EMPLOYMENT TRIBUNALS

Claimant Miss AC Xia

Respondents **v** Tag Europe Ltd and 19 others

PRELIMINARY HEARING

Heard at: **London Central** **On: 25 September 2019**

Before: **Employment Judge Baty**

Appearances
For the Claimant: In person
For the Respondents: Ms V Brown (counsel)

JUDGMENT

1. The claim is struck out in its entirety because the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable and vexatious.

2. The claim is also struck out in its entirety because it has no reasonable prospect of success.

3. The respondents' costs application succeeds. An award of costs of £2,000 (Two Thousand Pounds) is made, payable by the claimant to the 1st respondent (Tag Europe Limited).

REASONS

Today's hearing

1. Today's hearing was listed for one day to consider two specific issues, which were set out in the notes of the preliminary hearing of 5 September 2019 (the "5 September PH"), which was also before me. Those issues were:

a. The respondents' application set out in their letter of 20 August 2019 to the tribunal; and

b. If applicable following the determination of the above, whether the list of issues previously put together with EJ Clark at the preliminary hearing (in private) before her on 27 June 2019 should be amended as set out in the

claimant's eight-page document sent to the tribunal by email of 12 July 2019 (including whether there should be an amendment to the claim to include the whistleblowing complaints proposed in that document).

2. As it turned out, because of the decisions which I made in relation to issue (a) above striking out the claim, there was no requirement to consider issue (b). However, the respondents had previously indicated that they would be making a costs application at this hearing (indeed they indicated this in the letter of 20 August 2019) which, after I had made my other decisions regarding issue (a) above, Ms Brown duly made. That application was, therefore, also considered.

3. The applications made in the respondents' letter of 20 August 2019 which were pursued at this hearing were, in summary, as follows:

a. Whether all or any of the claimant's complaints should be struck out on the grounds of being conducted in a manner that is scandalous, unreasonable or vexatious under rule 37(1)(b) of the Employment Tribunal Rules 2013 (the "2013 Rules");

b. Whether all or any of the claimant's complaints should be struck out on the grounds of having no reasonable prospect of success under rule 37(1)(a) of the 2013 Rules;

c. In the alternative, whether all or any of the claimant's complaints should be the subject of a deposit order under rule 39(1) of the 2013 Rules on the grounds that the complaints have little reasonable prospect of success; and

d. Whether the 19 individual named respondents should be removed from the proceedings.

4. These reasons should be read with EJ Clark's note summarising the preliminary hearing (in private) before her on 27 June 2019 (the "27 June PH") and my note summarising the 5 September PH (the contents of which are not repeated in full in these reasons). Any findings or observations contained in those notes are incorporated into these reasons; in particular, and without prejudice to the generality of the above, the findings and observations which I made in the note of the 5 September PH relating to the (over an hour's worth of) recordings covertly taken by the claimant which I listened to at that hearing are incorporated into these reasons.

Conduct of today's hearing

5. At the start of the hearing, I reiterated what the purpose of today's hearing was and proposed that we should deal with the respondents' applications in the morning and, if applicable, deal with the list of issues in the afternoon.

6. Ms Brown had produced an 11 page skeleton argument, together with some authorities referred to in that skeleton argument, copies of which she had given to the claimant that morning in advance of the hearing commencing. The claimant had not yet had the chance to review the skeleton argument fully and (and this is no criticism of Ms Brown) I wanted the claimant to have the chance to do so and proposed a half hour adjournment to enable her to do so.

7. The claimant had produced a pack of roughly some 200 pages of documents, indexed documents AX1 - AX9, a copy of which she had given to Ms Brown in advance of the hearing. Three of these documents had been sent to the tribunal on 17 September 2019 and I had had the chance to have a look at them in advance of the hearing. However, although the claimant said that she had sent some of the others, they were not on the tribunal file at the time and I had not had a chance to read them. The documentation was extremely extensive and it would have been impossible for me to have read all of it thoroughly without delaying the commencement of this hearing by several hours, which I did not consider proportionate to do. I therefore explored with the claimant which documents in that pack she considered to be key to any submissions she wished to make in relation to the respondents' applications. The claimant went through the documents and essentially suggested that I needed to read all of them. I explained that this was not proportionate and gave her another chance to identify what she felt was most relevant. She started to identify some specific documents (AX1, AX2 and AX3 for example) but then went on to include most of the other documents as well; we were, therefore, no further on. Eventually, given that the claimant seemed incapable or unwilling to narrow the documents down, I explained that I would skim through the documents during the adjournment but I made it clear that I could not properly read them all; however, I explained again that it would not be proportionate for me to spend several hours doing this and I would not, therefore do it. The claimant could (and indeed did) direct me to documents within her pack during her submissions.

8. The parties agreed, prior to the adjournment to read the documents, that each would have up to 45 minutes to address me in submissions in relation to the applications. When we resumed, they duly made their submissions.

9. Ms Brown completed her submissions within her 45 minutes.

10. The claimant's submissions for the most part did not address in any detail the points which had been made by Ms Brown in her skeleton argument and oral submissions in relation to the applications and much of her submissions was irrelevant to the issues which I had to decide. The claimant spent the first 20 minutes of her submissions trying to argue, contrary to my findings from the 5 September PH, that the recordings which were played at the 5 September PH did in fact demonstrate, as she maintained, that the respondents' employees were engaged in a social media conspiracy against her. I had to remind her that, whether she liked the findings that I had made or not, I had made those findings and the applications which I had to consider at this hearing were in the context of and on the basis of those findings; notwithstanding this, the claimant was unwilling to accept this and continued to make submissions about what the recordings revealed before eventually moving on to something else.

11. The claimant went beyond the 45 minutes without showing any sign of coming to a close; I asked her how much more time she needed and explained that, the timetable having been agreed at the start of the hearing, it would not be proportionate or just to allow her a considerable amount of time in excess of Ms Brown's allocation. The claimant asked for a further 20 minutes; on the grounds of proportionality, and given that so little of the time which had been used so far had been spent in addressing me on matters which were relevant to my decision, I told the claimant that she would need to wrap up her submissions within the next 10 minutes. In the end,

she got to the end of those 10 minutes without stopping and I therefore told her that she would have to stop at that point.

12. In the end, therefore, Ms Brown had 45 minutes for her submissions whilst the claimant had one hour for hers.

13. I adjourned over lunch to consider my decision and delivered it orally to the parties when we returned.

14. Ms Brown then made the respondents' costs application. I heard submissions from both parties and adjourned briefly to consider my decision. When the parties returned, I gave them my decision on the costs application orally.

15. The claimant then asked for written reasons for my decisions.

16. After I had given my respective decisions in relation to striking out the claim and on the costs application, the claimant continued in each case to push back on those decisions. Having reiterated briefly why I made them, I had to explain at the end of the hearing that, having made those decisions, the claimant could not keep trying to argue her case in relation to them before me and explained to her that, if she considered that I had made an error of law, she had the right to appeal the decision.

The relevant law in relation to the respondents' applications

17. Rules 37 and 39 of the 2013 Rules provides as follows:

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; …

Deposit orders

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

Conduct

18. The legal principles for strike out under Rule 37(1)(b) are set out in Abegaze v Shrewsbury College of Arts & Technology [2009] EWCA Civ 96 at [15] per Elias LJ, with whom Ward and Rimer LJJ agreed. The test is three-fold:

a. Was the conduct scandalous, unreasonable or vexatious?

b. Is the result of that conduct that there could not be a fair trial?

c. Is strike out proportionate?

19. In Bennett v Southwark London Borough Council [2002] ICR 881, CA at [27] Sedley LJ held: *"without seeking to be prescriptive, the word "scandalous" in its present context seems to me to embrace two somewhat narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court."* Ward LJ added at [53]: *"The first question is to understand what is meant by 'scandalous'. The best, indeed only, definition I have chanced upon was that given by Daniel, the great master of and author of the seminal work Chancery Practice. He is recorded in Byrne's Dictionary of English Law, 1923, as having said with reference to pleading that: 'Scandalous consists in the allegation of anything which is unbecoming the dignity of the court to know, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause: to which may be added that any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous.'"*

20. In Attorney General v Barker [2000] 1 FLR 795 (QBD), Lord Chief Justice Bingham (as he then was) described vexatious as *"the hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."*

21. Unreasonable was discussed in Bolch v Chipman [2004] IRLR 145, EAT. Burton P held that the substitution of unreasonable for frivolous in the old rule had lowered the hurdle. One need not conclude proceedings had been conducted scandalously, vexatiously or frivolously to conclude it was unreasonable: [52].

22. As to the possibility of a fair trial, Burton P held: *"There will plainly be circumstances, perhaps such as we indicated earlier by way of illustration, in which conduct of proceedings, for example by way of a threat, even if it results in some kind of promise of good behaviour, or something of that kind, by a respondent, can still have such lingering effect that the tribunal is of the view that there can no longer be a fair trial. That can certainly be the case in the example given by Millett J where documents have been fabricated, if, for example, no tribunal hearing the case can be satisfied that there are no further documents to be produced or that the present documents may not also have been fabricated, because confidence has been entirely lost in the good faith and honesty of one party or the other. But there must be, and certainly should have been in this case, in our judgment, a conclusion as to whether or not a fair trial can and could be held."*

23. Weir Valves (UK) Ltd v Armitage [2004] ICR 371, EAT at [27] establishes that whether a fair trial is possible is an objective question for the tribunal. The feeling of one party, soundly based or not, is not decisive. The tribunal must address its mind to the issues in the case, the fairness of allowing the case to proceed in light of the default, and reach an objective decision. The guiding consideration is the overriding objective, which requires justice to be done between the parties: [10]

Prospects

24. Tribunals should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospect of success, as per the recent case of Mbuisa v Cygnet Healthcare Ltd EAT 0119/18. Having said that, Mbuisa involved a poorly pleaded claim of automatically unfair constructive dismissal for health and safety reasons under s100 Employment Rights Act 1996. The EAT's concern was that poorly pleaded cases are not held against litigants in person, where a formal amendment and deposit order may be more appropriate. In this case, the claimant's pleading has been pinned down into a list of issues (albeit one which the claimant currently seeks to change further); the issue is no longer deciphering a difficult claim but the prospect of evidence being capable of supporting that claim.

25. There is also the well-known line of case law noting the difficulties of striking out discrimination claims involving disputes of fact (see, for example, Anyanwu v South Bank Student Union [2001] ICR 391, HL), and of which I am fully mindful. However, as Ms Brown correctly submits:

a. The Court of Appeal have confirmed that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established: Ahir v British Airways PLC [2017] EWCA Civ 1392, CA;

b. Even in Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 where the Court of Appeal emphasised that it is only in exceptional cases that it would be appropriate to strike out a claim where the central facts were in dispute, they went on to give the following example of an exceptional situation: where the facts asserted by one party were clearly and directly contradicted by contemporaneous documentation; and

c. the EAT has confirmed that Anyanwu is distinct from cases where the tribunal has heard evidence on the core area of factual dispute at the preliminary hearing and resolved it against the claimant: Eastman v Tesco Stores Ltd [2012] All ER (D) 264. Where there is such a finding, strike out is permissible.

As we shall see, all three of the above scenarios are applicable in this case.

Strikeout (reasonable prospects) - social media allegation 4.32

26. Ms Brown began her submissions by submitting that I should strike out, on the basis of no reasonable prospect of success, allegation 4.32 in the list of issues set out in the note of the 27 June PH; this was the allegation that the majority of the 19 named respondents had conducted "a social media campaign against the claimant (details unclear)".

27. Ms Brown pointed out that at the 5 September PH I dismissed the claimant's application for disclosure of the 19 named respondents' Instagram accounts; and that that application related to allegation 4.32. The claimant had explicitly alleged that she had not herself seen any social media posts (see paragraph 6 of the EJ Clark's note of the 27 June PH); her only evidence of such a conspiracy was said to be the covert

recordings which she had taken in the 1st respondent's workplace. As I found, in turning down the disclosure application, the recordings reveal nothing to indicate this.

28. It follows that it will not be possible for the claimant to prove allegation 4.32. She cannot adduce witness evidence in respect of social media posts, having confirmed that she has never seen any. There has been a finding of fact that the audio recordings do not evidence any social media campaign. Therefore, there is no reasonable prospect of the claimant succeeding in this allegation.

29. In her submissions at this hearing, the claimant suggested, again in very vague terms, that she somehow relied on "other evidence" as well as the covert recordings. However, in doing so, she was rowing back from the concession which she made before EJ Clark and, in so doing, demonstrating yet another example of her changing the goalposts as the litigation goes on (of which more below). I do not accept that, submitting this as she does at this late stage, she does have other evidence (and she has certainly not been clear as to what it is); furthermore, it is not proportionate or just that she should change a position now having set it out with EJ Clark in an extensive preliminary hearing on 27 June.

30. Therefore, as set out above, the claimant does not have the evidence to prove allegation 4.32 and it has no reasonable prospect of success. I therefore strike out that allegation.

Strikeout (conduct scandalous, unreasonable or vexatious) of whole claim

31. In approaching this application, I apply the three-stage test outlined above.

Is the claimant's conduct scandalous, vexatious or unreasonable?

Scandalous

32. I accept Ms Brown's submission that the conduct of the proceedings by the claimant has been scandalous in that it misuses the privilege of legal process to vilify others. The allegations made against the respondents are obscene. They include international terrorism, attempted murder, and threats of gang rape (and these are not even the ones in the 32 allegations set out in the list of issues). The respondents are said to have done those things not only to the claimant but also to her family. I accept that the tribunal is being used to vilify the respondents without justification and accordingly is being misused. These are, as set out in Bennett, "unnecessary allegations, bearing cruelly upon the moral character of an individual".

33. In accepting that these are allegations made without justification against the respondent, I take into account the credibility of the claimant (or lack of it) which I have experienced myself in the 5 September PH. I cross refer to my note of the 5 September PH as a whole but, in summary: the claimant maintained that the recordings in question (of which I listened to over an hour's worth) evidenced the respondents' conducting a social media campaign against her and that their conversations contained "Chinese" words (despite the fact that they cannot speak Chinese) which, when translated into English, were extremely offensive terms; in fact, not only was none of this evident from the recordings, but throughout the entire hour's worth of recordings which I heard, all that can be made out from those recordings were the occasional word or phrase (although that was rare); it was enough to be able to ascertain that there were some conversations going on in the background and that

those conversations were in English; there was nothing whatsoever to suggest that anything which was said was in Chinese; apart from the odd word and phrase, nothing could be heard and it was impossible to get any sense as to what was being said or discussed in any of the conversations; no meaning could therefore be gleaned of any sort from these recordings; certainly it was impossible to ascertain anything which suggested that any of the individuals were referencing social media or making any comments about things that they had posted about the claimant or a campaign against the claimant on social media. In the light of the extraordinary and manifestly untrue assertions of the claimant about what the recordings revealed, I consider that what she says is not merely unreliable but utterly lacking in credibility and I would find it difficult to accept anything she said unless it was backed up by other evidence; in short, I have no trust and confidence in what the claimant tells me. This is a further reason for my conclusions in the paragraph above.

34. In this context, I also reference various examples set out in the respondents' 20 August 2019 application of areas in the recordings where typically it is possible to make out some words that are being said, with the recordings clearly demonstrating that the spoken language is English, such that the claimant's interpretation on the words as set out in her "transcript" is unsustainable. In doing so, I should make clear that I heard over an hour's worth of recordings, which were selected by the claimant at her sole discretion and which she chose to play to me; I did not, therefore, hear the whole of the recordings, which would have been a grossly disproportionate use of time; but that, on the basis of what I did hear, I accept Ms Brown's submission that I should infer that, given what I had listened to already, all of the other recordings were of a similar quality. Similarly, given my findings above in relation to the claimant's credibility, I accept what the respondents assert in the 20 August 2019 application in relation to the examples below (whether or not the examples were in sections of the recordings heard by me or not). The examples are as follows:

a. At page 6 of the claimant's 33 page "transcript" of the recordings (where the claimant alleges the individuals are speaking <u>entirely</u> in Chinese including extremely scandalous and offensive language which she translates as *"cunt/kill, easy pleasure"* and *"let's furiously fuck her cunt"*), it is possible faintly to hear the innocuous words in English *"keep it" "this" "okay, thank you" "that's why you have got to…"*. No Chinese can be heard.

b. At page 22 of the "transcript" (where the claimant alleges the individuals are speaking a mixture of Chinese and English but again including inappropriate language she translates as *"great cunt"* and other nonsensical sentences such as *"I'm superior to that"*) it is only possible to hear faintly the innocuous words in English *"send it to brand"* and *"want to edit"* i.e. words relating to work.

c. At page 23 of the "transcript" (where again the claimant alleges the individuals are speaking a mixture of Chinese and English but again including inappropriate language which she translates as *"slutty woman" "let's isolate her"* and *"fuck her over"* and again other nonsensical sentences such as *"I'm competing to psycho that"*) it is only possible to hear faintly the innocuous words in English *"Tesco or Morrisons"*, *"Bury St Edmunds"*, *"I just said it"* and *"that's what I am talking about"*.

d. Other examples in which the claimant alleged that what was on the recording was spoken in Chinese but translates it into English as something scandalous and offensive, shocking, or nonsensical include: *"kill her, whether or not it'd be a success is not for certain"*; *"mouth-gaged cunt"*; *"beat her dad to bleed blood"*; *"beat her up, covered in blood"*; *"we're beating up the head of the pregnant, be patient"*; *"what's that to do with you? Smelly cunt"*.

e. Further examples of extremely shocking allegations made by the claimant set out in the "transcript" (but not evidenced anywhere in the recordings) include: *"I have heard… psychopathic rape threats and life threats towards me"*; *"they incited and encouraged a huge number of extremely dangerous psychopathic sexual predators to abuse me in the same pattern and to brutally defame, torture, and murder me and my close family member in our disadvantages position of information asymmetry"*; and *"their dangerous psychotic sexual predator men inside and outside this company had been conspiring to sexual abuse her. Some extremely psychopathic and horrifying rapists/murderers/terrorists or the criminals-wanna-be have repeatedly threatened to secretly install cameras for shooting footages of me and Kristy using toilet and to group-rape me and her where no rescue for us is around"*.

35. Furthermore, I reference examples set out in the claimant's claim form where she states:

a. *"Yue Yue…. and many extremely horrifying psychopathic men, who have been bombarding me with outrageous verbal abuses and life threatening actions, were possibly incited by many Respondents of this Employment Tribunal claim in the victimisation and criminal campaign against my rights in the office and on social media…. it can't be more obvious that the psychopathic sexual predator men were boasting about their intention and ability to rape and kill me"* [page 17]

b. *"I heard "Sa-gou-eh" being said a lot from passers by outside where I currently live… I presume these seriously-mental criminal men of Shanghai origin had been inciting killing of me as well as taking other actions, as if any woman especially woman of Chinese origin meant dog that could be killed as long as any man wished according to them"* [page 20]

As well as the scandalous nature of these allegations, the claimant is suggesting that somehow even passers by in front of her house were making comments and that this was somehow to do with the actions of the respondents; the suggestion is bizarre.

36. For all of the above reasons, the claimant's conduct of these proceedings has been scandalous. The above represents a misuse of the privilege of legal process in order to vilify others; it gives gratuitous insult to the court; it is unbecoming to the dignity of the court to know and is contrary to good manners; it charges persons with crimes not necessary to be shown in the cause (it should be noted that many of the examples set out above are not contained in the issues of the claim produced by EJ Clark after considerable discussion with the claimant); and it represents "unnecessary allegations, bearing cruelly upon the moral character of an individual". Therefore, on

most of the definitions of "scandalous" set out in Bennett in my summary of the law above, the claimant's conduct was scandalous.

Vexatious

37. For similar reasons, the claimant's conduct of the proceedings has been vexatious within the definition set out above in Barker, which I do not repeat here but merely cross refer to.

38. I note the emphasis in Bennett on "effect" as opposed to "purpose" in subjecting a respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant (and it should be noted, in this respect, that the respondent has so far incurred roughly £27,000 of legal and other cost in defending these proceedings and they are nonetheless still only at a stage where there is not even an agreed list of issues); whatever the purpose of the claimant, the above behaviour certainly has had that effect. In any event, given the nature of the material above and the way the claimant has conducted herself in relation to her attitude to the recordings (as detailed above), I find on the balance of probabilities that it was her "purpose" too.

Unreasonable

39. Ms Brown has highlighted three areas in which she maintains that the claimant has been unreasonable in her conduct of the proceedings: first, that the claimant consistently updates and seeks to add more to her claim; second, that the claimant fails to comply materially with orders of the tribunal; and third, that the claimant is unwilling to accept any ruling against her. She gave a large number of examples of these areas, which are set out below.

Consistently updates and seeks to add more to her claim

40. The claimant submitted an 83 page document with her claim form, which was not in a form where the respondent could properly discern the precise nature of the complaints faced. EJ Clark, therefore, spent three hours with the claimant in the 27 June PH going through her potential claims, having spent half a day prior to the hearing trying to categorise the claims. This resulted in a list of 32 different complaints. In the PH, EJ Clark gave the claimant numerous reminders of the benefit of attempting to select potent examples whilst using the remaining allegations as "background". The claimant requested additional time to consider the draft list of issues for any significant omission. EJ Clark suggested that the claimant might use that time to take advice from ELIPS, especially before seeking to add to the list.

41. However, on 11 July 2019, the claimant submitted eight pages of "comments in response to the issues and order". As I noted at the 5 September PH, this document had the effect of "changing and expanding substantially the list of issues" as well as adding an entirely new (and very different) cause of action (whistleblowing). I accept Ms Brown's submission that the claimant's amendments actually undermined the time-consuming and painstaking exercise undertaken by EJ Clark and do not allow the respondents or the tribunal to understand the case being put.

42. Furthermore, on 12 July 2019, the claimant attempted to provide more comments on the list of issues.

43. As regards the "transcripts" in relation to the covert recordings, EJ Clark ordered that the claimant *"must identify precisely where on each audio file the passages in which she relies are contained and she must provide written transcripts of those passages"*. On 25 July 2019, the claimant submitted the 33 page "transcript" of her three chosen recordings; I accept Ms Brown's submission that what she did was certainly not a limited identification of precise passages. In addition, as noted, the "transcript" is peppered with commentary and "translations" and does not read as a transcript, but rather attempts with the commentary to persuade the tribunal. Furthermore, on 30 August 2019 (only four working days before the 5 September PH, and in breach therefore of EJ Clark's order), the claimant submitted 122 further pages which, amongst other things, contained 46 further pages of "transcript".

44. Five working days before the 5 September PH, the claimant sought to substitute the 2nd respondent for the 19th respondent.

45. During the course of the 5 September PH, the claimant regularly attempted to adduce further recordings and to rely on the 46 page additional "transcript", despite my clear instruction that, given the prejudice to the respondent because the 46 page "transcript" was submitted so late, we would use the 33 page "transcript".

46. Having identified one extract as beginning at [1-18] on page 6 of the "transcript", the claimant in fact began playing the recording from [1-14] thus extending her identified extract by six minutes.

47. On conclusion of the claimant's identified passages, she claimed to have also identified page 29 of the "transcript" as part of the requested extracts; this was incorrect, and the claimant's selection of pages 23-28 had been agreed numerous times with me.

48. Prior to today's hearing, on 17 September 2019, the claimant submitted a three page response to the respondents' strike out application as well as two chronologies; on 18 September 2019, the claimant sought to replace her three page response with a four page response; she then submitted an additional letter on 23 September 2019 and later that day another set of documents. Not all of these made their way to the tribunal in advance of the hearing. This resulted in the roughly 200 pages of documents referred to already being presented to the tribunal at the start of today's hearing.

49. The 23 September 2019 letter referred to in the paragraph above purports to be a letter from a friend of the claimant who has purportedly listened to the recordings and agrees with the claimant's view of what they show (as set out in the claimant's "transcript"). It is an impermissible and unreasonable attempt to go behind the findings that I made at the 5 September PH and reopen the issue.

Fails to comply materially with orders of the tribunal

50. On 30 August 2019, the claimant provided the additional "transcript" already referred to in lieu of a witness statement such that she did not comply with EJ Clark's order to provide a statement and likewise contradicted her order to provide transcripts by 26 July 2019.

51. The claimant failed to provide written transcripts in contradiction of EJ Clark's order in that: the "transcripts" themselves do not identify any social media campaign;

the "transcript" and the claimant's claim form contains obscene language and/or allegations which the claimant contends find support in evidence (i.e. the recordings) that is flatly disprovable; even on the claimant's own case, where the transcripts are said to reflect conversations in English, they are incomprehensible.

52. The claimant also failed, in breach of the order, to identify limited passages demonstrating an admitted social media campaign. Following repeated requests by me at the 5 September PH, it was clear that, as I noted, the claimant had given no or little thought to this and only at this point started seeking to select sections of the recordings which she wanted me to hear. This took up significant tribunal time and once the sections had been selected, they amounted to over one hour of audio recording, which was plainly not within the spirit of EJ Clark's order.

Unwilling to accept any ruling against her

53. At the 5 September PH, I made a ruling that the original 33 page "transcript" would be used, rather than the claimant's late submitted 46 page "transcript". However, as I noted in my note of that PH, the claimant continued to object and I had to repeat that I had made my decision, reiterating the reasons for it.

54. As noted in the section above, it also became clear at the 5 September PH that the claimant had not identified specific passages as per EJ Clark's order. After numerous attempts by me to facilitate the identification of such passages, the claimant repeatedly attempted to persuade me to go behind EJ Clark's order and play further sections, both before and after I had heard the claimant's identified passages.

55. Partway through playing the recordings at the 5 September PH, the claimant paused the recordings to attempt to provide commentary on them.

56. The claimant's written response to the respondents' strike out application was largely an attempt to reopen the social media/recordings issue. As I have alluded to already, the claimant persisted with this in her submissions at this hearing, both in terms of the production of the 23 September 2019 letter purportedly from her friend and in the first 20 minutes of her oral submissions. Despite my attempt to persuade her to move on (as the decision about what the recordings showed had already been taken), the claimant persisted.

5 September PH

57. In addition to the above, I reiterate what happened at the 5 September PH. Presiding over a hearing where I was requested to and did listen to over an hour's worth of recordings which for the most part were little more than white noise, with the claimant trying to suggest that this evidenced anything relevant to her case at all, let alone that it evidenced a number of individuals engaged in a social media conspiracy against her, was undoubtedly one of the more bizarre experiences of my judicial career to date; I have never experienced anything like it previously. It was a complete waste of time for the tribunal and of both time and costs for the respondents. Unquestionably, the claimant's conduct at and in relation to that hearing was entirely unreasonable.

58. The long list of examples set out above therefore evidences the numerous occasions in which the claimant has conducted these proceedings unreasonably.

59. In summary, therefore, the claimant's conduct of the proceedings has been both scandalous, vexatious and unreasonable.

Is a fair trial still possible?

60. Ms Brown has submitted that a fair trial is no longer possible for two reasons: first, that confidence has been entirely lost in the good faith of the claimant such that a fair trial is no longer possible; and second given the claimant's continuing unreasonable conduct of consistently adding more to her claim, the respondents could not be given a fair trial in the face of constantly moving goalposts. I deal with each issue in turn.

Confidence entirely lost in the good faith of the claimant

61. I refer to the guidance in Bolch on this issue.

62. I have already found in the section above regarding whether the claimant's conduct was "scandalous" that, in the light of the extraordinary and manifestly untrue assertions of the claimant about what the recordings revealed, I consider that what she says is not merely unreliable but utterly lacking in credibility and I would find it difficult to accept anything she said unless it was backed up by other evidence; in short, I have no trust and confidence in what the claimant tells me.

63. In this context, I reiterate that the "transcripts" provided are so fundamentally unreflective of the audio recordings. In my note of the 5 September PH, I found that: *"all that could be made out… was the occasional word or phrase, although that was rare"*: the *"conversations were in English"* and *"there was nothing whatsoever to suggest that anything which was said was in Chinese"*; *"no meaning could therefore be gleaned of any sort from these recordings"*; and *"there appeared to be no or very little similarity between what was set out in the claimant's 33 page "transcript" and what I could (or more to the point could not) hear on the recordings"*. These findings were in the context of the claimant claiming that the "transcripts" show an admitted social media campaign against her.

64. Furthermore, as Ms Brown points out, one of the very few sections of the audio passages which did contain clearly discernible speech does not appear in the transcript at all. She referred me to a section which appeared to relate to the football "transfer window", and individuals can be heard saying words such as "Arsenal", "Liverpool", "Man U" and "Man City".

65. The claimant maintained that the recordings included Chinese and very obscene language (which they did not).

66. Furthermore, during the 5 September PH, the claimant maintained other readily disprovable positions. After having listened to a significant amount of audio recording, I had informed the claimant that I could not make out the content of the conversations, apart from the odd word and phrase and being able to tell that as a result, whatever was being said was in English, and I asked the claimant whether the recordings became clearer in due course. The claimant contended that they did become clearer. However, they did not, as listening to the further recordings demonstrated.

67. In the light of this extraordinary display of behaviour by the claimant, as set out above, I have entirely lost confidence in the good faith and honesty of the claimant. For that reason alone, it is not possible to have a fair trial.

Constantly moving goalposts

68. I accept Ms Brown's submission that, for the reasons which I have set out above in the section on "unreasonable conduct", in particular the unreasonable conduct of consistently adding more to her claim, the respondents could not be given a fair trial in the face of constantly moving goalposts. This sort of behaviour has gone on from the start of this claim onwards, through several preliminary hearings, and I have no doubt that, if the litigation went further, this would continue. For this reason too, I do not consider it is possible to have a fair trial.

Is strike out proportionate?

69. I accept Ms Brown's submission that there is no case management that will suffice to allow this litigation to be conducted sensibly and proportionately. That much is evident from the way the claimant has behaved so far over the various hearings that have been held. No case management is capable of remedying the problems identified above. Even at this hearing, the claimant displayed the same unreasonable approach to litigation.

70. The respondents have spent (in terms of the various individuals at the respondent and their legal advisers) a total of 60 days' worth of man-hours in defending these proceedings so far (comprising approximately 34 days' worth for the 19 individual respondents themselves and other employees of the 1st respondent; and the rest for the respondents' legal advisers). That is unsurprising given the amount of work which the claimant has created by the way she has conducted this litigation. One example alone is that three of the individual respondents identified by the claimant under the orders of EJ Clark, plus one HR manager and one lawyer had to spend a considerable amount of time listening to the recordings provided by the claimant (which in total lasted for 9 hours and 16 minutes), using various methods including laptops, speakers and headphones to try and ascertain any meaning from those recordings. The respondents have similarly incurred almost £27,000 of costs (almost £20,000 of lawyers' fees and £7,000 cost to the business in terms of the time spent by the 1st respondent's various employees on this litigation when they could not therefore be doing their jobs for the 1st respondent). And yet, we are not even at the stage of this litigation where there is an agreed list of issues, let alone commencing on what is normally the more expensive and time-consuming work of disclosure, witness statements and attending what would be (given the number of allegations) a lengthy final hearing. This is utterly unjust and unacceptable.

71. In the light of the above, it is not only entirely proportionate for me to strike out this claim; it would be utterly disproportionate, unjust and unfair if I did not do so.

72. I therefore strike out the claim in its entirety on the basis that the claimant's conduct of the proceedings has been scandalous, unreasonable and vexatious.

Strikeout of whole claim (reasonable prospects)

73. Ms Brown made her submissions in relation to this application incrementally and they therefore break down into three sections.

Allegations 4.12, 4.13, 4.23 and 4.29

74. First there are numerous allegations in the list of issues which are said to be proven by the covertly recorded recordings; these are allegations of things allegedly said by the respondents which should be captured on those recordings if they were said. These allegations are 4.12, 4.13, 4.23 and 4.29.

75. Again, in relation to analysing these allegations, I rely on the evidence which I heard myself and, to the extent that the relevant part of the recording was not played to me, the inference from what I heard myself (which I have already drawn above) that what the respondent says about what is capable of being heard in the remaining recordings is correct.

4.12

76. The allegation in the list of issues is that the 8th respondent *"On 19 December 2018 stating he wanted to punish lesbians and wants to punish the claimant….I want to sandwich them to punish them"*. 19 December 2018 is one of the recorded conversations.

77. The claimant's "transcript" of this same allegation reads something similar to what is alleged at issue 4.12: *"I wanna sandwich yeah, to punish them"*.

78. This particular section of the recording is, however, inaudible. The only words that the respondents have been able to identify in this particular part of the recording are the English words *"picnic"*, *"yeah"* and *"I see it"*. In no way does the recording say anything like the words attributed to the respondents by the claimant.

4.13

79. The allegation in the list of issues is that the 8th respondent: *"On 19 December 2018, referring to the claimant as Mau and Supercat and stating "Prince of Love - you are right - everybody sue Supercat, ha, ha, last over there. Blood shoot that Miao. Your function is supreme""*.

80. The claimant's "transcript" of this same allegation reads something similar: *"So Prince of L, you are alright, everybody sue Supercat. Hahaha… Lust over there. Blood-shot that Miao."*

81. Again, this particular section of the recordings is inaudible. The innocuous English words that the respondents can identify in this particular part of the recording are *"yeah"*, *"mate"*, *"oh"* and *"have you seen…"*. In no way does the recording say anything like the words attributed to the respondents by the claimant.

4.23

82. The allegation in the list of issues is against the 12th respondent who is said to have *"On 19 December 2019 referring to the claimant, stating "kill that career mate, it's insane all over""*.

83. The claimant's "transcript" of this same allegation reads something similar: *"Kill that career, mate… That's insult… That's cool… cunt music"*.

84. Again, this particular section of the recording is inaudible. It is possible that the innocuous English word *"Korean"* is used (albeit this is not clear). Again, in no way does the recording say anything like the words attributed to the respondents by the claimant.

4.29

85. The allegation in the list of issues is against the 20th respondent who is said to have stated: *"In December 2018, stating to [the 9th respondent] that he was feeling sour about the social media attention towards the Claimant and the female live interest in her"*.

86. The respondents have listened to the recordings from December 2018 but there is nothing in the recordings which sounds like this allegation. There are several references to *"sour"* in the claimant's "transcript". However, the respondents have not been able to hear this word at all in the recordings.

87. In relation to all of the above four allegations, the recordings clearly do not demonstrate anything like what the claimant alleges. I accept Ms Brown's submission, therefore, that as a fact those allegations are not supported by the recordings and, as that is the evidence relied on to support them, they have no reasonable prospect of success.

88. As already noted, at this hearing the claimant tried to suggest (almost certainly in response to the findings I made at the 5 September PH that the recordings did not reveal what she asserted that they revealed), that she had "other evidence" (although she never suggested which of the 32 allegations this other evidence supported or went into very much detail about what it might be. Nothing she referred to in her submissions evidenced the comments in the list of issues which she alleges were made (and it is worth noting that the vast majority of the 32 allegations in the list of issues are of comments said to have been made by one or more of the respondents)). This is a further attempt by the claimant to shift the goalposts and, on the basis of the primary evidence which she has submitted and asserted she relies on so far (the recordings) one which I do not accept is either legitimate for her to make at this stage or is in any way likely to represent what is in fact the case. I also remind myself that the test that I have to apply is not whether the claimant's allegations have "no prospect of success" but is whether they have "no <u>reasonable</u> prospect of success".

89. I therefore have no hesitation in concluding that the claimant has no reasonable prospect of proving the four allegations above and that they therefore have no reasonable prospect of success; I therefore strike them out.

<u>Allegations 4.11, 4.14, 4.16, 4.18, 4.19, 4.20, 4.22, 4.24 and 4.25</u>

90. Without repeating them all here (the allegations are set out in full in EJ Clark's note of the 27 June PH), these allegations all use similar language to the language alleged by the claimant in her "transcript" to have been used in the recordings (for example *"psycho her up"*, *"fuck her up"*, *"fuck her over"* and *"slut"*).

91. The respondents have listened to the recordings provided by the claimant and there is no evidence of any such language being used. Certainly, there was no evidence of such language being used in the recordings which I listened to.

92. In the light of the fact that the sort of language which the claimant alleges the recordings evidence (but which the recordings do not in fact evidence) is the basis for the allegations dealt with in this section, I find that there is no reasonable prospect of the claimant demonstrating that the words alleged in these allegations were in fact said. Again, I reiterate that the test is "no reasonable prospect" and repeat the findings I made in the section above regarding the claimant's assertions in her submissions that she had "other evidence".

93. As they have no reasonable prospect of success, I strike these allegations out.

The remaining allegations

94. The covert recordings have been said by the claimant to be the principal evidence in support of the totality of the claimant's allegations. As noted, those recordings amount to inaudible noise or, in the few areas where anything can be made out, banal office-based conversation and they demonstrably do not support the claimant's allegations. They provide no evidence whatsoever to support any of the claimant's allegations.

95. Again, I repeat my findings above regarding the claimant's assertions in her submissions that she had "other evidence". However, in the light of the fact that the recordings are her primary evidence, and reminding myself that the test is "no reasonable prospect of success", I find that, having heard this primary evidence myself at the 5 September PH and in the light of the bizarre nature of many of the claimant's allegations, and the fact that, in the light of what the claimant suggests about these recordings, one cannot have any faith in anything the claimant asserts, that whilst I do not consider that I could conclude that the remaining allegations had "no prospect of success" at all, I can and do conclude that they have "no reasonable prospect of success".

96. I therefore strike out the remaining allegations and, therefore, the totality of the claim as having no reasonable prospect of success.

Deposit order

97. Had I not struck out the claim as having no reasonable prospect of success, I would have, for the reasons above, found that it had little reasonable prospect of success and would, subject to the claimant's means, have made a deposit order requiring the claimant to pay a deposit in respect of each of the 32 allegations as a condition to continuing to pursue each of those allegations.

The 19 individual respondents

98. As I have struck out the claim in its entirety, it is not strictly necessary to deal with the application about removing the 19 individual respondents as respondents to the proceedings. However, for completeness' sake, I set out what I would have done in this respect had I not struck out the claim.

99. First, I would have struck out the claim against all 19 respondents for being scandalous, vexatious and unreasonable for the reasons set out above.

100. Even if I had not done that, I would have used my case management powers under rules 29 and 34 of the 2013 Rules to remove the 19 named respondents for the following reasons:

a. The 1st respondent has accepted liability for the acts of the 19 individual respondents so there would be no prejudice to the claimant in not being able to recover any compensation made in respect of any discrimination proven against the 19 individuals, as the 1st respondent would pay it;

b. 19 individuals are being forced to defend themselves against allegations of threatening, amongst other things, rape, gang rape, terrorism and attempted murder notwithstanding a total absence of cogent evidence;

c. The claimant's principal evidence (the covert recordings) does not, for the reasons set out above, provide any probative evidence at all against them; on the contrary, the very fact that, contrary to the claimant's assertions, it obviously provides no probative evidence whatsoever casts doubt on the possibility of any truth whatsoever in the allegations the claimant makes in her claim or what the claimant asserts in general;

d. These individuals have had to go through the turmoil of giving instructions for three separate hearings and, now, two open hearings. As a result, the individuals have had to inform family members of the severity of the allegations made;

e. There is no benefit to the addition of the named respondents, but there is significant detriment in the form of time and cost for all parties and the tribunal;

f. In her response to the respondents' strike out application, the claimant appeared to suggest that the benefit would be questioning of the named respondents during the course of the hearing. If the 1st respondent did not call any of the given individuals, the claimant could apply to compel their attendance; this is not therefore a benefit contingent on their remaining as named parties; and

g. Furthermore, the only allegation against respondents 9, 14, 16, 17 and 18 is that they *"[gave] evidence denying claims of harassment and/or social media discussions on witness statements in the course of disciplinary proceedings against the Claimant"* (allegation 4.30). The respondents submit, and I have no reason to doubt this and therefore accept it, that the witnesses were asked to provide witness statements as part of the 1st respondent's normal HR process and the 1st respondent has confirmed that it accepts liability for these actions. It is inherently unlikely that employees providing these statements at the request of their employer amounts to an act of discrimination on their part. Leaving that aside, however, there is certainly no benefit in keeping these individuals as named respondents in a case involving such serious allegations of treatment in general where the single allegation against them is so limited and, even as pleaded, is clearly not on the same scale of seriousness as the other allegations.

101. For all of the above reasons, I would, had I not already struck out the claim in its entirety, have removed the 19 individual respondents as respondents under my case management powers.

Respondents' costs application

The law on costs

102. The tribunal's powers to make awards of costs are set out at rules 74-84 of the 2013 Rules. The test as to whether to award costs comes in two stages:

a. First, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? If that is the case, the tribunal must consider making a costs order against that party.

b. Secondly, if that is the case, should the tribunal exercise its discretion to award costs against that party and, if so, in what amount? In doing so, the tribunal may take into account anything that it considers relevant. In this respect, the tribunal may, but is not obliged to, have regard to the paying party's ability to pay.

The application

Stage one

103. I have already found that the claim had no reasonable prospect of success; and that, in conducting the proceedings, the claimant has acted vexatiously and otherwise unreasonably. I would add to that that, for the reasons set out above which I do not repeat here, the claimant also acted abusively in disruptively in her conduct of the proceedings.

104. Stage one of the test is therefore satisfied.

Stage two

105. In considering whether to exercise my discretion and in what amount, I have regard to the fact that unreasonable etc conduct of the proceedings by the claimant has been particularly serious and has entirely unnecessarily caused the respondents to spend a significant amount of time and cost defending them.

106. Ms Brown explained that the legal costs incurred by the respondents totalled £19,251 and that that was the amount in respect of which she was seeking a costs order. She explained that any order should be made in favour of the 1st respondent.

107. The above sum did not include VAT, which Ms Brown conceded was something which the 1st respondent could recover and which she was not therefore applying for.

108. The breakdown of costs was: £15,682 (being 97 hours solicitors' work, predominantly done by a six-year qualified solicitor based in Manchester at a rate of £190 per hour); and Ms Brown's fees of £2,600 (£600 for the 27 June PH and £1,000 each for the next two PH's) with Ms Brown being a barrister called in 2014.

109. I consider the rates charged for both the solicitors and barristers work to be reasonable for solicitors and barristers of that level of experience, call and location. Furthermore, I consider the amount of time spent was entirely understandable in the circumstances of this case and bearing in mind the amount of work which the respondents were put to as a result of the conduct of the claimant. In this context, I reiterate: that the respondents have spent (in terms of the various individuals at the respondent and their legal advisers) a total of 60 days' worth of man-hours in defending these proceedings so far (comprising approximately 34 days' worth for the 19 individual respondents themselves and other employees of the 1st respondent; and the rest for the respondents' legal advisers); and that that is unsurprising given the amount of work which the claimant has created by the way she has conducted this litigation. One example alone is that the three individual respondents identified by the claimant under the orders of EJ Clark, plus one HR manager and one lawyer had to spend a considerable amount of time listening to the recordings provided by the claimant (which totalled 9 hours and 16 minutes), using various methods including laptops, speakers and headphones to try and ascertain any meaning from those recordings.

110. The sums sought were therefore entirely reasonably incurred.

111. I take into account the fact that the claimant is a litigant in person. However, that is tempered by the fact that, on her own admission, she has previously had access to legal advice from, as she put it in the documents, "a prestigious London firm", albeit she says that she no longer engages legal advisers because she cannot afford it. In any event, the issues which led to the findings which I made in relation to the claimant's conduct of the proceedings are not ones which arise from the difficulties which a litigant in person faces in terms of, for example, unfamiliarity with tribunal processes and the difficulty of drafting documents; they are entirely to do with the way the claimant approaches and conducts litigation.

112. The only factor which points against an award of costs in the full amount is the claimant's means of paying. The claimant has no money; she has no income; she has no immediate prospect of income in the near future; she rents her accommodation (as opposed to owning her own home) and she has ongoing rent and living expenses to pay; and she has debts of £24,000. The claimant will therefore struggle to pay any costs awarded. I take that into account and, for this reason alone, do not make an award of costs in the full sum.

113. However, the claimant's unreasonable etc conduct of these proceedings has been of such a serious nature that I consider that, notwithstanding the financial difficulties, it is appropriate that she should pay something, notwithstanding that she will find it difficult. I consider that such a sum should not be so insignificant as to be derisory whilst at the same time being only a small part of the sum claimed as a whole.

114. I therefore make an award of costs of £2,000, payable by the claimant to the 1st respondent. This represents just over 10% of the totality of the costs which were sought by the respondents.

Employment Judge Baty

Dated: 26th Sept 2019

Judgment and Reasons sent to the parties on:

27/09/2019

For the Tribunal Office