitable dates for such a hearing.

Employment Judge: **M MacLeod**
Date of Judgment: **24 December 2021**
Entered in register: **29 December 2021**
and copied to parties