EMPLOYMENT TRIBUNALS

Claimant: Miss K Sangster

Respondent: UK Carline Limited

HELD AT: Manchester **ON:** 22, 23, 24 and 25 September 2020
7 and 9 October 2020
27 October 2020 (In Chambers)

BEFORE: Employment Judge Holmes
Ms A Ross - Sercombe
Mr T Walker

REPRESENTATION:

Claimant: Mr D Doran, HR Consultant
Respondent: Mr R Evans, Solicitor

RESERVED JUDGMENT ON APPLICATION TO STRIKE OUT THE RESPONSE AND FOR A PREPARATION TIME ORDER

It is the unanimous judgment of the Tribunal that:

1.The respondent having acted unreasonably in the conduct of the proceedings, and having breached Tribunal orders, the response is struck out pursuant to rules 37(1)(b) and (c) of the 2013 rules of procedure;

2.The respondent is permitted to participate in the hearing to the extent only of making submissions as to whether the claimant has established a prima facie case of sex discrimination, and, if appropriate , in any remedy hearing.

3.The hearing of the claimant's claims will resume on **20 and 21 January 2021** for two days.

4.The claimant's application for a preparation time order will be considered further once it has been further particularised.

REASONS

1. The Tribunal had commenced the hearing of the claimant's claims of sex discrimination on 22 September 2020. The hearing was listed for four days, before a full Tribunal. The claimant was represented by Mr Doran, a Consultant, and the respondent by Mr Evans, solicitor.

2. The claimant's case is that her summary dismissal by the respondent on 8 July 2019 by Darren Godbert, the Managing Director , was an act of sex discrimination. The respondent admits that she was dismissed in this manner, but denies that this was discriminatory. The claimant gave evidence first, and was cross – examined, and questioned by the Tribunal.

3. There were issues with disclosure by the respondent. The claimant had previously made applications for specific disclosure, and most recently Employment Judge Franey , by Order of 28 August 2020, sent to the parties on 3 September 2020, had ordered the respondent to disclose all documents mentioned in the Grounds of Resistance , and any other documents relied upon by Mr Godbert in deciding to dismiss the claimant . That resulted in the respondent giving further disclosure, by means of a Supplementary Witness Statement from Mr Godbert on 10 September 2020, to which he exhibited an Index with many further documents which were then disclosed by the respondent for the first time in the proceedings, some 12 days before the final hearing.

4. Various documents were then further disclosed by the respondent during the hearing. They necessitated the claimant being re-called to answer questions upon them, as they had not been available during her cross – examination.

5. Mr Doran, for the claimant , during the course of the hearing , when presented with this further, piecemeal, and late, disclosure made strong criticisms of the respondent and its legal representatives for this conduct, which he considered was deliberate and unfair. Be that as it may, after taking instructions , he did agree to these further items of disclosure being admitted in evidence.

6. The claimant finally finished giving evidence, and her case was closed on 24 September 2020. The respondent then called Darren Godbert, the Managing Director, and, having confirmed his witness statement as his evidence in chief, Mr Doran commenced his cross – examination.

7. The respondent's pleaded case is, and has always been, that the claimant was dismissed for poor performance and misconduct. That misconduct was pleaded in the response as being that the claimant failed to follow the respondent's company policies, which cost the respondent financially, £4,710.89 on two deals which she had negotiated, and which had to be reversed, and varied, so that the respondent did not make the expected level of commission, but only made around £747.

8. The documentation in the bundle as presented to the Tribunal at the outset of the hearing in support of this contention was rather sparse, and in response to the Order of Regional Employment Judge Franey, the respondent had disclosed, and had included in the bundle at pages 503 and 504 , two handwritten file notes, which were said to be evidence which related to these two deals, and their subsequent variation,

which are the basis of the respondent's contention that the claimant had committed misconduct.

9. The respondent's business is arranging rental finance for new motor vehicles. It is, in effect, a broker. It was the claimant's job to negotiate such transactions, matching customers' requirements with finance houses. This involved the purchase of the vehicle from a dealer, and then the financing , on lease, of the vehicle for the customer. The respondent's income was derived from commission that it received upon such agreements being effected. Part of the claimant's role was to source a vehicle, get an on the road price (the "OTRP") agreed with the supplying dealer, and then negotiate a suitable rental package with a finance house. The amount of commission the respondent would receive would depend upon the profitability of the rental agreement for the finance house. This was thus a function of the purchase price, the rental payments due from the customer, and the residual value of the vehicle at the end of the rental agreement.

10. The respondent's case is that shortly before her dismissal the claimant had effected two transactions which appeared to be very good for the respondent, and would bring in commission of £4,710.89 in total.

11. This turned out not to be the case, because as the transactions were being processed, it was noticed that there was an issue with the OTRP for the two vehicles involved. There were various discounts that could be applied in these transactions, with manufacturers or dealers agreeing certain discounts on sales of vehicles to certain finance houses.

12. It emerged , largely during the course of the hearing from the documents that the respondent disclosed during it, that the claimant had utilised figures for the OTRPs for the vehicles in question, which had then been ordered from the supplying dealer, which were too low. A double discount available with a certain finance house had been applied in calculating the OTRP for the two vehicles in question, which was not in fact applicable. This meant that the OTRP negotiated by the claimant for each vehicle was too low. Although the supplying dealer had agreed these prices, it was realised that these OTRPs were too low, and these deals then had to be revised to show the correct, higher, OTRPs for each vehicle. The result was lower commission for the respondent.

13. Upon enquiry in the course of the hearing, it transpired (as was indeed obvious) that the two handwritten notes, the only documents disclosed prior to the start of the hearing by the respondent which related to these two transactions, were but extracts from a larger document, in fact two such documents, which were the "deal packs" for each transaction. Overnight on 23 September 2020 the respondent disclosed, or purported to disclose , the entirety of these documents, together with other documents relating to these deals. The claimant was then , upon recall to the witness stand, able to answer questions upon them, and explain from them , as best she could, what she understood to have happened, and why and how the deals were then revised to utilise correct figures, with the resultant reduction in the commission receivable by the respondent.

14. Even then, disclosure was not complete, as the documents did not actually demonstrate the change in the OTRP for each vehicle agreed with the supplying dealer, and these documents were further disclosed even later in the hearing.

15. The claimant was dismissed verbally in a meeting on 9 July 2019, at which only she and Mr Godbert were present. No letter of dismissal was issued. The claimant was cross – examined about that meeting at length, and was also questioned by the Employment Judge and the Panel.

16. In particular, at pages 512 to 515 of the bundle there is a typewritten note of that meeting. The claimant was cross – examined , and questioned by the Employment Judge, upon its contents. She disputed parts of these notes, and could not recall certain parts of the meeting. She became upset in the meeting on 9 July, when reference was made to her absence from work in January 2019, when her grandfather had died, and she had suffered a miscarriage. The meeting was adjourned for her to compose herself, and then was resumed. She also became upset in the hearing when questioned about this part of the meeting. Her answers to questions about what was said were not clear, and she professed not to be able to remember much of the detail of what was said, particularly after she had become upset.

17. No mention of this important note is actually made in Mr Godbert's first witness statement. Its provenance had in fact been questioned by Mr Doran, as he had sought the metadata in relation to the production of the notes. It was first disclosed on 10 September 2020 with Mr Godbert's Supplementary Witness Statement.

18. Upon questioning by the Employment Judge during his cross – examination by Mr Doran about the meeting on 9 July 2019, in which reference was made to these notes, Mr Godbert told the Tribunal that the second part of the meeting had been covertly recorded by him. He had made a transcript of the recording, and had also made handwritten notes of the whole meeting. He had referred to the recording, the transcript , and the notes in making his witness statement.

19. The hearing adjourned (it was in any event near to the end of the hearing day) for the respondent to produce the audio recording, transcript and the handwritten notes.

20. The following day , Friday 25 September 2020, the hearing was resumed. The respondent had disclosed , the previous evening, the audio file, and the transcript. The handwritten notes could not be located. Additionally , the respondent disclosed more documents relating to the two deals, effectively demonstrating the revision of the OTRP for the two vehicles.

21. The Tribunal afforded Mr Doran time to take instructions. The claimant had become visibly upset in the resumed hearing on 25 September 2020, and she left the hearing, content to then let Mr Doran deal with these issues in her absence.

22. Mr Doran is not legally qualified. He was clearly very concerned at what he saw as yet further late disclosure, and was again very critical of the respondent and its representatives.

23. The upshot was that Mr Doran sought a postponement of the hearing for further instructions and possibly legal advice, without making any further applications at that stage . He asked for a week in which to inform the Tribunal of any applications to be made, which the Tribunal granted. The hearing was therefore adjourned, part heard.

He was directed to make any applications resulting from the further disclosure by the respondent by 2 October 2020.

The application and response.

24. By email of 2 October 2020 Mr Doran duly made applications under rule 37(1) that the response be struck out, and for a preparation time order. The Tribunal reconvened, as listed, on 7 October 2020 to consider the application.

25. Mr Evans for the respondent, however, pointed out that the application had only been received by his firm on Friday 2 October 2020, and he had had little time to respond to it. He sought further time in which to do so, and Mr Doran did not oppose that application. Consequently, the Tribunal heard the application and Mr Evans' response on 9 October 2020. The Tribunal reserved its judgment, deliberating in Chambers on 27 October 2020, and reached this unanimous judgment. The Employment Judge apologises for the delay in its promulgation, occasioned by pressure of judicial business , and limited access to judicial premises and resources during the current pandemic.

The claimant's application.

26. Mr Doran set out his application in an email of 2 October 2020. He actually made it on an N244 form, which is a County Court form, and , he attached a .. page document setting out his grounds for the application. In the same application he also applied for a preparation time order. He also submitted a bundle for the application, containing certain documents, and taking the Tribunal through the procedural history of the claims, the history of disclosure , and of the orders made by the Tribunal.

27. These documents can be inspected in full, but in essence his application can be summarised thus. In his oral submissions Mr Doran took the Tribunal through his application document. He pointed out that when the respondent served its List of Documents on 21 July 2020, no copies were supplied at that time. The List only contained documents that the respondent considered were relevant. Whilst some of the claimant's disclosure was included, this had led to his application to the Tribunal on 7 August 2020.

28. His complaint generally was that the respondent had sought unilaterally to determine what was and what was not relevant to the claimant's case. He contended that the respondent was procrastinating at this stage. He referred to the letter at page 24 of the application bundle as being indicative of the respondent's mindset.

29. The respondent had sought to dismiss the evidence of Mr Nolan, and to contend that the claimant would need to amend her claims, if it was to be relied upon.

30. The Orders made by the Regional Employment Judge were very clear, as were the reasons why he had made them. They resulted in late disclosure, which then was added to during the course of the hearing.

31. Mr Doran went on the refer to the respondent's correspondence as to the possibility of the hearing being conducted by CVP, which the respondent would not agree to. He again regarded this as a delaying tactic. At that point there was still no hearing bundle.

32. The claimant, not wishing to breach the Tribunal's orders, had made her witness statement on 2 September 2020, before she had sight of any further disclosure from the respondent.

33. He took the Tribunal through the correspondence leading up to the hearing, and the email of 17 September 2020 (page 51 of the application bundle) in which the assertion was made that the claimant was impecunious and in debt, and the threat of an application for a wasted costs order was made. He went through his response to that email, and the ensuing correspondence about what would be in the hearing bundle, and the subsequent decision he made to provide a supplementary bundle.

34. He confirmed that he had not received any actual copy documents until the respondent provided the hearing bundle, after the claimant had made her witness statement.

35. In summary , he contended that the additional documents disclosed up until the start of the hearing and during it had affected the fairness of the hearing, and the claimant's ability to defend herself and bring her claim. The covert recording had only come to light on day three of the hearing, during cross – examination of Mr Godbert, in response to questions from the Employment Judge. The claimant still believed that only half of what was recorded has been disclosed.

36. From 23 July 2020 the respondent had behaved vexatiously and unreasonably, and had disregarded the orders for disclosure made by Employment Judges Allen and Franey.

37. The allegations on 17 September 2020 about the claimant's alleged impecuniosity , being in debt, and that her claim was motivated by money, were abusive . The contention that no adviser would advise her to proceed was similarly abusive and unnecessary. The respondent had been uncooperative and unreasonable. The covert recording had been deliberately withheld, but the transcript of it had been used to cross examine the claimant , in full knowledge of its existence. This was demeaning and violating for the claimant. It was unnecessary and intrusive. That conduct had denied, or had potentially denied, the claimant a fair trial. Had the claimant been aware of that recording her evidence about the meeting may have been different. It was certainly disclosable after the Order made by REJ Franey. The meeting notes had been disclosed in response to those Orders.

38. Mr Doran then took the Tribunal through the second part of his application, the Issues section. At para. 7 , Mr Doran alleges that Mr Evans and Mr Godbert had been winking and gesturing to each other during the claimant's cross examination, which had been brought to the Tribunal's attention. It was now apparent why. He had recognised in para. 8 the draconian nature of the Order he was seeking. He submitted in that paragraph that , given the manner in which the respondent had conducted the proceedings, the claimant did not feel she would be able to have a fair hearing, even if the matter was heard by another Tribunal.

39. The Employment Judge explored this with Mr Doran, who took some time to confer with the claimant . Upon resumption, he said the claimant believed that she would get a fair hearing before this Tribunal.

The respondent's response.

40. Mr Evans in response , after seeking the postponement which was agreed as set out above , provided a Skeleton Argument for the hearing on 9 October 2020, together with copies of various authorities referred to in the Skeleton. He had also submitted a supplemental bundle of documents for the application.

41. In his oral submissions, Mr Evans initially submitted that in the light of the claimant's concession that a fair trial was still possible, a necessary pre-requisite for the making of the Orders sought , a coach and horses had been run through the application, and he questioned whether he need make any further submissions. He was told that the Tribunal considered that he should nonetheless proceed to address the application on its merits. He accordingly did so, speaking to his Skeleton.

42. He initially went through his submissions as to the claimant's lack of qualifying service for a claim of unfair dismissal, the history of the pleadings, and the issues that were agreed at the preliminary hearing on 27 January 2020. The sole act of discrimination was the dismissal on 9 July 2019, in respect of which the burden of proof is upon the claimant. He made reference to her pleaded "vulnerability" and how this was not a protected characteristic. He referred to the claimant's continued attempt to claim unfair dismissal when she could not . This, the Employment Judge interposed, was an issue that had been dealt with at the outset of the hearing, when he had pointed out to Mr Doran that his argument that that the claimant could nonetheless recover compensation for unfair dismissal on the grounds that , had she not been dismissed she would have gone on to acquire sufficient qualifying service, was not a sustainable one.

43. He took the Tribunal through the procedural chronology , and in particular the disclosure process. There had not been deliberate default on the part of the respondent, there had been a difference of opinion on what was and what was not relevant. The claimant may not have liked the way that the respondent was viewing the process, but that was not unreasonable.

44. He went on to discuss the Orders made by Regional Employment Judge Franey, which had been complied with. The claimant had exchanged witness statements, and appeared to be happy to do so. There was no application to adduce a further witness statement.

45. In relation to the "late" disclosure on 10 September 2020, had the claimant at that point sought a postponement of the hearing, it would have been hard to oppose such an application, but she did not. She was ready to proceed to the final hearing.

46. In relation to the statement of Mr Nolan, that had been served in an email, but it was unclear whether the claimant was relying upon it. The claimant could have made an application to strike out the response much sooner if she was dissatisfied with the disclosure, but she did not.

47. In relation to the disclosure during the course of the hearing, the OTRP documents related to the mistake that the claimant had made, and arose out of her cross - examination. When asked by the Employment Judge why only pages 503 and 504 of the bundle, identified at the outset of the hearing as the only documents at all

that the respondent had disclosed in relation to the two transactions which led to the claimant's dismissal, were only extracts of larger documents , Mr Evans acknowledged that this had been fully his fault. As soon as this issue was raised, the whole of the documents were disclosed, but he appreciated they should have been sooner.

48. This was, however, water under the bridge, they had been dealt with. In any event, they did not blow a hole in the respondent's case, they show the OTR price agreed with the dealer. This cannot impact upon the fairness of the hearing.

49. Turning to the recording, in cross – examination the claimant had disputed some seven parts of the notes of the meeting on 9 July 2019. Her position, however, is unknown as to the extent to which she agrees with the recording or the transcript , and she should be pressed on this. The recording anyway can only undermine her case, not help it. She was aware of the reasons for her dismissal from ACAS, so this recording will not help her case.

50. He then took the Tribunal through the relevant provisions of the rules. The Employment Judge indicated that he need not address rule 37(1)(e) as a separate ground for the applications.

51. He cited ***Arriva London North Ltd v Maseya UKEAT/0096/16*** as authority for the proposition that even where there had been a deliberate failure to comply with Tribunal orders, the Tribunal still had to go on to consider whether a fair hearing was still possible. The claimant was now saying that she was happy to proceed, and a fair hearing was still possible.

52. There were two separate issues, the pre – hearing disclosure, and the post – hearing disclosure. He acknowledged that the recording and the transcript were the nub of the issue. The claimant's argument about this recording was difficult to see. If it had been disclosed sooner, it would not have helped her.

53. Further, the claimant had made applications to the Tribunal before the hearing, and Orders had been made. There had been no appeal from those Orders.

54. Turning to ground (c) of rule 37(1), he contended that there had not been a breach of the Tribunal's orders. Anything requested had been produced, the respondent had not refused anything. The claimant had not made this application when the OTRP and dealer documents were disclosed. She had used SAR and GDPR applications , had complained about the respondent to the ICO, and had done everything to complain about the respondent's behaviour.

55. In relation to the recording, he had doubts as to its admissibility as a covert recording, but accepted with the benefit of hindsight that it should have been disclosed. This had not, however, prejudiced the claimant , a fair trial was still possible. He then rather reiterated previous submissions.

56. Turning then to the email of 17 September 2020, he said that the Tribunal should consider sauce for the goose and for the gander. The claimant has failed to deal with remedy in her evidence and disclosure. The respondent could have made an application, but had not done so.

57. In relation to the parts of the email that Mr Doran contended were threatening, he did not accept that they were , but accepted that they could have been better phrased.

58. In response to the Employment Judge inviting submissions in the alternative as to what the Tribunal should allow the respondent to do by way of continued participation if the response is struck out, Mr Evans submitted that the respondent should still be permitted to participate. The Tribunal had already heard the claimant's evidence, and it would be a perverse situation if the respondent were not then allowed to continue with its evidence. Alternatively it should be permitted to make submissions and observations upon Mr Nolan's evidence.

59. In reply, Mr Doran said that Mr Evans had tried to justify the unjustifiable. The respondent had decided what was and what was not relevant for disclosure. The respondent was represented by an experienced advocate, who had tried to take advantage of the claimant and himself.

The Law.

60. The relevant provisions are those of rule 37 of the 2013 rules of procedure, which provide:

"37 Striking out

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

61. In terms of guidance as to how Tribunals should approach such applications, the caselaw is as follows. The EAT has held that the striking out process under rule 37(1) requires a two-stage test (see ***HM Prison Service v Dolby [2003] IRLR 694***, EAT, at para 15; approved and applied in ***Hasan v Tesco Stores Ltd UKEAT/0098/16***

(22 June 2016, unreported). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. In ***Hasan***, the EAT held that the failure of the employment judge in that case to consider 'whether to exercise his discretion in favour of not striking out following his finding that the claims had no reasonable prospect of success' amounted to a clear error of law (para 18). According to Lady Wise, the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (para 19). In this case, of course, that would apply to a response that may have merit.

62. The purpose of the rule is to provide a means for dealing with litigants (or their advisers) who conduct their cases in a disruptive and unruly manner, or refuse to obey the directions of the Employment Judge, but whose cases could not be struck out on either of the other two grounds. It is not directed solely to conduct at the hearing but may apply to conduct at any stage of the proceedings. It has been held that there are two 'cardinal conditions' for the exercise of the power under rule 37(1)(b), namely, that the unreasonable conduct has taken the form of a deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible (see ***Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684, [2006] IRLR 630***, at para 5, per Sedley LJ). Where these conditions are fulfilled, it is necessary for a Tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question (ibid). As Sedley LJ put it, the power to strike out under the rule is 'a Draconic power, not to be readily exercised'.

63. A number of points of general importance on the meaning of rule 37(1)(b) arise from the judgments in ***Bennett***, particularly that of Sedley LJ (with which Longmore LJ agreed). First, the manner in which a party's proceedings are conducted is not to be equated with the behaviour of the representative, although it may be evidenced by it. Dealing with the 1993 rule, Sedley LJ observed that it was directed to the conduct of proceedings in a way which amounts to abuse of the tribunal's process, abuse being 'the genus of which the three epithets scandalous, frivolous, and vexatious are species' (para 26). The same comments no doubt apply to the 2013 rule. Second, what is done in a party's name is 'presumptively, but not irrebuttably' done on his behalf. This means that, before a claim is struck out on the grounds of a representative's conduct, the party should be given the opportunity to dissociate himself from what the representative has done. An advocate's ostensible or implied authority does not extend, in the absence of ratification, to abusing the judicial process (para 26). Third, the meaning of the word 'scandalous' in the rule is not its colloquial meaning; it is therefore not a synonym for 'shocking'. According to Sedley LJ, it embraces both 'the misuse of the privilege of legal process in order to vilify others', and 'giving gratuitous insult to the court in the course of such process' (para 27). Fourth, not only must the conduct of a party's case be shown to have been scandalous, but it must be such that striking out is a proportionate response: 'it is not every instance of misuse of the judicial process, albeit it properly falls within the description scandalous, [unreasonable] or vexatious, which will be sufficient to justify the premature termination of a claim or of the defence to it' (para 28).

64. What is required to be decided by an Employment Tribunal before making a striking out order under rule 37(1)(b), was also considered by Burton J, giving judgment in ***Bolch v Chipman [2004] IRLR 140***, taking account of the judgments in

the ***Bennett*** and ***De Keyser*** cases. He stated that there are four matters to be addressed (see para 55). First, there must be a conclusion by the Tribunal not simply that a party has behaved scandalously, unreasonably or vexatiously but that the proceedings have been conducted by or on his behalf in such a manner. As Burton J stated: 'If there is to be a finding in respect of [rule 37(1)(b)] … there must be a finding with appropriate reasons, that the conduct in question was conduct of the proceedings and, in the circumstances and context, amounted to scandalous, unreasonable or vexatious conduct.' Such conduct is not confined to matters taking place within the curtilage of the tribunal, and could comprise, for example, the making of threats as to possible consequences if the proceedings are not withdrawn. Second, even if such conduct is found to exist, the tribunal must reach a conclusion as to whether a fair trial is still possible. In exceptional circumstances (such as where there is wilful disobedience of an order) it may be possible to make a striking out order without such an investigation (see ***De Keyser***), but ordinarily it is a necessary step to take. Third, even if a fair trial is not considered possible, the tribunal must still examine what remedy is appropriate, which is proportionate to its conclusion. It may be possible to impose a lesser penalty than one which leads to a party being debarred from the case in its entirety. Fourth, even if the tribunal decides to make a striking out order, it must consider the consequences of the debarring order. For example, if the order is to strike out a response, it is open to the tribunal, pursuant to its case management powers under rule 29 or its regulatory powers under rule 41, to debar the respondent from taking any further part on the question of liability but to permit him to participate in any hearing on remedy.

65. A case in which a pleading was struck out on the ground of intimidatory conduct was ***Force One Utilities Ltd v Hatfield [2009] IRLR 45***. There a Tribunal struck out the respondents' response and debarred them from taking any further part in the proceedings, either as to liability or remedy, on the ground that a fair trial was no longer possible. The conduct in question consisted of threats made by a director of an associated company of the respondents, who had conduct of the proceedings on their behalf, to the claimant as they left the tribunal building following a hearing which had been adjourned to enable the claimant to obtain legal advice. The claimant was, as the tribunal found, put in real fear for his safety. Upholding the tribunal's decision, and applying the staged approach in ***Bolch***, the EAT (Elias J presiding) noted that this was 'wholly unacceptable conduct which goes to the very root of the tribunal's ability fairly to assess the evidence of the witnesses' (para 34). Although it was argued that the tribunal should have carried out a balancing exercise, weighing up the adverse effect on the claimant with the detrimental effect on the respondents if they were debarred from defending the case, the EAT held that this was not appropriate in such a case. Elias J stated (at para 36):

''We do not accept that a balancing exercise is the correct metaphor in a case of this kind. The intimidatory conduct of one party is specifically designed to put the other in fear of the consequences of continuing with the action. Where a tribunal concludes that the intimidated party will be unable to manage that fear and is likely to tailor the evidence to fit with the other party's case, then it seems to us that the only proportional response is to disallow the intimidating party from being allowed to take further part in the proceedings, at least with respect to liability. It is a draconian step to take and it plainly does affect the ability of the intimidating party to defend the case, but that is a consequence which that party has brought upon itself.''

66. The importance of Tribunals adopting a structured approach when considering whether to strike out a pleading, and carrying out a careful and dispassionate analysis of the factors indicating whether a fair trial is or is not still possible and whether a strike out is or is not a proportionate penalty, has been stressed in a number of cases. For example, in ***Arriva London North Ltd v Maseya UKEAT/0096/16*** , cited by Mr Evans, Simler J stated: 'There is nothing automatic about a decision to strike out. Rather, a tribunal is required to exercise a judicial discretion by reference to the appropriate principles' (para 27).

67. That case concerned a Tribunal's decision to strike out a response to a disability discrimination claim on the grounds that the respondents had conducted the proceedings in a scandalous and unreasonable manner by pursuing a 'false defence' and deliberately failing to disclose documents. Allowing the respondents' appeal, Simler J held that, on the facts, there was no justification for categorising the response as 'false', and no basis for concluding that there had been a deliberate failure to disclose relevant documents. In reaching these conclusions, the Tribunal had failed to analyse the facts properly and had fundamentally misunderstood the nature of the cases put forward by the claimant and the respondent. Moreover, it had crucially failed to consider the authorities on striking out and the principles to be applied. It did not properly investigate whether a fair trial was still possible and did not consider the question of proportionality. Simler J found that the problems regarding amendments to the response and the disclosure of documents, which were at the heart of the decision to strike out, were all capable of resolution without causing undue delay, so that there was nothing to prevent a fair trial from taking place. Further, and in any event, she held that the draconian sanction of strike out was disproportionate in the circumstances. The case was accordingly remitted to a fresh tribunal for a full hearing on the merits.

69. Again, in ***Baber v Royal Bank of Scotland plc UKEAT/0301/15*** Simler J expressed similar views on the draconian nature of striking out orders when setting aside an order striking out the claimant's unfair dismissal claim for non-compliance with case management orders. Pointing out that such orders are neither automatic nor punitive, she held that not only did the Tribunal fail to identify the extent and magnitude of the claimant's non-compliance with the order, merely stating that there had been non-compliance, but it had not examined whether a fair trial was still possible or whether a lesser sanction could be imposed (see para 56).

Discussion and ruling.

70. Both parties have set out in their submissions the procedural history, which is the factual basis upon which , and is hence vital to, the determination of, the applications that the Tribunal has before it. That history is therefore set out here, adapted from Mr Evans' chronology in his submissions (references being to page numbers in the main hearing bundle).

Pre-Hearing : Disclosure; and Disclosure Correspondence

1. On 27th January 2020, Judge Ainsworth made an Order for disclosure, page 63, para 3.1:

> *"each party must have provided to the other a list of all the documents in its possession or control relevant to the issues in the case."*

2. On 19th February the Claimant's Representative emailed the Tribunal with a Request for Disclosure of Documents and a SAR request. Judge Ainsworth replied:

> *"The Tribunal does not have jurisdiction over SAR. Any issue must be taken up with Information Commissioner. The Tribunal will deal with any application for specific disclosure once the parties have completed disclosure process."*

3. On 24th March 2020, a stay was sought by email due to Covid 19.

4. By letter dated 16th April 2020, the Tribunal provided further directions:

> *"Disclosure: 21 July 2020 with copies of documents provided by 28 July 2020;*
> *Agreed bundle: 11 August 2020; and*
> *Witness statements:1 September 2020"*

5. On 21st July at 12:46, the Respondent served a list of documents.

6. On 23rd July at 16:28, the Claimant served: (i) a list of documents; and (ii) a request for disclosure. This email went in junk.

7. On 4th August at 14:02, the Claimant chased up the email of 23rd July. The email was located.

8. On 7th August at 15:14, the Respondent emailed the Claimant with a response to the Request.

9. On 7th August at 16:25, the Claimant emailed the Tribunal with the request for disclosure.

10. On 13th August at 11:45, the Claimant wrote to the Tribunal re the request for disclosure.

11. On 13th August at 11:54 the Claimant replied to the email of 7th August stating the documents requested were critical to the Claimant's case.

12. On 13th August at 12:47, the Respondent replied to the email of 13th August 11:54.

13. On 13th August at 13:21, the Claimant replied to the email of 13th August 12:47.

14. On 13th August at 13:47, the Respondent replied to the email of 13th August 13:21.

15. On 13th August at 13:52, the Respondent emailed the tribunal to oppose the application.

16. On 17th August at 17:27, the Respondent raised the issue of witness statements vis a vis the Claimant's application.

17. On 26th August at 10:51, Employment Judge Allen requested (by letter dated 21st) an explanation from the Respondent.

18. On 26th August at 11;13, the Respondent replied to the request.

19. On 27th August at 11:23, the Claimant emailed the Tribunal asserting that there had been an order for disclosure by Employment Judge Allen.

20. On 3rd September at 14:53, the Tribunal sent over the order for disclosure with the following note:

> *"This Order is made having considered the claimant's application of 13 August 2020 and the respondent's reply of the same date. Although the fairness of the dismissal is not in issue, the Tribunal will need to see the material on which the respondent claims to have formed the view that the claimant should be dismissed in order to assess whether that decision was influenced by sex. The respondent is correct in asserting that a genuine mistake in evaluating performance will not of itself lead to a finding for the claimant, but if the assertion that there was underperformance is not matched by the records that will make it more likely that the claimant will shift the burden of proof to the respondent."*

21. On 7th September at 13:38, the Claimant was informed that the Respondent would disclose.

22. On 10th September at 09:40, disclosure was provided with a covering Second Statement of Mr D Godbert.

During Hearing Disclosure Part I: (i) sale documents and (ii) dealer documents showing the on the road price (OTR)

23. This disclosure arose during the cross-examination of the Claimant on days 2 and 3 of the hearing.

24. On day 2, Employment Judge Holmes requested the full sale documents be disclosed, being the complete sale file from which the handwritten notes showing the mistake, had been taken.

25. The sale documents were disclosed overnight (day 2) and agreed;

26. On day 3, Employment Judge Holmes requested the dealer documents be disclosed, which would show the final OTRP invoiced for both vehicles by the dealer.

27. The dealer documents were disclosed (day 3) and agreed;

During Hearing Disclosure Part II: The covert recording and transcript

28. The Respondent produced the notes as a result of Regional Employment Judge Franey's order a note of the meeting on 9th July 2019.

29. It is an agreed fact that there were two parts to the meeting.

30. The Claimant had been cross-examined on those notes by Mr Evans and questioned by Employment Judge Holmes.

31. During cross-examination on day 4, Mr Godbert informed the Tribunal that his notes arose from handwritten notes he made post meeting and a recording of part two of the meeting.

32. The Claimant had been unaware that the meeting was recorded.

33. Of part two, the Claimant in cross examination denied seven parts of Mr Godbert's notes.

34. Employment Judge Holmes requested disclosure of the handwritten notes and recording. These were disclosed overnight. In fact the latter were not disclosed, as they could not be located.

Findings.

71. As is clear from the caselaw, the Tribunal must adopt a two stage process, the first is to determine whether the grounds for making any order at all under rule 37(1) have been made out, and secondly, if so, whether the Tribunal should proceed to strike out the response.

72. It is to the first of these, therefore, that we turn. Whilst Mr Doran's application under rule 37(1)(b) refers to all three types of conduct, we consider that neither "scandalous" nor "vexatious" conduct, as those words are properly understood in this context can be established. They require a high degree of conduct, and motive, which we do not think can be found here. Rather, the more realistic contention is that the respondent's conduct of the proceedings has been unreasonable. That is, in essence, how we see the claimant's application.

a)Unreasonable conduct – disclosure.

i) Documents relating to the transactions relating to the allegation that the claimant lost the respondent commission.

73. Mr Evans, whilst apologetic, does not concede any unreasonable conduct on the part of the respondent. Rather he focusses on what he contends has been the claimant's unreasonable approach to this litigation , and in particular her repeated attempts to obtain orders for specific disclosure. Much of his response to the application has focussed upon the claimant's lack of qualifying service for an unfair dismissal claim , what she has to prove in establishing a sex discrimination claim, and how little prospects of success he considers that she has of doing so.

74. The Tribunal, with respect, fails to see what any of this has to do with the extent to which the respondent has complied , or failed to comply, with its obligations of disclosure. If, by this argument Mr Evans considers that a respondent can sit back and ignore its disclosure obligations until the claimant has done enough to shift the burden of proof, then he is sadly mistaken.

75. The respondent's disclosure obligations arose as soon as the claim commenced. An examination of the respondent's disclosure is instructive. Whilst Mr Evans makes reference to the Tribunal ordering "standard disclosure", a term from the CPR, and not the Tribunal's orders, the disclosure initially given by the respondent in response to the Tribunal's order was rather sparse. Mr Doran has included the Respondent's disclosure at pages 9 to 10 of his application bundle. The respondent therefore did not actually produce a List , it produced a Hearing Index. Comparison with the claimant's List at pages 2 to 3 of the application bundle reveals that most of the documents included in it had originated from the claimant, with the respondent contributing only a few documents.

76. This was consistent with the views expressed by Mr Evans in his response to the claimant's attempts to widen the scope of disclosure , by dismissing any requests for documents which pre-dated the meeting on 9 July 2019, when the claimant was dismissed.

77. The Order made by Regional Employment Judge Franey, and the disclosure that followed it, is revealing. He obviously disagreed that the documents sought by the claimant were not relevant, and made the order that he did. By contrast to the paucity of the original disclosure, the respondent at this stage disclosed, on 10 September 2020 as deposed to Mr Godbert's Supplemental Witness Statement, a considerable number of new documents which were , and always had been, clearly relevant. Looking at the Index Exhibited to the Statement, whilst some Items were included in the original disclosure, or were part of the claimant's disclosure, Items 9 to 33 were wholly new . Of particular note is Item 28 "Final Interview Notes 9 July 2019". That subsequently formed pages 512 to 515 of the final hearing bundle.

78. The manner in which the respondent provided this disclosure even at this stage is also of note. Mr Godbert in his supplemental witness statement, at paragraph 30, simply refers to document 28 in the Index that he had prepared and says simply "these are my notes of the meeting on 9th July 2019". There was no explanation whatsoever as to why these notes had not previously been disclosed, notwithstanding that they fell fairly and squarely within even Mr Evans's restricted view of what was relevant disclosure. There was , of course, also no mention that they had been compiled as a result of a covert recording of part of that meeting.

79. Regardless of the issues that arose in respect of any recording of that meeting, this late disclosure meant that the claimant had prepared and exchanged her witness statement , which she had signed on 2 September 2020 without sight of this , and the other late disclosure from the respondent.

80. There was thus, on any view, a considerable , and unexplained, failure on the part of the respondent to comply with its disclosure obligations until 10 September 2020, itself unreasonable conduct. To be clear, it has not been suggested at any stage that any of this arose because of difficulties arising out of the current pandemic.

Rather, as Mr Evans has accepted, in most instances, the respondent did not initially give the disclosure that it subsequently did when ordered to by three Employment Judges because of its, or Mr Evans' somewhat misguided view of what was and what was not relevant.

81. Had the respondent then actually given full disclosure, the position may be less serious, but it transpired during the course of the hearing that the respondent had not, even then, given complete disclosure. On one level, what could be regarded as only partial disclosure had occurred, in that only extracts of larger documents in relation to the two deals that the respondent considered the claimant had mishandled were included in the bundle (Items 23 and 24 in the Index produced by Mr Godbert, and pages 503 and 504 of the final hearing bundle) . This had to be subsequently remedied in the hearing by disclosure of the whole of the relevant documents.

82. Further, the rest of the paper trails relating to these transactions also had to be extracted from the respondent during the course of the hearing.

83. Mr Evans' approach to this further disclosure during the course of the hearing at times verged on the concessionary, almost implying that the respondent was providing these documents because the Tribunal had asked for them, and the respondent was being co-operative, and was simply helping the Tribunal fill in some missing paperwork.

84. His observations in his Skeleton are instructive. He says this:

"67.The sale and dealer documents are not central to the Claimants case in any way, nor relevant to the Issues. They do not explain how the Claimant had made a mistake. The Claimant did that. They simply showed what happened on the file and how the final OTR was calculated. They did not explain away the Claimant's mistake caused by using the Arval system, then the Lex system. The two deals were damaged when the Claimant made a mistake with the OTR and bound the Respondent's customer to the deal with the Dealer and Lex Finance.

68.The only issue the Claimant can point to arising from these documents is that her mistake was not that bad and dismissing her was excessive and unfair. Clearly, this would have nothing to do with the protected characteristic."

86. He goes on to repeat such arguments in his submissions. The sale and dealer documents were in a sense, indeed, not central to the claimant's case , they were, however, central to the respondent's case, they were central to the respondent's case that it dismissed the claimant for non – discriminatory reasons. Similarly, his dismissive approach to what the claimant may or may not be able to demonstrate from these documents about the mistake that she had made ignores the facts that, firstly, the respondent did not until its response in these proceedings, or possibly through ACAS (if one can ignore the privileged nature of any such communications) actually tell her the precise reasons for her dismissal, and , secondly, that it is not for him to justify non – disclosure by reference to how strongly he considers that this evidence in fact negates a discriminatory motive for her treatment. Whether it advances one side's case or the other's is not the issue, relevance is.

87. Mr Evans therefore should be under no illusion that the Tribunal considers that the totality of this documentation was disclosable from the very outset. The respondent's case was that these transactions were part of the reasons that she was dismissed, and all, not just selected highlights, of the evidence which was relevant or potentially relevant to them, was disclosable.

88. As it was , it was the claimant who had originally, in her disclosure , provided some documents relevant to these transactions. That alone should have prompted the respondent to include in its disclosure those , and all other documents pertaining to these transactions.

89. The upshot of all of this is that the Tribunal is quite satisfied that in the manner in which the respondent has discharged its disclosure obligations in relation to the documents relating to the two transactions upon which the respondent allegedly lost commission (or more accurately made less commission that the claimant had led it to believe it would) the respondent has clearly acted unreasonably.

ii)The covert recording and handwritten notes.

90. That is one aspect, but there is another, more serious issue. That is the failure of the respondent , until the cross examination of Mr Godbert, to disclose even the existence of a covert recording of part (allegedly) of the meeting during the course of which the claimant was dismissed by Mr Godbert. Added to that is the failure to disclose that he had taken handwritten notes as well, to which he had referred , as he did also with the recording , when compiling the notes of that meeting which were disclosed on 10 September 2020.

91. Mr Evans' explanation of , and defence for, this manifest and serious failure to give disclosure is that he was not sure of their admissibility. That is irrelevant, disclosure of documents is one thing, admissibility is another. The respondent was under an obligation to disclose at least the existence of the recording from day one. It may have been admitted by agreement, or its admissibility , if in issue, determined at a preliminary hearing. That it was covertly obtained makes disclosure of its existence even more important.

92. Rather, Mr Evans appears to seek to shift attention from the respondent's failings in this regard by requiring the claimant to state whether she agrees or disagrees with the transcript, and to suggest that this evidence can only harm her case.

93. Again, regretfully , Mr Evans rather spectacularly misses the point. The disclosability or otherwise of a document does not turn upon whether it will advance or hinder either party's case, still less upon whether it will be agreed. It turns upon relevance, and there can be no doubt that these were relevant "documents" (in the broadest sense of that word in this context). The very fact that such a document may be injurious to the claimant's case is a reason to disclose it, not to withhold it.

94. The Tribunal has no hesitation in holding that this, in itself, was unreasonable conduct. The respondent can have no excuse. It knew that the meeting had been recorded, it knew it had referred to the recording in compiling the notes that were disclosed as recently as 10 September 2020. That disclosure itself was very late, and

unreasonable conduct, but to fail to disclose at even that late stage that there was also an audio recording upon which those notes were based is a very serious act of concealment on the part of the respondent. It cannot be justified or excused, and was manifestly unreasonable conduct. It is hard to avoid any conclusion other than that it was calculating and deliberate conduct. It was then compounded by the fact that the claimant was cross - examined upon the matters to which the recording related without its existence being disclosed to her. That is further unreasonable conduct, which goes beyond the original non – disclosure .

Conclusion on unreasonable conduct

95. The Tribunal is accordingly satisfied that in relation to both the piecemeal and late disclosure of the transactional documentation, and the failure to disclose the existence of a covert recording of a crucial meeting until partway through cross examination of its sole witness , after the claimant had been cross – examined without any awareness of this recording, the respondent has clearly acted unreasonably in the conduct of these proceedings.

96. The Tribunal also noted that Mr Evans conceded that , had the claimant , upon receipt of the late disclosure on 10 September 2020, then sought a postponement on those grounds, it would have been difficult to resist such an application. It is difficult not to suspect that such an eventuality would have been most welcome to the respondent at the time.

b)Unreasonable conduct – other conduct.

97. That is not, however the only basis upon which Mr Doran puts the application, as he also relies upon an email from the respondent's solicitor to himself of 17 September 2020 in which a threat was made of an application for a wasted costs order against Mr Doran personally. This is not conceded to be unreasonable conduct on the part of the respondent , Mr Evans contending that this was the respondent simply pointing out to the claimant's representative the risk that the claimant and he were taking in proceeding with a claim that the respondent considered had no merits.

98. The Tribunal can appreciate that in certain circumstances this could be a legitimate, if robust, step to take, but the obvious concern is that this was a form of intimidation designed to dissuade the claimant, or Mr Doran, from proceeding with the claims. If the respondent was truly of the view that the claims had no reasonable prospects of success , the appropriate course was to make an application to the Tribunal either they be struck out , or for deposit order . No such application was made. Further , this communication included an allegation, without any substantiation , that the claimant was in debt, and was bringing the claim for financial motives.

99. Quite what the purpose of such a contention was is unclear, as that would not in itself mean that the claimant did not have reasonable prospects of success. Many claimants, especially if dismissed by their employer, find themselves in financial difficulties, and do indeed bring Tribunal proceedings in order to obtain the compensation to which they may well be entitled. The relevance of this allegation rather appears to be to justify the respondent seeking a wasted costs order against Mr Doran.

100. This was, of course, an open letter, and was not, as is often the case, accompanied by a without prejudice offer to settle. Whilst on the robust side of litigation, the Tribunal would not find this letter , of itself , unreasonable conduct were it to have been sent at a time when the respondent had fully complied with its disclosure obligations, and had, in effect, put its cards on the table. It is arguably legitimate to attempt to persuade an opposing party of the weakness of their case , if the party seeking to do so has put all the material before their opponent from which a sensible and objective view of the merits of the claim could be made.

101. This communication, however, came at a time when the respondent had not done that, and, as noted above , remained in serious default of its disclosure obligations until 10 September 2020, and even beyond.

102. We therefore consider that writing this email at the time that Mr Evans did, when the respondent had not provided anything like full disclosure, was little more than an attempt to intimidate the claimant and/or Mr Doran from pursuing the claims any further, and was in the circumstances, a further, if less serious , instance of unreasonable conduct. It was not, we agree, of anything like the magnitude of the concealment of the covert recording cited above, but it was, nonetheless, in the circumstances, itself unreasonable conduct. We do, however, take into account that it did not have the effect of dissuading the claimant , or Mr Doran on her behalf, from pursuing the claims.

103. For completeness and in a similar, if less serious vein, we have considered the allegation of winking and gesturing during the claimant's cross – examination. This matter was brought to our attention, and Mr Evans did concede one such instance, for which he apologised. Whether inappropriate or otherwise, that too had no discernible effect upon the ability of the claimant or Mr Doran to conduct the proceedings, and we attach no real significance to it.

c)Breach of Tribunal Orders.

104. The application, of course, is made also on the basis of rule 37(1)(c), that there had been breach of the Tribunal's orders. This largely overlaps with the main basis upon which the unreasonable conduct ground is relied upon. For completeness, the Tribunal is satisfied that the respondent did indeed fail to comply with the order for disclosure first made by the Tribunal by Employment Judge Ainscough on 27 January 2020. That the respondent was in such breach is apparent from the fact that Regional Employment Judge Franey then had to make the further orders that he did on 3 September 2020. Further, by not disclosing the recording or the transcript thereof, which were clearly included in the scope of that order, as disclosure of the note of the meeting at item 28 of the index produced by the respondent clearly acknowledges, there was further breach of the Order made by Regional Employment Judge Franey. The Tribunal is accordingly satisfied that the respondent has been in material breach of two express orders made by the Tribunal for disclosure. The latter Order was very specific, and led to partial disclosure in the form of the note of the meeting. The Tribunal considers the respondent's failure to disclose the recording and transcript of the covert recording of the meeting of 9 July 2019 was a deliberate, very serious and flagrant breach of its orders, and a blatant disregard of the overriding objective.

d)Is striking out the response an appropriate sanction?

105. It is clear from the authorities that once the Tribunal is satisfied that any of the threshold conditions set out in rule 37(1) are satisfied, it may not simply proceed to strike out, in this case , a response, but must consider whether that is a proportionate sanction to impose, and for that purpose must have regard to whether a fair trial is still possible.

106. Mr Evans on behalf of the respondent submits that even if the respondent has been found to have conducted the proceedings unreasonably, and/or in breach of Tribunal orders, a fair hearing is still possible. In this regard, as well as generally, his constant focus is very much upon the burden of proof being upon the claimant. He also submits that the claimant is required now to state whether she agrees or disputes the transcript of the recording the meeting in question. He submits that she cannot dispute this evidence, and that it would not have assisted her case had it been disclosed previously. He repeatedly has submitted that the respondent was "entitled to dismiss the claimant", who could not complain of unfair dismissal, and invites the Tribunal rather to overlook the effects of the respondent's failures to give disclosure, and to proceed to continue with the hearing.

107. Mr Evans also, understandably relies upon Mr Doran's concession made verbally in the course of submissions, that the claimant believed a fair hearing before this Tribunal is still possible. In considering whether a fair hearing is still possible the Tribunal , of course, takes into account the submissions of the parties. It is right that Mr Doran for the claimant did not maintain his original submission that a fair hearing was no longer possible.

108. With all due respect to Mr Doran and the claimant, however, the Tribunal does not consider that they are best placed to consider whether a fair hearing is still possible. The Tribunal ultimately is the final, and indeed the best, arbiter of such an issue. Whilst Mr Doran and the claimant clearly have confidence in this panel of the Tribunal as currently constituted, which is gratifying, they are equally, the Tribunal fears , concerned that this hearing is concluded as soon as possible , with no further delay. They doubtless fear the risk that this Tribunal , if satisfied that this hearing has not been , and cannot continue as , a fair hearing, will then abort it and relist it afresh before another Panel, at some time in the future. The Tribunal considers this may well be acting upon the minds of the claimant and Mr Doran, and influencing , consciously or subconsciously , their submissions. This view is reinforced by the fact that in his written application, at para. 8 , Mr Doran originally submitted that the claimant believed that a fair hearing, even before another Tribunal, was not possible. There has thus been a degree of uncertainty as to the claimant's position, which is perhaps a good indication of the need for great caution on the part of the Tribunal in relying upon it. The Tribunal will therefore make its own assessment of whether a fair hearing, in fact, remains possible.

109. In approaching this issue the Tribunal , firstly, examines the hearing has taken place thus far. Further , the concept of a fair hearing is , the Tribunal considers, a wide one. It is not confined simply to a hearing which ultimately achieves the correct result, but also relates to the manner in which the proceedings are conducted. The position as the Tribunal sees it therefore, in the circumstances is this.

110. The claimant prepared for this hearing on the basis of the very limited disclosure provided by the respondent up until 10 September 2020. She made a witness

statement on 2 September 2020. She did all this in ignorance of the full paperwork relating to the two deals for which the respondent says it dismissed her. She was thus, even though she had obtained some of this paperwork herself, handicapped in the preparation of her evidence in relation to these transactions, as she was having to second guess what the respondent's case was.

111. Further, and rather more seriously, she prepared her evidence and her case before even the note of the meeting of 9 July 2019 was disclosed on 10 September 2020. She also did this in ignorance of the fact that that note itself been prepared from a covert recording of that meeting. She remained ignorant of the latter fact during her cross examination, and Tribunal questioning, upon what occurred in that meeting. The Tribunal recalls and has noted her cross examination on this issue, which is, of course, the central issue in the case as this was the meeting at which she was dismissed, the act of discrimination of which she complaints. She became upset during that meeting, and she became upset during her cross examination about it. Whilst Mr Evans put some of the detail from the note which the respondent had finally disclosed to her, and the Employment Judge asked further questions based upon that document, the claimant was unable to provide some specific answers, and to some extent her evidence at this point was unsatisfactory.

112. For one party to cross examine the other on the basis of undisclosed material of which it is aware, and the other party is not , is not in the Tribunal's view, fair cross examination, and does not result in a fair hearing. It is not , in the Tribunal's view, sufficient to say that subsequently, in the light of the disclosed material, the claimant may then be able to revisit this evidence and give different answers, and this would effectively remedy any unfairness.

113. The unfairness also arises in the claimant having to be subjected to this unfair process in the first place , as result of the respondent's woeful failure to provide appropriate disclosure at the appropriate juncture. The requirement for a fair hearing includes the ability to prepare for the hearing, on a level playing field, and not just the actual hearing itself. The claimant was deprived of that opportunity by reason of the respondent's late disclosure , and persistent failure to disclose even the existence of the covert recording.

114. Whilst less significant, the piecemeal further disclosure of other documents in the case relating to the transactions for which the claimant was dismissed has also resulted in unfairness. The claimant again was deprived of the opportunity of preparing fully for this hearing with the benefit of that disclosable material, and has, on the hoof as it were, had to deal with it in the course of the hearing. That too was not fair. Indeed, we consider that had the claimant had the benefit of the appropriate disclosure relating to these two transactions and how they went wrong, she would have been likely to seek disclosure , or other evidence, perhaps from Mr Nolan, of other instances of such errors being made, particularly by male employees.

115. One of the difficulties in assessing whether the hearing thus far has been fair, in a highly fact-sensitive discrimination claim, is the risk that a party's credibility and accuracy upon crucial issues of fact may have been adversely affected by the evidence they have already given. Put shortly, however it may subsequently be dealt with in further cross-examination or re-examination, the claimant's evidence at the beginning of the hearing about this meeting cannot be undone, and however confident

the claimant and Mr Doran may be in the Tribunal's abilities to ignore parts of evidence previously given, there must remain a risk, if the claimant were not to succeed, that she may feel that her evidence at that stage of the proceedings has had some bearing upon the ultimate outcome of her claims.

116. A second , but perhaps sometimes overlooked aspect of fairness is the fairness of the process upon the parties. All litigation is stressful, and a discrimination claim in the Employment Tribunal is perhaps more so than most other types. A claimant has to accept a degree of discomfort, and stress, when bringing such claims, but this claimant has on two occasions been reduced to tears in the course of the proceedings. The first occasion was indeed in relation to the questions that were put to her about the meeting on 9 July 2019. Had the respondent provided the disclosure that it should have done when it was due, the claimant's approach to her evidence about this meeting may have been very different, and the course of her questioning upon this issue may well have been less traumatic.

117. The second occasion was when the claimant, having learned for the first time that this meeting had been covertly recorded on Thursday 24 September , was present when the Tribunal was discussing on Friday 25 September 2020 how it should proceed in relation to it. She again became upset , and left the Tribunal, content to let Mr Doran to make the appropriate submissions on her behalf. It is to be borne in mind that she was , prior to her dismissal , receiving counselling , in fact from Mr Godbert's wife, for the effect upon her mental health of two events in her personal life in January 2019.

118. Quite apart from the effect upon the legal process of the hearing as a whole, the Tribunal considers that these two additional aspects of the hearing of themselves are instances of unfairness to the claimant to which she need not have been subjected.

119. The Tribunal thus considers for all these reasons that she has not thus far had a fair hearing, so the question remains of whether a fair hearing is nonetheless still possible. With all due respect to the claimant and Mr Doran in terms of their confidence in proceeding further before this Tribunal, for the reasons given above the Tribunal does not consider that a fair hearing before it is still possible. The damage has been done, the genie is out of the bottle as it were , and the Tribunal does not consider that simply to proceed with the various further steps that Mr Evans proposes are now required of the claimant, but with the response still in place, would remedy the existing unfairness.

120. The Tribunal notes from the authorities cited above that a Tribunal should not be overhasty in, in effect, recusing itself from further involvement in a hearing. That, however, is not quite what the Tribunal is doing. It is recognising that the hearing thus far has not been a fair hearing, and is assessing the degree to which that damage can subsequently be undone by continuing the hearing with no further sanctions (save perhaps for financial ones) against the respondent.

121. Thus reluctantly, and acknowledging the claimant's final position was to the contrary, this Tribunal considers that a fair hearing before it is not still possible.

122. It is perhaps worth interjecting at this point that this is a highly unusual and novel situation. This application is made at an advanced stage in the hearing, and is an application to strike out a response, not a claim. Most of the jurisprudence on this topic

is in relation to applications to strike out claims, not responses. It is thus often far easier to determine whether there can still be a fair hearing if a claim is not struck out, than it is to determine if there still can be if a response is not struck out. It thus seems to us that one has to add the words "if the response is not struck out" to the question of whether a fair hearing remains possible.

123. That therefore leaves the question of whether a fair hearing remains possible before another Tribunal. Clearly, once all the disclosure matters have been rectified and the claimant has an opportunity to re-prepare her case in the light of the appropriate disclosure, the Tribunal can see the argument that a further hearing before a fresh tribunal Panel could then possibly proceed as a fair hearing.

124. The difficulty with that, however, is that it would be a second hearing. It is likely not to be until March 2022 , the Employment Judge has been informed, at the earliest, and would mean the claimant would have to start all over again and give evidence afresh. As observed , she has already experienced upset during the course of these proceedings, and is likely to have further anxiety awaiting the rehearing, and will have to go through all these matters once again. Quite apart from that aspect, a fair hearing, under Article 6.1 of the ECHR requires a determination of a person's civil rights and obligations in a fair and public hearing "within a reasonable time". Whilst what is a reasonable time in any given case will depend upon the particular circumstances, almost three years after the events giving rise to the claim would not in the Tribunal's view be within a reasonable time. That is particularly so when one bears in mind that the Tribunal requires claimants to bring their claims within three months, and seeks to have them heard within a reasonable time. A hearing almost three years after the event , in this context, and with the additional factors referred to above, is not within a reasonable time.

125. The Tribunal's view , therefore, is that such a second hearing would not be a fair hearing. The only reason the claimant is in this position was that the respondent had woefully and deliberately disregarded its disclosure obligations. There is no good reason why the claimant should have to endure a second process because of the unreasonable and unfair manner in which the respondent has conducted this one.

126. Whilst appreciating that this is a draconian sanction, bearing in mind the overall course of unreasonable conduct on the part of the respondent throughout these proceedings , including for these purposes the intimidatory threat made on 17 September 2020, culminating in the most serious and deliberate concealment of a covert recording of the crucial meeting at which the claimant was dismissed , the Tribunal is satisfied that the grounds exist for striking out the response, and that a fair hearing is no longer possible.

127. Finally, the Tribunal has considered, as it is required to, whether some lesser sanction is appropriate. The most obvious is perhaps is not to allow the evidence of the covert recording to be admitted , but to allow the respondent to continue to adduce evidence without reference to it. Were the Tribunal only to be considering the late disclosure of the other , transactional, documents, this may be a possible resolution. The recording, however, is central to the issue of the meeting in which the claimant was dismissed, and the reasons for that dismissal. She has already given evidence about that, and Mr Godbert is still giving evidence. He has been aware of it since the recording was made. The Tribunal cannot just therefore exclude it as a separate piece

of evidence, relating to some discrete issue, it is inextricably linked to the evidence of the claimant and Mr Godbert about what happened in that meeting. That option would not repair the damage done, or magically restore fairness to what has become a severely corrupted process.

128. Thus the Tribunal sees no viable lesser alternative , and the response is accordingly struck out.

Whether a fair hearing is still possible – as a separate ground.

129. Whilst the Tribunal has made this finding in the context of the two-stage test to be applied in respect of grounds (b) and (c) of rule 37(1), it does not however do so for the purposes of ground (e). That ground is generally made out in circumstances where, without any default on the part of any party, a fair hearing has become impossible. There is thus no triggering precondition, and the Tribunal's only focus is upon whether a fair hearing is still possible. The test is therefore slightly different to that applied above as part of the two-stage test. As a stand-alone ground, however, the Tribunal would not find that this ground was made out, and would not grant the application on this basis alone.

The effect of the striking out of the response.

130. The striking out of the response does not of itself mean that the respondent can play no further part in the proceedings. As is clear from the provisions of rule 21, a respondent may thereafter only participate in the proceedings to the extent permitted by the Tribunal. Mr Evans was asked specifically to address this point in the alternative in his submissions should the response be struck out.

131. If this were an unfair dismissal case, where the burden of establishing a potentially fair reason for dismissal would lie upon the respondent, the effect of the striking out of the response would be that the claimant would succeed. Given however that this is a discrimination claim, where the burden lies initially upon the claimant to establish a prima facie case it is open to the respondent to seek to test that case, as it has already done in cross examination , and to make submissions as to whether the claimant has done enough to establish a prima facie case.

132. In these circumstances the Tribunal agrees that the respondent ought to be permitted to test the claimant's case and to make submissions upon whether she has satisfied the evidential burden upon her.

133. The effect of the striking out of response, therefore, at this stage the Tribunal considers should be as follows. Had the response not been submitted in time the respondent would not have been permitted to adduce any evidence. It has of course done so and Mr Godbert is currently being cross-examined. The Tribunal considers that one consequence of the striking out of the response must be that the respondent is not permitted to rely upon any witness evidence and his witness statement and his evidence thus far in cross examination will be disregarded. He will give no more evidence. Thus , in the event the claimant does establish a prima facie case, so that the burden of proof does shift to the respondent , the respondent will have no evidence before the Tribunal upon which it can seek to satisfy that burden. If the claimant does

succeed in her claim, further, the Tribunal would also consider that the respondent was entitled to participate in any remedy hearing.

The claimant's application for a preparation time order.

134. Finally, and of rather less significance, but nonetheless an outstanding issue, the claimant has made an application for a preparation time order. Mr Evans' submissions in that regard have been that the Tribunal cannot entertain such an application until after judgment has been given.

135. That struck the Employment Judge as a novel submission, as he had himself previously made many such orders in cases well before any final judgment was given, as had most of his colleagues. In particular, a common example of when such orders are made is upon the postponement of a hearing, when such orders have been made, and indeed, paid before the postponed hearing has taken place.

136. The Tribunal has accordingly examined the rule under which preparation time orders are made, and how and when any application for such an order must be made. Those rules are rules 76 and 77 of the 2013 rules of procedure. The relevant rule for making such an application is rule 77, which provides:

"77 Procedure

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application."

137. It would seem that Mr Evans' submission is based upon an erroneous reading of this rule. The Tribunal considers that it sets an end point for any such application, namely 28 days after final judgment is given. The words "*at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties"* do not prevent a party applying for such an order before final judgment. Read literally and sensibly they mean that such an application can be made "at any stage", with the backstop of 28 days from final judgment. They do not preclude an application being made before final judgment, and, indeed, if that were so, it would preclude a party making such an application when a hearing was postponed.

138. The Tribunal, however, has not considered the claimant's application any further, and wished to make this determination first. If the claimant pursues it, Mr Doran must now specify how many hours of preparation are being sought, and specify how those hours were spent. He will doubtless be aware that it is a feature of the rules that only preparation time can be awarded, which excludes time at any hearings, travel time or any other form of financial loss incurred by the claimant in connection with attending any hearing.

139. It will be appreciated that as we have found that the grounds for striking out the response have been made out, and those grounds are effectively the same that need to be established to entitle the Tribunal to make an award of costs, or, in this instance, a preparation time order, the Tribunal's only task in considering the application for

such an order in these circumstances would appear to be solely to quantify what order should be made.

Employment Judge Holmes

Date: 9 December 2020

RESERVED JUDGMENT SENT
TO THE PARTIES ON
11 December 2020

FOR THE TRIBUNAL OFFICE