EMPLOYMENT TRIBUNALS

Claimant: Miss S Tufail

Respondent: The Alan Turing Institute

Heard at: London Central (via CVP) **On:** 15th September 2022

Before: Employment Judge Nicklin (sitting alone)

Representation

Claimant: in person, supported by her sister, Ms Anwar

Respondent: Ms N Motraghi, Counsel

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was by video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT ON A PRELIMINARY HEARING

It is the judgment of the tribunal that:

1. All claims are struck out pursuant to Rule 37(1)(d) and (e) of the tribunal's Rules of Procedure.

2. The hearing listed to commence on 1st December 2022 is vacated.

REASONS

Introduction

1. This judgment concerns the Respondent's application to strike out the Claimant's claims under Rule 37(1)(b)(c)(d) and (e) of the Employment Tribunal's Rules of Procedure and, in the alternative, an application for an unless order. The application was heard at a 3 hour hearing on 15th September 2022, by CVP. Unfortunately, having heard the parties and allowed sufficient time for the parties to make their representations at the hearing, there was insufficient time to deliberate and give judgment on the day. Accordingly, I

decided to reserve judgment and explained this to the parties at the end of the hearing.

2. To determine this application, I had before me a hearing bundle running to 271 pages and a supplementary bundle running to a further 7 pages. Counsel for the Respondent had, following a direction made by the tribunal, prepared a skeleton argument, which was accompanied by two relevant authorities. I heard detailed oral submissions from counsel for the Respondent and the Claimant, who attended supported by her sister. Where necessary, I permitted Ms Anwar to speak on the Claimant's behalf as an adjustment to enable the Claimant to present her case.

Factual background to the application

3. By a claim form presented on 16th May 2021, the Claimant brought claims of direct race discrimination; discrimination arising from disability; failure to make reasonable adjustments; victimisation, harassment, constructive unfair dismissal and breach of contract (wrongful dismissal). The Claimant was employed by the Respondent as a Communications and Marketing Manager from 16th January 2017 to 11th January 2021.

4. The Claimant's health is relevant to the background and progression of this claim. The Claimant's GP, by a letter dated 6th June 2022, confirms that the Claimant was diagnosed in 2013 with dyspraxia and a sensory and auditory processing disorder. She also suffers from endometriosis which led to surgery (the details of which do not need to be set out in this judgment). In January 2020, the Claimant was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). Her sensory processing disorder means she can feel over or under stimulated by sights, sounds, noise and light. Noise affects her auditory processing disorder. Dyspraxia may make it more challenging to communicate verbally and may affect writing or typing. Her organisation, planning and the structuring of her work is also affected. The Claimant's ADHD has an impact on her ability to focus and concentrate, leading to impulsiveness and disordered thinking. Consequently, she can become exhausted and fatigued making work and study difficult and unpredictable.

5. Having presented the claim herself, it was defended by the Respondent by an ET3 Response dated 28th June 2021. Three case management hearings followed.

Hearing on 8th September 2021 before Employment Judge Glennie

6. At the first case management hearing, the Claimant was directed to send to the Respondent and the tribunal a numbered list in chronological order of the acts relied on as breaches of contract, discrimination, victimisation, harassment or failure to make reasonable adjustments ("The List"). This was to include specific information, including: the date of the acts; detail of what happened; persons involved; the applicable heads of claim; the protected characteristic for any harassment claim; the adjustments the Claimants says should have been made (where applicable) and for the list to cross refer to the Particulars of Claim. This exercise would enable the Respondent to know exactly how each claim was being put and, consequently, would lead to a comprehensive list of issues being prepared.

7. The List was due to be sent to the Respondent and the tribunal by 20th October 2021. By the same date, the Claimant was ordered to provide disclosure

relevant to any disability relied on in her claims (i.e. indexed copies of her medical records, reports, assessments and similar documents and a witness statement setting out the effects of any relevant conditions on her ability to carry out normal day to day activities and the duration or likely duration of those effects – "impact statement"). By 3rd November 2021, the Respondent was ordered to confirm the extent to which it accepts any disability relied on and, if there is a dispute, how it proposes this is to be resolved. Further directions were made, including an order for the Claimant to provide a schedule of loss by 3rd November 2021 and the listing of a case management hearing on 17th November 2021.

8. The Claimant did not comply with these orders. She wrote to the tribunal seeking an extension on 4th October 2021 but did not copy the Respondent into that correspondence. In any event, she did not provide the required material. The 17th November hearing was then vacated by Employment Judge Adkin on 12th November. The Claimant was ordered to: provide copies of the correspondence not previously sent to the Respondent by 15th November 2021 and to file evidence by 26th November 2021 explaining why she had failed to comply. The timetable was varied so that the Claimant had until this date to provide The List and her medical evidence disclosure concerning disability. The variation gave the Claimant until 3rd December 2021 in respect of the Schedule of Loss.

9. On 16th November 2021, the Claimant wrote to the tribunal explaining that she was waiting for a response from the tribunal about how much medical evidence she should share. The Claimant cited her health, including the debilitating side effects of her medical titration for ADHD and investigations into her abdominal pain as issues affecting her ability to participate. On 25th November 2021, the Claimant provided the outstanding correspondence to the Respondent's solicitors and asked them if the Respondent could confirm which disabilities were in dispute in order to better hone her medical record search. The Respondent's solicitor replied on the same date reminding the Claimant that she had not complied with the orders requiring her to first provide information on which the Respondent could base such a decision and an unless order would be sought.

10. On 1st December 2021, the Respondent duly made that application for an unless order on the following principal grounds:

    10.1. The Claimant provided the correspondence 10 days late;
    10.2. Despite accommodating an extension, the Claimant had not provided The List and had said she did not have the capacity to respond to orders at that time. Whilst this was for health grounds, the Respondent maintained that it could not 'remain in limbo indefinitely';
    10.3. The Claimant had not provided her medical disclosure or impact statement for the disability issue;
    10.4. Non-compliance therefore continued.

11. The unless order sought covered the orders for The List, the medical disclosure and the impact statement. This application was considered by Employment Judge Glennie on 6th December 2021 and he directed the Claimant to send to the tribunal and the Respondent, by 13th December 2021, any medical evidence on which she relies in relation to her ability to comply with tribunal orders. The parties were also ordered to confirm their respective positions as

to any postponement of the final hearing (listed for March 2022). The Respondent's solicitor, on 13th December 2021, confirmed that the Respondent did not consider that the hearing could go ahead in March owing to the Claimant's continuing delays. On the same date, the Claimant provided a GP letter dated 29th November 2021 which outlined a number of health issues. These included the effects of her ADHD and related medication, including the impact on work and studies and previous medical issues which exacerbated her ADHD symptoms. The GP said that the Claimant would not be able to function physically or cognitively until she is settled and stable on the correct medication. The Claimant was also due to start cognitive behavioural therapy ("CBT") in January 2022. On the basis of the letter, the Claimant sought a postponement to the March final hearing.

12. On 20th December 2021, the Respondent confirmed it agreed to an extension of time in respect of compliance in light of the medical evidence. The Respondent asked for a varied case management timetable to be underpinned by an unless order.

13. Employment Judge E Burns then made an order postponing the March final hearing and postponing a case management hearing listed for 14th February 2022, to be re-listed on the first day of the postponed final hearing: 16th March 2022.

Hearing on 16th March 2022 before Employment Judge Brown

14. At this hearing, the judge re-listed the final hearing for 7 days starting on 1st December 2022 and a third case management hearing on 18th May 2022. The Claimant explained that her medication was causing significant side effects. The Claimant was on new medication and needed time to adjust. The expected CBT had not commenced and she was on a waiting list, although there was no updating medical evidence before the judge. The Claimant was unable to agree the final hearing date owing to her undertaking an MBA and did not know of the commitments of that course at the time. The tribunal directed the Claimant to provide, by 16th May 2022, a medical report stating:

    14.1. Whether she was fit to attend a 2 hour hearing by video on 18th May 2022 and thereafter prepare her case for final hearing in December 2022; and
    14.2. If she is not fit to do that, confirm the condition, prognosis and when she is likely to be fit to attend a case management hearing and prepare for final hearing and what adjustments would be required.

15. On 1st April 2022, the Claimant sent to the Respondent an update regarding her ADHD medication. This was a document dated 28th February 2022 from Psychiatry UK LLP which confirmed that her previous medication had been withdrawn. She also obtained a letter from her GP, Dr Billington, dated 1st April 2022 (seemingly prepared for her study course provider) explaining that the Claimant had not been able to tolerate multiple medications. The GP explained that this was affecting her ability to complete necessary assignments due to the side effects. The GP asked this is taken into consideration when assessing her current assignments with a request for some time out for study. The letter did not suggest she was not fit to complete her assignments.

16. On 5th May 2022, the Respondent's solicitors wrote to the Claimant to advise her that, unless case management orders towards the final hearing could be

agreed at the forthcoming preliminary hearing on 18th May 2022, the Respondent would apply for a costs order on the basis of unreasonable conduct. The Respondent also indicated that it would seek an unless order to underpin the remaining case management stages.

17. The Respondent formally applied for an unless order on 6th May 2022. On 17th May 2022, the Claimant wrote to the tribunal opposing the application on medical grounds, attaching various pieces of medical evidence.

18. On 8th May 2022, the Claimant appeared on BBC Politics London as a contributor about neurodiversity in the workplace.

Hearing on 18th May 2022 before Employment Judge Spencer

19. At this hearing, the Claimant confirmed that she wished to progress the case. The judge ordered the Claimant to provide The List, her impact statement and medical records (disclosure for the disability issue), all of which was originally due by 20th October 2021, by 17th June 2022.

20. The judge also indicated that, whilst the Claimant's conditions prevented her from concentrating for long periods, unless the case was pursued, there could be no remedy and there would come a time when it was no longer possible to have a fair hearing and the case would need to be struck out on this basis.

21. On 17th June 2022, the Claimant emailed the tribunal and Respondent's solicitors. The Claimant explained that she had tried to follow the tribunal's suggestion of a little work on the case each day (to meet the deadline). The Claimant explained that she had suffered with debilitating fatigue and that it had taken several weeks to get an appointment with her GP. The Claimant said she would aim to submit the required documents by 11th July 2022. In support, the Claimant attached a letter from her GP, Dr Baron, dated 6th June 2022 (referred to above) which said that, in light of her conditions, the Claimant can become exhausted and fatigued easily and suddenly making both work and study difficult and unpredictable. It also concluded that "*it is impossible to predict how the disease will progress*". It was recommended that contact is made with Psychiatry UK for more information about the Claimant's treatment for ADHD. The GP concluded: "*this will give you a better idea of when she is likely to be fit*".

22. On 24th June 2022, in response, the Respondent applied again for an unless order. This was its third application for such an order. Employment Judge Glennie refused the application on 8th July 2022 (on paper). However, the reasons for refusal included a clear warning as to the risk of strike out (such a warning being a repeat of the warning made by Employment Judge Spencer on 18th May 2022). The Claimant was also warned that the making of an unless order is not a necessary pre-condition to the tribunal striking out her claim.

23. On 12th July 2022, the Respondent's solicitor wrote to the Claimant to point out that she had not complied with her own (self imposed) deadline of 11th July. The Claimant replied on the same day saying she had been working on the documents and had expected to submit them by the 11th July. She said she planned to send the documents within the week.

24. On the same date, the Claimant posted on Twitter that she had been involved with the Camden Climate Citizens Panel.

25. On 19th July 2022, the Respondent's solicitor again reminded the Claimant that the documents had not been supplied (8 days on from the 11th July date promised by the Claimant).

26. On 2nd August 2022, this application to strike out was made. The documents had still not been supplied. The Claimant replied on 7th August 2022 objecting to the application. In addition to her health, the Claimant explained her ability to comply had been impacted by ongoing delay since November 2021 for Access to Work support and her laptop and printer requiring repair in July 2022. She said that the documents were 95% complete. However, they had not been provided to the Respondent.

27. The Respondent's solicitor wrote to the tribunal on 22nd August 2022 to explain that the Claimant had still not complied (or sent the work which the Claimant said had been completed in her correspondence of 7th August 2022). Later that day, the Claimant sent The List and a draft of her medical evidence index to the tribunal and the Respondent's solicitor. The impact statement was not included and the index was incomplete. The List is detailed (although incomplete in parts) and set out as a table. The Respondent's solicitor wrote to the tribunal the next day complaining that The List did not comply with the original direction from the tribunal (examples given were that various alleged acts did not explain how they were said to be discriminatory). The Respondent's solicitor also said that the Claimant had not provided her actual medical evidence or impact statement. The Respondent requested a determination on the papers but the tribunal duly listed this hearing.

28. On 9th September 2022, as an adjustment for this hearing, Employment Judge Adkin directed that the Respondent serve a skeleton argument to enable the Claimant to focus on the arguments that the Respondent wished to make in respect of the application. This was duly provided.

29. On 13th September 2022, two days before this hearing, the Claimant completed her impact statement. This is a detailed document which clearly took the Claimant a considerable amount of time to complete. The statement is incomplete (various items are set out in red marked 'X' – to complete). During the course of the hearing, the Claimant confirmed that she could send the Respondent her medical evidence documents (after the hearing), but required more time to collate all of it.

Law

30. Rule 37 of the tribunal's Rules of Procedure provides:

> ***37.***—*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
> *(b) that the manner in which the proceedings have been conducted by or on*

behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

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

(d) that it has not been actively pursued;

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

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

…

31. An order striking out a claim on the basis that the proceedings have been conducted unreasonably (now Rule 37(1)(b)) is a draconic power, not to be too readily exercised. There must be unreasonable conduct which takes the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are satisfied, the tribunal must consider whether, even so, striking out is a proportionate response. This requires a structured examination and consideration of whether there is a less drastic means to the end (see **Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684; [2006] IRLR 630**).

32. As to Rule 37(1)(d) (claim has not been actively pursued): the House of Lords in **Birkett v James [1978] AC 297** identified the two bases for this ground:

    32.1. *Delay that is intentional or contumelious (disrespectful or abusive to the court), or*

    32.2. *There has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the Respondent.*

33. As to whether it is no longer possible to have a fair hearing in respect of the claim, the following authorities and principles are of assistance:

    33.1. **Riley v Crown Prosecution Service [2013] EWCA Civ 951; [2013] IRLR 966**. In this case, the Claimant was not fit to attend the hearing and would not be so fit until the expiry of two years. There was no prognosis and, on a balance of prejudice, the tribunal decided that a fair trial was not possible. The Court of Appeal observed that Article 6 of the European Convention on Human Rights emphasises that every litigant is entitled to 'a fair trial within a reasonable time'. The Court concluded that it would be wrong to expect tribunals to adjourn heavy cases, which are fixed for a substantial amount of time many months before they are due to start, merely in the hope that a Claimant's 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 the tribunal.

    33.2. **Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167.** Considerations as to a fair trial in this case were summarised as follows at paragraph 55:

a fair trial is 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.

33.3. **Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327 (EAT, Choudhury P)** (an unfair dismissal case which concerned strike out of the Response at the beginning of a 5 day final hearing). Choudhury P made the following observations of counsel for the Respondent's submission as to whether a fair trial is 'possible':

> ***19*** *I do not accept Mr Kohanzad's proposition that the power can only be triggered where a fair trial is rendered impossible in an absolute sense. That approach would not take account of all the factors that are relevant to a fair trial which the Court of Appeal in Arrow Nominees [2000] 2 BCLC 167 set out. These include, as I have already mentioned, the undue expenditure of time and money; the demands of other litigants; and the finite resources of the court. These are factors which are consistent with taking into account the overriding objective. If Mr Kohanzad's proposition were correct, then these considerations would all be subordinated to the feasibility of conducting a trial whilst the memories of witnesses remain sufficiently intact to deal with the issues. In my judgment, the question of fairness in this context is not confined to that issue alone, albeit that it is an important one to take into account. It would almost always be possible to have a trial of the issues if enough time and resources are thrown at it and if scant regard were paid to the consequences of delay and costs for the other parties. However, it would clearly be inconsistent with the notion of fairness generally, and the overriding objective, if the fairness question had to be considered without regard to such matters.*
>
> ***20*** *Mr Kohanzad's reliance on rule 37(1)(e) does not assist him; that is a specific provision, it seems to me, where the tribunal considers that it is no longer possible to have a fair hearing in respect of a claim, or part of a claim, that may arise because of undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons. However, that provision does not circumscribe the kinds of circumstances in which a tribunal may conclude that a fair trial is not possible in the context of an application made under rule 37(1)(b) or (c), where the issue is unreasonable conduct on the part of a party or failure to comply with the tribunal's orders or the Rules.*

33.4. Where there is an overlap between Rule 37(1)(d) and (e), the tribunal may consider the grounds together (**Abegaze Shrewsbury College of Arts & Technology [2009] EWCA Civ 96; [2010] IRLR 236)**.

Submissions

34. I do not set out here all of the submissions made by both parties, but I have had regard to all of the documentation in the bundle (having gone through the correspondence as part of my deliberation) and all of the oral and written

submissions made. I set out here a brief overview of the positions adopted by the parties:

Respondent

35. The Respondent says the tribunal should strike out on ground (b) – (e). Primary emphasis is placed on an unreasonable level of non-compliance with the tribunal's orders such that, one year on from the first hearing before Employment Judge Glennie, the litigation is no further forward and the final hearing is already fast approaching its second listing (starting 1st December 2022). It says that the Claimant has failed to pursue her claim and a fair trial is no longer possible within the listed trial window. The tribunal was told that it could have no confidence that there will be any change in approach by the Claimant whilst the Respondent continues to be put to further cost and delay. The Respondent is concerned that, as the case management orders become more onerous (disclosure, witness statements, preparing for final hearing), it will become more difficult for the claim to progress given the difficulties encountered to date.

36. The Respondent submitted that, of the documentation provided by time of the hearing, there is still material non-compliance meaning that the Respondent is unclear about the case it has to meet. The Respondent's solicitor's email to the tribunal of 23rd August 2022 emphasises the concern, because The List does not fully address what the allegations of discrimination actually are (only the facts). The loss of the 1 December 2022 hearing date (if it is determined this is necessary) exacerbates the prejudice the Respondent says it will continue to suffer if the claims are not struck out.

Claimant

37. The Claimant expressed how challenging the process has been, in respect of her ongoing health conditions and the impact on her concentration and ability to manage the documentation. She said she has done her best; the volume of documentation has been overwhelming at times, although she has been able to rely on the helpful support of her sister.

38. The Claimant explained that she is able to provide her medical records after this hearing save for those items marked with an X on her index (provided on 22nd August 2022). Those items will need to be collated and she was not sure how long that would take. It was accepted that the impact statement may need to be updated or completed.

39. The Claimant explained that she had a particularly difficult time in July which has impacted on her ability to comply. She explained that, having disabilities should not preclude her from being able to seek justice. The Claimant said she needed extra time as a reasonable adjustment and she was in the process of getting other adjustments in place (for example: accessibility software which will require time to be embedded).

40. The Claimant explained that 1st December 2022 was too soon for a final hearing. Her sister briefly spoke on her behalf and supported this submission. Ms Anwar explained that the Claimant would struggle to prepare for a hearing by this date. It was requested that the tribunal provide clarity and direct instructions for each task which the Claimant needs to complete with one date for each task.

Discussion and conclusions on the application

Which grounds under Rule 37 are engaged?

41. In my judgment, the primary reason for the early delays in progress and compliance with the tribunal's orders is the ongoing state of the Claimant's health. She has suffered debilitating effects from her conditions and medication at different times. Whilst she has the support of her sister, she is not represented and is managing this process without the administrative support which would otherwise be provided by a representative. Nothing in my decision is to suggest that the Claimant has not suffered from the effects of her conditions and medication, or that this has, at times, impacted on the tasks she has been required to complete as part of the case management orders. This does not mean that there have not been other priorities for the Claimant during the process. For example, the Claimant told Employment Judge Brown in March 2022 about her MBA course plans and, as set out above, during time critical points this year, the Claimant has been engaged in other activities (such as news items and community projects). I make no criticism of the Claimant for that; she is, of course, entitled to pursue her own work and interests whilst being involved, separately, in a tribunal claim. Such activities also do not undermine the ongoing difficulties she has encountered with her health. However, this evidence does go to Rule 37(1)(d), to which I shall return below.

42. In my judgment, this application is not one that properly comes within Rule 37(1)(b) or (c). This is because:

    42.1. The impact of the Claimant's health is such that I do not conclude that she is acting in a manner which is in deliberate and persistent disregard of the orders. The Claimant's health conditions have impacted on her ability to make progress. This has led to ongoing delay and missed deadlines but, in my judgment, it is not out of disregard for the tribunal or the Respondent. When the steps have been carried out (or partially carried out) the documentation has been detailed and plainly produced as a result of hard work and effort. Unfortunately, the steps are incomplete, but the Claimant is dealing with these tasks by herself and without representation.

    42.2. It does not amount to unreasonable conduct within the meaning of Rule 37(1)(b) because of the barriers the Claimant has faced with her health. The effect of the delay and prejudice to the Respondent, as set out below, is unreasonable, but that is not the test.

    42.3. As regards Rule 37(1)(c), this concerns strike out for non-compliance and is to be considered having regard to the overriding objective and proportionality. There is material non-compliance with a number of tribunal orders. However, non-compliance alone does not, in my judgment, warrant a strike out of the claim in the circumstances of this case. This is because of the Claimant's health as the primary reason for the early non-compliance and because, if non-compliance was the basis to consider strike out, it would be proportionate to make an unless order in the first instance. The Respondent has applied for an unless order on a number of occasions, all of which have been refused having regard to the Claimant's health and, in respect of the latest application, the difficulty of imposing an unless order in respect of a direction about providing better particulars of claim. The refusal of these applications is, in my judgment, indicative that the tribunal has not proceeded on the footing

that the Claimant refuses to comply. Having regard to the history, the Claimant would likely have struggled to comply with an unless order had one been made following the various applications.

Rule 37(1)(d) and (e)

43. The real problem caused by the non-compliance is one of fairness and prejudice and this engages Rule 37(1)(d) and (e). These two grounds overlap and, whilst I shall analyse them together, I address the tests for both grounds.

44. Regrettably, in my judgment, a fair trial is no longer possible in this case. The prejudice to the Respondent is such that the claims must be struck out and this is the only proportionate step the tribunal can take. My reasons for this conclusion are:

    44.1. As regards Rule 37(1)(d), there has been inordinate and inexcusable delay. I have not characterised the ongoing non-compliance with the tribunal's orders as unreasonable conduct for the purposes of Rule 37(1)(b), taking account of the Claimant's health. However, the *delay* is one particular feature of the non-compliance and, in my judgment, the point has now been reached where the delay is of a length which is inordinate and inexcusable:

        44.1.1. The claim was presented in May 2021 and first came before an Employment Judge for case management on 8th September 2021. Around one year on from this point, the Claimant is only now producing vital documents which state the case the Respondent is to meet and, at the hearing on 15th September 2022, has still not provided all of the medical evidence, a complete index of medical evidence documents and a complete impact statement.

        44.1.2. Further case management is required to go through The List and identify how all alleged acts are to be put in terms of the different claims. Further case management orders are required to direct dates by which the complete medical evidence is to be provided and when the impact statement is to be updated. Provision is then required to allow the Respondent to amend its Response, as may be required. These are the preliminary steps in setting out the case. The more onerous tasks of disclosure and witness evidence are to follow.

        44.1.3. Whilst the Claimant's health has been a barrier affecting her ability to get on and comply with the tribunal's orders, the last piece of evidence from the Claimant's GP explaining that she was not fit to comply with orders is dated 29th November 2021. On 1st April 2022, her GP requested more time for her to complete assignments on her study course but did not suggest her health meant she could not complete the work at all. By the hearing on 18th May 2022, a new date for compliance was ordered for 17th June 2022 and the Claimant then set about complying with the orders by 11th July 2022 (a date the Claimant imposed on herself). It was not contended at that hearing that the Claimant could not comply with orders at all. Accordingly, the tribunal has made a number of adjustments to enable the Claimant to progress her claim. These include: a.) setting out in structured form what is required; b.)

adjusting the dates for compliance; c.) making adjustments for the hearings to ensure the Claimant is better able to access the hearing and participate (adjustments such as her screen off and directing the Respondent to prepare its written argument in advance).

44.1.4. There have been three case management hearings and very little progress has been made. The delay is inordinate and inexcusable because, whilst the Claimant requires more time to complete the steps in the litigation than another litigant might, there has been sufficient time, in light of the limited medical evidence before the tribunal, to have completed all of the initial steps (The List, the medical records and impact statement) by the 17th June 2022 date (or a short, reasonable extension to that date). The Claimant has been involved in other professional, community or study activities during the course of this year and, in the circumstances, with the time adjustments allowed, can be expected to have made progress with the claim. As it stands, the steps to comply have given rise to the need for further case management which could only reasonably be completed by listing a further case management hearing.

44.1.5. The Claimant has also been warned by Employment Judges Spencer and Glennie as to the consequences of delay and the possibility of achieving a fair hearing. These warnings, in the context of the various adjustments to the timetable to see that the claim is progressed support a conclusion that the delay is inexcusable.

44.2. The delay, as defined above, gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the Respondent. This also engages Rule 37(1)(e). I have carefully considered the extent to which a fair hearing remains possible in the circumstances of this case. It is not possible because:

44.2.1. The Claimant and her sister both confirmed that the Claimant would not be ready for a final hearing on 1st December 2022. She requires more time. The Respondent shares the view that a 1st December hearing would be unlikely to go ahead. If the tribunal made case management orders towards this date (whether they had been set at the hearing on 15th September or after this judgment was sent to the parties), the Claimant would be expected to comply with a very pressured timetable which would be unrealistic. In any event, the claim is not ready to progress to disclosure and evidence. As above, a case management hearing would be required and the Claimant would need to complete these initial steps which were originally due to be complied with on 20th October 2021. It would not be possible to complete all of the necessary steps in order to have an effective hearing in December. Accordingly, the tribunal would have to re-list the final hearing for 7 days into the later part of 2023. This would be the second postponement of the final hearing (because of the Claimant's delay). This causes significant prejudice to the Respondent. It suffers the additional cost and delay of a further case management hearing whilst awaiting completion of the initial documents. It must also ask its witnesses to come to the tribunal up to nine months to

one year later than currently planned to give evidence about events back to 2019 and 2020.

44.2.2. A further postponement of this case will therefore cause significant and unnecessary prejudice to the Respondent. I have regard to Choudhury P's observations in **Emuemukoro.** Whilst that case concerned Rule 37(1)(b), assessing whether a fair trial is still possible is not to be considered in absolute terms. It is not in accordance with the overriding objective to simply postpone, re-list, conduct further case management hearings and set further timetables spanning over two years on the footing that, whatever the expense, a trial might be possible at the very end. That is not proportionate to the complexity and importance of the issues; it does not put the parties on an equal footing and would allow expense to spiral.

44.2.3. The limited medical evidence does not set out a current rationale to decide how and when the Claimant will be in a position to comply with a case management timetable which, necessarily and in accordance with the overriding objective, has to progress - step by step (i.e. after one task is performed, another will follow until the final hearing arrives). It is not said that the Claimant cannot currently comply with orders but the letter of 6th June 2022 vaguely refers to "when she is likely to be fit" (although I have taken into account what the position was in 2021 and have had regard to that in not labelling the overall non-compliance as unreasonable conduct). There is a lack of medical evidence addressing her prognosis in terms of managing this litigation in order to complete a fair hearing within a reasonable amount of time. In my judgment, the tribunal has made adjustments based on the information before it and facilitated an instructive timetable for the Claimant to follow. It is unclear how long the Claimant would need for a revised timetable to complete all tasks and have a final hearing but, having regard to the history and the Claimant's submissions at the hearing, I consider it likely that a case management hearing would be required in the coming weeks followed by a staged timetable with a final hearing at the end of 2023 or possibly early 2024. On balance, this is so prejudicial given the existing delay that it makes a fair hearing within a reasonable amount of time impossible.

44.2.4. Having regard to Choudhury P's observations in **Emuemukoro** where he said, obiter, that, as regards Rule 37(1)(e): such a conclusion *may arise because of undue delay or failure to prosecute the claim over a very substantial length of time, or for other reasons.* In the circumstances of this case, the parties are no further forward than the starting line. So little progress has been made in a year that the Respondent still does not know exactly what case it has to meet. There cannot yet be an Amended Response or a complete list of issues. The Respondent cannot confirm its position on disability (where it is in dispute). Having regard to: the fact that the tribunal does not have firm medical evidence advising as to what could be a practical timetable to assist the Claimant; the adjustments in place to facilitate compliance by the summer of this year and, in light of the loss of the hearing date in December with

the associated increase in cost, delay, impact on witnesses and further allocation of tribunal resources, I conclude that this is a rare case which has gone past the point of being able to secure a fair hearing for both parties within a reasonable amount of time.

Proportionality

45. I therefore step back to consider the proportionality of a decision to strike out the claims, having regard to the overriding objective. In my judgment, it is the only proportionate response to the position this litigation has now arrived at. It would be manifestly unfair to further postpone the final hearing late into next year and start the timetable all over again from the beginning (given that a case management hearing is required, as above, and significant further steps are needed to complete the documentation which has been provided shortly before this hearing). I balance that against any prejudice in respect of the Claimant. She loses the ability to continue her claims and, in part, the delays were because of her health. However, the medical evidence does not support a conclusion that the Claimant cannot comply at all and, by her own admission, the Claimant would not be ready for the final hearing as planned. I have considered whether there are further adjustments the tribunal can make with a reformulated timetable as part of this proportionality analysis. In my judgment, in this case, there are no such adjustments that have not already been arranged (including access to the hearing, additional time and instructions in the orders as to what is required). Further, the Claimant has, at times, prioritised other activities at time critical points (such as in July, when the deadline of 17th June had been missed and the Claimant's self-imposed date of 11th July was also missed). This supports the conclusion that whilst health may at several points have been a barrier, the extended timetable could have been properly met.

46. I have also considered whether the Respondent's alternative proposal of an unless order is a more proportionate response. In my judgment, this will not, at this stage, remedy the severity of the prejudice caused by vacating the final hearing in December. The parties will still need case management as explained above before specific directions could be set out (going into 2023), which are then the subject of an unless order. That will not mitigate the impact of the severe delay to the final disposal of this claim and, in the circumstances, would not be a response which is compatible with the overriding objective.

47. Finally, I have considered whether it is proportionate to limit the striking out to any particular claim brought in the ET1. However, all of the substantive issues concern the initial documents which have been in issue in this application. All of those claims would require further consideration at a case management hearing and, subsequently, substantial directions towards a postponed final hearing. In the circumstances, there is no basis to strike out one type of claim and not another.

Conclusion

48. For the reasons set out above, the claims are therefore struck out pursuant to Rule 37(1)(d) and (e). The hearing in December is accordingly vacated.

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Employment Judge Nicklin

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Date: 13th October 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13/10/2022

FOR THE TRIBUNAL OFFICE