Case Number: 2200214/2018
2200248/2018

sb

EMPLOYMENT TRIBUNALS

V

Claimant ***Respondent***

Mrs M Leeks **AND** UCL Hospitals NHS Foundation Trust

HELD AT: **London Central** **ON:** 24 April, 11 July and 19 September 2019

BEFORE: Employment Judge Walker (Sitting alone)

Representation:

For Claimant: Ms P Lewis of Counsel on 24 April only
For Respondent: Miss A Carse, of Counsel

RESERVED JUDGMENT

The application to strike out the claim pursuant to Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 is refused2.

REASONS

Purpose of the preliminary hearing

13. This preliminary hearing was first listed pursuant to the order of Employment Judge Pearl made on 6 February 2019, to consider the Tribunal's own motion, being whether the Claimant had acted unreasonably in the way she had conducted the claim in recent months prior to that order. Additionally, he allowed for some further applications to be made by the parties. The Respondent applied to the Tribunal to strike out the claims under Rule 37(1)(b) on the basis that the Claimant's conduct of the proceedings had been

scandalous, unreasonable or vexatious and alternatively on the basis that it had not been actively pursued and pursuant to Rule 37(1)(d) and/or that it was no longer possible to have a fair hearing pursuant to Rule 37(1)(e). Other applications have not yet been heard or considered.

Background Facts

1. The Claimant lodged claim 2200214/2018 on 20 January 2018. She lodged a second claim 2200278/2018 on 27 January 2018, that is one week later. Both claims cited the Respondent as University College London Hospitals NHS Foundation Trust. Both related to applications for employment made by the Claimant, but the second claim also raised a question about compliance with the data protection legislation which is outside the scope of this Tribunal's jurisdiction. In essence, the Claimant complained that she had been awarded jobs by the Respondent which had been withdrawn. The Respondent defended the claims. It admitted that two conditional offers had been made and then withdrawn, but believed it had proper reasons for doing so.

2. The full merits hearing was listed for five days in September 2018 and a notice of hearing sent out on 28 February 2018 set out standard directions for that hearing. In addition, the Tribunal listed a preliminary hearing at which the case management directions were reviewed. The cases were considered together and have been addressed together at all times.

3. The Claimant complied with the first direction on the standard directions list by preparing a schedule of her loss and sending that to the Tribunal and to the Respondent.

4. On 23 April 2018 the parties attended the preliminary hearing for case management consideration and the issues were identified and recorded. The claims were a public interest disclosure claim, a claim for direct disability and a claim for discrimination arising from a disability, all of which arose out of the withdrawal of the offers of employment.

5. The orders made on 23 April 2018 were made by consent and included retaining the listing between 4-10 September 2018 but adjusting the time periods for various case management steps. New dates were agreed for the exchange of list of documents and for the Respondent to provide the Claimant with a draft index of the bundle with a view to agreeing its content. The Respondent was to supply the Claimant with a bundle by 23 May 2018 and finally the date for exchange of witness statements was amended to 13 June 2018. Provision was made for consideration of the question of whether the Respondent conceded the Claimant was disabled.

6. It appears that the parties discussed the date for service of witness statements and the Respondent sought an extension until 18 July, which was agreed. The Claimant and the Respondent were therefore expecting to exchange witness statements on 18 July. In practice this did not happen and, having not heard from the Claimant, on 25 July 2018 the Respondent applied for an unless order. On 27 July the Tribunal made an unless order that the Claimant serve her witness statement by 4pm on Monday 5 August. Unfortunately, 5 August was in fact a Sunday. The Tribunal order should have put the date as 6 August 2018, which was a Monday.

7. The Claimant wrote on 3 August pointing out the error and asking for an extension of time until 17 August to comply with the order, explaining that she was unwell with Fibromyalgia and struggling to word process. Her application was not addressed by the Tribunal prior to the deadline. The Tribunal did send a request to the Respondent for comments. Meanwhile the Claimant served a short witness statement on the Respondent. The Respondent wrote to the Tribunal on 7 August 2018 commenting on the Claimant's application for relief from sanctions but stating that they did not think that the error was confusing as the Claimant stated, nor did they think that the Claimant required relief from sanctions and referring to the fact that the Claimant had now provided a statement. In those circumstances the Tribunal concluded that there was no need for relief from sanctions as the unless order appeared to have been complied with. By letter dated 10 August 2018 the Tribunal wrote to the Claimant as follows:

> "The Respondent accepting that the unless order was complied with by you there is no need for relief from sanctions.
>
> If the claimant produces a further witness statement between now and trial the Tribunal will decide how to deal with the situations, taking into account of Respondent submissions" [sic].

That was an indication that if the Claimant wished to submit another witness statement, she should produce it and the Tribunal would consider the position. The Claimant did not produce another witness statement prior to the full merits hearing in September.

8. The Tribunal understands the statement provided by the Claimant to the Respondent on Monday 6 August was in practice various extracts from her claim form but it did amount to a three-page statement and did address the key sequence of events.

9. There was subsequently a dispute over the bundles. The Claimant wrote to the Tribunal on 6 August 2018 and one aspect of her email was an application for an unless order requiring the Respondent to provide the Claimant with hard copies of all the Respondent's disclosure and a hard copy of the current hearing bundle.

10. The Claimant's email explained that the Respondent had provided the Claimant with access to a file sharing website (which the Tribunal understands is a reference to an electronic disclosure system). The Claimant complained that she had not been provided with a hard copy of the bundle and explained that she was having difficulty in downloading the bundle of documents on her mobile phone. She then continued her request for relief from sanctions, which as I have noted the Tribunal had already indicated was not necessary, given the fact that her witness statement had been supplied. The Claimant re-sent that email on 31 August but the Tribunal did not take any action. The Respondent did eventually supply the Claimant with hard copy of the hearing bundle.

11. On 4 September, the hearing was due to start. On the morning of 4 September, at 7.22 am, the Claimant wrote to the Tribunal requesting a four day stay of the commencement of the hearing and setting out her reasons which included a complaint about the hearing bundle which she had received on Monday 3 September 2018 in hard copy. The Claimant also complained about having asked for an extension of time to finish her witness statement and said she had come down with painful mouth blisters making it difficult for her to be in a position to give oral testimony at that day's hearing and as she wanted to get medical treatment so that she could participate in the hearing without being distracted by all manner of pains including mouth pains - that cause food intake difficulties - hence causing hunger pains to the claimant.
12. The Claimant's application could not be dealt with before the hearing started. The Claimant did not attend the hearing. She notified the Tribunal by a later email sent on 4 September that she was suffering from painful blood filled oral ulcers which rupture. This is apparently a recurrent problem that she suffers from and an episode began on 3 September which led her to go to hospital to the department of Oral Medicine on 3 September. In her place her husband attended to explain her difficulty and the hearing was postponed.

14. Employment Judge Grewal, chairing the Tribunal on that occasion, made the order which adjourned the hearing. In her order, Judge Grewal recorded that the Tribunal would not adjourn the hearing on the basis that the hearing bundle had only been received the previous day because the Claimant had received it electronically in June. She had not paid the photocopying costs for a hard copy and the Tribunal concluded that if there were issues for the Claimant not having the bundle she should have raised them earlier with the Tribunal.

15. In relation to the request for an adjournment based on the Claimant's medical condition, the order recorded the fact that the Tribunal had asked for medical evidence to verify the Claimant's assertions and she had produced her GP's notes and an outpatient medical referral from the hospital which confirmed she had been seen by a doctor in the department of oral medicine. Judge Grewal recorded the fact that the medical evidence did not comply fully

with the order that was made, but that was not surprising given the short timescale for producing it. However, it was accepted that the mouth ulcers would cause her pain and difficulty in talking and in the light of that, the Tribunal was satisfied that it was appropriate to adjourn.

16. The full merits hearing was relisted for a shorter period being three days on Wednesday 6, Thursday 7 and Friday 8 February at 10am each day. The notice of hearing was sent out on 9 November 2018.

17. On 30 January 2019 the Claimant sent two emails to the Tribunal, one at 5:30pm and one at 23:57pm. The one at 5:30pm attached evidence of the Claimant's health problems in the period of time from October 2018 to January 2019. In November 2018 she had a fit note recording acute kidney injury and had supplied information to explain what this might relate to. In December 2018 she had a fit note relating to Fibromyalgia. The acute kidney injury fit note said she was unfit until 22 November 2018. There was no period on the Fibromyalgia fit note.

18. In her second email of 30 January sent at 23.57, the Claimant wrote over three pages asking to convert the full merits hearing to a pre-hearing review to discuss what she called the Respondent's "obstruction of a fair hearing and judicial intimidation" of the Claimant. She complained in that email of a number of things in relation to the case preparation.

18.1 She complained about the witness statement saying that the Respondent's solicitor had barred her from making a witness statement. She regarded that as manifestly unfair.

18.2 She complained that the bundle compiled by the Respondent's solicitors contained the wrong documents and she wanted time to make her own bundle and paginate the documents in the proposed Claimant's bundle. She also complained that there were sensitive personal identity documents in the bundle (her passport, driving licence, council tax, marriage certificate and all her examination

qualifications) and she complained that this posed a serious personal safety threat to the Claimant exposing her to identity theft fraudsters.

18.3 She also complained the Respondent had towards the middle of 2018 changed the reasons they gave the Claimant in August, October and November 2017 for withdrawing two conditional job offers from her. She said there were different reasons given in the documents disclosed in the bundle and the Claimant would like to be given the opportunity to amend the claim (and include documents in the bundle that would enable her to deal with the Respondent's 2018 disclosed reasons for withdrawing job offers from the Claimant). She did not supply a draft amended claim at that stage and a general request to amend is not enough at this stage.

19. The Claimant said she did not think there could be a fair hearing unless the Tribunal treated parties on equal footing and extended time to allow the Claimant to put in her witness statements in the two merged cases and also to allow time to prepare her own bundle. The Claimant expressly said She thought that one day could be used for the PHR following which the case could be adjourned and relisted for two days only.

20. The wording used by the Claimant about the Respondent was extremely strong. For example when she complained again about her passport being in the bundle she said the Respondent had "so dishonestly compiled the bundle with full fraudulent intentions of obstructing and blindsighting the ET from seeing the real and actual evidence in this matter, hence I strongly contend that the bundle compiled by the Respondent's solicitor contains some "manufactured evidence"/Fabricated evidence, which had been fabricated by the respondent HR and respondent's solicitor with the sole aim of misleading the Tribunal into arriving at the wrong findings of facts".

21. She asked that the bundle prepared by the Respondent should be rejected in its entirety by the Tribunal as being non-compliant with rules of civil procedure. She complained again about the hearing bundle being served on

her first day of the previously listed hearing and about the unless order in relation to the witness statements.

22. In the event the second full merits hearing was not converted to a PHR and the Claimant did not attend. The hearing was postponed and Employment Judge Pearl in the postponement order determined there should be a preliminary hearing on 24 April 2019 to consider whether the claim should be struck out for unreasonable conduct of the proceedings by the Claimant and also to consider any other applications that the parties might make. He set out at some length the issues in general considerations and then made orders including an order which allowed the Claimant to apply to submit a further witness statement, such application to be made by her serving that statement (which would technically be a draft) on the Respondent and the Tribunal by 1 March 2019. He allowed the Respondent to make any applications by 15 March 2019, and required any documents or witness statements in support of their applications to be served on the Claimant by 29 March 2019. He also provided for the Claimant to be able to serve on the Respondent any additional document she wished to rely on and any witness statements, if she wished to give evidence at the preliminary hearing, by 12 April 2019.

23. In the event the Claimant sought a further extension of time to serve her draft witness statement on the Respondent until 25 March 2019. Comments were sought from the Respondent. Meanwhile, the Claimant provided some information about her medical position. The Tribunal did extend time for the Claimant to serve her proposed witness statement to 25 March 2019.

24. The Respondent applied to the Tribunal to strike out the claims under Rule 37(1)(b) and alternatively on the basis that it had not been actively pursued and pursuant to Rule 37(1)(d) and/or that it was no longer possible to have a fair hearing pursuant to Rule 37(1)(e). The Respondent further made an application for costs.

25. On 24 March the Claimant made a further application for an extension of time until 29 March to submit her draft witness statement. She explained that she had further problems with the Fibromyalgia which her GP had identified as being caused by severe lack of vitamin D. She was on a course of vitamin D therapeutic treatment.

26. Again, the Tribunal sought the Respondent's comments and then the Tribunal received a further request from the Claimant for more time specifically on the basis that on Friday 29 March she would have to attend an NHS hospital appointment and this could take most of the day by the time she had travelled to the appointment and waited.

27. On 1 April 2019 the Claimant served on the Tribunal and on the Respondent a draft witness statement in both proceedings. The draft witness statement was some 39 pages long and appears to quote extensively from documents as well as addressing a series of matters which are outside the usual scope of a witness statement such as detailing her contact with ACAS and repeating parts of her ET1 Form. Additionally, on 1 April the Claimant served what she called, "Claimant's pleadings" which was a 16 page document although it is not clear whether it simply amounts to an additional witness statement or something else. Also, on 1 April 2019 the Claimant served a draft chronology of events which amounted to 33 pages of text, although the document had a few sections which had no text in them other than heading. This appeared to be a detailed account of events as well.

28. This hearing was a preliminary hearing and was originally listed on 24 April as a full days hearing to consider all the matters before the Tribunal. The Claimant attended the hearing on that day, but did not come into the hearing room, rather staying in the Claimant's waiting room. She was represented by Counsel. The Respondent was represented by Counsel as well. The first matter for consideration was the Respondent's application for a strike out. Having heard the parties' submissions at some length, and read the papers provided, I considered that there was insufficient medical available to indicate whether the Claimant was going to be fit to attend a future hearing, particularly as I was told by her Counsel that the reason she had not come into the

hearing room was that she was too unwell to do. I was told that she was lying across several chairs and when Counsel had asked her to look at a document, she sat up, whereupon she then fell off the chair. Her Counsel's own assessment was that she was unfit to come into the hearing room and I was subsequently told that the Claimant departed the hearing early to go home.

29. I pointed out that an important consideration was whether the Claimant would be well enough to attend any future hearings given she had not been able to attend two full merits hearings and a further days preliminary hearing. I therefore adjourned the hearing and ordered the Claimant to provide further medical evidence. The order I made set out a detailed explanation for any medical advisor to understand what might be expected of the Claimant in relation to attending to future hearings and asked a number of questions.

30. The hearing resumed on 11 July 2019, but the Claimant did not attend as she was at another tribunal hearing. The Claimant's application to change the date was made on 28 May 2019 although she would have been fully aware of the clash of dates on 24 April 2019 as her Counsel who had attended on 24 April 2019 told me that she was instructed under the direct access scheme and I have no doubt she would have reported the outcome of that hearing to the Claimant immediately it finished on 24 April 2019. The order was drawn up and sent out to the parties on 13 May 2019 and on 14 May 2019 the Tribunal also sent a notice of the preliminary hearing confirming the hearing dates. Thus, the Claimant had two documents confirming the hearing date, namely the adjournment order and the notice of preliminary hearing by about the middle of May 2019 and had been aware of the date since 24 April 2019.

31. As noted, on 28 May 2019 the Claimant wrote to the Tribunal requesting an extension of time to produce the medical report. She explained that her GP's practice had told her that the current waiting time for the provision of such a report was 4 – 8 weeks.

32. Also on 28 May 2019, the Claimant wrote a second email asking to vacate and relist the hearing on 11 July to a future date. She explained that she was due to be at a full merits hearing at Employment Tribunal London

South for a period of time including 11 July. The Tribunal responded on 18 June stating that the Claimant would need to provide evidence that she was obliged to be at London South, which she had not provided so far and it was suggested that she sent evidence of her being a part in those proceedings and of the notification of the hearing dates. It was not clear from what she had written already whether she was simply a witness in the hearing or a party.

33. The Claimant then submitted a medical report dated 12 June 2019 from her local GP which said that she was fit to attend an Employment Tribunal. The GP's report responded to this Tribunal's detailed order and questions with only a few lines stating that [the Claimant] "is fit to attend an Employment Tribunal. She does suffer with Fibromyalgia and is being investigated for ongoing fatigue so she may therefore benefit from the option of being able to take more frequent rests/comfort breaks."

34. In the light of that report this hearing continued on 11 July 2019, even though the Claimant did eventually supply further evidence which demonstrated that she was required to be at the London South Tribunal at a full merits hearing. Initially, there was a confusion on the part of the Tribunal as it appeared that the letter she supplied indicated that she was committed at 10 am on 11 July but in practice this was a misreading. However, the document supplied was still not clear about the Claimant's role and it was simply a notice of a telephone hearing to consider whether to consolidate certain claims so that it did not satisfy the Tribunal that the Claimant's attendance was actually necessary. Subsequently, on 10 July the Claimant supplied further information which made it clear that she was a party in proceedings which were ongoing at London South. As it had taken the Claimant so long to produce the necessary evidence, it was too late to postpone the hearing, so it took place. The Claimant did not attend, sending her husband instead to ensure the Tribunal had become aware of the additional evidence she had sent which explained her commitment at London South Tribunal.

35. In the light of the Claimant's situation, the Tribunal did not hear any further submissions on the matter. Indeed, submissions had already been given. Instead the Tribunal reserved the matter and this is the reserved decision on the strike out application.

36. Although the Claimant produced medical evidence which says that she is fit to attend a hearing, she also specified a series of dates which she wished to avoid which are 1-12 July (understood) 22-30 August (no information as to why), 4-18 September (no information as to why) 1 November -20 December (no information as to why). The Claimant's husband was asked if he knew why the Claimant was unavailable on those occasions. He said he thought the first absence might be related to an unspecified medical procedure which was due to happen at a date which had not yet been fixed but he had no explanation of the other dates.

37. In consequence the present position is this.

37.1 Notwithstanding the fact that there have been two full merits hearings which have only been adjourned due to the Claimant's medical condition, the Claimant disputes the status of the Respondent's bundle and argues that this contains inaccurate documents and falsified documents and that she wishes to produce her own bundle.

37.2 Notwithstanding the fact that witness statements were due first in June 2018 and in by mid August 2018, the Claimant had a letter indicating the Tribunal would consider any application she made to submit a different one, the Claimant now makes an application to produce a new witness statement which is very extensive and addresses matters which are undoubtedly privileged, being the details of her ACAS discussions.

37.3 The Claimant has not followed up on her suggestion that she wished to make an application to amend her claim.

38. I have not heard the Claimant's application to amend her witness statement. This remains to be considered.

39. There is no current application to amend the claim and if there were to be one made, it would have to be made in a clear and properly pleaded manner and would have to be considered in the normal manner following the principles laid down in case law, particularly the case of Selkent Bus Co Ltd v Moore: EAT 2 May 1996. I note there is a document headed "Claimant's pleadings" but it is more of a witness statement than any form of draft pleading and does not appear to be a draft amendment.

40. The Claimant's assertions about the bundle also remain to be considered but I note that Tribunals can usually find methods of addressing concerns about the security of personal documentation. In so far as the Claimant has indicated that her objections to the bundle are far more extensive such as unspecified fraud, it is not possible to say what could be done without knowing the problem but it would not be normal or desirable for the parties each to have their own bundle. The advantage of agreed bundles is that everyone can find the same document with the same pagination.

41. The facts about which the Claimant complains largely took place in 2017 and given that the length of hearing required and the Claimant's lack of availability, this hearing would be listed some time in 2020 so that some matters about which the Claimant's complains would be over three years old by that date.

The Law

42. Rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provide as follows:

` "(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 the 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.

43. In the case of Baber v The Royal Bank of Scotland UK EAT/0301/15/JOJ and /0302/14/JOJ, it was noted that Tribunals must have regard to the overriding objective of seeking to deal with cases fairly and justly. This is the guiding principle and requires consideration of all the circumstances and, in particular the following factors; the magnitude of non-compliance, whether the failure was the responsibility of the party or his or her representative; the extent to which the failure causes unfairness, disruption or prejudice; whether

a fair hearing is still possible; and whether striking out or some lesser remedy would be an appropriate response to the disobedience in question".

44. That case set out a history of key cases and provided guidance for Tribunals in determining whether or not they could strike out which included:

(1) there must be a finding that the parties are in default of some kind, falling within Rule 37(1)

(2) if so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed;

(3) even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed;

(4) if strike out is the only proportionate and fair course to take, reasons should be given why that it so

45. The case also cited the case of James v Blockbuster Entertainment Limited [2006] IRLR 630CA in which it was recognised that there was a draconian nature of the strike out power and it was not to be readily exercised.

46. One question which Tribunals must consider is whether the claim can be tried because time remains during which orderly preparation can take place, or whether a fair trial cannot take place.

47. The overriding objective is set out at Rule 2 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 and provides as follows.

"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.

Submissions

48. The Claimant has submitted that there were reasons largely relating to her ill health, on each occasion when she had not complied with the Tribunal orders and particular the two occasions when she had not attended the full merit hearings. In all the circumstances it was suggested it would be unreasonable for the case to be struck out. The Claimant wanted to be able to pursue her case.

49. The Respondent set out the timetable at some length and submitted that the chronology was such that the Claimant had been guilty of unreasonable behaviour in failing to provide a witness statement in accordance with the directions, leading to the Respondent having to obtain an unless order, in bringing complaints about the failure to provide the bundle the day before when the Claimant had appeared to have downloaded the documentation and the bundle in June some three months before, in making a late application to postpone the final hearing on 4 September and indeed, when the Claimant did supply medical documentation, lots of it was redacted so that it could not be seen when appointments had been booked for example which might have

indicated that she had some considerable knowledge of the appointment before she made the application to the Tribunal.

50. On 30 January the Claimant had applied for a preliminary hearing to be able to provide a fuller witness statement but there was no draft copy of the witness statement. She had further alleged that the Respondent had maintained unfair deceitful tactics and she was not afraid to make serious allegations very lightly.

51. The Respondent relied on the fact that the Claimant had on many occasions sent emails late before a hearing, late at night and early in the morning.

52. The Respondent also said that the Claimant had alleged that the Respondent had tried to prevent her from making a witness statement and that was obviously not correct and she would have known that from the correspondence. The Respondent merely accepts the document she supplied as witness statement as no other draft was provided.

53. The Respondent referred to various strange emails which cast aspersions on people who were not parties and who had no opportunity to respond to these aspersions that were made on their character.

54. Thereafter the Claimant provided three documents, one which was called the Claimant's pleadings which was not required and not relevant.

55. Finally, there was the impact on the Respondent where they had significant costs which had been thrown away by virtue of the abandoned hearings and they had had to bring three witnesses with them on each occasion and had to prepare and go through the stress of a hearing. Costs issues were quite significant and they were still uncertain about the future position.

56. The Respondent focussed on the conduct of the proceedings and not on the question of the Claimant not actively pursuing the claim.

Conclusion

57. I am mindful of the huge significance of striking out a claim and of the difficulty for a litigant in person of knowing how to prepare a claim.

58. Following the guidance in the case of Baber v The Royal Bank of Scotland, if there is to be a strike out, I must make a finding that the parties are in default of some kind, falling within Rule 37(1). The allegation is that the Claimant's behaviour has been unreasonable, if not scandalous and vexatious.

59. The Claimant has delayed compliance with most procedural steps till she has been faced with an unalterable deadline. She is now making applications which, if granted, will oblige the Respondent to review its previous preparation.

60. Her language in some emails and her accusations about the Respondent are very serious. Even a lay individual without representation is expected to comply with the overriding objective and to co-operate with the other side and with the Tribunal, which generally includes temperate language. The Claimant has repeatedly sent lengthy emails, often several pages long with detail in them and in the light of that ability, it is not clear why she could not have produced a witness statement of reasonable length in reasonable depth at a much earlier stage, particularly given that she was well aware of the requirement for the witness statement, originally in June 2018. She failed to serve a witness statement until she was faced with an unless order and then supplied such a short statement that she herself is apparently unsatisfied with it. Thereafter she did not take up the indication in the Regional Judge's letter that she might be allowed to put in a longer witness statement if she made an appropriate application. When she was told that the Tribunal would consider an application for her to amend her witness statement, even then she delayed until it seemed likely that she would not be allowed to apply at all.

61. Similarly, the Claimant's attitude towards the bundle in terms of complaining about not receiving it in hard copy when in fact she accessed an electronic version is a matter of concern. Additionally, the challenges which

the Claimant makes to the Respondent's compilation of the bundle are dramatic and unspecified. To suggest that documents have been fraudulently compiled is an extraordinarily serious allegation. To make it without further information is indeed unreasonable, as indeed is her allegation that the Respondent's solicitor had barred her from making a witness statement. That was simply not correct.

62. I am mindful that the Claimant has given a list of dates she cannot do in future which take up the whole of August, half of September and effectively the whole of November and what would amount in practice to the whole of December, as her dates end on 20 December by which time many other people would in fact be away on their Christmas holiday. There is no explanation for this. The Claimant is well aware from her dealings with the Tribunal that some explanation is appropriate and without one there is the question of whether the Claimant has any real wish for the hearing to proceed in an effective or timely manner.

63. All these matters taken together are certainly behaviour which is unreasonable and raise deep concerns about the future of this claim. I have therefore given careful consideration to the possibility of striking out this claim in its entirety.

64. I disregard for these purposes the fact that the Claimant has failed to attend at two previous full merits hearings as on each of those occasions the Tribunals have accepted her position and I do not consider I can question those decisions. I do note that when asked for medical evidence, what the Claimant supplies is rarely clear and sufficiently detailed, so that questions still remain.

65. Nevertheless, even if I conclude that the Claimant's behaviour merits a strike out, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed. In general, the approach which Tribunals are expected to take is to hold a hearing, if indeed a fair hearing is still possible and there are steps which could be taken which would enable it to take place.

66. I requested the medical information about the Claimant in order to try to assess whether there was a prospect of her attending a future hearing. One concern which I made clear in that Order was the possibility that the Claimant's medical conditions or the stress of a hearing might always trigger the Claimant to suffer physically (from her main condition or some side effect) and thus prevent the Claimant from attending so that there could not be a fair hearing. In response to this lengthy order and numerous questions as well as an explanation about the type of steps a tribunal can take to accommodate an individual, I can only describe the medical evidence provided as limited. It was short and blunt and made reference only to the Claimant's Fibromyalgia, but importantly it indicated that she was fit to attend a hearing. That evidence is extremely important. I take it to mean that the Claimant should be able to attend at a future date.

67. The Respondent did not set out to persuade me that it had suffered impediments that made a fair hearing not possible. The Respondent reasonably and fairly accepted that it had prepared the bundle and witness statements and still had access to the witnesses which it would seek to call. The Respondent was clearly concerned, not only by the manner in which the proceedings had been conducted by the Claimant to date, but also that it had already attended twice with all the consequent costs and disruption to its witnesses, and that it might need to attend another time only to find that the Claimant did not attend again.

68. Based on the medical evidence and given the Respondent's acceptance that they could still conduct their defence, I cannot say that a fair trial is not possible.

69. Even if a fair trial were to be unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed. That links with the question of what case management directions could be made which would ensure the case does go forward to a full merits hearing without any further delay in a manner which ensures that there will be a fair hearing.

70. It is my view time remains during which orderly preparation can take place. It is however, important that the Claimant's application and future case management directions are considered sensibly and with the appropriate legal considerations in mind. Additionally, it is essential that the Claimant co-operates fully as required by the over-riding objective. Such co-operation would encompass her communications in future and seeking to find a convenient date for that hearing as well as attending any future hearings. If, as the matter progresses, it turns out that a fair hearing is not in fact possible due to future events or for reasons I had not considered, the question of strike out may be revisited.

71. For the avoidance of doubt, I do not think it can be said that the Claimant has not actively pursued this claim.

72. It would certainly be the case that when the claim is next listed for a full merits hearing, it must go forward. Based on the medical evidence the Claimant has supplied, she is fit to attend. However, if the Claimant is taken ill close to that hearing, there are two possibilities. One is that the Tribunal will have to proceed in any event. It could not postpone for a third time. The other is that, if the Claimant finds herself unwell again and the medical report which I have relied upon turns out to be wrong, the Tribunal at such a time, would have no alternative but to assess the position for itself, based on the Claimant's history in this claim. There is a strong possibility it would conclude that the Claimant is in fact never likely to be fit enough to attend a future hearing and there is no possibility of a fair hearing.

73. I do consider that the Claimant's medical condition must be taken into account in terms of the arrangements made at the hearing and certainly the Tribunal does make efforts to accommodate parties and witnesses and will do so for the Claimant.

74. In all the circumstances I do not propose to strike out but will list the matter for a preliminary hearing to consider the Claimant's application to

adduce a new witness statement as well as any other case management directions needed and to find a date for the full merits hearing.

Employment Judge Walker

Dated: 02 10 2019

Judgment and Reasons sent to the parties on:

22/10/2019

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For the Tribunal Office