EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Morris	**v**	**Wolverhampton City Council**

Heard at: Birmingham **On**: 27 June 2022 to 1 July 2022

Before: Employment Judge Broughton
Ms Fox
Mr Faulconbridge

Appearances:
For Claimant: Mr N Brockley, counsel
Respondent: Mr J Gidney, counsel

JUDGMENT

The claimant's application for a postponement is refused.

All of the claimant's claims that require her evidence, including all claims for disability discrimination / failure to make reasonable adjustments, are struck out and dismissed.

All her other claims are also struck out unless they are able to be heard and determined without evidence from the claimant on the documents and/or very brief evidence from the respondent and submissions by no later than the last day of the trial window, Monday 4 July 2022.

REASONS

Background

1. The final hearing in this matter was due to start on Monday 27 June 2022 but was adjourned to allow witness statement exchange, which had apparently been delayed by the claimant's ill health and, having made the application to postpone without providing any up-to-date medical evidence addressing the preparation, adjournment and prognosis issues, to allow the claimant to rectify this.

2. The claimant's representative had hoped that witness statements would be able to be exchanged by noon on Tuesday 28 June 2022. As it transpired, this was ordered but not complied with.

3. The claimant was, apparently, able to participate in a conference with her representatives on Monday afternoon at which advice was given in relation to her statement.

4. It appeared, however, that the claimant's representatives heard nothing further until shortly after the commencement of the reconvened hearing at 2pm on 28 June 2022. The claimant had, however, contacted the tribunal direct, contrary to repeated instructions, to claim that she needed more time to source the medical advice.

5. At the reconvened hearing, on 28 June 2022, we were informed that it was almost certain that witness statements would not be able to be exchanged that day and that it was now unlikely that would be achieved the following day either. That has transpired to be the case and, indeed, witness statement exchange continues to remain outstanding.

6. No medical evidence was forthcoming, nor has it been subsequently. The claimant's unredacted GP notes have also not been made available.

7. We have grave concerns about the claimant's health, the prospects of a fair hearing ever being possible and, indeed, the ongoing adverse effect on the claimant's health, which appears to be deteriorating, in part, perhaps, by virtue of the ongoing proceedings.

8. We would acknowledge that strike-out is a severe sanction that should be used with restraint, often as a last resort. We are aware that we should we should consider all lesser, proportionate responses where the same are available.

9. However, having heard further representations, it seemed to us that this was one of those rare cases where we may need to consider striking out the claims for some or all of the following reasons:

    a. Under rule 30A - By virtue of refusing the postponement application in circumstances where the claim cannot proceed in the trial window

– the application was not made 7 days in advance of the hearing and, therefore, in the absence of consent, requires there to be exceptional circumstances, which may include existing long, term ill health.

b. Under rule 37 (1) (b) – unreasonable conduct
c. Under rule 37 (1) (c) – non-compliance with the rules and/or tribunal orders
d. Under rule 37 (1) (e) – where a fair trial is no longer possible

All references to the ET Rules of Procedure 2013

10. In those circumstances, we felt it appropriate to put both parties on notice and to give them a further, reasonable opportunity to prepare and make representations on Wednesday 29 June 2022 at their requested time of 2pm (with written submissions to be exchanged no later than 1pm).

11. It was common ground that, by this stage, the only feasible alternative to dismissal of the proceedings was a full postponement with a likely trial date at least 12 months hence and with no indication of what, if any, prospect there may be of the claimant being well enough to attend then.

12. The claimant's representative confirmed that there was no prospect of any part of the case being able to proceed at any time in her absence, albeit that appeared to be a position that he resiled from in his supplemental submissions.

13. Somewhat bizarrely, on 29 June 2022, the claimant produced a letter from BUPA seemingly to her GP, albeit without an address, asking the GP to respond to our request for information urgently.

14. We clarified that this was a reference to the claimant's NHS GP. The Claimant said she needed 7 days to obtain such a report but produced no evidence to support that nor, indeed, of any attempts to contact her GP.

15. In any event, we had clearly required at least some information from her private GP who, we imagined, would be more readily available or would, at least, be able to provide a letter explaining her efforts and any delay. There was no evidence that any attempt had been made although the claimant claimed that this route would have taken longer.

16. We had asked for the original of Dr Sayar's report and clarification of the date but this has not been provided, nor any explanation offered when, we imagine, at least some relevant information must be known.

The claimant's employment

17. The following details our current understanding and do not amount to formal findings of fact:

18. The claimant commenced employment at one of the schools under the respondent's auspices on 1 September 2018 as a food technology teacher.

19. Within days, the school were allegedly receiving complaints about the claimant's attitude, body language and disparaging comments.

20. Within just a few weeks there appear to have been discussions about the potential need to investigate / commence a disciplinary process or, indeed, the claimant's potential departure on consensual terms.

21. In October 2018, the claimant went off sick, never to return. She claimed she was disabled from this point in time, albeit we saw no evidence to support that.

22. In any event, it was clear that the conduct allegations and discussions around termination predated any alleged disability.

23. The reasons for the claimant's absence were various including, initially, stress followed by a virus and a hernia and, from around April 2019, anxiety and depression. The respondent said that significant periods were not appropriately covered by sicknotes and there were, as a result, disputes over whether the claimant received the correct pay, including holiday pay.

24. We observed that the respondent had chosen not to dispute disability from April 2019, albeit in relation to a somewhat different disability than that pleaded. This appeared to be on the basis that they accepted a significant adverse effect on the claimant's day to day activities from that date.

25. Notwithstanding such a concession, we would still be required to determine whether the statutory definition of disability was met. We, therefore, expressed a concern that there did not appear to be any evidence before us currently from which we could conclude that such an adverse effect was likely to last 12 months at that stage and, if it wasn't, from when, earlier or later, such a likelihood would have arisen.

26. This is relevant because, in the absence of such evidence, the disability claims may fail. If further evidence is required, this would need to come from the claimant.

27. In any event, the respondent was apparently carrying out their investigations into the allegations against the claimant in early 2019. On their case, the claimant was invited to a couple of investigation meetings but did not attend.

28. The claimant asked for the investigation to cease.

29. The claimant was invited to a disciplinary but did not attend, seemingly on ill health grounds. She was dismissed summarily in her absence and this was confirmed by letter dated 22 May 2022.

30. The claimant subsequently wrote to the chair of the disciplinary hearing, in June 2019, raising a number a number of complaints about the process.

The tribunal process

31. She commenced early conciliation in August 2019 and submitted her claim on 3 October 2019.

32. The claimant claimed for alleged unpaid wages and holiday pay. She also claimed wrongful dismissal in relation to her notice pay and disability discrimination under s15 Equality Act 2010 and a failure to make reasonable adjustments, largely in relation to the respondent's operation of it's sickness and disciplinary procedures.

33. The hearing was initially listed to take place in June 2020.

34. The original case management directions of EJ Dimbylow required, amongst other matters, exchange of witness statements by 18 April 2020.

35. As a result of the coronavirus pandemic, the June hearing was converted to a case management hearing by telephone.

36. That hearing was before EJ Perry and the claimant was represented by counsel.

37. The final hearing was relisted for 4 days starting on 19 July 2021. The issues were identified (albeit the issue of knowledge was inadvertently omitted from the reasonable adjustments claims) and orders made and directions given. These included an order for witness statements to be exchanged on 27 November 2020. They also referenced an agreement from the claimant to provide disclosure of her medical records.

38. It appeared that a significant number of those directions were not complied with. The claimant's legal representatives kept changing and repeated requests for extensions were made due to difficulties obtaining instructions from her.

39. Subsequent evidence suggested that the claimant's health was such that she would be unable to participate in the hearing and, indeed, had been unable to prepare.

40. She attended a private GP, Dr Sahay, who produced a report confirming the above on 11 July 2021, a Sunday.

41. However, with the hearing only 8 days away, no application for a postponement was made until 14 July 2021, less than 7 days in advance.

42. The hearing was postponed and a further case management hearing took place on 12 August 2021.

43. The claimant was represented by different counsel and the case was relisted for 27 to 30 June 2022. A revised set of directions were given.

44. These included provision for a judicial mediation in December 2021 and for exchange of witness statements in March 2022.

45. The claimant failed to attend the judicial mediation before EJ Perry, again citing health grounds.

46. EJ Perry understandably had concerns about when or whether the claimant may ever be fit to give instructions and/or attend trial and, if she would be fit, what adjustments could reasonably made to facilitate this.

47. As a result, he made an order for the claimant to produce a report from her GP by 14 January 2022 detailing whether she was currently fit to give instructions or attend trial or would be fit for the same by June 2022 and, in the latter case, what adjustments would be required.

48. He also asked for a medical opinion on the likelihood of the claimant ever being fit for trial.

49. No such medical report was produced and the date for exchange of witness statements again came and went.

50. EJ Perry had also required the parties to notify the tribunal that all directions had been complied with and to notify us **IMMEDIATELY** (his emphasis) if there was any reason the time estimate could not be achieved.

51. EJ Perry had, nonetheless, wisely arranged for a further case management hearing, on 9 May 2022, to check on compliance.

52. Again, the claimant did not attend but was represented by different counsel. It was stated that the claimant was waiting on a medical report from her GP, who in turn was awaiting a psychiatric report, to answer the questions posed by EJ Perry.

53. The claimant was ordered to provide the same by 27 May 2022 and it was indicated that the claimant was in the process of instructing a new firm of solicitors (her eighth).

54. It was also requested, on behalf of the claimant, that she be permitted to give her evidence by telephone and she was advised to produce medical evidence to both explain and support this request.

55. EJ Dean expressly reserved the issue of proposed adjustments to the tribunal hearing the claim.

56. A further date for exchange of witness statements, of 8 June 2022, was provided and a further telephone hearing arranged for 13 June 2022.

57. It appears that, at some stage thereafter the claimant produced a further medical report from Dr Sahay, albeit that we had some concerns about that document.

58. Firstly, it was not dated. Secondly, whilst produced in purported compliance with EJ Dean's order in May 2022, it read as if it were written on, or before 13 January 2022. It also appeared to reference a psychiatric report, which appeared to relate to an assessment on 5 January 2022. That report did not appear to be before us, nor did the one claimed to be anticipated in the hearing before EJ Dean.

59. The Dr Sahay report said that the claimant would not be fit for trial on 13 January 2022. It also suggested, however, without any seeming basis or timeline, that the claimant would be able to "proceed with the tribunal process" subject to certain adjustments.

60. Surprisingly, the psychiatric report that we did have was also not dated but it appears to have been produced some time shortly after March 2022 i.e at some point between the 2 reports seemingly referenced above and after the report of Dr Sahay.

61. The second page of the Dr Sahay letter did not appear to naturally flow from the first. Tellingly, the letter before us did not address the question of the claimant's fitness to prepare for, or attend, a trial in June 2022 as ordered.

62. Confusingly, the report referenced some adjustments, perhaps suggesting a trial may be possible but, to the extent that the report addressed the claimant's prognosis it referred to her condition being long term and career ending. If anything, therefore, it did not appear to be offering any hope of an improvement in her symptoms from the point at which it had said she was unfit for trial.

63. We note that Dr Sahay, in his report in July 2021, had hoped for an improvement by 2022, but this had not materialised.

64. The psychiatric report produced at some point shortly after March 2022 identified that the claimant was, at that time, suffering from severe depression with psychotic symptoms as part of a recurrent depressive disorder.

65. It seemed clear from that report that the claimant's health was deteriorating and certainly worse than in 2021.

66. For example, the psychiatrist recommended 2 new medications and an urgent referral to the community mental health team. He also said there was to be a further review in 4 weeks, although no evidence of that has been produced.

67. There was a fairly detailed analysis of what appeared to be the claimant's deteriorating symptoms and abilities. This even resulted in a recommendation that the claimant stop driving completely. It was expressly stated that the claimant's difficulties had "worsened".

68. The psychiatrist identified a “long-term risk to self” and stated that there was no guarantee that long term psychotic symptoms would go away. It was repeated that the claimant’s condition was long term and “most likely career ending”.

69. The report expressly identified the difficulties that the claimant had in attending court hearings due to her anxiety.

70. There was no indication in the report of any realistic prospect of any improvement in the claimant’s health, let alone a sufficient improvement to enable her to participate in tribunal proceedings. There was no suggestion in this specialist report of any adjustments that may have assisted the claimant.

71. Witness statements were not exchanged on the further revised date of 8 June and yet the claimant was able to instruct a new firm of solicitors on 10 June 2022.

72. She had still not approved the bundle as at the date of the hearing on 13 June 2022.

73. At that hearing, the claimant was represented by her solicitor.

74. The EJ, seemingly without regard to the previous order of EJ Dean, proposed the adoption of certain adjustments in relation to breaks and the claimant only appearing by telephone.

75. As an aside, that latter point caused us considerable concern and had not been explained by any of the medical reports before us, although Dr Sahay had said, without explanation, that the claimant would not be able to give evidence in front of a video link screen.

76. In such circumstances it would be unclear who, in fact, was giving evidence, let alone whether they were receiving any assistance. It may also hamper a proper assessment of the evidence, particularly in circumstances where there were, apparently, serious issues of credibility and allegations about the claimant’s manner, body language etc.

77. However, for what it is worth, we do not accept the submission on the part of the claimant that we were bound to accept those adjustments unless there was a material change in circumstance.

78. Firstly, the order appeared ultra vires given the previous order of EJ Dean. In any event, it cannot be right that a tribunal can be expected to proceed with hearing a case in circumstances they consider to be unfair, because of a previous order by a Judge who was not in possession of all of the facts.

79. That is all, however, academic. We have not determined the point. The claimed need for such an adjustment, or, indeed, the briefly mooted alternative of the claimant that she could appear in a mask and dark glasses

may, however, inform our deliberations in relation to whether a fair trial may ever be possible.

80. Whilst provision of regular breaks would be an adjustment that is regularly accommodated, Dr Sahay had suggested breaks of at least an hour every 30 to 45 minutes when the claimant was giving evidence.

81. When the case came before us the claimant was, by that time, suggesting breaks of at least an hour every 15 to 30 minutes, suggesting a further deterioration in her health, albeit unsupported by medical evidence.

82. That, of course, would mean the anticipated cross examination time of 5 hours would take around 3 days.

83. Nonetheless, this latter point, could, perhaps, in appropriate circumstances be reasonably accommodated.

84. However, again, such regular long breaks, after relatively short periods of evidence, could give rise to the appearance of a greater risk of assistance with evidence and hence the appearance of unfairness.

85. We should stress that none of this is to suggest that the claimant would act in any way inappropriately. That said, the respondent was, understandably, concerned about the possibility and also the need for justice to not only be done but to be seen to be done.

86. The June hearing proposed a further, revised date for exchange of witness statements on 22 June 2022.

87. It seems that the claimant was still not in a position to exchange and her representative sought to agree a further extension with the respondent's representative until 24 June 2022.

88. It turns out that the claimant was to prepare the first draft of her statement and this was not provided to her solicitor until the morning of 24 June 2022.

89. It seems to us that, given the history of this matter and the presentation of the claimant throughout, it must have been abundantly obvious, even immediately after the hearing on 13 June 2022, that there was, at least, a significant risk that she remained unable to properly prepare and instruct her representatives, let alone attend the hearing and give evidence over several days.

90. The claimant had previously, in July 2021, provided medical evidence, albeit late, in support of a postponement application.

91. There was no explanation for such a failing in this instance.

92. On the afternoon of 24 June 2022, the claimant's representative applied for the hearing to be adjourned to 29 June 2022, stating that they had been unable to take instructions on the witness statement.

93. Nonetheless, the claimant took it upon herself to email the tribunal direct, both repeating and making additional requests for adjustments.

94. Such direct contact was something the claimant repeatedly engaged in, despite repeated explanations that this was not permitted. There was nothing in any of the medical evidence before us that would explain her seeming inability to follow simple instructions.

95. The events of the first day of the hearing are adequately recorded in our summary and directions of the same date.

96. The subsequent events are recorded at the commencement of this judgment.

97. It was common ground that during the course of theses proceedings the claimant has instructed 8 different firms of solicitors and has been represented by 5 separate counsel. Whether that was a consequence of mental health difficulties, or otherwise, was unclear.

The claimant's application for delay

98. At the start of submissions, the claimant made an application for us to postpone our determination for at least 7 days to enable her to produce the requested medical information.

99. That application is refused for the following reasons:

    a. A medical report detailing the claimant's fitness to prepare for and to attend this hearing was first required by EJ Perry to be produced in January 2022. Nothing was produced.
    b. That order was repeated by EJ Dean in May 2022. To the extent that anything was produced in response to that we had the somewhat curious letter from Dr Sayar that didn't address the question at all.
    c. On both occasions the claimant was also required to provide medical evidence about her likely future fitness for a hearing. That question has never been addressed.
    d. The claimant and her representatives are well aware of the well-established need (by case law and presidential guidance) to support an application for a postponement with medical evidence, yet none has been provided.
    e. The likelihood of the need for such medical evidence must have been known at least a few days before the hearing yet no attempts to secure the same had apparently been made.
    f. We gave a further opportunity for such evidence to be provided this week but nothing has been produced, nor has any evidence been produced of attempts to contact the appropriate medical

professionals, let alone any evidence from them of likely response times.

g. All we heard was that the claimant claimed to have tried to contact her NHS GP, the only evidence of which was a letter from an entirely unrelated private GP saying that the claimant had told them that she was unable to contact her GP which told us nothing.

100. The claimant has, therefore, had numerous opportunities to provide the medical information necessary over a period in excess of 6 months.

101. To accede to the claimant's request would, inevitably, cause further delay and uncertainty. If she were to produce further medical evidence we would need to give an opportunity for representations thereon and would then have to get the panel together again at some future date.

102. Moreover, having further considered the medical evidence that we do have, it seems highly unlikely that one of the treating physicians would offer a view contrary to their previous prognoses.

103. Finally, in the unlikely event that the claimant does provide a satisfactory explanation for all the missing, delayed and incomplete medical information and also obtains medical evidence from her private GP and/or psychiatrist answering all of our previous questions in a way which may alter our decision she can always apply for a reconsideration.

The postponement application

104. Whether or not the claimant's initial request for an adjournment until 29 June 2022 amounted to a request for a postponement under rule 30A has become academic as it was common ground that there was no longer any prospect of the case commencing in the current trial window.

105. The rule provides that any such application must be made as soon as possible after the need arises and we are not convinced that it was.

106. It must have been known at least a week in advance that there was a significant chance the hearing may be unable to proceed due to the claimant's health presentation. That state of affairs should, at the very least, have resulted in appropriate medical enquiries being made and, in the absence of a confirmation that the trial could proceed, a report sought.

107. That is before consideration of the fact that the relevant medical information had previously been ordered both 6 months and 1 month previously.

108. Given that the application was made less than 7 days before the date the hearing was due to commence we are governed by rule 30A (2) and, in the absence of consent, as here, we can only grant it when there are "exceptional circumstances" (r30A(2)(c)). These may include ill health relating to a long-term health condition.

109. That language, at least, appeared to suggest that postponement remained an option in the circumstances of this case. However, it seems to us that "exceptional circumstances" must mean something more than the normal, long-term presentation of an existing condition which appeared to be the situation in the case before us. Further details of our reasons for this conclusion are provided later in this judgment.

110. As a result, postponement does not appear to be an option available to us under the rules. In addition, it became common ground that the case could not proceed in the trial window.

111. In those circumstances, where the case can neither proceed, nor be postponed there would arguably be no alternative but to strike out the claims. That view is arguably reinforced by the recent case of ***Emuemokoro v Crome Vigilant (Scotland) Ltd*** [2022] ICR 327, *EAT*.

112. It was not in dispute that this was authority for the proposition that consideration of whether a fair trial remains possible can mean whether it remains possible in the existing trial window. As this was not possible in the case before us, strike out must be an option before us.

113. To us, however, that is not entirely satisfactory and we note that Emuemokoro was about whether to strike out the response on grounds of the respondent's conduct.

114. We, therefore, considered it vital to go on to consider whether it is no longer possible to have a fair hearing and/or whether there were any realistic and just alternatives to strike out.

Strike out

115. We have considered the provisions of rule 37 and, specifically, the subsections identified at paragraph 8 above.

116. Taking 1 (c) first, it was abundantly obvious that there had been numerous breaches of the rules and tribunal orders by the claimant throughout these proceedings.

117. Merely by way of example:

a. Serious delays in compliance with almost all tribunal orders, often after the initial dates had been revised.
b. Applications, including those for adjustments and postponements being made late, often very late
c. Witness statements still not having been exchanged, having originally been ordered over 2 years, with several extensions thereafter, right up to this week, when they still remain outstanding

d. Repeated failures to provide ordered medical information, particularly that regarding the claimant's fitness to attend this hearing or any future hearing

118. Those failures, of course, were part of the reason that a fair trial was not possible in this trial window and so, to some extent, align this case with Emuemokoro.

119. Those factors also, in isolation, would appear to show a course of unreasonable conduct. There were others, not least the claimant continuing to contact the tribunal direct and/or not copy in the other party, despite repeated requests to communicate via her instructed representatives.

120. There was no specific medical evidence before us addressing the extent to which some or all of these issues may have been, at least in part, impacted by the claimant's mental health.

121. That said, on the evidence that we do have before us, we are prepared to accept that at least some of the above compliance and conduct issues would have been adversely affected by the claimant's condition.

122. There would be nothing to be gained by making further orders, including unless orders, following such extensive non-compliance, in circumstances where the maintained reasons were medical and no evidence being adduced to identify any prospect of improvement.

123. We had invited the parties to consider the case of *Andreou v Lord Chancellor's Department [2002] EWCA Civ 1192*.

124. In that case, the claimant had requested a postponement of the tribunal hearing on the basis of a medical certificate which stated that she was unfit to attend work. The tribunal adjourned the proceedings for one week with directions that a medical report be produced detailing the nature of and prognosis of the illness and the reasons why the Claimant was unfit to attend the Tribunal hearing. She failed to provide adequate information about her inability to attend the hearing and, as a result, the tribunal struck out her claim on the ground that she had failed to comply with a direction.

125. The Court of Appeal held that it was necessary for a tribunal to balance fairness to the claimant with fairness to the employer and with that in mind, concluded that all relevant matters had been weighed up and it was open to the tribunal to strike out as they had done.

126. That case has significant similarities to our own. We would acknowledge, however, the claimant's submissions that there were a couple of key differences, namely that we didn't formally order a medical report, nor was there any express warning from the tribunal of the potential for strike out should a satisfactory report not be forthcoming.

127. However, in our case, the necessary medical report was actually ordered to be produced in January 2022, and again in May 2022. It was known to be needed in support of any application to postpone and, nonetheless, a further opportunity to produce such a report was given. As a result, the claimant in the case before us has had far greater opportunity to comply.

128. Nothing of substance, nor meaningful evidence of any difficulties faced, has been forthcoming 5 days later.

129. The claimant has instructed solicitors on the record and so must have been aware that, in the absence of appropriate medical evidence, particularly in light of the presidential guidance on such matters, her postponement request may not be granted. In circumstances where her case could not proceed that would inevitably raise the possibility of strike out.

130. Moreover, the respondent applied for strike out at the outset of the hearing on 27 June 2022 and that application has remained "live" thereafter.

131. The differences between Andreou and the case before us are, therefore, limited. There was a repeated failure to provide appropriate medical evidence and an inevitable and, subsequently, express awareness of the potential consequences of failing to do so.

132. In those circumstances, strike out, once more, potentially appeared to be only just outcome, rather than speculatively waiting for possible compliance, which may or may not address the issues and which, in any event would result in significant further delay, cost and inevitable ongoing uncertainty given the medical prognoses that we do have.

133. Nonetheless, we were rightly reminded that, when considering strike out for such reasons we should, in any event, also revert to consideration of whether a fair trial remained possible, which was also the final ground for our consideration under rule 37(1)(e).

134. In that regard, following submissions, we also invited further submissions on the following cases:

a. Peixoto v British Telecommunications Plc | [2008] UKEAT 0222
b. Riley v The Crown Prosecution Service [2013] EWCA Civ 951

135. It is clear to us that a fair trial was not possible in this trial window. The claimant has repeatedly failed to provide medical evidence addressing when, or whether, that position may change.

136. The claimant has largely been unable to give instructions on her witness statement this week and so is clearly unable to give oral evidence.

137. The medical evidence at the postponement of the trial in July 2021 hoped for an improvement in the claimant's symptoms. Regrettably, that did not materialise.

138. In fact, the only psychiatric report before us indicated a significant decline in the claimant's health, to some degree linked to the tribunal process, and a poor long-term prognosis with no indication of any possibility of a time when the claimant may be able to actively engage in a tribunal hearing.

139. We are, therefore, unable to establish any point in the foreseeable, or even distant, future when a trial could take place. Both parties have the right to a trial within a reasonable time. The effect of a postponement now would mean that the case would be relisted next summer at the earliest, almost 5 years after the first events in issue.

140. There was, however, no evidence that that the claimant was likely to be able to engage any more then than now. In fact, on the evidence before us, it seemed that further decline was more likely than any material improvement.

141. There were, therefore, some similarities with the Peixoto case which, we note, also included claims of disability discrimination and a reasonable determination that there was no prospect of the claimant ever being able to meaningfully engage and proceed.

142. We note and fully endorse the following quote from the tribunal in that case as equally applicable in it's entirety here:

> '*In the circumstances, we have no alternative but to accept and agree with the Respondent's submission that if we were to agree to the application to postpone that we would find ourselves (or another tribunal would find themselves) in the same position at a resumed Hearing. … In order to grant the application to postpone, we would need to feel that there was some point in postponing the hearing, and there was some likelihood in the near future that the hearing could be effective. Regrettably, we cannot reach this conclusion. In the circumstances, we feel that a postponement would be futile and would only add to the cost and the distress of the Claimant'*

143. Riley, it seemed to us, was even more closely aligned to the circumstances of the claimant in our case.

144. In that case the tribunal, again, had no prognosis of when, if ever, the claimant would be well enough to take part in the proceedings and went on to consider the balance of prejudice to either party.

145. The respondent addressed us on the significant prejudice they would suffer by virtue of having to respond to allegations at least a further year down the line or, in the more likely scenario, of proceedings simply continuing to drag on with no prospect of a fair hearing.

146. It goes without saying that the greater the delay, the greater the prejudice and the risk to the cogency of the evidence, coupled with the risk of relevant witnesses moving on or becoming unavailable for other reasons.

147. It was also submitted that each postponement was costing the respondent in the region of £14k to £20k and those were being paid from the public purse and were unlikely to ever be recoverable from the claimant.

148. It should be remembered that this is a case arising from a period of active employment of only a few weeks.

149. Against that, the claimant is claiming career loss damages and makes allegations of discrimination and so the prejudice to her of losing the opportunity of doing so is considerable. That said, if the respondent's purported reasons for dismissing the claimant, which relate to her conduct prior to any alleged disability and, indeed, their stated intention to exit her which also preceded any alleged disability, those matters could cap any potential compensation at a relatively modest amount.

150. We also note that the very fact that career long losses are claimed affirms our views that the claimant will consider

151. We have considered the claims themselves and whether there is any possible lesser sanction than strike out to allow some determination on at least some of the claims, notwithstanding the original submissions by her counsel that there would be no meaningful prospect of any form of participation in this trial window.

152. Moreover, in submissions yesterday, the claimant's counsel expressly confirmed that he did not foresee any circumstance in which parts of the claim could be hived off to be heard without the claimant's active participation, either now or in the future.

153. It seems to us that, contrary to claims in submissions, the money claims do not relate to any entitlement to pay when suspended as the claimant does not appear to have been suspended. Rather, they relate to sick pay and whether or not the claimant submitted appropriate sicknotes and what impact that may have had on her holiday entitlements.

154. Assuming that the claimant was paid her full entitlements in accordance with the sicknotes, the only material dispute, if any, must be over when, how or whether they were submitted. On that matter we would need to hear evidence from the claimant. That said, on the evidence currently before us, there was nothing to suggest any sicknotes had even been obtained for around 3 months in early 2019.

155. However, if there were issues that could readily be addressed, whether on the documents and/or submissions and that could be achieved within the trial window, notwithstanding the previous submissions of both parties that this would not be possible, we are prepared to consider that.

156. A similar possibility may arise with regard to the wrongful dismissal claim, not least because the burden is on the respondent. That said, we

have the dismissal letter which identifies potential gross misconduct and, in the absence of the claimant being able to give instructions on any material challenge, that may take us no further forward.

157. It seems clear that there is no prospect, however, of the disability discrimination claims ever reaching a fair trial.

158. The idea, suggested in supplemental submissions that the claimant should be permitted to give evidence without a witness statement in circumstances where she is clearly not well enough to give instructions, is inconceivable.

159. The initial burden, in relation to the disability and the claims themselves is on the claimant.

160. It remains the case that the claimant has been unable to produce a witness statement for over 2 years and continues to be unable to give meaningful instructions or respond to appropriate advice, as has been evidenced throughout this week.

161. There is no evidence before us that this is ever likely to change and, if anything, it appears to be getting worse and may well further decline, on the limited evidence before us, when any rearranged hearing approached.

162. The fact that those allegations would require a significant multi-day trial, probably lasting at least 8 days only confirms that view.

163. To quote Riley at paragraph 25:

> 'It is important to remember that the overriding objective in ordinary civil cases (and employment cases are in this respect ordinary civil cases) is to deal with cases justly and expeditiously without unreasonable expense. Article 6 of the ECHR emphasises that every litigant is entitled to 'a fair trial within a reasonable time'. That is an entitlement of both parties to litigation. It is also an entitlement of other litigants that they should not be compelled to wait for justice more than a reasonable time. …. It would, in my judgment, be wrong to expect tribunals to adjourn heavy cases, which are fixed for a substantial amount of court time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time and the case itself deals with matters that are already in the distant past, striking out must be an option available to a tribunal.'

164. It seems to us, again on the limited medical evidence before us, due to the claimant's repeated failings to provide the required evidence, that any further delays, postponement, revised directions or hearings will inevitably lead to further difficulties for the claimant, further costs for the respondent, uncertainty, confusion and we see no prospect of them taking us any further forward.

165. For all of the above reasons a fair trial of the disability claims was clearly not possible in this trial window and we do not consider that there is anything to suggest that it, nor any claims which would require evidence from the claimant, will ever be possible in the future.

166. As a result, the claims, other than any which can meaningfully be heard and determined in this trial window, without the need for evidence or instructions from the claimant, are dismissed on strike out. The precise details will be confirmed following brief submissions this afternoon.

Employment Judge Broughton

Date: 1 July 2022

Sent to the parties on: 7 July 2022
For the Tribunal Office