EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102860/2022 (V)

Held in Glasgow on 23 January 2023

(Preliminary Hearing in public and conducted remotely by Cloud Video Platform)

Employment Judge Ian McPherson

Miss Gillian Sinclair	**Claimant** **In Person**
Sensee Limited	**Respondents** **Represented by:** **Ms Priya Cunningham - Trainee Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved Judgment of the Employment Tribunal, having heard from the claimant in person, and the respondents' representative, at this Preliminary Hearing, and having thereafter considered, in private deliberation in chambers, both parties' written and oral submissions, is that:

(1) The claimant's then lay representative, having, at the third telephone conference call Case Management Preliminary Hearing in this case, held on 5 December 2022, before Employment Judge Amanda Jones, withdrawn the claimant's complaints of alleged breach of **Section 3(1) of the Health and Safety at Work Act 1974**, and alleged breach of the data protection provisions of the **General Data Protection Rights** ("GDPR"), as it was accepted that the Tribunal does not have jurisdiction to consider such claims, the Tribunal notes and records that those heads of complaint, having been withdrawn by the claimant in terms of **Rule 51 of the Employment Tribunal Rules of Procedure 2013**, are now formally dismissed by the Tribunal in terms of its powers under **Rule 52.**

(2) Having considered both parties' submissions as advanced by them at this Preliminary Hearing, the Tribunal finds that the claimant's complaints against the respondents, as specified in her ET1 claim form, presented on 19 May 2022, as later augmented by her further and better particulars, were presented out of time, and that it is not just and equitable, in terms of **Section 123 of the Equality Act 2010**, to extend the time for bringing her claim against the respondents.

(3) Further, and in any event, the Tribunal **grants** the respondents' opposed application to strike out the entire claim as having no reasonable prospects of success, in terms of **Rule 37(1) of the Employment Tribunal Rules of Procedure 2013**, and so dismisses the claim against the respondents in its entirety.

(4) In these circumstances, the Tribunal finds it unnecessary to consider the respondents' opposed application for the claimant to pay a deposit order, in terms of **Rule 39 of the Employment Tribunal Rules of Procedure 2013,** as a condition of continuing to advance her allegation of unlawful disability discrimination against her by the respondents.

REASONS

Introduction

(1) This case first called before me as an Employment Judge sitting alone at the Glasgow Employment Tribunal for a one-day public Preliminary Hearing by CVP on Monday, 23 January 2023, further to Notice of Preliminary Hearing issued by the Tribunal to both parties on 7 December 2022, as set down by Employment Judge Amanda Jones at a telephone conference call Case Management Preliminary Hearing held before her on 5 December 2022.

(2) The case was listed to consider whether the claim should be struck out under **Rule 37 of the Employment Tribunal Rules of Procedure 2013** on the grounds that it has no reasonable prospects of success, and also to consider whether a Deposit Order should be made under **Rule 39**.

(3) Only recently have I managed to complete my private deliberation in chambers, and progress to issue of this my finalised Judgment, and for the resultant delay, I again apologise to both parties, further to the written apology previously issued by the Tribunal, on my behalf.

Claim and Response

(4) On 19 May 2022, following ACAS early conciliation between 1 and 22 April 2022, the claimant, acting through her then representative, Catherine McLean, presented her ET1 claim form against the respondents, complaining of discrimination on the grounds of disability, arising from the termination of her employment on 18 November 2021.

(5) Although the claim appeared to have been presented outwith the 3-month statutory period for making a claim, the claim was accepted out of time by the Tribunal administration, and served on the respondents on 23 May 2022, requiring an ET3 response by 27 June 2022, and the case was listed for a telephone conference call Case Management Preliminary Hearing on 18 July 2022. Parties were advised that the Tribunal would have to decide, as a preliminary issue, whether the claim should be allowed to proceed.

(6) Thereafter, on 17 June 2022, an ET3 response was lodged on behalf of the respondents by their then solicitor, Mrs Balbir Bird, from Rradar solicitors, Birmingham, defending the claim. That response was accepted by the Tribunal, on 20 June 2022, and, following Initial Consideration by Employment Judge David Hoey, on 21 June 2022, he instructed that the case proceed to the listed telephone conference call Case Management Preliminary Hearing on 18 July 2022.

Earlier Preliminary Hearings and Case Management

(7) On 18 July 2022, the case first called before Employment Judge Peter O'Donnell, for a private, Case Management Preliminary Hearing, conducted remotely, by telephone conference call, where the claimant was represented by Ms McLean, while the respondents were represented by Mr Perry, counsel.

(8) The claimant was ordered to provide further information and specification in respect of each act of discrimination complained of, and to do so within 28 days, and the respondents were allowed 28 days to revise their ET3 response to reflect the claimant's further specification. A further Case Management Preliminary Hearing was listed for 19 September 2022 to review the revised pleadings and make further case management orders.

(9) Thereafter, on 14 August 2022, the claimant's representative, Ms McLean, provided Glasgow ET and Mrs Balbir with additional information, with details of the claimant's accusations of discrimination. On 9 September 2022, Mrs Balbir provided the respondents' updated grounds of resistance, in response to the claimant's further information provided on 14 August 2022.

(10) The Case Management Preliminary Hearing listed for 19 September 2022 did not go ahead, as that day was the funeral of HM Queen Elizabeth II. It was relisted, on 15 September 2022, for 3 October 2022.

(11) On 30 September 2022, Ms Priya Cunningham, trainee solicitor with Rradar solicitors, Glasgow, having assumed representation of the respondents, wrote to the Glasgow ET, with copy to the claimant, providing the grounds for the respondents' Strike Out application (at paragraph 22 of their updated grounds of resistance), under **Rule 37**, or, in the alternative, a Deposit Order, under **Rule 39,** as also seeking an order for further information from the claimant as the respondents did not accept that she was a disabled person for the purposes of **Section 6 of the Equality Act 2010.**

(12) On 3 October 2022, the case then called again before Employment Judge Peter O'Donnell, for a second private, Case Management Preliminary Hearing, conducted remotely, by telephone conference call, where the claimant was again represented by Ms McLean, while the respondents were represented by Ms Cunningham, trainee solicitor.

(13) Judge O'Donnell ordered the claimant to provide further information, and specification in respect of each act of discrimination complained of, and to do so within 28 days, and the respondents were allowed 28 days to revise their ET3 response to reflect the claimant's further specification, and to confirm

whether or not the issue of time-bar was insisted upon, and whether or not the Strike Out application was insisted upon.

(14) Further, Judge O'Donnell also ordered the claimant to provide further information, and any medical evidence or records in her possession which she relies upon in support of her position that she is a disabled person, and to do so within 28 days, and the respondents were allowed 28 days to confirm whether or not they concede that the claimant is disabled and, if not, the basis on which that is disputed.

(15) A further Case Management Preliminary Hearing was listed by Judge O'Donnell for 5 December 2022.

(16) Thereafter, on 29 October 2022, the claimant's representative, Ms McLean, provided Glasgow ET and Mrs Balbir with additional information, with details of the claimant's accusations of discrimination. On 31 October 2022, Mrs Balbir reminded Ms McLean that Ms Cunningham now had conduct of this matter, on behalf of the respondents, and all future emails should be addressed to her.

(17) On account of Employment Judge O'Donnell having a previous connection with Ms Cunningham, as disclosed in his PH Note & Orders dated 4 October 2022, the case was reallocated to me.

(18) On 28 November 2022, Ms Cunningham advised the Glasgow ET, with copy to Ms McLean for the claimant, that the respondents did not intend to lodge amended grounds of resistance at that stage, but reserved their position on amending their defence at a later date, and stating that, as the respondents did not consider that the claimant had complied with the Tribunal's order to provide further and better particulars, she was awaiting client instructions in relation to the Strike Out application.

(19) Thereafter, on 2 December 2022, Ms Cunningham advised the Glasgow ET, with copy to Ms McLean for the claimant, that the respondents' Strike Out application still stood, and the respondents do not accept that the claimant was a disabled person.

(20) On 5 December 2022, the case then called before Employment Judge Amanda Jones, for a third private, Case Management Preliminary Hearing, conducted remotely, by telephone conference call, where the claimant was again represented by Ms McLean, while the respondents were again represented by Ms Cunningham, trainee solicitor.

(21) Judge Jones, having heard from both parties' representatives, ordered that this Preliminary Hearing be listed to consider Strike Out / Deposit Order. The claimant having been given two opportunities to set out a stateable claim, Judge Jones did not consider it to be in keeping with the Tribunal's overriding objective to make further orders in that regard.

Case Management Orders and Directions issued for this Preliminary Hearing

(22) Thereafter, on 5 January 2023, the casefile having been referred to me, as the allocated Judge, I had the Tribunal clerk write to both parties, on my instructions, with case management orders made by me, in exercise of my general case management powers, under **Rule 29**, and acting on my own initiative, for the good and orderly conduct of this Preliminary Hearing, as follows:

*(1) To put the claimant's lay representative on an equal footing with the respondents' legal representative , in terms of **Rule 2**, the Tribunal **orders** that the respondents' representative shall prepare and intimate to the claimant's representative, by email, with copy sent at the same time to the Glasgow ET office, at least than 7 days before the start of the Preliminary Hearing, i.e., **by no later than 10:00am on Monday, 16 January 2023,** a **skeleton written argument** (in Word format, not PDF) setting out the factual and legal basis of the respondents' application for Strike Out of the claim under **Rule 37**, which failing a Deposit Order, in terms of **Rule 39**, to cite all and any statutory provisions being relied upon, and all and any relevant case law authority from the higher tribunals and courts, by proper citation, and paragraph / judge reference to the applicable legal principle being relied upon, and to provide the claimant's representative and*

*Tribunal with **hyperlinks** to the free access Bailli website for any case law to be relied upon by the respondents.*

*(2) To allow the Tribunal to have regard to the claimant's ability to pay any Deposit Order, if the Tribunal considers it appropriate to so order, the Tribunal **orders** that the claimant's representative shall prepare and intimate to the respondent's representative, by email, with copy sent at the same time to the Glasgow ET office, at least than 7 days before the start of the Preliminary Hearing, i.e., **by no later than 10:00am on Monday, 16 January 2023,** any information which the claimant wishes the Tribunal to take into account as regards her financial means, and ability to pay, having regard to her whole means and assets, including income, capital, and any savings, and to provide with her **statement of financial means** any vouching documents to show the extent of her ability to pay, should the Tribunal decide, having heard both parties, that a Deposit Order should be made.*

(3) If the respondents challenge the claimant's statement of financial means, then the claimant shall be examined on oath, at the Preliminary Hearing on 23 January 2023, and be open to cross-examination by the respondents' representative, and any questions of clarification by the Judge: time allocation not exceeding 30 minutes in total.

(4) At the Preliminary Hearing on 23 January 2023, the Tribunal shall thereafter hear oral submissions from the respondent's representative first, for a maximum of one hour, followed by oral submissions from the claimant's representative, in reply, for a maximum of one hour. The respondents' representative shall thereafter have a right to a final reply, not exceeding 15 minutes.

*(5) The claimant's representative may reply in writing to the respondents' skeleton written argument, in which case that written reply shall be sent to the Glasgow ET office, and copied to the respondents' representative, **by no later than 4.00pm on Friday, 20 January 2023**. If no written reply is*

delivered, the claimant's representative shall reply orally at the Preliminary Hearing, within the one hour allocated.

(23) Thereafter, on 16 January 2023, Ms Cunningham emailed the Glasgow ET, with copy to Ms McLean for the claimant, attaching the respondents' skeleton argument, with apology for the slight delay in providing it, and noting that they awaited sight of the claimant's financial information. Ms Cunningham's skeleton argument for the respondents read as follows:

"Respondent's skeleton argument

1. ***The Respondent submits that their strike out applications of 30 September 2022 and 2 December 2022 should succeed. The application under Rule 37 seeks strike out on the basis the claim is time barred and has no reasonable prospects of success R37 (1) (a) and R37 (1) (c) that the Claimant has failed to comply with Orders set by the Tribunal.***

2. ***The Claim is time barred for the purposes of s.123 of the Equality Act 2010.***

3. ***No reasonable explanation for the delay from C. Palmer and Saunders v Southend – on – sea Borough Council [1984] IRLR 19 and Porter v Bainbridge [1978] ICR 943 CA***

4. ***Robertson v Bexley Community Centre 2003 IRLR 434C – the burden lies with the Claimant.***

5. ***Habinteg Housing Assocition*** [sic] ***v Holleran UKEATS/0247/14/BA the Tribunal should conclude that in the absence of a reasonable explanation, one does not exist.***

6. ***It is not just and equitable to extend the time limit. Chief Constable of Lincolnshire v Caston 2010 IRLR 327***

7. ***The fault in delay lies entirely with the Claimant. DeSouza v Manpower UK Ltd***

8. Balance of prejudice. British Coal Board v Keeble [1997] IRLR 336

9. The claim has no reasonable prospects of success.

10. The Claimant has failed to provide sufficient medical information, despite having ample opportunity to do so, and in breach of the Tribunal's Order.

11. The Claimant has failed to particularize her claim, despite having ample opportunity to do so, and in breach of the Tribunal's Order. Cox v Adecco and Ors EAT 0339/19 and Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1

12. The complaints made are not likely to succeed resulting in prejudice and cost to the Respondent.

13. Ahir v British Airways EWCA Civ 1392

14. A deposit order is sought under Rule 39 for each allegation that the Claimant seeks to advance."

(24) On my instructions, on 18 January 2023, the Tribunal clerk wrote to both parties' representatives. The claimant's representative was reminded that their response to point 2 of the Tribunal's correspondence of 5 January 2023 remained outstanding, along with their compliance with point 5. Both of these returns should be submitted to the Tribunal and the respondents' representative by no later than 4pm on Friday 20 January 2023.

(25) Further, the respondents' representative was advised that their skeleton argument did not comply with the Case Management Order, Order (1), as no hyperlinks have been provided to case law cited, and as such the Tribunal and the claimant could not access the links. Reference to case citation alone is insufficient–the respondents' representative was directed to refer to the legal principle, and where in the cited judgment it is to be found (by paragraph reference, as directed in the Case Management Order). This was to be provided by no later than 4pm on Thursday 19 January 2023,

together with an explanation as to why the Case Management Order had not been fully complied with by the respondents' representative.

(26) In reply to the Tribunal, later that same afternoon, 18 January 2023, Ms Cunningham stated that:

"*Ms McLean has informed the Respondent today that she will not continue to be instructed in this matter. We understand that this leaves the Claimant unrepresented for the hearing that is scheduled for Monday.*

There have already been 3 preliminary hearings in this matter, which unfortunately have not advanced the claim. In the circumstances the Respondent would be prejudiced by the expense of Monday's hearing in circumstances where it would seem that the strike out application cannot be addressed. We understand from Ms McLean that it would be her intention to tell the Tribunal on Monday that she will no longer be instructed. That being the case, we apply for the hearing scheduled for Monday to be postponed.

We also seek that the Claimant provide us with the following information:

1) Confirmation that she intends to continue to purse [sic] the claim. If she seeks to withdraw the claim, then the application should be made to the Tribunal and copied to the Respondent.

2) If the claim is going to be pursued then we would be grateful if the Claimant would confirm whether she seeks to represent herself, or whether she has another representative."

(27) Ms McLean emailed the Glasgow ET, with copy to Ms Cunningham, on the morning of 19 January 2023, stating as follows:

"I would like to add to Ms Cunningham's email that after my email exchange with Ms Cunningham, I have tried to contact Gillian Sinclair via text and email. I asked Ms Sinclair, "the tribunal want to know if you have legal representation, or if you are completely withdrawing your complaint?" Ms Sinclair has not replied to my text or email.

I would like to take this opportunity to thank everyone involved in this case, for their patience and guidance during this case."

(28) On my instructions, a further communication was sent by the Tribunal clerk to Ms Cunningham, with copy to the claimant, on 19 January 2023, stating that, having considered the respondents' application dated 18 January 2023 to postpone the Preliminary Hearing listed for Monday, 23 January 2023, I had refused I, as it was not in the interests of justice to postpone the listed Hearing.

(29) Parties were advised that, if the claimant did not appear, and / or she was not represented, then the case could proceed in her absence, and the respondents' representative could seek dismissal of the claim under **Rule 47**.

(30) As the claimant's representative had withdrawn, the Tribunal's letter refusing the respondents' postponement request was sent urgently to the claimant, by email, along with confirmation that the case remained listed for hearing on Monday, 23 January 2023 at 10:00am.

(31) By emails sent to the Glasgow ET office and claimant at 3:45pm on Friday, 20 January 2023, Ms Cunningham had emailed two large files, one being a Zip file entitled "***Strike Out",*** with copy case law authorities, and the other being a word document entitled "***Respondent's Submissions***", running to 28 numbered paragraphs extending across 10 typewritten pages (as reproduced below, at paragraph 46 of these Reasons.)

(32) These documents were sent by Ms Cunningham for download by the Tribunal and claimant, using the Mimecast system, but the files could not be downloaded except with an access key, sent to the Tribunal and claimant under separate email.

Preliminary Hearing before this Tribunal

(33) This Preliminary Hearing was a remote public Hearing, conducted using CVP, under **Rule 46 of the Employment Tribunals Rules of Procedure 2013.** The Tribunal considered it appropriate to conduct the Hearing in this way, and parties did not object. In any event, a CVP Hearing for a Strike Out PH is

consistent with the default position set forth in the **ET Presidents revised Joint Road Map dated 31 March 2022**.

(34) In accordance with **Rule 46**, the Tribunal ensured that members of the public could attend and observe the Hearing. This was done via a notice published on the ***Courtserve.net*** website. In the event, no members of the public attended this Preliminary Hearing.

(35) When the case called, just after 10:00am, the claimant was in attendance, as was Ms McLean. Ms Cunningham appeared as representative for the respondents. The claimant confirmed that she had been able to access and read the respondents' documents, as had I, after the Tribunal clerk had tried many times to get an access key that opened up the documents at the Tribunal.

(36) As Ms McLean had written to the Tribunal, on 19 January 2023, withdrawing from acting for the claimant, I had not expected her to appear. Accordingly, I queried why she was in attendance. She explained that she felt it was courteous to do so. The claimant confirmed that she did not wish Ms McLean to act on her behalf, and that she was now representing herself. Ms Cunningham stated that she had had no contact at all from Ms McLean, as the claimant's representative, and she had assumed that she would not show up at this Hearing.

(37) In these circumstances, I thanked Ms McLean for her attendance and contribution, and explained that, in the changed circumstances, where she was no longer acting as lay representative for the claimant, she was not required to remain at the Hearing, and she could leave, if she wished to do so. It being a public Hearing, she could have attended as a member of the public. She intimated that she would leave, and duly disconnected herself from the CVP link. The claimant stated that she felt Ms McLean had done a lot of work for her up to this date, and that she had provided enough evidence to let her continue to prosecute her claim, and that she opposed the respondents' application for Strike Out.

(38) The Tribunal had been provided with a Joint Bundle of Productions, with 9 indexed documents, extending to 113 pages. In the course of this Preliminary Hearing, additional documents, referred to in discussion with both parties, were added, being (1) Ms Cunningham's email to the CVP clerk at 12:19 pm on 23 January 2023, with Grievance Appeal outcome letter of 15 March 2022 from Damian Hodge, Hide & Co; and (2) Ms Cunningham's further email to the CVP clerk at 12:42 pm on 23 January 2023, with Occupational Health assessment report of 12 November 2021 on the claimant by Ian Watkinson, consultant occupational health nurse, with Indus Occupational Health Ltd.

(39) There were no insurmountable issues with use of the CVP, and I was able to take evidence from the claimant, and receive oral submissions from both parties, and both parties were able to see and hear each other, and me, except during adjournments where, rather than disconnect and re-connect parties, we adopted a practice of cameras off and microphones muted.

Findings in Fact: Claimant's financial circumstances and ability to pay any Deposit Order

(40) In opening this Preliminary Hearing, after initial discussion with both the claimant and Ms Cunningham, I stated that as the respondents were seeking Strike Out of the claim, which failing a Deposit Order, then the Tribunal would start by taking information about the claimant's financial means, and her ability to pay a Deposit Order, if the Tribunal decided to so order. Nothing had been lodged by the claimant, or by Ms McLean on her behalf, by 10am on Monday, 16 January 2023, as per my order (2) of 5 January 2023.

(41) The claimant stated that Ms McLean had not mentioned this to her, and that there had been a breakdown in communication between her and Ms McLean, and that is why she felt Ms McLean could not represent her anymore. I explained to the claimant that there had been 3 earlier Preliminary Hearings in this case, and that I was guided by the Tribunal's overriding objective, under **Rule 2,** to deal with the case fairly and justly, and I explained to her the process that had been set out in the Tribunal's case management orders of 5 January 2023, which she noted and confirmed that she understood.

(42) Further to the Tribunal's correspondence of 18 January 2023, I asked Ms Cunningham why there had not been full compliance with the Tribunal's first case management order made on 5 January 2023, by the extended deadline of 4pm on Thursday, 19 January 2023, and she apologised, stating that she had not received any financial means information from the claimant, or her representative, as due by 10am on Monday, 16 January 2023, and she had to look at minimising costs to her client, but she had provided her full written submission at 3:45pm on Friday, 20 January 2023.

(43) I then took sworn evidence from the claimant about her financial means, and ability to pay. Of consent of both parties, as the claimant was an unrepresented, party litigant, I asked her a series of structured and focused questions designed to elicit the information required by the Tribunal, in making reasonable enquiries in terms of **Rule 39(2)**.

(44) While Ms Cunningham was afforded by me the usual opportunity to cross-examine the claimant on her oral evidence to this Tribunal, Ms Cunningham stated that she had no questions to ask the claimant in regard to her evidence just given to the Tribunal.

(45) On the basis of the claimant's unchallenged evidence in chief, I have made the following findings in fact:

(a) The claimant, who is aged 44, was formerly employed by the respondents as a home agent between 10 April 2020 and 21 November 2021 when her employment ended.

(b) She still resides at the address provided in her ET1 claim form.

(c) She is currently in full time employment in a new job, but she stated that she did not feel comfortable in identifying her new employer or any other details, other than to say she is paid £10 per hour and earns £350 per week net.

(d) The claimant further stated that her new employment started last week, and it is her sixth job since leaving the respondents.

(e) Further, she owns her own residential property, and it is mortgaged.

(f) Her monthly outgoings are for her mortgage, insurance, council tax, gas and electricity, and food. She stated that she is not an extravagant person, and that she has income sufficient to meet her monthly expenditure and leaving a free balance of say £300 to £400 per month available.

(g) Finally, the claimant stated that she has no other capital or savings, describing her savings as nil.

Respondents' Written Submission

(46) Ms Cunningham's skeleton written submission for the respondents, as intimated on the afternoon of 20 January 2023, was in the following terms:

[Note: the Tribunal has not corrected the formatting and spelling errors]

IN THE EDINBURGH** [sic] **GLASGOW TRIBUNAL

CASE NUMBER:4102860/2022

between

Gillian Sinclair Claimant

And

Sensee Limited Respondent

RESPONDENT'S SUBMISSIONS

Introduction

1. The Respondent submits that their strike out applications dated 30 September and 2 December 2022 should succeed.

2. The Respondent submits that the claim should be dismissed in its entirety.

*3. References to pages of the parties' joint bundle of productions in respect of the application are in **bold text**.*

Background

The relevant background facts are as follows:

- *Claimant was employed from 10 April 2020 until 21 November 2021 when she resigned.*
- *She had two periods of long-term sick leave in 2021, with low mood and anxiety. These are from 20 July 2021 – 1 September 2021 and then 22 October 2021 until resignation.*
- *16 August 2021 the Respondent invited her to a capability review.*
- *17 August 2021 the Claimant submitted a grievance.*
- *15 October 2021 the Claimant received the grievance outcome.*
- *22 October 2021 the Claimant went on sick leave.*
- *15 November 2021 she received the Occupational Health Assessment report.*
- *15 November 2021 she resigned with notice.*
- *21 November 2021 was the effective date of termination.*
- *1 April 2022 EC was engaged (**1**)*
- *19 May 2022 ET1 lodged (**2-17**)*

Legal background

S.123 Equality Act 2010

https://www.legislation.gov.uk/ukpga/2010/15/section/123

*1. **Time limits***

2. (1) Subject to [F2[F3section] 140B]] proceedings on a complaint within section 120 may not be brought after the end of—

3. (a) the period of 3 months starting with the date of the act to which the complaint relates, or

4. (b) such other period as the employment tribunal thinks just and equitable.

5. (2) Proceedings may not be brought in reliance on section 121(1) after the end of—

6. (a) the period of 6 months starting with the date of the act to which the proceedings relate, or

7. (b) such other period as the employment tribunal thinks just and equitable.

8. (3) For the purposes of this section—

9. (a) conduct extending over a period is to be treated as done at the end of the period;

10. (b) failure to do something is to be treated as occurring when the person in question decided on it.

11. (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

12. (a) when P does an act inconsistent with doing it, or

13. (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

*4.1 The Respondent submits that the claim is time barred. The Claimant's effective date of resignation was 21 November 2021. The claim is accepted by the Tribunal out of time (**22-23**). She did not engage in early conciliation with ACAS until 1 April 2022. The latest possible date to conciliate would be 20 February 2022. The Respondent submits that the entirety of the claim is time barred and it would not be just and equitable to extend the time limit.*

*5. The burden of proof lies with the Claimant **Porter v Bainbridge [1978] ICR 943 CA.** The Respondent submits, following the approach in Porter, the Claimant should be able to satisfy the Tribunal that she did not know of her rights in the period preceding the claim, and that there was no reason she would know and no reason why she would make enquires. The Respondent submits that this has not been satisfied. Instead, what she says in the ET1 is that she is late due to the Respondent's Solicitor not sending the grievance outcome earlier. The Respondent submits that this isn't a reasonable explanation for the dely [sic] from the Claimant. **Palmer and Saunders v Southend – on – sea Borough Council [1984] IRLR 19** which sets out that relying on interim procedure as a delay should not be accepted.*

*14. It is not just and equitable to extend the time limit. **Chief Constable of Lincolnshire v Caston 2010 IRLR 327.** The question of whether it is just and equitable to extend the time limit for lodging a claim is a question of fact and judgment for the Tribunal and not an automatic right. The is no evidence available to explain the delay, other than blaming the Respondent.*

15. An employment tribunal's discretion in determining whether or not it is just and equitable to extend time is very wide it is entitled to take into account anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. On the contrary, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time.

*16. No such arguments have been advanced. The exercise of discretion is the exception rather than the rule **Robertson v Bexley [2003] EWCA Civ 576** the Court of Appeal makes it clear that a Claimant should not presume that the time can be extended, unless the Claimant can show that there is a justified reason for not making the*

claim in time. An extension of time is the exception, rather than the rule.

17. ***Habinteg Housing Assocition*** *[sic]* ***v Holleran UKEATS/0247/14/BA*** *the Tribunal should conclude that in the absence of a reasonable explanation, one does not exist. The Respondent submits that no reasonable explanation does exist. Three Preliminary Hearings have taken place and no explanation has been given.*

18. *The Respondent relies on* ***DeSouza v Manpower UK Ltd UKEATS/0234/12/LA*** *and submits that the fault lies entirely with the Claimant. The strict approach in* ***DeSouza****, where the claim was only 1 day out of time, should be adopted.*

Striking out discrimination cases

19. ***Ezsia*** *[sic]* ***v North Glamorgan NHS Trust 2007 ICR 116*** *Lord Justice Maurice Kay "It would only be in exceptional cases 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".*

20. *The Claimant has withdrawn the claims for GDPR and Health and safety breaches. The Respondent submits that the remainder of the claim has no reasonable prospects of success.*

21. ***Ahir v British Airways EWCA Civ 1392*** *the time and resources of the Tribunal should not be taken up with cases that are destined to fail.*

21.a *Employment Tribunal should not be deterred from striking out discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and*

explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment.

22. ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA**, Lord Justice Underhill observed that 'Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed…"*

23. *The Respondent submits that the Claimant's claims are destined to fail and the failure to particularise the claims supports this. Further and better particulars were provided on 13 August 2022 (**55-70**) and on 22 November 2022 (**106-113).** The Claimant has failed to identify a valid comparator and simply doesn't know whether she complains of direct discrimination or indirect discrimination. The claim has not been advanced and is not ready to be considered at a final hearing.*

24. *The Respondent submits that complaints relative to a tone of voice policy, the qualifications of the Occupational Health provider and the Employee Support Program are destined to fail. The Claimant has failed to produce medical information relative to her alleged disability. The Tribunal simply cannot make a determination on these matters.*

25. *In **Cox v Adecco and Ors EAT 0339/19** the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are. 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.*

26. *The Respondent submits that there has been no reasonable attempt at identifying the claim and the issues to be considered before the*

Tribunal. This does prejudice the Respondent's ability to prepare for the hearing.

Balance of prejudice

27. The Respondent submits that the Respondent is being severely prejudiced by defending the claim. ***British Coal Board v Keeble 1997 UKEATS IRLR 336*** *the Employment Appeal Tribunal provides five criteria which the Tribunal should consider when deciding to exercise the discretion. The Respondent will address these in turn:*

27.1 The length of and reason for delay. Early Conciliation was engaged on 1 April 2022. The Claimant has failed to provide a timeline. However, the earliest date of complaint in the grievance is 8 July 2021, meaning that the any claim relative to this should have been conciliated no later than 7 October. That would mean that the claim is potentially 6 months time barred. The Respondent submits that the case of ***Miller v Community Links Trust UKEATS/04*** *should be followed, given that it was reasonably practical to lodge on time.*

27.2 The extent to which the cogency of the evidence is likely to be affected by the delay. The Respondent submits that the evidence will be affected by the delay. As litigation has not been on the Respondent's mind, memories of the redundancy [sic] *process may have faded, and a fair Hearing might not be possible. The Respondent is likely to suffer prejudice in these circumstances.*

27.3 The extent to which the Respondent co-operated with requests for information. The Respondent submits that the Respondent has assisted the Claimant by co-operating with her in relation to all requests.

27.4 The promptness of the Claimant once she knew the facts giving rise to the action. The Respondent submits that the facts of the case are the matters outlined in the ET1, all of which were within the Claimant's knowledge prior to 1 April 2022.

27.5 The steps taken by the Claimant to obtain professional advice once she knew of the possibility of taking action. The Respondent submits that the possibility of taking action should have been a consideration as soon as she had an issue which resulted in the grievance being raised.

Deposit orders

https://www.legislation.gov.uk/uksi/2013/1237/schedule/1/paragraph/39/made

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

28 39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

29 (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

30 (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

31 (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

32 (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

33 (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

34 (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

35 otherwise the deposit shall be refunded.

36 (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

28. The Respondent submits that the Tribunal is not minded to strike the claim out then a deposit order should be applied for each allegation that the Claimant seeks to have determined. The Respondent understands the Claimant pursues the following:

a) The Occupational Heath [sic] provider being unqualified.

b) Comment from Caroline Pile about struggling.

c) Further comment from Caroline Pile about the outcome not being the same for everyone.

d) Caroline Pile reporting the Claimant to HR for swearing.

e) Nina Ekere's complaint that the Claimant was abrupt.

f) The tone of voice policy.

g) The Employee Assistant Program's advice.

h) The care calls during her absence.

Oral Submissions for the Respondents

(47) Ms Cunningham proposed to read through her written submission, and take me, at the appropriate point, to the relevant part of the various case law

authority judgments that she had cited. She stated that she would require to pause to look at them, as her written submission did not include written annotations, as directed in the Tribunal's case management order of 5 January 2023, and re-iterated in the Tribunal's correspondence of 18 January 2023, for which she apologised, stating that she had misunderstood the Tribunal's direction.

(48) She estimated that it would take her up to one hour to annotate her submissions. Rather than stop and start, at each citation, I stated I would adjourn, to allow her to mark up her copy, and she could then deliver her full submissions, with appropriate citation annotations, to the Tribunal. We adjourned for that purpose, at 10:33am, resuming at 11:19 am. Ms Cunningham then proceeded to read her submissions, reading from them on her laptop.

(49) Ms Cunningham focussed on the claimant's effective date of termination of employment being 21 November 2021, following her resignation from employment, and that ACAS early conciliation had started on 1 April 2022, and ACAS EC certificate issued on 22 April 2022, with the ET1 claim form presented on 19 May 2022.

(50) She submitted that the entire claim is time-barred, having regard to **Section 123 of the Equality Act 2010**, that ACAS early conciliation should have started by no later than 20 February 2022, and that it would not be just and equitable to extend the time limit. While there had already been 3 Preliminary Hearings in this case, Ms Cunningham stated that the burden of proof lies with the claimant, and no information had been put forward by her to explain why her Tribunal claim was presented late.

(51) Ms Cunningham apologised that her reference to ***Porter v Bainbridge [1978] ICR 943 CA*** should have been to ***Porter v Bandridge [1978] ICR 943 CA.*** She referred to what I then noted as paragraph 212 of **Bandridge**, which, on writing up this Judgment, and checking her references, I see does not exist, as Court of Appeal judgments of that age did not include paragraph

numbering as they do now, but page references and alpha characters A to H in the side page margin. That ICR report runs from pages 943 to 959.

(52) In any event, **Bandridge** relates to a complaint of unfair dismissal, and whether or not it was reasonably practicable for the claimant to have presented their Tribunal claim within 3 months of dismissal. That, of course, is not the same legal test as in a discrimination case, such as the present claim, where the just and equitable test applies to seeking an extension of time if a claim is presented late.

(53) Further, as regards her citation of ***Palmer and Saunders v Southend – on – sea Borough Council [1984] IRLR 19,*** another case involving unfair dismissal, and not a discrimination complaint, she stated that she did not intend to refer me to any specific paragraphs of that judgment, it was a general reference only.

(54) Referring to her citation of ***Chief Constable of Lincolnshire v Caston 2010 IRLR 327***, Ms Cunningham stated that she wished me to look at paragraphs 12, 15 and 16, and that an extension of time is not an automatic right, and all the claimant had done, to explain the delay, was to blame the respondents for their solicitor taking time to respond to her grievance appeal , with the Hodge & Co letter of 15 March 2023 in reply to the claimant's appeal of 4 November 2021 to the grievance decision intimated to her on 15 October 2021.

(55) Ms Cunningham stated that there is a wide discretion open to the ET, but unless justification is put forward by the claimant, her application to extend time should simply not be granted by this Tribunal.

(56) In writing up this Judgment, I pause to note and record that I do not know why Ms Cunningham referred me to paragraphs 12, 15 and 16 in **Caston**. In re-reading that judgment, while writing up this Judgment, I see that the relevant passages in **Caston** are to be found later in the Court of Appeal's judgment, per Lord Justice Wall at paragraphs 17 to 28, and Lord Justice Sedley at paragraphs 30 to 32. I have had regard to that judicial guidance from the higher Courts.

(57) Turning then to her reference to ***Robertson v Bexley [2003] EWCA Civ 576,*** Ms Cunningham stated she wished to rely upon Lord Justice Auld, at paragraph 33, where he had stated that the Employment Tribunal had a very wide discretion in determining whether or not it was just and equitable effectively to extend time, and that it was entitled to consider all the circumstances, anything that it considered to be relevant.

(58) When she came to refer to ***Habinteg Housing Association*** *[sic]* ***v Holleran UKEATS/0247/14/BA,*** Ms Cunningham stated that she had no specific paragraph in that judgment to refer me to, but her point was a generalised point. In the absence of a reasonable explanation from the claimant, for the delay in presenting her Tribunal claim, Ms Cunningham submitted that one does not exist. No reasonable explanation for the delay had been put forward by the claimant, despite 3 earlier PHs, she submitted, adding that the respondents submit that no reasonable explanation exists.

(59) When I asked her about the citation provided by her, Ms Cunningham agreed it was not a Scottish EAT case, and she apologised for her error. In writing up this Judgment, and checking her citation reference, I note and record that the proper citation is ***Habinteg Housing Association v Holleran*** **[2015] UKEAT/0247/14**, per Langstaff J(P).

(60) When Ms Cunningham came to refer to ***DeSouza v Manpower UK Ltd UKEATS/0234/12/LA***, she invited me to look at paragraph 11 of that judgment, where the EAT Judge stated: "***Plainly, every Claimant who does not receive an extension of time suffers the prejudice of not being able to pursue his or her claim."*** She submitted that the fault in the present case lies entirely with the claimant, and the strict approach in **DeSouza**, where the claim was only 1 day out of time, should be adopted here.

(61) When I asked her about the citation provided by her, Ms Cunningham agreed it was not a Scottish EAT case, and she apologised for her error. In writing up this Judgment, and checking her citation reference, I note and record that the proper citation is ***DeSouza v Manpower UK Ltd [2012] UKEAT/0234/12/LA,*** per HHJ Peter Clark.

(62) Next, Ms Cunningham referred me to the Court of Appeal's judgment in **Ezsias**, by Lord Justice Maurice Kay, described by her as ***Ezsia** [sic] **v North Glamorgan NHS Trust 2007 ICR 116***, stating that : ***"It would only be in exceptional cases 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".***

(63) In writing up this Judgment, I note that her case citation for **Ezsias** is wrong. It is properly cited as ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126,*** and her cited paragraph from Lord Justice Maurice Kay is to be found at paragraph 29 of the Courts' judgment, at pages 1134H and 1135A of the ICR report.

(64) She submitted that as the claimant had withdrawn the claims for GDPR and Health and Safety breaches, the remainder of the claim has no reasonable prospects of success. Despite her written reference to ***Ahir v British Airways EWCA Civ 1392***, and that the time and resources of the Tribunal should not be taken up with cases that are destined to fail, Ms Cunningham advised that she was no longer relying upon the quoted passage from **Ahir** cited by her in her written submission at her paragraph 21 as 21a.

(65) In writing up this judgment, and having checked Ms Cunningham's citation, the case of **Ahir** is properly cited as ***Ahir v British Airways [2017] EWCA Civ 1392*** , and Ms Cunningham's cited quote at her paragraph 21a is actually an excerpted quote from paragraph 16 of the judgment in **Ahir**, by Lord Justice Underhill, which in full reads as follows:-

"16. There is force in Mr Burns's point. Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence

has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'

(66) In continuing with her submissions, Ms Cunningham stated that she wished to refer to paragraph 77 of the Court of Appeal judgment by Lord Justice Underhill in ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA***. She submitted that the claimant's claims are destined to fail, and in saying that, she commented that she was not trying to be overly harsh, and she understood that the claimant has not had the benefit of legal representation.

(67) Looking at the claimant's case, Ms Cunningham stated that two sets of Further and Better Particulars for the claimant had not advanced her claim. No valid comparator had been identified, and the claimant does not know whether she complains of direct and / or indirect discrimination, and at best, she says it could be indirect discrimination.

(68) Ms Cunningham stated that the claimant had ***"not pinned her colours to the mast"***, the case lacked particularisation, and it is not ready for any Final Hearing. Further, she submitted, the claimant had failed to produce medical information related to her alleged disability, being the mental health disorder of anxiety and low moods referred to in the ET1 claim form.

(69) Next, Ms Cunningham stated that she wanted to refer to paragraph 31 of the EAT Judgment by His Honour Judge Tayler in ***Cox v Adecco and Ors EAT 0339/19***. It being a now oft-cited judgment in Strike Out applications, I asked

her about other paragraphs in that Judgment, specifically paragraphs 28 to 32.

(70) She then stated that she felt paragraphs 28(5) and 29 were relevant too, as also that there had already been 3 PHs in this case when, in her experience, a claimant is normally given one opportunity to provide Further and Better Particulars, and she felt the Tribunal and respondents had taken a very generous approach with this claimant.

(71) As there had been no reasonable attempt at identifying the claim, and issues to be considered before the Tribunal, Ms Cunningham submitted that that prejudices the respondents' ability to prepare for a Final Hearing.

(72) Turning then to address the balance of prejudice, Ms Cunningham referred to her citation of ***British Coal Board v Keeble 1997 UKEATS IRLR 336.*** She apologised for her incorrect citation of this well-known case, and agreed it is not a Scottish case, as suggested by her citation. **Keeble** is properly cited as ***British Coal Board v Keeble 1997 IRLR 336.***

(73) She highlighted how the EAT in **Keeble** had provided five criteria which a Tribunal should consider when deciding whether or not to exercise the discretion to allow a late claim. She submitted that the respondents are severely prejudiced in defending this claim.

(74) Further, on the length and reason for the delay in bringing the claim, being one of those 5 criteria, she submitted that the case of ***Miller v Community Links Trust UKEATS/04*** as cited by her should be followed, given that, in her submission, it was reasonably practicable for the claimant in this case to have lodged her Tribunal claim on time.

(75) Ms Cunningham stated that she was not relying upon a specific paragraph in that EAT Judgment, but on the specific facts of that case, where she stated the claim in **Miller** had been presented one day late, and it was rejected, and a very strict approach should be taken in the present case.

(76) She apologised for her incorrect citation of this case, and agreed it is not a Scottish case, as suggested by her citation. I note and record here that the

proper citation is ***Miller v Community Links Trust Ltd [2007] UKEAT/0486/07***. In her electronic Bundle of authorities, as provided to the Tribunal, and copied to the claimant, Ms Cunningham had provided not the full EAT Judgment, by Judge McMullen QC, but an abstract from **[2007] All ER (D) 196.**

(77) From that abstract, and from my reading of the full EAT judgment in **Miller,** which I have read in writing up this judgment, Ms Cunningham's understanding of the facts in incorrect.

(78) In **Miller,** the claimant failed to present his claim for unfair dismissal within the prescribed period, his online claim form being received 8 seconds after expiration of the time limit, and he appealed against the finding of the ET that it had been reasonably practicable to do so. The EAT dismissed his appeal.

(79) That case, of course, considered the "***reasonable practicability"*** test, under the **Employment Rights Act 1996,** and not the "***just and equitable"*** test under then then anti-discrimination statutes (now **Section 123 of the Equality Act 2010**.)

(80) Looking at the other factors in her paragraphs 27.1 to 27.5, Ms Cunningham submitted that the cogency of the respondents' evidence was likely to be affected by the delay, and she apologised for using the words "***redundancy process"***, when speaking of memory fade, when she should have referred to the grievance process, at her paragraph 27.2. She clarified that, in her view, memories will have faded, as any Final Hearing in the present case, if allowed to proceed, could well be in to summer 2023, looking at matters almost some 2 years after the claimant's grievance was submitted.

(81) Next, looking at her paragraph 27.3, Ms Cunningham stated that the respondents had assisted the claimant by co-operating with her in relation to her requests for information and, as per her paragraph 27.4, the facts of the case are the matters set out in the ET1 claim form, all of which were within the claimant's knowledge prior to 1 April 2022. She submitted that the respondents had not put up any barriers to this claim, all the claimant's

requests had been complied with by them, and they had co-operated with her, and that was as per the Tribunal's overriding objective.

(82) As regards her paragraph 27.5, Ms Cunningham submitted that the claimant should have taken professional advice as soon as she had an issue with the respondents, which had then resulted in the grievance being raised by her in August 2021. In her view, Ms Cunningham added that it did not look to her as if any professional advice had been taken by the claimant, and it would have been reasonable for her to have taken some such advice, and not rely on being represented by a friend, Catherine McLean, as a lay representative.

(83) Finally, Ms Cunningham turned to her alternative argument that, if the claim were not struck out, then there should be a Deposit Order made under **Rule 39**. She described that as being less than the draconian step of a whole Strike Out, and confirmed that she sought a deposit for each of the allegations that the claimant appears to be pursuing, which she noted at her final paragraphs 28 (a) to (h) , on page 10 of her written submission.

(84) With Ms McLean having recently come off record for the claimant, Ms Cunningham suggested that the claimant might wish to consider her position but, meantime, on the respondents' behalf, she was seeking a Deposit Order for each of the 8 allegations. While she had not described the respondents' position in any detail, in her written submissions previously lodged with the Tribunal, she submitted that it was in line with the overriding objective for her to make her submissions on Deposit Order orally at this Hearing.

(85) I noted her position, and that she had not referred to any relevant caselaw on Deposit Orders. In reply, Ms Cunningham stated that it was not her intention to do so.

(86) When I stated that there was such caselaw, and I specifically mentioned what I then referred to as the **Hasan** case relating to the amount of any deposit, and it not being a barrier to justice, Ms Cunningham stated that she was completely in my hands, she appreciated that it was not appropriate to use a Deposit Order as a barrier to justice, but the claimant had given her evidence to the Tribunal about her financial means, and ability to pay.

(87) In writing up this Judgment, I apologise to both parties that I inadvertently misnamed the relevant case as **Hasan** – the case that I meant to refer to was the judgment of Mrs Justice Simler, then President of the EAT, in **Hemdan v Ishmail & Another [2017] ICR 486 ; [2017] IRLR 228**.

(88) Having heard that evidence, Ms Cunningham submitted that a sum of say **£100** per allegation would be a reasonable amount for any Deposit Order to be paid by the claimant.

Claimant's oral Reply to Respondents' Submissions

(89) It then being 12:06pm, Ms Cunningham concluded her oral submissions to the Tribunal, and I asked the claimant whether she wished a comfort break, to gather her thoughts before delivering her own oral submissions, or if she would prefer to just carry on, without any such break. The claimant stated that she was happy to do so, without the need for any break, and she then proceeded to address me with her own oral submissions to the Tribunal.

(90) In opening her oral submissions, the claimant stated that a lot had been said by Ms Cunningham about the time delay. The claimant then stated that she had contacted ACAS before April 2022, to get advice about grievances, and she had seen it through to the end, as after she appealed the grievance outcome on 4 November 2021. The respondents had sent that to a third party, external solicitor (Hodge & Co, Wrexham), and Damien Hodge had written to her, by email on 15 March 2023, with the written outcome to her appeal against the grievance outcome received on 15 October 2021.

(91) By way of further information, the claimant stated that she had emailed a Rachel Laing, an HR business partner at Sensee, every few weeks for an update, as the claimant stated that she knew there was a time limit for an ET claim. She added that she believed that time limit was 3 months and, in her head, she was not sure if ACAS discussed it with her.

(92) She further stated that there was nothing that she could do until she got that solicitors' letter with the outcome of her grievance appeal, and she submitted her ET1 to the Tribunal on 19 May 2022, alleging that she had submitted it to

the "***wrong department***", which she described as another third-party company. No clarification was provided by her of what she alleges had happened between 22 April and 19 May 2022.

(93) Turning to look at the documents before this Tribunal, in the Joint Bundle lodged by Ms Cunningham, the claimant noted the terms of her claim form, at pages 2 to 17 of the Bundle, and the ACAS EC certificate at page 1.

(94) Further, looking at the eleven bullet points at page 3 of the respondents' written submissions, the claimant agreed that the relevant background facts and key dates are as set forth there, which she described as being a fair and accurate chronology of dates, except for the tenth bullet point which stated that ACAS was engaged on 1 April 2022, because she stated that she had been to ACAS before that date for advice about the grievance process, and only latterly about early conciliation.

(95) At this stage, I asked Ms Cunningham, as the respondents' representative, about the date when the grievance appeal outcome was made known to the claimant, for it was not detailed in her chronology of dates, within her written submissions, nor was there any relevant correspondence contained within the Joint Bundle of Productions provided for this Hearing. The ET1 claim form had however referred to the claimant receiving a letter from Sensee's lawyer, Damian Hodge, about the final stage of the grievance on 15 March 2022.

(96) Ms Cunningham clarified that the relevant date was 15 March 2022, and she agreed to email in to the Tribunal a copy of the Hodge & Co letter, as an additional document for use at this Hearing, it not having been included in the Joint Bundle. It was subsequently received by the CVP clerk, and forwarded by her to me, and a copy was provided to the claimant too.

(97) While awaiting that copy letter, the claimant stated that she had followed ACAS guidance to let her grievance process complete itself before she could do anything further. She described it as being "***out of my hands",*** as if she had started the ET process, then she believed that she would have been asked to complete the grievance process first. Even if the third-party lawyer has upheld her grievance (which he did not do), she added that the

respondent's OH provider should not have made the comments about her that she had complained of.

(98) As regards Ms Cunningham's submission that the respondents are being prejudiced by her late claim, the claimant rejected that as certainly not being the case, as she submitted that she has been "***ripped to bits"*** by Sensee's professional advisers, and the OH therapist, and that if I read the OH report, then I would be quite a "***shocked Judge***", as she stated that the third-party solicitor had upheld her complaint against the respondents' OH.

(99) While Ms Cunningham, at her paragraph 27.2, had founded upon the extent to which the cogency of the evidence is likely to be affected by the delay, and she had referred to "***memory fade"***, the claimant stated that memory had not faded for her, as matters had "***uprooted my life so much***." She added that she has struggled to keep a job down, and that she is now on her seventh job since leaving Sensee. In her submission, the OH report says it all, as also the third-party solicitor's report / grievance appeal outcome letter.

(100) Commenting next on Ms Cunningham's paragraph 27.3, the claimant stated that she had provided everything that she had been asked to provide, and she added that she did not feel that Ms McLean, her former representative, had given her enough information, as she was lacking in the detail of what she had done for her. She stated that she did not know about the Tribunal's correspondence of 5 January 2023, and that it had not been copied to her by Ms McLean.

(101) On paragraph 27.4 for the respondents, the claimant stated that she had provided everything to the Tribunal, and, in reply to their paragraph 27.5, the claimant posed the rhetorical question how could she take professional advice when the respondents had not given her the outcome of her grievance appeal?

(102) At this stage, Ms Cunningham stated that the respondents had not provided the Tribunal with the OH report, but she believed it had been referred to in a respondents' PH Agenda at an earlier stage, although she was not sure, as

she had taken this case over from another colleague in Rradar. She confirmed that the respondents do dispute the claimant's asserted disability status.

(103) Replying to Ms Cunningham's submissions about a Deposit Order, the claimant stated that the only two issues she wished to raise with the Tribunal were the report of the third-party solicitor, and the OH report, and not the full 8 allegations identified by Ms Cunningham at her paragraph 28.

(104) As regards the type of discrimination she was complaining about, she stated that possibly it could be direct discrimination in terms of **Section 13 of the Equality Act 2010**, but it could also be indirect discrimination under **Section 19**.

(105) She added that she seeks to progress both direct and indirect, as she feels her case is "***a bit of both".*** She then commented that ***"it's definitely direct."*** As her former representative, Ms McLean, had not provided her with information, the claimant stated that there was not much she could do about that, and that is why she is now taking on her case herself.

(106) Next, I asked the claimant if she had anything to say about the relevant law, or the cases cited by Ms Cunningham for the respondents. I explained to her that it was my responsibility as the presiding Judge to apply the relevant law, and that while Ms Cunningham had given case law citations, the law was ultimately for me as the Judge, but I would welcome any comments from her as the claimant, if she had anything to say about the relevant law.

(107) As an unrepresented, party litigant, I did not expect her to address me on the law as Ms Cunningham had done, and I added that I made that comment, as an observation, and not as a criticism of the claimant for being unrepresented.

(108) The claimant stated that she felt like a "***rabbit in the headlights***", and I reminded her of the Tribunal's overriding objective under **Rule 2**, and how I had to try and ensure a level playing field between the parties, she being unrepresented, and the respondents being represented by Ms Cunningham, as a trainee solicitor.

(109) In reply, the claimant stated that she thought I should have regard to the OH report, and the third-party solicitor's reply, in his letter of 15 March 2023. At this stage, Ms Cunningham stated that this PH was on Strike Out / Deposit Order, and it was not relevant to look at the OH report which might be for any PH on disability status. She clarified that there was an OH assessment report of 15 November 2021.

(110) Ms Cunningham agreed to email in a copy of that OH report to the Tribunal, as an additional document for use at this Hearing, it not having been included in the Joint Bundle. It was subsequently received by the CVP clerk, and forwarded by her to me, and a copy was provided to the claimant too.

(111) Returning to the matter of prejudice to the parties, the claimant stated that, if her case did not go ahead, that would be prejudicial to her, and she wanted to stop other people being treated by the respondents like she had been treated by them. She stated that no professional person should write an OH report like had happened in her case, ripping somebody to shreds, when the OH was not even professionally qualified, but a OH nurse.

Adjournment, and Further Submissions for the Respondents

(112) When I had heard the claimant's oral submissions, as detailed above, and it then being 12:48pm, I advised both parties that, having heard the respondents' representative speaking to her written skeleton argument, I wished Ms Cunningham to address certain additional case law authorities that I had identified, during her oral submissions to the Tribunal, after the lunch-time break.

(113) I further advised her that I would then hear further from the claimant, re the 2 documents emailed by Ms Cunningham during this Hearing (as not included in the Bundle), and give Ms Cunningham the final right of reply, before reserving the Tribunal's judgment to be issued in writing, with reasons, at later date.

(114) As this PH was only listed for 3 hours, I enquired about both parties' ability to continue after the lunch-time break. Both confirmed that they could do so. We adjourned, to resume at 1:45pm.

(115) For her assistance, and for the claimant's use too, I had the CVP clerk email Ms Cunningham, and the claimant, during the lunch break, with clarification of my further directions, and with Bailli hyperlinks to those additional case law authorities, as well as those on Ms Cunningham's list (marked below with a double asterisk, ** for purposes of identification) that she could not locate on Bailli, being as follows:

- **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23; [2021] ICR D5. per Underhill LJ, at para 37 re time-bar.

- **BPP Holdings v Revenue And Customs** [2016] EWCA Civ 121; [2016] 1 WLR 1915; [2016] 3 All ER 245, per Sir Ernest Ryder (SPT) at paras 37 & 38 re compliance with Tribunal rules.

- **** British Coal Corporation v Keeble & Ors** [1997] UKEAT 496_96_2603; [1997] IRLR 336

- **Chandhok & Anor v Tirkey** (Race Discrimination) [2014] UKEAT 0190-14-1912; [2015] ICR 527; [2015] IRLR 195, per Langstaff J, at paras 16 / 20, re importance of ET1 etc, and strike out.

- **Harris v Academies Enterprise Trust & Ors** (Practice and Procedure: Striking-out/dismissal) [2014] UKEAT 0102_14_3110; [2015] ICR 617; [2015] IRLR 208, per Langstaff J(P) at para 40 – "rules are there to be observed" .

- ****Miller v Community Links Trust Ltd** [2007] UKEAT 0486_07_2910 ; [2007] All ER (D) 96

- **Miller & Others v The Ministry of Justice & Ors** (Part Time Workers) [2016] UKEAT 0003_15_1503, per Elisabeth Laing J, at para 12, re "forensic prejudice".

- **Rathakrishnan v Pizza Express (Restaurants) Ltd** (Jurisdictional Points: Extension of time: just and equitable) [2015] UKEAT 0073_15_2310; [2016] ICR 283; [2016] IRLR 278 - **Habinteg** doubted.

- **Redhead v London Borough Of Hounslow** (Practice and Procedure: Amendment) [2014] UKEAT 0086_13_0205, per Simler J, at para 70, re "memory fade".

Respondents' further Submissions

(116) When we resumed, at 13:52pm, after the lunch-time break, Ms Cunningham addressed the Tribunal, confirming that she had received and read the Tribunal's email sent at 13:10pm, with hyperlinks, and that she could deal with them in her further oral submission for the respondents.

(117) Commenting on **Adedeji**, she agreed that there was no need to follow **Keeble** so strictly, and that the Tribunal should consider all relevant factors, but the claim is, she submitted, significantly time-barred, and the claimant has failed to put forward any argument why it is just and equitable to extend the time limit.

(118) From **BPP Holdings**, Ms Cunningham accepted that flexibility of process does not mean a shoddy attitude to delay or compliance by any party to ET orders, and she apologised for the respondents' non-compliance with the order of 5 January 2023, but she had submitted written submissions, and there was not a deliberate failure to comply re case law citations and hyperlinks, but a misunderstanding on her part, where she had not meant to be disruptive to the proceedings. She made no submissions about the claimant's failure to comply with ET orders.

(119) Turning then to **Chandhok v Tirkey**, Ms Cunningham stated that the ET1 is not the starting point, and the claimant should by now have set out her case clearly, to give the respondents clear notice of the claim at the point of lodging her ETI. She referred to paragraph 17 of the judgment, and the need to avoid ***"shifting sands"***. She described that as being what we have here, in the present case, with an ET1, further & better particulars, an amended ET3,

further further & better particulars, and the respondents still do not know quite where they stand, and what is the case pled against them.

(120) Referring to paragraph 20 of **Chandhok**, she accepted that Strike Out is draconian for a discrimination claim, but it may be struck out where something, such as time-bar in the present case, applies, going to the Tribunal's jurisdiction. In her submission, this ET1 was about 6 months late, and that is a relevant consideration to be taken into account by the Tribunal.

(121) Looking at the **Harris** EAT judgment, Ms Cunningham accepted that rules are there to be observed, and that procedural breaches must be carefully considered. As a trainee solicitor, she apologised for the respondent's breaches of the ET order about a skeleton written submission. However, without wishing to be overly critical of the claimant, she then pointed out that the claimant had failed to comply with certain ET orders.

(122) She appreciated that Ms McLean was not a legally qualified representative, and that the claimant would not have a detailed knowledge of the Tribunal process, and she cited the claimant's failure to comply with Employment Judge O'Donnell's orders about clarifying the type of alleged unlawful disability discrimination she is complaining of.

(123) Next, commenting on the judgment in **Miller v MoJ**, Ms Cunningham stated that witness memories fading is an important point, and while she appreciated the claimant's statement that her own memory may not have failed, it will have failed for her clients' witnesses.

(124) She acknowledged – in reply to my request for clarification – that she did not know if respondent witnesses had moved on elsewhere, and, while the respondents had identified possible witnesses at the stage of earlier Case Management PHs, she explained that that was before she became involved with this case.

(125) Ms Cunningham then advised me that when she last took instructions from the respondents, the previous week, there was no indication that those witnesses had left the respondents' employment. However, at this stage, she

stated that no precognition / witness statements had yet been taken from identified respondent witnesses.

(126) When I asked her about the **Rathakrishnan v Pizza Express judgment,** where her cited case of **Habinteg** had been doubted, Ms Cunningham noted its terms, and apologised that she had missed it in preparing her submissions for the respondents.

(127) While the claimant had explained that she had been awaiting the outcome of her grievance appeal, the respondents say that she could have raised her ET claim earlier, and sought a sist of proceedings, pending conclusion of the grievance appeal. Further, she added, why would a claimant wait? – a grievance appeal outcome could not give the claimant a **Vento** award of damages for injury to feelings, which is what she seeks from this Tribunal. It could either uphold her grievance, or not.

(128) Ms Cunningham stated that she adhered to her earlier submissions that the claimant has not provided any reasonable explanation for the delay in presenting her Tribunal claim, and that the claimant awaiting the outcome of her grievance appeal is not sufficient reason to extend the time limit, and the claimant should have started her ET claim earlier.

(129) Commenting on the **Redhead** judgment, Ms Cunningham stated that, as she had submitted when referring to **Miller**, there was prejudice here to the respondents.

(130) Any further delay will lead to further fading of memory for the respondents' witnesses, and the respondents' witnesses need to be equally footed with the claimant at any Final Hearing. Their thought processes are part of their evidence for the respondents, and the respondents' witnesses will not be clear given the passage of time since the relevant time of matters complained of by the claimant.

(131) Ms Cunningham invited the Tribunal to have regard to the 2 emails sent in during the lunch-time break, with the Hodge & Co grievance appeal outcome letter, and the OH assessment report. The claimant commented that she did

not believe that memory is needed for this case, as her complaint is purely down to these two reports that she received from the respondents.

(132) The claimant stated that she had contacted Sensee, and she had been advised that Rachel Laing, the HR business partner had left. Ms Cunningham stated she understood that she was still there, but now with the surname Starner, unless she had left in the previous week, since she had a conversation with her.

(133) The claimant further commented that if the respondents' lawyer, at Hodge & Co, had looked at her complaint about the OH therapist properly, then we would not be here now, and that she feels that nobody else should be made to feel like she does arising from her treatment by the respondents.

(134) Continuing with her reply to the claimant's oral submissions, Ms Cunningham stated that the claimant had referred to going to ACAS before early conciliation, but the ACAS certificate, at page 1 of the Bundle, shows ACAS EC started on 1 April 2022.

(135) She submitted that the claimant should have sought advice from ACAS, or started the process at an earlier date, when she was in contact with ACAS before. She commented how the claimant had not stated that she was unaware of her rights, and the Tribunal time limit, and that she believed it was 3 months.

(136) While the claimant had put the blame for her delay on the respondents' solicitor not replying to her grievance appeal until 15 March 2022, Ms Cunningham stated that that should not be accepted as an excuse. Further, when the claimant had, in her oral submissions, made some reference to using the "***wrong form***", and submitting her ET1 claim form to the "***wrong department***", not ACAS, nor the ET, she could have sought professional advice earlier.

(137) Ms Cunningham then stated that 15 March 2022 is the date of the grievance appeal outcome being sent to the claimant, and even if its receipt was the

"***tipping point***" for the claimant, it was still more than 2 weeks later before she started the ACAS EC process on 1 April 2022.

(138) While the claimant says she was following ACAS guidelines, Ms Cunningham commented that the claimant has not produced those guidelines to the Tribunal, to show what advice she was given by ACAS, when she is well aware, by her own admission, that the time limit is 3 months.

(139) On the matter of prejudice, and the **Keeble** judgment, Ms Cunningham stated that it is very clear that the claimant is very upset by the OH report given to her on 15 November 2021, but it would have been available to her when she was in contact with ACAS about the grievance process, and she could have raised that complaint by lodging an ET1 claim form at or around that time.

(140) On the matter of Deposit Order, Ms Cunningham adhered to her earlier suggestion of **£100** per allegation and noted that the claimant is now saying she only wishes to proceed with two complaints, being the OH report, and the grievance appeal outcome letter. If she only continues with those two heads of complaint, then **£100** should be ordered as the deposit for each of those allegations.

(141) Finally, Ms Cunningham referred to the **Hasan** judgment referred to by me before the lunchbreak. As mentioned earlier in these Reasons, I mis-named it – it is the **Hemdan** case. She added that she did not see a **£200** total deposit from the claimant as being a barrier to justice given the claimant's evidence that she had up to £400 per month surplus income.

(142) Ms Cunningham's submissions concluded at 14:20pm, bringing this Hearing to a close. I reserved Judgment to follow in around 3 to 4 weeks. Unfortunately, there has been a delay, for which I have apologised to both parties.

Relevant Law: Extension of Time in a Discrimination Complaint

(143) While the Tribunal received a detailed written submission from Ms Cunningham, with some statutory provisions and some case law references cited by her on the respondents' behalf, the Tribunal has nonetheless required

to give itself a self-direction on all aspects of the relevant law, on extensions of time in a discrimination complaint, Strike Out, and Deposit Orders. I deal with each of these subjects in the following separate sections of these Reasons.

(144) The statutory test for an extension of time in a discrimination complaint is to be found in **Section 123 (1) of the Equality Act 2010** which provides that, subject to **Section 140B** (extension of time limits to facilitate conciliation before initiation of proceedings) proceedings before the Employment Tribunal may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

(145) The 3-month time limit therefore runs from the date of the act complained of. The key dates and events, in the claimant's case against the respondents, are 15 October 2021 when she received the initial grievance outcome, and 15 November 2021, when she received the OH assessment report, and resigned with notice, effective from 21 November 2021. While, as an existing employee, she appealed the grievance outcome, on 4 November 2021, she did not receive the grievance appeal outcome until 15 March 2022, well after her employment had terminated.

(146) Whatever the date of the alleged acts complained of, there is no dispute that the claimant did not notify ACAS until after the expiry of the 3-month time limit. She notified ACAS for the purposes of early conciliation on 1 April 2022. The 3-month time limit had expired, at latest, by 20 February 2022, being 3 months less one day after the effective date of termination of her employment.

(147) An extension of time to facilitate ACAS conciliation before instituting ET proceedings therefore does not arise: I refer in this respect to paragraph 23 in the EAT judgment of Her Honour Judge Eady QC in Mr **Ian Pearce v 1) Bank of America Merrill Lynch 2) Bank of America Merrill Lynch International Ltd 3) Merrill Lynch: [2019] UKEAT/0067/19/ LA.**

(148) The "***just and equitable***" test applies to a claim for discrimination. It is broader than the "***reasonably practicable test***" found in the

Employment Rights Act 1996, such as applies in a complaint of unfair dismissal. It is for the claimant to satisfy the Tribunal that it is just and equitable to extend the time limit and the Tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather that the rule – per **Robertson v Bexley Community Centre [2003] IRLR 434.**

(149) There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. These are statutory time limits, which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it**: Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 per Sedley LJ at [31-32]**.

(150) In considering whether it is just and equitable to extend time, the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434** is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule.

(151) At paragraph 25, Lord Justice Auld stated:

> ***"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."***

(152) In **Chief Constable of Lincolnshire Police v Caston** [**2010] IRLR 327** Lord Justice Wall noted that the comments in **Robertson** were not to be read as encouraging Tribunals to exercise their discretion in a liberal or restrictive manner. The Tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension. As succinctly stated by him, at paragraph 17:

"…the discretion under the Statute is at large. It falls to be exercised "in all the circumstances of the case" and the only qualification is that the EJ has to consider that it is "just and equitable to exercise it in the claimant's favour."

(153) The Tribunal may have regard to the checklist in **Section 33 of the Limitation Act 1980** as modified by the EAT in **British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT:**

- The length and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party has cooperated with any requests for information.
- The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.
- The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

(154) However, in the applying the just and equitable formula, the Court of Appeal held in **Southwark London Borough v Alfolabi 2003 IRLR 220** that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, ***'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'.***

(155) This was approved by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050** when the Court noted that *"**factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."***

(156) In deciding whether or not to extend time, there are a number of factors which a Tribunal has to take into account in the balancing exercise that it requires to carry out. I have had particular regard to the Court of Appeal judgment in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.**

(157) I have taken account of Lord Justice Underhill's' judgment, at paragraph 37 in **Adedeji**, where the learned Lord Justice (himself a former President of the EAT) warned against the mechanical working through of a checklist, and instead advised that:

"***The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… the length of, and the reasons for, the delay".***

(158) The Tribunal must therefore consider:

- The length and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay; and
- The prejudice that each party would suffer as a result of the decision reached.

(159) I pause here to note and record that the **Limitation Act 1980** to which **Keeble** refers does not apply in Scotland, the equivalent legislation being the

Prescription and Limitation Scotland Act 1973. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, **Section 19 A** simply stating:

"19A Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

(160) **Section 123 of Equality Act 2010** does not make reference to either the **Limitation Act 1980** or the **1973 Act**. It does not seek to define itself by reference to either statutory model.

(161) As the Employment Appeal Tribunal recognised in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

"…. There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses…"

(162) In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence: **Redhead v London Borough of Hounslow UKEAT/0086/13/LA** per Simler J at paragraph 70.

(163) Neither party in this case referred me to the Court of Appeal's judgment in **Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ. 1853; [2002] IRLR 116; [2002] ICR 713** often cited in these types of

Preliminary Hearing where there has been an internal grievance procedure ongoing between the claimant and respondents.

(164) The judgment of the Court of Appeal in **Apelogun-Gabriels,** by Lord Justice Peter Gibson, makes clear, at paragraph 16, that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing. The fact that a claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative.

Relevant Law: Strike Out

(165) As far as the statutory provisions on Strike Out are concerned, for present purposes, I need only refer to the terms of **Rule 2**, and **Rules 37(1) and (2) of the Employment Tribunal Rules of Procedure 2013,** 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.

Striking out

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.

(166) 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. As the Court of Session 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.

(167) A Tribunal can exercise its power to strike out a claim (or part of a claim) '***at any stage of the proceedings'*** - **Rule 37(1).** However, the power must be exercised in accordance with ***"reason, relevance, principle and justice":*** **Williams v Real Care Agency Ltd [2012] UKEATS/0051/11**, **[2012] ICR D27,** per Mr Justice Langstaff at paragraph 18.

(168) In directing myself to the relevant law, I have recalled **H M Prison Service v Dolby [2003] IRLR 694,** at paragraph 14 of Mr. Recorder Bower' QC's judgment, with Strike Out being described by counsel as the "***red card***.", and a Deposit Order is the ***"yellow card***" option. While **Dolby** reviewed the options for the Employment Tribunal, under the then 2001 Rules of Procedure, Mr Recorder Bower's judgment, at his paragraphs 14 and 15, is still worthy of consideration today, reading as it does, as follows:

> ***"14. We thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put it, "the yellow card"). Fourthly, they may decide at the end of the case that the application was misconceived, and that the Applicant should pay costs.***
>
> ***15. Clearly the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the Tribunal must adopt a two-stage approach; firstly, to decide whether the application is***

misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point."

(169) In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13, [2014] IRLR 14**, the then learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

(170) However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination or public interest disclosures, the circumstances in which a claim will be struck out are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

(171) Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391,** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

(172) In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126,** the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application 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 are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

(173) Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezsias** in **Balls v Downham Market High School and College [2011] IRLR 217,** stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, 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 prospect of success.

(174) The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that 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 a high test.

(175) In **Balls,** at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

"…***to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached."***

(176) In giving myself a self-direction on the relevant law, it is appropriate to look at a more recent judgment from the EAT in ***Mechkarov v Citibank NA [2016] ICR 1121,*** in particular to paragraphs 11 to 18 of the **Mechkarov** judgment by Mr Justice Mitting, reading 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 Students' Union [2001] UKHL 14; [2001] IRLR 305 at paragraph 24:***
>
> > ***"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 paragraph 29 of his Judgment in Ezsias v North Glamorgan NHS Trust [2007] ICR 1126:***
>
> > ***"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 was 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 Company Ltd v Reilly [2012] CSIH 46 at paragraph 30.

> ***"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, at 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 Mann 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 Mann …; 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 facts. I would treat the approval of the course taken by an Employment Judge in Eastman v Tesco Stores Ltd [2012] UKEAT/0143/12 by HHJ Peter Clark, sitting in this Tribunal, of hearing oral evidence on critical disputed questions of fact with reserve, because Tayside, which was decided before Eastman, was not cited to him or by him in his Judgment. In any event, it cannot determine the approach that the Employment Tribunal should take in a case such as this, in which an analysis of contemporaneous documents is required to permit a secure conclusion to be reached.

15. In his self directions of law the Employment Judge correctly in paragraph 35 of his Judgment cited the conclusions to be drawn from Anyanwu and Ezsias:

> ***"35. … Guidance given there was that only in rare cases should a tribunal strike out a discrimination claim without hearing evidence, where the central facts are in dispute. If facts are not in dispute, one should take the Claimant's case at its highest and only then, if there are no prospects of success, should a claim be struck out."***

16. ***After two further citations, at paragraph 37 he summarised the approach he would take:***

> ***"37. … The long and the short of it as I see it is that I should take the Claimant's case at its highest on undisputed facts and if on that basis, he has no prospects of success, I should strike it out. If there are disputed facts, unless they could be very shortly and simply dealt with within the PHR [pre-hearing review], the case should be allowed to proceed to a hearing. In this case I did her some evidence and have been able to make findings on some disputed facts."***

17. ***He was not referred to and did not cite Tayside. The oral evidence that he heard was from the Claimant, Ms Pierre and Mr Pannu. He made the following findings of fact at paragraphs 43 and 47 of his Judgment:***

> ***"43. As to the investigation into [the Claimant's] complaint, the compelling evidence of Mr Pannu, which I accept, was that he had been instructed to investigate allegations which [the Claimant] had made, or rather concerns which he had raised and brought to their attention, about financial transaction processes that have nothing to do with this case whatsoever. He was also instructed to investigate and take appropriate action arising out of Ms Pierre's report that she had felt threatened by [the Claimant]. [The Claimant] complains that the Respondent did not report back to him on the outcome of their investigation. There was no obligation upon them to do so.***
>
> ***…***
>
> ***47. As to the victimisation claim, as I have mentioned above, we established during the hearing that the alleged***

protected act was that [the Claimant] told Mr Pannu that everything which had happened to him was because he was Bulgarian and therefore he had made a complaint of discrimination. That in any event would mean that nothing with regard to Ms Pierre could be said to be an act of victimisation and only anything which happened after the 8 December 2014 could have been. However, I heard evidence from Mr Pannu and [the Claimant] about this. I unhesitatingly accept the evidence of Mr Pannu, whose evidence was straightforward and consistent. I have already explained my criticisms of [the Claimant's] evidence. I find that [the Claimant] did not make an allegation of discrimination in the meeting with Mr Pannu on 8 December 2014. I am reminded that in cross-examination at its conclusion, [the Claimant] agreed that he had not mentioned discrimination until he issued these proceedings. I therefore find on that basis, the complaint of victimisation has no reasonable prospects of success and is also struck out.

18. In determining the application on the basis of the oral evidence to which I have referred, the Employment Judge did indeed conduct a "mini trial" on core issues of fact. He should not have done so, for two reasons:

(1) Tayside precludes that option.

(2) In any event, whether or not the Claimant's case was well founded on either issue, discrimination or victimisation, turned at least to a significant extent on contemporaneous documents that were not produced to the Employment Tribunal, including notes of any interaction between Mr Pannu and persons interviewed by him and his report and, if they exist, internal emails dealing with the acts of

> ***discrimination alleged by the Claimant, the imposition of a "firewall" between him and his ex-colleagues, the reason for the imposition of the "firewall" and, if it be the case, the discouragement of ex-colleagues from speaking to him. The documents actually provided to the Tribunal are anodyne and may be incomplete."***

(177) It is surprising to me that Ms Cunningham did not include in her list of authorities the opinion of the Lord Justice Clerk in the Court of Session in **Tayside Public Transport Company Ltd v Reilly [2012] CSIH 46** at paragraph 30, the terms of which are reproduced above in **Mechkarov**, at paragraph 13. That judgment from the Inner House of the Court of Session is, after all, the familiar authority on Striking Out (exercise of ET's powers) at paragraph 25 of the **Employment Appeal Tribunal's Practice Statement in relation to Familiar Authorities** re-issued on 17 March 2016.

(178) I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, an unreported Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to ***"a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

(179) Finally, and while not cited by Ms Cunningham, I have also reminded myself of the judicial guidance from the Employment Appeal Tribunal, in the judgment of the then Her Honour Judge Eady QC, now the High Court judge, Mrs Justice Eady, current President of the EAT, in **Mbuisa v Cygnet Healthcare Limited [2019] UKEAT/0119/18**, at paragraphs 19 to 21 as follows:

> ***"19. The ET's power to strike out a claim for having no reasonable prospect of success derives from Rule 37 Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"). The striking out of the claim amounts to the summary determination of the case. It is a***

draconian step that should only be taken in exceptional cases. It would be wrong to make such an order where there is a dispute on the facts that needs to be determined at trial. As the learned authors of Harvey on Industrial Relations and Employment Law explain (see P1 [633]):

"It has been held that the power to strike out a claim under SI2013/1237 Schedule 1 Rule 37(1)(a) on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755 at para 30) or specifically cases should not as a general principle be struck out on this ground when the central facts are in dispute (see Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 [2007] IRLR 603 [2017] ICR 1126; Tayside Public Transport Co Limited (trading as Travel Dundee) v Reilly [2012] CSIH 46 [2012] IRLR 755; Romanowska v Aspirations Care Limited UKEAT/0015/14 25 June 2014 unreported). The reason for this is that on a striking out application, as opposed to a Hearing on the merits, the Tribunal is in no position to conduct a mini trial with the result that it is only an exceptional case that it would be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence…"

20. ***Such an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see <u>Ukegheson v London Borough of Haringey</u> [2015] ICR 1285 at para 21 per Langstaff J at para 4.***

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."

(180) 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 carefully consider the more recent judicial guidance provided in the judgment from the case of **Cox v Adecco [2021] UKEAT/0339/19; [2021] ICR 1307.** It was cited by Ms Cunningham, as it rightly should have been, as it is an important judgment from His Honour Judge James Tayler in the Employment Appeal Tribunal, and it bears close reading.

(181) In addition to the summary of the current state of the law on strike out, Judge Tayler considered that the judgment of the former President, Mr Justice Choudhury, in **Malik v Birmingham City Council [2019] UKEAT/0027/19,** which helpfully summarised the current, and well-settled, state of the law on strike out, and that judgment was important because of the consideration the then President gave to dealing with strike out of claims made by litigants in person.

(182) I have specifically taken into account what Judge Tayler stated in that **Cox** judgment, namely at his paragraphs 24 to 26, 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. 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." [emphasis added]***

26. I consider that the ETBB provides context to the statement by the President of the EAT in Malik about the importance of not expecting a litigant in person to explain their case and take the employment judge to any relevant materials; but for the judge also to consider the pleadings and any other core documents that explain the case the litigant in person wishes to advance:..."

(183) Further, I have also taken into account Judge Tayler's further sage guidance at his paragraphs 27 to 34 in **Cox**, as follows:

"27. Because the material that explains the case may be in documents other than the claim form, whereas the employment tribunal is limited to determining the claims in the claim form (Chapman v Simon [1994] IRLR 124), consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been pleaded, or are apparent from other documents in which the claimant seeks to explain the claim. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: HM Prison Service v Dolby [2003]IRLR 694; Hasan v Tesco Stores Ltd UKEAT/0098/16. Part of the exercise of that discretion may involve consideration of whether an amendment should be permitted should the balance of justice in allowing or refusing the amendment permit if it would result in there being an arguable claim that the claimant

should be permitted to advance. In Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18, HHJ Eady QC held at para. 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."

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."

Relevant Law: Deposit Order

(184) Somewhat surprisingly, Ms Cunningham's written submissions for the respondents only recited the statutory provision from **Rule 39 of the Employment Tribunal Rules of Procedure 2013.** She made no reference whatsoever to any relevant case law authority. As such, I have had to give myself a self-direction on the relevant law in that regard.

(185) Under **Rule 39(1),** at a Preliminary Hearing, if an Employment Judge considers that any specific allegation or argument in a claim or response has "***little reasonable prospect of success***", the Judge can make an order requiring the party to pay a deposit to the Tribunal, as a condition of being permitted to continue to advance that allegation or argument.

(186) In **H M Prison Service v Dolby [2003] IRLR 694**, at paragraph 14 of Mr. Recorder Bower' QC's judgment, a Deposit Order is the ***"yellow card***" option, with Strike Out being described by counsel as the "***red card***."

(187) The test for a Deposit Order is not as rigorous as the "***no reasonable prospect of success***" test under **Rule 37(1) (a),** under which the Tribunal can strike out a party's case.

(188) This was confirmed by the then President of the Employment Appeal Tribunal, Mr. Justice Elias, in **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07,** who concluded it followed that ***"a Tribunal has a greater leeway when considering whether or not to order a deposit"*** than when deciding whether or not to strike out.

(189) Where a Tribunal considers that a specific allegation or argument has little reasonable prospect of success, it may order a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(190) **Rule 39(1)** allows a Tribunal to use a Deposit Order as a less draconian alternative to Strike Out where a claim (or part) is perceived to be weak but could not necessarily be described by a Tribunal as having no reasonable prospect of success.

(191) In fact, it is fairly commonplace before the Tribunal for a party making an application for Strike Out on the basis that the other party's case has ***"no reasonable prospect of success"*** to also make an application for a Deposit Order to be made in the alternative if the '***little reasonable prospect'*** test is satisfied.

(192) The test of '***little prospect of success'*** is plainly not as rigorous as the test of '***no reasonable prospect'***. It follows that a Tribunal accordingly has a greater leeway when considering whether or not to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim – **Van Rensburg** cited above**.**

(193) Prior to making any decision relating to the Deposit Order, the Tribunal must, under **Rule 39(2),** make reasonable enquiries into the paying party's ability to pay the deposit, and it must take this into account in fixing the level of the deposit. It was, in terms of this **Rule 39(2),** that I took evidence from the claimant at this Hearing.

(194) As stated by Lady Smith, in the unreported EAT judgment given by her in **Simpson v Strathclyde Police & another [2012] UKEATS/0030/11,** at

paragraph 40, there are no statutory rules requiring an Employment Judge to calculate a Deposit Order in any particular way; the only requirement is that the figure be a reasonable one.

(195) Further, at paragraph 42 of her judgment in **Simpson**, Lady Smith also stated that:

"It is to be assumed that claimants will not readily part with money that they are likely to lose – particularly where it may pave the way to adding to that loss a liability for expenses or a preparation time order (see rule 47(1)). Both of those risks are spelt out to a claimant in the order itself (see rule 20(2)). The issuing of a deposit order should, accordingly, make a claimant stop and think carefully before proceeding with an evidently weak case and only do so if, notwithstanding the Employment Tribunal's assessment of its prospects, there is good reason to believe that the case may, nonetheless succeed. It is not an unreasonable requirement to impose given a claimant's responsibility to assist the tribunal to further the overriding objective which includes dealing with cases so as to save expense and ensure expeditious disposal (rule 3(1)(2) and (4)."

(196) Lady Smith's judgment referred to the then 2004 Rules. Further, at paragraph 49, she also stated that: "***it is not enough for a claimant to show that it will be difficult to pay a deposit order; it is not, in general, expected that it will be easy for claimants to do so."***

(197) Further, I wish to note and record that in the EAT's judgment in **Wright v Nipponkoa Insurance (Europe) Ltd [2014] UKEAT/0113/14,** dealing with the *quantum* of Deposit Orders, it was held that separate Deposit Orders can be made in respect of individual arguments or allegations, and that if making a Deposit Order, a Tribunal should have regard to the question of proportionality in terms of the total award made.

(198) HHJ Eady QC, as she then was, now Mrs Justice Eady, the current EAT President, discusses the relevant legislation and legal principles, at paragraphs 29 to 31, and in particular I would refer here to the summary of

HHJ Eady QC's judgment at paragraph 3, on the *quantum* of Deposit Orders, stating that the Tribunal Rules 2013 permit the making of separate Deposit Orders in respect of individual arguments or allegations, and that if making a number of Deposit Orders, an Employment Judge should have regard to the question of proportionality in terms of the total award made. Paragraphs 77 to 79 of the **Wright** judgment refer.

(199) In the present case, while the claimants' complaints in the ET1 claim form are registered by the Tribunal's administration under only one administrative jurisdictional code, for disability discrimination, being ***"DDA***", Ms Cunningham had identified 8 allegations although, in her own oral submissions, the claimant explained that she only has two allegations that she wishes to pursue against the respondents.

(200) Finally, although I was not referred to it by Ms Cunningham, I am aware that there is also the more recent guidance from Her Honour Judge Eady QC, in **Tree v South East Coastal Ambulance Service NHS Foundation Trust [2017] UKEAT/0043/17**, referring to Mrs Justice Simler, then President of the EAT, in **Hemdan v Ishmail & Another [2017] ICR 486 ; [2017] IRLR 228**, and Judge Eady QC holding that, when making a Deposit Order, an Employment Tribunal needs to have a proper basis for doubting the likelihood of a claimant being able to establish the facts essential to make good their claim.

(201) **Hemdan** is also of interest because the learned EAT President, at paragraph 10, characterised a Deposit Order as being "***rather like a sword of Damocles hanging over the paying party"***, and she then observed, at paragraph 16, that: "***Such orders have the potential to restrict rights of access to a fair trial.***"

(202) Mrs Justice Simler's judgment from the EAT in **Hemdan**, at paragraphs 10 to 17, addresses the relevant legal principles about Deposit Orders, and I gratefully adopt it as a helpful and informative summary of the relevant law, as follows:

"10. A deposit order has two consequences. First, a sum of money must be paid by the paying party as a condition of pursuing or defending a claim. Secondly, if the money is paid and the claim pursued, it operates as a warning, rather like a sword of Damocles hanging over the paying party, that costs might be ordered against that paying party (with a presumption in particular circumstances that costs will be ordered) where the allegation is pursued and the party loses. There can accordingly be little doubt in our collective minds that the purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails. That, in our judgment, is legitimate, because claims or defences with little prospect cause costs to be incurred and time to be spent by the opposing party which is unlikely to be necessary. They are likely to cause both wasted time and resource, and unnecessary anxiety. They also occupy the limited time and resource of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit.

11. The purpose is emphatically not, in our view, and as both parties agree, to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party's means in determining the amount of a deposit order is inconsistent with that being the purpose, as Mr Milsom submitted. Likewise, the cap of £1,000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice. There are many litigants, albeit not the majority, who are unlikely to find it difficult to raise £1,000 by way of a deposit order in our collective experience.

12. ***The approach to making a deposit order is also not in dispute on this appeal save in some small respects. The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.***

13. ***The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strike out application, because it defeats the object of the exercise. Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested.***

14. ***We also consider that in evaluating the prospects of a particular allegation, tribunals should be alive to the possibility of communication difficulties that might affect or compromise understanding of the allegation or claim. For example where, as here, a party communicates through an interpreter, there may be misunderstandings based on badly expressed or translated***

expressions. We say that having regard in particular to the fact that in this case the wording of the three allegations in the claim form, drafted by the Claimant acting in person, was scrutinised by reference to extracts from the several thousand pages of transcript of the earlier criminal trials to which we have referred, where the Claimant was giving evidence through an interpreter. Whilst on a literal reading of the three allegations there were inconsistencies between those allegations and the evidence she gave, minor amendments to the wording of the allegations may well have addressed the inconsistencies without significantly altering their substance. In those circumstances, we would have expected some leeway to have been afforded, and unless there was good reason not to do so, the allegation in slightly amended form should have been considered when assessing the prospects of success.

15. Once a tribunal concludes that a claim or allegation has little reasonable prospect of success, the making of a deposit order is a matter of discretion and does not follow automatically. It is a power to be exercised in accordance with the overriding objective, having regard to all of the circumstances of the particular case. That means that regard should be had for example, to the need for case management and for parties to focus on the real issues in the case. The extent to which costs are likely to be saved, and the case is likely to be allocated a fair share of limited tribunal resources, are also relevant factors. It may also be relevant in a particular case to consider the importance of the case in the context of the wider public interest.

16. If a tribunal decides that a deposit order should be made in exercise of the discretion pursuant to Rule 39, sub-paragraph (2) requires tribunals to make reasonable enquiries into the paying party's ability to pay any deposit ordered and further requires tribunals to have regard to that information when deciding the

amount of the deposit order. Those, accordingly, are mandatory relevant considerations. The fact they are mandatory considerations makes the exercise different to that carried out when deciding whether or not to consider means and ability to pay at the stage of making a cost order. The difference is significant and explained, in our view, by timing. Deposit orders are necessarily made before the claim has been considered on its merits and in most cases at a relatively early stage in proceedings. Such orders have the potential to restrict rights of access to a fair trial. Although a case is assessed as having little prospects of success, it may nevertheless succeed at trial, and the mere fact that a deposit order is considered appropriate or justified does not necessarily or inevitably mean that the party will fail at trial. Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued (see, for example, the cases to which we were referred in writing by Mr Milsom, namely Aït-Mouhoub v France [2000] 30 EHRR 382 at paragraph 52 and Weissman and Ors v Romania 63945/2000 (ECtHR)). In the latter case the Court said the following: -

"36. Notwithstanding the margin of appreciation enjoyed by the State in this area, the Court emphasises that a restriction on access to a court is only compatible with Article 6(1) if it pursues a legitimate aim and if there is a reasonable degree of proportionality between the means used and the aim pursued.

37. In particular, bearing in mind the principle that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, the Court

reiterates that the amount of the fees, assessed in the light of the particular circumstances of a given case, including the applicant's ability to pay them and the phase of the proceedings at which that restriction has been imposed, are factors which are material in determining whether or not a person enjoyed his or her right of access to a court or whether, on account of the amount of fees payable, the very essence of the right of access to a court has been impaired …

42. Having regard to the circumstances of the case, and particularly to the fact that this restriction was imposed at an initial stage of the proceedings, the Court considers that it was disproportionate and thus impaired the very essence of the right of access to a court …"

17. An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered."

(203) For the purposes of this Judgment, I do not need to address the differing approaches identified by Lady Smith in ***Simpson***, and Mrs Justice Simler in ***Hemdan***. I suspect, however, that it will only be a matter of time before another Employment Judge somewhere else, in another case, will have to wrestle with the competing views of these two learned EAT Judges, and decide what is the correct approach under the current 2013 Rules.

(204) It is not necessary for me to do so in the present case. For any future case, however, I note from the ICR law report, and the list of cases cited in argument before Mrs Justice Simler in ***Hemdan***, as listed at ***[2017] ICR 487 C/F,*** that Lady Smith's unreported judgment in ***Simpson*** was not cited, although various other unreported EAT judgments were cited in argument before her, and ***Simpson*** is not referred to in the EAT's reported Judgment in ***Hemdan.***

Discussion and Deliberation

(205) In deciding whether or not to extend time, for it is accepted by the claimant that her ET1 claim form was presented late, namely on 19 May 2022, when her employment with the respondents had ended on 21 November 2021, there are a number of factors which I have taken into account in the balancing exercise that I have required to carry out.

(206) The matters with particular significance in the balancing exercise were as follows:

The length of delay:

(207)The delay was significant here. The acts complained of were in October and November 2021. It is not just a matter of days or weeks late. It was measured in almost 6 months before her ET1 was lodged.

(208) The claimant had knowledge of the factual matrix which supports her claims against the respondents by the effective date of termination of employment on 21 November 2021.

(209) While she did not institute Tribunal proceedings arising out of these matters within 3 months of that date, or at all at that stage, it clearly lay there, in the background, and it came to the fore again, in spring 2022, when she received the grievance appeal outcome on 15 March 2022.

(210) Even then, it took her until 1 April 2022 to engage ACAS early conciliation, and while an ACAS EC certificate was issued on 22 April 2022, there was a further delay before she presented her ET1 claim form on 19 May 2022.

(211) The claimant provided no explanation to me for the further delay between 22 April and 19 May 2022.

(212) No explanation was provided to me by Ms Cunningham why it had taken the respondents' third-party solicitor until 15 March 2022 to conclude the internal grievance appeal procedure that started on 4 November 2021.

(213) That is a delay factor which weighs against the respondents, and in favour of the claimant, when it comes to the balancing exercise.

Advice received:

(214) The claimant had taken advice from ACAS, about the grievance procedure, before notifying them, on 1 April 2022, for the purposes of early conciliation, and she acknowledges that she was aware that there was a 3-month time limit for going to the Employment Tribunal.

Grievances:

(215) Although a grievance will not automatically enable a claimant to say that it was not just and equitable to have presented their ET1 claim form in time, if the grievance process had exhausted the statutory time limit period, it could be a relevant factor.

(216) The claimant's grievances in the present case were relevant in two ways here; as I see things, firstly, it reflected the claimants' desire to pursue an internal process with a view to trying to resolve differences with her employer. Although that course of action is no longer a mandatory precursor to proceedings in the Tribunal, it is still to be encouraged.

(217) Secondly, and perhaps more importantly, the grievances served to crystallise the claimant's concerns, and so put the respondents, as her then employer, on notice that the claimant considered that their treatment of her had been discriminatory, and that she was intent on pursuing matters using the established internal procedures first.

Prejudice:

(218) The above points about the grievances feed heavily into the issue of prejudice. The obvious prejudice to the claimant, if her claim is struck out, as time-barred, is that her claim against the respondents will be stopped in its tracks, and there will be no evidentiary Final Hearing. Put simply, her claim will be at an end.

(219) These were not claims which had been sprung on the respondents from the depths of history. They were complaints which were made in October and November 2021. While Ms Cunningham made some submissions to me, about the effect of delay, there was no substantial basis for her to suggest that the cogency of the respondents' evidence had been affected, either documentary or oral.

(220) I am not at all satisfied that the respondents have shown any actual forensic prejudice. Nor am I satisfied that the cogency of evidence from either party is likely to be affected by the delay in bringing the claim. Delay in bringing the claim is a matter which will likewise impact on the claimant, and her ability to recall matters. It is not a matter which, in my view, impacts in any greater way on the respondents than it does on the claimant.

(221) Much of the relevant background seems to be captured in writing, in respect of the claimant's initial grievance, and subsequent appeal, and so captured in contemporaneous form.

(222) The claimant's principal submission to me, in seeking an extension of time, was to submit that it was just and equitable to do so, because, as she put it, she could not do anything until she had heard back from the respondents' third-party solicitor at Hodge & Co about the outcome of her grievance appeal.

(223) As I recorded earlier, at paragraph 97 of these Reasons, the claimant stated that she had followed ACAS guidance to let her grievance process complete itself before she could do anything further. She described it as being "***out of my hands",*** as if she had started the ET process, then she believed that she would have been asked to complete the grievance process first.

(224) The claimant did not explain, or provide any supporting documentation, to me to vouch what she says was the guidance given to her by ACAS. Ms Cunningham founded upon her failure to do so. In my view, she was right to do so, because it is well known that many claimants bring Tribunal proceedings, within the relevant statutory time limit, as a "***protective measure"***, and the Tribunal will usually sist Tribunal proceedings to allow internal proceedings, and any associated appeals, to be exhausted internally with the employer.

(225) The claimant has advanced no good reason to explain why she did not take that common sense and pragmatic approach. She has not prayed in aid that there was some impediment, physical or mental, such as a debilitating illness, that prevented her from doing so. She was not ignorant of her rights, and she was aware of the statutory time limit. She was able to enter into correspondence with the respondents, to intimate her grievance, and to intimate her grievance appeal.

(226) On the information available to me, at this Preliminary Hearing, the claimant was aware of all of the relevant facts in the initial 3-month period following termination of her employment with the respondents. She had been in contact with ACAS, about the grievance procedure, and there was no argument presented by her to me that there had been any misrepresentation by the respondents, as her employers, that had somehow misled her, or caused her to be confused about how and when to complain to the Tribunal.

(227) In my view, all of these matters makes it unjust and inequitable now to give her an extension of time. She could, and in my view, she should have presented her ET within 3 months.

Disposal and Closing Remarks

(228) For the foregoing reasons, the Tribunal finds that the claimant's complaints against the respondents, as specified in her ET1 claim form, presented on 19 May 2022, as later augmented by her further and better particulars, were presented out of time, and that it is not just and equitable, in terms of **Section**

123 of the Equality Act 2010, to extend the time for bringing her claim against the respondents.

(229) Further, and in any event, the Tribunal has granted the respondents' opposed application to strike out the entire claim as having no reasonable prospects of success, in terms of **Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013**, and so dismisses the claim against the respondents in its entirety.

(230) I regarded the Strike Out arguments advanced by Ms Cunningham to be well-founded in that regard. I remind myself of the terms of paragraph 20 of the EAT judgment in **Chandhok**, where it is stated that:

> ***"20. This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time;…"***

(231) Had I not dismissed the claim as time-barred, I would have considered, on my own initiative, Strike Out of the claim under **Rule 37(1) (c)** for non-compliance with the Rules or with an order of the Tribunal, specifically failure to fully comply with Employment Judge O'Donnell's orders.

(232) While the claimant, though her lay representative, Ms McLean, did correspond with the Tribunal, her emails were not material compliance, as the legal basis of the claim against the respondent remains unspecified by her. It is the claimant's case, and she needs to clearly state what it is. It is not for the Tribunal, any more than the respondents, to second guess what they think might be the legal basis of a claimant's case.

(233) 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.

(234) 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 Judge O'Donnell issued his Orders. The answer is short and easily ascertainable. There has been no material compliance with his Orders.

(235) The claimant here 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.

(236) I wish to note and record that the claimant presented a Tribunal 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.

(237) The Employment Tribunal's resources have to be shared with all users, many of whom are not professionally represented, and the Tribunal is well used to dealing with unrepresented claimants, or claimants represented by another lay person.

(238) That said, when most claimants and / or their lay representatives are ordered to provide information in support of what they say, they do so. The prejudice to the claimant in having her claim struck out at this stage, having had the opportunity to prevent that happening by the provision of information, is, in reality, very little.

(239) It is likely that the conduct of the case would continue to be similarly non-compliant, and in those circumstances, she would be at risk of strike out again in the future. The prejudice to her of strike out now is far less than it would be

for a party who has routinely demonstrated being able to progress a claim in accordance with directions, as most do.

(240) As the claimant's asserted disability status is disputed by the respondents, if the case were allowed to go forward, then it is likely that before any consideration of the case on its merits, there would need to be a public Preliminary Hearing to determine whether or not, at the material time, the claimant was a disabled person within the meaning of **Section 6 of the Equality Act 2010.**

(241) Such a Preliminary Hearing will inevitably involve further time and expense to both parties, as well as for the Tribunal administration. That is a potential prejudice to the respondents, because it will protract the Tribunal proceedings. If the Tribunal were thereafter to determine that the claimant is not a disabled person, then her disability discrimination complaint would be at an end, but, if it found that she was, there would still be a lack of proper specification of her claim to go forward to a Final Hearing. In all the circumstances, I consider that it is appropriate that this claim end now.

(242) To do otherwise, in my view, would be inappropriate. The claimant has failed to comply fully with previous Orders, and I have no feeling that making an Unless Order, under **Rule 38**, would change things for the better, given the experience to date. To allow this case to continue is likely to cause both wasted time and resource, and unnecessary anxiety. It would also occupy the limited time and resource of this Tribunal that would otherwise be available to other pro-active and truly engaged litigants.

(243) 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."***

(244) 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. …"

(245) In closing, 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…".***

(246) Yes, strike out of a claim is a Draconian step. However, in my view, where the claim brought is not within the Tribunal's statutory jurisdiction, because it is time-barred, 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.

(247) In these circumstances, the Tribunal finds it unnecessary to consider the respondents' opposed application for the claimant to pay a deposit order, in terms of **Rule 39 of the Employment Tribunal Rules of Procedure 2013,** as a condition of continuing to advance her allegation of unlawful disability discrimination against her by the respondents.

(248) What I would add here, by way of a further closing remark, is that if I had not dismissed the claim as time-barred, and I had not struck it out for no reasonable prospect of success, I would have made a Deposit Order against

the claimant to pay a deposit of **£100** for each allegation that she wished to pursue against the respondents. In the claimant's financial circumstances, as outlined by her to this Tribunal, such an amount would not have been a barrier to justice.

Employment Judge: **EJ McPherson**
Date of Judgment: **13 April 2023**
Entered in register: **17 April 2023**
and copied to parties