Case Nos. 2300549/2016
2301719/2016
2300414/2017
2301738/2017
2303957/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr J Edwards

Respondents:
1. National Union of Rail, Maritime and Transport Workers
2. Michael Cash
3. Karen Mitchell
4. Sean Hoyle
5. S Hedley
6. Mr M Lynch
7. Dr Perkins
8. Mr A Gilchrist

Heard at: Manchester **On:** 27 July 2020

Before: Employment Judge Leach

REPRESENTATION:

Claimant: In person
Respondents: Mr Panesar QC

JUDGMENT

The judgment of the Tribunal is that:-

1. the claimant's application for a postponement of this hearing is refused;

2. the claimant's application that the respondents' responses in these claims should be struck out pursuant to rule 37 of the Employment Tribunals (Rules of Procedure) 2013 is refused.

REASONS

Introduction

1. The claimant has issued five different claim forms against these respondents. All were issued in 2016 and 2017. The claims have been combined and are due to be heard at the Manchester Tribunal over 25 days commencing 7 September 2020.

2. The claims are complex and voluminous. Mr Panesar QC told me that there are 127 separate claims in total and the claims as a whole involve eight respondents.

3. The claims (and the responses to the claims) are being hard fought. There have been numerous applications and preliminary hearings and considerable and lengthy correspondence has been generated.

4. I was told that the bundle of documents prepared for the final hearing is currently 3,500 pages or so long and that may increase. It was apparent from the hearing today that although these claims were issued long ago and were (or at least some of them) were initially to be heard in late 2017, there continue to be disputes between the parties in relation to documentation particularly and witness statements have yet to be exchanged.

5. The claimant claims that the respondents (directly and through the actions of Thompsons, their solicitors) have conducted the proceedings in a manner which has been scandalous, unreasonable or vexatious and their responses should be struck out. The claimant provides a number of instances of what he says amount to scandalous behaviour on the part of the respondents and which are referred to below.

Application for Postponement

6. At the beginning of this Preliminary Hearing the claimant made an application for a postponement of the hearing of his strike out application. The reason he provided was that he had just received new information that a key individual within the respondent union Mr Cash (the second respondent) has or has attempted to intimidate an intended witness, Mr Sean McGowan. Having received this information the claimant wrote to the Employment Tribunal by letter dated 21 July 2020. It was initially understood from the terms of that letter that the claimant, would be seeking further Case Management Orders rather than a postponement of the hearing.

7. The claimant has in his current application raised a number of instances of what he says amount to scandalous, unreasonable or vexatious conduct within the meaning of Rule 37(1)(b) of the Employment Tribunal Rules of Procedure. The claimant stated it was important for a Tribunal to consider his strike out application

on a cumulative basis and that must include the most recent allegation about which he has just been informed.

8. Mr Panesar QC resisted the postponement application noting the very substantial submissions that the claimant had provided in relation to the current application and noting the claimant clearly considered that the terms of the application as currently made was sufficient for a strike out application to proceed and succeed.

9. In deciding whether or not to allow the application I had regard to the overriding objective at Rule 2 of the Tribunal Rules of Procedure ("Rules"). The last two limbs of the overriding objective require me to (as far as practicable) avoid delay so far as is compatible with proper consideration of the issues and to save expense.

10. I decided not to allow the postponement but I made the following points.

(a) Where conduct of the seriousness as is raised against Mr Cash then that in itself is likely to warrant a strike out application. The conduct that has been alleged by the claimant in the letter of 21 July is very serious indeed (the claimant notes that it may be criminal conduct) and my decision to refuse to postpone the hearing of the existing strike out application does not prevent him making a subsequent application.

(b) As far as the issue of a cumulative effect is concerned then:

(i) given the seriousness of what is alleged against Mr Cash, that in itself may warrant a strike out application, regardless of other grounds;

(ii) on the basis that the outstanding strike out application was to proceed today, I would provide reasons for agreeing or not agreeing to the strike out application. Those reasons would be available to any Tribunal tasked with dealing with a subsequent strike out application (should I decide not to strike the responses out on the basis of the current application).

11. I also took in to account the fact that the parties had prepared fully for the existing application and clearly at considerable cost and using considerable time and resources. I was provided with very substantial bundles prepared for this hearing – of over 800 pages - and submissions. Further, the parties were clearly in a position to proceed. I decided that it was not appropriate to postpone but to allow the claimant to proceed with his application.

12. Having received my decision on his postponement request, the claimant confirmed that he would proceed with the application.

The Remainder of the Hearing

13. The hearing of the application itself did not commence until approximately 11.30am. Given the limited circumstances of dealing with hard copies during trhe COVID 19 pandemic, it had been necessary for the parties to submit hard copy documents at least three days in advance of a hearing. The respondents had not provided hard copies of a witness statement of Mr Patel (solicitor and partner at Thompsons, solicitors for the respondents), or a hard copy of the skeleton argument that Mr Panesar wished to provide. Electronic copies were arranged. The claimant confirmed that he had received copies of these documents a week or so in advance of the hearing.

14. The claimant requested a reasonable adjustment to assist his mental impairment. He asked that Mr Patel read aloud his witness statement rather than the Tribunal taking the statement as read. The claimant explained that this would assist in his concentration when dealing with the hearing.

15. Neither Mr Panesar QC nor Mr Patel objected to this (for which I am grateful), and it was agreed to proceed on that basis even though that would take up some time.

16. The claimant also noted that he may require a break in the hearing to assist his concentration. Breaks were taken throughout the day.

17. We adjourned for a short time (to enable me to receive and review respondent's documents and for the claimant to review further Mr Patel's statement and other documents) and we recommenced at 12.30pm.

18. Once Mr Patel had read his statement out loud the claimant asked a number of questions and most of the afternoon was taken up with this cross examination. It is clear that the claimant is an experienced representative: his questions and line of questioning was well prepared.

19. The claimant's cross examination of Mr Patel concluded at approximately 3.40pm.

20. The parties and I then dealt with a number of case management issues and the parties will be provided with a separate case management summary document.

21. Finally, I heard submissions from both the claimant and Mr Panesar QC in relation to the strike out application. As both had provided me with detailed and helpful written submissions they agreed to be brief in their oral submissions. I reserved my decision.

22. Reference to page numbers below are to the bundles of documents provided by the respondents unless stated otherwise.

The claimant's grounds for strike out application

23. I summarise the grounds below:

(1) That Thompsons made a misleading statement to the Employment Tribunal on 20 December 2019.

(2) That the respondents/Thompsons failed to disclose earlier versions of investigation reports of Mr Carey (and Mr Croy) and made misleading statements as to whether earlier versions existed.

(3) That the respondents/ Thompsons made misleading statements to the Employment Tribunal on the following occasions:

(i) On 6 July 2017 when Thompsons (specifically Mr Patel) stated to the Tribunal that the respondents had not received a bundle of documents sent by the claimant even though there was postal proof that the bundle had been received by Thompsons on 3 July 2017;

(ii) That Thompsons misled the Employment Tribunal in the terms of their letter of 17 July 2017.

(iii) That the respondents/ Thompsons misled the Employment Tribunal in the terms of their letter of 24 July 2017;

(iv) That the respondents/ Thompsons misled the Tribunal in the terms of their letter of 1 August 2017;

(v) That the respondents/ Thompsons misled the Tribunal in the terms of their letter of 25 March 2019.

(4) That the respondents/ Thompsons were untruthful or misleading in relation to the existence of a record of an interview that the Metropolitan Police may have held with Karen Mitchell, the third respondent ("R3").

(5) That the respondents/ Thompsons were misleading when stating that an employee of the first respondent (Mr Welch) *"was not formally interviewed by the Metropolitan Police in relation to the allegations you made against Karen Mitchell"*, when the respondents/Thompsons knew that the police had spoken with Mr Welch;

(6) That Thompsons stated to the Tribunal that they had not received the documentation relevant to a preliminary hearing taking place on 6 July 2017 whereas, in fact, they had; (this is the same instance and documentation referred to at ground 3(i) above);

(7) That the respondents/ Thompsons sought Employment Tribunal orders which required the claimant to attend on an independent medical expert, knowing that such attendance would cause distress to the claimant.

Findings of Fact

24. I have made findings of fact relevant to the claimant's strike out application.

Disclosure of grievance documents, being statements sent by R3 to Scott Perkins, the seventh respondent (R7) on 17 November 2015 and 15 December 2015 (Relevant to Ground 1)

25. Mr Patel provided evidence that he became aware of these documents when preparing for a preliminary hearing listed for 9 April 2020. His preparation required him to take instructions from (and prepare a witness statement for) R7. Mr Patel's evidence was that, in the course of this preparation he became aware of the documents in question, being statements that R3 had sent to R7 on 17 November 2015 and 15 December 2015. In these statements R3 (the claimant's line manager at the time) expressed dissatisfaction with the claimant's conduct and performance.

26. I find that Mr Patel became aware of these documents at this stage of his preparations and not before. I note that the grievance investigation itself was carried out by Mr Carey (not Mr Perkins) and I find that Mr Patel understood he had been provided with all grievance documentation including a written grievance from R3 (but one which post-dated her earlier emails to Mr Perkins).

27. Mr Patel/Thompsons had, through their counsel Mr Panesar QC, informed the Tribunal at a preliminary hearing on 20 December 2019 that all documents had been disclosed and specifically that there was no document sent by R3 to Mr Perkins in which R3 raised complaints about Mr Perkins. This statement was inaccurate because the two documents referred to were exactly as described – complaints made by R3 against the claimant. I find that neither Mr Patel nor Mr Panesar QC (acting on the instructions provided by Mr Patel) was aware of the existence of these documents on 20 December 2019.

28. Once Mr Patel had prepared R7's witness statement (intended for use at the PH on 9 April 2020) he provided the claimant with a copy. It is not clear to me exactly when the statements were provided to the claimant, but I understand that to be around mid-March 2020.

29. The claimant made a strike out application on 1 April 2020, specifically referencing the non-disclosure of the documents that R7 had referred to in his witness statement. The documents themselves were disclosed to the claimant on 3 April 2020.

30. The claimant asserts the reason the respondents disclosed the documents was because he had made a strike out application. I find this was not the case. Although the documents themselves were not disclosed until 3 April 2020 the existence of these documents was acknowledged in March 2020 in the terms of the witness statement and at this stage their disclosure was inevitable.

Whether Mr Patel was aware that a bundle of documents had been sent by the claimant and received at Thompsons offices, prior to the preliminary hearing on 6 July 2017 (relevant to grounds 3(i) and 6).

31. My findings are as follows:

(1) The claimant sent a bundle of documents to Thompsons on 2 July 2017 and that this bundle arrived at their offices on 3 July 2017.

(2) Unfortunately, this coincided with the relocation of the majority of Thompsons' London office from Congress House to Condor House. Thompsons had arranged a redirection service with Royal Mail on the basis that the majority of their staff had been relocated.

(3) The bundle therefore arrived at Condor House even though addressed by the claimant to Congress House. Mr Patel, however, was one of a few solicitors who had not relocated to Condor House and remained at Congress House. Thompsons' internal mail system arranged for the bundle to be sent to him at Congress House but this did not arrive until 5 July 2017, as evidenced by the date stamp at page 341(b).

(4) Mr Patel was not in the office on this day, and on the following day (6 July, being the day of the preliminary hearing), the claimant emailed Mr Patel at 06:58am to inform him that he had sent a preliminary hearing bundle but had not received any documents from the respondents.

(5) Mr Patel responded at 7:03am to inform the claimant that *"I have not received any correspondence or documents from* [you] *regarding this morning's hearing"*. Mr Patel was not in the office when he sent this email. He was at home and was travelling from there, directly to the London South Tribunal for the preliminary hearing that morning.

Reference to a report of Dr Rouse (relevant to ground 3(iv)

32. In a letter dated 1 August 2017 from Thompsons to the Employment Tribunal they referred to a report of Dr Rouse. At the fourth page of that letter Thompsons says, *"Dr Rouse's report was obtained for the purposes of the criminal investigation as an expert report".*

33. I find as follows:

(1) Dr Rouse was instructed by R3 through solicitors appointed by her to advise her on potential criminal proceedings against her. The claimant had complained to the police that R3 had assaulted him and also I understand there was some threat of action against her under the Protection from Harassment Act 1997 (although this may have been a threat of a civil claim rather than a criminal prosecution).

(2) The report was disclosed to the claimant and became a topic of dispute in these proceedings. By that time the threat of criminal proceedings had passed.

(3) In addition to the reference at the fourth page of the letter Thompsons refer to the report in more detail on the second page of the letter. I find that the terms of this letter as it describes the report of Dr Rouse are accurate.

Whether Mr Patel knew how long the police would retain a copy of an audio recording of an interview with R3 (relevant to ground 4)

34. The claimant wrote to Thompsons on 7 February 2017 (page 335) requesting a copy of an audio recording of R3's interview under caution with the police, under the existing case management disclosure order.

35. In response (email 22 February 2017 – page 336) Thompsons on behalf of the respondents resisted the request in the following terms: -

> *"Ms Mitchell has not been provided with the audio of the police interview. We do not consider it to be relevant in any case. Therefore, we shall not be asking the police to provide a copy, assuming that they have retained a copy, given the fact that no action was taken against Ms Mitchell."*

36. The claimant says that Mr Patel must have been aware that the police keep audio recordings for six years because, under the terms of the Limitation Act 1980, certain civil claims have a limitation period of six years. The claimant alleges:-

> *""Thompsons Solicitors would be well aware that the third respondent's statement would be kept for six years for reasons stated. They were motivated to make the statement that the police may not retain records to put the claimant off making an application for disclosure: the claimant asks the Tribunal to draw inferences from the fact when the request was made Thompsons Solicitors objected to the application on a number of occasions."*

37. I find that when replying to the claimant's request, Mr Patel was not aware of the Metropolitan Police's data retention period in relation to audio interviews.

Mr Patel's reference to a "formal interview" in an email from Mr Patel to the claimant dated 26 September 2017 (relevant to Ground 5)

38. This email correspondence concerned a police investigation into an allegation of assault that the claimant made against his then line manager, Karen Mitchell. The claimant had alleged he had been assaulted by Karen Mitchell in 2015. On 21 September 2017 the claimant emailed the respondent's solicitors asking about whether an employee of the respondent (Liam Welch) was interviewed as a witness to the alleged assault. The reply from Mr Patel stated as follows:

> *"I do not understand the relevance of the information you have requested to the issues in the claims before the Tribunal. Nevertheless I can confirm that Liam Welch-May was not formally interviewed by the Metropolitan Police in relation to the allegations you made against Karen Mitchell."*

39. The claimant did not leave matters there and on the same day (26 September 2017) he contacted the Metropolitan Police himself and was informed that Mr Welch had been spoken to but had stated he did not see any altercation and *"he offered no investigation to the evidence – therefore a statement was not taken"*.

40. Mr Patel has provided evidence that when he used the term "formal interview" he meant an interview undertaken by the Police when a formal record was taken and a witness statement prepared. I accept his evidence. I also accept that his use of the term was reasonable.

Whether Mr Patel was aware that requiring his attendance on an independent expert doctor, in order to assess his fitness to attend a Tribunal hearing, would cause him distress (relevant to Ground 7).

41. The claimant alleges that, when requesting a case management order at the preliminary hearing on 6 July 2017 for him he attend an appointment with an independent medical expert, that the respondents/Thompsons knew that this would cause him distress.

42. At this hearing, the claimant's counsel said the claimant may not be fit to attend and participate in the final hearing in these claims (or at least the first 3 of them) and so may require a postponement. The final hearing was due to take place over 7 days in September 2017. The respondent applied for an order that an independent medical expert provide a report on the claimant's fitness to attend. That order was granted by the Judge. I do not know whether or not the claimant's counsel resisted the application and if so on what basis.

43. In his strike out application the claimant refers to the content of 2 medical reports relevant to ground 7:-

(a) A letter dated 4 May 2017 and addressed "to whom it may concern" from Dr Regan a clinical psychologist.("Dr Regan letter")

(b) A psychiatric report from Dr Elanjhitara, consultant psychiatrist, compiled following a consultation in September 2016. (Dr Elanjhitata report)

44. Dr Regan letter includes the following comment:-

"*Mr Edwards has informed me that he has received a request for an assessment with a different psychiatrist, whom he saw last September. I am writing to strongly express my clinical opinion that Mr Edwards be seen again by the previous psychiatrist for further medical assessment, as the prospect of another initial assessment/history taken with a new psychiatrist is increasing Mr Edward's anxiety levels and may be re traumatising for him which would negatively affect his treatment."*

45. The Dr Elanjhitata report includes the following comment:-

"I am also concerned about the risk of suicide as he is currently in a fragile mental state. There is a significant impact in his day to day functioning and quality of life due to his psychological health."

46. The claimant claims that the respondents and Thompsons knew about the contents of these reports and the application for an order requiring the claimant to attend on an independent medical expert was made when they *""must have been aware that this would be damaging on the claimant's health.*"

47. I find as follows:-

(1) that the reference in the Dr Regan letter to the "previous psychiatrist" was a reference to Dr Elanjhitata;

(2) The reports were in the possession of the first respondent –as they were provided in relation to the management of the claimant's long term absence;

(3) Neither the letter nor the report comments on the claimant's likely fitness to attend and participate in the final hearing in September 2017;

(4) Thompsons were not aware, prior to attending the preliminary hearing on 6 July 2017, that a postponement of the final hearing was being sought on behalf of the claimant;

(5) Thompsons were not aware that an order that the claimant attend an independent medical expert to assess his fitness to attend and participate in a tribunal hearing would cause him distress, and place him under intolerable pressure.

(6) The respondents were being advised and represented by Thompsons in the Tribunal litigation.

(7) An alternative method of obtaining a relevant medical opinion (such as the prospect of obtaining an opinion from Dr Elanjhitata on the claimant's fitness to attend and participate in an employment tribunal hearing) was not raised by the claimant's counsel;

(8) The respondents did not want to delay the hearing unless it was necessary.

Claimant's Submissions

48. The claimant provided a 41 page submissions document prepared for this hearing. The majority of his submissions concern his strike out application. In the documents the claimant provides a number of legal authorities (see section below) and also refers to the Solicitors' Code of Conduct. The claimant notes particularly rule 11 of the Solicitors' Code of Conduct 2007. Whilst the 2007 Code of Conduct has been replaced by the Solicitors Regulation Authority Handbook, the principles and expected behaviours referred to by the claimant continue to be relevant. The claimant refers to the requirement of former rule 11 which provided that, *"a solicitor must never deceive or knowingly or recklessly mislead a court or knowingly allow the court to be misled".*

49. An important component of the claimant's submissions is that I should consider the actions of the respondents/Thompsons which the claimant has brought to the attention of the Tribunal in his application, on a cumulative basis. The claimant accepts some of the matters which form part of the claimant's application date back to 2017 and other parts of his application are more recent. The claimant's case is that the respondents/Thompsons have misconducted themselves on an ongoing/frequent basis such that matters have now reached the stage when considered cumulatively, their conduct falls within Rule 37(1)(b) of the Rules.

50. The claimant has provided me with submissions on each and every ground which I have taken in to account in reaching my conclusions and decision.

Respondents' Submissions

51. Mr Panesar QC provided a skeleton argument, which I have considered. By way of (a very brief) summary:

(1) Whilst acknowledging late disclosure (in relation to ground 1), this was by way of omission and does not come anywhere near scandalous or vexatious conduct;

(2) In relation to the other matters, many of them are historical and as such were relevant to case management in 2017 but not now, and in any event there has been no conduct which is scandalous or vexatious; and

(3) Some of the grounds relied on by the claimant are in fact issues for determination in the proceedings as they form part of the claimants claims against the respondents.

(4) There is nothing in relation to the conduct which makes it impossible to have a fair trial.

(5) Any errors on the part of the claimant have to be considered in the context of this litigation which Mr Panesar QC describes as including:

"The respondent having to respond to a blizzard of claims, correspondence, allegations of wrongdoing in correspondence and documentation, in this matter. It is entirely unsurprising that there would occasionally, given the huge volume of documentation insisted upon by the claimant, arise occasional errors."

(6) The claimant's conduct in bringing the strike out application amounts to an unreasonable conduct of proceedings and Mr Panesar QC's written document notes that the respondents make an application for costs for that unreasonable conduct.

The Law

52. Rule 37 of the Employment Tribunals Rules of Procedure 2013 states:

"Striking Out

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

(a) That it is scandalous or vexatious or has no reasonable prospects of success;

(b) 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)."

53. The claimant also referred me to the Employment Tribunal Presidential Guidance which states as follows:

"(8) Under rule 37 the Tribunal may strike out all or part of a claim or response on a number of grounds at any stage of the proceedings, either on its own initiative or on the application of a party. These included that it is scandalous or vexatious and has no reasonable prospect of success or the manner in which the proceedings have been conducted has been scandalous, unreasonable or vexatious.

(9) Non-compliance with the rules or orders of the Tribunal is also a ground for striking out, as if the fact that the claim or response is not being actively pursued.

(10) The fact that it is no longer possible to have a fair hearing is also ground for striking out. In some cases the progress of the claim to hearing is delayed over a lengthy period. Ill health may be a reason why this happens. This means that the evidence becomes more distant from the events in the case. Eventually a point may be reached where a fair hearing is no longer possible.

(11) Before a strike out on any of these grounds a party will be given a reasonable opportunity to make representations in writing or request a hearing. The Tribunal does not use these powers lightly. It will often hold a preliminary hearing before taking this action.

(12) In exercising these powers the Tribunal follows the overriding objective in seeking to deal with cases justly and expeditiously and in proportion to the matters in dispute. In some cases parties apply for strike out of their opponent at every perceived breach of the rules. This is not a satisfactory method of managing a case. Such applications are rarely successful. The outcome is often further orders by the Tribunal to ensure the case is ready for hearing."

54. Mr Panesar QC made reference to an extract from the Judgment of Lord Steyn in **Anyanwu v South Bank Student Union & another [2001] ICR 391** as follows:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic

society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

55. Both parties have referred me to the case of **De Keyser Limited v Wilson [2001] IRLR 324**. There the EAT decided that a strike out of the response was disproportionate in the circumstances even though an Employment Tribunal had found that the respondent's conduct in the proceedings had been scandalous. The judgment in the case made clear that when an employment Tribunal is exercising its discretion as to whether a claim or response should be struck out, should ask itself whether a fair trial of the issues was still possible (para 24 at page 328).

56. Both parties also referred me to the judgment in **Bennett v. LB Southwark [2002] ICR 881,** particularly in relation to the meaning of "scandalous" for the purposes of rule 37 and to the case of **ET Marler Limited v. Robertson [1974] ICR 72** on the meaning of vexatious.

Conclusions and decision

Ground 1

57. As noted above, I have made a finding of fact that when the statement was made to the Tribunal on 20 December 2019 that all documentation had been disclosed, that is what Thompsons honestly believed.

58. Mr Patel became aware of the existence of the two further documents in early March 2020 when preparing for the preliminary hearing due to take place on 9 April 2020. The existence of those documents was acknowledged in the witness statement prepared in advance of the preliminary hearing and provided to the claimant around mid-March 2020.

59. Ideally:

(1) The documents should have been disclosed in the course of general disclosure which had taken place sometime earlier (I understand in 2017); and,

(2) On the basis that the documents were missed originally, should have been disclosed at the same time as the witness statements acknowledging the existence of those documents was also disclosed (mid-March 2020).

60. The highest standards are expected of legal representatives in litigation, and parties to litigation are expected to comply with Case Management Orders, including obligations of disclosure. However, cases are seldom (if ever) processed without one or more errors by the parties or their representatives.

61. Disclosure which postdates the service of a list of documents for inspection is not uncommon in litigation. Clearly all reasonable attempts should be taken to avoid late disclosure, but it does happen. What is important is that when a party (or a party's representative) becomes aware that documents have not been disclosed, they should be disclosed promptly. The disclosure by the Thompsons in early April 2020 could (and should) have been more prompt. The disclosure in early April was late. The conduct of the respondents/Thompsons here was slow. In itself, it does not amount to conduct within Rule 37(1)(b) of the Rules. I comment below on the cumulative effect.

Ground 2

62. This ground arises from the fact that the respondents/Thompsons inadvertently disclosed a version of a grievance report which included a tracked amendment to the report which had been made by Thompsons whilst providing legal advice to the respondents. The claimant has noted that the report that was disclosed in error is headed "Final Report" and has therefore sought disclosure of earlier versions. His position is that the respondents are hiding behind the doctrine of privilege when refusing to disclose earlier reports and this is scandalous and vexatious. The claimant did not provide any evidence that there are any earlier reports which were not covered by legal advice privilege even though he has alleged that there has been concealment of an earlier draft.

63. The claimant appears to misunderstand that just because a document has not been sent by the first respondent to their instructed solicitors does not mean that privilege cannot attach to it. For example, notes of legally privileged telephone discussions can be made but not shared; a version of a draft report can be annotated when receiving legal advice but not sent to solicitors. Legal advice privilege attaching to such a document is not lost if it is not sent to the instructed solicitors.

64. In ground 2 the claimant also claims that Thompsons have made misleading statements about versions of Mr Carey's grievance investigation report but had no evidence that the terms of Thompsons letter of 7 July 2019 (pages 541-543) was inaccurate on this point. I have no criticism of the respondents/Thompsons in relation to this ground.

Ground 3(i)

65. I have accepted Mr Patel's explanation of events. It is unfortunate that the post was redirected. The bundle should have reached Mr Patel on 3 July 2017. However, the claimant's application does not criticise failings in Thompsons internal mail arrangements at the time; rather it accuses Mr Patel of misleading the Tribunal by falsely claiming that he had not received the bundle of documents in question. He did not mislead the Tribunal.

Ground 3(ii)

66. This is a reference to a letter from Thompsons to the Tribunal dated 17 July 2017 and specifically the comment in the letter: *"in relation to any capability procedure the claimant has refused to attend a medical with the first respondent's chosen occupational health practitioners. Under the circumstances, there is little progress being made to move internal matters forward and therefore it would not be in the interests of justice to postpone the full hearing."*

67. The claimant now claims (although did not at the time) that Thompsons deliberately misled the tribunal as they had not provided the Tribunal with a fuller explanation as to why the claimant had refused to attend a further medical appointment but with a different doctor.

68. The respondents/Thompsons did not mislead the tribunal. The statement made in the letter of 17 July was accurate as far as it went and was sufficient information to provide to the Tribunal tasked with deciding whether or not to postpone the final hearing (the claimant sought to postpone the final hearing pending the outcome of internal employment procedures). I have no criticism of the respondents/Thompsons under this ground.

Ground 3(iii)

69. This relates to an error in a letter from Thompsons to the Tribunal dated 24 July 2017 (pages 387/388). In this letter they note that the claimant had not raised an alleged assault (which the claimant alleged to have taken place in August 2015) until January 2016. In fact the claimant had made an allegation in November 2015 and the respondents solicitors corrected this error in an email to the Tribunal on 26 July 2017 which stated:

> *"We would like to correct an error in paragraph 4 of the letter. We mistakenly said that the claimant had not raised a complaint about the alleged assault of 27 August 2015 until 26 January 2016. In fact in an email to the RMT dated 10 November 2015 the claimant referred to being physically assaulted by Karen Mitchell prior to 10 November 2015 but did not provide any further details."*

70. As noted above, errors are sometimes made by representatives. Thompsons corrected their error promptly.

Ground 3(iv)

71. This concerns a statement made by Thompsons to the Tribunal in a letter of 1 August 2017 when they stated:

> "*Dr Rouse's report was obtained for the purposes of the criminal investigation as an expert report."*

72. I have set out my findings of fact on this point and it is clear from these that I have no criticism of the respondents/Thompsons in relation to this ground.

Ground 3(v)

73. In this ground the claimant alleges that Thompsons misled the Tribunal when stating, in a letter dated 25 March 2019, that the first claims (I understand this to be a reference to the first three claims issued) were *"fully prepared for the full hearing including agreed List of Issues, disclosure and a paginated bundle".*

74. I have read the whole of this letter. The extent of preparatory steps already undertaken/outstanding were also referred to elsewhere in the letter. It is noted that witness statements had not been exchanged for example.

75. The claimant also claims that the comment is misleading as a joint bundle had not been agreed. However, he does not dispute that a paginated bundle had been prepared by the respondents and sent to him.

76. This letter was written by Thompsons in the context of concern about further delay in these proceedings when the respondents were understandably keen to avoid further delay. The respondents were ready for the hearing; they had prepared their side, and they wanted to proceed.

77. Strictly, no party will be "fully prepared" until the morning of the first day of the hearing. All litigation involves preparation up to and including the first morning of a hearing and during the hearing. However, it is clear to a reader of the letter what the message was that Thompsons was conveying to the Tribunal and I have no criticism of their use of the term when considering the letter as a whole and the circumstances in which it was sent.

Grounds 4 and 5

78. I have made findings of fact relating to these grounds. I have no criticism of the terms of Thompsons' emails of 22 February 2017 or 26 September 2017.

Ground 6

79. I have made findings of fact on this point and also made findings under ground 3(1) above.

Ground 7

80. The circumstances relating to the allegation in ground 7 are also relevant to a claim made by the claimant in case number 2303957-17 (Claim 5). In his submissions the claimant recognises this although notes that at the time that Claim 5 was issued, he was not aware that Thompsons were advising the first respondent on

their internal capability procedures. I also note that his allegation under ground 7 is not the same as his allegation of unlawful discrimination in Claim 5.

81. In ground 7, the claimant alleges that, when applying for an order requiring he attend an independent medical expert that "*the respondents and their solicitors were motivated to add intolerable pressure on the claimant and effect his good health, the goal that he would not be able to pursue these proceedings*." (Claimant's submissions at 3.13.6). The allegation made is of conduct which would fall within Rule 37(1)(b) of the Rules.

82. I find that the respondents and Thompsons were not motivated as the claimant alleges. They were first informed at the preliminary hearing of 6 July 2017 that the claimant might apply for a postponement of the final hearing is September 2017 on medical grounds. The respondents did not want a postponement. They wanted to proceed with the hearing if possible and to defend the claims brought. That was their motivation in not agreeing to a postponement and requiring independent medical evidence to provide an impartial medical view on the claimant's fitness to attend a hearing in September. There was at the time, no medical opinion on the claimant's fitness to attend the hearing.

83. In his submissions the claimant notes that he was not aware prior to the hearing on 6 July 2017 that the respondents would not agree to the claimant's request for a postponement (Claimant's submissions para 3.13.14). The claimant raised postponement in the letter/bundle which is the subject of grounds 3(i) and 6. (which the respondents counsel and solicitor attending the hearing had not received or considered.)

84. The claimant is an experienced employment lawyer engaged in litigation. It was predictable that the respondents would resist a postponement application and I would be surprised if he had not anticipated this. The claimant had also instructed counsel to represent him at the hearing. He and his counsel will have been aware of the importance of medical evidence in support of an application to postpone on medical grounds (as made clear for example in the 2013 Presidential Guidance on seeking a postponement of a hearing).

85. It was inevitable that the issue of obtaining and assessing medical information would have been raised at the preliminary hearing in the context of postponement. I have no criticism of Thompsons raising this and making an application for (and obtaining) the order that they did.

<u>Considering the grounds cumulatively.</u>

86. I have provided my conclusions against each individual ground for strike out. It is also appropriate that I consider the matters cumulatively as the claimant has asked that I do, and provide my conclusions on that basis.

87. As far as grounds 2,3(ii), 3(iv) 4,5 and 7 are concerned, I have made clear that I have no criticism of the respondents/Thompsons.

88. This leaves ground **1** (late disclosure of two documents); **3(i) and 6** (not receiving the bundle prior to the hearing on 6 July 2017); **3(iii)** (making an error in an email of 24 July and correcting it by email of 26 July). Each is an instance of unintentional human error and even when considered cumulatively, these grounds fall a very long way from conduct which would warrant a strike out of the responses.

A fair trial.

89. I record my conclusion on this for completeness. None of the grounds would prevent a fair trial of these proceedings even if (whether considered individual or cumulatively) they amounted to conduct within rule 37(1)(b) of the Rules.

Employment Judge Leach
Date: 30 July 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
30 July 2020

FOR THE TRIBUNAL OFFICE