EMPLOYMENT TRIBUNALS

Claimant: Mr Duncan Ndegwa

Respondents: 1: University Hospitals of Leicester NHS Trust
2: Asif Patel
3: Donna White

RECORD OF A PRELIMINARY HEARING

Heard at: Leicester Employment Tribunal

On: Thursday 19 March 2020

Before: Employment Judge Jeram (sitting alone)

Representation:
Claimant: In person
Respondent: Mr B Frew of Counsel

CORRECTED
RESERVED JUDGMENT AT A PRELIMINARY HEARING

1. The respondents' application to strike out the claimant's discrimination claims on the ground that the proceedings have been conducted by the claimant in a manner that is scandalous, unreasonable or vexatious is dismissed;
2. The respondents' application to strike out the claimant's discrimination for non-compliance of an order of the Tribunal is dismissed;
3. The claimant's claim that the response be struck out for non-compliance of an order of the Tribunal is dismissed;

4. The claimant's four allegations of harassment against R3 have little reasonable prospect of success and a deposit order will be made as a condition for proceeding with these allegations and arguments.

5. If the claimant wishes the tribunal to take into account his ability to pay in accordance with rule 39 he must by **4pm 19 June 2020** provide to the respondent and the tribunal a witness statement setting out his means which shall include the value of his monthly income and outgoings, any savings or assets (including all businesses or properties in which he has an interest) and any liabilities. The statement shall be accompanied by any evidence on which he intends to rely on regarding his ability to pay. The statement must also be accompanied by a statement of truth – i.e. a statement saying *"I certify the contents of this statement are true"* – and be signed and dated.

REASONS

Background and Issues

1. The claimant was employed by the first respondent as bank security officer between 19 March 2018 and 19 June 2019. On 6 September 2018, the claimant, then legally represented, presented claims of harassment, victimisation and unlawful deduction from wages. He did so with the benefit of legal representation. The, second respondent was at the time, the claimant's line manager and the third respondent was the Security Manager and the person who dismissed him.

2. A significant part, but not all, of the claimant's claims are predicated upon the following three events, all of which are in dispute.

3. First, that it is alleged that an exchange took place on 10 June 2018, wherein the second respondent is alleged to have shouted at the claimant, who is black *"you have an attitude like your fellow people*"[1]. R2 denies this[2].

4. Second, those comments are alleged to have been reproduced in a grievance said to have been sent by the claimant to the second respondent on 11 June. The alleged contents of that grievance are reproduced in the full[3] in the claimant's grounds of complaint and contain an allegation that R2's conduct towards him was

[1] Para 6 and 35 of the grounds of complaint
[2] Para 23 of the grounds of resistance
[3] Para 23

motivated by race, stating of R2: *"Thereafter, he started shouting at me and alleging that I have to attitude like my fellow people".*

5. The sending of that grievance is not admitted; R3 denies that she received it[4].

6. Third, it is alleged that the same grievance that was sent on 11 June 2018 was *"re-sent"* on 18 June 2018[5]. R3 admits to receiving a grievance on 18 June, but avers that the grievance stated only that R2 alleged that he *'had attitude.*' She expressly denied that it contained the words pleaded by the claimant *"like my fellow people"* were contained therein[6].

7. By way of completion of the narrative, the claimant on 28 June 2018 wrote to the two Human Resources staff ostensibly to complain about the lack of action in relation to his grievance, and in which he complained of a breach of the Equality Act on the part of R1; that this email amounts to a protected disclosure is not in dispute[7].

8. The claims made by the claimant are as follows:

   a. Harassment claims as against:

      i. R2 for the comment allegedly made on 10 June 2018[8];

      ii. R3 for, in broad terms, her alleged inaction with regard to his grievance he claims contains the disputed words, together with her decision to dismiss him the day after she received the grievance[9];

      iii. R1 specifically for a failure on the part of the HR personnel to action his request that his grievance been addressed[10] as well as more generally, for being vicariously liable for the acts of R2 and R3[11].

   b. Victimisation claims:

      i. where the protected acts are said to be:

         i. The contents of the grievance of 11 June 2018 sent to R3;
         ii. The same contents re-sent on 18 June 2018 to R3;

[44] Para 16 of the grounds of resistance
[5] Para 24 of the grounds of complaint
[6] Para 17 of the grounds of resistance
[7] Para 32 of the grounds of resistance
[8] Para 35 of the grounds of complaint
[9] Para 41(a) to (d) of the grounds of complaint
[10] Para 43 of the grounds of complaint
[11] Para 53 of the grounds of complaint

iii. The contents of his email dated 28 June 2018 to the Human Resources department. Only this act is accepted as amounting to a protected act;

ii. The detriments said to have been suffered by the protected acts are, without reference to any specific protected act, said to be[12]:

i. The failure to pay the claimant his wages, or withholding the same;
ii. Dismissing him;
iii. Being placed on a 'special applicant's register'.

9. Finally, the claimant pursues a wages claim. Although the R1 initially denied that any monies were owing, on 6 January 2020, it wrote to the tribunal in advance of a preliminary hearing on 8 January 2020 that accepted that it owed the claimant £339.67, being the amount he claimed.

10. On the face of the pleaded claim, therefore, the words *'like my fellow people'* are a necessary constituent of the harassment claims against R1, R2 and R3 as well as for two of the three protected acts.

Litigation History

11. Both parties were legally represented at the outset and the parties' representatives co-operated well in the preparation of this case.

12. On 23 January 2019, there took place disclosure by way of copy documents. The claimant disclosed to the respondents a document said to be the grievance attached to an email sent to R3 on 11 and 18 June 2018. That grievance stated that R2 had shouted at the claimant that he had attitude *'like my fellow people'* ('the disputed words'). The respondents' solicitor sent to the claimant's solicitor a copy of the grievance they claimed was attached to the email of 18 June 2018 which did not contain the disputed words.

13. On 4 September 2019, the claimant's solicitor ceased representing the claimant with immediate effect.

14. On 10 September 2019, the respondents wrote to the claimant by email and by special delivery to his home address. The correspondence contained a narrative about the discrepancies between, on the one hand, the document relied upon by

[12] Para 48 of the grounds of complaint.

the claimant and his pleaded case, and on the one hand, the version of the grievance said to have been received by R3. They stated that it was a deliberate attempt to mislead the tribunal by falsifying evidence and, that in the event that he did not withdraw his claim, they would apply to strike them out on the basis of his unreasonable, scandalous or vexatious conduct. They put him on a costs warning and included a costs estimate to date.

15. The claimant says he received neither copy; the hard copy was returned to sender, unsigned, and, a few days later, the claimant emailed the respondent's solicitor from a different email address which he has used since. He accepts receiving the letter when it was sent to him by email on 17 September 2019 to his new email address; he accepts that he understood the contents of that document, the seriousness of the allegation and the scale of the costs being incurred.

16. In his reply to the respondents' solicitor, the claimant did not respond to the application, but instead sought confirmation of when his wages of £339.67 would be paid. He also sought a date for the exchange of witness statements.

17. On 23 September 2019, therefore, the respondents made an application to strike out the claimant's claims on the basis that the manner in which he had conducted proceedings had been, in accordance with rule 37(1)(b), scandalous, vexatious and unreasonable.

18. The claimant responded by stating that he did not understand why the application had not been made sooner, criticised the ET3 for containing inconsistencies, sought his wages in the sum of £339.67 and sought further disclosure and a date for the exchange of witness statements.

19. In advance of a telephone Preliminary Hearing on 31 October 2019, the claimant submitted a document which suggested he wished to add a further respondent to the proceedings and amend his claim to add further allegations against current respondents.

20. The claimant did not, however, respond to the application to strike out his claims.

21. The respondent's application was therefore discussed at the Preliminary Hearing, which I conducted. The claimant's explanation was noted at paragraph 7 of the case management discussion as follows:

"*Today, the claimant explained that [the discrepancy] had been down to "human error". He said that he, himself, had sent an email to the third respondent on 11 June 2018, and that he again had forwarded that same email in the third respondent on 18 June 2018. He said he had, between those dates, printed out the email and send it by post in the third respondent also. He did not explain how it came to be that his solicitor had included the words "like my fellow people" the claim form though it seemed to me that he was accepting that there had been a discrepancy. I directed the claimant set out his response fully, explaining the discrepancy between the email and the pleaded claim, in writing."*

22. The claimant was directed to provide an explanation for the apparent discrepancy by 15 November 2019. He was also required to support in detail is additional claims whether against the second respondent or against the proposed fourth respondent. The application to strike out was set down to be heard at an attended preliminary hearing on 2 December 2019.

23. The claimant chose only to comply the latter part of that direction so that on 4 November 2019 the claimant attached to an email is application to amend his claim. His explanation for not having complied with the direction requiring him to provide an explanation for the discrepancy in the pleaded case was that whilst he had heard me make the direction on the telephone, he did not make a record of it and that in relation to the written direction *"he must not have seen it".*

24. On 18 November 2019 the respondent made a further application to strike out, this time on the basis of his *"persistent and wilful non-compliance with tribunal orders".*

25. The matter came before me on 2 December 2019, when a preliminary hearing was set down to consider the respondent's applications to strike out the claimant's claims, alternatively whether a deposit order should be made, any application for costs, and if the claims were not struck out, the claimant's application to amend his claim as well as is application for specific disclosure.

26. I made a direction for the respondent to prepare to skeleton argument and a bundle of authorities to be served upon the claimant in advance of the hearing, so that he could be properly prepared.

27. The claimant did not attend the hearing. The evening before the claimant emailed the tribunal attributing his non-attendance to ill-health, and attached a sick note from his GP certifying that he was unfit for work between 7 October 2019 until 8 March 2020. I gave the claimant a strike out warning, requiring him to provide by 4pm 18 December 2019 to provide his explanation for why the disputed words

appeared to be in his pleadings and yet did do not appear in the grievance apparently received by R3.

28. On 17 December 2019 the claimant wrote to the tribunal stating as follows:

"I was not aware of any discrepancy or error step of the way until September 2019. Claimant have no clue or recollection of the document produced in page 110 being in existence. It is refuted the claim is scandalous, unreasonable or vexatious, hence it should not be struck out because it has real prospect of success. Further, it is denied that there was any attempt to mislead anybody. The respondents surprise allegation is baseless, orchestrated, malicious and I have been made a scapegoat. They have made up story and there is no iota of evidence or certainty the claimant is responsible for the defect as alluded."

29. The claimant did not provide medical evidence in relation to his unfitness to attend.

30. The claimant attended a telephone preliminary hearing on 8 January 2020. In respect of his failure to provide medical evidence, the claimant said that although he had read and understood my direction, he felt better now, so did not consider it necessary to comply.

31. I asked the claimant at that hearing to provide a clearer verbal explanation of his email sent on 17 December 2019. I told him that I was making a note of the explanation as he gave it to me. I recorded the paragraph 24 of my case management summary relating to that hearing. In essence, the claimant accepts that on 18 June 2018, in response to R3's email stating she had not received his earlier grievance, he responded with an email in which he stated *"here's a copy of the letter sent to you"*. To that email, the claimant says he re-attached the grievance he sent on 11 June 2018, in which the disputed words *'like my fellow people'* appear. He could not explain why the document that R3 says she received does not include those words.

32. He had no comment to make about R3's document, which contained the 'properties' data for the grievance she said she received, and which suggested that the document had been (at least) edited on 16 June 2018.

33. For the first time, the respondent accepted that it owed the claimant wages in the amount his solicitor had pleaded at the outset of his claim i.e. £339.67; the claimant, for the first time, claimed that the figure he was owed was greater. I therefore gave the claimant time to consider his position, and if he was contending

for a higher figure, he should set out his calculation and send it to the respondent's solicitor by 17 January 2020. A calculation was required of the respondents by 31 January 2020 of the sum it contended it owed the claimant.

34. On 16 January 2020, the claimant reverted to the figure of £339.67 in respect of his outstanding wages; on 14 February 2020, the respondent wrote to the tribunal, apologising for its late compliance, but confirming that it accepted liability of that sum.

35. On 15 February 2020, the claimant wrote to the tribunal seeking a strike out or deposit order against the respondents for failing to provide its calculation of the sum owed to him in accordance with the direction to do so by 31 January 2020; he alleged that the respondent has misled the tribunal, shifted the goal posts and made up stories.

36. In fact, despite there being apparent agreement as to the figure that R1 owes the claimant, **the claimant accepts he received the sum of £228.56 on 27 February 2020** and the parties are again in dispute as to whether the sum claimed represents a gross figure or net figure.

37. It was in those circumstances that the matter came before me at a preliminary hearing to consider whether to strike out the claim, consider the respondent's application for costs if the claims were struck out, consider whether to make deposit orders in the alternative, and the claimant's application to amend his claim.

38. On 22 March 2020, that is to say, after the hearing, the claimant emailed the tribunal with a number of observations about his case as well as that of the respondents.

The Law

39. Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the 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;

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

(c) . . .

(d) . . ."

40. The proper approach to be taken in a strike out application in a discrimination case was summarised by Mitting J in Mechkarov v Citibank NA [2016] ICR 1121 at [14] as follows:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts"

41. In Bolch v Chipman [2004] IRLR 140, the EAT set out factors that the tribunal must have regard to when considering whether to strike out a claim pursuant to rule 37(1)(b); the first of which is to distinguish any unreasonable conduct of the party from the proceedings having been conducted unreasonably by or on his/her behalf; the second of which is to consider whether a fair trial is still possible and thirdly whether a strike out is a proportionate response.

42. In respect of an application to strike out pursuant to rule 37(1)(c) there must be deliberate and persistent disregard of required procedural steps or that it has made a fair trial impossible: Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684.

43. Different considerations apply, however, in relation to deposit orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

"(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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

44. The tribunal must be satisfied that there is a proper basis for doubting the likelihood of a party the facts essential to a claim or response before making a deposit order: Jansen van Rensburg v The Royal Borough of Kingston-upon-Thames EAT 0096/07.

45. There is a distinction to be drawn between an undisputed document contradicting a primary factual allegation made by a claimant and one that contradicts an inference that a claimant seeks to persuade a tribunal to draw: Javed v Blackpool Teaching Hospitals NHS Foundation Trust EAT 0135/17.

Strike Out Applications

The respondents' applications

46. I was invited to strike the claimant claims pursuant to rule 37(1)(b) out on the basis that it is *"plain that the [claimant] retrospectively amended the grievance letter in an attempt to bolster his claim";* summarising Mr Frew's oral submissions, the claimant has misled the tribunal by presenting claims based on a factual assertion that he knows to be untrue and that he has 'falsified evidence' (the grievance letter that includes the disputed words) to make good that claim.

47. The contention is based on:

    a. The respondents' pleaded response denying the claimant's version of events;

    b. The copy of the grievance that R3 says she received on 18 June 2018, which is at odd with that disclosed by the claimant (page 110);

    c. A copy of the 'properties' data for the grievance document above (page 110AA);

    d. The claimant's apparent inability to explain the discrepancy between his claim and the document that R3 has disclosed

48. Central to the respondents' application and indeed, central to a significant part of this case, is whether the claimant did, in fact, send to R3 on 11 June and/or 18 June 2018 a grievance which contained the disputed words. If he did, the chances of his succeeding in his harassment claims against R2 and R3 and establishing two

of his protected acts are that much improved; if he did not, his claims are that much weaker; the respondents would say fatally so.

49. The respondents argue that the discrepancy between what the claimant says he sent, and what R3 says she received, cannot reasonably be explained by the claimant and he has not even attempted to explain the discrepancy in any fashion that could be described as clear or coherent. Mr Frew invites me to consider that on the balance of probabilities the document that the claimant claims to have sent to R3 was created on a date after 11 June and, in any event, did not include the disputed words when it was allegedly 're-sent' on 18 June 2018. If I am with him, he argues, then the claimant's credibility is so fundamentally undermined, that all his claims of harassment and victimisation must be struck out[13].

50. In essence, there is a simple dispute of fact between the parties; the claimant says he knows what he sent included the disputed words (and he has disclosed the document that he says he sent on both dates); R3 says she knows that what she received on 18 June 2018 and it did not contain those words.

51. The respondents' application, essentially, invites me to either approach the hearing as a mini-trial of the issue as to who is to be believed, alternatively to strike out the claims on the basis that 'no reasonable tribunal' would prefer the claimant's case *("on the balance of probability, that document was created on 16 June")*; both would amount to pre-empting the determination of a full tribunal hearing by striking out now and both would amount to an error of law: Mechkarov.

52. The correct approach is to take the claimant's case at its highest. The claimant says he sent the version as set out in his pleadings. It is, of course, possible to strike out a claim where there are considered to be no reasonable prospects of success, even where there is a central dispute of facts. It was on that basis that, of my own initiative, I considered whether I had the power to strike out pursuant to rule 37(1)(a) - but those instances are necessarily exceptional and the power should be exercised in rare circumstances. I do not understand the respondents to be saying that there is, in truth, anything exceptional about this case, only that the claimant's account is exceptionally unlikely.

53. What I understand Mr Frew invites me to do, is to accept that this is one such rare case where the claimant's claim can, as the authorities allow, be 'conclusively disproved' by contemporaneous evidence or is 'inexplicably inconsistent with the

[13] With the exception of the wages claim that the first respondent accepts is well founded, albeit the claimant currently appears unable to accept the amount he seeks

undisputed contemporaneous documentation'. The documents relied upon in this application are the grievance letter that R3 says she received and the document 'properties' data; but the application rather misses the point: they are very much in dispute in that the claimant says they do not relate to the grievance he says he sent. Those documents, if taken on their face, certainly demand an explanation, but they cannot be said to 'conclusively disprove' what the claimant says; more accurately speaking, they serve to severely undermine his claim.

54. Making the critical distinction between the claimant's unreasonable conduct and the conducting of the proceedings being unreasonable, I do not consider, as Mr Frew invites me to find, that the claimant's actions, generally, can be said to an unreasonable conduct *of the proceedings*, but in any event, at this stage, strike out is a disproportionate response; the 'mischief' is more appropriately addressed with deposit orders. There may be force in the observation that if the tribunal at the final hearing concludes that the claimant has falsified the evidence, then it is likely to lose confidence in the claimant's honesty and good faith in respect of all his claims; but it is premature of me to make that assessment now.

55. I further considered whether the respondents' application to strike out the claims pursuant to rule 37(1)(c) i.e. non-compliance with my order made at the preliminary hearing on 30 October 2019 to provide an explanation for the discrepancy between his pleaded case and the documents produced by the respondent. I do not accept the claimant's claim that he *"must not have seen"* the order: the order was made verbally on the telephone and confirmed in writing; since the claimant took advantage of the opportunity to provide further information in relation to his proposed amendments, I reject his explanation that he was unaware of the more inconvenient order requiring him to answer what the respondents were saying.

56. That was the single basis upon which the respondent made its application. I considered in addition, the failure on the part of the claimant to submit medical evidence to support his claim that the was unfit to attend the hearing on 2 December 2019. I concluded that his failure to provide that medical evidence, ostensibly because he thought he no longer needed to because of the improvement in his health, was opportunistic, certainly; I am not satisfied it amounted to deliberate non-compliance.

57. In any event, I am not satisfied that two failures, even if deliberate, is so serious that it is proportionate to strike out the claimant's claims on this basis.

<u>Claimant's application</u>

58. The claimant invites me to strike out the respondent' responses on the ground that R1 failed to comply with my order requiring it to provide a calculation for the sum it contended was owing by 31 January 2020.

59. As the claimant astutely points out, on a strict reading of my order, R1 was required to provide that calculation, irrespective of whether the claimant confirmed to it that he was seeking only the £337.67 he originally claimed or was maintaining that he was owed a higher figure.

60. In the event, the claimant reverted to his original figure; the claimant invites me to strike out the responses of all respondents because, I understand, R1 did not respond by the deadline, but 14 days later, and because, notwithstanding that it agreed that the liability was for £366.67, it did not provide a calculation as to how it arrived at that figure.

61. I do not strike out the respondents' responses; there was no prejudice to him for failing to respond by 31 January, or indeed to fail to provide a calculation; to strike out in such circumstances would be grossly disproportionate.

62. The amount has not been paid to the claimant, I understand because R1 contends the figure was a gross figure and not a net figure. That is a dispute that exists between the parties, so that, as with the dispute as to the contents of the claimant's grievance, the issue of how much pay is owing to the claimant will need to be case managed and, if not resolved between the parties beforehand, determined by a tribunal at a final hearing.

Deposit Order

63. It is open to me to make a preliminary evaluation of the evidence when deciding whether it is appropriate to make a deposit order pursuant to rule 39. If I consider that a specific allegation or argument has little reasonable prospect of success, I may make a deposit order of up to £1,000 as a condition of continuing to make each allegation or argument.

64. The claimant has no response to make about the respondents' version of his grievance, or the properties data in respect of that document; indeed, he insisted at the preliminary hearing that he cannot see the problem.

65. The respondent's copy of the grievance and its properties data are wholly inconsistent with, and contradicting of, the claimant's version of his grievance. I therefore accept that there is little reasonable prospect of the claimant establishing the 4 claims of harassment against R3 which are pleaded as being based on the sending of those grievances. For the avoidance of doubt, whilst the claimant alleges that R1 is vicariously liable for those same acts of harassment, I do not consider it appropriate to make any separate order in that regard.

66. Furthermore, whilst, if accepted, those documents are, as a matter of common sense, likely to serve to undermine the claimant's case of harassment against R2, I cannot say that the documents are inconsistent with or contradict that claim. The protected acts are not reliant on the disputed words. I therefore but I do not intend to make deposit orders in respect of any other claims.

67. I consider it proportionate to exercise my discretion to make deposit orders. The case is still at a relatively early stage; although disclosure has taken place, witness statements have not yet been exchanged and no final hearing has been set down. Indeed, the issues have not yet been finalised - there remains outstanding the claimant's application to amend his claim. The deposit orders below relate to a significant proportion of the claimants claims and therefore will demand expenditure of a significant amount of resources not just on the part of the respondents but also the tribunal.

68. I therefore intend to make the deposit orders in relation to the 4 allegations against R3 of harassment, pleaded at paragraph 41a – 41d of the claimant's grounds of complaint; the amount of the deposit orders will be decided once the claimant has had an opportunity to provide information about his means.

69. I am required to make reasonable enquiries of the claimant's ability to pay the deposit and have any such regard to such information when deciding the amount of the deposit. I have therefore given the claimant an opportunity to provide such information in my orders. He is not compelled to provide the information, but if he does not do so, that will not prevent me from making an order.

70. Once the claimant has provided that information, the respondent may, if it wishes, respond to that information within 14 days of receipt. I will, however, determine the amount of the deposit without a further hearing, so as to save further time and costs. Once the deposits have been paid, or time has passed for them to be paid, a further telephone preliminary hearing will take place to discuss the respondents' outstanding costs application (if still being pursued) and the claimant's application to amend (if still being pursued) and further case management orders.

CORRECTED REASONS

71. The Judgment was sent to the parries on 4 June 2020. On 19 June 2020, R1 emailed the Tribunal and the claimant to point out that, according to their note of the Preliminary Hearing, in response to a direct question, the claimant had admitted to receiving the sum of £228.56 from R1. The claimant has not responded to that email, or at all. I am therefore prepared to correct my Judgment in the manner sought by R1.

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Employment Judge Jeram

Date: 4 June 2020

Re-dated: 17 July 2020

Sent to the parties on:

…….

For the Tribunal:

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