EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4117006/2018

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Held in Glasgow on 31 October 2018

Employment Judge: Ian McPherson

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Mr Hugh Graham	**Claimant** **Represented by:** **Mr Ryan Russell** **-Solicitor**
(1) Argent Energy (UK) Limited	**First Respondent** **Represented by:** **Mr Stephen Hughes** **- Advocate**
(2) Mr James Walker	**Second Respondent** **Represented by:** **Mr Alistair Murdoch** **- Solicitor**

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WRITTEN REASONS FOR

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Dated 5 November 2018, and entered in the public Register and copied to Parties on 5 November 2018.

Introduction

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1. This case called before the Tribunal on the afternoon of Wednesday, 31 October 2018, at 2.00pm, for a Case Management Preliminary Hearing, further to Notice of Claim and Notice of Preliminary Hearing issued to all

parties by the Tribunal under cover of the Tribunal's letter dated 30 August 2018.

2. As per standard practice, it was listed for a one-hour Hearing in private, before an Employment Judge siting alone. On 30 October 2018, in refusing the claimant's solicitor's application to postpone the Case Management Preliminary Hearing, I directed that the duration of the Hearing be extended to two hours.

3. All parties enjoyed the benefit of legal representation. Having considered parties' completed Preliminary Hearing agendas, and oral submissions from all 3 parties' representatives, case management orders regulating further procedure before the Tribunal were intimated orally, and these have since been confirmed in writing by my written Note and Orders dated 9 November 2018, issued to all parties' representatives under cover of the Tribunal's letter dated 12 November 2018.

4. A continued Case Management Preliminary Hearing will be held before me, on a date to be hereinafter assigned, no sooner than 6 weeks from the date of issue of that Note and Orders.

5. These Written Reasons refer to my reserved decision, on 5 November 2018, having heard the solicitors for the claimant and second respondents, at the Hearing on 31 October 2018, to refuse the second respondent's application for Strike Out of the claim , and being reserved reasons that are now provided, in writing, in terms of **Rule 62 of the Employment Tribunals Rules of Procedure 2013.**

Background

6. In his ET1 claim form, presented to the Tribunal, on 27 August 2018, the claimant's solicitor, Mr John Muir, of Muir Myles Laverty, solicitors, Dundee, had stated, in the paper apart, paragraph 7, that:

> "***The Claimant is not in a position at the present time to give further details of the circumstances behind his dismissal and the full details of the claim he wishes to make as the Second***

Respondent was served with a Writ alleging defamation by the Second Respondent on or about the 6th July 2018 and by that time the Second Respondent obtained an Interim Interdict at Hamilton Sheriff Court on 28th June 2018 which prevented and continues to prevent the Claimant and any agents acting on his behalf from making any details of his claim public. The Interdict is presently being challenged and as and when the Interdict is overturned or restricted the Claimant will provide further and better details of his claim but at the present time the forgoing information is the most the Claimant can safely give without breaching the terms of the Interdict."

7. In the lead up to this Preliminary Hearing, parties' representatives were in e-mail communication with each other, and with the Tribunal. In his e-mail of 30 October 2018 to the Tribunal, Mr Muir, the claimant's solicitor, replying to an email of 29 October 2018 from Mr Murdoch, solicitor for the second respondent, advised that:-

"***We are still of the opinion that we are interdicted from rehearsing major parts of our clients claim – despite the views of Mr Murdoch. This will mean that the PH will not be able to hear the full arguments of the Claimant.***

Further, there are issues in respect of completing the Agenda on behalf of the Claimant with the interdict in place. To do so would require to specify parts of the claim which are inextricably linked to the interdict.

The application for Strike Out is premature. The ET1 whilst skeletal provides fair notice of the claims. There will require to be further particular in due course but the Tribunal will hopefully be sympathetic to the fact neither my client or my firm are willing to run the risk of breaching a live interdict."

8. Following further consideration, after ET3 responses had been lodged, Mr Muir advised the Tribunal, by e-mail of 1 October 2018, that he had noticed ***"that the terms of the Paper apart and in particular paragraph 7 are somewhat nonsensical."*** He attached a proposed amendment and asked that his revised text be substituted for the original paragraph 7. On 29 October 2018, Employment Judge Sutherland, having noted that Mr Muir's amendment was very minor, and a "***tidying up exercise***", allowed the amendment, there having been no objection from either respondent.

9. As amended, paragraph 7 now reads:

> "***The Claimant is not in a position at the present time to give further details of the circumstances behind his dismissal and the full details of the claim he wishes to make. The Second Respondent served a Writ alleging defamation by the Second Respondent on or about the 6th July 2018. The Second Respondent had obtained an Interim Interdict at Hamilton Sheriff Court on 28th June 2018 which prevented and continues to prevent the Claimant and any agents acting on his behalf from making any details of his claim public. The Interdict is presently being challenged and as and when the Interdict is overturned or restricted the Claimant will provide further and better details of his claim but at the present time the forgoing information is the most the Claimant can safely give without breaching the terms of the said Interdict."***

10. At the Case Management Preliminary Hearing, on 31 October 2018, I was advised, by Mr Russell, as per the claimant's completed PH Agenda, at section 9, that the claimant's solicitor was requesting :

> ***"A sist or continuation of proceedings until outcome of Motion calling on 7th November 2018 at Hamilton Sheriff Court to recall / relax interim interdict proceedings."***

Sheriff Court Proceedings

11. I had ordered, on 30 October 2018, that a copy of the *interim* interdict be produced, as while a copy had previously been provided, at an earlier stage, through an email of 11 September 2018 from a Nicki Dowdles at Muir Myles Laverty, in response to Employment Judge Michelle Sutherland's direction of 5 September 2018, the copy provided to the Tribunal did not show the Sheriff Court case number, nor identify the parties. That email from the claimant's solicitor did, however, indicate that : "***We will be taking steps to recall, or at least restrict the interim interdict in due course."***

12. At the start of this Case Management Preliminary Hearing, Mr Murdoch provided a copy of the *interim* interdict granted by the Sheriff at Hamilton on 27 June 2018. Granted by Sheriff Macfadyen, it appears that the Sheriff, on Mr Murdoch's motion, there being no appearance for Mr Graham, granted *interim* interdict in terms of Crave 3 of the Initial Writ.

13. At this Hearing, I was not provided with, nor did I request, a copy of the Initial Writ. I was advised, without any detail being provided, that it was a defended defamation action, and, as per emails to the Tribunal from Mr Muir and Mr Murdoch, the sum of £50,000 is stated to be the sum sued for by the pursuer, Mr Walker, against Mr Graham, as defender.

14. When I enquired about when the motion to recall / restrict had been enrolled, I was advised by Mr Russell that it had been enrolled by the claimant's solicitor on 18 September 2018, to call on a date in October, it had been opposed by the second respondent's solicitor on 25 September 2018, but that initial date for hearing the opposed motion was then postponed, and rescheduled for 7 November 2018. Later on, in the course of this Hearing, I was advised that a Proof before Answer ("PBA") was set down in the Sheriff Court for one-day on 16 January 2019.

First Respondent: Argent Energy (UK) Ltd

15. The first respondents were the claimant's former employer. In the completed PH Agenda lodged for the first respondents, it was stated that the claimant should be ordered to produce a full Schedule of Loss, and also that the claimant had not provided sufficient details of his claim in order for a full List of Issues to be drafted. I have ordered a detailed Schedule of Loss to be provided by the claimant's solicitor, by no later than 21 November 2018, and given both respondents a period of 14 days thereafter to reply.

16. The first respondents applied to have the claimant provide further and better particulars, and while the second respondents sought to be dismissed from the proceedings, and they also sought to have the claim against them struck out, the first respondents did not seek a Strike Out of the claim at this Hearing, even although their ET3 response, lodged on 27 September 2018, submitted that the claim should be struck out in its entirety on the basis that the claim is not properly pleaded.

17. Alternatively, the grounds of resistance in that ET3 response for the first respondents requested that the claimant provide further and better particulars of claim, including identification of the alleged protected disclosures and alleged detriments so that they could understand the claims made and be enabled to respond properly.

Second Respondent: Mr. James Walker

18. In the completed PH Agenda lodged for the second respondent, further to his ET3 response dated 26 September 2018, it was explained that Mr Walker was not, at any time, the employer of the claimant, and it was stated that he sought to be dismissed from these Tribunal proceedings, and he had applied for the case against him to be struck out, as per the application intimated on 24 October 2018 in Mr Murdoch's email to the Tribunal.

19. It is not in dispute that the first respondents were the claimant's employer, and Mr Walker was, at that time, but not now, a director of the company. As per the ET1, paper apart, at paragraph 3, the claimant states he raised a grievance against Mr Walker prior to his dismissal, and that his grievance raised various protected disclosures which, he believes, linked to his dismissal by the first respondents.

20. It is stated that if any proper case is presented against the second respondent, the claimant has given no indication whatsoever of the remedy he seeks against the second respondent. This should be addressed by the fact that I have ordered a detailed Schedule of Loss to be provided by the claimant's solicitor, by no later than 21 November 2018, and given both respondents a period of 14 days thereafter to reply.

<u>Second Respondent's application for Strike Out</u>

21. Attached to Mr Murdoch's email of 24 October 2018 to the Tribunal, enclosing the second respondent's completed PH agenda, was a written application in the following terms: -

> ***APPLICATION BY SECOND RESPONDENT FOR STRIKE OUT***
> ***In terms of Rule 37 of the Employment Tribunal Rules of Procedure***
>
> ***The Second Respondent applies for the case against him to be struck out in terms of Rule 37, in respect that no case against him has been disclosed. The Claimant claims to have been subject to post-dismissal detriment by the Second Respondent, but no details whatsoever of any alleged actions by the Second Respondent said to amount to post-dismissal detriment have been provided.***
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> ***The Second Respondent has no fair notice of the case against him and is prejudiced by the lack of fair notice.***

The order is sought on the grounds that:

(A) The claim against the Second Respondent has no reasonable prospect of success;

(B) The manner in which the proceedings have been conducted by the Claimant as against the Second Respondent has been unreasonable or vexatious; and

(C) ***The claim has not been actively pursued.***

22. At this Hearing, on the opposed application for Strike Out, I heard from both Mr Russell for the claimant, appearing in lieu of his principal, Mr Muir, and Mr Murdoch, solicitor for the second respondent.

Claimant's Objections

23. In his oral submissions to me, Mr Russell stated that he opposed the second respondent's application for Strike Out of the claim against Mr Walker. In particular, Mr Russell stated that:-

24. The claimant wishes to proceed with his 3 heads of claim before the Tribunal, but there is a possible issue about breach of interdict, and potential risk and exposure to the claimant and his solicitor's firm.

25. He advised that the motion, enrolled at Hamilton Sheriff Court, on 18 September 2018, is ***" to recall the interim interdict granted on 27 June 2018 in order that the Defender can properly set out his Employment Tribunal claim against his former employer and the Pursuer."***

26. Mr Russell "***fundamentally accepted that there is a lack of specification***", but under explanation there is a very good reason, being an interdict in place preventing the claimant from pleading his claim here for "classic" unfair dismissal, contrary to **Sections 94 and 98 of the**

Employment Rights Act 1996, and claims under **Sections 47B and 103A**, where Mr Walker, the second respondent, was the claimant's line manager.

5 27. With respect to the solicitor for Mr Walker, Mr Russell then stated further that this situation is "***totally bizarre***", and ***"it's like trying to litigate with your hands behind your back",*** and he described the Strike Out application as a "***kick in the teeth***."

10 28. He confirmed that the claimant wishes to give further and better particulars, but the claimant and he were prevented from doing so by the "***very wide interim interdict",*** which he submitted made it "***impossible"*** for him to plead the claimant's case fully without breaching the interdict. He added that the claimant opposes the second respondent's application for Strike 15 Out "***in the strongest terms***".

29. Mr Russell further stated that, if the second respondent's application for Strike Out was insisted upon by Mr Murdoch, then an application by the claimant for a Wasted Costs Order against Mr Murdoch would be ***"a very*** 20 ***live issue***", as he described this Strike Out application as "***an abuse of process to stop the claimant pleading , by seeking Strike Out of his claim***".

30. He then added that he had a case law authority from the Queen's Bench 25 Division in England & Wales to rely upon to argue that the second respondent's application here for Strike Out of the claim against him is a "***barrier to justice***."

31. Mr Russell then identified Mrs Justice Sharp's judgment of 11 April 2013 in 30 **Vaughan v London Borough of Lewisham & others [2013] EWHC 795 (QB)**, a single hard copy print out of which he had, but not copies for the other agents, nor me as the presiding Judge.

32. He apologised for that failure on his part and, on my instructions, handed 35 up his copy, which I then had the Tribunal clerk copy so that before Mr

Russell addressed the Tribunal further, on behalf of the claimant, the other agents and I could all have the opportunity of an adjournment to read and digest any applicable legal principles from that cited judgment.

5 **Submission for First Respondent**

33. Mr Hughes, counsel for the first respondents, stated that he was not seeking Strike Out of the claim against his clients, the first respondent, and that the application before the Tribunal was a matter between the claimant
10 and second respondent, and as such he had no submissions to make thereon. That being so, at the close of the Case Management Preliminary Hearing, at around 3.15pm, I excused him from further attendance.

Arguments for Second Respondent

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34. When I called upon Mr Murdoch to reply, after allowing an adjournment of about 20 minutes, from 2.48 until 3.10pm, while the clerk copied the judgment cited by Mr Russell, and for Mr Murdoch to clarify whether he wished to pursue the Strike Out application at this Hearing, given Mr Ryan's
20 "***costs warning***", in his oral submissions, after stating that he sought to proceed with the application, Mr Murdoch then stated that:-

35. He was not persuaded that ***Vaughan*** was in point, and there are grounds for him to present his application substantively at this Hearing. Mr Russell
25 confirmed that he was happy to proceed , that afternoon, rather than relist for another date.

36. After discussion about the meaning and effect of **Rules 48,50, 53, 54 and 56**, and the overriding objective under **Rule 2**, I agreed to a joint application
30 by Mr Russell and Mr Murdoch to hear their oral arguments about the opposed Strike Out application at this sitting of the Tribunal.

37. I so ordered so as to prevent delay and avoid unnecessary expense, and both Mr Russell and Mr Murdoch consented to this Hearing being

converted from a Case Management Preliminary Hearing in private into a substantive Preliminary Hearing in public, on less than the usual 14 days' notice, to allow the second respondent's opposed application to Strike Out the claim against the second respondent to be heard at this Hearing.

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38. On the matter of a sist of the Tribunal proceedings, Mr Russell stated that he sought a sist, in light of the Sheriff Court proceedings. He departed from that approach later on in this Hearing. Mr Murdoch stated that he wanted the Strike Out application dealt with first, but if Strike Out was refused, then he could see sense in a sist.

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39. Mr Hughes, counsel for the first respondents, stated he saw a sist as being appropriate, perhaps until after the PBA in the Sheriff Court in January 2019. He was then excused, and so did not participate further in what had now become a Preliminary Hearing on Strike Out.

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Submissions for Second Respondent

40. Mr Murdoch, solicitor for Mr Walker, then delivered his oral submissions in support of his client's application for Strike Out. He referred to his written application, in its 3 parts (A,B & C), as detailed above, and stating that it was for the case against the second respondent only to be struck out, under **Rule 37,** he invited me to accept *verbatim* his written application.

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41. He further submitted that the second respondent was "***prejudiced by the lack of fair notice"*** of the case against him as set forth in the ET1 claim form. He then referred to parts A, B & C of his application, and stated further that legs B & C have a bearing on A. Later on, in the course of his submission, he stated that he did not rely strongly on leg C, that the claim has not been actively pursued by the claimant, but he did not withdraw that part of his application.

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42. While paragraph 7 of the ET1 paper apart had been "***tied up***" by Mr Muir, by the amendment allowed by Judge Sutherland, Mr Murdoch submitted

that the substance of any claim against Mr Walker, as second respondent, is very limited, as he is not the employer, that is the first respondent, and he was, but is no longer, a director of the first respondent company.

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43. Mr Murdoch then referred to paragraph 6 of the ET1 claim form, which is the only paragraph that sets out the claim against the second respondent. It reads as follows : "***The Claimant believes he has been subject to detriment for making the protected disclosures and has also been subject to post-dismissal detriment by the Second Respondent***."

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44. Further, he added, paragraph 7 of the claimant's ET1 paper apart contains relevant information about the i*interim* interdict, and what the claimant can or will produce by way of further and better particulars of his claim at some later stage.

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45. Meantime, as the ET1 is set out, it says "***absolutely nothing***" about the circumstances on which any claim against Mr Walker as an individual is founded and, as a matter of reality, the second respondent has "***no idea***" himself of the claim being advanced against him by Mr Graham.

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46. Further, submitted Mr Murdoch, the claimant could have set out at least an outline of what the claim is about, beyond one sentence, and rather than the one sentence (in paragraph 6), perhaps a paragraph could have been written. He stated that : "***It's not been properly pled is my essential argument."***

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47. As regards the interim interdict in place, Mr Murdoch stated he expected parties to be "***at odds***" as to the effect of the interdict, but on behalf of the second respondent, he submitted the interdict was quite specific in its terms, and none of its terms appear to relate to the alleged post-dismissal detriment.

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48. He further submitted that the **Vaughan** judgment, cited by Mr Russell, is "***very different from the present case***", on its facts and circumstances, and so distinguishable. He also prayed in aid that the second respondents

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was not the claimant's employer, and in **Vaughan**, the claim had been set out. He added that there is no abuse of process by him, or his client, and the timings in the present case are very different from those in **Vaughan.**

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49. Further, added Mr Murdoch, the *interim* interdict granted by the Hamilton Sheriff, on 27 June 2018, was granted at a time when there was no ET1 lodged with the Tribunal, and so the second respondent had no knowledge of any claim raised against him until it was served, at the employer's place of business, on 30 August 2018, and he was not aware of any ACAS early conciliation either, with him as a prospective respondent, as the ACAS EC certificate was addressed to him at the first respondent's address, not his home address, which is now on the Tribunal file.

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50. At this point, I referred to the Tribunal file, and noted the terms of the two ACAS EC certificates produced along with the claim form, and referred to therein by their unique reference numbers. They showed that Mr Graham, as prospective claimant, notified ACAS on 29 June, and they issued their EC certificates on 29 July 2018.

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51. I pause here to note and record that this state of affairs is vouched at section 3.1 of the ET3 response for Mr Walker, lodged on 27 September 2018, which states that the ACAS early conciliation details provided by the claimant are "***not known",*** *w*hile the ET3 lodged, on 27 September 2018, for the first respondents, agreed the claimant's details as being correct.

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52. In these circumstances, submitted Mr Murdoch, the interdict and defamation proceedings in the Sheriff Court were not designed to interrupt the claimant's ET proceedings, as the civil action pre-dates the Tribunal claim.

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53. In closing, given he had not referred to the relevant ET rules of procedure, other than to refer to **Rule 37**, and he did not cite any case law authority, but simply sought to distinguish **Vaughan**, I enquired of Mr Murdoch if he had anything further to say. He replied saying that he had no further

submissions to make regarding the Tribunal rules of procedure, or any case law authorities.

Submissions for Claimant

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54. I then invited Mr Russell to reply, on behalf of the claimant. In his oral submissions, objecting to the Strike Out application made by Mr Murdoch, he started by asking : ***"Why are we where we are***?", and then proceeded to answer his question, by stating that : "***The elephant in the room is the interdict, and that is the sole reason why there are no further and better particulars for the claimant."***

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55. Mr Russell then added that the claim included **Section 47B** detriment short of dismissal, and **Section 103A** automatically unfair dismissal for making a protected disclosure, as well as "ordinary" unfair dismissal, and that he could "***draft the case in a couple of hours with great specification***", but he was prevented from doing so by the interdict.

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56. He explained that his client had no *caveat* in place at the Sheriff Court, so there was no opposition by the claimant when *interim* interdict was granted by the Sheriff, on Mr Murdoch's application, and he described the interdict granted as being "***3-legged***", namely :

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> ***"… ad interim interdicts the Defender, his servants, agents and all others acting on his behalf or on his instructions, from repeating, or otherwise disseminating the allegation that the Pursuer threatened and bribed the Defender and used his position of power to intimate the defender, or any part thereof, all until further Orders of Court".***

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57. Further, stated Mr Russell, the Strike Out application being pursued by Mr Murdoch, on behalf of the second respondent, Mr Walker, is ***"a blatant attempt to silence the claimant.***" He added that, in his view, it was

important to note that the claimant had been dismissed in early May 2018 (4th May 2018 being the agreed effective date of termination of his employment), and, come the end of June, the *interim* interdict was in place, granted on 27 June 2018.

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58. By way of further explanation, Mr Russell stated that Mr Walker was sued as second respondent, and while the first respondents would be vicariously liable, Mr Walker had personal liability for certain things, but he advised that he could not tell me what, as his hands were "***completely and utterly***
10 ***tied by the interdict".***

59. While Mr Murdoch had stated to the Tribunal that his client, Mr Walker, had "***no idea***" of the claim being brought against him in the Employment Tribunal, the fact is - submitted Mr Russell - that he had raised civil
15 proceedings against Mr Graham, the claimant here in the Tribunal, and he had obtained an *interim* interdict against his client.

60. As per the ET1, at paragraph 4, he added, there was reference to a grievance raised by the claimant against the second respondent prior to
20 the claimant's dismissal, and Mr Russell stated that that grievance document was lodged in the civil proceedings. While referenced in the ET1, it has not, as yet, been lodged with the Tribunal.

61. Mr Russell invited me to "***tip the balance 100% in favour of the claimant***",
25 as he described Mr Walker, the second respondent, as preventing the claimant from saying anything about him, without breaching the interdict in place. He invited me to exercise my discretion in favour of the claimant, and refuse Mr Murdoch's application for Strike Out of the claim against the second respondent.

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62. Further, Mr Russell described the case law on Strike Outs referring to it being "***Draconian"***, and that a claim should not be struck out without any investigation of its facts and circumstances, in a case, such as the present one, where much is in dispute.

63. He then referred, by case name, but without full citations, which I have added here, to the well-known Court of Session judgment in **Tayside Public Transport Co Ltd v Reilly [2012] IRLR 755 (CSIH)**, Lady Smith's EAT judgment in **Balls v Downham Market High School and College [2011] IRLR 217**, and the Court of Appeal's judgment in **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.**

64. Mr Russell stated that it was not unusual to get further and better particulars in a discrimination and / or whistleblowing case, after an ET3 response was lodged, and, even if there had been no *interim* interdict in place here, the Tribunal has a discretion to refuse to Strike Out a claim, and instead to continue a case to a point in time to allow a claimant to better specify their claim against a respondent.

65. I was then referred to the email exchange between Mr Muir and Mr Murdoch, copied to the Tribunal, in emails of 4 and 12 October 2018, as held on the casefile, and Mr Russell submitted that the second respondent's position in these Tribunal proceedings is a "***barrier to justice for the claimant***", given the serious allegations made, and if the case were to be struck out.

66. He added that the second respondent should make his mind up – does he want further and better particulars from the claimant, or does he want the claim against him struck out?

67. Without producing a copy, or quoting directly from its terms, Mr Russell then referred loosely to the Scottish Presidential Guidance on Postponements (2014), and how, akin to criminal proceedings, if there are related civil proceedings, whether there is any good cause to sist Tribunal proceedings or postpone a Hearing.

68. Mr Russell then added that he was "***not making a big point***" about the Lewisham case of **Vaughan**, and he recognised it was from an English Court, and that it had different facts, but he submitted that the QBD

judgment relates to the interplay between interdict and Tribunal proceedings, and it is "***the closest case I could find at such short notice***."

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69. In particular, he stated that the judgment of Mrs Justice Sharp, at paragraphs 17 to 19, is "***right on point***" with what he was saying to this Tribunal, and he referred me in particular to paragraph 18 of the **Vaughan** judgment. He then stated that there would be ***"very severe consequences"*** for the claimant, if this claim was struck out against the second respondent, and likewise if the claimant were to give specifics, and leave himself and his solicitors open to proceedings for breach of interdict.

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70. Next, Mr Russell referred to **Rule 76** of the ET rules of procedure, and submitted that it is unreasonable conduct of the proceedings by the second respondent when the interdict is in place, at his application, which prevents the claimant from providing further and better particulars. Referring then to ***Tolleys*** stating the case law is clear, although he did not produce any printed except from ***Tolley***s, to which he was referring, he did mention **Tayside v Reilly**, and that there is a higher test for Strike Out in discrimination and whistleblowing cases.

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71. Further, added Mr Russell, the *interim* interdict has been granted by the Sheriff, but there is no substantive Hearing in the Sheriff Court until the PBA next January 2019, and he was trying, with the motion to be heard on 7th November 2018, to get the *interim* interdict recalled or relaxed.

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72. He disputed that the claimant's issue of the Tribunal proceedings was unreasonable, or vexatious, or at least, premature to say that, when the claimant is presently prevented from fully pleading his case, and specifying his case, to address the 3-prong test required for a **Section 103A** claim, and to plead detriment.

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73. Mr Russell then described the ET1 as being a ***"protective, or skeletal, claim"***, which was lodged, and this was not unusual, because such cases

are generally ***"fleshed out later"*** through case management, and, as regards leg C of Mr Murdoch's application, Mr Russell stated that the case is at an early stage, the claimant insists on his claim, and it cannot therefore be said that the claim is not being actively pursued by the claimant.

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74. Further, Mr Russell described the claimant, Mr Graham, as formerly holding a senior role in Argent Energy (UK) Ltd, as Head of Health & Safety, and it is premature of the second respondent to say the claim is not being actively pursued, where the claimant and his solicitors have done as much as they

10 can at this time, when ***"our hands are tied***."

75. On the matter of a sist, or continuation, Mr Russell then suggested that, given the Sheriff Court motion on 7 November 2018, if the Strike Out was refused, as was his principal motion to me, he did not now invite a sist of

15 the Tribunal proceedings, but felt the case should be continued for further procedure before this Tribunal. He undertook to update the Tribunal, after the Sheriff's decision, and about further Tribunal procedure.

76. Continuing with his oral submissions, Mr Russell stated that the balance of

20 prejudice was "***firmly against the claimant***", if the Strike Out application was granted, despite his opposition, as there is no prejudice to the second respondent by it being refused, and the case sisted, or continued for further procedure.

25 77. On the contrary, he submitted, it would be prejudicial to the claimant if Mr Walker, the second respondent, could "***walk away***" from these Tribunal proceedings due to a lack of specification of the claim against him, caused by the interdict being in place.

30 78. Mr Russell then described that as it could be seen as: "***an abuse of process by Mr Walker"***, given he has "***thrown his weight against the claimant, where others may well have fallen by the wayside by now."***

79. He invited me to dismiss Mr Murdoch's application for Strike Out, and to fix

35 such further procedure as I saw fit, and confirmed that he hoped to specify

the claim, at the first available opportunity that does not compromise the claimant or his representatives as regards the interdict, and the current possibility of breach of interdict if further and better particulars were provided now.

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80. On the matter of Mr Murdoch's leg A argument, that the claim has ***"no reasonable prospects of success"***, Mr Russell stated that he referred to ***Tolley,*** at paragraph **19.76** onwards (but, unfortunately, he did not provide an excerpt copy for my use, nor for Mr Murdoch), and he noted that Mr Murdoch had himself stated he was not vigorously pursuing leg C about failure to actively pursue the claim.

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81. As regards that part of leg B, founded upon the manner in which the proceedings have been conducted being "***vexatious***", Mr Russell stated that the claim was neither unreasonable, nor vexatious, but he could not further comment upon that allegation, as otherwise he would have ***to "wax lyrical on the merits of the case"***, and the interdict was still in place.

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82. When I referred to the well-known definition of "***vexatious"***, from **<u>E T Marler v Robertson</u> [1974] ICR 72 (NIRC),** as being something that is not pursued with the expectation of success but to harass the other side or out of some improper motive, Mr Russell replied by stating that the claimant had lodged a grievance against Mr Walker, before the claimant was then dismissed, and as parts of that grievance were upheld, he submitted that that showed the claim was "***absolutely not"*** vexatious on the claimant's part. He then concluded his submissions by reminding me that the ***"common denominator throughout the process is Mr Walker."***

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<u>Reply for Second Respondent</u>

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83. Having heard Mr Russell's submissions, I then invited Mr Murdoch to reply. He stated that he had listened to Mr Russell, but the claim as pled in the ET1 does not plead a case against the second respondent, and so Mr Walker does not know the case being brought against him. Other than that,

Mr Murdoch stated, he had nothing further to say, but to invite me to grant the Strike Out, as per his earlier submissions.

84. When I asked Mr Murdoch if he had anything to say about the well-known, familiar authorities of **Reilly, Balls, etc**, referred to earlier, he confirmed that he was happy for me to accept the propositions of law set forth in those cited judgments, but he described this case as having "***exceptional circumstances",*** and in his submission, that "***justifies Strike Out, as being a disposal within the range of actions that the Tribunal can take."***

85. Having noted his position, I then referred him to the "***red card / yellow card***" analogy (from **H M Prison v Dolby [2003] IRLR 694 (EAT)**) about the choice between Strike Out and other things, such as a Deposit Order, and he stated that he still felt Strike Out was appropriate in this case, and that to strike out the claim would be consistent with the Tribunal exercising its powers fairly and justly under **Rule 2,** and the Tribunal's overriding objective.

86. If, however, Strike Out was not to be granted, in terms of his application, Mr Murdoch stated that a sist was appropriate, until after the Sheriff Court PBA on 16 January 2019. When I asked him about the effect of a sist on the case management orders made earlier by the Tribunal, he offered no further comment, but Mr Russell intervened to suggest that there should be a continuation to another Case Management Preliminary Hearing, in say 2 or 3 weeks' time, to review further procedure at that stage, and then consider whether or not to sist these Tribunal proceedings

Reserved Judgment

87. It then being just before 4.20pm, I reserved Judgment, and advised both solicitors that I would reflect carefully on their submissions, and give my decision, in writing, as soon as possible.

88. In private deliberation, in chambers, over the next few days, I did so, and issued Judgment only on 5 November 2018, which, due to the proximity to the Sheriff Court calling on 7 November 2018, I had the clerk to the Tribunal issue, by email, with a scanned, signed Judgment, stating that Written Reasons would follow. These are my reserved Written Reasons.

Relevant Law

89. So far as relevant, for present purposes, it is necessary to make some reference to the relevant statutory provisions to be found in the **Employment Tribunals Rules of Procedure 2013**, in particular, **Rule 37** (Striking Out) and **Rule 2,** the Tribunal's "***overriding objective***", and it is appropriate to record their full terms now, as follows:

Overriding objective

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

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

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

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

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

(e) saving expense.

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

Striking Out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

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

(d) that it has not been actively pursued;

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

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

90. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances. Even if the Tribunal so determines, it retains a discretion not to strike out the claim. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances.

91. A Tribunal can exercise its power to strike out a claim (or part of a claim) '***at any stage of the proceedings'*** - **Rule 37(1).** However, the power must be exercised in accordance with ***"reason, relevance, principle and justice":*** **Williams v Real Care Agency Ltd [2012] UKEATS/0051/11** (13 March 2012), **[2012] ICR D27,** per Mr Justice Langstaff at paragraph 18.

92. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13,** 24 April 2013, **[2014] I.R.L.R. 14**, the learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

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

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

95. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126,** the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

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

Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

97. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

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

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

99. Although not cited to me by either party, I am aware that in a reported EAT judgment by the Honourable Mrs. Justice Simler DBE, the President of the Employment Appeal Tribunal, in **Morgan v Royal Mencap Society [2016] IRLR 428**, she helpfully analyses the principles laid down in the case law,

and their application, at paragraphs 13 and 14 of her judgment, where, at paragraph 14, she states that the power to strike out a case can properly be exercised without hearing evidence.

100. Again, while not cited to me, by either party, I am aware that in **Lambrou v Cyprus Airways Ltd [2005] UKEAT/0417/05**, an unreported Judgment on 8 November 2005 from His Honour Judge Richardson, the learned EAT Judge stated, at paragraph 28 of his judgment, as follows:

> ***"Even if a threshold ground for striking out the proceedings is made out, it does not necessarily follow that an order to strike out should be made. There are other remedies. In this case the other remedies may include the ordering of specific Particulars and, if appropriate when Particulars are ordered, further provision for a report which, in furtherance of the overriding objective, will usually be by a single expert jointly instructed. A Tribunal should always consider alternatives to striking out: see HM Prison Service v Dolby [2003] IRLR 694."***

101. So too have I considered **Dolby**, where, at paragraphs 14 and 15 of the judgment, Mr Recorder Bowers QC, reviewed the options for the Employment Tribunal, as follows:

> ***"14. We thus think that the position is that the Employment Tribunal has a range of options after the Rule amendments made in 2001 where a case is regarded as one which has no reasonable prospect of success. Essentially there are four. The first and most draconian is to strike the application out under Rule 15 (described by Mr Swift as "the red card"); but Tribunals need to be convinced that that is the proper remedy in the particular case. Secondly, the Tribunal may order an amendment to be made to the pleadings under Rule 15. Thirdly, they may order a deposit to be made under Rule 7 (as Mr Swift put it, "the yellow card"). Fourthly, they may decide at the end of the case that the***

application was misconceived, and that the Applicant should pay costs.

15. Clearly the approach to be taken in a particular case depends on the stage at which the matter is raised and the proper material to take into account. We think that the Tribunal must adopt a two-stage approach; firstly, to decide whether the application is misconceived and, secondly, if the answer to that question is yes, to decide whether as a matter of discretion to order the application be struck out, amended or, if there is an application for one, that a pre-hearing deposit be given. The Tribunal must give reasons for the decision in each case, although of course they only need go as far as to say why one side won and one side lost on this point."

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

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

104. In **H M Prison Service v Dolby [2003] UKEAT/0368/12**, at paragraph 14 of Mr. Recorder Bower' QC's judgment on 31 January 2003, a Deposit Order is the ***"yellow card***" option, with Strike Out being described by counsel as the "***red card.***"

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

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

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

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

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

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

111. Prior to making any decision relating to the Deposit Order, the Tribunal must, under **Rule 39(2),** make reasonable enquiries into the paying party's ability to pay the deposit, and it must take this into account in fixing the level of the deposit.

112. At this Preliminary Hearing, I was not invited by Mr Murdoch to consider making a Deposit Order, nor did Mr Russell invite me to do so. Accordingly, I did not make specific enquiries of the claimant's solicitor , as regards his client's ability to pay, if I decided to order him to do so, because to have done that I would ordinarily have already ordered a claimant to provide a statement of their whole means and assets, with vouching documents.

113. As stated by Lady Smith, in the unreported EAT judgment of 10 January 2012, given by her in **Simpson v Strathclyde Police & another** **[2012] UKEATS/0030/11,** at paragraph 40, there are no statutory rules requiring an Employment Judge to calculate a Deposit Order in any particular way; the only requirement is that the figure be a reasonable one.

114. Further, at paragraph 42 of her judgment in **Simpson**, Lady Smith also stated that:

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

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

116. Finally, I wish to note and record that in the EAT's judgment in **Wright v Nipponkoa Insurance (Europe) Ltd [2014] UKEAT/0113/14,** dealing with the *quantum* of Deposit Orders, it was held that separate Deposit Orders can be made in respect of individual arguments or allegations, and that if making a Deposit Order, a Tribunal should have regard to the question of proportionality in terms of the total award made. These, however, are all matters that I need not dwell upon further, at least not at this stage of these Tribunal proceedings.

Disposal

117. Having reserved Judgment, and following private deliberation, in chambers, and taking account of the oral submissions made by the solicitors for the claimant, and second respondents, I decided to refuse Mr Murdoch's application inviting me to Strike Out the claim against the second respondent.

118. I came to that view, after careful reflection, because of the circumstances where, at this stage of these Tribunal proceedings, I was not satisfied that it was in the interests of justice to do so, nor was I satisfied that to Strike Out the claim against the second respondent only was in accordance with the Tribunal's overriding objective under **Rule 2 of the Employment Tribunals Rules of Procedure 2013** to deal with the case fairly and justly.

119. While Mr Russell referred to the **Vaughan** judgment, the facts and circumstances of that reported case are far removed from those of the present case, and I found no material assistance to me in that judgment. I agree with Mr Murdoch, solicitor for the second respondent, that that case is distinguishable from the present case, and in addressing case law, I have considered relevant case law on Strike Out of Tribunal claims, as I have detailed above.

120. It seemed to me then that it was highly relevant for me to note and take into account the unusual circumstances, where the claimant's solicitor argued that the terms of an *Interim* interdict granted by the Sheriff at Hamilton on 27 June 2018, in a civil action by the second respondent against the claimant, is in force, and for the claimant, and / or his solicitor, to provide further

specification of the claim could be the subject of proceedings in the Sheriff Court for breach of that interim interdict.

121. In light of the information provided to the Tribunal at this Hearing that the claimant in these Tribunal proceedings, as defender in that civil action, has enrolled a motion, to be heard on Wednesday, 7 November 2018, to recall / relax that *interim* interdict, so as to allow him to provide further and better specification and fair notice of the basis of claim against both respondents, and further noting that that motion has been opposed by the solicitor for the second respondents, as pursuer in that civil action at Hamilton Sheriff Court, I considered that, in this *forum*, parties are therefore not on an equal footing at this stage.

122. Further, I specifically noted that the claimant wishes to pursue his claim before this Tribunal, and his solicitor has confirmed at this Hearing that the claimant seeks to actively pursue his claim before the Tribunal, once the *interim* interdict is recalled, or relaxed, appropriately, to allow him to fully plead the claimant's case against both respondents in this Tribunal, in fuller terms than at present in the ET1 claim form.

123. I considered whether or not, as an alternative to a Strike Out, I should make an Unless Order, under **Rule 38**, requiring the claimant to lodge detailed Further and Better Particulars of his claim, within a set period, but I decided not to do so, at least not at this stage. I did not consider that there was any other appropriate disposal at this stage.

124. In these circumstances, I found that it would be draconian to Strike Out the claim, at this stage, before the claimant has had an opportunity to fully plead his case, and both respondents have had the opportunity to reply to the claimant's further and better particulars of claim.

125. I felt that the Tribunal, at that stage, with the benefit of all parties' revised pleadings in the claim and responses, could consider further procedure in these Tribunal proceedings, at a future Case Management Preliminary Hearing held in private before me, on a date to be hereinafter assigned by the Tribunal.

126. In issuing these Written Reasons, I have instructed the clerk to the Tribunal to write separately to all 3 parties' representatives to make arrangements to set up that up that Case Management Preliminary Hearing held in private before me, estimated 2 hours, personal attendance, on a date sometime in December 2018 / January 2019.

Employment Judge: GI McPherson
Date of Reasons: 26 November 2018
Entered in register: 26 November 2018
and copied to parties