EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104414/2022

Expenses / Strike Out Preliminary Hearing held in chambers at Glasgow on 2 February 2023

Employment Judge Ian McPherson

Mrs Jill Meikle	**Claimant** **Written representations by:** **Mr Stephen McNamee (Son) -** **and the Claimant herself**
Gas Call Services Limited	**Respondents** **Written representations by:** **Ms Amy Jervis -** **Senior Litigation Consultant** **[Peninsula Group Ltd]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal, having considered both parties' written representations in chambers, and that without the need for an attended oral Hearing, as previously agreed by both parties, with them consenting to matters being dealt with on the papers only, is that: -

(1) Having considered, at this Hearing, the respondents' opposed application of 19 December 2022 for a preparation time order against the claimant, in the sum of £151.20, inclusive of VAT, that application is **refused** by the Tribunal, for the reasons given in the undernoted Reasons.

(2) Further, having considered, at this Hearing, the respondents' further application of 19 January 2023 for dismissal of the claim, on the grounds of the claimant's failure to comply with the Tribunal's Unless Order made on 7 December 2022, and issued on 8 December 2022, the Tribunal **grants** that application, for the reasons given in the undernoted Reasons.

(3) Having granted that latter application, the Tribunal instructs that the clerk to the Tribunal shall forthwith issue to both parties written notice by the Tribunal, in terms of **Rule 38(1) of the Employment Tribunal Rules of Procedure 2013,** confirming that **the whole claim is dismissed by the Tribunal**, on the basis that the claimant has not fully complied with the Unless Order issued by Employment Judge Ian McPherson on 8 December 2022 requiring that the claimant provide additional information, namely further and better particulars of her disability discrimination claim, disability impact statement, and detailed schedule of loss, by not later than 4.00pm on Wednesday,18 January 2023, and that if she failed to comply with that Unless Order, her claim would be automatically dismissed on the date of non-compliance without further order.

(4) Accordingly, the Tribunal confirms that this case is at an end, and the further Case Management Preliminary Hearing, previously listed for Wednesday, 15 March 2023, to be conducted by CVP, is **cancelled**, and both parties will not require to attend.

(5) If, after issue of this Judgment to both parties, the claimant or her representative makes an application for relief from sanctions, **within 14 days of issue of this Judgment and attached Rule 38 Notice**, then the Tribunal **reserves** for further consideration, by Employment Judge Ian McPherson, whether or not the claimant should be granted relief from sanctions, and her claim resurrected.

REASONS

Introduction

1. This case was listed to call before me again on Friday, 27 January 2023, for an in chambers Hearing to determine two matters: (1) the respondents' application for expenses / preparation time order against the claimant; and (2) the respondents' application for the claim to be automatically struck out on the basis of the claimant's failure to comply with an Unless Order.

2. Notice of Hearing was issued to both parties, for information only, on 4 January 2023, stating that they were not required to attend, as the

Tribunal was dealing with matters on the papers, on the basis of written representations from both parties, neither party having sought an attended, oral Hearing.

3. On account of other judicial business that particular day overrunning, as explained to both parties in a letter from the Tribunal sent on 30 January 2023, it had to be relisted to a later date. I considered both of these matters at a re-arranged in chambers Hearing on Thursday, 2 February 2023, and in subsequent private deliberation in chambers.

Background

4. The claimant, acting on her own behalf, presented her ET1 claim form in this case to the Tribunal, on 12 August 2022, following ACAS early conciliation between 22 and 25 July 2022. Her claim was accepted by the Tribunal administration, and served on the respondent, then Lyndsey Robertson, on 16 August 2022. Then, as now, the claimant was a continuing employee of the respondents.

5. Thereafter, on 13 September 2022, an ET3 response, defending the claim, was lodged, on each respondents' behalf, by Ms Amy Jervis, senior litigation consultant with Peninsula, Manchester, for (1) Gas Call Services Ltd, and (2) Lyndsey Robertson, but only the response for Lyndsey Robertson was accepted by the Tribunal administration on 16 September 2022, on instructions from Employment Judge Peter O'Donnell, and copy sent to the claimant, and to ACAS.

6. Subsequent correspondence ensued between the claimant, the respondents' representative and the Tribunal, after the claimant emailed the Tribunal, on 18 September 2022, to say that she only wanted to sue the company, and not Ms Robertson.

7. On Tuesday, 11 October 2022, the claimant first appeared before me, on the telephone, as an unrepresented party litigant, at a first Case Management Preliminary Hearing, while the respondents were then

represented, on the telephone, by a Ms Elizabeth Evans-Jarvis, lead litigation consultant from Peninsula.

8. Having heard both parties, in the course of that telephone conference call Preliminary Hearing, I made various case management orders and directions, and I fixed Tuesday, 6 December 2022, at 10:00am, for up to 2 hours, as a further Case Management Preliminary Hearing, but this time to be held using the Tribunal's Cloud Video Platform ("CVP").

9. In particular, at that first Preliminary Hearing, of consent of both parties, having noted and recorded that the claimant wished her claim only to proceed against her employer, Gas Call Services Ltd, I granted an order sought by the respondents, in terms of **Rule 34 of the Employment Tribunal Rules of Procedure 2013,** and not opposed by the claimant.

10. Gas Call Services Ltd was substituted as the proper and only respondent, and the claimant's line manager, Ms Lynsey Robertson, identified as R2 in the respondents' ET response, was removed from the proceedings as having been wrongly included, when the claimant's ACAS early conciliation certificate issued on 25 July 2022 identified the limited company as the proposed respondent.

11. My written PH Note & Orders were sent to both parties under cover of a letter from the Tribunal dated 12 October 2022. I ordered the claimant to provide additional information, namely further and better particulars of her disability discrimination claim, disability impact statement, and detailed schedule of loss, by not later than 4.00pm on Tuesday, 8 November 2022. That PH Note signposted the claimant to where, she might be able to secure advice & assistance, if not representation, from, amongst others, Citizens Advice, and the Strathclyde University Law Clinic.

12. Due to an administrative error by the Tribunal staff, the case was, in fact, listed for Wednesday, 7 December 2022, and when this came to light, on 22 November 2022, I directed that it proceed on that later date, as per the Notice of Hearing issued on 13 October 2022, rather than the originally fixed date.

13. On 30 November 2022, the Tribunal emailed the claimant, on my instructions, stating that, having noted comments from the respondents' representative emailed the previous day, I had noted the claimant's failure to comply with the Tribunal's previous case management orders and directions, that she had failed to supply the additional information ordered, she had not sought any extension of time, and she was reminded that failure to comply with Tribunal orders can result in the Tribunal striking out a claim under **Rule 37**.

14. Even if she did not complete and return her own updated PH agenda (which had been due by 22 November 2022), the claimant was asked to consider the respondents' draft list of issues submitted on 29 November 2022, and clarify the basis of her own case, by no later than 12 noon on Monday, 5 December 2022. She failed to do so.

15. Thereafter, on Wednesday, 7 December 2022, the claimant again appeared before me, on the CVP videoconferencing platform, as an unrepresented party litigant, at a second Case Management Preliminary Hearing, while the respondents were then represented, on CVP, by Ms Amy Jervis, a senior litigation consultant with Peninsula.

16. In the course of that CVP Hearing, I allowed the claimant's son, Mr Stephen McNamee, to act as her lay representative. It was explained to me, by the claimant, that she was still trying to get representation from the Strathclyde University Law Clinic, whom she had approached, after the last Hearing, as signposted to her by me, but they were then unable to assist her as they were working at full capacity, and so unable to take on any new cases at that time.

17. In the course of that second Preliminary Hearing, the respondents' representative made an application to the Tribunal, as per Ms Jervis' email of 7 December 2022, sent at 12:06, stating as follows:

"Further to the adjourned preliminary hearing this morning, the Respondent expressed its intentions to make applications for an unless order or strike out.

On brief reflection, instead of requesting a hearing for the strike out application, we are of the view that it can be appropriately decided on the papers.

The Respondent's strike out application is on the basis that the Claimant has failed to comply with tribunal orders and is failing to actively pursue her case pursuant to Rules 37 (1) (c) and (d) of the ET Rules 2013.

Our application to strike out arises out of the following

1. *On 11 October 2022, what was required of the Claimant was explained to her in detail.*

2. *Written case management orders were subsequently sent, which detailed what was required of the Claimant by 8 November 2022(paragraph 7 of the CMO)*

3. *On 15 November, we wrote to the Claimant seeking the ordered further information and noted there had been no application to extend time.*

4. *On 15 November, we wrote to the Claimant's representative highlighting outstanding case management orders further noting there had been no application to extend time.*

5. *On 22 and 23 November 2022, the tribunal highlighted the non-compliance to Claimant.*

6. *On 30 November, 1 December and 5 December 2022, the tribunal reminded the Claimant of the need to comply with case management orders.*

Despite having 7 reminders of what was required, the Claimant has not done so, nor has she applied to extend time despite being aware she could do so.

The Claimant has not replied to any reminder to comply that she was confused or that she did not know what she was doing, nor did she assert that she had complied to some extent as has been asserted today.

The claim was submitted on 12 August 2022; some 4 months later the Respondent does not know the case that it has to meet as the Claimant has repeatedly failed to comply with orders and is failing to actively pursue her claims. It is submitted that in the circumstances, it is proportionate to strike out the Claimant's claims on the papers.

Alternatively, the Respondent applies for an unless order, requiring the Claimant to comply with paragraph 7 of the case management orders by 4pm on 22 December 2022 otherwise her claims will be dismissed in their entirety.

The Claimant is copied in on these applications and is hereby notified that should there be any objection, it should be put in writing to the tribunal and copied to us."

18. Having heard both parties, in the course of that CVP Preliminary Hearing, I made various case management orders and directions, and I fixed Wednesday, 15 March 2023, at 10:00am, for up to 2 hours, as a further Case Management Preliminary Hearing, again by CVP, for further case management, and to determine further procedure for a substantive Hearing in May, June or July 2023.

19. My written PH Note & Orders were sent to both parties under cover of a letter from the Tribunal dated 8 December 2022. I granted the claimant an extension of time to reply, and allowed her a further 6 weeks, by way of an Unless Order, explaining to her, and her son, that this was "***the last chance saloon***". That PH Note again signposted the claimant and her son to where they might be able to secure advice & assistance, if not representation.

20. Included within that written PH Note and Orders was Order (7) requiring the claimant's representative, within no more than 6 weeks from the date

of that Preliminary Hearing, i.e. by no later than 4.00pm on Wednesday, 18 January 2023, to supply certain defined additional information to the respondents' representative, by email, with copy sent at the same time to the Glasgow ET office, namely further and better particulars of her disability discrimination claim, disability impact statement, and detailed schedule of loss.

21. At Order (8) in that PH Note, it was stated therein, in bold red lettering, as follows:

"In terms of **Rule 38 of the Employment Tribunals Rules of Procedure 2013**, **UNLESS THIS ORDER (7) IS COMPLIED WITH BY THE DATE SPECIFIED, THE WHOLE CLAIM SHALL BE DISMISSED ON THE DATE OF NON-COMPLIANCE WITHOUT FURTHER ORDER."**

22. At that Preliminary Hearing, where the claimant confirmed that she remained unrepresented, but she was trying to get representation from Strathclyde University Law Clinic, I noted her situation. Further, and as set forth in my written PH Note, at paragraph 46, I explained briefly to the claimant about an **Unless Order** under **Rule 38**, and its effect if non-compliance, and **Strike Out** under **Rule 37**.

23. Further, and as I recorded at paragraph 59 of that PH Note, with the claimant getting upset, her son intervened and, with her consent, I agreed to allow him to speak for her as her representative. He stated that he did not object to an Unless Order being made by the Tribunal, but he queried why only 2 weeks to comply, as suggested by the respondents' representative.

24. Mr McNamee stated that he and the claimant would need more time, and he suggested maybe by mid-January 2023 would be better, as his mother did not need this stress, at this time of year, and that he was worried about her health and health risks. While Ms Jervis, for the respondents, felt the claimant had been given enough time already, I decided to grant a 6-week period for the claimant's compliance, on the basis of an Unless Order.

25. As I stated at paragraphs 62 and 63 of my PH Note, I did so whilst explaining to her, and her son, that this was "***the last chance saloon".*** In writing up that Note, I explained my reasoning. It was clear that the claimant wished to pursue her claim, and that she wished to do so actively, notwithstanding her failure to comply fully with earlier Orders of the Tribunal.

26. At paragraphs 64 and 64 of that PH Note, I stated that:

> *"64. Given the claimant's repeated failures to fully comply with my earlier Orders, made on 11 October 20222, I take this opportunity to remind her that it is **her claim**, and she requires to take ownership of it, as otherwise there is a real danger that the Tribunal may decide that she is not actively pursuing it, and strike it out under **Rule 37** for that reason.*
>
> *65. Active pursuit of a claim necessitates proper and active, timeous engagement in the Tribunal process. In terms of **Rule 2**, the claimant has a duty to assist the Tribunal to further the overriding objective and in particular to co-operate generally with the respondents and with the Tribunal. If she is to continue with her claim, she must focus on her role and responsibilities. In making Orders for Further & Better Particulars, etc, she is in the **"last chance saloon**"."*

Respondents' Costs application to the Tribunal, and Claimant's reply

27. On 9 December 2022, the respondents' representative, Ms Jervis, by email sent at 21:33, wrote to the Glasgow ET, with copy to Mr McNamee, as the claimant's representative, seeking a ***"costs order***" against the claimant, under **Rule 76(1)(a),** for its costs of attending the Hearing, and its work carried out in the adjournment from 10:00 am to 1:00 pm, totalling £180 plus VAT, being in the total sum of **£216.00**, inclusive of VAT, stating that:

"*Because of the claimant's continued non-compliance with case management orders, the hearing on 7 December 2022 did not achieve its purpose; proceedings could not be progressed any further than what they had been at the previous case management hearing of 11 October 2022",* and "… *in light of the claimant having seven reminders to comply with orders that this constitutes unreasonable conduct also meriting a costs order.*

28. Ms Jervis asserted that her application could be appropriately determined on the papers to save further costs being incurred and to save Tribunal resources.

29. Following referral of her application to me, the Tribunal wrote to both parties, by letter dated 12 December 2022, emailed to both parties, at 15:14, stating that:

"Following referral to the allocated Judge, Employment Judge I McPherson, I am instructed to advise both parties, as follows:

Mr McNamee, as the claimant's representative, must advise Glasgow Employment Tribunal in writing (with copy to Ms Jervis by same email) whether or not the respondent's application for expenses of £216 is opposed and, if so, on what basis. Reply within 7 days, i.e. by no later than 4pm on Monday, 19 December 2022.

If he wishes the claimant's financial means and ability to pay to be taken into account, as per Rule 84, then Mr McNamee must detail her current financial circumstances, including any savings or capital.

Judge McPherson is minded to deal with the expenses application on the papers, as suggested by Ms Jervis, and without an oral Hearing.

If the claimant's representative wishes an oral Hearing, then his reply to this correspondence should explain why he feels that is necessary in the interests of justice, if he can submit written objections setting out the claimant's position. In that event, he should provide a note of his

availability in January 2023 to attend an expenses Hearing conducted remotely by CVP.

As regards the respondent's position, Judge McPherson asks Ms Jervis to explain the basis of the hourly charge out rate, and provide reference to any case law authority on expenses to which she wishes to refer the Tribunal in support of her application. Reply within 7 days, i.e. by no later than 4pm on Monday 19 December 2022."

30. By email from Stephen McNamee, sent to the Glasgow Tribunal on 12 December 2022, at 16:55, and copied to Ms Jervis, for the respondents, it was stated on the claimant's behalf, as follows:

"I am writing in reply to the respondent's application for expenses to be paid following the proceedings of the 9th of December.

Jill Meikle would strongly oppose any charges for reasons that the incomplete documents had been assumed to have been sent by her sister and received by Amy Jervis and the court.

Given Jill has had no legal representation it's clear this played its part in this error and moving forward all documents will be lodged and completed by 18th January as per instruction by Judge McPherson."

31. By email from Ms Jervis to Glasgow ET, sent at 15:57 on 19 December 2022, and copied to Mr McNamee, the claimant's representative, it was stated as follows, in reply to the Tribunal's letter of 12 December 2022, namely:

"We continue to represent the Respondent in the above matter and write further to the tribunal's recent correspondence.

£60 per hour was submitted on the basis that this what Peninsula charge clients / insurance per hour for work carried out / attendance at tribunal. Further to the Court of Appeal in ***Lodwick v Southwark London Borough Council [2004] EWCA Civ 306, [2004] IRLR 554****, costs are intended to be compensatory, not punitive.*

However, on reflection, we wish to clarify it is a time preparation order. We appreciate that in these circumstances, Rule 79(2) of the ET Rules 2013 fixes the hourly rate at £42. As such, the basis of our application is £42 plus VAT (totalling £151.20).

*Costs awarded should be no more than is proportionate to the loss caused to the receiving party by the unreasonable conduct (**Barnsley Metropolitan Borough Council v Yerrakalva [2011] EWCA Civ 1255, [2012] IRLR 78**). Given that the rate charged is £60, and we are seeking to recover £42, such an award is proportionate.*

*Further, the Employment Appeal Tribunal has confirmed that costs are claimable notwithstanding that such costs are indemnified under an insurance policy (**Mardner v Gardner [2014] UKEAT/0483/13**).*

We note that the Claimant's representative did not oppose to the application being disposed of on the papers."

32. By letter from the Tribunal, emailed to parties on 20 December 2022, at 16:08, Mr McNamee was requested to provide his written comments on Ms Jervis's email, and to confirm whether he agreed with the application for expenses being dealt with on the papers, or did he request an oral Hearing.

33. Thereafter, by email sent to the Tribunal, on 27 December 2022, at 07:20, and copied to Ms Jervis for the respondents, Mr McNamee confirmed that : *"… we would not require an oral hearing and would be happy for this to be dealt with on the papers."*

Respondents' Strike Out application to the Tribunal, and Claimant's reply

34. Thereafter, on 19 January 2023, the respondents' representative, Ms Jervis, by email sent at 11:35, wrote to the Glasgow ET, stating as follows:

"We continue to act on behalf of the Respondent in the above case and write further to the Unless Order which the Claimant was required to comply with by 4pm Wednesday 18 January 2023.

The only document that the Respondent has received is a case management agenda on 19 December 2022 and we do not consider that there has been material compliance with the Unless Order at paragraph 7 of the CMO.

The disabilities relied upon have now changed from that understood to be the case as per paragraphs 42 and 49 of Case Management Summary. The Claimant did not object this and conveyed her disability were ones of mental health and diabetes. The agenda now makes no reference to any disability discrimination claim based on mental health and as such, we have no further and better particulars of this claim.

The Claimant has not sought to rely upon COPD as a disability within in her claim form, nor at the preliminary hearing. No permission to amend the claim was sought or given. This goes beyond the scope of the further and betters she was required to supply; it is a new claim.

The Claimant clarified at the preliminary hearing that the heads of claim she was pursuing was victimisation and failure to make reasonable adjustments (as per paragraph 50 of the Case Management Summary). However, the Claimant's agenda goes beyond that adding claims under s.15 and s.26 of the EqA 2010. Again, no permission to amend the claim was sought or given and there is no particularisation of a victimisation claim.

The Claimant has still failed to provide dates of any alleged discrimination so the Respondent still does not know the exact case it must meet.

There is no disability impact statement for the Respondent to be able to assess its position on whether the Claimant is or is not disabled. However, given that the Claimant has sought to introduce a further disability and abandoned one previously relied upon, the Respondent is not clear as to what it must respond to any event.

There has been no updated schedule of loss. 3.2 of the Claimant's agenda is insufficient. We still do not understand how the Claimant calculates her loss of earnings and how she claims such an entitlement.

As such, the Respondent respectfully requests that the tribunal strike out the Claimant's claim as the automatic consequence of a failure to comply with the Unless Order.

We are grateful for your assistance in this matter and look forward to hearing from you.

We confirm compliance with Rule 92."

35. Parties were advised, by correspondence from the Tribunal, sent on 20 January 2023, that the respondents' application for Strike Out had been passed to me, and that I would consider it at the same time as in the in chambers Expenses Hearing on 27 January 2023.

36. By email from the claimant to the CVP clerk, rather than the Glasgow ET inbox, the claimant emailed in, at 07:20 on 27 January 2023, stating as follows:

"Good morning, All

Hope is all well,

Could you please send the application you have made to strike out my claim,

At present I am unrepresented party even though I copy my son in and the Law Clinic,

I have the law clinic for assistance but cannot yet confirm whether they can represent me.

I have complied with the tribunal orders to the best of my ability.

Kind regards

Jill Meikle"

37. By further email from the claimant to the CVP clerk, rather than the Glasgow ET inbox, the claimant emailed in again, at 12:55 on 27 January 2023, stating that:

"Following my email I sent this morning, I would like to clarify that I object to the application which has been made to strike out my claim. As listed in my previous email, I am an unrepresented party. I have asked for assistance from the Strathclyde Law Clinic but they cannot yet confirm whether they can represent me. Additionally I have complied with the Tribunal's orders to the best of my ability."

In Chambers Hearing

38. On my instructions, both parties were advised by email from the Tribunal clerk, on 27 January 2023, that the claimant's e-mails of that date had been forwarded to me for consideration at that afternoon's in chambers Hearing, and that the Tribunal's written Judgment & Reasons would follow in due course, after my private deliberations in chambers. The claimant was asked to send all replies to GlasgowET@justice.gov.uk and not to a named individual in the Tribunal.

39. As explained to both parties in a letter from the Tribunal sent on 30 January 2023, this Expenses / Strike Out Hearing had to be relisted to a later date. I considered both of these matters at a re-arranged 3 hours in chambers Hearing on the afternoon Thursday, 2 February 2023, and in subsequent private deliberation in chambers.

40. In writing up this Judgment, I observe that other than the 3 cases cited in Ms Jervis' email of 19 December 2022, as detailed above, at paragraph 31 of these Reasons, both parties' written representations to the Tribunal were devoid of any reference to applicable case law authority from the higher Tribunals and Courts on the relevant law about how to approach a Preparation Time order/Strike Out application.

41. I make that comment as an observation, and not as a criticism of Mr McNamee, as the claimant's lay representative, as there had been no

earlier judicial order or direction that he should provide any list of statutory provisions, or relevant case law, on which he intended to rely, or make reference to, as often happens with this type of Preliminary Hearing where a claimant is professionally represented. It would not have been appropriate to order him, as a lay representative, to do so.

42. I recognised that, and I did not expect him to make any such citation of case law. As is the usual practice, with unrepresented, party litigants, and lay representatives, who are unfamiliar with the Tribunal, its practices and procedures, it is my responsibility, as presiding Judge, to apply the relevant law to the facts as I might find them to be in determining the case before this Tribunal.

43. As such, I have required to give myself a self-direction as regards the relevant law impacting on this claim before this Tribunal. While no evidence was led at this in chambers Hearing, given its nature, I have been able to narrate the chronology of events, and key dates, from the correspondence held on the Tribunal's case file.

44. What I did expect, but what Mr McNamee did not do, was for him to make written representations about the claimant's ability to pay if the Tribunal decided to make a Preparation Time Order in favour of the respondents.

45. Neither Mr McNamee, as her representative on record, nor the claimant herself, who sent in the last two emails to the Tribunal on 27 January 2023, have provided the Tribunal with any such information about her financial means to allow the Tribunal to assess her ability to pay. It is not clear to me whether that has not been done by design, or by default.

46. The Tribunal's correspondence of 12 December 2022 was clear and unequivocal. If he had wished the claimant's financial means and ability to pay to be taken into account, as per **Rule 84**, then Mr McNamee was informed that he must detail her current financial circumstances, including any savings or capital. He has failed to do so, and the claimant has not remedied that failure, by herself providing the Tribunal with such information.

47. As regards the respondents, I have had regard to Ms Jervis' reference to statutory provisions, and her cited case law, as referenced above at paragraph 31, earlier in these Reasons, but I have also required to give myself a self-direction on the relevant law, which I address later in these Reasons, at paragraphs 54 to 72 below.

Subsequent Representations from the Law Clinic on behalf of the Claimant

48. On 15 February 2023, there was referred to me, by the Tribunal clerk, an email from Strathclyde University Law Clinic, sent at 15:39 on 13 February 2023.

49. The emailed 4-page letter from the Law Clinic was acknowledged by the Tribunal, on 15 February 2023, and it was placed on the Tribunal's casefile.

50. Following instructions given by me, both parties were advised that I had directed that the Law Clinic's letter be filed, but no action taken thereon, at present, as it came far too late for my consideration as part of the written representations from both parties considered by me at the re-arranged in chambers Strike Out / Expenses Hearing held on 2 February 2023, in substitution for the Hearing originally listed for 27 January 2023, as intimated in the Tribunal's letter to both parties dated 30 January 2023.

51. In the Tribunal's letter to parties, on 15 February 2023, they were advised that I had a written Judgment and Reasons in preparation, and this would be issued to both parties' representatives as soon as possible. I apologised for the delay in this coming out, due to pressure of other judicial business, and sittings, but confirmed that I expected it to be completed, and promulgated to both parties, before expiry of the Tribunal administration's target of Judgments being issued within 28 days., i.e. on or before 2 March 2023.

52. While the Law Clinic had not come on record as the claimant's representative, I further instructed that a copy of the Tribunal's letter to both parties be copied to them, but stating that, unless and until Mr

McNamee, the claimant's son, withdraws from acting, and the Law Clinic confirms that they are on record, the Tribunal will only correspond going forward with the claimant's representative on record.

53. I did not require Ms Jervis to comment on the Law Clinic's letter, as I was not taking it into account, as it was not available to me on 2 February 2023 when I had my in chambers Hearing, and to have sought her comments would have resulted in further delay, and on cost to the respondents, and thus been inconsistent with the Tribunal's overriding objective in those respects, being contrary to avoiding delay and saving expense.

Relevant Law

54. I have given myself a self-direction on the relevant law.

55. It is for the claimant to have laid out her stall and put all her cards on the table before this Preliminary Hearing. In this regard, I refer to the Judgment of the Employment Appeal Tribunal in **Chandhok –v- Tirkey [2015] IRLR 195,** and in particular at paragraphs 16 to 18 of Mr Justice Langstaff's Judgment in **Chandhok**, where the then learned EAT President (now Lord Justice Langstaff, in the Court of Appeal of England & Wales) referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows: -

"16. …The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a in which disputes can be

resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with

it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

56. The power to strike out a claim has been described by the Court of Appeal as a '*draconic power not to be readily exercised*' (**James v Blockbuster Entertainment Ltd [2006] EWCA Civ 684**, Lord Justice Sedley, para 5). It is described as such because it can stop the claimant from proceeding with their claim without having their case considered and evidence reviewed fully at a full hearing. Hence, the power should be used sparingly.

57. As the Court of Session in Scotland held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances. It considered the wording of the then ET Rules of Procedure, but the current **Rule 37** is similarly worded.

58. In **Reilly**, as per paragraph 30 of the Opinion of the Court, delivered by the Lord Justice Clerk, it is recorded that:

"….Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts … There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions … But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out …"

59. As Lady Wise held, in the Employment Appeal Tribunal judgment in **Hasan v Tesco Stores Ltd [2016] UKEAT 0098/16**, there is a 2-stage test to a Strike Out application under **Rule 37**. The first stage is to consider whether any of the five stated grounds (a)-(e) in **Rule 37** have been established. Thereafter, a Judge has to consider whether or not to exercise the discretion in favour of striking out.

60. Support for that approach is found in the earlier EAT judgment of **HM Prison Service v Dolby [2003] IRLR 694**, where Mr Recorder Bower QC's judgment described a Deposit Order as the "***yellow card***" option, with Strike Out being described by counsel as the "***red card***."

61. Consequently, there is a very high threshold to strike out a claim for no reasonable prospects of success. In **Balls v Downham Market High School & College [2011] IRLR 217**, at paragraph 6, Lady Smith, the Court of Session judge sitting as an EAT judge, set out the procedure that must be followed when considering striking out a claim on the basis of no reasonable prospects of success:

"Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

62. It has been further highlighted in **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330**, where there are facts in dispute, it would only be

"*very exceptionally*" that a case should be struck out without the evidence being tested.

63. In writing up this Judgment, I have reminded myself that the proper approach to an application to strike out a discrimination case was summarised by Mr Justice Mitting, sitting as an EAT judge, in **Mechkarov v Citibank NA [2016] ICR 1121**, as follows:

> *"11. The approach to striking out applications in discrimination cases is not, with one reservation, controversial. The starting point is the observation of Lord Steyn in* ***Anyanwu v South Bank Student Union (Commission for Racial Equality intervening) [2001] ICR 391,*** *para 24: "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."*
>
> *12. Maurice Kay LJ emphasised the point in* ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126,*** *para 29: "It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words 'no reasonable prospect of success'. It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and*

inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

*13. To these statements of principle must be added the observations of the Lord Justice Clerk in the Court of Session in **Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755**, para, 30: "Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (**Balls v Downham Market High School and College [2011] IRLR 217**, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (**ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51**, Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (**ED & F Man …; Ezsias …**). But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (**Ezsias** …, Maurice Kay LJ, at para 29)."*

14. On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is

"conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed fact…."

64. I also remind myself that, in **Mbuisa v Cygnet Healthcare Ltd [2019] UKEAT/0119/18,** HHJ Eady QC (as she then was, now Mrs Justice Eady, President of the EAT) held at paragraph 21:

"*Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see* ***Hassan v Tesco Stores Ltd UKEAT/0098/16*** *at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in* ***Hassan*** *- the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."*

65. When considering whether a claim can be struck out on the grounds that the case has no reasonable prospects of success, I have also reminded myself that the Tribunal should consider the Employment Appeal Tribunal's judgment in the case of **Cox v Adecco [2021] ICR 1307.** It was stated there by His Honour Judge James Tayler, the EAT circuit judge, at paragraph 30, as follows:

"There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really

is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success."

66. I have also taken into account what Judge Tayler stated earlier in that **Cox** judgment, namely at his paragraphs 24 and 25, as follows:

> *24. Guidance for considering claims brought by litigants in person is given in the Equal Treatment Bench Book ("ETBB"). In the introduction to Chapter 1 it is noted, in a very well-known passage:*
>
> ***"Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.***
>
> ***The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.***
>
> ***Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.***
>
> ***All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a***

problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants."

25. At para. 26 of Chapter 1 ETBB, consideration is given to the difficulties that litigants in person may face in pleading their cases:

"Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:

- ***Failing to choose the best cause of action or defence.***
- ***Failing to put the salient points into their statement of case.***
- ***Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any legal label at all. <u>Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess.</u>" [<u>emphasis added</u>]***

67. Further, I have taken into account Judge Tayler's further sage guidance at his paragraphs 28 to 34 in **Cox**, as follows:

"28. From these cases a number of general propositions emerge, some generally well-understood, some not so much:

(1) No-one gains by truly hopeless cases being pursued to a hearing;

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;

(3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;

(4) The Claimant's case must ordinarily be taken at its highest;

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the

possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the

claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.

31. Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise

an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focussed as possible.

33. I have referred to strike out of claimants' cases, as that is the most common application, but the same points apply to an application to strike out a response, particularly where the respondent is a litigant in person.

34. In many cases an application for a deposit order may be a more proportionate way forward."

68. On the matter of expenses in Employment Tribunal cases in Scotland, I need refer to only one reported case law authority, not cited by the respondents' representative, Ms Jervis, and that is the Employment Appeal Tribunal judgment by Mrs Justice Simler, then President of the EAT, in **Haydar v Pennine Acute NHS Trust [2017] UKEAT 0141/17,** at paragraph 25 of her judgment, namely:

"The words of the Rules are clear, and require no gloss as the Court of Appeal has emphasised. They make clear (as is common ground) that there is, in effect, a three-stage process to awarding costs. The first stage - stage one - is to ask whether the trigger for making a costs order has been established either because a party or his representative has

behaved unreasonably, abusively, disruptively or vexatiously in bringing or conducting the proceedings or part of them, or because the claim had no reasonable prospects of success. The trigger, if it is satisfied, is a necessary but not sufficient condition for an award of costs. Simply because the costs jurisdiction is engaged, does not mean that costs will automatically follow. This is because, at the second stage - stage two - the tribunal must consider whether to exercise its discretion to make an award of costs. The discretion is broad and unfettered. The third stage - stage three - only arises if the tribunal decides to exercise its discretion to make an award of costs, and involves assessing the amount of costs to be ordered in accordance with Rule 78. Ability to pay may be considered, both at the stage two exercise of discretion and at stage three when determining the amount of costs that should be paid."

69. Finally, in deciding upon my decision on the two issues before the Tribunal at this in chambers Hearing, I have had regard to the specific statutory wording set forth in the **Employment Tribunals Rules of Procedure 2013**.

70. As regards the Tribunal's overriding objective, **Rule 2** provides as follows:

"***Overriding objective***

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

71. As regards expenses and preparation time, **Rules 74 to 84**, so far as material for present purposes, provide as follows:

COSTS ORDERS, PREPARATION TIME ORDERS AND WASTED COSTS ORDERS

Definitions

74.—

(1) "Costs" means fees, charges, disbursements or expenses incurred by or on behalf of the receiving party (including expenses that witnesses incur for the purpose of, or in connection with, attendance at a Tribunal hearing). In Scotland all references to costs (except when used in the expression "wasted costs") shall be read as references to expenses.

Costs orders and preparation time orders

75.—

(1) A costs order is an order that a party ("the paying party") make a payment to—

(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative; …

(2) A preparation time order is an order that a party ("the paying party") make a payment to another party ("the receiving party") in respect of the receiving party's preparation time while not legally represented. "Preparation time" means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.

(3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.

When a costs order or a preparation time order may or shall be made

***76**.—*

(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success; or …

(2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Procedure

***77**. A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment*

finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.

The amount of a costs order

78.—

(1) A costs order may—

(a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party;

(b) order the paying party to pay the receiving party the whole or a specified part of the costs of the receiving party, with the amount to be paid being determined, in England and Wales, by way of detailed assessment carried out either by a county court in accordance with the Civil Procedure Rules 1998, or by an Employment Judge applying the same principles; or, in Scotland, by way of taxation carried out either by the auditor of court in accordance with the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, or by an Employment Judge applying the same principles;

(c)…

(d) …

(e) if the paying party and the receiving party agree as to the amount payable, be made in that amount.

(2) Where the costs order includes an amount in respect of fees charged by a lay representative, for the purposes of the calculation

of the order, the hourly rate applicable for the fees of the lay representative shall be no higher than the rate under rule 79(2).

(3) For the avoidance of doubt, the amount of a costs order under sub-paragraphs (b) to (e) of paragraph (1) may exceed £20,000.

The amount of a preparation time order

79.—

(1) The Tribunal shall decide the number of hours in respect of which a preparation time order should be made, on the basis of—

(a) information provided by the receiving party on time spent falling within rule 75(2) above; and

(b) the Tribunal's own assessment of what it considers to be a reasonable and proportionate amount of time to spend on such preparatory work, with reference to such matters as the complexity of the proceedings, the number of witnesses and documentation required.

(2) The hourly rate is £33 and increases on 6 April each year by £1.

(3) The amount of a preparation time order shall be the product of the number of hours assessed under paragraph (1) and the rate under paragraph (2).

*[Note by Tribunal: The hourly rate, as of 6 April 2022, is **£42.**]*

Ability to pay

***84**. In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.*

72. As regards Unless Orders, **Rule 38(1) and (2)** provide as follows:

Unless orders

38.—

(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.

(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

Discussion and Deliberation

73. In my private deliberation in chambers, I have now carefully considered both parties' written representations, and also my own obligations under **Rule 2 of the Employment Tribunal Rules of Procedure 2013,** being the Tribunal's overriding objective to deal with the case fairly and justly.

74. I consider that both parties have been given a reasonable opportunity, at this Hearing, held of consent of both parties in chambers, and on the papers only, to make their own written representations to me pursuing, and opposing, as the case may be, the respondents' applications for expenses / preparation time order against the claimant, and for the automatic dismissal of the claim on the basis of the claimant's failure to comply with the Unless Order.

75. While this Hearing was held in chambers, and without parties in attendance, as agreed with both parties' representatives, in earlier

correspondence with the Tribunal, I must note and record that, on the morning of the date originally assigned for this Hearing, being 27 January 2023, the Tribunal received two emails from the claimant herself, the terms of which I have already reproduced above, at paragraphs 36 and 37 of these Reasons.

76. In those two emails, the claimant (rather than her son, Mr McNamee, as her lay representative on record) clarified that she objects to the application which has been made to strike out her claim, and she prays in aid that she is an unrepresented party, who has asked for assistance from the Strathclyde University Law Clinic, and she further states that:" ***I have complied with the Tribunal's orders to the best of my ability."***

77. The claimant does not refer to Mr McNamee no longer being her representative, although she does refer to herself as "***unrepresented"***. The situation is thus confused and confusing, so I have instructed the clerk to the Tribunal to send this Judgment, and attached **Rule 38** Notice, to both the claimant and Mr McNamee on a "***belt and braces***" approach.

78. Mr McNamee's last correspondence with the Tribunal was on 27 December 2022, as I record at paragraph 33 above, earlier in these Reasons, and before that, on 12 December 2022, as recorded at paragraph 30 above, when he "***strongly opposed***" the respondents' application for expenses, and he stated that the claimant having " ***no legal representation it's clear this played its part."***

79. I have taken that into account as the claimant's representations, under **Rule 77,** to the respondents' application for a preparation time order. No representations have been made, in terms of **Rule 84**, about the claimant's ability to pay. I have taken the claimant's emails of 27 January 2023 as her written representations, opposing Strike Out, under **Rule 37(2)**.

80. The Tribunal is always mindful of the need to assist those representing themselves, acknowledging the need to ensure that the parties are on an equal footing. However, it is the claimant who brings the claim and makes

the allegations, and it is the claimant who must take responsibility for managing the case and treating it with the seriousness and importance that any legal proceedings deserve.

81. Giving assistance to a lay party litigant does not mean doing the claimant's job for them. The Tribunal's Orders and directions are not aspirational, and they must be complied with. Accordingly, I have looked at the Tribunal's casefile to see what, in fact, has happened since I issued the Unless Order.

82. The answer is short and easily ascertainable. There has been no material compliance with the Unless Order. On 7 December 2022, at the second Case Management Preliminary Hearing before me, the claimant advised me that she found "***legal jargon"*** hard to understand – see my PH Note at paragraph 37.

83. While I do not doubt that that is the case, and that she has been suffering from ill-health while absent from work on sick leave, she is in the same position as very many other claimants, yet they manage to communicate effectively with the Tribunal, and comply with its Orders and directions.

84. In this case, we know, that the claimant has had assistance from her sister, Carol Westbury (who emailed her first PH Agenda to Glasgow ET on 23 August 2022, stating that "***She is awaiting her doctor writing her a letter to substantiate her case***"), then representation, for a short while, from Cumbernauld Poverty Action, before they withdrew from acting for her, and she then sought advice from Strathclyde University Law Clinic, where I had signposted her to go and get advice on her case. More recently, her son, Mr McNamee, has stepped forward and acted as her lay representative.

85. The Tribunal's Orders, originally made at the first Case Management PH, and then replicated in the Unless Order, required the claimant to provide additional information, namely further and better particulars of her disability discrimination claim, disability impact statement, and detailed schedule of loss.

86. The first PH Agenda, submitted by her sister, in August 2022, was incomplete. It was copied to the respondents, by the Tribunal, after the first Case Management PH, in October 2022. When the claimant confirmed it, at the second Case Management PH, in December 2022, she did so only changing one item, as recorded in my second PH Note, at paragraph 49, which was to reduce the amount of compensation sought from the respondents from **£30,000**, to **£5,000**.

87. Mr McNamee's email of 12 December 2022 refers to the claimant's GP medical records, which were produced to the Tribunal, and copied to Ms Jervis for the respondents, but there was no medical report on the claimant's disability status.

88. No schedule of loss has been provided for the claimant - the only information provided is in the handwritten comment, in section 3.3 of the claimant's PH Agenda from August 2022 stating that **£30,000** is sought as financial compensation from the respondents, but with no detailed explanation of how that amount had been calculated, other than stating "***holiday pay and length of time on sick***."

89. Despite signposting to the CAB Scotland website, on how to prepare a schedule of loss, and showing a template document, no such document has been provided on behalf of the claimant. Similarly, no explanation has been provided to show how the now reduced amount of **£5,000** has been calculated.

90. In these circumstances, had it not been for the Unless Order, the Tribunal is likely to have been asked by the respondents, and granted a Strike Out of the claim, in terms of **Rule 37(1)(c) & (d)**, for failure to actively pursue the claim, and failure to comply with Orders of the Tribunal.

91. There having been material failure to comply with the Unless Order, automatic dismissal of the claim is the consequence, as the claimant and her representative were forewarned at the second Cas Management PH. Mr McNamee's email of 12 December 2022 spoke of "***moving forward***

all documents will be lodged and completed by 18th January as per instructions by Judge McPherson." We know now that they were not.

Disposal

92. In these circumstances, I have instructed that the clerk to the Tribunal to forthwith issue to both parties written notice by the Tribunal, in terms of Rule **38(1) of the Employment Tribunal Rules of Procedure 2013,** confirming that the whole claim is dismissed by the Tribunal, on the basis that the claimant has not fully complied with the Unless Order made by me on 7 December 2022, and issued to parties the following day, along with my written PH Note & Orders.

93. On the matter of the preparation time order, I have decided, after careful and anxious consideration, to refuse the respondents' application. Initially, of course, it was made by Ms Jervis, in terms of **Rule 76(1)(a),** on the basis of the claimant's unreasonable conduct, rather than she had acted vexatiously, abusively or disruptively, but not on the basis of the claim having no reasonable prospect of success under **Rule 76(1)(b),** nor breach of a Tribunal order or direction under **Rule 76(2).**

94. Now, as the respondents' application is pled before me, it is seeking a preparation time Order under **Rule 79(2).** It seeks the costs of attending the Preliminary Hearing on 7 December 2022, and work carried out by Ms Jervis in the adjournment. 3 hours is claimed, which ties in with my PH Note recording that the second Case Management PH stated at 10:05am, and concluded at 1:00pm, with an adjournment of proceedings, between somewhere after 10:21 am, and before12:30pm.

95. Costs / expenses in the Employment Tribunal do not simply follow the event. They are still the exception rather than the rule. Although regard may be had to the conduct of the claimant, as the potential paying party, to found such an award, a costs / expenses order remains compensatory and not punitive. The receiving party is to be compensated for the expenses to which they have been unreasonably put by the other party. However, even where there is unreasonable conduct, that of itself will not

be sufficient. The Tribunal still has to decide whether it is appropriate to exercise its discretion to award costs / expenses.

96. This is not a case where I am being asked to assess costs / expenses after a full merits hearing of the case after a Final Hearing. While the actual contractual relationship between Peninsula and the respondents has not been explained to me by Ms Jervis, it seems to be the case that the respondents are represented by Peninsula as an insurer, and as such it is not clear to me how they are out of pocket.

97. As costs / expenses are to be compensatory not punitive, if the respondents have already paid a premium to Peninsula to represent them, and they are covered by whatever is that arrangement, insurer to insured, then I do not see what costs are to be paid by the respondents to Peninsula.

98. Ms Jervis referred to a £60 per hour charge out rate, so it looks like there is maybe some payment arrangement. Be that as it may, the matter has not been made transparent to me, and so I am not satisfied that the respondents have in fact been charged, and paid, any amount to Peninsula. Nothing is vouched by any documents provided by Ms Jervis.

99. As such, while satisfied that the claimant's conduct complained of can be described as unreasonable, and so found an award of costs / expenses in favour of the respondents, I have decided not to make any such Order, reading the claimant's conduct as related to her party litigant status, and not related to anything adverse on her part to simply spite the respondents, or put them to an unnecessary expense out of some act of vengeance.

100. Even if I am wrong on that point, I do not consider it appropriate to make any award on account that I am not satisfied that the claimant has the ability to pay. Put simply, I have no information before me as regards the claimant's ability to pay any order, if I were to make such an order against her.

101. While invited to make representations, neither she nor her son have done so. I cannot read into that that the claimant must have funds to meet the amount of the preparation time Order sought by Ms Jervis on behalf of the respondents. As far as I am aware, from briefly discussing the claimant's circumstances with her, at two Case Management PHs, she remains an employee of the respondents, but on sick leave. I have no information as to her pay (if any) while on sick leave. I have no information as to hr financial circumstances, nor any capital or savings.

102. From the ET1 claim form, and ET3 response, the respondents admit that the claimant is employed by them, as a service administrator, working 40 hours per week, for a gross wage of £1,716 pay before tax, and £1,332.2 monthly net normal take home pay.

103. From documents produced to the Tribunal, by her, on 6 December 2022, the claimant is in receipt of Personal Independence Payments from the Government at the rate of standard £59.70 and enhanced £62.25 per week for her daily living needs and mobility needs respectively.

104. While the claimant's email described her October 2021 PIP letter as evidence of her disability, the Tribunal has explained to her that disability has a technical, legal definition. Indeed, at paragraph 30 of my first PH Note, I made it clear to the claimant that while she saw her PIP payment from DWP, and her disabled Blue Badge, as vouching her disability status, I informed her that there is a legal definition of disability, in **Section 6 of the Equality Act 2010**, and she needs to clarify her case by reference to that statutory definition. She has failed to do so, despite numerous opportunities.

105. As far as I am aware, on the very limited information available to me, the claimant is a lady living in modest financial circumstances. As such, even if I was satisfied that a preparation time order should be made, the respondents being successful at stages 1 and 2 of the **Haydar** test, having considered the whole picture, and having regard to all relevant factors, I

would not trigger an award against her, having regard to her financial circumstances, and her ability to pay.

Closing Remarks

106. In closing, I wish to note and record that the claimant presented a fairly short claim form which, in my view, cried out for further information as to the legal basis of her claim, but despite earlier Orders / directions by the Tribunal, clear and unequivocal in their terms, the claimant in effect has done nothing to explain what is the legal basis to her claim that lies within the jurisdiction of the Employment Tribunal.

107. I am reminded of the comments of Her Honour Judge Kathrine Tucker in the unreported case of **Mr W Khan v London Borough of Barnet** [**2018] UKEAT/0002/18,** in which, at paragraph 31, she states: "***Being a litigant in person does not mean that a litigant is exempt from compliance with procedures or from engaging in the litigation process to pursue a claim."***

108. Similarly, the circumstances of this case also remind me of the more well known, familiar and often cited Employment Appeal Tribunal judgment in **Rolls Royce plc v Riddle [2008] IRLR 873** and the comments of Lady Smith, then an EAT judge, at paragraph 20 of that report, where she stated: ***"….it is quite wrong for a claimant, notwithstanding that he has, by instituting a claim, started a process which he should realise affects the employment tribunal and the use of its resources, and affects the respondent, to fail to take reasonable steps to progress his claim in a manner that shows he has disrespect or contempt for the tribunal and / or its procedures. In that event a question plainly arises as to whether, given such conduct, it is just to allow the claimant to continue to have access to the tribunal for his claim. …"***

109. Further, I am also reminded of the judicial guidance, per Mr Justice Langstaff, then President of the Employment Appeal Tribunal, in **Harris v Academies Enterprise Trust & Ors [2015] IRLR 208**, at paragraph 40 of his judgment, that: "…***Rules are there to be observed, orders are***

there to be observed, and breaches are not mere trivial matters; they should result in careful consideration whenever they occur…".

110. Yes, strike out of a claim is a Draconian step. However, in my view, given the circumstances of this specific case, it is not proportionate for further Tribunal resources, both administrative and judicial, to be taken up in dealing with this case. Accordingly, the claim is struck out.

Employment Judge: **G.I. McPherson**
Date of Judgment: **01 March 2023**
Entered in register: **01 March 2023**
and copied to parties